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Strategies to Increase the Availability of Skills Education in China

Brian K. Landsberg*

When I attended the University of California's Boalt Hall Law School from 1959-1962, Boalt had no clinical education program. It offered two experiential education electives: Legislation, where we were tasked with actually drafting and justifying a proposed law, and Trial Advocacy, offered for the first time in 1962 and taught by a young trial lawyer who was not a regular member of the Boalt faculty. Today the landscape at Boalt, like that at most American law schools, has changed to include a strong clinical program and several skills courses, though Boalt continues to rely heavily on adjuncts for such courses. In considering what strategies will increase the availability of experiential education in China, it may be instructive to look at the American law schools' evolution.

It would be presumptuous of me to provide a prescription for increasing the availability of skills education in China.¹ Rather, this paper seeks to address the strategies that have been used in the United States and to consider whether any of them might be effective in China. I will, however, mention a few lessons learned in the past year from our partnership with Chinese law schools. I believe that many Chinese legal scholars are convinced that Chinese law schools should do more to incorporate experiential education—simulation courses in client relations, negotiation, mediation, arbitration, trial, persuasive argument, as well as courses in clinical education—as mainstream elements of their curriculum.

Many of the obstacles to skills education in China have been identified: resources, academic politics, a preference for theoretical and doctrinal teaching rather than experiential education, the lack of a large body of scholarship on the theory of experiential learning, the large number of required courses in the curriculum, and acceptance of the status quo by the legal profession and judiciary.

These obstacles are not unique to China. This list could have been applied to American legal education forty years ago, and some remain as obstacles to experiential legal education in the U.S. today. However, experiential education is much more prominent in the United States today than it was forty years ago, and its use continues to grow here.

Change has come to U.S. legal education slowly, encountering resistance from faculty and administrators accustomed to the so-called Socratic and case-based method of instruction, which was introduced over a hundred years ago by Dean Langdell of Harvard Law School. This method is designed to force students

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1. For a critique of "reductive strategies for promoting legal development," see Michael W. Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 *FORDHAM INT'L. L.J.* 56 (2000). By "reductive strategy" Dowdle means "a developmental strategy in which we know at the commencement of the developmental process what the institution being 'developed' should look like after that development is completed." *Id.* at 59.

to learn legal analysis by requiring them to draw legal principles from their reading of cases, and then to apply those principles to other fact patterns. Harvard, which had a long-standing moot court program prior to Dean Langdell's reign, abolished moot court, the main experiential education opportunity of the era, in 1897.² The American law schools resisted change for many years. In 1933, the noted legal scholar Jerome Frank wrote an article titled "Why Not a Clinical Lawyer-School?" He agreed that the Langdell method was useful to teach rules and legal analysis, but also argued that "the tasks of the lawyer do not pivot around those rules and principles. The work of the lawyer revolves about specific decisions in definite pieces of litigation."³ Frank proposed that schools should offer clinical education, along the lines of medical education. It took around thirty years before Frank's notion of skills education started taking root, with the introduction of both advocacy skills education, using simulations of legal problems, and clinical legal education, where students obtain skills by handling real legal problems under close supervision. Skills training was, at the outset, often an extracurricular activity.⁴ Such courses received low priority, and were often assigned to part-time adjuncts rather than full-time faculty. Even when skills faculty were full-time, they were often not considered part of the regular tenured faculty, as it was thought that the discipline was not sufficiently academic. That attitude has changed, if slowly, and today American law schools include advocacy and clinical education as important parts of the curriculum, taught by tenured faculty. A large academic literature now addresses skills education.

For those who wish to promote experiential legal education, strategies for doing so can be roughly divided into internal and external strategies: those within the academy and those in the broader world.

I. INTERNAL STRATEGIES

Support for experiential education must come from within the law school and university. Although the governance structures of American and Chinese law schools differ, they are both generally led by deans and operate under the overall control of university officials. When the dean embraces experiential education, this leadership can have a powerful impact on the faculty and on the university. Perhaps the most dramatic example of this point is Howard University Law School under Dean Charles Hamilton Houston in the 1930's. Through his vigorous leadership, the school was transformed into "a living laboratory where

2. II CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 416 (Lewis Publishing 1970). However, Harvard did reinstate occasional mock jury trials around the same time. *Id.* at 441. Moot court at Harvard [and Columbia] seems to have been a club activity. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 127, n.32 (University of North Carolina Press 1983).

