FACING DOWN THE GLADIATORS: ADDRESSING LAW SCHOOL'S HIDDEN ADVERSARIAL CURRICULUM

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I INTRODUCTION

Every autumn, stereotypes of lawyers walk in the door of the law school. These stereotypes are carried in the minds of each new group of students, who arrive already indoctrinated in the popular culture myth that the dominant role of the lawyer is as an advocate in an adversarial system.[1] These students, if they become practising lawyers, will be more likely to fill their days with negotiation than with litigation, to represent a client in mediation than at trial. In reality, they are more likely to become deal-makers than gladiators. Nevertheless, their preconception or *misconception* of the dominance of lawyers' adversarial role will be reinforced in their legal training.

Adversarialism is deeply embedded in both the formal and the hidden curricula of US and Australian law schools. While most law schools now teach courses that deal with non-adversarial processes, the pervasive ethos is — often unintentionally — adversarial. This ethos constrains the way that students conceptualise their future roles and limits the 'possibility space'[2] available to them for 'legal creativity', 'constructive lawyer[ing]' and 'peacemaking.'[3] The ethos may also contribute to a law school climate that is hostile and stressful for many students.[4]

This paper takes a look at the contemporary law school's hidden curriculum — the unstated norms and values that are communicated to students. It asserts that despite the success of the Alternative Dispute Resolution ('ADR') movement in legal education, adversarial messages still dominate the law school ethos. These messages, sent through choices of teaching materials, classroom pedagogy,

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1 Michael Asimow, 'Popular Culture and the Adversary System' (2006) 40(2) *Loyola of Los Angeles Law Review* 653.

2 See Steve Fuller, 'Playing without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory' (1988) 97 *Yale Law Journal* 549, 573 n 50.

3 I have borrowed the quoted terms from Carrie Menkel-Meadow, 'The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering' (1999) 72 *Temple Law Review* 785, 786.

4 A number of recent studies indicate that law school has a negative impact on many students' mental health and wellbeing. See, eg, Norm J Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain and Mind Research Institute at the University of Sydney, 2009); Kennon M Sheldon and Lawrence S Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-being' (2004) 22 *Behavioral Sciences and the Law* 261; Cf James J White, 'Maiming the Cubs' (2006) 32 *Ohio Northern University Law Review* 287.

assessment practices and extra-curricular emphasis on contests, are not always intended by law teachers. This paper suggests that, by addressing the hidden curriculum, law schools can create more space for 'constructive lawyering' and better prepare students for the variety of roles that they may inhabit as lawyers (including roles as advocates in adversarial processes). It will suggest that to provide greater room for non-adversarialism in law school and in legal practice, legal education must import non-adversarial processes and materials into its pedagogy; institute assessment regimes that provide broad measures of student merit; and reign in the law school culture of competition and contest.

II THE HIDDEN CURRICULUM

A *Implicit Messages*

What we learn is not bound by what a teacher intends to teach. When a young Barack Obama was awakened each morning at four am to be tutored by his mother, he learned much more than the grammar and vocabulary lessons she taught. He learned to value education; he learned that he was expected to work hard; he discovered his mother's 'faith that rational, thoughtful people could shape their own destiny.'[5] These values were not explicit in the lessons, but they formed an important and durable aspect of his education.

Similarly, when a child attends school, what is learned is not limited to the formal or intentional structure and content of schooling.[6] For example, in kindergarten, the first things children learn are to 'share, listen, put things away, and follow directions.'[7] During the first week of school, the kindergartner learns that he/she has no role in organising the activities and is unable to affect the routine. It is the teacher's duty to structure the use of time and to make materials available. The child learns to distinguish between 'play' — freely chosen activity — and 'work' — something you are told to do, something that is supervised and evaluated.[8] These lessons are implicit in the day's activities and may or may not represent what the teacher intends to teach.

