INTEGRATING PROCEDURE, ADR AND SKILLS: NEW TEACHING AND LEARNING FOR NEW DISPUTE RESOLUTION PROCESSES

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INTRODUCTION

For some time, I have been interested in clinical legal education in the broadest sense, as a method of teaching and learning, and as a substantive focus for teaching and research.[1] As a method, it incorporates the key elements of structured experience and reflection, elaborated below.[2] As a substantive focus, it looks at what lawyers really do and what really happens in practice. I have regularly argued that both aspects of clinical legal education can and should be introduced into the LLB, even in quite large classes. Clinical legal education methods and insights can be effectively combined with conventional legal education to further the goals of legal education.

This paper elaborates on those teaching and learning ideas, in the specific context of teaching civil procedure. Some background about the goals of legal education and the changing patterns of legal education in Australia is necessary. This leads to a recognition of the importance of addressing the changing dispute resolution processes in Australia and the skills and understanding law graduates need, especially a broad grounding in values and ethics. The second part of the paper describes a program designed to integrate theoretical, critical and practical approaches to the formal rules of civil litigation. As well as covering formal rules and practices, this program considered the reality of settlement in

litigation and examined mediation and other forms of dispute resolution, in light of ideas about the nature of civil justice and the moral and ethical dimensions of legal practice.

LEGAL EDUCATION

Legal education is often characterised as torn between two competing goals: training professional practitioners and providing liberal education as part of a university.[3] It is important to recognise and reconcile these apparently diverse goals. Ideally, university education should enable students to acquire, develop and use information and ideas for themselves, and to apply, evaluate and connect diverse new ideas and information. As recognised by the Pearce report, the core functions of law schools must also include theoretical and critical dimensions.[4] Law schools must enable graduates to critically analyse legal institutions and the place of law and legal institutions in society and encourage scholarship which develops broader doctrinal and theoretical understandings of law. Law schools have a distinctive intellectual obligation to expand all aspects of legal knowledge.

At the same time, legal education necessarily includes a competence component, but it must be generalisable. Law changes and legal education must stress the "dynamic nature of law" and not treat law as a set of "stagnant propositions".[5] Students must be able to locate, understand and apply new law, rather than reproducing doctrines learned in law school. Legal practice changes as well. The preliminary statement of the Lord Chancellor's Advisory Committee on Legal Education and Conduct identified the need for lawyers to be capable of responding to rapid changes in law and society, including the increasing diversity in the legal profession.[6] Increasingly, many law graduates will not practice law at all. For all these reasons, competence in legal education cannot be limited to knowledge of legal rules and skill at legal analysis and adversarial advocacy. Legal education must include transferable skills as well as the intellectual abilities expected of all university graduates. The changing nature of law, legal practice, and the future careers of law graduates also demand a greater stress on ethical values in a broad sense.[7] The Australian Law Reform Commission has recognised this need to "encompass broader considerations of legal and social ethics".[8]

More than ten years ago, the Pearce Report stated that most Australian law schools teach neither theory nor practice, but doctrine.[9] Legal education in Australia depended largely on exposition of substantive legal doctrine in lecture, through examination of appellate judicial decisions, legislation and important academic commentary. A practical or critical perspective, within the compulsory core of legal education was fairly unusual.

This "expository tradition",[10] with its emphasis on appellate cases, has distorted legal education. Insistence on the process of "analysis, exposition and argumentation about legal doctrine"[11] derived from appellate cases assumes dispute resolution in court, or at least pursuant to law.[12] Treating adversary litigation as central in this way contributes to the adversary culture.[13] There is an irony in this criticism of the case method, as case reading was introduced as a form of law in action. Compared to legislation and treatises, cases had real facts and real people; they were easy to use and free.[14] The emphasis on their use has, however, put litigation at the centre, with its either/or, win/lose focus, and limited attention to whether settlement could or should be achieved.[15] It has confined discussion within the existing system, discouraged criticism[16] and caused legal education to lack exposure to alternative views.[17]

Riskin and Westbrook summarise the weaknesses of conventional legal education as: dominance of doctrine, including the dominance of substance over process; a focus on adversarial procedure, in which the lawyer acts as hired gun; insufficient attention to the lawyer's role as problem solver; and inadequate exposure to skills of interviewing, counselling and negotiation.[18] Other critics argue that university legal education is simply not doing the professional training job expected of it and that law graduates lack the skills or competence necessary before they can be released upon an unsuspecting public.[19]

The criticisms above are quite broad and general and, to be fair, are no longer generally applicable to Australian law schools, if they ever were. Many Australian law schools, perhaps especially the newer schools, pay substantial attention to critical theory, consider law in context, and integrate skills with the undergraduate curriculum. Most law schools now recognise that the challenge for legal education is "…the integration of doctrine, theory, … practice [and ethics] into a unified, coherent curriculum."[20]

TEACHING PROCEDURE AND TEACHING SKILLS[21]

As well as the general criticisms discussed above, there are some specific criticisms of the way procedure has been taught, when compared to this ideal unified curriculum, and, even when skills are taught in the LLB, similar objections are sometimes made.

