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Experiential Education and the Rule of Law: Teaching Values Through Clinical Education in China

*Elliott S. Milstein**

We were warned by various friends and colleagues who had preceded us in working with Chinese law faculty that they had all found it difficult to understand the legal system, the educational system, the role of lawyers, the role of courts, the nature of law practice, and more in China. It should therefore be no surprise that I begin this paper with the disclaimer that the more I find out about all of this, the more I feel uncertain that I know it at all. In all of the ways that I feel grounded by comparisons between my own understanding of what has happened to create clinical education in the United States and what I perceive to be the situation in China, I am often taken aback by discovering that the mirror I am using is a trick mirror of assumptions that obscure rather than explain what I see. Thus, the claims that I will make here are necessarily modest and tentative, particularly regarding the role that clinical education can play in advancing the rule of law in China.

The core idea of clinical legal education is to place law students in situations in which they have to perform in role as lawyers. The pedagogical goal at that moment is to teach them to integrate skills, legal knowledge, and ethical decision making with a professional commitment to justice. “The complexities, ambiguities and uncertainties” that are inherent in that situation permit us “to explore with our students the values that will define their lives as lawyers. We believe that as they acquire these values and embrace their responsibilities, they are motivated to learn the skills necessary to carry out the tasks entrusted to them. We can help them learn how to develop those skills in the context of the decision-making and actions that are the work of a lawyer.”¹

Will the establishment, expansion, and improvement of clinical legal education in China advance the Rule of Law there? What relationship might there be between teaching students lawyering skills and the rule of law? Will the values that can be transmitted to students by faculty at the moment they engage in the representation of clients find their way into the legal system in ways that we would recognize as improving the rule of law?

One of the pleasures of this project is that I have a weekly seminar with three Chinese professors, one from each of the partner schools. These are Professor Chao Li from CUPL, Professor Hongqing Teng from SCUT, and Professor Qilin Ma from ZGU. In addition, in the first semester we were joined by our visiting professor from ZGU, Yanning Yu. I teach them what I know about clinical legal

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1. Susan Bryant & Elliott Milstein, *Rounds: A “Signature Pedagogy 1. For Clinical Education?”* 14 CLINICAL L. REV. 195, fn. 4. (2007)

education, and they teach me about China. We explore together the transferability of American lawyering theory and pedagogical methods to the Chinese context.

I recently put the question to them: “What do you see as the connection between clinical education and the Rule of Law in China?” The most basic response is that “we are building our country as a Rule of Law country so we can learn from you about what that means.” Central to this endeavor is reform of legal education so that lawyers, prosecutors and judges will be trained in the rule of law. Traditional Chinese legal education only teaches theory and legal codes and involves rote learning. Their belief is that if clinical education is widely introduced, including simulations and the real case method, this will change the entire vision of legal education and lead to wider understanding of the value of the rule of law.

These professors agree that the goal of legal education in China ought to be to make students competent to be a lawyer, prosecutor, or judge, but that traditional Chinese legal education does not do this. The idea is, of course, central to the founding idea of clinical education in the U.S. Even now, clinical courses in the U.S. are often the only ones that teach students lawyering skills, legal practice, professional self-identity, and the normative dimensions of being a lawyer. Skilled lawyers committed to operating within a framework of loyalty to clients are an essential ingredient to creating a functioning legal system. If law schools abdicate the possibility of preparing lawyers for this mission then how can the legal system be improved?

It is, of course, difficult to discuss the rule of law without trying to define it. In some sense, we want a system that enables a weaker party to be able to invoke a process that requires a more powerful party to obey a set of predetermined and knowable rules. To the extent that the rule of law involves being able to bring a dispute to a decision-maker such as a court, we want a neutral and detached (independent) referee who finds facts using a fair and rational process and applies those facts in a transparent way to legal rules that are rationally determined to produce results that are understandable, consistent and enforceable. To the extent that the rule of law involves controlling governmental officials, we want to be able to challenge the exercise of authority (or the failure to exercise authority) to a decision-maker who is empowered to review the behavior and overrule it if it is inconsistent with announced rules or procedures. These definitions are obviously somewhat simplistic but they are useful to frame the issue.