In any school setting, students are exposed to multiple curricula. The *official curriculum*, usually set out in the course syllabus and in various law school policy documents, is the formal substance of the course. During the semester however, the material covered and assessment practices may or may not coincide with what is stated in the official documents. The *operational curriculum* — or the curriculum as implemented — may diverge from the official curriculum intentionally (as when a teacher decides to discuss a topic not included in the syllabus) or unintentionally (as when, for example, a teacher gives up on trying to

5 Barack Obama, *Dreams from My Father* (Text Publishing Company, 1995) 50.

6 Kathleen P Bennett and Margaret D LeCompte, *The Way Schools Work: A Sociological Analysis of Education* (Longman Publishing Group, 1st ed, 1990) 188.

7 Decker F Walker and Jonas F Soltis, *Curriculum and Aims* (Teachers College Press, 2nd ed, 1992) 70.

8 Ibid.

find evidence of critical thinking in exam answers and awards points to answers that simply regurgitate rules). The *hidden curriculum* encompasses the conceptual assumptions and implicit norms and values that underpin both the official and operational curricula. Critics of legal education have explored, for example, how legal education implicitly teaches hierarchy[9] and patriarchy.[10] The hidden curriculum is informed not only by the choice of course material (what is taught and not taught), but also by the pedagogy, materials and context of the class.[11]

B *Process Courses*

The official law school curriculum in both the US and Australia has historically been oriented toward adversarial processes. This should come as no surprise. In courses like Civil Procedure, Criminal Procedure, Evidence and Trial Advocacy, students are explicitly taught the rules, strategy, theory and practice of adversarial processes. Non-adversarial processes typically were not taught in US or Australian law schools before the 1980s. While a few law teachers experimented with teaching law students dispute resolution processes for work-place relations as early as 1947,[12] non-adversarial processes remained the 'stepchild' of legal education at least through the 1980s.[13] Beginning in the 1990s, however, and continuing through to today, a trend in legal education has been toward more explicit education in non-adversarial processes and skills.[14] By 2002, the vast majority of US law schools offered stand-alone courses in ADR, in mediation and in negotiation.[15]

The trend toward increased inclusion of non-adversarial processes in the official curriculum continues. Current initiatives in legal educational reform seek to 'expand students' understanding of what law is, to move beyond adjudication and the courtroom, to introduce broader forms of knowledge, and to develop a wider range of skills.'[16] Nevertheless, teaching of adversarial processes still remains more widespread, thorough and mandatory than the teaching of non-adversarial processes. A 2002 survey of US law programs showed that every program required students to take Civil Procedure.[17] All schools offered — and many

9 See, eg, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (New York University Press, 2004).

10 See, eg, Lani Guinier et al, 'Becoming Gentlemen: Women's Experiences at One Ivy League Law School' (1994) 143 *University of Pennsylvania Law Review* 1.

11 See, eg, Bennett and LeCompte, above n 6; George J Posner, *Analyzing the Curriculum* (McGraw-Hill, 1992).

12 Laura J Cooper, 'Teaching ADR in the Workplace Once and Again: A Pedagogical History' (2003) 53 *Journal of Legal Education* 1.

13 Frank E A Sander, 'Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles' (1984) 34 *Journal of Legal Education* 229, 231.

14 See generally Catherine L Carpenter, 'Recent Developments in Law School Curricula: What Bar Examiners May Want to Know' (2005) 74(4) *The Bar Examiner* 39.

15 Ibid 41.

16 Susan Sturm and Lani Guinier, 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60 *Vanderbilt Law Review* 515, 517.

17 American Bar Association — Section of Legal Education and Admissions to the Bar, *A Survey of Law School Curricula: 1992–2002* (American Bar Association, 2004).

schools required — a course in Criminal Procedure.[18] By contrast, courses in dispute resolution, mediation or negotiation were offered as upper level electives. No law school surveyed in 2002 required a course in non-adversarial processes.[19]

In Australia, as in the US, most law schools now include non-adversarial processes in an official curriculum that remains weighted in favour of adversarial processes. As in the US, criminal procedure and civil litigation remain mandatory subjects of study in most Australian law schools. They are included in the 'Priestly 11' list of subjects that are required for admission to practice law across all of Australia.[20] Most Australian law schools also offer several full-semester upper level electives that teach adversarial processes and skills: Advocacy Skills, Appellate Procedure, Moot Court, Advanced Civil Litigation, etcetera. Meanwhile, only approximately half of all Australian law schools offer even one full-semester course on non-adversarial processes and skills. Only one law school has made it mandatory.[21] Where negotiation or mediation are taught in a stand-alone, mandatory course, the course may be a short one (less than a full-semester). It may carry fewer academic credits and be marked on a pass/fail basis. Accordingly, expectations for performance may not be high and students may thus consider it a 'bludge'.[22]

