Curriculum Reform in American Legal Education: Potential Lessons for Reform of Legal Education in Japan

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Introduction

Although we often think of the curriculum at American law schools as essentially unchanged since the advent of the Langdellian method at Harvard Law School in the late 1800's,[1] legal education in the United States is very much a "work in progress." The classical use of Socratic method in large amphitheaters is more the exception than the rule in today's American law school environment. Emphasis on the skills and values needed by today's lawyer has, if not replaced an historical focus on the teaching of legal reasoning, modified the curriculum in fundamental ways.

In this paper I will discuss the developments in curriculum at American law schools and the potential lessons as Japanese lawyers, educators and government officials reconceptualize the training of lawyers in Japan. In doing so, I will highlight the changes in the standards governing the accreditation of American law schools and the extent to which these changes reflect or mandate recent curricular developments. I will then conclude with a discussion of clinical legal education, the model of legal education that most accurately reflects a coherent approach to the development of skills and values in law students that they will require to be effective and responsible attorneys in whatever form of practice they engage.[2]

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1) The law school model developed by Dean Christopher Columbus Langdell at Harvard Law School was based on high student/faculty ratios, large classes, low per-student expenditures and, in consequence, on nonexperiential pedagogy and tuition-driven financing. **See** John J. Costonis, **The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education,** 43 J. **Legal Educ.** 157, 157-66 (1993).

2) Unlike in Japan, it is common in the United States for lawyers to practice in a variety of settings. For example, the author was a political appointee under President Jimmy Carter, was a former Maryland Assistant Attorney General, and worked for many years as a civil rights lawyer. He worked as a public defender, as director of a public interest law firm, as a lobbyist, as a juvenile commissioner, and as a legal services attorney providing civil representation to low-income clients.

Reforming the goals of American legal education

One cannot evaluate the adequacy of curriculum without first defining the educational outcomes that that curriculum is supposed to achieve in students. And, those outcomes cannot be identified without first addressing the broader issues of the roles that law and lawyers should play in society.

The questions of the roles of law and lawyers in American society are very much in flux. The United States has recently emerged from an anti-lawyer period coinciding with the so-called Republican revolution associated with the election of Congressman Newt Gingrich as Speaker of the House of Representatives. During this period, access to the legal system for the poor was greatly restricted through cutbacks in funding for government-funded legal services for the poor and in the imposition of other restrictions on access to lawyers and courts. At the same time, the place of lawyers as elected representatives of the people was also denigrated.

Now that American society has begun to emerge from this period, there appears to be a growing consensus that lawyers remain a critical force in preserving and furthering democratic goals. And, if there are perhaps enough lawyers in American society, there are still far too few lawyers for many segments of that society.

Changes in the goals of American legal education have been alternately reflected in and mandated by changes in the American Bar Association Standards for Approval of Law Schools. Chapter 3 of those Standards contains the requirements for the "Program of Legal Education." Standard 301 defines the objectives for the Program of Legal Education. The current version of this standard provides as follows:

> Standard 301. OBJECTIVES.
>
> (a) A law school shall maintain an educational program that prepares its graduates for admission to the bar and to participate effectively and responsibly in the legal profession.
>
> (b) A law school shall maintain an educational program that prepares its graduates to deal with current and anticipated legal problems.
>
> (c) A law school may offer an educational program designed to emphasize certain aspects of the law or the legal profession.

This standard did not always contain these requirements. The history of the development of this standard is instructive on the development of American legal education.

For example, prior to 1999, Standard 301(a) provided as follows:

> Standard 301. OBJECTIVES.
>
> (a) A law school shall maintain an educational program that is designed to qualify its

graduates for admission to the bar and to prepare them to participate effectively in the legal profession.

The current standard changed the requirements for law schools in two fundamental ways. First, the change from "designed to qualify its graduates for admission to the bar" to "prepares its graduates for admission to the bar" reflects a goal that must be achieved and not merely an intent embodied in the design of the curriculum.[3] Second, and probably more important, the change from "participate effectively" in the pre-1999 standard to "participate effectively and responsibly" in the current standard reflects a requirement that law school education transmit not merely the skills that will allow graduates to practice law effectively, but also that law school education must transmit the values that will allow graduates to practice law responsibly.

