

## **Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)**

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### I. INTRODUCTION

When Americans want to refer to the wisdom of the Chinese, we nearly always refer, properly or not, to Confucius as the Chinese philosopher and scholar best known to western-centric Americans. Although the source of the following quotation, like many of the quotations attributed to Confucius, is at best questionable, the wisdom certainly is not: “I hear and I forget, I see and I remember, I do and I understand.”<sup>1</sup>

One might stop there as sufficient justification for the importance of experiential learning in Chinese legal education and in international legal education generally. However, there is much ferment in American legal education and much new impetus for rethinking and expanding the role of experiential learning in legal education. I will therefore start with Confucius, but focus on the efforts to apply that wisdom by modern adult learning theorists.

### II. IMPACT OF THE CARNEGIE FOUNDATION REPORT

As I began to prepare for my initial summer in China, the rumblings created by the release of the Carnegie Foundation Report<sup>2</sup> were already beginning to reverberate within academia generally, within the community of clinical teachers especially, and within my thoughts specifically. The Carnegie Foundation for the Advancement of Teaching has conducted numerous studies of professional education. In 1910, the Carnegie Foundation issued the landmark Flexner Report on medical education. It then conducted other pioneering studies of education in engineering, architecture, teaching and law as part of a research agenda to influence improvement of education for the professions. *Educating Lawyers* is part of a series of reports on professional education issued by the Foundation through its Preparation for the Professions Program. *Educating Clergy* was the first in this series, which will include reports on the education of engineers,

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1. The Quotations Page, Quotation #25848 from Laura Moncur’s Motivational Quotations, <http://www.quotationspage.com/quote/25848.html> (last visited April 14, 2009).

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

nurses and physicians.<sup>3</sup> Presentations of what would be included in the Executive Summary and later in the full report were made in a variety of settings and encouraged soul searching by academics concerned with the current shortcomings in American legal education.

Although I believe that the choice of language was unfortunate, the authors identified three “apprenticeships”<sup>4</sup> for legal education:<sup>5</sup>

The first apprenticeship . . . intellectual or cognitive, focuses the student on the knowledge and way of thinking of the profession . . . . The . . . second apprenticeship is to the forms of expert practice shared by competent practitioners . . . . The third apprenticeship . . . identity and purpose, introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.<sup>6</sup>

I have some quarrel with the choice of the word “apprenticeship.” I worry that the term will conjure up the kind of post-graduate apprenticeship still used in many countries in which law school graduates spend up to two years in legal practice settings.<sup>7</sup> Wayne J. Carroll describes one such example in particular:

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3. *Id.*

4. As the authors explain, “[T]he metaphor of apprenticeship sheds useful light on the practices of professional education . . . . [W]e . . . extend it [the metaphor] to the whole range of imperatives confronting professional education. So we speak of three apprenticeships. The signature pedagogies of each professional field all have to confront a common task: preparing students . . . to think, to perform, and to conduct themselves like professionals.” *Id.* at 27.

5. *Id.* at 28.

6. *Id.* In the report, the authors later define the cognitive apprenticeship as “[t]he teaching of legal doctrine and analysis, which provides the basis for professional growth.” *Id.* at 194. The authors define the practice apprenticeship as “[a]n introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients.” *Id.* The authors define the formative apprenticeship as “[a] theoretical and practical emphasis on inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.” *Id.* The authors also expand on the scope of the formative apprenticeship in the following language:

This apprenticeship of professional identity should encompass issues of both individual and social justice, and it includes the virtues of integrity, consideration, civility, and other aspects of professionalism. The values that lie at the heart of the apprenticeship of professionalism and purpose also include conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession.

*Id.* at 132.

7. See, e.g., Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417, 423-25 (2006) (“[T]he apprenticeship program was fully implemented in 1946, and a key feature of the new program was combining attorney training with training for prosecutors and judges through the creation of the Legal Training and Research Institute (Institute) under the control of the Supreme Court of Japan. . . . Training at the Institute has consisted of a combination of lectures and apprenticeship-like rotations through judicial, prosecution, and law offices.); Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928-2002*, 71 FORDHAM L. REV. 1621, 1641 (2003) (“The bar administers internal disciplinary forums (regional and national), issues rules of ethics, sets dress codes, and oversees the required apprenticeship period before taking the entrance exams.”).

[M]ost of the EU Member States have a third component of practical training before full admission to the local profession is possible. In England, for example, solicitors would traditionally have to complete their so-called “Articles” training before becoming full-fledged lawyers. This basically entailed working with a practicing solicitor for a period and learning the ropes of the profession. In recent years, this requirement has morphed into a general practical training requirement, but without the more formal structure that the “Articles” entailed.

In Germany, a mandatory training period of two years between the two state examinations requires the aspiring lawyer to complete various rotations, including one with a court, one with a government agency, and one with a law firm or private practitioner. During this training period the individuals usually have the status of civil servants. There are also particular training obligations which the “hosts” must meet to ensure proper training. The status as “trainee” also permits the aspiring lawyer to undertake certain preparatory legal work.<sup>8</sup>

While law school graduates working in these settings provide cheap human labor, the quality of these apprenticeships varies greatly and claims of academic integrity are too often lacking. Many such “apprentices” describe hours spent photocopying or delivering documents for their host law practices, activities that would not be tolerated in externship programs in law schools accredited in the United States.<sup>9</sup>

That is not to say that there are no mentors who take their educational responsibilities seriously. However, in my experience they are the exception in an “educational” model that depends on mentors who are not necessarily skilled teachers, who are not committed first and foremost to the education of their apprentices, and who are not compensated to maximize the educational benefits of this experience. This is one telling reason why law graduates can complete the Monash Postgraduate Diploma in Legal Practice, Skills and Ethics (PDLP) as an alternative to “articles” (the name given to the post-graduate apprenticeship system in Australia), providing law graduates with the knowledge, skills and ethical awareness required to practice law in Victoria.<sup>10</sup>

Critical for my thinking was the recognition in the Carnegie Foundation Report that experiential learning was necessary to achieve the goals of the second

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8. Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 PENN ST. INT’L L. REV. 563, 570-71 (2004).