Several Australian law schools integrate the teaching of adversarial and non-adversarial processes into one mandatory course. The content of this course typically includes what was formerly taught as a full-semester course called Litigation or Civil Procedure. Non-adversarial processes are squashed into what was already a bulgingly full-semester's curriculum. Non-adversarial processes may therefore receive fairly summary treatment. At the ANU College of Law where I teach, for example, the mandatory Litigation and Dispute Management course currently focuses on adversarial processes for 11 out of the 13 weeks of the semester. Non-adversarial processes, including negotiation, mediation and other alternatives to litigation, are 'covered' in just 2 weeks.

Whether they plan to be litigators or not, law students in both the US and Australia are required to take a full-semester course in civil procedure, which usually (but not always) focuses on litigation processes. On the other hand, if new lawyers graduate without having taken a course in negotiation or mediation, that is all right. Why? Is it because legal educators believe that understanding court procedures is particularly vital to understanding all legal issues? Is it because we believe that adversarial processes are more difficult (theoretical or complex) than non-adversarial processes? Or is it because we believe students will pick up 'skills' in negotiation and mediation in practice? Whatever the reason or intent of

18 Ibid.

19 Ibid.

20 Richard Johnstone and Sumitra Vignaendra, Australian Universities Teaching Committee, *Learning Outcomes and Curriculum Development in Law* (Higher Education Group Department of Education, Science and Training — Commonwealth of Australia, 2003).

21 Ibid 98.

22 Molly Townes O'Brien and John Littrich, 'Using Assessment Practice to Evaluate the Legal Skills Curriculum' (2008) 5 *Journal of University Teaching and Learning Practice* 61, 73.

legal educators, the message sent to students by the curriculum as a whole is that it is more important for them to learn adversarial than non-adversarial processes.

C *Doctrinal Courses*

But most law school courses do not focus on process. They focus on substantive law or doctrine. In doctrinal courses, although the adversarial process is not explicitly taught, it forms the context for exploring the substantive content. In courses like Administrative Law, Contracts, Constitutional Law, Criminal Law, Employment Law, Equity, Property and Torts, the law is generally viewed through an 'adversarial frame.'[23]

> Often, students are introduced to administrative, legislative, or transactional activity by reading appellate decisions assessing the adequacy of decisions by non-adjudicative institutions, and by applying an adversarial mode of inquiry to analyzing the work of these institutions.[24]

Appellate decisions are the meat and potatoes of legal education. In spite of the addition of practical, clinical courses to legal education and the supplementation of casebook materials with commentary and materials from social science, the predominant mode of teaching law — especially in introductory classes — is still case analysis.[25] Law students learn to derive legal rules and principles through reading and questioning the decisions of appellate judges. The legal story that is told in appellate decisions, however, is one in which the law emerges as the result of conflict resolved by adjudication. Rules are derived through the analysis of the rights of parties. Winners and losers are nominated. Wrongs are punished. In courses where appellate decisions are the primary teaching documents, law is predominantly the story of triumph and loss in the appellate courts. The task of the lawyer is to serve as an advocate for a client, to maximise that client's position and to win. The implicit messages of these stories are that the lawyer's central role is as an agent and advocate for a client whose interests are opposed to those of other parties and that '[r]eal law emerges from the careful reasoning of appellate judges.'[26] More importantly, law is narrated as an adversarial story — one in which the litigation process forms the context for deriving rules and divining truth.

It is not only the context, but also the language of appellate decisions and the case analysis that proceeds from them that is pervasively adversarial. According to Beth Mertz:

> There is a core approach to the world and to human conflict that is perpetuated through US legal language. This core legal vision of the

23 Sturm and Guinier, above n 16, 527–28.

24 Ibid 528.

25 Bethany Rubin Henderson, 'Asking the Lost Question: What Is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48, 64.