The notion that law schools have the responsibility to teach "skills" and "values" to law students is a relatively recent development in American legal education. Probably the central value of lawyers—professional responsibility or legal ethics—did not even become a fixture in American law schools until the Watergate scandal engulfed American society.[4]

One of the characteristics that nearly every individual who was criminally involved in the Watergate cover-up shared, from the President on down, was a legal education. This fact was extremely embarrassing to the legal community and spurred it into action to rethink its underlying values and training. Thus, in response to the scandal, the American Bar Association amended its standards for legal education to require that every law school offer instruction in professional responsibility.[5] If smart lawyers from good law schools were so susceptible to breaking the law,[6] the thinking went, it must be because the ethical values of the profession had not been sufficiently inculcated in these individuals when they were students. This was one of the first times that the standards actually defined the content of the instruction that law schools had to provide.

Another major event in the recent development of curriculum at American law

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3) Unlike in Japan, passage of the bar in the United States is largely a matter of persistence. Although passage rates vary from approximately 30 percent to approximately 80 percent on the various state bar examinations, the passage rate for persons who flunk the bar initially is nearly 100 percent by the time that the bar examination is taken for the third time.

4) The Watergate scandal involved a break-in by Republican operatives into the headquarters of the Democratic National Committee in the Watergate Hotel in Washington, D. C. and the cover-up of that break-in by members of the administration of President Richard Nixon.

5) Standard 302(b) of the Standards for Approval of Law Schools of the American Bar Association Section of Legal Education and Admissions to the Bar provides as follows:
A law school shall require of all students in the J. D. degree program instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction.

6) Graduates of some of the best American law schools were included among the Watergate defendants.

schools was the issuance of the MacCrate Task Force Report. In 1989, the Section of Legal Education and Admission 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 in 1987-88, the Task Force issued its report in 1992.[7]

The **MacCrate Task Force Report** affirmed that education in lawyering skills and professional values should be central to the mission of law schools.[8] The Report also acknowledged the curriculum changes leading to the current stature of skills and values instruction in law schools.[9] At the same time, the **Report** noted that "[m]uch remains to be done to improve the preparation of new lawyers for practice."[10] The Task Force therefore urged that at each law school:

> the 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.[11]

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;
> - reflective evaluation of the student's performance by a qualified assessor . . . .[12]

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7) ABA **Task Force on Law Schools and the Profession: Narrowing the Gap, Statement of Fundamental Lawyering Skills and Professional Values** (1992) (hereinafter **Macrate Task Force Report**)..

8) **See Maccrate Task Force Report, supra** note 7, at 6.

9) "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. **Maccrate Task Force Report, supra** note 7, at 6.

10) **Maccrate Task Force Report, supra** note 7, at 266; **see also** Bryant G. Garth & Joanne Martin, **Law Schools and the Construction of Competence,** 43 J. **Legal Educ.** 469 (1993).

11) **Maccrate Task Force Report, supra** note 7, at 266.

12) **Maccrate Task Force Report, supra** note 7, at 331 (item six).

These characteristics define clinical legal education in American law schools.

After the issuance of the MacCrate Task Force Report, a conference was held to consider the implications of the MacCrate Report.[13] Former ABA President Talbot "Sandy" D'Alemberte delivered a speech at the conference that was characterized as having "unleasing a thunderbolt criticizing the direction [legal education] is taking in the United States."[14] 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.[15] 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.[16]

Until August 1993, Standard 301(a) simply required that "[a] law school shall maintain an education program that is designed to qualify its graduates for admission to the bar."[17] In August 1993, largely as a result of the MacCrate Report,[18] the ABA House of Delegates amended Accreditation Standard 301(a) by adding the italicized language: "A law school shall maintain an education program that is designed to qualify graduates for admission to the bar **and to prepare them to participate effectively in the profession.**"[19] The new focus on effective participation in the profession necessitated changes in the law

13) 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.

14) Daniel B. Kennedy, **Fire and Brimstone,** A. B. A. J., Dec. 1993, at 96.

