Methods of Experiential Education: Context, transferability and resources

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One of the most powerful arguments for the cross-cultural applicability of clinical legal education is its embrace of experience and the meaning we give to that experience. Because clinical education starts from a variety of experiences—those of the student, the client, the legal system, the educational system, and so on—and aims to be especially attentive to the way in which we are shaped thereby, it lends itself to developing in different substantive ways in different countries and cultures. Yet the process of clinical education may well transcend easily observed differences and provide important opportunities for cross-fertilization and exchange of ideas. We need to be attentive to the extent to which differences in culture will lead to different pedagogical choices, while, at the same time, being willing to explore the degree to which some of the insights of clinical education can transcend social, political and cultural barriers.

In this paper, I use the term “experiential education” rather than “clinical education” to emphasize this focus on experience, and to avoid some of the conceptual confusion that can arise when one attempts to mix educational technique and academic location into one all-encompassing term. Experiential education is a broad rubric under which clinical legal educators in the United States place a variety of forms of legal education. Conventionally understood, experiential education includes live-client, in-house clinical legal education; externship programs; and courses that in whole or significant part use simulations (often based on highly edited versions of cases that were “real” at one point) to teach lawyering skills and/or values. Although this definition could be contested in various ways, and could certainly be expanded to include other types of “experiences”—such as client-oriented activities for credit attached to academic courses; co-curricular moot court programs (at the appellate or trial level) or law journals (teaching the experience of writing and editing academic work); or academic programs that attempt to draw on students’ paid work experiences—this triumvirate of ideal type components of an experiential education program captures the range of programs that almost all would recognize as “clinical legal education.”

I describe these components as ideal types because many clinical programs in the United States combine aspects of all three forms of experiential education in one course. For example, at American University, Washington College of Law, the Criminal Justice Clinic is a two-semester clinical program in which students spend one semester of their fieldwork prosecuting cases under the supervision of a local prosecutor (externship component); one semester representing indigent criminal defendants under the
supervision of the law school’s clinical professors (live-client, in-house component); and two semesters in a seminar that runs concurrently with the fieldwork experiences in which the faculty make heavy use of simulations in criminal and other cases to teach such lawyering skills as interviewing, counseling, case theory development, negotiation, and trial-related skills (simulation component). The mix of in-house and externship components in the same course is somewhat unusual, but certainly linking one or the other component with a simulation-based seminar is now de rigueur in U.S. clinical legal education circles.

Each of these forms of experiential education has strengths and weaknesses, which perhaps explains why clinical legal educators often seek to combine one or more elements in their clinical classes, and why many U.S. law schools seek to have all three types of programs to various degrees. Live-client, in-house clinical programs provide (or at least can provide if properly structured) students with the unparalleled opportunity of representing real clients as the “first-chair” lawyer under the supervision of an experienced legal educator (the in-house clinician). For those of us who teach in this type of program, the experience of having a real client, who faces real consequences, can be transformative for law students. But in-house clinics may have a relatively limited range of legal problems to assign to students (especially if they are subject matter-specific clinics) and, in any case, are almost always geared toward representing indigent or otherwise under-represented clients. Such a limitation, although not a negative—indeed, it may help to achieve the clinic’s and law school’s pro bono and public service goals—may nevertheless lead to an under-emphasis on some kinds of legal problems that poor and under-represented clients do not routinely face. In-house clinical programs are also the most expensive to operate, because to provide responsible supervision to nascent attorneys-in-training clinical educators must have a low student:faculty ratio (most U.S. programs strive for a ratio of no more than 8:1).

Externship programs—defined here as programs in which law students perform their legal fieldwork under the supervision of a lawyer in practice who is not a full-time legal educator—can provide a far broader array of practice settings for students to experience. The breadth of potential practice settings (especially in large urban areas) is impressive even if, as is true in many U.S. law schools, externship sites are restricted to governmental or public interest/legal service settings. Students can learn firsthand how legal work is organized in the work place, how to receive effective feedback from supervisors, and how lawyers achieve their organizations’ substantive goals (e.g., to promote non-discrimination in hiring, or to work for environmental protection measures).