> The traditional procedure course has some significant weaknesses: it places undue emphasis on abstract detached analysis of cases and rules; it practically ignores the real world context of informal processes and pragmatic lawyering skills in which those rules are embedded; and it overemphasises the adversarial mentality. In the context of an overall curriculum that shares these same weaknesses, the need for improvements is even more compelling.[22]

Although this is a description of US law schools, it may be equally applicable in Australia.[23] As with legal education generally, civil procedure can be taught in a way that is neither theory nor practice, only doctrine.

Related and similar criticisms can be made of skills components, such as interviewing/counselling, negotiation and advocacy. A skills component (wherever taught) can intensify the focus on adversary litigation as central and reinforce the false image of litigation and trial as the dispute resolution norm. Riskin and Westbrook describe a "lawyer's philosophical map", in which disputants are adversaries, the outcome is win/lose and the dispute is resolved according to a substantive legal rule.[24] Students absorb these assumptions very well. When put into a lawyer role in a skills activity, without substantial preparation, students tend to emulate extreme or stereotypic lawyer behaviour.[25] Carrie Menkel–Meadow argues that a well educated lawyer solves problems and facilitates relations and transactions.[26] Fisher and Jackson point out the gap between what law students are sometimes taught in a professional skills activity and what lawyers really do; they suggest that, rather than teaching the "skills of battle", law students should learn "skills of peace".[27]

Another concern about the way procedure is taught and the ways skills are taught is their relationship with ethics and professional responsibility. In a procedure course as well as a skills component, consideration of ethics may be limited to attention to formal rules of professional conduct or adversarial etiquette.[28] Adversarial strategy can too easily be used to ignore the moral

complexity of much that lawyers do.[29]

WHY INTEGRATE ADR[30] WITH CIVIL PROCEDURE AND WITH SKILLS ACTIVITIES?

A recurring issue in legal education is the tension between mainstream and special focus subjects. For example, should there be a separate introductory course on case reading and statutory interpretation, or should these be taught when a judicial decision or legislation is first encountered early in a substantive law course, or both? Similar curricular issues arise with considerations of race, gender, ethics, or theory, and the same question arises with ADR, procedure and skills. Should there be a separate procedure topic, a separate ADR topic, a separate skills or lawyering topic? Or, should any or all of these be integrated with substantive law topics? What should be covered in a foundation first year introduction and what should be in the later years or in pre–professional practical legal training (PLT)?[31] As I have argued elsewhere, I reject divisions such as theory and practice, or procedure and substance,[32] so in this context, I support integration of ADR, procedure, substantive law and skills, in first year and in later years, with specialist optional topics for those with greater interest.

Forms of dispute resolution other than litigation are expanding rapidly and students must know about them.[33] Treating ADR and procedure together is also a more accurate description of the real legal system; the civil trial is, practically, a rarely used form of dispute resolution, as most cases settle before/during litigation.[34] "ADR is a piece of the process puzzle that is missing from the picture of litigation we present to students."[35] Combining ADR and ,procedure enables us to break away from a false image of litigation as the norm, as what ought to happen. It also illuminates the strategic and practical relationship between various stages of litigation and the parallel settlement processes. Teaching ADR along with litigation and civil procedure helps to legitimate ADR processes,[36] but it does not necessarily mean endorsing all forms of court–annexed ADR or an increased judicial role in settlement.[37]

Because ADR often employs an interest–based, problem solving mode of thought rarely demonstrated or discussed in a traditional procedure classes, integrating ADR with procedure facilitates a critical understanding of adversary and cooperative

processes.[38] Teaching ADR raises the question of the values reflected in ADR and how these values relate to aims and objectives of civil justice.[39] considering ADR and procedure together raises important policy questions, such as the nature of and justifications for party control or the detached role of the judge, as well as problems of access, cost, or power imbalance.[40] Bush describes how observation of ADR and classroom discussion identifies unstated assumptions about dispute resolution and civil justice, and then allows them to be questioned.[41] For example, students expressed concern about a mediator's behaviour whose management of the process revealed a preference for a particular outcome. Discussing this concern identified implicit student beliefs that "choice" is a paramount value.[42] Similarly, a concern when legal rules were ignored by an arbitrator, clearly not bound by law, exposed assumptions that justice is achieved primarily by applying legal rules.[43]