15) 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 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?'"

Daniel B. Kennedy, **Fire and Brimstone, supra** note 14, at 96.

16) 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." Kennedy, **supra** note 14, at 96. 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 gretest future alternatives by pursuing such jobs. **Id.**

17) **Maccrate Task Force Report, supra** note 7, at 261. Since the goal of legal education should involve more than simple passage of a bar examination, the MacCrate Task Force proposed to add the following language to standard 301(a): "and to prepare them to participate effectively in the legal profession." **Id.** At 262.

18) 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.

19) ABA **Standards for Approval of Law Schools and Interpretations** Standard 301(a) (1993) (emphasis added).

school curriculum and in teaching methods to realize this goal.

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 . . . .[20]

As a result of forces both within and outside of legal academia, important changes had been made in defining the objectives of American legal education. Many more changes would need to be made to reflect these changes in objectives in the content of American legal education.

Reforming the content of American legal education

Just as Standard 301 defines the objectives for American legal education, so Standard 302 defines the curriculum at American law schools. And, just as Standard 301 has been changed substantially over the past ten years to reflect a different consensus on the objectives for American legal education, so Standard 302 has been changed to reflect the means by which those objectives are to be achieved. Standard 302 now provides as follows :

Standard 302. CURRICULUM.

(a) A law school shall offer to all students in its J. D. program :

(1) instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession ;

(2) at least one rigorous writing experience ; and

(3) adequate opportunities for instruction in professional skills.

(b) A law school shall require of all students in the J. D. degree program instruction

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20) **ABA Reformulates Ancillary Business Rule, Reaffirms Support for Universal Health Care,** 62 U. S. L. W. 2497, 2500 (Feb. 15, 1994). This resolution was drafted by the Illinois State Bar Association to respond to the MacCrate Report. **Id.**

in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction.

(c) The educational program of a law school shall provide students with adequate opportunities for study in seminars or by directed research and in small classes.

(d) A law school shall offer live-client or other real-life practice experiences. This might be accomplished through clinics or externships. A law school need not offer this experience to all students.

(e) A law school should encourage and provide opportunities for student participation in pro bono activities.

(f) A law school may offer a bar examination preparation course, but may not grant credit for the course or require it as a condition for graduation.

Standard 302(a)(1) previously required "instruction in those subjects generally regarded as the core of the law school curriculum." Now it requires "instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession." Although there was never a definition of the term "subjects generally regarded as the law school curriculum," most faculty members and law school administrators included such courses as contracts, civil procedure, criminal procedure, property, torts, evidence, and similar courses within that definition. The emphasis under the prior standard 302 was on the substantive label of the course. By contrast, under the revised standard 302, the emphasis is on the lawyering skills and values that students will develop through the course.

Another significant change in the program of legal education is highlighted by the requirement that law schools offer to all students "adequate opportunities for instruction in professional skills." In 1980, the ABA issued what was then Interpretation 2 of Standard 302(a)(iii).[21] This interpretation provided that "[a] law school's failure to offer adequate training in professional skills, whether through clinics or otherwise, violates Standard 302(a)(iii).[22] Thus, at least since 1980, provision of "adequate" professional skills training

21) The Council on Legal Education's interpretation of Standard 302 was approved at the August 1980 meeting. The vote was preceded by a discussion of lawyer competency and the recommendations of the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts. This Committee is commonly referred to as the Devitt Committee after Judge Edward J. Devitt, chairman of the Committee. **Susan K. Boyd, The ABA'S First Section: Assuring a Qualified Bar** 117 (1993).

22) **ABA Standards for Approval of Laws Schools and Interpretations** Interpretation 2 of Standard 302(a)(iii) (1991). Standard 302(a)(iii) has not been interpreted to require law schools to provide clinical courses for all students wishing to enroll. Interpretation 4 of Standard 302(a)(iii), issued in February 1990, provided: "There is no ABA ruling that a student requesting enrollment in ↗

has been an explicit requirement of that standard.[23]

Reforming teaching in American legal education

The changes in the accreditation standards had the potential to herald a new era in American legal education in which legal educators would first contemplate the outcomes they wanted to produce through three years of full-time legal education (or four years of part-time legal education).[24] Once a consensus was developed over educational outcomes (i.e., the skills and values students should develop in law school), legal educators would then design a curriculum that would achieve those educational outcomes. Then, legal educators would use innovative teaching techniques within that curriculum to maximize the likelihood that educational outcomes would be achieved.