26 Sturm and Guinier, above n 16, 527.

> world and of human conflict tends to focus on form, authority, and legal-linguistic contexts rather than on content, morality and social contexts.[27]

Law, as taught in the US and Australia, translates human conflict into abstract legal categories requiring dispassionate analysis and adversarial critique. Law students use case analysis to frame problems in legal terms and learn to 'think like a lawyer'. While there has been a great deal of discussion and a multi-decade debate around what it means to 'think like a lawyer',[28] an underlying assumption of the concept is that the student must learn to critically evaluate conflict and be prepared to develop arguments and counter-arguments as an advocate in an adversarial process.

D *Pedagogy*

The adversarial ethos is further embedded in law schools' teaching formats. Law's stereotypic pedagogy — vividly depicted in movies like *The Paper Chase* and *Legally Blonde* — features Socratic interrogation of a hapless student by an imperious professor. This kind of Socratic case analysis is essentially an adversarial cross-examination. In the last two decades most law schools have softened or abandoned the Socratic method,[29] but some of the core features of traditional law school pedagogy remain substantially intact, including case analysis, hierarchical organisation of the class, large group teaching and individual questioning. This hierarchical, individualist format, when coupled with a competitive assessment regime, creates an oppositional atmosphere. Students compete with each other during class and afterward. While the stereotypic law school 'paper chase' may be out of date, the competitive, cut-throat mood of the law school has not necessarily softened over the years. Years ago, students tore pages from library books to prevent other students from finding the 'right' answers to assigned problems. Today's students have reported that they find 'wiki' sites, make a note of the correct information and then edit the site using incorrect information to trip up the next student doing online research. In the 1950s the Dean might have welcomed the first year law students by saying: 'Look to your left; look to your

27 Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press, 2007) 4.

28 See, eg, Roger C Cramton, 'The Ordinary Religion of the Law School Classroom' (1978) 29 *Journal of Legal Education* 247; Peter R Teachout, 'Uneasy Burden: What it Really Means to Learn to Think Like a Lawyer' (1996) 47 *Mercer Law Review* 543; Robert J Morris, 'Not Thinking Like a Nonlawyer: Implications of "Recogonization" for Legal Education' (2003) 53 *Journal of Legal Education* 267; Jess M Krannich, James R Holbrook and Julie J McAdams, 'Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education' (2009) 86 *Denver University Law Review* 381.

29 There have been few studies that document the extent of use of the Socratic method in contemporary law teaching. But see Steven I Friedland, 'How We Teach: A Survey of Teaching Techniques in American Law Schools' (1996) 20 *Seattle University Law Review* 1. Beth Mertz asserts that there is not enough evidence to conclude that the use of extended dialogue or Socratic method has declined, but points out that 'studies purporting to show the end or decline of Socratic teaching frequently yield evidence of its continued influence.' Mertz, above n 27, 144.

right; look at yourself; one of you three will not be here next year.'[30] A twenty-first century Dean might say: 'Look to your left; look to your right; look at yourself; one of you three will not graduate with honors.'[31]

E *Assessments*

The assessment regime in many law schools requires the rank ordering of students. Some schools calculate marks on a one hundred point scale and report a 'cumulative grade point average' ('GPA') to prospective employers. Other schools require the marks to fit to a curve; others 'recommend' a marking policy that results in marks that fall into certain 'bands'. In most law schools, grade normalising policies create a pattern or scheme for distribution of marks which defines the relative standing of law students and becomes the key measure of their success. Some students work the marking system strategically and are rewarded with higher marks when they, for example, shop for easy-marking teachers, complain about a mark on an essay, or appeal a bad exam grade. Students with the highest marks are valued and celebrated by the law school with honours, prizes, recommendations and awards. Recognition goes to a very few.

As Barbara Glesner Fines points out, 'the primary reasons for our reporting of grades are not educational but economic: we grade because we need to sort our students for the marketplace.'[32] Law schools provide grades because employers want a handy proxy for merit. Ambitious students have to beat their classmates if they hope to be in the 'top 10 per cent' or 'top half' of the class who will be interviewed for the most prestigious or high-paying jobs. Thus, the competition for jobs begins in the first year of law school when the students' cumulative grade point averages begin to accrue.