From the law school’s perspective, the student:faculty ratio can be much higher in externship programs because the law school faculty member is not responsible for supervising the student’s legal work on behalf of a client. Thus, it would not be unreasonable in a U.S. clinical externship program for a clinical teacher to teach a seminar of 20 students who were placed in a variety of external legal settings. Such an approach makes externship programs ostensibly more cost-effective than in-house programs.
But if the breadth of legal work is a plus for externships (when seen from a program-wide perspective), the students almost always are working for one or more experienced lawyers rather than serving as lead counsel on their own cases. In a good externship program, the student may be included in important lawyer-client meetings, and receive extensive feedback on his or her work (and how it fits within the larger context of the client representation). But the transformative potential present in the in-house context is missing.

In addition, the very strength of a program that emphasizes working under supervision in a real live law office with an active caseload suggests an important limitation: unlike an in-house clinic, the externship site’s primary focus is to produce the legal work that it is in business to perform. The lawyers working in the office are there primarily to serve as lawyers, and only secondarily to serve as teachers or mentors (let alone supervisors) of law students. Of course, some of these on-site supervisors may be extraordinary legal educators in fact (just as, conversely, some in-house supervisors may not be very good at providing clinical supervision), but from a structural standpoint one would not expect them to be as good at providing pedagogically sound clinical supervision as full-time law teachers specifically trained for that purpose. Moreover, even if the on-site supervisors are committed to providing high-quality supervision, the demands of their legal job—the need to file a brief on a short deadline or to prepare on short notice for an emergency hearing, for example—may cause the lawyers to have to jettison their best-laid plans of providing thoughtful and timely supervision to law students.

Simulation courses, the third prong of the experiential triumvirate, offer the advantage of allowing the clinical professor to identify discrete teaching goals and then design problems or simulations calculated to allow students the opportunity to achieve the contemplated learning outcomes. For example, if a law professor wants to teach his or her students about the importance of being empathetic toward one’s clients (perhaps by using the technique of active listening), the professor can devise or adapt an existing simulation that has a simulated “client” tell his or her narrative in a very emotionally charged way, such that empathy from the lawyer is called for. In a real case, such emotional issues might or might not be present, and the professor’s teaching goal might have to be adjusted to take into account specific developments in the case or in the lawyer-client relationship. Simulation courses are relatively inexpensive to run, and, indeed, are no more expensive (in terms of professorial time) than a substantive seminar or small course. Although it may be difficult to conduct simulations on a regular basis in very large classes (say 80-100 students), there are a variety of ways in which the professor can structure a simulation class to provide students with opportunities for structured, role-based learning.

Of course, the disadvantage of the simulation course should be clear: the course does not deal with live, ongoing cases. Not only is this limitation a pedagogical one—the students will almost certainly be less motivated in such a course than they would be in an in-house clinic with real cases, or an externship program with real cases—but also, of course, there is no opportunity to provide actual legal representation, and thereby serve
social justice and other law reform goals that many clinical programs believe are essential to their mission.

To this point, I have discussed the above forms of experiential education in a vacuum, without considering the overall context of legal education in the United States. That context is important to understand if any serious effort at adaptation of experiential education to China’s experience is to have any chance of success.

U.S. legal education, of course, is graduate-level education that follows at least four years of undergraduate training at the college or university level, and may also follow some period of time in which the law student has been in the work force or in pursuit of an advanced degree in a discipline other than law. Within the law school itself, even large classes emphasize a level of intellectual engagement and teacher-student interaction (the Socratic dialogue or case method) that is quite unfamiliar to a number of other legal educational systems around the world. Our Chinese colleagues have emphasized to us the traditional lecture style of much of Chinese legal education (which is offered at the undergraduate level), a passive form of teaching in which students are expected to absorb the information the professor presents without engaging the material in a critical manner.

Although many people have rightly criticized US legal education—indeed, clinical education began in no small part as an effort to reform traditional legal education—the fact remains that the foundation of first-year classes, in which at a minimum students can expect professors to call on them to recite the facts or the holding of the case under discussion, makes the more active form of education known as experiential education a less radical departure from the student’s prior pedagogical experience than would a Chinese clinical program compared to its lecture antecedents. For Chinese educational system, experiential education could be seen either as the newest and most attractive toy on the block, or alternatively as an ephemeral if interesting experiment that is unlikely to have any lasting effect on that system.