Integrating ADR with procedure challenges the traditional role of a lawyer and expands what it means to be a lawyer.[44] "By presenting problem–solving as an integral part of the regular work of a lawyer, we can balance the adversarial mentality we continually reinforce… [in other ways]"[45] Law students and lawyers would often prefer to be problem solvers; being a zealous advocate, as that role has been constructed, does not produce satisfaction for many in the legal profession.[46]

Critical examination of the real world of dispute resolution will naturally raise concerns of access to justice and compel consideration of dominance and disadvantage and diversity, of gender, class, race, sexuality, and power.[47] Teaching effectively about these questions requires us to draw on theory and especially what is called "outsider" legal scholarship, based on gender, race, critical legal studies and some of law and literature.[48] This scholarship is often criticised as impractical,[49] but its value is in deepening understanding of self and of others and understanding the world as something people see and experience differently. For a law student or legal practitioner or judge to grasp these profound differences in perspective leads to valuable practical insights about basic practice skills such as interviewing, counselling, negotiation, witness examination and advocacy. Recognising difference in this sense will also generate substantial questions about the very nature of law and justice which all participants in the legal system must

consider. Linking these questions to a concern about process leads to identification and examination of assumptions about the relation between law/power/process and emphasises the ambiguous and morally complex real world. These insights reinforce the need for law schools to teach ethics in the broadest sense.[50]

Part of the wider, non–adversarial, problem–solving orientation of ADR is a recognition of the importance of interpersonal communication skills such as listening, in addition to the intellectual, analytic abilities traditional legal education fosters, and in addition to the adversarial advocacy skills fostered by some practical training programs. At the very least, integration of ADR and litigation will lead to an appreciation of practical skills and a recognition that ADR skills, especially listening, are actually central to all lawyering.[51]

Integrating ADR with procedure and skills activities enables/ encourages greater use of experiential teaching and learning methods, which produces distinctive benefits.[52] This teaching and learning method draws on a four–stage model articulated by Kolb and Fry which includes experience, reflection, abstract generalisation, then testing of the insight, which leads to new experience.[53] This method enhances an important goal of legal education: to "…teach students a method for learning from their experiences, then by applying this method, [to] continue to learn. ..after formal professional education…"[54]

Experiential learning also "make[s] the process of litigation come to life, and give[s] students a more concrete and realistic understanding of how it really functions".[55] Students can understand the issues better if they have some familiarity with or exposure to the tasks involved in ADR or civil procedure".[56] [S]tudents are more interested and learn more theory and more practice when they participate in the process" either by actively doing a task or through critique of actual work.[57]

Integrating experience and skills effectively requires careful planning and attention to teaching method. Just as not every case or group of cases achieves learning goals, not every experience leads to useful learning, so the experiences must be carefully selected or structured,[58] At the same time, practice alone or experience alone will not necessarily lead to useful learning. "Only experience that is reflected upon seriously will yield its full measure of learning…."[59]

Context is important as well.[60] ADR and legal doctrine operate

in particular contexts and are used to achieve particular goals, so learning must connect with or recreate that context and the objectives that are part of the context. For example, procedural rules are used by practitioners to solve a problem or complete a particular task, as part of assisting a client. When a practitioner needs to draft a statement of claim, the rules are consulted to see what is required, permitted, or forbidden, then the rules are applied to the task. Recreating this context will assist the students to learn and understand procedural rules. A forced march through the rules in sequence as a text will be much less effective.

An important way to achieve the diverse aims of legal. education, especially with regard to civil procedure and ADR, is to use a version of the four stage model of teaching and learning which usefully incorporates actual experience.[61] The first stage is background information on the process, the skill, the rules to be studied, including description, empirical research, critical analysis, policy, ethics and theory. Next is a concrete experience, which can take a number of forms. Perhaps the most elaborate is direct involvement in and responsibility for a task which is part of an actual dispute resolution process, such as through an inhouse clinic or placement. More usually, students will participate in a simulation, either in lawyer role or in some other capacity which models some aspect of dispute resolution or lawyering. Alternatively, students may personally observe all or part of an actual (or simulated) dispute resolution process as it happens; or they may see a video of all or part of an actual (or simulated) dispute resolution process; or they may be given a case study, consisting of written materials. The final stages include analysis, reflection and discussion of the actual or vicarious experience, incorporating self–reflection and the views and observations of other students and teachers. This is related back to the substantive law, policy and theory introduced at the beginning.