F *Contests*

The competition culture extends beyond the classroom into the extra-curricular life of the law school. Competitions are now held not only for appellate advocacy (the realm of the traditional moot court) and mock trials, but also for client interviewing, essay writing and negotiation. Winners of these competitions are feted, photographed and celebrated. It seems that every skill learned in law school can be ranked or ordered and every student defined as a winner or loser.

The hidden curriculum of all of this competition in law school — in the classroom, in assessments, in extra-curricular contests — is the implicit reinforcement of the adversarial model of legal practice, which envisions 'its actual and practical goals

30 This often quoted 'chestnut' has been attributed to a variety of law school Deans, including Harvard's Edward ('Bull') Warren. See Bernard D Meltzer, 'The University of Chicago Law School: Ruminations and Reminiscences' (2003) 70 *University of Chicago Law Review* 233, 240.

31 Ibid, this update of the old story is attributed to Meltzer.

32 Barbara Glesner Fines, 'Competition and the Curve' (1997) 65 *University of Missouri Kansas City Law Review* 879.

not as truth seeking ... [or rights protecting or problem solving] ... but as client maximization or "winning."'[33]

III ILLUMINATING AND CHANGING THE HIDDEN CURRICULUM

The adversarial model is an insufficient model for practice that 'does not reflect [the] complex world of multiple causes, multi-party responsibilities, and conflicting but equally legitimate rights.'[34] The adversarial model is limiting. It distorts lawyers' interactions and judgment.[35] The 'conception of the role of the lawyer as an advocate of his client and as someone else's adversary is a crabbed and incomplete conception of the lawyer's role.'[36] It is almost certainly not the conception of the lawyer that contemporary legal educators intend to promote. Contemporary legal educators in both the US and Australia are actively seeking to re-envision and reinvent legal education in ways that expand the conception of the role of the lawyer and are more inclusive of various styles of learning and modes of lawyering.[37]

Changes, however, have not come easily. Carrie Menkel-Meadow remarked that law school culture is 'so powerful and robust that it has fought off almost every major reform effort.'[38] Law school's adversarial subtext is deeply embedded. The hidden curriculum, which is taught by and through the implicit values and norms of the school, cannot be addressed by simply adding a course in mediation or stating from the lectern that lawyers are problem solvers. It can, however, be changed. By becoming attentive to the messages sent by the way learning is structured in the law school context, we can begin to see possibilities for reform. It is possible to send the message we intend to send. What follows is an initial exploration of some of the ways that the hidden curriculum might be modified to provide greater room for non-adversarialism in law school and in legal practice.

A *Non Adversarial Materials and Pedagogy*

Case analysis is an important legal skill. It is important for law students to learn to read and analyse a legal case, derive its rules, rationale and principles. It is

33 Menkel-Meadow, above n 3, 789.

34 Ibid.

35 See Marjorie A Silver, 'Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law' (2004) 19 *Touro Law Review* 773.

36 Menkel-Meadow, above n 3, 785.

37 See, eg, Roger C Cramton, 'Beyond the Ordinary Religion' (1987) 37 *Journal of Legal Education* 509; Marjorie A Silver, 'Emotional Intelligence and Legal Education' (1999) 5 *Psychology, Public Policy and Law* 1173; Sturm and Guinier, above n 16; Susan Daicoff, 'Lawyer, Be Thyself: An Empirical Investigation of the Relationship between the Ethic of Care, the Feeling Decision-Making Preference and Lawyer Wellbeing' (2008) 16 *Virginia Journal of Social Policy and the Law* 87; Lawrence S Krieger, 'Human Nature as a New Guiding Philosophy for Legal Education and the Profession' (2008) 47 *Washburn Law Journal* 247.

38 Menkel-Meadow, above n 3, 809.

also important that students be able to understand a precedent and analogise or distinguish new facts. It is not necessary, however, for law students to learn the majority of substantive law principles through case analysis. Why do they?