Unfortunately, that process never took place at most American law schools. Instead, most law schools started with the structure that has been in place in American legal

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an advocacy course must be admitted to that course. The Standard in question states merely that the law school shall offer training in professional skills." ABA **Standards for Approval of Laws Schools and Interpretations** Interpretation 4 of Standard 302(a)(iii) (1991). This interpretation is now reflected explicitly in Interpretation 302-2 (1996).

23) As early as 1976, the Council on Legal Education of the American Bar Association considered a proposal to amend accreditation standards to require that all schools provide courses in trial advocacy. BOYD, **supra** note 21, at 116. However, that proposal was rejected on the basis "that Standard 302 already required that law schools offer 'training in professional skills.'" **Id.** The issue of skills training in law schools was revisited in 1979 by a Task Force of the Section of Legal Education and Admissions to the Bar of the American Bar Association. **Id.** This task forced, chaired by Roger C. Cramton, then Dean of Cornell Law School, recommended that law schools consider "a full range of the qualities and skills important to professional competence." **Id.** The task force recommended that law schools improve their performance in "(a) developing some of the fundamental skills underemphasized by traditional legal education; (b) shaping attitudes, values, and work habits critical to the individual's ability to translate knowledge and relevant skills into adequate professional performance; and (c) providing integrating learning experiences focuses on particular fields of lawyer practice." ABA **Sec. Legal. Educ. & Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools** 14 (1979).

24) Nearly all students in American law schools have earned an undergraduate degree at a four-year college or university before entering law school. However, under the ABA Standards of Approval of Law Schools, the opportunity exists for a student to apply for admission without an undergraduate bachelor's degree. Standard 502 provides as follows:

Standard 502. EDUCATIONAL REQUIREMENTS.

(a) A law school shall require for admission to its J. D. degree program a bachelor's degree, or successful completion of three-fourths of the work acceptable for a bachelor's degree, from an institution that is accredited by a regional accrediting agency recognized by the Department of Education.

(b) In an extraordinary case, a law school may admit to its J. D. degree program an applicant who does not possess the educational requirements of subsection (a) if the applicant's experience, ability, and other characteristics clearly show an aptitude for the study of law. The admitting officer shall sign and place in the admittee's file a statement of the considerations that led to the decision to admit the applicant.

education for the past century and attempted to minimize alterations in that structure. That is not to say that there have not been significant changes in legal education in the past century. However, those changes have largely developed from outside the academic community and have only grudgingly been accepted by many within the academic community. Perhaps the most significant example of those changes relates to clinical legal education.

Most law schools still have a program of legal education that looks something like this: **First Year:** Torts, Contracts, Civil Procedure, Property, Criminal Law, Legal Writing and Research; **Second Year:** Constitutional Law, Evidence, Criminal Procedure, Wills and Estates, Business Associations, Externships, Professional Responsibility; **Third Year:** Electives, Clinic. The first year curriculum is ordinarily required at most schools. The second year curriculum usually is made up mostly of courses classified as electives, but this is somewhat misleading. Although a particular course may not be formally required by the faculty for graduation, the fact that the subject matter is included on most bar examinations means that nearly all students will take that course before graduation.

At the same time, American legal educators have begun to rely less and less on the Socratic method as a form of teaching. Although there are still many adherents to this method who romanticize the effectiveness of this teaching technique,[25] no one has ever demonstrated that this approach is really effective as a teaching technique. The theory is that as a teacher engages a student in Socratic dialogue all of the other students will share in that dialogue and learn how to reason effectively along with the student "on the spot." In fact, the advent of the computer in the American classroom has allowed even casual observers to discover students not only not engaged by extension in the Socratic dialogue but instead surfing the internet, checking their stock portfolios on the web, and playing computer games. The Socratic method in the large classroom pioneered by Langdell at Harvard Law School is an inexpensive way of running a law school, but no one has shown that it is an effective way of teaching students to become lawyers.