To be most effective, this learning sequence would be linked to knowledge or experience which the students already have of disputes and their resolution;[62] it would include group work,[63] occur at several different points in the curriculum, beginning in first year[64] and would involve a progression from simpler to more complex situations.[65]

IMPLEMENTING THESE IDEAS IN A PROCEDURE

COURSE

In 1995, the University of Adelaide decided to reintroduce a subject in procedure, stressing the integration of practical and conceptual components, using new teaching methods and materials. To support this initiative, the University awarded a teaching development grant, which created the opportunity to apply some of the ideas articulated above. Planning the subject began with a review of the literature and consultation with legal practitioners. With the help of a research assistant, we reviewed academic writing on methods for teaching procedure and dispute resolution, legal professional journals regarding current issues in procedure and ADR, and discussions of theoretical and policy perspectives from the US and the UK as well as Australia. Because reform of civil procedure has recently been such an important academic and practical question, the current literature is particularly rich, in the US and the UK, as well as Australia. Other procedure teachers around Australia very generously shared ideas, videos, practical exercises and other teaching and research materials.

Legal practitioners and judicial officers helped us to identify important current practical issues in procedure. Areas which were most frequently mentioned as needing attention included lawyer–client relations, pleading, discovery, case flow management, incentives to encourage settlement, as well as various alternative dispute resolution mechanisms. Practitioners provided suitably modified case files and documents to be used as course materials or loaned training videos and practice manuals. Based on this research, we developed the content, structure, materials, teaching methods, and assessment for the topic. There were a number of constraints in choosing the content. We were limited to only one semester, we were mindful of the Priestley requirements, and we were also concerned to avoid too much particularity (for example, file x document within 21 days of the event). Originally, we considered a thematic comparative structure, examining litigation and ADR together, in parallel, but this became unwieldy, so we ended up with an essentially sequential or chronological structure with thematic links.

We formulated broad, inclusive objectives for the topic, as stated in the course guide.

> This course aims to acquaint students, at both conceptual and practical

levels, with the various procedures, informal and formal, which exist for the resolution of civil disputes. It will provide an opportunity to examine law as a concrete practice in specific contexts, with important moral and ethical dimensions, relating theory, doctrine, rules and practice. In addition, in the first lecture, we conducted an interactive exercise, asking the students to identify their own goals for the topic. The goals they expressed were:

- acquire some (elementary) knowledge of procedure: rules and practices
- learn through practical exercises
- understand the range of dispute resolution processes
- consider the phases and stages of disputes and dispute resolution
- develop some people skills, especially for dealing with clients
- qualify for admission
- gain some familiarity with legal documents used in civil disputes
- learn some negotiating techniques
- learn about common disputes, such as debt collection
- identify the resources available to assist a (new) legal practitioner.

Original teaching materials developed especially for the course included modifications of actual case files; a specially edited video on lawyer–client interviewing; a specially made video on mediation; and materials for practical exercises. Rather than a textbook, students used the Rules of the Supreme Court, District Court and Magistrates' Court and the Rules of Professional Conduct; read selected judicial decisions; and considered critical and empirical research about the nature of civil justice and the moral and ethical dimensions of legal practice.

We used a variety of teaching methods, in an attempt to match the learning process with the learning objectives. Large classes included lectures from two members of the full–time academic staff; videos; brief, interactive demonstrations and discussions; panel discussions with practitioners and judges addressing key issues; and other guest speakers. The small group classes were taught with the assistance of recent graduates and practitioners. These classes included interactive exercises on listening, interviewing, pleadings, discovery, and negotiation, and discussions of cross–vesting jurisdiction, standards for lawyer–mediators and civil justice reform.

Choosing assessment for the course was particularly challenging, as student expectations about assessment really drive their attention and their learning.[66] Assessment included a mark for preparation and participation in the small group classes (which

included the practical exercises), an exam, and an optional written assignment. In lieu of a conventional research essay, students could choose to be assessed on their written plans for and subsequent reports on their experience in the interviewing or negotiation exercise, requiring reflection on substantive content, outcome and process. The exam, based on case documents distributed in advance,[67] included problems requiring analysis and application of procedural rules, consideration of dispute resolution methods and discussion of broader issues about the nature of civil justice and the appropriate roles of legal representatives and the judiciary.