Those of us who are Americans know that our system is not always successful in living up to these precepts. Nevertheless, these ideals are embedded into the expectations of American lawyers, and when they are violated it is the role of lawyers here to object and push for improvement. The failures of fairness in our own legal system often animate clinical teachers here, and students in clinics are taught to identify injustice and are encouraged to challenge it.

Prof. Teng describes the Rule of Law as a “faith, like a religion,” and he also said that the obligation of law professors in China is to instill this “religion” in

law students and to give them the tools to operate within it. Professor Ma believes that in teaching students skills in a clinical setting, professors should be attentive to the “vision of law” that students learn while practicing in the clinic. Included in this vision ought to be knowledge of legal ethics and knowledge of the lawyer’s obligations to do useful things for the society. Perhaps showing student lawyers how to help others and to demonstrate to them that they have the ability to help others will advance, even in a small way, respect for the role of law in social reform. While none of the Chinese professors thought that clinical education or, for that matter, legal education, had the capacity to change all of China, they all see in it one of the building blocks for reform.

The formative experiences of American clinical teachers frequently involve the representation of poor or otherwise disempowered individuals and groups. We identify closely with various social reform movements concerned with economic, racial and gender equality. “Our experience as lawyers exposed us to daily injustice in the courts and caused us to believe that lawyers, individually and collectively, could make things better. We also believed that involving law students in the representation of poor people would contribute to this effort.”² Because we see that judges, prosecutors, police officers, landlords, employers and others were not always motivated to follow legal doctrines and often do otherwise, one of our roles is to teach students that they can right wrongs by trying to get the various actors to obey the rules. In doing this we, like the Chinese professors, believe that by mastering the tools of the legal profession our students learn that lawyers can fight systemic injustice.

These Chinese professors believe that in order to advance the rule of law in China the numbers of people believing in it must be increased, particularly in the various branches of the legal profession. Although only a minority of the judges in China are educated as lawyers, there is reason to believe this is changing. Unlike the U.S., Chinese judges have a variety of backgrounds. According to Professor Li, perhaps it will only be possible to say that China follows the Rule of Law when judges, prosecutors and lawyers all march to the same understanding of legal ethics and “legal belief.” Their aspiration is to ultimately educate entrants into all branches of the profession within a clinical program providing services to clients so that they would have a common basis for understanding law, procedure and ethics.

Professor Teng insists that in order to move the idea of a just society from a romantic ideal to a reality, students need to come out of law school knowing rules and possessing the skills to combine facts with the rules to successfully deal with real cases. In addition, students should learn legal ethics and understand the importance of being a lawyer who does good rather than one who does evil. Finally, following up on the sense that rule of law requires legal faith, students

2. See Susan Bryant & Elliott Milstein, *Reflections Upon The 25th Anniversary of the Lawyering Process: An Introduction to the Symposium*, 10 CLINICAL L. REV. 1 (2003).

should learn a commitment to it while in law school. Law schools, he said, need to teach all parts of this triad, but the traditional curriculum fails at all of them. Similarly, here in the U.S., there is wide recognition that the traditional curriculum has not accomplished all that it ought to, even now after more than 35 years of growth in clinical programs and the concomitant influence of the clinical faculty on the rest of the faculty and the curriculum.³

Thus, it seems that in China as in the United States, if permitted and supported, the burden of reform of legal education will be taken up by the legal clinic. And, if the aspiration that clinical education will shape the values of lawyers, and that through them the rule of law will be realized, it is essential that pedagogically sound models be put into place to accomplish that. In each of our partner law schools there pre-exists a center bringing together clients with law students willing to try to help them. This is identical to what pre-existed in many American law schools, legal aid programs built around student volunteers, before faculty members joined the effort and experimented with ways to teach students that built upon that experience. In China, the project of inventing that pedagogy is in its infancy. We have come to believe that the American experience can be helpful, even if not fully transferable, to the Chinese professors who are eager to make this happen.