9. See Peter Jaszi et al., *Experience as Text: The History of Externship Pedagogy at the Washington College of Law, American University*, 5 CLINICAL L. REV. 403, 419 n.19 (1999) (requiring that work assigned to students be of the same general character as that which would be assigned to an entry-level attorney in the same office).

10. See Monash University, *Postgraduate Diploma in Legal Practice, Skills and Ethics (PDLP)*, <http://www.law.monash.edu.au/pdlp/> (last visited on March 29, 2009).

and third apprenticeships.<sup>11</sup> And, while the Report did not mandate real-life client representation as the modality for the “values” apprenticeship, it did acknowledge that, “[m]uch of the humanizing and inspiring aspects of the law have always resided in actual contact with clients and their needs.”<sup>12</sup>

Although the Report authors promote the notion that the intellectual or cognitive apprenticeship can be achieved through the existing classroom model,<sup>13</sup> I am far less accepting of this belief. I find the powerful socialization referred to by the Report authors, during the first year of law school especially, dehumanizing and devaluing of the values that will become necessary to further the second and third apprenticeships—the practical and formative apprenticeships.<sup>14</sup> And, I question the extent to which students who are “passively” involved in the case-dialogue method actually engage in the intellectual and cognitive process theorized by advocates of the case-dialogue method.

Significantly, although the Report authors quote extensively from the novel *THE PAPER CHASE* and situate Professor Kingsfield’s techniques within three of the four basic teaching methods identified by cognitive theorists—modeling, coaching, and scaffolding (they note that Kingsfield does not make use of fading because of the early stage of legal education in which the scene takes place),<sup>15</sup> they decline to mention the scene that follows that application of the case-dialogue method in which the student barely reaches the lavatory in time to throw up his entire breakfast. Many others have described this dehumanizing aspect of the case-dialogue method and have sometimes placed it within a gender framework.<sup>16</sup>

This “signature pedagogy” of the first year also has another equally disastrous effect. In discussing the results of a study of the case-dialogue method, the Report authors state that, “In the law, they [the students] gradually are being led to see facts are only those details that contribute to someone’s staking a legal claim on the basis of precedent.”<sup>17</sup> It is hard to imagine that students could absorb a more disastrous lesson than this and one that those of us who teach clinical courses must struggle mightily against.

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11. SULLIVAN ET AL., *supra* note 2, at 28 (“In this second apprenticeship, students learn by taking part in simulated practice situations, as in case studies, or in actual clinical experience with real clients . . . [The] lessons [of the third apprenticeship] are also ideally taught through dramatic pedagogies of simulation and participation.”).

12. *Id.* at 33.

13. *Id.* at 28 (the intellectual and cognitive apprenticeship is “most at home in the university context because it embodies that institution’s great investment in quality of analytical reasoning, argument and research”).

14. *Id.*

15. *Id.* at 48-49, 62.

16. See Paula Gaber, “Just Trying to be Human in this Place”: *The Legal Education of Twenty Women*, 10 *YALE J. L. & FEMINISM* 165, 181 (1998).

17. SULLIVAN ET AL., *supra* note 2, at 53.

Practicing lawyers know that nearly all cases are won or lost on the basis of the stories that are told by legal advocates on behalf of their clients. Although attacking this view of facts with the vehemence it deserves goes beyond the scope of this article, a hint might be obtained from the film clip that I use to introduce the importance of facts and storytelling to my students in clinic and in the non-case-dialogue method in which I teach even first-year classes. It comes from the movie *Amistad*, and it focuses on the scene in which Theodore Joadson, an abolitionist and former slave, approaches John Quincy Adams, seeking his assistance in pursuing the defense of the slaves on trial for murder when they escape their shackles on the slave ship *La Amistad*.<sup>18</sup> Adams states, “Well, when I was an attorney, uh, a long time ago, young man, I, uh, I realized after much trial and error that in a courtroom whoever tells the best story wins. In un-lawyer-like fashion, I give you that scrap of wisdom free of charge.”<sup>19</sup>

Citing with approval the forthcoming research by Elizabeth Mertz, the Report authors explain that “‘People and problems are located in abstract individuals’ who are seen as working in an oddly ‘acontextual context’ of ‘two contracting parties interacting with each other—even speaking in the first-person singular—against the backdrop of legal rights, jurisdictions, and doctrines’ . . . .”<sup>20</sup> This discussion reminded me immediately of the criticism of the “constructed client” within legal education by my colleague Ann Shalleck.<sup>21</sup>

Suffice it to say that those of my fellow clinicians and other academics who participated in The Best Practices for Legal Education Project criticized the case-dialogue method on these and other grounds in favor of context-based education.<sup>22</sup> And, to be fair, the Carnegie Foundation Report authors do acknowledge that, “we found two missing complements to the case-dialogue method. The first and more significant of the two is something that is the natural concomitant of most lawyers’ activity: experience with clients. It is noteworthy that throughout legal education, the focus remains on cases rather than clients. . . . The second ‘shadow’ that emerged from our conversations with students (and, occasionally with faculty) is the worry that the profession itself lacks ethical substance.”<sup>23</sup>

Once real-life clients are brought into the equation, the opportunities for cognitive, practical, and formative development are nearly unlimited. This is a fact that is not limited by national borders. Instead, it is based on recognition of

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18. *AMISTAD* (Dream Works SKG 1997).