The practical exercises were a particularly effective feature of the course. Most of these were built around a particular dispute over an agreement for the sale of land. After an initial tutorial with a role play emphasising the importance of listening as a skill, the first practical exercise involved a simulated client interview, with some students acting as clients and others as lawyers. Other exercises required students to draft pleadings, assess whether documents were discoverable, and attempt to negotiate a settlement. Materials used for these exercises comprised case file materials, setting up the activity; background reading on techniques and formal rules. Materials also included consideration of ethical issues, power relations, and cooperative processes; information about planning for the activity with a requirement of appropriate written preparation; and guidance for self assessment and peer assessment. The exercises emphasised direct practical application of rules, techniques and concepts to a particular case as well as how to reflect on and thus learn from their own experience. Class discussions allowed consideration of theoretical, critical and ethical issues.

A particularly important aspect of these exercises was the very strong emphasis on a relatively formal clinical method: planning, activity, reflection and abstract generalisation. In the negotiation and interview exercises, all students were required to produce a written plan or preparation, to engage in the activity, and then to prepare written self–assessment and provide written feedback for the other participant. In other exercises, students were required to produce some sort of written preparation, and the tutorial process provided feedback. In this way, students acquired methods which will enable them to continue to learn from their own experience, in the absence of a teacher.

It is especially important to think about the purposes and uses of the practical exercises. For example, the purpose of a simple, in–class exercise in interviewing is not primarily or even substantially to teach students the particular skill involved. They may become better listeners, but what is more important is that the students understand that listening is a skill, and, when confronted with a situation that demands it, they will be aware of the need for appropriate learning. The opportunity to draft one pleading document will not make them experts at pleading, but will enable them to understand some aspects of legal and fact analysis. The purpose of an informal moot is not to teach students, in one 10–minute session, to be barristers. The more realistic and appropriate goal is to enable students to understand the very particular process of argument which leads to a judicial decision, and the analysis necessary to construct and test that argument.

These experiences can generate valuable insights, such as understanding that facts are constructed by all the participants in a legal dispute, in a variety of ways, rather than existing in a neat bundle labelled "contract" or "fraud". Professor Galanter uses a class in negotiation "as a platform for intellectual reorganisation of the law school experience".[68] An opportunity is created for the students to understand the dynamic context in which law operates and to use this to gain a deeper understanding of the sometimes questionable or arbitrary assumptions which underlie much of formal legal process and analysis. Critical scholarship is especially valuable here, as it provides a framework for students to develop their new understanding of the profoundly different ways people experience the world.

Integrating consideration of different dispute resolution processes, especially facilitative interest based mediation, helps make explicit the critical, questioning focus of legal education. ADR was considered in a number of ways. We began with the idea of lawyers themselves as dispute resolvers or problem solvers, which may occur simply by giving advice to a client or making an inquiry or request on a client's behalf. Readings and lectures described different processes, claims of advantages and disadvantages, and raised issues about the integration of ADR with court processes. An experienced arbitrator presented a case study of an arbitration. Students discussed and prepared a submission on draft standards for lawyer–mediators. Role plays in class, followed

by discussion, illustrated cooperative and competitive processes. Perhaps most effective was a video of a mediation of the dispute which was the basis for the earlier drafting and negotiation exercises. This very effectively illustrated the particular features of a professionally conducted mediation, with a well–trained, skilled mediator. Students could compare this process in a very concrete way with formal litigation and with settlement negotiations between legal representatives. This enabled a more perceptive consideration of the positive and negative aspects of mediation itself, as well as the values and risks of including some forms of mediation as part of the court's processes.

Questions of professional responsibility and ethics were a consistent theme, arising almost every week in readings, lectures from academic staff and practitioners, discussions and practical exercises. The formal rules for professional conduct were regularly referred to and subjected to critical scrutiny. Ethical aspects of the practical exercises (especially interviewing, discovery, and negotiation) were directly addressed in the preliminary materials, in the self–assessment and feedback, and in class discussion. When an ethical dilemma arises during a simulation, students experience the difficulty of actually making a choice more intensely than in an abstract discussion of what ought to be done.[69] In this way, we emphasised that professional competence must include a deeper conception of ethics and morality.[70]

Student reaction was generally very positive. Student enthusiasm, effort, and attendance were high. Students appeared to understand and share the goals of the subject; the standard of preparation and tutorial performance was very high. Detailed student questionnaires administered in the last week of classes reveal that students agreed very strongly that the subject showed how theory was related to practice. Though they thought the workload was very heavy, they rated the practical exercises and the videos as valuable for understanding the subject and in achieving the aims of the subject. The videos were especially praised for showing the theory–practice connection. Students welcomed the use of panels to present varied professional points of view and most felt that they had developed skills needed by legal professionals. Whether students have actually developed those skills, and the insight to use their abilities responsibly, will only be established in the years to come.