The starting point for clinical education involves placing law students in professional roles in either real or simulated situations. This requires that each of them take individual responsibility for decisions, actions, performances and, hopefully, reflection. Particularly in China where nearly all of the students' prior experiences involve passive learning, both simulation and particularly real client representation will be powerful experiences. These situations will provide students with multiple opportunities to describe, evaluate and solve problems. It will also encourage students to generalize, utilize readings, classroom discussions, and various forms of feedback to focus the learning from experience.⁴ And, among the important things that can be learned at this moment of acquisition of professional role is the importance of examining the "values and attitudes" of the profession and to developing "a critical perspective" on the "tasks and relationships" involved in lawyering.⁵

I like to describe the moment in which a student takes responsibility for a real client in the real world as the beginning of adulthood. For the first time in the student's life what he or she says and does has consequences for another. When that happens in the role of a lawyer, there is an opportunity to shape how that

3. See WILLIAM SULLIVAN, ANN COLBY, JUDITH WEGNER, LLOYD BOND & LEE SCHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 187-93* (2007) (identifying the failure of most law schools to teach students how to engage in moral dialogue as well as how to use legal thinking in the complexity of practice). Quoted in Bryant and Milstein, "Rounds" article, *supra* n. 1 at fn.5.

4. See, Bryant & Milstein, Reflections article, *supra* n.2, at 13.

5. *Id.* at 15 (Describing Gary Bellow's goals in writing the highly influential clinical textbook, *The Lawyering Process*, Foundation Press (1978).

student understands what that means. It goes without saying that the student will need to acquire the skills to undertake the tasks of representation, and that need provides strong motivation for working to learn them.

Like most U.S. clinicians, “we teach the lawyering process in our clinical seminar, including some or all of the clinical classics—interviewing, cross-cultural communication, client-centered lawyering, client theory, legal theory, case theory, problem-solving, fact investigation, counseling, negotiation, persuasive advocacy, and trial. Our teaching methods in the seminar include readings, lectures, discussions, role-plays, and simulations and we liberally utilize techniques to bring all of the students into the conversation. . . .”⁶ At the same time, as in all of our clinical teaching, much of our attention is devoted to value questions, such as client-centeredness and other questions about the relationship between lawyer and client or the demands and limits of zealous advocacy, social justice and more.

In clinical programs, ethical questions arise with astonishing frequency, as they do in law practice. In the clinic, students are guided in their resolution of these questions by faculty members. In the absence of the clinical program where will young lawyers learn how to resolve the ethical and values questions that are inherent in the practice of law? No doubt in every society lawyers learn these values (and skills) somewhere and I shudder to think what they learn when this is left to chance. Faculty members chosen on the basis of both intelligence and integrity, are in my opinion best able to teach ethical practice (and respect for the Rule of Law. They ought to be people with experience in practice but not so jaded by it that they have lost their critical distance from it, individuals who are not committed to the status quo, and these professors should develop the ability to engage students in moral and ethical dialogue.

In our summer program with 18 Chinese law professors in Guangzhou in the summer of 2007, our Chinese colleagues demonstrated in a role play how some ethical questions can arise in a clinical case. They built into their simulation two glaring ethical questions (there were, no doubt, others that we did not explore). One involved indigent clients bringing student lawyers a modest gift and the other involved the client giving the student lawyers an envelope with cash to be used to bribe a judge or to be used to get a famous professor to take their case. From what we have learned from this group and from other Chinese colleagues, scenes like this are fairly common in China. What will students be taught about this? During the role play there seemed to be a comfortable resolution that taking the modest gift was permissible because of ancient Chinese customs regarding the dignity of giving a gift. But, the envelope with money was treated as an unwelcome intruder and the students were told by the clinical instructor that they had violated the rules of legal ethics and the money had to be returned. This

6. Bryant & Milstein, Rounds article, *supra*, n. 2, at n.17.

seemed to satisfy everyone in the room but I have since come to understand that this scene was simplified for purposes of the training.

