

The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture

*By David M. Siegel**

Recent criticism of American legal education has focused on its being theory-driven rather than practice driven, which either produces or reinforces a divide or gap between theory and practice. Yet two features of American legal education expressly draw upon experiential learning, one directly by sending students into experiential learning situations (legal clinics) and the other indirectly by bringing instructors who are engaged full-time in active practice into the classroom (*i.e.* adjunct faculty). If skills development is a feature of American legal education, to what degree can, or should, this be transplanted to other systems of legal education? Are American experiential techniques of legal education meaningful elsewhere?

While both legal clinics and adjunct faculty are virtually universal in penetration of American legal education, they have ambivalent positions in the academy. To the extent that either adjunct faculty or legal clinics respond to the criticism that American legal education does not adequately remedy the theory/practice divide, to what degree is either transplantable? Another approach to the question might be: to what degree are these methods of instruction a cause, or an effect, of the adversarial system?

Part A of this article briefly reviews data describing the role of adjunct and clinical faculty in American legal education to show the position each has as nominally important yet distinctly secondary in the pedagogical framework. Part B briefly reviews recent evaluations of attempts to transplant American educational approaches, and suggests legal culture as an explanation for the results of these efforts.

A. Adjunct and Clinical Faculty in American Legal Education

American legal education is undergoing extensive self-study.¹ Virtually all of the seven basic recommendations of the recently released report of the Carnegie Foundation for the

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¹ WILLIAM M. SULLIVAN, ET AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, Carnegie Foundation for the Advancement of Teaching (2007) (hereafter "CARNEGIE REPORT").

Advancement of Teaching, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, address integrating the experiential or practical aspects of legal education with doctrinal ones. For example, Recommendation 4 (“Support Faculty Work Across the Curriculum”), suggests “[b]oth doctrinal and practical courses are likely to be most effective if faculty who teach them have some significant experience with the other, complementary area.”² Similarly, Recommendation 5 (“Design the Program so that Students—and Faculty—Weave Together Disparate Kinds of Knowledge and Skill”) observes “. . . in teaching for legal analysis and lawyering skills, the most powerful effects on student learning are likely to be felt when faculty with different strengths work in a complementary relationship.” These recommendations conflict with the present status of adjunct and clinical faculty in important respects.

I. Adjunct Faculty

Adjunct faculty, lawyers and judges with full-time occupations who also teach part-time in law schools in non-tenure track positions, have a growing but ambivalent position in US legal education. Recent surveys suggest roughly one quarter of courses in US law schools are taught by adjuncts,³ and that economic pressures will almost certainly expand their use. Lander surveyed fifty-six law schools’ use of adjunct faculty in the Spring 2007 semester,⁴ and found a median use of adjuncts in 24% of classes. In terms of subject matter, at most schools a majority of trial advocacy classes were taught by adjuncts, as were specialty courses such as sports law, entertainment law, bankruptcy, and to a growing degree advanced corporate and tax courses.⁵ He confirmed that the use of adjuncts was increasing.

Against this growth are key systemic factors that limit the role for adjuncts. While law school accreditation rules of the American Bar Association (ABA) encourage including “practicing lawyers and judges as teaching resources to enrich the educational program,”⁶ they also require that “full-time faculty shall teach the major portion of the law school’s curriculum, including substantially all of the first one-third of each student’s coursework.”⁷

² *Id.*, summary at 7.

³ David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 UNIV. OF DAYTON LAW REV. 285 (2008) (citing 2004 survey, and conducting 2008 survey) (hereafter “Lander”).

⁴ Lander, *supra* note 3, at 288. Lander sent a survey to all law schools in the AALS Directory; fifty-six responded.

⁵ *Id.*

⁶ AMERICAN BAR ASSOCIATION, Standard 403(c) (“Instructional Role of Faculty”), 2008-2009 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS. Available at <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%204.pdf> (last accessed on 14 June 2009) (hereafter “ABA STANDARDS”).

⁷ ABA STANDARDS, Standard 403(a).