In fact, what many advocates of the Socratic method are really talking about when they use the term "Socratic method" is a form of education that is better described as "directed dialogue."[26] Whereas the Socratic method often seems like a never-ending series of questions posed by a professor who already knows the answers, "directed dialogue" provides an opportunity for an entire class to engage in a joint and non-hierarchical search for meaning and truths.[27] It also is a far gentler method of intellectual engagement than

25) In the paper he presented on the occasion of the 100th anniversary of the Kyoto University Faculty of Law, Carl Schneider characterized the Socratic method "as crucial a feature of American legal education as any other, and perhaps the feature best suited for export." Carl E. Schneider, **On American Legal Education** (undated paper delivered at Kyoto University Faculty of Law) at 7.

26) Schneider acknowledged this when he wrote, "Today, the Socratic method is used in many ways, but at its core is the idea that the professor best spends class time by leading a probing discussion, not by lecturing." Schneider, **supra** note 25, at 7.

the stereotypical use of the Socratic method described in the American movie, "The Paper Chase," about a student's experience in his first year at Harvard Law School.

The advent of experiential learning

The role of experiential learning in developing skills and values required for responsible and effective lawyering dates back in the United States to at least the early 1930s. In 1933, Jerome Frank wrote a seminal article that would become almost a blueprint for clinical educators thirty-five years later.[28] In the article Frank explained that clinical education helps students see the human side of the administration of justice, including: how juries decide cases; the uncertain character of the "facts" of a case; how legal rights often turn on the faulty memory, bias, or perjury of a witness; the effects of fatigue, alertness, political pull, graft, laziness, conscientiousness, patience, impatience, prejudice, and open-mindedness of judges; the methods of negotiating contracts and settlements; and the nature of draftsmanship.[29] This theoretical analysis would take life in the late 1960s when CLEPR, the Council on Legal Education for Professional Responsibility, provided the financial impetus clinical legal education needed to take root in American legal education.[30]

Today there are three major types of experiential learning on display in American law schools. These three forms of experiential learning are simulations, externships and clinics. Together they have had a dramatic effect on the development of skills and values in law students.

Simulations

Simulations are exercises in which lawyering skills and values must be developed and applied in a fictional factual context designed by the instructor. These exercises are ordinarily based on and track real-life cases. However, because the exercises are artificial and because the interests of real-life clients are not at stake, students can be given wide latitude in the exercises and greater faculty-student ratios can be tolerated.

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27) This type of interactive approach also encourages students to continue the practice of questioning the underpinnings of the legal system in their practice as attorneys. Such a model encourages continued growth of and improvement in the legal system.

28) **See** Jerome Frank, **Why Not a Clinical Lawyer-School?**, 81 **U. Pa. L. Rev.** 907, 918-19 (1933).

29) **Id.**

30) CLEPR was created by the Ford Foundation with a grant in excess of $10 million to provide the impetus for the expansion of clinical programs. CLEPR provided more than 100 grants to law schools to provide lawyer-client experiences for their students. Most of these schools then continued and expanded the programs started with CLEPR grants. **See** William Pincus, **Preface** to **Council on Legal Educ. for Prof. Responsibility, Inc. & Int'l Legal Center, Selected Readings in Clinical Legal Education** at I (1973).

Although simulations were initially used primarily in free-standing courses to teach interviewing, counseling, negotiation, and mediation, the more recent trend is to incorporate simulations in traditional classroom courses. For example, a simulated contract drafting exercise will be added to a contracts course, a simulated interview of a client who has been injured in an accident will be added to a torts course, or a simulated negotiation will be added to a civil procedure course. The simulation exercises help students understand the ways in which the substantive law will be applied in a specific context and the exercises also help students learn the skills and values through which knowledge of the substantive law will be applied.