Students learn law through case analysis, in part, because that is how their teachers learned law. Teachers use what they are familiar with. Further, appellate decisions have many virtues as teaching tools. Perhaps the foremost virtue of the appellate decisions is that they are *available*. They are the endpoint of a public process. They are routinely published and are downloadable from the web. They are frequently excerpted in casebooks and can be conveniently packaged in assignment-sized pieces. By contrast, the content and outcome of policy discussions, negotiations and mediation sessions may be private; they are rarely published; and they appear infrequently in law textbooks. In short, non-adversarial processes are not very accessible.

Appellate decisions have the additional virtues of being *real, contextual* and *timely*. They are not hypothetical. They involve genuine problems of real people. They tell real stories and are usually engaging — even when they are (and they frequently are) poorly written. They are also clearly located in time and thus present an historical perspective. In contrast, other legal materials that are sometimes used in law teaching, for example legislative materials or contract documents, may present only abstract, general or hypothetical problems. They lack the characters, the plot, the legal *story* and the history that is told in an appellate decision.

If law teachers are to move away from using case analysis as the predominant mode of teaching law, then alternative materials — materials that possess the virtues of being engaging, real, timely and contextual — need to be made easily available to them. In form these materials might borrow ideas from the business school 'case method'. This method provides students with 10 to 30 page files of information taken from real business scenarios and asks students to work collaboratively, consulting theoretical texts and secondary materials, to derive applicable principles and make managerial decisions.[39] Or, the materials might — like the medical school model — create simulations that present students with a problem they might encounter in a clinical setting.[40] Medical school simulations require students to evaluate symptoms, determine what tests should be done, make a diagnosis and formulate treatment. Students sort out for themselves which symptoms are important and how to interpret the data. Students work together as problem-solvers and healers, roles young lawyers might also inhabit when they leave law school.

Beyond case model or simulation materials, law teachers are in dire need of any concrete and compelling way to present information about low level justice and private justice. If appellate decisions are law school's meat and potatoes, reports of

39 Benjamin H Barton, 'A Tale of Two Case Methods' (2008) 75 *Tennessee Law Review* 233.

40 Jennifer S Bard, 'Teaching Health Law —What We in Law Can Learn from Our Colleagues in Medicine about Teaching Students How to Practice Their Chosen Profession' (2008) 36 *Journal of Law, Medicine and Ethics* 841.

low level or private justice processes are its rare, white truffles. We know that the vast majority of legal problems (even complex and expensive ones) are resolved informally through negotiation, mediation or other informal means. Thousands of criminal and civil complaints are also resolved in magistrates' courts, where no record is made. Informal and low level resolutions are not reported and law teachers know surprisingly little about them. It may come as a bit of a shock to realise that law teachers know almost nothing about the vast majority of legal conflicts and how they are resolved. We do not have stories from real and recent mediations, negotiations or plea bargains. We do not have teaching texts that collate and critique the principles that might be derived from the experience of hundreds of thousands of resolutions. Some form of 'testimony' of clients whose conflicts were resolved by non-adversarial means and the outcomes of non-adversarial proceedings need to be documented regularly and made available for study. Contextual material, policy discussions and material from psychology, anthropology, history and social science should also be distilled into law teaching materials in a way that allows students to consider a full array of legal issues and possibilities for resolution.

Some of these kinds of materials — particularly simulations and theoretical commentary — are available,[41] but students report that their use is spotty, at best. Shortly after her graduation from law school, Bethany Henderson wrote:

> modern [casebooks] … do include selections from law review articles, directive questions, limited commentary, and occasional historical and political background materials. Such material does help to put judicial decisions in context, but in most casebooks it is heavily edited and relatively sparse. Furthermore, the most substantive commentary offers theoretical perspectives on cases' doctrinal value and theoretical justifications for or criticisms of judges' decisions. Rarely does any commentary give students a broad contextual background for judicial decisions or any insight into lawyers' actions.[42]

Henderson goes on to say that most students simply skip the commentaries and read the cases because class discussion will almost certainly revolve around the cases.[43] Alternatives to reading and discussing appellate decisions must not only be good teaching tools and be readily available, but they must also be supported by a pedagogy that makes good use of them. The old Socratic method or modified Socratic dialogue is not up to the task. Pedagogies that call on students to collaborate, to think creatively, to balance multiple and conflicting interests, or

41 See, eg, simulation materials created by Nancy Knauer for transactional practice: *Transactional Practice Series* (National Institute of Trial Advocacy, 1998–99). *The Transactional Practice Series* is a five-volume set of course materials that teach Trusts and Estates and Professional Responsibility concepts through client simulation and drafting exercises.

