

The Direction at Twist Time

—Legal ethics and professionalism in China law school

Hongqing Teng*

Basically the ideal of experiential education is “learning by doing”. For the clinical legal education case, the goal is let the law students “act as lawyer” and “think as lawyer”. In the United States, this new education started from 1960s, it becomes more popular these years and particularly the ABA recognizes the rule on the experiential education, like the clinics. Generally most clinicians believe the experiential educations not only train the legal knowledge and legal skills for the law students, but also the more important thing is to cultivate the legal ethics and legal professionalism for them. That is good point.

Meanwhile since we introduced the American legal clinical education into China law school from 1990s, actually we already know the basic idea as well, but in practice we found it’s so hard to achieve the same goals just mentioned before. For the reason, we could use a Chinese saying, “Different people have different views.” (仁者见仁、智者见智) So this essay will examine the role of experiential education in China law school, the disputes on the professionalism, and the direction at current twist time, specially after the Opinions on Judicial Reform was published on Nov. 28, 2008 by CCP.

1. Legal Ethics in Experiential education

All the way back in 1938, in his defining work *Experience and Education*,²⁰ John Dewey proposed that education have a purpose and that it incorporate experience into the processes of teaching and learning. Kurt Hahn, a contemporary of Dewey’s and father of Outward Bound and the United World College, was committed to developing compassion and character in students through practical challenges. Growing out of Hahn’s educational philosophy, today many think of experiential education as something that primarily happens in the outdoors. Still others simply and broadly define experiential education as “learning by doing.”

Experiential education also happened in legal education in America. It’s quite different from the traditional way, like lectures, seminars, case method, and Socratic Method. Clinical legal studies are one of the experiential educations. It means

* Dr. Hongqing Teng , Assistant Dean, South China University of Technology College of Law, Ph.D (Wuhan University, 2006), LL.M(Washington College of Law, 2008). Concentration: Human Rights Law.

Mobile: (+86)15920178974. E-mail: tenghq@scut.edu.cn

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²⁰ John Dewey, *Experience and Education*. New York: Macmillan. 1938.

law-school training in which students participate in actual cases under the supervision of a practicing attorney or law professor. But actually the clinical education provided law students with a substitute for traditional apprenticeship programs.²¹ So it looks like a circle.

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.”²²

Obviously the experiential education, particularly the clinical legal education, can help law students consider the ethical questions, understand the legal knowledge and practice legal skills. Of course the clinics also can achieve the goal of social justice through dealing with the cases happening to the disadvantages. Well when we analyze the background of why American experiential education, like clinics, emphasizes the legal ethics issue, we would find the big reason is about Watergate Scandal.²³ The involvement of so many lawyers in that scandal embarrassed the profession and prompted the American Bar Association to require that all law students receive instruction in legal ethics.²⁴ So beyond the in-class lecture, the experiential education must be the most effective way.

After the vice-president of Supreme People’s Court Judge Huang Songyou was found guilty last year, I believe that’s our turn to think about the legal ethics seriously. Maybe many kinds of reasons involved that case, like legal system, supervision on powers, and selection of judges. This essay will focus on legal ethics in our legal education. Back to Chinese classic philosophic question, “Weather to know is more difficult than to practice, or to know is much easier than to practice.” (知易行难、知难行易) I can’t figure it out, either. But the thing is we do teach students legal ethics

²¹ *Black’s Law Dictionary*(8th edition), ed. By Bryan A. Garner, 2004, Thomson West P.271.

²² Susan Bryant and Elliott Milstein, “ROUNDS: A “SIGNATURE PEDAGOGY” FOR CLINICAL EDUCATION?” 14 *Clinical L.Rev.* 195, fn. 4. (2007).

²³ The legal profession responded to Watergate in a few ways. New emphasis was placed on professional responsibility courses in the law schools. For the first time, by the late 1970s, every law school in the country offered a course on professional responsibility. Bar examiners increasingly added Professional Responsibility to those subjects tested on the bar exam, tests required for a lawyer to get licenses in a particular state. The American Bar Association, which had only a few years earlier adopted the *Model Code of Professional Responsibility*, also embarked on a project that would lead to the wholesale revision of the Code.

Interestingly, the federal government did not itself seek to regulate the legal profession. Rather, reforms in the legal profession in response to Watergate were led by the ABA, the state courts and the state bar associations.

²⁴ ABA Standards for the Approval of Law Schools, Standard 302(a)(iv)(1995), discussed in Roger C. Cramton and Susan P. Koniak, “Rule, Story, and Commitment in the Teaching of Legal Ethics,” 38 *William and Mary Law Review* 145-98(1996)

course and we do arrange students to participate in all kinds of experiential legal education, like clinics, practical teaching-class, externship, internship, street law, simulation, role play, survey trip and so on. Eventually we don't want to ask the students this question, or even we ask it, we don't dare to get the answer. It is "after your graduation, you would be a judge, prosecutor, or lawyer, if sometime you can take advantage of your position, would you take the bribe and corruption?"