3. Jerome Frank, *Why Not a Clinical Lawyer-School*, 81 U. PA. L. REV. 907, 910 (1933).

4. HERBERT PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 37 (McGraw-Hill 1972). See also STEVENS, *supra* note 2, at 216.

civil-rights law was invented by teamwork.”⁵ A generation of civil rights lawyers acquired the skills that led to the dismantling of the official racial caste system in the United States. Another example is Harvard Law School Dean Elena Kagan’s leadership, which has brought to the home of the Langdell method of legal education a new first year required course designed to “give students an ongoing opportunity to work on a set of problems connected to first-year subjects through the use of transactional and regulatory as well as adjudicatory frameworks.”⁶ On the other hand, without the Dean’s support, experiential education does not have much of a chance.⁷

Change from within comes not only from the dean, but from the faculty. One strategy that proved important in the United States was that those scholars who believed in skills education wrote extensively about both the methods and the theory of skills education. Although clinical and advocacy education can now be found in all American law schools, a recent study sponsored by the Carnegie Foundation observes that until recently these forms of education had not been “linked with an accepted theory of lawyering that could provide a bridge between theory and practice”⁸ However, just last year a new report by Professor Roy Stuckey advanced such a theory, which the Carnegie report embraces: “Students cannot become effective legal problem-solvers unless they have opportunities to engage in problem-solving activities in hypothetical or real legal contexts.”⁹ In other words, students learn problem-solving by doing it, with close and expert guidance from faculty. We cannot teach problem-solving simply by talking about it. A student will dutifully write down our words on paper or type them on a computer, but that will not prepare the student to help clients solve problems.

Law professors were able to serve as a force for change in the United States partly because of the tradition of academic freedom and the status of law faculty as full-time tenured [or tenure-track] academic professionals. Under the U.S. legal education system, law faculty must devote all or most of their time to teaching and scholarship.¹⁰ While not unheard of, it is unusual for law faculty to

5. RICHARD KLUGER, *SIMPLE JUSTICE* 128 (Vintage 1977).

6. Memorandum to The Faculty from Curricular Innovations Committee (Bill Alford, Scott Brewer, Allen Ferrell, Jerry Frug, Elena Kagan, Martha Minow, Todd Rakoff, Al Warren) Re: First Year Curriculum (September 26, 2006), [http://www.aals.org/documents/curriculum/documents/HarvardFirstYear\(2\).pdf](http://www.aals.org/documents/curriculum/documents/HarvardFirstYear(2).pdf).

7. In our U.S. AID program we have observed first hand the impact of Dean Kong’s strong leadership in promoting experiential education at Zhejiang Gongshang University and of similar leadership by several high ranking officials of China University of Political Science and Law. The willingness of the leadership of South China University of Technology to participate in our program gives us hope for similar advances at SCUT.

8. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 87 (Carnegie Foundation for the Advancement of Teaching ed., Jossey-Bass 2007).

9. *Id.* at 95 (quoting ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION ROADMAP* 109 (Clinical Legal Education Association 2006)).

10. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 402 (2008-2009): “(b)

A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member’s capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one’s responsibility as a faculty member.”

maintain separate law practices. Law professors receive adequate salaries, though less than they could earn as practitioners. They willingly give up the financial rewards of a lucrative private practice. In return, the law schools are required to “establish and maintain conditions adequate to attract and retain a competent faculty, including academic freedom and a tenure system.”¹¹ While the teaching load of faculty may vary from school to school, the norm in the United States, outside a few of the top-ranked schools, is eleven or twelve hours per academic school year.

Is the status of faculty in China different? Professor Peng Xihua noted that faculty lacked independence. However, Professor Ma Huaide of CUPL spoke in April 2005 about the relation of the Dean and the faculty in China. He described the ideal Dean as a respected leader, easy-going, willing to listen and be inclusive, able to get Professors to work together, an organizer, and trusted by students and by the University. He noted that the Dean should follow two main principles: that the Dean’s power must be exercised according to law, and that law school is academically free.¹² If Professor Ma’s advice is followed, then Chinese law faculty can become a key element in bringing experiential education to China.

A prerequisite to a strong experiential education program is the existence of excellent text books. For simulation courses, case files must be created. To maximize the student experience, new files must be created or old files altered regularly. Obviously, this is another way in which faculty create the conditions under which experiential education can flourish.¹³

In the United States, law students served as another force for curricular change. Professor Milstein has pointed out that modern clinical education “responded to students’ desire to learn how to use law as an instrument of social change and to be involved in the legal representation of poor people.”¹⁴ Both simulation skills courses and clinical courses often began as student-run activities. For example, at Pacific McGeorge our required second year course in Appellate and International Advocacy began as a student-run moot court program, as was typical in the 1960s.¹⁵ Experiential education in the United States was a home-grown technique, created by American legal scholars and practitioners, based on the circumstances of American legal education and the American legal system. Professor Wang Rong has described the tremendous interest of students at CUPL in enrolling in clinical courses. Dean Zhu Su Li, on the other hand, suggested that the law of supply and demand worked against student interest. I obviously must defer to my Chinese colleagues to decide which is correct.