But assume for the sake of argument that an embrace of some form of experiential education makes sense for China to consider. Assume further that in a perfect—or at least a well-resourced world—a law school would want to have all three of the types of experiential education discussed above. Nevertheless, many law schools are faced with choices about which subset of these programs to offer. U.S. law schools certainly face these choices: historically, for example, many law schools chose to provide experiential education through externship programs because it was less expensive than in-house programs. In other cases, law schools not located in large urban areas have sometimes concluded that there are an insufficient number of appropriate placements (especially if restricted to non-profit settings) for a viable externship program. Simulation courses, while easier to offer in theory, might not be high on the list of needed courses for a faculty that was not otherwise imbued with the importance of role-based professional education.
Apart from outside constraints, financial and otherwise, what elements might go into a law school’s decision to focus on one form or another of experiential education? Here are some preliminary thoughts:

- What are the goals of the program (or the law school in which it is housed)? Some goals can only be achieved with certain forms of experiential education (e.g., social justice reform would not be directly promoted by a simulation-only program).

- Is there a sufficiently qualified group of law faculty, either currently employed or capable of being recruited, to provide the in-house supervision of actual legal work that is required in an in-house clinic? If the hiring of faculty is oriented toward people with strong academic backgrounds but little or no experience in legal practice, the faculty will not be in a position (at least not without some collaborative arrangement with a lawyer(s) in practice) to provide the level of supervision needed.

- If the law school has, or is willing to hire, faculty with the requisite practice experience to serve as in-house supervisors, will these faculty members “look enough like” other faculty members to be fully integrated into the law school’s program? U.S. law schools have struggled with this problem since the introduction of modern clinical education in the late 1960s and early 1970s. Can a law school have a good clinical program if the faculty who teach in it are considered “second-class citizens”?

- Does the law school have the financial wherewithal to hire clinical faculty, at salaries and with perquisites comparable to those of non-clinical faculty, who will only be able to serve a much smaller number of students than their non-clinical counterparts? Will clinical faculty get sufficient teaching credit for their work to make the intensive nature of in-house clinical supervision at all viable?

- If the law school chooses to establish an externship program (either as its first choice, or because of concerns with the above problems), will it have sufficient authority to reject placements that do not meet the law school’s pedagogical goals. In many U.S. law schools, for example, judicial externships have been problematic because law schools have not acted as if they believed they could tell a federal judge that he or she could no longer receive extern students because the judge did not interact with the law students directly but only through their post-graduate law clerks.

- If the law school chooses to establish an externship program, is it committed to having some kind of academic program at the law school (for example, a seminar or small- to medium-sized class in which all of the students are in or another external placement) to support the fieldwork?
Will the law school be able to establish clear linkages between law school faculty and on-site externship supervisors?

- If the law school determines that legal or social justice reform are part of its mission (or if it concludes that provision of legal services to clients is a high priority), will an externship-only program provide sufficient recognition for the law school’s role in meeting this goal, or will the fieldwork sites take principal credit for such activities?

- Is there a risk to the law school and its clinic taking on cases that are seen as “too political”? If so, will the law school be in a position to support an in-house clinic that takes controversial positions? If not, is there some advantage to being associated with a well-respected NGO that could serve to deflect some of the political heat?

- If the law school and its clinical program decide that a primary goal is to train lawyers to work in a particular area of law (e.g., in labor rights or environmental protection), can it meet that goal sufficiently if students are placed in a variety of field placements in varied subject matter areas? Are there a sufficient number of NGOs and other field sites to be able to accommodate students in a particular area of the law? If there is no environmental NGO in the surrounding area, for example, the law school might need to establish its own in-house clinic to address environmental issues.

- How will the local community respond to a new in-house program? Will potential clients trust law students to provide adequate representation? How will the local bar (and judiciary) respond to the presence of an in-house clinical program? Will they embrace the program, taking some pride in and seeking out ways to “teach” the students about practical legal concerns? Or will they feel threatened (or bothered) by a program that may lead to unwelcome attention on the legal system?