One Chinese professor took a more cynical view in a recent conversation in our seminar here at WCL. He said that legal ethics in China consists of three priorities, in this order: (1) the lawyer's profit; (2) the Client's profit; (3) the lawyer should be the ruler to push the client to obey the rule of law. He wondered whether any lawyer could avoid acceding to a judge's request for a bribe or resist corruption. It is, he said, a social problem for the lawyer and the only crime committed is that of the judge. He described the difficult competitive market that lawyers face in China and opined that a lawyer who refused to try to influence a judge would quickly find that he or she had no business. Other professors described for us a systematic need for lawyers to curry favor with judges by taking the judge to dinner or other more tawdry social events.⁷ And so, will Chinese law faculty play a role in teaching students how to bring about social change in regard to this kind of corruption or will they be taught that this is the normal situation to which they must accommodate? If it is professionally suicidal to resist individual requests for payments in order to get favorable decisions, how can young lawyers be taught to bring about change? What role can clinical faculty members play in bringing this about? In the United States where many clinical professors have tenure (a guarantee of life-time employment), academic freedom, and salaries that presuppose that the professor will not receive fees from clients, we are fortunate to be in the vanguard on issues such as this without fear of serious reprisal. Perhaps as clinical education develops in China faculty members will find this freedom as well.

The integration of ethical concerns into learning from experience, with the result that students study their own choices to act or failure to act, produces an experiential learning experience that is powerful and very distinct from what can be learned in the classroom.⁸ For example, although ethics rules in the United States require that lawyers advocate zealously for their clients (within the bounds of the law), it does not spell out with clarity precisely what this means in every circumstance. When the client proposes a course of conduct that the lawyer considers repugnant, although not unlawful, how does the lawyer decide what to do? How does a lawyer discuss this with the client? These types of ethical questions that come up and must be resolved contextually provide life-long lessons to students about the responsibilities of lawyers. My sense is that some of the same ethical questions that arise in practice in

7. We Americans need not be sanctimonious about this. The New York Times reported that the Chief Justice and an Associate Justice of the West Virginia Supreme Court were both elected with large financial donations from a litigant in whose favor they later ruled. Only when confronted with a photograph of the two justices at dinner with the litigant in Monte Carlo did the Chief Justice finally recuse himself. The other justice has declined to do so. Adam Liptak, "West Virginia Chief Justice Steps Away From Case," N.Y. TIMES, Jan. 18, 2008.

8. See Robert D. Dinerstein, Stephen Ellmann, Isabelle Gunning & Ann Shalleck, *Legal Interviewing and Counseling: An Introduction*, 10 CLIN. L. REV. 281 (2003).

the US also arise in China although the rules and customs for their resolution may very well be different.

One of the core values of most American clinical programs is client-centered lawyering. By this we mean that lawyers represent clients and must do it in a way that ensures the autonomy of the client as the primary decision-maker over the life of a case. It assumes that all important decisions involved in solving a legal problem involve value-choices and that a primary job of a lawyer is to help a client make those decisions in a way that is consistent with the client's values.⁹ This value has been difficult to translate to our Chinese colleagues, either because we misunderstand each other or because we understand each other and they reject this as inappropriate for the Chinese context. During the summer training in Guangzhou two of the professors from ZGU, Profs. Liu Jian Ming and Mao Xiaoxiao, wrote an essay in which they asserted that client-centered lawyering was antithetical to the project of Chinese lawyers of establishing the Rule of Law in China.