11. *Id.* at Standard 405.

12. Ma Huaide, Presentation at the Chinese and American Law Deans’ Conference, Beijing (April 1, 2005) (transcript available in Conference Book 45-47).

13. See generally MICHAEL R. FONTHAM ET AL., *PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS* (2d ed., Aspen Publishing 2007) and accompanying annual case files.

14. Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 375 (2001).

15. See, e.g., DAVID E. SNODGRASS, *UNIV. OF HASTINGS COLL. OF LAW, MOOT COURT HANDBOOK* 3 (1967).

Development of a cadre of indigenous scholars dedicated to experiential education is essential. This means that scholars of experiential legal education must collaborate with one another and create networks of mutual support. It also means that those scholars must seek to enlarge the pool of faculty with expertise in teaching experientially. Training of new experiential education faculty, through workshops, conferences, and advanced degree programs can lead to the required critical mass. In the U.S., the Association of American Law Schools [AALS] has created several sections devoted to various aspects of experiential education, including Alternative Dispute Resolution, Clinical Legal Education, Litigation, and Teaching Methods.¹⁶ The AALS also co-sponsors publication of the *Clinical Law Review*, with Clinical Legal Education Association (CLEA) and New York University. As Frank Bloch has pointed out, experiential education has benefitted not just from “a group or network of persons or institutions with a common aim.” It has benefitted from being part of a “movement,” with “the ambition to develop the aim—an agenda—and the capacity to pursue it, which means to foster change.” He adds that “a movement is also inspirational . . . [t]eachers teach because they want to empower their students”¹⁷

China, of course, has created the Committee of Chinese Clinical Legal Educators [CCCLE], which promotes experiential education by holding training workshops and conferences, and facilitating communication among clinical educators through its website.¹⁸ Our partnership, carried out through workshops, conferences, LLM programs, and teacher exchanges, reflects a commitment by three Chinese law schools. Yale, Columbia, NYU, and other American schools have promoted experiential education in China in various ways. Temple University and Tsinghua University sponsored an Experiential Education Methods Roundtable in July 2007 in Beijing.¹⁹ Oklahoma City University Law School offers a summer advocacy program for Chinese law students. Experiential education has gone global, with the formation of the Global Alliance for Justice Education (GAJE), which was formed by a group of clinical law teachers with the idea of creating a place where persons from around the world interested in advancing the cause of justice through legal education could organize around matters of common interest and concern. Experiential education text-books are starting to emerge in China. David Chavkin’s book on clinical education was translated into Chinese for last summer’s workshop, and, as Professor Leach reported, a Chinese translation of Steven Lubet’s book on *Modern Trial Advocacy* has been published. However, in the long term, translations of American books are not the ideal strategy. China will need books

16. See The Association of American Law Schools, Services: Sections, http://www.aals.org/services_sections.php (last visited March 29, 2009).

17. Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, 28 WASH. U. J.L. & POL’Y 111, 130 (2008).

18. *Id.*, www.cliniclclaw.cn (a translation of this page is available by searching for “www.cliniclclaw.cn” via Google, and selecting “translate this page.”).

19. TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, RULE OF LAW PROJECTS IN CHINA: 2006-2007 ANNUAL REPORT 8.

written by Chinese scholars and adapted to Chinese conditions, perhaps in collaboration with professors from other countries who have written such books relating to their own legal systems. Professor Zhen has noted that Chinese clinical teachers have “compiled a series of teaching and learning brochures featuring collections of teaching materials and actual cases processed by students.”²¹

I have been encouraged by the initial reports from participants in our summer workshops that they have already found ways to incorporate skills education into their teaching. In the last day of the advocacy workshop, participants outlined their future plans. For example, Professor Lu Wei Feng of CUPL said he would introduce into his Labor Law course workshop methods relating to negotiation, mediation, pretrial preparation, and moot court. In their evaluations at the close of the workshops, all participants said the workshops would have an impact on their teaching. When asked what were the most important things you learned at the workshop, responses from advocacy workshop participants included: “Teamwork, course design and the style of teaching,” “The use of role play and simulations,” and “Encourage students to participate in the teaching method.” Clinical workshop participants gave similar responses, including this one: “Systematic clinical education theory and the teaching method including interaction between students and teachers.” Of course, one could suggest that they were just telling us what we wanted to hear. Much more important is what they have actually done. For example, Professor Shu Yao Zhi of Zhejiang Gongshang University reported that the school was further formalizing and systematizing its clinical program and had introduced skills training techniques into the required course on lawyering.