Externships

Another recent trend in American legal education is the use of externships to provide students with insights into the ways that law is practiced in specific legal environments and into the ways that lawyers define their identities as professionals. Similar to the legal apprenticeships that were superseded by formal law school education in the late 1800s, students work for 10-15 hours per week with lawyers and perform lawyering tasks, primarily legal research, under the general supervision of a judge or lawyer while having the opportunity to observe the judge or lawyer in action.

Most recently, the trend in American law schools has been to combine these externship experiences with a seminar taught by a faculty member in which students share their experiences and their insights and in which students have the opportunity to meet individually or in small groups with the instructor.[31] Students often keep journals of their experiences and these journal entries provide the subject matter for these one-on-one meetings. Students also often are given such assignments as interviewing lawyers regarding such issues as the balances they strike between personal and professional lives.

Clinical Education

While simulations and externships can provide students with the opportunity to gain necessary skills and values, they are necessarily limited in their benefits. Simulations are, by their nature, artificial and students will never engage in the same way they would in a real-life case.[32] Externships are, by their nature, limited in scope because students are

31) **See** Peter Jaszi, Ann Shalleck, Marlana Valdez, & Susan Carle, **Experience as Text : The History of Externship Pedagogy at the Washington College of Law, American University,** 5 **Clin. L. Rev.** 403 (1999).

32) In describing her work teaching a simulation course, 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 ↗

working for lawyers and judges and are not assuming the roles of lawyer or judge.[33]

By contrast, clinical education in the United States (and now in many other countries throughout the world) provides an opportunity for students to practice as a lawyer 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.[34] Because of these benefits, clinical education is the fastest growing part of American legal education.[35]

It is difficult to over-emphasize the importance of the real-life aspects of clinical

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↘that such "learning experiences" are a substitute, much less a match, for supervision by skilled and experienced clinical professors.

Barbara Bennett Woodhouse, **Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life,** 91 **Mich. L. Rev.** 1977, 1982-83 (1993).

As described by another 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.
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> 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, the motivation and level of learning decreases as well. 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.

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

33) Externships had traditionally been used in American legal education as a way of providing experiential opportunities for students without committing the resources required for a clinical program. Analyzing data from an ABA survey of comparative costs for clinical and traditional programs at 78 schools, the authors reported that a law-school supervised clinic was, on average approximately 13 times more expensive than a field-placement program, 2.4 times more expensive than a traditional law school seminar, and 7 times more expensive than a traditional class. Peter del. Swords & Frank K. Walwer, **Cost Aspects of Clinical Education,** in **Clinical Legal Education: Report of the Association of American Law Schools-American Bar Association Committee on Guidelines for Clinical Legal Education** 133, 177-78 (1980). These costs were largely attributable to instructional expenses and the costs of compensation paid to faculty members teaching and supervising students. Supporting-service costs, including costs of the program's secretaries, duplication, telephone and travel costs incurred by the program in prosecuting its caseload were important, but less significant factors.

34) Besides the United States, law schools in Canada, Great Britain, Australia, Chile 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.

35) According to the on-line directory of clinical legal education (found at http://www2.wcl.american.edu/clinic), there are now more than 1700 legal educators involved in clinical legal education in American law schools.

education. Justice Rosalie Wahl, a former chair of the ABA's Section of Legal Education and Admissions to the Bar,[36] 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."[37] 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 must grapple with a model of representation in most American legal clinics that maximizes client autonomy in decision-making.

Another benefit of real-life client clinical experiences relates to motivation. Harkening back to a common law school maxim,[38] 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.[39]

Real-life client representation may therefore motivate students in a way 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. 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. 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.[40] At a time when American legal educators have increasingly acknowledged the importance of inculcating values of professional responsibility in our students, the provision of clinical legal education to every law student takes on an increasing level of urgency.

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36) Justice Wahl was chair of the Section from 1987-1988. Now a 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. BOYD, **supra** note 21, at 121, 138.

37) BOYD, **supra** note 21, at 122.

38) 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.

39) Laser, **supra** note 32, at 267.

40) **See** Andrew S. Watson, **Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education,** 8 **U. Mich. J. L. Ref.** 248, 259-52 (1975).

The shape of clinical legal education

Although clinical courses vary from school to school and often from clinical course to clinical course within a school, there are several common features that all of the best programs share.