Maybe we could rebuild our confidence on legal ethics through the experiential education. In my simulation class, we discussed a case²⁵ and when I asked "would you tell the nursing house administrator that they can ask court to change guardian so that they might save the old person's life?" my students were excited and put many opinions. So through this case, we want to instill that **A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.**²⁶ After this class, some students said they never thought such moral questions before, they only care about how to deal with the case as soon as possible, or they felt too much empathy and sympathy in the old man, they forgot the role of attorney as the couple, and they are struggling for their own answers when facing the legal issues and ethical issues. That's true; they are impossible to be put into such situation in traditional course, not like simulation or role play in clinics. So the experiential education works.

Perhaps the Legal Ethics in-class course is boring for students, the experiential education is much better. But the awkward thing is when they finished their summer externship in law firm, government, and judiciary last year, I read the reflective

²⁵ Simulation:

You have been contacted by Ms. Chen and Mr. Chen, a wife and husband seeking advice on an unusual problem. You interviewed them last week. Ten days ago they were informed by the administrator of the nursing home where Mr. Chen's father, Old Chen, lives that, unless Mr. Old Chen has an operation to repair kidney damage that he suffered as a result of a fall, he will die within the next two months.

Ms. Chen was appointed legal guardian for her father-in-law six months ago, when her father-in-law became incompetent. She does not want to give consent for the operation. Under the terms of the guardianship her consent is required. Ms. Chen says that she does not want to give consent because, as she puts it, "It's no kind of life for my father-in-law to live. First his mind went and now his body. I know Old Chen would not want to go on like that. Besides, the cost of warehousing my father-in-law is an enormous burden." Mr. Chen was silent throughout your interview a few days ago, except to nod, perhaps uncomfortably, in agreement with his wife.

The nursing home administrator has indicated that no operation will be performed unless Ms. Chen consents. As stated above, without the operation, Old Chen's life expectancy is a few months. With the operation, it would be from two to five years.

The Chen's Couple have asked for advice regarding the consequences of refusing consent. You have agreed to advise them, and they will be here in about 15 minutes. Your research reveals:

- Ms. Chen's refusal to consent would not subject her to criminal or civil liability.
- The nursing home could file a petition for change of guardian for purposes of consenting to the operation. (There is an unreported lower court decision where the court ordered such a change of guardian.)

In dealing with the nursing home administrator, you realize that she is unaware of the option of asking for a change in guardian. She believes she is powerless to act in the absence of explicit consent from Ms. Chen.

What advice would you give the couples? Would you inform the nursing home administrator of her legal options? Are there any other options you would consider?

²⁶ See Chinese National Bar Association CODE OF LAWYER PROFESSIONAL CONDUCT (Trial) March 2004 Canon 9. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY August 1980. Canon 4.

journals written by them, some said they found the true rules in real society, so they do care about the legal ethics in my simulation class, but they also do care about the hiding rule in practice. This is so wired, we arrange the experiential education for students, but what they learn is not like what we expect. What's wrong with our experiential education on legal ethics?

2. Context of Sino-U.S. Judicial Ethics

On Nov. 7-9 2008, SCUT law school and NYU law school co-hosted WORKSHOP ON COMPARATIVE STUDIES OF SINO-US JUDICIAL ETHICS in Guangzhou City. We invited Professor Jerome A. Cohen from NYU, Judge John M. Walker from U.S. Court of Appeals for the Second Circuit, Judge Jed Rakoff from U.S. District Court Southern District of New York, etc. At the first day morning, Judge Walker gave a speech on Ethics and Procedural Justice. That impressed me so much.

Judge Walker pointed out that “In any society that aspires to the rule of law, the judge must naturally be concerned with the subject of ethics. ...each judge should possess: independence, integrity, impartiality, and competence.” He introduced the administration system of judicial ethics in the United States and the ABA MODEL CODE OF JUDICIAL CONDUCT (February 2007). Also he mentioned that China has emphasized ethics as it has reformed its judicial system. “[T]he 1995 Judges Law contains a list of eleven categories of ethical violations that can lead to punishment. The 2001 and 2005 Codes of Conduct issued by the Supreme Peoples Court are exhaustive in setting forth the ethical standards required of the judge under the following general principles: Ensuring judicial impartiality, enhancing judicial efficiency; guaranteeing judicial integrity, observing judicial procedural rules and practices; engaging in self-improvement and promoting moral awareness; and refraining from engaging in certain non-judicial activities. ...But enacting the correct rules is the easy part. Virtually every society has ethical rules in place for judges; but the overriding challenge, however, is to make sure that they are enforced.” His conclusion inspired me.

After Judge Walker's speech, during the discussion, a Chinese judge introduced himself; he is the vice president of some People's Court, the member of Trial Committee, the member of Judicial Compensation Committee, the presiding judge of Trial Supervision Tribunal. So from his identification, we can figure out our basic framework on the judicial ethics. But obviously the enforcement is not perfect because of some very sad examples.