19. *Id.*

20. SULLIVAN ET AL., *supra* note 2, at 54 (citing ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK” LIKE A LAWYER* ch. 6 (Oxford University Press 2007)).

21. See generally, Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 *STAN. L. REV.* 1731 (1993) (detailing the consequences of the constructed client in legal education).

22. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* 109-22, 209-75 (Clinical Legal Education Association 2007).

23. SULLIVAN ET AL., *supra* note 2, at 56-57.

three interrelated factors. First, adults learn differently than children.<sup>24</sup> Second, adults learn best through discovery, and through grappling with ambiguous problems in which they can own their experience.<sup>25</sup> Third, legal education should integrate the teaching of doctrine, skills, and values in order to produce responsible and effective lawyers.<sup>26</sup>

### III. IMPACT OF THE MACCRATE REPORT

Another major event in recent curriculum development at American law schools was the issuance of the *MacCrate Task Force Report*.<sup>27</sup> In 1989, the Section of Legal Education and Admissions to the Bar of the American Bar Association established the *Task Force on Law Schools and the Profession: Narrowing the Gap* to examine the extent to which law schools were actually preparing students for the profession. Chaired by Robert MacCrate, the ABA President from 1987-88,<sup>28</sup> the Task Force issued its report in 1992.<sup>29</sup>

The *MacCrate Task Force Report* affirmed that education in lawyering skills and professional values should be central to the mission of law schools.<sup>30</sup> The Report also acknowledged the curriculum changes leading to the current stature of instruction in skills and values in American law schools.<sup>31</sup> At the same time, the *Report* noted that “[m]uch remains to be done to improve the preparation of new lawyers for practice.”<sup>32</sup>

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24. This is why we refer to the teaching of children as “pedagogy” and to the teaching of adults as “andragogy.” See Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982).

25. See David F. Chavkin, *Am I My Client’s Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998).

26. This conclusion is reflected in both the Carnegie Foundation Report and in the accreditation standards developed by the American Bar Association. Standard 301, OBJECTIVES, provides that, “(a) A law school shall maintain an educational program that prepares its students for admission to the bar, and *effective* and *responsible* participation in the legal profession.” ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 301 (2008-2009) (emphasis added).

27. Amendment of Standard 301(a) was originally proposed by the Illinois State Bar Association. That proposal expressly referenced the MACCRATE TASK FORCE REPORT: “Resolved, to amend Standard 301(a) of the ABA Accreditation Standards, regarding law school’s educational programs, pursuant to Task Force Recommendation C.2. of the ‘Report of the Task Force on Law Schools and the Profession: Narrowing the Gap’ . . . .” *House Amends Standard 301(a)*, SYLLABUS, Fall 1993, at 15.

28. Robert MacCrate is now Senior Counsel at Sullivan & Cromwell, LLP, a major law firm based in New York City. See Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805 (2004).

29. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (American Bar Association 1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> [hereinafter MACCRATE TASK FORCE REPORT].

30. *Id.* at 6.

31. “Unquestionably, the most significant development in legal education in the post-World II era has been the growth of skills training curriculum. . . . Today, clinical courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all ABA-approved law schools.” *Id.* at 6.

32. *Id.* at 266; see also Bryant G. Garth & Joanne Martine, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

The Task Force therefore urged that at each law school:

[T]he faculty ask as to each course, what skills and what values are being taught along with the coverage of a substantive field . . . . In a similar vein, we suggest that faculty for all advanced courses in a school's program should at least consider the skills content that might be effectively included in such courses and the professional values implicated.<sup>33</sup>

The MacCrate Task Force also made specific recommendations to improve legal education and professional development. Of special significance within the recommendations to enhance "professional development during the law school years" is the following:

To be effective, the teaching of lawyering skills and professional values should ordinarily have the following characteristics: development of concepts and theories underlying the skills and values being taught; opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation; and reflective evaluation of the students performance by a qualified assessor.<sup>34</sup>

These characteristics define clinical legal education today in American law schools.<sup>35</sup>

After the *MacCrate Task Force Report*, a conference was held to consider its implications.<sup>36</sup> Former ABA President Talbot "Sandy" D'Alemberte delivered a speech at the conference that "unleashed a thunderbolt criticizing the direction [legal education] [was] taking in the United States."<sup>37</sup> D'Alemberte, a former dean at Florida State University College of Law and later president of the University, criticized the failure of law schools to teach students to be lawyers.<sup>38</sup>

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33. MACCRATE TASK FORCE REPORT, *supra* note 28, at 266.

34. *Id.* at 331.

35. John Henry Schlegel has described the clinical model as:

"Teach theory based on knowledge about the world of practice and let students try out that theory through simulations or, when appropriate, through clinics that are an integral part of the classroom and not some 'thing' that flits over at the side of the building where we let the poor people in through the back door."

Bob Gordon et al., *Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 747, 757 (1998). The "side" of the building has actually often been the "basement." See Marjorie Anne McDiarmid, *What's Going on Down There in the Basement?: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239 (1990).