ABA accreditation rules count adjuncts as only 2/10 of a full time faculty member for calculating student-faculty ratio (a criteria for accreditation), and limit to 20% for student-faculty ratio purposes the total proportion of faculty that can be adjuncts.⁸

Perceptions about advantages and disadvantages of adjunct faculty are well-established, but they are supported by very little data. Adjunct faculty are thought to bring areas of specialized expertise to the curriculum, “real world” or practically-oriented approaches to their subjects, highly relevant experience for practice or simulation-based courses, teaching enthusiasm, and networking opportunities for students.⁹ Drawbacks may include limited availability to students as part-time teachers, reduced teaching quality vis-à-vis full time faculty, and the secondary effects of having a subject area dominated by part-time teachers such as reduced scholarship and reduced institutional attention to these subjects.¹⁰ There has been very little systematic study or collection of data on the effects of adjunct teaching in law schools.

There has been greater study of the use of part-time, non-tenure track faculty in non-professional education, where they are used much more frequently than in legal education.¹¹ Use of part-time, non-tenure track instructors in undergraduate education, where they may be graduate students headed to an academic career, may not be directly comparable to their use in legal education but it offers some data. Part-time, non-tenure track faculty have been used in the US for over a century,¹² with significant increases after World War II particularly in the 1970s and 1980s, due to their low cost compared to tenure-track faculty.¹³

Extant data do not support significant distinctions between outcomes, either perceived or measurable, between part-time and full-time faculty. Comparisons of student evaluations of part-time and full-time faculty in eight different social science departments at a large public university (Boise State) show “no significant differences in students’ evaluation of

⁸ ABA STANDARDS, Interpretation 402-1(1) to Standard 402 (“Size of the Full-Time Faculty”).

⁹ Lander, *supra* note 3, at 289-90.

¹⁰ *Id.*, at 291-92.

¹¹ A 2003 by the National Center for Education Statistics found 43.7 percent of instructional faculty at degree-granting institutions in the US were part-time faculty. National Center for Education Statistics, 2005. *Full-time and part-time instructional faculty and staff in degree-granting institutions, by field and faculty characteristics: Fall 1992, Fall 1998, and Fall 2003 Table 232*. US Department of Education, Institute of Education Sciences. Available at http://nces.ed.gov/programs/digest/d05/tables/dt05_232.asp (last accessed on 14 June 2009).

¹² Kate Thedwall, *Nontenure-Track Faculty: Rising Numbers, Lost Opportunities*, 143 NEW DIRECTIONS FOR HIGHER EDUCATION (Fall 2008).

¹³ *Id.*, at 13.

instruction or in course grade distributions.”¹⁴ In 2004, Bettinger and Long compared outcomes for undergraduates at twelve public universities in Ohio who had taken courses with full-time faculty to those who had taken the same courses with part-time instructors (adjuncts and graduate students).¹⁵ They found that the use of adjuncts and graduate student instructors reduces the number of courses a student later takes in the same subject and the likelihood that the student will major in that field. However, “[t]he results suggest that adjuncts and graduate assistants negatively impact enrolments but not student success in subsequent courses.”¹⁶

II. Clinical Instruction

Clinical instruction, virtually universal in US law schools, offers a direct method of transcending the theory/practice divide in legal education, and its history has been thoroughly set forth elsewhere.¹⁷ It offers application of concepts and skills to “real world” problems, opportunities for social change, engagement with persons who are underserved, and a chance for students to see the larger consequences of their actions. Yet it too has an ambivalent position in American legal education. While the ABA requires that accredited law schools offer “substantial opportunities” for “live-client or other real-life practice experiences,”¹⁸ it does not mandate that students participate in them as a requirement of graduation and it makes clear that accredited schools need not offer them to every student.¹⁹

A 2007-2008 study by the Center for the Study of Applied Legal Education, surveying 188 ABA-accredited US law schools, suggests that clinical education, either “in-house” with “live clients” or in external “field placements,” is a significant feature of US law students’ experience measured by their participation *but not* as measured by its formal integration into the curriculum. The study found that only 9% of responding schools had a graduation requirement that students participate in a legal clinic, either in house or in a field

¹⁴ R. Eric Landrum, *Are there Instructional Differences between Full-time and Part-time Faculty?*, 57 COLLEGE TEACHING 23, 25 (Winter 2009).