42 Henderson, above n 25, 66–7 (citations omitted).

43 Ibid 67.

to lead their own inquiry, require teachers to innovate.[44] They may also require lower faculty/student ratios and more faculty time.

It is an open secret that the real reason we continue using the large lectures and Socratic dialogue is not because they are effective pedagogy. They are used because they are cheap. Still, a great deal of pedagogical reform could be accomplished without drastically changing law school budgets if such reform were appropriately 'counted' or valued by law schools. That is, if creating publishable teaching materials were counted equally with writing law review articles and monographs (for purposes of promotion, tenure and salary), more innovative teaching materials would be written. If teachers who innovated their pedagogies were explicitly given 'research relief' for a semester, more innovative pedagogy would emerge. The calculus of how teaching time and clinical work are valued needs to be addressed at the top levels of law school administration to create a trickle-down effect into the law classroom. If the multiple tasks that law teachers work on were valued, it might open the door to pedagogical reform that would value the multiple roles that the students (as future lawyers) will inhabit.

B *Measures of Student Merit*

Assessment regimes are the most potent drivers of the hidden curriculum. They speak loudly to students about what is important and what is not. The bottom line for students is that if something is not assessed, it is not important.[45] Meanwhile, most law schools assess only a fairly narrow range of skills. The ability to collaborate, to negotiate, to think creatively, to build coalitions, to communicate persuasively both orally and in writing, to mediate, to balance competing interests and to interact with clients, are very difficult to evaluate in a typical three hour written exam. They are therefore only infrequently evaluated, if at all. Law school assessment practices produce a very 'skinny' measure of merit.[46] We make our measure of merit even skinnier by reducing it to a single number or mark. A student's strengths and weaknesses can, from the viewpoint of the law school, be summed up with an '82' or a 'C'.

As law teachers, we spend an inordinate amount of time ranking student work and wrestling with the frustration that is caused when the merit of this work is not aptly described by a number. More often than I like to admit, I have encountered a student exam answer that starts out strong and finishes with a scrawled note that says, 'OUT OF TIME!!' My assessment — a single number — will not tell a future employer anything about the student's intellectual or interpersonal abilities. I will have measured the student's ability to write quickly and manage time in an exam situation. These may or may not be skills that a particular employer is interested

44 For an excellent example of one law teacher's innovations along these lines, see Patricia Easteal, 'Teaching about the Nexus between Law and Society: From Pedagogy to Andragogy' (2008) 18 *Legal Education Review* 163.

45 O'Brien and Littrich, above n 22.

46 I have borrowed the term 'skinny merit' from Lani Guinier, 'Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals' (2003) 117 *Harvard Law Review* 113.

in; and the employer will have no way of knowing what skills, in fact, the grade reflects.

Changing the hidden curriculum of the assessment regime will require us to formulate standards of achievement and competency that will allow us to stop ranking students against each other. We will also need to come up with more robust measurements of student merit and to assess a broader spectrum of abilities.[47] These goals are not unrealistic. Changes in the assessment regime would almost certainly produce an atmosphere that would be more conducive to cooperation and collaboration. As a result, employers would also adjust their expectations.

Recently, Harvard law school dropped letter grades and stopped ranking its students.[48] The reaction among my colleagues — and legal educators generally — has been to say: 'Well, they can afford to do that. They are Harvard. Harvard students will get jobs even without a class rank. Our students would be handicapped in the job market without grades. They would have no way to distinguish themselves.' My own experience at a non-Harvard law school contradicts these assumptions.

Northeastern University School of Law, where I attended law school, did not rank students or assign 'grades'. Instead, students received a pass/fail mark along with a short written evaluation of their work in the course. As a student, my experience of law school was almost completely devoid of competition. Although students competed for jobs and in athletic contests, the competition did not bleed into the classroom. We worked together in study groups, collaborated on papers and projects and cooperated as teams in client simulation exercises. We worked hard because it was not easy to pass courses. We understood that expectations of performance were high. Nevertheless, we were not working against each other. My success could in no way detract from the success of my peers. My peers' success could take nothing from mine. There was no class rank and no grade point average.