Not every aspect of a subject like this is perfect, however. As Bush discovered in teaching through student observation of actual ADR sessions, students sometimes tended to overfocus on substance and underfocus on process.[71] Students seemed to have a limited process consciousness, which is perhaps a natural result of law study. Flexible, generalisable education, which emphasises theory, may be swimming against a tide of student and professional expectations. Student comments showed a preference for more practical coverage and a slight preference for less theory. They were relatively tolerant of theory in this instance, perhaps because the link to practice was strongly stressed. At the same time, some members of the legal and judicial professions have unrealistic expectations about the knowledge and skills students can actually achieve in any academic environment. Some professional practice learning requires professional practice contexts, and even the best simulation cannot provide it.

The biggest difficulty with teaching a course of this sort is resources. Designing a course and teaching in the ways described takes a great deal more time and energy from academic staff and support from legal practitioners than conventional teaching. Developing this course was really only possible because of a substantial grant which provided research assistance, funds to purchase or prepare materials and release time from teaching. Perhaps most important are tolerant and supportive colleagues who participate in and support such developments.

CONCLUSION

As stated earlier, the challenge for legal education is "...the integration of doctrine, theory … practice [and ethics] into a unified, coherent curriculum.[72] Integrating ADR and procedure with experiential skills components provides an excellent opportunity to move towards this coherence. It allows teachers and students to move away from materials and practices that promote litigation and an adversary mindset, and to use skills as a starting point for a critical and theoretical evaluation of law and legal practice. Jennifer David has described the Utopia of ADR in law schools as the inclusion of ADR in every topic.[73] Carrie Menkel–Meadow's more modest ideal curriculum includes a first year introduction, more specialised work on skills processes with

simulated and real case work in later years, and, finally, an in–depth exploration of jurisprudential and policy questions.[74]

We are working towards this ideal at Flinders. In the first year Introduction to Law subject, taught in conjunction with Torts, we consider issues of lawyer–client relations, procedure, ADR and access to justice. All students have a brief experience of interviewing, negotiation, drafting a statement of claim and informal advocacy which is followed up by a substantial component of legal theory. Later year substantive subjects include more focused, elaborate activities covering interviewing, negotiation, mooting and drafting. There is a separate Dispute Resolution optional subject, and ADR is considered in the Litigation subject, usually taken in the final year. We have specific plans to incorporate more group work and to consider ethical issues in a more consistent way throughout the curriculum.

Integrating ADR and procedure with practical skills helps us understand the unbreakable nexus between substantive law, legal process and lawyer tasks,[75] and between theory and practice.[76] The curriculum at Flinders will continue to emphasise practical, theoretical and ethical perspectives on the civil justice process.

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 (1998) 9 *Legal Educ Rev* 83.

1 K Mack, Bringing Clinical Learning into a Conventional Classroom (1993) 4 *Legal Educ Rev* 89.

2 AG Amsterdam, Clinical Legal Education – A 21st Century Perspective (1984) 34 *J Legal Educ* 612, at 616–617.

3 D Pearce, E Campbell, & D Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)* (Canberra, AGE, 1987) Summary, Chapter 1.

4 *Id* at 24–28.

5 A Halpin & P Palmer, Acquiring Values (1996) 146 (3) *New LJ Practitioner* 1357, at 1358.

6 *Id.*

7 Halpin & Palmer, *supra* note 5.

8 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System,* (Issues Paper 20) (Sydney: The Commission, 1997) para 11.24, at 102.

9 Pearce, Campbell, & Harding, *supra,* note 3 at 27, 30.

10 R Cranston, Law and Society: A Different Approach to Legal Education (1978) 5 *Mon LR* 54 at 54–55.

11 W Twining, Alternatives to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo–American Jurisprudence: Some Neglected Classics (1993) 56 *MLR* 380, at 382 cited in R Calver, The Teaching of Commercial Alternative

Dispute Resolution: Problems and Opportunities, paper presented at the Professional Legal Skills Conference, Bond University, 10–11 February 1994, at 3–4.

[12] LL Riskin & JE Westbrook, Integrating Dispute Resolution in Standard First Year Courses: the Missouri Plan (1989) 39 *J Legal Educ* 509, at 514, quoted in Calver, *supra* note 11, at 5.