36. The conference, "The MacCrate Report: Building the Educational Continuum," was held at the University of Minnesota School of Law from September 30 through October 2, 1993. *The MacCrate Report: Building the Educational Continuum*, SYLLABUS, Winter 1994, at 7.

37. Daniel B. Kennedy, *Fire and Brimstone*, 79 A.B.A. JOURNAL, Dec. 1993, at 96.

38. As reported, D'Alemberte used the following language:

Law students "are being told by law professors that 'We don't teach you to be a lawyer, but to

D'Alemberte also criticized the impact of inadequate skills training in forcing students to choose such jobs as law firm associates because they are not qualified to practice law on graduation.<sup>39</sup>

At the meeting of the ABA's House of Delegates in February 1994, the House approved a resolution urging law schools, *inter alia*, to:

... identify and describe in their course catalogs the skills and values content of their courses and make this information available to students for use in selecting courses; ... advise law students regarding course selection to consider what opportunities may or may not be available to them after law school to develop the skills and competencies they will need in practice; [and] develop or expand instruction in such areas as problem solving, factual investigation, communication, counseling, negotiation, and litigation, *recognizing that methods have been developing for teaching law students skills previously considered learnable only through post-graduation experience in practice* . . . .<sup>40</sup>

As a result of forces both within and outside of legal academia, important changes have been made in defining the objectives of American legal education.<sup>41</sup> However, these changes apply with equal force to any system of training future lawyers to practice within any legal system.

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think like a lawyer," said D'Alemberte, launching in before his progressively more uneasy audience. "Isn't that a damn strange statement?" D'Alemberte continued. "What would you say to . . . educators in other fields if they said, "We don't teach you to be a musician, actor, historian, physicist—but only to think like one?"

*Id.* It is interesting and somewhat scary to realize that Jerome Frank had used nearly identical language sixty years earlier in criticizing the structure and modalities of American legal education. See Jerome Frank, *Why Not A Clinical-Lawyer School?*, 81 U. PA. L. REV. 907, 916 (1933) ("What would we think of a medical school in which students studied no more than what was to be found in such written or printed case-histories and were deprived of all clinical experience until after they received their M.D. degrees?"). There is dissension from the viewpoint that the case-dialogue method even teaches students to think like a lawyer. Some believe that the Langdellian model more accurately teaches students to "think like a judge." SULLIVAN ET AL., *supra* note 2, at 11.

39. Kennedy, *supra* note 37, at 96. As reported, D'Alemberte decried the impact of inadequate skills training on student employment choices after graduation and "described a 'conspiracy theory' that views legal educators as not unlike grocers who sort apples and potatoes according to size and quality, all for the benefit of the most reliable customers." *Id.* The impact of this approach is to "precondition" students to seek and accept law firm employment and to make them believe that they will get the best training and have the greatest future alternatives by pursuing such jobs. *Id.*

40. *ABA Reformulates Ancillary Business Rule, Reaffirms Support for Universal Health Care*, 62 U.S. LAW WEEK 2497, 2500 (Feb. 15, 1994) (emphasis added). This resolution was also drafted by the Illinois and Iowa State Bar Associations to respond to the MacCrate Report. 1994 A.B.A. SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 19-21. The House of Delegates took this action despite the opposition of the ABA Section of Legal Education and Admissions to the Bar. *Id.*

41. The cross-fertilization between the Carnegie Foundation Report and the Best Practices Study is a significant example of the coming together of similar forces from disparate backgrounds.

#### IV. SIMULATIONS VERSUS LIVE-CLIENT CLINICS

Experiential learning is a broad term that incorporates a continuum of learning opportunities ranging from drafting exercises in traditional courses to simulations to live-client representation. Simulations permit instructors to bring something approaching real life into the classroom without dealing with the costs and other aspects of real-life client representation.<sup>42</sup>

Simulations can serve a useful purpose, especially in a sequence culminating in real-life experiences. However, they necessarily suffer from the limitations inherent in all “staged” learning.<sup>43</sup> Students know that simulations are an exercise or a game and they do not invest themselves the same way they would in real life.<sup>44</sup> Simulations therefore have their place and they are a significant improvement over exclusive reliance on the case-dialogue or lecture methods of teaching. However, that place is limited by their very nature and those limitations are most real when one focuses on inculcating values in future lawyers. As described by a legal educator:

The strengths of simulation over live-client experiential learning are considered to be uniformity of experience among students, simplification of difficult problems with an orderly progression to the more complex, repetition of student performance when necessary, susceptibility to interruption and videotaping, lack of costliness, and a higher student-teacher ratio. On the other hand, simulation is considered to lack the factual complexity and uncertainty of real cases. Furthermore, students do not become as emotionally involved. Because the emotional investment is less, motivation and level of learning decreases as well.

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42. See James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 122-33 (1991) (the lower costs associated with simulations are part of the reason that some commentators are willing to accept the tradeoffs of simulations within the law school curriculum).

43. In making this statement, I am not unmindful of the value that some of my contemporaries place on simulations. For example, Angela McCaffrey has written of the role that she thinks simulations can play in transforming the values of her students. Angela McCaffrey, *Transforming Minnesota Nice Law Students into Vigorous, yet Respectful Advocates: The Value of Simulations in Preparing Clinical Law Students for Ethical and Effective Client Representation*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 91 (2004). I do not claim that simulations are valueless. However, I do believe that their value pales in comparison to the benefits of role assumption in a live client context. Perhaps the place that Angela and I part company most clearly is in her statement that, “Persons interested in the law enter as students and leave some three years later transformed into attorneys.” *Id.* I think that it is far more accurate to state that, “Persons interested in the law enter as students and leave some three years later transformed into law graduates.” They do get transformed, often in negative ways, but they are seldom transformed into attorneys.