We have also sought to expose Chinese faculty and students to experiential learning by sending visiting professors to China. For example, Professor Xu Shenjian described Professor Jay Leach’s visit to teach trial advocacy at China University of Political Science and Law: “This kind of teaching method was highly accepted and welcomed by students. They not only learned academically, but also found the shortcomings and merits of their characters and personalities.”²²

Legal educators face resource issues in providing experiential education. The strategy underlying our U.S. AID program is to develop a cadre of Chinese law professors expert in legal experiential education, who can in turn provide training to faculty from their own schools and other schools throughout China. We hope to incorporate some Chinese professors from our LL.M. program and our 2007 Guangzhou workshop into our summer 2008 Hangzhou workshop, as co-faculty.

21. Zhen Zhen, *The Present Situation and Prosperous Future of China Clinical Legal Education* (Oct. 7, 2005) (unpublished manuscript), available at http://www.law.ucla.edu/docs/zhen_zhen_prosperous_future_of_chinese_clinical_educatio_.pdf. In addition, the China Trial Advocacy Institute, a joint project of Renmin University School of Law and Indiana University School of Law-Indianapolis, has published a *China Trial Advocacy Handbook*, written in Chinese and English, with accompanying DVD of lectures and trial techniques. Robert Lancaster & Ding Xiangshun, *Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration between a U.S. and a Chinese Law School*, 30 *FORDHAM INT’L. L.J.* 356, 369 (2007).

22. E-mail from Xu Shenjian, Professor of Law, Law School of China University of Political Science and Law to Brian Landsberg, Professor of Law, Pacific McGeorge School of Law (Dec. 13, 2007, 20:16:33 PST) (on file with author).

This experience would both provide them additional training in teaching methods and help them to share their training with others. A related resource problem is that experiential education generally requires a lower pupil-teacher ratio than traditional lecture or Socratic classes. One tempting way to overcome that problem is to have a full-time faculty member supervise a group of part-time teachers in providing small group instruction. The part-time teachers could be practicing attorneys or even upper-class students with demonstrated ability in the subject. This has risks, and I believe that best practices require that most experiential classes be taught or supervised by full-time faculty, especially at this early stage of seeking academic acceptance of skills training.²³

American law schools have tended to draw rigid lines between clinical education and other forms of experiential education, as well as between experiential education and legal theory and doctrine. David Chavkin's paper, which is included in this symposium issue, argues that while simulations can be useful, clinical education is more realistic and students take it more seriously.²⁴ Let me suggest that Chinese law schools may have the opportunity to develop a more integrated experiential program, taking advantage of the strengths of each type of experiential education. An undergraduate curriculum that offers courses in client counseling, negotiation, arbitration, trial practice, and persuasive argument could create the basis for a stronger clinical program in the final year of the bachelor degree program. Students would enter the clinic already having been taught many of the skills required to represent their clients. Experiential education could also be introduced into traditional subject matter courses. Such a strategy maximizes resources. Pamela Phan has noted that perhaps "the Chinese system of legal education holds greater potential for integrating doctrinal and clinical methods than its American counterpart," both because of the broad definition Chinese educators give to "clinical education" and "because Chinese clinicians are also educators in doctrinal subjects."²⁵

II. EXTERNAL STRATEGIES

In addition to the above internal strategies, we must recognize that law schools operate in an environment of pressures and opportunities from external

23. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 403 (2008-2009):

- "(a) The full-time faculty shall teach the major portion of the law school's curriculum, including substantially all of the first one-third of each student's coursework.
- (b) A law school shall ensure effective teaching by all persons providing instruction to students.
- (c) A law school should include experienced practicing lawyers and judges as teaching resources to enrich the educational program. Appropriate use of practicing lawyers and judges as faculty requires that a law school shall provide them with orientation, guidance, monitoring, and evaluation."

24. See David F. Chavkin, *Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1 (2009) (noting that clinical legal education is often more motivating than traditional classroom methods).

25. Pamela Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE HUM. RTS. & DEV. L.J. 117, 143-44 (2005).

sources: the public, the government, private enterprise, and the legal profession, including both judges and lawyers. One source of pressure on U.S. law schools has been the legal profession. In 1992 a committee of the American Bar Association issued a report on legal education containing a Statement of Fundamental Lawyering Skills and Professional Values, which it suggested law schools should use as a guide to curriculum development. This report, known as the MacCrate report, lists ten fundamental lawyering skills: problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternate dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.