[13] Australian Law Reform Commission, *supra* note 8, at 102.

[14] R Fisher & W Jackson, Teaching the Skills of Settlement (1993) 46 SMU *L Rev* 1985, at 1992.

[15] *Id* at 1993.

[16] Cranston, *supra* note 10, at 58.

[17] Australian Law Reform Commission, *supra* note 8, at 102.

[18] Riskin & Westbrook, *supra* note 12, at 509–510.

[19] HT Edwards, The Growing Disjunction between Legal Education and the Legal Profession (1992) 91 *Mich L Rev* 34 (also attacking the emphasis on theoretical rather than doctrinal scholarship by elite US law schools) and the American Bar Association, *Legal Education and Professional Development – An Educational Continuum/Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, known as the McCrate Report (Chicago: ABA, 1992).

[20] P Spiegelman, Integrating Doctrine, Theory and Practice in Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web (1988) 38 *J Legal Educ* 243, at 245.

[21] For the purpose of this paper, the term "skills" refers primarily to interpersonal skills such as interviewing/counselling, negotiation and advocacy, though some of the comments may also be applicable to other skills such as drafting.

[22] P Spiegelman, Civil Procedure and Alternative Dispute Resolution: The Lawyer's Role and Opportunity for Change (1987) 37 *J Legal Educ* 26, at 27.

[23] R Calver, Teaching ADR in Australian Law Schools: A Study (1996) 2 *CDRJ* 209.

[24] Riskin & Westbrook, *supra* note 12, at 520.

[25] P Bergman, A Sherr, & R Burridge, Learning from Experience: Nonlegally Specific Role Plays (1987) 37 *J Legal Educ* 535, at 542.

[26] C Menkel–Meadow, To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum (1993) 46 *SMU L Rev* 1995, at 1995.

[27] Fisher & Jackson, *supra* note 14, at 1985.

[28] A Goldsmith, Heroes or Technicians: The Moral Capacities of Tomorrow's Lawyers (1998) 16 *Journal of Prof Legal Education* 1.

[29] D Rhode, *Professional Responsibility* (Boston: Little Brown, 1994); D Luban, The Adversary Excuse in D Luban ed, *The Good Lawyer: lawyers' rules and lawyers' ethics* (Totowa, NJ, USA: Rowman & Allanheld, 1984).

[30] I am using the term ADR to refer to methods other than court–based adversary adjudication for resolving disputes between two or more parties. This use of ADR as an acronym for "alternative" dispute resolution is criticised as inaccurate and misleading, because it implies that litigation is the normal or standard or ideal dispute resolution method. See for example H Astor & C Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992) 67. Other suggested terms include "additional" dispute resolution, "appropriate" dispute resolution, "complementary" dispute resolution or, as in the Family Law Act, "primary" dispute resolution. Nonetheless, it is now accepted practice to use the term ADR as a term of art on its own to describe dispute resolution methods other than litigation.

[31] J David, Integrating Alternative Dispute Resolution (ADR) in Law Schools (1991) 2 *ADRJ* 5; S Carr–Gregg, Alternative Dispute Resolution in Practical Legal Training – Too Little, Too Late? (1992) 10 *Journal of Prof Legal Education* 23; Menkel–Meadow, *supra* note 26.

[32] Mack, *supra* note 1; *K* Mack & R Hunter, Exclusion and Silence: Procedure and Evidence, in R Owens & N Naffine ed, *Sexing the Subject of Law* (Sydney: Law Book Company, 1997) 171.

[33] Riskin & Westbrook, *supra* note 12.

[34] Menkel–Meadow, *supra* note 26.

[35] Spiegelman, *supra* note 22, at 27.

[36] RAB Bush, Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation (1987) 37 *J Legal Educ* 46, at 48, 55.

[37] J Resnik, "Many Doors? Closing Doors? ADR and Adjudication (1994) *Ohio St J on Disp Resol* 211; S Roberts, ADR and Civil Justice: An Unresolved Relationship" (1993) 56 *MLR* 452; M Galanter & M Cahill, "Most Cases Settle': Judicial Promotion and Regulation of Settlements (1994) 46 *Stan L Rev* 1339.

[38] Menkel–Meadow, *supra* note 26; Spiegelman, *supra* note 22; Bush, *supra* note 36.

[39] Calver, *supra* note 12.

[40] Menkel–Meadow, *supra* note 26, at 1998–1999.

[41] Bush, *supra* note 36, at 55.

[42] *Id* at 53.

[43] *Id* at 54.

[44] Menkel–Meadow, *supra* note 26; Calver, *supra* note 12.