In our discussion of this with the entire group of 18 professors, it wasn't entirely clear whether in translating this across the language barrier and across the barriers of assumptions that each of us carried from our experience in our legal culture and our social culture the concept got distorted. We came to believe that the Chinese believed that the concept meant that American lawyers did whatever their clients wanted them to do. They said that that might be fine in a country in which the rule of law was firmly established but that in China, where it isn't, it is important for lawyers to be able to tell clients that their conduct or their proposed conduct was in violation of law and that this was done in furtherance of the duty of lawyers to expand the rule of law.

We explained to them that we took it as a given that American lawyers had a duty to explain to a client when a proposed course of conduct was unlawful and to withdraw from representation under certain circumstances in which the client insists on doing it anyway. We said that the debate in the US was over what kind of reactions were permissible or, indeed, required when the client's proposed conduct was such that the lawyer found it objectionable although lawful. It is a caricature of client-centeredness to require non-judgmental acceptance in such a circumstance.

However, for Americans, client-centeredness is a concept intended to keep lawyers from making decisions on behalf of clients based upon the lawyer's partially-informed judgment about what is in the client's best interest. Instead, lawyers are called upon to assist clients in making decisions in which competing values of the client are at stake (risk-tolerance versus certainty, economic gain versus vindication, concern for family members versus self, etc.). It remains to be seen whether Chinese clinicians, as they go forward to create lawyering theory

9. See Elliott S. Milstein, *Clinical Legal Education in the United States In-House, Externships and Simulations*, 51 J. LEGAL EDUC. 375 (2001) (Two useful and widely-adopted texts for teaching client-centered lawyering are David A. Binder, Paul Bergman & Susan Price., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (West Publishing Co. 1991) and Robert M. Bastress & Joseph D. Harbaugh, *INTERVIEWING, COUNSELING, AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION* (Aspen Publishers 1990).

for China, will decide to include Client-centered Lawyering to their pantheon of concerns and, if they do, how they will adapt it to their world where the social gulf between lawyer and client is huge.

In a legal clinic students have responsibility to handle clients' legal problems while being closely supervised and taught by faculty members within the context of the school-run law office that is often located in the law school building (although Prof. Pei Bei points out in the paper she prepared for this conference the difficulty of finding a suitable place for the clinic office given the distant location of the campuses of all three partner law schools).¹⁰ These facts alone express the institutional value that lawyering is central to the mission of the law school. It provides the opportunity for students to explore the role of lawyers in promoting a just society and to situate themselves in that process. It also teaches that formal and informal activities such as negotiating, litigating, legislating, organizing, publicizing and educating are all tools that lawyers can use to promote changes in the people and institutions that matter. It remains for the future to know whether the mix and interrelationships among these tools will be similar in China to what they are in the U.S. We do know that the orientation of American lawyers to turn to the courts for redress is usually not the same for the Chinese. What all of us need to teach our students is that one of the core competencies of the reflective lawyer is developing, applying and testing theory to solve problems in the context of the real world.

In general, clinical teachers everywhere are challenged to have various types of social justice conversations with their students. These conversations should seek, among other things, to define and explore visions and limits (or the pleasures and the pains) of zealous advocacy on behalf of the wronged (and the wrong), to uncover the ways in which the client's situation is emblematic of broader concepts of injustice in the world (class, race, gender, sexuality, economics, consequences of authoritarianism, etc.), and how to lawyer to make things better.¹¹ "And, perhaps most fundamentally, observations about clients, opponents, and the possibilities and difficulties of using law to empower the powerless enable students to see that the core project of being a lawyer involves commitment to clients and service to society."¹²

10. PEI BEI, THE EXPECTATION OF LEGAL SKILLS IN CHINESE LEGAL EDUCATION, (2008)

11. See Bryant & Milstein, Rounds article, *supra*, n.1, at 219.

12. *Id.* at 251.