¹⁵ Eric Bettinger and Bridget Terry Long, *Do College Instructors Matter? The Effects of Adjuncts and Graduate Assistants on Students’ Interests and Success*, NBER Working Paper No. 10370 (2004).

¹⁶ *Id.* at 25-26.

¹⁷ Andreas Bückner and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 GERMAN L. J. 575, 578-609 (2008).

¹⁸ ABA STANDARDS, *supra* note 6, Standard 302(b)(1) (“Curriculum”) (“The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.”).

¹⁹ *Id.*, Interpretation 302-5.

placement.²⁰ Despite the optional status of clinic participation at the overwhelming majority of schools, estimates by responding schools of student participation rates in at least one applied legal education experience by graduation were a median of 26-30% for both in-house clinics and field placements.²¹ Nearly two-thirds of responding schools (62%) reported an increase over the past five years in student demand for both types of applied legal education.²²

B. Transplanting Methods of Instruction

As has been observed before, law is practice and theory, it is doing and thinking, and there has been persistent disagreement as to which aspect of law should predominate in education of lawyers.

The debate over the skills and values required to be an effective lawyer is as old as the profession itself. The history of legal education in the United States is a reflection of that debate. While much has been written about the fundamental skills and values needed to practice law, there is no agreed upon list that all American law schools embrace.²³

Despite the recent criticisms that American legal education lacks integration of doctrine and skills, or theory and practice, in comparison to continental European approaches, it does integrate these components.²⁴ American legal education, however, perhaps uniquely, requires no period of practical training.²⁵

To what degree do these differences in educational approaches limit the transferability of experiential techniques? Are the educational approaches a function of the legal systems or the legal cultures? "One of the most over-looked differences between practical training

²⁰ David A. Santacrose & Robert R. Kuehn, *Report of the 2007-2008 Survey*, Center for the Study of Applied Legal Education at 10. Available at: <http://www.csale.org/CSALE.07-08.Survey.Report.pdf> (last accessed 14 June 2009). 145 schools (77%) responded to the "Master Survey." *Id.* at 1.

²¹ *Id.* at 10-11.

²² *Id.* at 11-12.

²³ Andreas Bückner and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 GERMAN L. J. 575, 589 (2008).

²⁴ *Id.* at 609-610.

²⁵ Marta Skrodzka, et al, *The Next Step Forward - The Development Of Clinical Legal Education In Poland Through A Clinical Pilot Program In Bialystok*, 2 Col. J. East. Eur. L. 56, 71-72 (2008) (noting practical training before second level examination in Germany, pupillage year in the UK, and three year period for acquisition of practical skills in Poland).

models is the legal education system within which the clinical education programs must function.”²⁶

The application of concepts and skills to “real world” problems, the potential for social change, and engagement with the underserved have been recognized as beneficial when clinical instruction is offered outside the US as well.²⁷ The experience of introducing clinical instruction outside the US, particularly in countries with civil law systems, has raised several questions concerning the applicability of the approach.

Clinical instruction has gone abroad, mostly through US clinical instructors working with non-US law schools in what Wilson has called the “Global South” (*i.e.*, Latin America, Africa, much of Asia and politically evolving areas of Russia and former Soviet-dominated countries of Eastern Europe).²⁸ This history has been thoroughly set out²⁹ as successive waves of US legal academics have participated in efforts to export American legal concepts and educational approaches.

Much of the experience with the transplantation of clinical education has been US educators offering clinical courses, or collaborating with non-US instructors, in developing clinical programs outside the US. Often this involved work in countries with a newly democratic legal system, or a newly independent legal system, in which the growth of legal education that explicitly promoted social change was a goal. How meaningful is any effort to transplant aspects of legal education thought to bridge the theory/practice divide, such as experiential learning through clinics and experiential instruction through adjuncts, in systems of legal education in countries with stable democratic traditions? How well do experiential work in developing hybrid legal systems or changing a legal culture from exclusively one model to another?³⁰

²⁶ Marta Skrodzka, *at al*, *The Next Step Forward - The Development Of Clinical Legal Education In Poland Through A Clinical Pilot Program In Bialystok*, 2 *Col. J. East. Eur. L.* 56, 68 (2008).