The decision to list problem-solving as the number one lawyering skill was especially significant, because traditional legal education did little to advance problem-solving skills. After years of discussion, in 2005 the American Bar Association finally adopted a rule requiring law schools to ensure that each student receive substantial education not only in substantive law, legal analysis and reasoning, and legal writing, but also in “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”²⁶ The American Bar Association is the official accrediting agency recognized by the U.S. Government, so this requirement now is mandatory for all law schools.

External elements may also provide financial and other forms of support to experiential education. For example, in 1968 the Ford Foundation granted \$6,000,000 over five years to found the Council for Legal Education for Professional Responsibility [CLEPR], which worked to make clinical education a “regular part of the curriculum in ABA approved schools.”²⁷ In addition government grants have contributed to the growth of clinical education in the U.S.²⁸ Many American law schools, including Pacific McGeorge, receive some funding from so-called IOLTA accounts. I should point out one problem with foundation and government grants: we cannot count on them to continue indefinitely. Foundations typically help start programs and then gradually wean them. Government funding depends on political and fiscal conditions. Publishers of law books may also be a source of support for creating texts for the huge Chinese market.

Although there is not a history of large foundation or government funding of non-clinical experiential education, the judiciary and bar in some places, including Sacramento, have been generous in donating their valuable time to help make our trial advocacy and related programs realistic simulations.

The Ford Foundation has also been very active in China, providing valuable start-up funding for CCCLE and other support for clinical programs. U.S. AID has also supported some programs, notably our partnership with American

26. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 302(a)(3).

27. STEVENS, *supra* note 2, at 230 n.95.

28. For example, a 1968 federal law authorized grants of up to \$75,000 to each law school for such programs. *Id.* at n.97.

University and three Chinese law schools. This source of support will also not last forever. Professor Cai Yanmin suggested in 2005 that “the national educational department, universities and law schools take effective measures to strongly support the institutionalization of the clinical legal education program, identify the status of this program in the legal curriculum, and establish specific funding to systematically solve the problems associated with its establishment and operational expenditures.”²⁹

The question I would pose to our Chinese friends is whether the Ministry of Education, the Ministry of Justice, provincial governments, or lawyer or judge associations might both push for expansion of experiential education in law schools and provide needed resources. Professor Wang Rong’s presentation demonstrates that private and government lawyers could be a source of pressure for change, in light of the gap she demonstrates between their needs and the current law school curriculum. Government support for experiential legal education would carry out Hu Jintao’s commitment in his Oct. 15, 2007 report to the 17th Party Congress to “comprehensively implement the rule of law as a fundamental principle and speed up the building of a socialist country under the rule of law.” His report noted the need to “strengthen the enforcement of the Constitution and laws, ensure that all citizens are equal before the law, and safeguard social equity and justice and the consistency, sanctity and authority of the socialist legal system.”³⁰ Achievement of these goals requires a well-trained, ethical professional cadre of lawyers and judges.

Chinese law schools are training tomorrow’s lawyers and judges. As Professor Guo Jie, Vice-president of Northwest University of Political Science and Law, has observed: “The outcome of the legal education will influence and even decide, in some sense, the direction, process and future of the judicial reform and development of the whole country.”³¹ The relation between the rule of law and experiential education should be manifest by this time in our conference.

III. CONCLUSION

Reform of legal education is an ongoing process. Lawyers and academics tend to favor the status quo. Strategies for change must recognize and value the good aspects of existing legal education techniques, while pressing for the addition of experiential education. This can succeed, if given support by deans, faculty, lawyers, judges, government agencies, and students. Chinese legal educators have the opportunity to learn from both the successes and the mistakes in other countries and to adapt experiential education to the Chinese system.

29. Cai Yanmin, *The Key Issues in the Institutionalization of the Clinical Legal Education in China*, in CONFERENCE BOOK FOR CHINESE AND AMERICAN LAW DEANS’ CONFERENCE 3 (April 1, 2005).

30. Hu Jintao, President, China, Report to 17th National Congress of the Communist Party of China, (Oct. 15, 2007), available at http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm.

31. Guo Jie, *Reform of Legal Training and Education Pattern of LLB Programs—A Study and Experience from Northwest University of Political Science and Law*, in CONFERENCE BOOK FOR CHINESE AND AMERICAN LAW DEANS’ CONFERENCE 22 (April 1, 2005).

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Change may come incrementally, but we must be aware that a watered down version of experiential education would ultimately be counter-productive. American law school curricular reform often consists to two steps forward and one step back. I would urge that at each step it is crucial that Chinese law schools do it right and keep moving forward.