Over the years I have found that prospective employers respond well to my Northeastern credentials. Although they are initially surprised not to find a class rank or grade point average on my resumé, they are subsequently pleased to have the benefit of the evaluations of my abilities which they find in my transcript. Written evaluations provided employers with more in-depth and accurate information about my strengths and weaknesses than a mark or a GPA. I have never felt handicapped in the job market by my law school's assessment regime.[49]

47 An excellent discussion of the destructive potential of normative grading and the lack of pedagogical justification for it, can be found in Fines, above n 32.

48 Martha Neil, 'Harvard Drops Letter Grades' (2008) *ABA Journal* <http://www.abajournal.com/weekly/harvard_law_drops_letter_grades>.

49 See Top-Law-Schools.com, *Northeastern University School of Law* (2010) <http://www.top-law-schools.com/northeastern-law.html>. According to this website, Northeastern does a better job than its peer schools in job placement.

C *The Contest Culture*

The whole world loves a contest. World Cup soccer games attract hundreds of millions of viewers worldwide. This is not a bad thing. It is not a bad thing for law schools to support some contests and to celebrate the winners. But not everything is a competitive sport. Negotiation, for example, is not a competitive sport. The idea that someone might sit and judge who 'wins' a negotiation session seems to distort the process and send the wrong message. Of course, the creators of negotiation competitions are not trying to send a message that negotiation is a win/lose proposition. They are trying to find a way to motivate students to learn negotiation skills and show that they are valuable.

It is not necessary, however, to convert every activity into a competitive sport in order to motivate students to do it or to show that we value it. Students can be motivated by the opportunity to receive formative feedback — especially from someone they respect. They can be motivated to learn by being given the opportunity to use their skills in situations that will have real impact. There are also a number of ways to demonstrate that the law school values activities that do not have winners and losers. One is to spend faculty time on these activities. A colleague of mine, Simon Rice, has recently helped students to organise to do *pro bono* and human rights projects. His involvement and dedication of time to the enterprise speaks loudly to the students about the value of their efforts. Other faculty members now contribute to ongoing projects, creating a snowball effect. A second way to recognise the value of various kinds of activities is to report on them publicly and to devote class time to discussing them. Finally, the value of non-competitive activities can be recognised in recommendation letters, individual compliments and congratulations on a job well done. We need not reserve accolades for the top few. Most law students are very bright and work hard. Students thrive on encouragement, intellectual engagement and recognition of their increasing competence and the impact of their efforts.

IV CONCLUSION

A few months ago I met Marie Jepson, founder of the Tristan Jepson Memorial Foundation, which works to raise awareness of issues relating to mental wellbeing in the legal profession. As we were talking about the challenges that face lawyers and law students, Marie commented: 'A lawyer's work must be particularly stressful, especially because there is always a winner and a loser in law.' 'No!' I objected in my usual emphatic way. 'The vast majority of legal conflicts are solved through negotiation and compromise. Lawyers need to work toward win-win resolutions of conflict because most people involved in conflicts have continuing relationships that might survive the conflict. Anyway, most lawyers don't deal with legal conflicts at all. They write legislation, they counsel, advise, teach, or put together deals...' I had a lot to say and was just getting started, but I

paused because of the stunned look on Marie's face. 'I've never heard *anyone* say any of that', she declared certainly.

Law schools did not create the culture of competition and adversarialism. The idea that law is necessarily adversarial — that there is 'always' a winner and a loser in law — is deeply embedded in popular culture and in traditional legal practice. But 'law schools are also powerful cultural agents themselves.'[50] If legal educators hope to impart a broad vision of the potential roles of lawyers to their students, they should not continue to 'amplify [adversarial] values as they distribute greater power and prestige to those who achieve the most under these competitive conditions.'[51] Cultural and structural change in the law school is needed. The messages we send must not only be stated in the official curriculum, but must also be embedded in the law school culture and the structures that define the way we teach and assess.

50 Fines, above n 32, 896.

51 Ibid.