44. See Barbara B. Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977, 1982-83, 1985 (1993) (In describing her work teaching a simulation course, Professor Barbara Bennett Woodhouse acknowledged these limitations: “[T]he kind of simulations I suggest incorporating in traditional courses are no substitute for real client representation and I have too great a respect for the craft of clinical teaching to pretend that such ‘learning experiences’ are a substitute, much less a match, for supervision by skilled and experienced clinical professors.”).

Also, real cases present students with ethical dilemmas in their emotional context. Many consider this necessary for teaching professional responsibility. To be *truly* effectual, simulation is seen to require the same level of supervision, making it just as expensive as live-client learning.<sup>45</sup>

Steven Hartwell has argued persuasively that one can positively influence the professional values of students through small, interactive seminars.<sup>46</sup> I agree with his conclusion, to a point, but I also feel that one can be more ambitious in one's goals if one is more ambitious in choosing one's teaching methodologies. And, as someone who uses simulations in my live-client clinics, I was long ago taught that students are affected by real interviews with real people with real problems at levels that simulated interviews with actors with simulated problems cannot hope to approach.

## V. THE ROLE OF CLINICAL EDUCATION

In contrast to the limitations of the case-dialogue and similar methods of legal instruction,<sup>47</sup> clinical legal education is virtually unlimited in its ability to fulfill the goals of all three models of apprenticeship identified in the Carnegie Foundation Report.<sup>48</sup> As described in that Report, students can learn legal doctrine (as in the case-dialogue method), but they can also learn the practice and formative skills and values necessary to fulfill the second and third apprenticeships.

If clinical education is so universally effective, why do we not have clinical law schools?<sup>49</sup> It is not as if that model has not been proposed by influential

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45. Gary S. Laser, *Educating for Professional Competence in The Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHL.-KENT L. REV. 243, 265-66 (1992).

46. Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 505-39 (1995).

47. There have been numerous criticisms of these methods and the impact they have on law students and their education. However, perhaps no criticism has been quite as telling as that of Andrew Watson with regard to the psychological impact of this approach.

There is little overt reward given for good performance under this system. Since most professorial responses are questions, they are perceived as never-ending demands, and hoped-for relief never comes into sight. Such a technique runs counter to all learning theory. The system of rewarding good performance is an ancient one, and the "prize" of good grades at the end of the year is probably too remote for many law students to use as a motivation to full application throughout the school year. This [Socratic] method should be seriously questioned as a good teaching technique.

Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 123 (1968).

48. SULLIVAN ET AL., *supra* note 2, at 120 (as acknowledged by the authors of the Carnegie Foundation Report, "[t]he potential of clinical-legal education for bringing together the multiple aspects of legal knowledge, skill, and purpose has long been noted").

49. The City University of New York and the University of the District of Columbia come very close to fulfilling this model of being clinical schools. Despite the limited financial resources available in these public

academics and others.<sup>50</sup> Three factors seem to predominate: tradition, vested interests of existing academics, and cost.

As to tradition, it is difficult to break the cycle of doing things as we have always done them. This is especially true when most other law schools with which a single law school competes for applicants are doing things exactly, or nearly exactly, the same way. Perhaps that is why many of the most significant changes in American legal education over the past 100 years have been imposed by outside forces, like the *MacCrate Task Force Report*.

As to the vested interests of academics, there is a very powerful recommendation by the authors of the Carnegie Foundation Report. As stated in the Summary to that Report, the authors urge as follows:

Both doctrinal and practical courses are likely to be most effective if faculty who teach them have some significant experience with the other, complementary area. Since all law faculty have experienced the case dialogue classroom from their own education, doctrinal faculty will probably make the more significant pedagogical discoveries as they observe or participate in the teaching of lawyering courses and clinics, and we predict that they will take these discoveries back into doctrinal teaching. Faculty development programs that consciously aim to increase the faculty's mutual understanding of each other's work are likely to improve students' efforts to make integrated sense of their developing legal competence. However it is organized, it is the sustained dialogue among faculty with different strengths and interests united around common educational purpose that is likely to matter most.<sup>51</sup>

So, within a faculty committed to maximizing educational outcomes for students, the division between clinical faculty and classroom faculty will be blurred as faculty members jointly struggle with the academic enterprise. While few faculty members may be willing to cross over from classroom to clinic, there will be far less of an attitude of "us" and "them."

The factor of cost is often put forward as an insurmountable barrier to the delivery of expanded opportunities for clinical legal education. However, this factor is too often accepted as gospel without critical examination.

The Washington College of Law employs approximately twenty-six full-time equivalent clinical teachers to serve between 200 and 220 students in our live-client clinics each academic year. Since our tuition fees are comparable to other institutions that provide far fewer clinic experiences, the issue in large part is one

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law schools, student lawyering experiences happen early and often as students develop the skills of responsible and effective lawyers.

50. See Frank, *supra* note 38.

51. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW: SUMMARY REPORT 9 (2007), available at [http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers\\_summary.pdf](http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf).

of will and not of impossibility. Moreover, within an academic year tuition expense of \$32,000, the tuition cost per semester is \$16,000. Since clinic constitutes one-half of a normal credit load, a faculty member teaching in a clinic with a “normal” 8:1 supervision load generates \$64,000 per semester in revenues (\$16,000 tuition per semester x one-half credit load x 8 students). That totals \$128,000 in tuition revenues per year. And, if the faculty member teaching in the clinical program teaches one other course per academic year, perhaps a 2-credit ethics course, that faculty member would generate an additional \$114,286 in revenues (\$16,000 tuition per semester x one-seventh credit load x 50 students = \$114,286).