[45] Spiegelman, *supra* note 22, at 27.

[46] Menkel–Meadow, *supra* note 26, at 1995.

[47] R Dinerstein, Clinical Texts and Contexts (1992) 39 *UCLA L Rev* 697, at 721.

[48] See, for example, R Delgado, Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative (1989) 87 *Mich L Rev* 2411; *P* Williams, *The Alchemy* of *Race and Rights* (Cambridge: Harvard University Press, 1991).

[49] HT Edwards, The Growing Disjunction between Legal Education and the Legal Profession (1992) 91 *Mich L Rev* 34.

50 J Rifkin, Teaching Mediation: A Feminist Perspective on the Study of Law in M Culley & C Portuges eds, *Gendered Subjects: The Dynamics of Feminist Teaching* (Boston: Routledge & Kegan Paul, 1985) 104; Goldsmith, *supra* note 28.

[51] Menkel–Meadow, *supra* note 26; Calver, *supra* note 12 at 9 , 11 .

[52] Menkel–Meadow, *supra* note 26.

[53] D Kolb & R Fry, Toward an Applied Theory of Experiential Learning, in CL Cooper, *Theories of Group Processes* (New York: 1975) cited in Bergman, Sherr, & Burridge, *supra* note 25, at 536–537. A more elaborate version of this model can be found in D Kolb, *Experiential Learning: Experience as a Source of Learning and Development* (Englewood Cliffs, NJ, USA: Prentice Hall, 1984) cited in M LeBrun & R Johnstone, *The Quiet (R)evolution Improving Student Learning in Law* (Sydney: Law Book Company, 1994) 78–79.

[54] K Kreiling, Clinical Legal Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision (1981) 40 *Maryland L Rev* 284, at 285.

[55] Spiegelman, *supra* note 22, at *27*.

[56] Menkel–Meadow, *supra* note 26.

57 Spiegelman, supra note 22, at 28 n 9.

58 Bergman, Sherr, & Burridge, *supra* note 25, at 536.

59 A Doherty, M Mentkowdski & K Conrad, Toward a Theory of Undergraduate Experiential Learning in M Keeton & P Tate ed, *Learning* by *Experience: What Why How* (San Francisco: 1978) cited in Bergman, Sherr, & Burridge, *supra* note 25, at *537*.

[60] A Collins, JS Brown, & SE Newman, Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing and Mathematics, in L Resnick ed, *Knowing*,

Learning, and Instruction: Essays in Honor of Robert Glaser (Hillsdale, NJ, USA: Laurence Erlbaum Association, 1989) 486–488.

[61] Menkel–Meadow, *supra* note 26; Fisher & Jackson, *supra* note 14; Spiegelman, *supra* note 22; Bush, *supra* note 36; Rifkin, *supra* note 50; M Galanter, "Worlds of Deals: Using Negotiation to Teach About Legal Process" (1984) 34 *J Legal Educ* 268.

[62] Bergman, Sherr, & Burridge, *supra* note 25, at 536 citing J Dewey, *Experience and Education* (New York: Collier, 1938)

[63] Fisher & Jackson, *supra* note 14, at 1994.

[64] Menkel–Meadow, *supra* note 26, at 2003.

[65] Bergman, Sherr, & Burridge, *supra* note 25, at 541.

[66] M LeBrun & R Johnstone, *The Quiet (R)evolution Improving Student Learning in Law* (Sydney: Law Book Company, 1994) 178–183.

[67] Thanks to Jenny Morgan, University of Melbourne Law School for this idea.

[68] Galanter, *supra* note 61, at 273.

[69] Amsterdam, *supra* note 2, at 616. 70 Goldsmith, *supra* note 28.

[71] Bush, *supra* note 36, at 51.

[72] Spiegelman, *supra* note 22, at 28.

[73] David, *supra* note 31, at 6.

[74] Menkel-Meadow, *supra* note 26, at 2013.

[75] D Brown et al, *Criminal Laws* (Sydney: Federation Press, 1990) 114; LM Grosberg, "Introduction" Colloquium: Currents in Clinical Scholarship" (1990) 35 NYL *Sch L Rev* 1; *P* Goldfarb, A Theory–Practice Spiral: The Ethics of Feminism and Clinical Legal Education (1991) 75 *Minn L Rev* 1599, at 1653.

[76] Goldfarb, *supra* note 75, at 1617; Grosberg, *supra* note 75; M Spiegel, Theory and Practice in Legal Education: An Essay on Clinical Legal Education (1987) 34 *UCLA L Rev* 577.