- 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.
- 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.[41]
- Seminar—Students need to learn some basic skills and values before they begin and while they are providing their real-life client representation and 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.
- 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 when real-life client interests are 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.

Replication and Expansion

In 1973, Professor Gary Bellow, one of the early theorists of clinical legal education, described the methodology of clinical education as the performance by the student of a

41) **See** David F. Chavkin, **Am I My Client's Lawyer? : Role Definition and the Clinical Supervisor,** 5 **S. Methodist Univ. L. Rev.** 1507 (1998).

role within the legal system and the use of this experience as the focal point for intellectual inquiry.[42] Fourteen years later, Professor Mark Spiegel wrote that "[I]f clinical education is a methodology, it conceivably can be used to teach any of the substantive subjects in the curriculum . . . . [T]here is nothing inherently limiting about clinical education other than using the student's performance as a starting point for inquiry."[43]

The unmet potential of the clinical education model can be realized in a wide variety of subject areas within the overall law school curriculum. Basic courses could integrate theory and practice and the educational goals could be expanded and enhanced through the opportunities presented by experiential learning.[44] At the same time, faculty members can inform their classroom teaching through the clinical experiences of their students as the students grapple with legal problems in the real world. The product will be an educational environment in which skills and values come alive and in which law students become active creative learners with the capacity to continue to grow in their profession long after graduation and admission to the bar.

Conclusion

As Japan reconceptualizes its legal education system, it will have to grapple with the answers to four interrelated questions. First, what should be the role of law and lawyers in society? Specifically, what role of law and lawyers will further Japanese society at home and Japan's role in international trade and commerce? Linked to this question is the issue of whether the tracking of lawyers as judges, prosecutors and attorneys from the beginning of their careers is a model that ensures that lawyers fulfilling different roles possess the skills and values related to experience that will allow them to perform their work effectively, responsibly, and humanely.

The second question relates to the skills and values that lawyers need to practice effectively and responsibly. Although the MacCrate Report may provide a useful starting point for the Japanese inquiry into these issues, it can only be a beginning. Japan will need to define for itself the specific skills and values that are relevant to the role of lawyers in Japanese society.

The third question relates to the form of legal education that is most likely to develop

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42) Gary Bellow, **On Teaching the Teachers: Some Preliminary Reflections on Clinical Education As Methodology,** in **Clinical Education for the Law Student** 374, 379 (1973) (Council on Legal Education for Professional Responsibility, Working Papers prepared for CLEPR National Conference, 1973).

43) Mark Spiegel, **Theory and Practice in Legal Education: An Essay on Clinical Education,** 34 **UCLA L. Rev** 577, 591 (1987).

44) **See** David F. Chavkin, **Training the Ed Sparers of Tomorrow: Integrating Health Law Theory and Practice,** 60 **Brooklyn L. Rev.** 303 (1994) (describing the author's integration of legal theory and practice at the University of Maryland).

these skills and inculcate these values in law students. Perhaps the greatest lesson from the American law school experience for Japanese legal educators, lawyers, and government officials is that clinical education is most effective when it is thought of as a form of "good teaching" and not as an alien teaching methodology. More and more, American legal educators are incorporating clinical approaches in their courses not because they are fashionable but because they allow law professors to achieve pedagogical goals for students that cannot be achieved with traditional techniques. As legal education in Japan is reconceptualized, clinical education provides a vehicle for thinking about goals, content and teaching techniques in a coherent way that will further the development of lawyers in Japan and the role of law in the country.

The fourth and final question relates to the cost of a legal education and its impact on the makeup of the student body in Japanese law schools. Since society is advanced through an educational system that encourages diversity, it is important that legal education not be priced out of the range of all but the wealthiest students. Clinical education must therefore be used to teach those skills and values that can only be taught through clinical techniques and to teach those skills and values that can be taught so much better through clinical techniques that the costs are worth incurring—where the value added by clinical education justifies the additional costs. As the United States begins to move toward a system in which every student will have the opportunity for a clinical legal education experience, it is essential that reform of the Japanese legal education system keep this principle of cost-effectiveness and its impact on diversity also in mind.