While those generated total revenues of \$242,286 (\$128,000 + \$114,286 = \$242,286) might not cover all of the expenses of salary, fringe benefits, administrative support, and other direct and indirect expenses, they begin to come very close to meeting the costs of these courses. Clinical education is therefore far more financially feasible than some make it out to be, even if one cannot argue with the observation that “it is unavoidably more expensive than large classes.”<sup>52</sup> One of the realities of the case-dialogue model is that it is something of a financial cash cow—another significant reason for its popularity.

Finally, perhaps the most persuasive response to the issue of cost was delivered by administrators of the City University of New York. When asked by the authors of the Carnegie Foundation Report how they could afford to provide a context-based small-class environment for first-year classes “when their more affluent competitor institutions obviously seek the economy of scale afforded by large first-year classes, CUNY administrators answered, ‘We cannot afford not to do it.’”<sup>53</sup>

Clinical education in the United States (and now in many other countries throughout the world)<sup>54</sup> therefore provides an opportunity for students to practice as lawyers in an environment in which they can be supported by faculty and in which reflective and critical analysis of their experiences can take place under the supervision of a trained instructor.<sup>55</sup> Because of these benefits, clinical education is the fastest growing part of American legal education.<sup>56</sup>

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52. SULLIVAN ET AL., *supra* note 2, at 94.

53. *Id.* at 36.

54. Canada, Israel, Palestine, Great Britain, Australia, Chile, Poland, China, and other countries have brought clinical education into the law school environment. Other countries, including Japan’s Legal Training and Research Institute, incorporate clinical education outside the law school. The critical benefit realized by bringing clinical education into the law school is that teaching is being provided by instructors committed solely to the education of their students and by instructors who are paid to reflect critically on the relationship between lawyering theory and practice.

55. Andrew Watson criticized those forms of experiential learning in which critical reflection did not take place.

My own assessment of their value [clinical programs] as part of professional education relates directly to the amount of interpreted experience which the student encounters. Mere contact with these professional situations may do little more than stir anxiety—anxiety traced to its source and analyzed creates growth potential.

It is difficult to over-emphasize the importance of the real-life aspects of clinical education. Justice Rosalie Wahl, a former chair of the ABA's Section of Legal Education and Admission to the Bar,<sup>57</sup> described the impact of live-client representation on student attorneys in the following terms: "I personally feel that the real consequences of working with a live client has a quality and an *ethical* responsibility to that person that you cannot experience by just listening about it."<sup>58</sup> Students are given the opportunity to relate to people of backgrounds that are often very different from their own. Students find that they have much to learn from the clients and they must grapple with a model of representation in most American legal clinics that maximizes client autonomy in decision-making.<sup>59</sup>

Another benefit of real-life client clinical experiences relates to motivation. Harkening back to a common American law school maxim,<sup>60</sup> one legal educator has described the impact as follows:

It has also been noted that students tend to lose interest in their studies as they progress in law school. In live-client in-house clinics, students move from spectator to actor. This change has a profound impact, in that the personal identification with clients and the assumption of the lawyering role bring with them a heightened desire to learn.<sup>61</sup>

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Watson, *supra* note 46, at 157.

56. According to the on-line directory of clinical legal education there are now more than 1700 legal educators involved in clinical legal education in American law schools. Gateway to Clinical Legal Education, University of Michigan Law School Clinical Law Programs, [https://cgi2.www.law.umich.edu/\\_GCLE/index.asp](https://cgi2.www.law.umich.edu/_GCLE/index.asp) (last visited April 16, 2009).

57. Justice Wahl was chair of the Section of Legal Education and Admissions to the Bar from 1987-1988. Later as Justice of the Supreme Court of Minnesota, Justice Wahl was one of two people assigned to establish the clinical legal education program at William Mitchell College of Law. SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 122 (American Bar Association 1993). The BEST PRACTICES REPORT was co-dedicated to Justice Wahl and Robert MacCrate for their contributions to legal education.

58. *Id.* William Trail and William Underwood have described the benefits in the following language: "Clinics and externships offer several benefits not available through use of simulations. First and foremost is exposure to real clients. The presence of real clients with real legal problems enables students to develop skills in interviewing and counseling clients that are more difficult to develop in simulations. Additionally, the presence of real clients reliant on the students provides an opportunity for students to begin developing a concrete understanding of the responsibility of being a lawyer."

William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 238 (1996).

59. This model is often referred to as "client-centered representation." See generally DAVID A. BINDER ET AL., *INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (2d ed., Thomson West 2004) (describing this model for legal representation).

60. There is a saying in American legal education that is more true than most legal academics would like to believe: "First year they scare you; Second year they work you; Third year they bore you." While many of the efforts to reform American legal education have focused on the development of skills and values, these new courses and teaching techniques have also had the effect of lessening the accuracy of the above aphorism.

61. Laser, *supra* note 45, at 267.

Real-life client representation may therefore motivate students in ways that even the most enthusiastic and energetic teaching cannot possibly match.