So back to the experiential education in our law school, I believe that it is so hard for every clinicians or professors to convince our law students to learn legal ethics and stick to judicial ethics under current serious situation. However, we can't make this as excuse to avoid or neglect the ethics education. On the contrary, we should emphasize this part more than before. Actually as Judge Walker said, some American judges involved in ethics problem, either, such as taking nap during the trial, drunk at the court, and some other misconducts. The same things happening to Chinese judges are

using the mobile during the trial, not dressing cope at the court, and so on. So Sino-U.S. are facing the same ethics problems and trying to solve them beginning from the education, not only the in-class education but also the experiential education. Even we have the similar ethics rules and goals. But my point is we can't neglect the different context of legal ethics, judicial ethics, and lawyer's ethics.

For example, when we talk about the independence of ethical rules which is recognized by China and U.S. together, there are two different views on it. Judge Walker thought of it in two ways: Institutional independence and individual independence. In America, "[j]udges are immune from criminal prosecution or disciplinary proceedings for any actions taken in good faith while performing the judicial function. If a judge makes a mistaken decision or even a series of mistakes in deciding a case, the sole remedy is for the losing party to appeal the decision to a higher court. A judge, who decides a case in good faith, cannot be sanctioned for that decision even if the judgment is found to be erroneous by a higher court." For this case, we can understand why we use up any kinds of education methods to teach ethics, but the outcomes are quite limited, even the law students are not interested in such topics. Legal education is the part of legal system. So considering this context, in China law school, we are not going to teach ethics itself by in-class course or experiential education, but going to teach ethics for law students to reform legal system. Through the experiential education, the students can observe, experience and understand this core goal very well.

3. At This Twist Time

The year of 2008 is 30th anniversary for Reformation and Open-up Policy implemented in China. In these 30 years China also keeps reforming the legal system, judicial system, legal education. We are pursuing the rule of law country which is embraced by our Constitution Amendment 1999. CCP Central Committee Political Bureau passed through Opinions on Judicial Reform ("Opinions") on Nov. 28, 2008. So the new twist time is coming. What should legal education do and what should legal educators do?

The first thing is about the professionalism. Is that the goal for China legal education? Under the Opinions, the legal reform should connect to the people; the judicial reform should be for the people, on the people, and to the people, welcome the supervision from the people. The court should meet the demands of the people and we should establish good People's Court satisfied by the people. So the professionalism conflicts with the democratism in the dialogue of legal reform. The professional/elite education conflicts with the popular education in the disputes on the legal education. However, we can't deny the legal education must be kind of professional education. But maybe we should also emphasize the Chinese characteristic things in the future. So the question for our legal education is weather professionalism is our unique goal, what else, could they be thought as legal ethics we should teach.

The second thing is about the law faculties' ethics. When we focus on the legal

ethics issue in legal education, we should look at law professors themselves. In Chinese saying, “Good Moral is Teacher, Good Knowledge is Instructor”. But these years some of law professors involved in the academic scandals and else. So maybe we should let law professors in the experiential education to learn legal ethics firstly, then do same thing to our law students. From Dec. 12-22, 2008 Professor Beth Lyon of Villanova University School of Law in Philadelphia worked with my law school and helped us improve our clinical legal education. I was lucky to teach a class with her on Human Rights in Crisis. There two small things impressed me. Before the class, she asked me she would play a clip in which there are a little bit bad words, is that ok for our students, because she don’t want students contaminated by that. During the class, she showed the pictures on the Guantanamo prisoners tortured by the army. But she blurred all of these pictures, because she just wanted to describe the true story but not to disgust students. I admired her. She is so qualified to teach legal ethics in the experiential education for law students. So at this twist time, we should reconsider the ethics issue not only for the students but also for the teachers during the experiential education.

The last thing is about the legal faith. When we examine the three stages of China judicial reformation, which are restoration of judiciary (1978), reformation of judiciary (1997), reformation of judicial system (2002), by now we are continuing this key construction. From my point of view, we still need build up the legal faith. President John F. Kennedy once remarked that “[t]he basis of effective government is public confidence and that confidence is endangered when ethical standards falter or appear to falter.” That’s very true. If everyone loses the faith in law, where can we talk about the legal ethics, on the contrary, the legal ethics would play an important role in restoring the legal faith.

So the legal education, particular the experiential education, is critical in China. We should train our law students trusting the law and adhering to the ethics, meanwhile we should pursue the rule of law ideal and legal ethics with our students together. Lao Tzu once said “People who are not trustworthy can not live; State which is not trustworthy can not develop.” (人无信不立 , 国无信则衰) So the conclusion is the lawyer’s ethics in China legal education has a special meaning or a special attribute to our legal system, and the experiential education is a good way for teachers and students to understand and practice the ethics.