²⁷ Tatiana Selezneva, *Innovative Legal Education and Its Role in Developing the State Based on the Rule of Law: Analysis of the U.S. Law Schools Academic Experience and the Prospects of its Implementation in the Republic of Belarus*, 58 *J. LEGAL EDUC.* 122, 138 (2008) (purposes of legal education include “guide the student in how to practice active social and democratic modes of behavior”); Andreas Bücker and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 *GERMAN L. J.* 575, 611-613 (2008).

²⁸ Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 *CLIN. L. REV.* 515, 518 n. 8 (2002).

²⁹ Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 *Clin. L. Rev.* 615 (2006).

³⁰ Oscar G. Chase, *Legal Processes and National Culture*, 5 *CARDOZO J. INT’L AND COMP. L.* 1 (1997) (suggesting efficiency advantages of German civil procedure would impose other costs on the American legal system because they are premised on features of German culture).

These questions increasingly focus not only on the specific processes and rules of a legal system but instead on its underlying culture. It is easy to imagine simply using methods of instruction from one country in another, but if the understanding, expectations and frameworks of students, educators, and legal actors in the country do not accommodate this method, the transplantation will not be meaningful. Nelken has written thoughtfully about the concept of legal culture as an explanatory mechanism for comparing law on the ground, or as it is actually implemented, and a similar use might be made of legal culture in connection with studying educational approaches to law.³¹ Legal culture as expressed in American legal education that has in the past century generally maintained a strict division between practice and theory (or even practice and instruction), may be useful way of understanding systemic choices.

Recently, Genty has canvassed his own experiences and those of others to identify five core differences between civil and common law “cultures,” either as manifested in their legal systems, their systems of legal education, or both, and the implications of these differences for effective clinical instruction.³² Genty notes these five differences between broadly defined civil law and common law legal cultures:

- (1) Importance in civil law cultures of substance over process;
- (2) Importance in civil law cultures of mastering, rather than creatively interpreting, legal doctrine;
- (3) Limited importance in civil law cultures of attorney-client relationship;
- (4) Importance in civil law cultures of an informed authority figure; and
- (5) The lack of a concept in civil law cultures of cause lawyering.³³

Genty suggests civil law countries will need to adapt clinical instruction to their own cultures by approaching it as a “laboratory experiment,” in which the “scientific” principles in a specific area of doctrine can be tested.

Others attempting to bring American-style legal instruction, beyond just clinical instruction, to civil law audiences have experienced resistance to both parts of the system and to its underlying concepts. Cavise has detailed resistance of Latin American lawyers from systems moving toward an increasingly party-based approach using orality who were presented simulation and trial advocacy-type courses.³⁴ These lawyers resisted both

³¹ David Nelken, *Using the Concept of Legal Culture*, Center for the Study of Law and Society Jurisprudence and Social Policy Program (2004) Available at <http://repositories.cdlib.org/csls/lss/20> (last accessed on 14 June 2009).

³² Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131 (2008).

³³ *Id.*, at 149-152.

³⁴ Leonard Cavise, *Essay: The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785 (2007).

adversarial institutions (*e.g.*, the jury system, an adversarial judge who acts as referee rather than rather directing the trial, and plea-bargaining) and the underlying concepts of the adversarial system (*e.g.*, the suggestibility of cross-examination, the responsibility of parties to investigate their cases and to develop a theory of the case).³⁵ Cavise's conclusion: "At issue is not only procedural and statutory reform but also a complete overhaul of the culture of the courtroom and the role of lawyers."³⁶ These anecdotal observations suggest that as increased efforts are made to bridge the practice/theory divide, increased attention will also have to be given to the specific legal culture in which the bridge is to be built.

³⁵ *Id.* at 803-812.

³⁶ *Id.* at 815.