Another significant benefit of live-client representation is the opportunity to identify and answer questions of professional responsibility that directly confront the student's role as a lawyer.<sup>62</sup> Students are consistently amazed at how quickly ethical issues arise in their real-life cases and how little useful information they have learned in their classroom courses about professional responsibility.<sup>63</sup> It is no surprise that one of the leading commentators on professional responsibility has argued that "live-client learning" is necessary for students to learn how to deal effectively with professional responsibility issues.<sup>64</sup> At a time when American legal educators have increasingly acknowledged the importance of inculcating values of professional responsibility in our students, the provision of meaningful clinical legal education to every law student takes on an increasing level of urgency.<sup>65</sup> I have purposefully inserted the word "meaningful" before the words "clinical legal education" because not every clinical course is designed to achieve these important educational outcomes. I believe that there are several common features that all of the best programs share. These include the following:

Small cases—Students need to 'own' their experiences if they are going to achieve all of the benefits of real-life representation and these benefits can be maximized if students can handle cases from beginning to end.

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62. It is hardly an accident that the project of the Ford Foundation that did the most to spur the development of clinical legal education in this country was named the Council on Legal Education for Professional Responsibility (CLEPR). See William Pincus, *The Lawyer's Professional Responsibility*, 22 J. LEGAL EDUC. 1 (1969); William Pincus, *The President's Report*, reprinted in CLINICAL EDUCATION FOR LAW STUDENTS: ESSAYS BY WILLIAM PINCUS 21 (1980).

63. As described by one observer of clinical programs:

A clinical law student quickly becomes aware of the breadth and complexity of ethical questions that lawyers face each and every time they undertake a case. Clinical supervision provides the time and the opportunity for practical ethical mentoring. It allows students to discuss ethical conflicts with experienced and skilled practitioners who usually have formed and maintained a variety of connections and networks with the legal community which assist them in navigating the ethical norms of the profession. Clinical class time is devoted to more academic explorations of ethical issues, as well as global issues of justice and equality that drive the work of public interest attorneys.

Kristen Edwards, *Found! The Lost Lawyer*, 70 FORDHAM L. REV. 37, 67 (2001).

64. With regard to the necessity of "live-client learning" for students to deal effectively with professional responsibility issues, see Watson, *The Quest For Professional Competence: Psychological Aspects of Legal Education*, *supra* note 47 (discussing the need for experiential learning in law school through "problem courses," involvement of practitioners, clinical programs with "interpreted experience"); Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective On Legal Education*, 8 J.L. REFORM 248, 249-52 (1975); and Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1964).

65. At least one respected commentator has urged that "licensing authorities . . . give credit in the admissions process for a successfully completed clinical experience in an accredited law school under faculty supervision and duly certified by that faculty . . ." MacCrate, *supra* note 28, at 831. This would, he argued, "be giving credit where credit is due." *Id.* This approach would parallel the approach in the State of Victoria in Australia. See Monash University, *supra* note 10.

Small caseloads—Students need to be provided with an opportunity to represent enough clients to have a diversity of experiences, but not so many clients that they do not have the time to reflect critically about those experiences.

Supervision, not direction—Students need to invest in the quality of their decisions and this process is facilitated by having supervisors help students reflect on their experiences and not by displacing students as the *lawyers* for their clients.

Seminar—Students need to learn some basic skills and values before they begin and while they are providing their real-life client representation. A seminar is a necessary vehicle for the transmission of these skills and values through a technique of adult learning known as exposition-application.

Rounds—Students need to learn how to benefit from the experiences of other students in the clinic and to brainstorm and provide insights to other students handling cases. A process in which students regularly present developments in their cases to their colleagues is an effective tool for providing these opportunities. Some have referred to “rounds” as the “continuing case seminar.”<sup>66</sup>

Simulation—Students need to have an opportunity to “try on” skills and values in a context in which no one will be harmed by mistakes and in which they can take some risks that they would not take if real-life client interests were at stake. Simulation exercises provide a tool for giving students these opportunities.

Case Supervision—Students need to regularly interact with their supervisors in a setting in which faculty members have sufficient time and energy to discuss case-related and personal issues with their students in a non-directive manner. This cannot be achieved in a faculty-student ratio of more than 1:8.<sup>67</sup>

The authors of the Carnegie Foundation Report also acknowledge the role that clinical legal education can play in providing a necessary bridge to practice. As described in the Report:

Decades of pedagogical experimentation in clinical-legal teaching, the example of other professional schools, and contemporary learning theory all point toward the value of clinical education as a site for developing

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66. See, e.g., Watson, *Lawyers and Professionalism*, *supra* note 64, at 276.

67. For a further discussion of these tenets, see David F. Chavkin, *Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 256-77 (2003).

not only intellectual understanding and complex skills of practice but also the disposition crucial for legal professionalism.<sup>68</sup>

This bridge is especially important when one considers the values that are essential to responsible practice and to improving the profession.

What is it about the opportunities presented by live-client clinical legal education that suggests that values can truly be inculcated in our students?<sup>69</sup> The answer, in large part, revolves around the magical opportunities presented by the lawyer-client relationship—by the one-on-one interactions (or two-on-one interactions in clinics in which students work in pairs) between student attorney and client. In doing so, we necessarily correct the pervasive disappearance of clients and their stories in existing models of legal education in this country.

One of my colleagues, Professor Ann Shalleck, has described the process in these terms:

This [the clinical] model is based on a deeply contextualized understanding of who clients are and why they are significant. Students no longer see clients as abstract people with predetermined traits; rather, they see clients as unique individuals with particular characteristics situated within the real world . . . . Live-client clinics only present an opportunity, albeit a powerful one because of the immediacy and force of human relationships, to undermine the constructed client, as well as to develop and teach new methods for understanding and working with clients.<sup>70</sup>

We need to ensure that this “opportunity . . . to undermine the constructed client” and to help students understand and work with clients becomes a reality for more students.<sup>71</sup> And, we need to maximize the likelihood that this

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68. SULLIVAN ET AL., *supra* note 2, at 120. Others have written quite poignantly and sometimes humorously about the potential for clinical education in recovering the “lost lawyer” (*see* ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (Belknap Press of Harvard University Press 1993)). Edwards, *supra* note 63, at 38 (“[C]linics seemed to be the only part of the law school turning out the kind of lawyer that everybody not only wished for, but appeared to think was lost long ago.”).

69. Moliterno, *supra* note 42, at 116. From a somewhat more Aristotelian perspective, James Moliterno argues that, “[i]n order to develop virtue, one must do virtuous things, preferably under the guidance of a moral teacher. One cannot develop morally by study alone. This practicing of virtuous lawyering can occur, and probably better occurs, in an academic setting than in the office.” *Id.*

70. Shalleck, *supra* note 21, at 1740-41.

71. One critical aspect of this is the importance on outcomes of client stories and the presentation of facts. As Karl Llewellyn pointed out:

Look at the facts—the cold ones. Before a jury you must make the jury believe your client *right*. Try facts before a court, and three times out of four or three and a half, you need the same. *Good* lawyers before an appellate court today spend over presentation of the facts, to persuade indirectly of the justice of their cause, an effort which exceeds the effort spent upon the marshalling of authorities.

Karl Llewellyn, *The Crafts of Law Re-Valued*, 15 *ROCKY MTN. L. REV.* 1, 6 (1942).

opportunity will be fully utilized by redesigning the law school curriculum in a way that sequences the development of skills and values.<sup>72</sup> Despite our demonstrable success in establishing and expanding opportunities for clinical legal education at most law schools, in the United States we have barely begun to rationalize the overall curriculum and the teaching techniques at these same institutions. However, clinical legal education has begun to address those deficiencies in the pre-existing model.

Professor Shalleck is somewhat more positive about the impact of clinical legal education on the larger enterprise of legal education and on the lawyering process generally. In a recent presentation at Syracuse University Law School as part of the Robert N. Endries Distinguished Faculty Workshop Series, Ann argued that clinical pedagogy has generated new insights about law, the legal process and the practice of law. While she also emphasizes the unrealized “potential [of clinical thought] to transform not just the pedagogy of law schools or the understanding of the work of the lawyer, but also our contemporary understandings of the law,” her glass is much closer than is mine to half-filled.<sup>73</sup>

Even the most zealous supporters of clinical legal education would not claim that this connection between student and client occurs in every clinical experience. It would be unrealistic to expect every student to be transformed by even the best models of instruction. As acknowledged by Professor Homer La Rue:

[Not] every student taking an LTP [Legal Theory and Practice clinical] course has a transformative experience in which she moves from “conventional moral reasoning” to a reasoning that emanates from a full integration of all dimensions of the person. Nor does every student understand the lawyer’s role as translator as one of power, in which the client being served can be further silenced or assisted in obtaining her, his, or the community’s own voice. However, there is anecdotal evidence that for some students, such a transformation does take place. Whatever

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72. Warren E. Burger, Chief Justice of the United States Supreme Court, alerted American law schools to their need to address the shortcomings in the training of lawyers and provided additional support for the development of clinical programs.

The modern law school is not fulfilling its basic duty to provide society with people-oriented counselors and advocates to meet the expanding needs of our changing world . . . . The shortcomings of today’s law graduate lies not in a decent knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made. It is a rare law graduate, for example, who knows how to ask questions—simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly—in or out of court.

Chief Justice Warren Burger, Address Before the ABA Convention Prayer Breakfast (Aug. 10, 1969), *quoted in* Dominick R. Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 OR. L. REV. 51, 59-60 (1970).

73. Ann Shalleck, *Toward a Jurisprudence of Clinical Thought*, Presentation in the Robert N. Endries Distinguished Faculty Workshop Series, Syracuse University Law School (April 12, 2002) (on file with author).

the number of students affected may be, the LTP courses legitimate the inquiry into how law can serve human needs.<sup>74</sup>

We provide an opportunity, albeit a powerful one. And, we work hard to help our students take advantage of that opportunity.

## VI. CONCLUSION

In the section on “Professional Identity and Purpose,” the authors of the Carnegie Foundation Report posed the following question: “How can law schools best teach that sense of public responsibility, indeed, public service that the American Bar Association uses to frame its own discussion of model rules?”<sup>75</sup> They ultimately answered that question by proposing “an integrative model for law schools” in which “students [could] fit together the various elements of their educational experience, preparing them for the varied demands of professional legal work.”<sup>76</sup>

To the extent that one of the goals of legal education in China should be the development of lawyers with a similar level of commitment to improving the profession and to the rule of law, there is no reason to limit the application of the Carnegie Foundation Report to reform of American legal education. The conclusions in that report are based on adult learning theory, not on American adult learning theory. To the extent that the Carnegie Foundation Report has identified experiential learning as a necessary element for American legal education reform, it sounds a similar message for reform of the Chinese system of legal education.

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74. Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 HASTINGS L.J. 1147, 1148-49 (1992).

75. SULLIVAN ET AL., *supra* note 2, at 129. The Report referenced the following language in the Preamble to the American Bar Association’s Model Rules of Professional Conduct: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” *Id.*

76. *Id.* at 194.