

Chapter 5

Does Global Clinical Legal Education Have, or Need, a Unifying Theory?*

This chapter will explore a persistent tension in clinical legal education, at least in developed countries of the global north: the relationship between theory and practice. Does clinical legal education have a single theoretical justification on which clinical method can be grounded, in the same way that the Socratic-case method has become the signature theory of the law school classroom? *Should* there be a single theory, or should a thousand theories bloom within the clinical movement? The Carnegie Foundation's report on legal education takes a view on these questions, which will begin the chapter and frame the issues for discussion. The chapter will then return to the period discussed in the previous three chapters¹ to explore the possible grounding of legal and medical education in the contemporaneous, and similarly new, movements in educational theory at the end of the 19th and beginning of the 20th centuries. This history may give us some understanding of the central ideas in clinical theory within the U.S. and the west – particularly in the United Kingdom and Canada – and also provides some parallel developments in educational theory to undergird the recent rapid growth of clinical legal education in the global south.

Carnegie and the Need for a “Unified” Clinical Theory

The Carnegie Foundation report on legal education gives clinical legal education its strong imprimatur. In its conclusion and recommendations, it offers a vision of an integrated

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¹ Note to readers: The previous three chapters cover the period of 1870-1920 in legal education in the U.S., a period in which Langdell's case method appears and clinical education appears strongly in medicine, while many law schools moving into the universities fight to keep a pedagogy of practice and clinics appear more widely than previously is thought to be the case.

curriculum, one that includes elements of the teaching of doctrine and analysis, practice through lawyering, and the inculcation of identity and values consistent with the role of the legal profession in society.² It calls on the legal academy to expand its “common core of legal education needs” to include “substantial experience with practice, as well as opportunities to wrestle with issues of professionalism.”³ The report refers to this core constellation of the educational mission as the “three apprenticeships,” apprenticeships of thinking, performing and behaving.⁴ In an earlier chapter, however, it does not spare criticism of clinical legal education’s role in training through the apprenticeship of practice. It adopts the position of a scholarly critique leveled at clinics in 1990, one which argued that clinical education suffered from three critical “strategic defects”: the institutionally devalued position of clinicians; the limiting three-year context of legal education, compared with longer clinical training offered in fields such as medicine; and the lack of a “worthy theory of legal practice on which skills training might be founded.”⁵ The Carnegie report embraces these conclusions. “These strategic defects are still in evidence fifteen years later, and skills training will continue to face an uphill battle unless it is linked with an accepted theory of lawyering that could provide a bridge between theory and practice and perhaps establish a rationale for more systematic continuing legal education beyond law school.” Clinicians, they argue, “still await their Langdell.”⁶

I agree that the identified defects are strategic and not substantive. However, I must respectfully and wholeheartedly disagree with the report’s conclusion . First, there may well be such a unifying theory, and second, all contemporary theory discussions occur in the context of

² Carnegie, at 194.

³ Id. at 195.

⁴ Id. at 27.

⁵ Id. at 94, citing to Joseph P. Tomain & Michael E. Solimine, *Skills Skepticism in the Postclinic World*, 40 J. Leg. Ed. 307 (1990).

⁶ Ibid.

this single theoretical framework. The unifying theory of clinic is not one of lawyering but one of education. The unifying educational theory of clinic lies in the concept of experiential learning itself, a concept that is taken for granted in the Carnegie report but which was – and is – revolutionary in its approach to learning and teaching. Moreover, while experiential learning may have a cultural dimension, learning and teaching through experience provides a universally accepted educational gateway for law students, if structured and guided appropriately, to rigorous intellectual inquiry as well as an enhanced sense of professional responsibility and true commitment to the highest values of the legal profession.

The Carnegie critique also fails to acknowledge what clinical teachers have brought to law study and legal theory via their experimentation within the theoretical structure of experiential learning: a vast literature examining legal skills and how to teach them. The very term “lawyering” came into currency, if it was not invented, with the publication of that “Trojan horse”⁷ of a case-book, *The Lawyering Process*, written by two clinical teachers.⁸ Professors Gary Bellow and Bea Moulton, in a volume of well over 1000 pages, used lawyering to mean “the experience of being a lawyer.”⁹ It is the thesis of this chapter that if a unifying theory is needed, it can be found in educational theory through the concept of experiential learning, a radical notion at the time of its initial development, and a concept at the core of clinical training today. The premises of a theory of experiential learning also provide context for that theory’s hundred progeny, born of the work of clinicians themselves. Those theories provide a bountiful range of theoretical grounding for the epistemology of clinic. A significant literature has

⁷ Frank S. Bloch et al., *Filling in the Larger Puzzle: Clinical Scholarship in the Wake of The Lawyering Process*, 10 *Clinical L. Rev.* 221, 222 (2003). The book was, these authors note, “a hardbound Foundation Press volume with the traditional look of an elite faculty-edited school casebook.” Note, however, that the cover does not use the term “cases and materials,” but only “materials.”

⁸ GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978). If clinicians needed a Langdell, Bellow would certainly be a strong candidate.

⁹ *Id.* at xix.

developed, principally in the last twenty years, which provides a wealth of largely coherent theories of lawyering. Moreover, these theories are the product of intense and ongoing reflection, the scholarly writing of clinical teachers themselves. Clinicians are the *only* academics who occupy the space within the academy that systematically bridges theory and practice, and clinical teachers have more than justified the ongoing, indeed expanded, role we play in the academy, theoretically and otherwise.¹⁰

Early Educational Theory in the U.S. – John Dewey

In the last two chapters, I explored why the narrative of a pedagogy of practice was lost or hidden in the early days of university education in law, while Langdell and his case method flourished. A strong contender among explanations for a lack of a narrative on the pedagogy of practice has to do with the nascent development of educational theory itself. Education, like the other professions, took on a more formal and structured approach to the articulation of educational philosophy and method. The recognized giant in educational theory in the US was John Dewey. One college-level education text-book calls Dewey “possibly the most influential educator of the twentieth century – and probably the most controversial one.”¹¹ His educational philosophy was carried out at the Laboratory School of the University of Chicago (known internationally as “the Dewey School”), which opened in January 1896.¹² In 1899, Dewey published *The School and Society*, a best-selling book about the school that has never been out of print. His educational philosophy, generally identified with the school of progressive education,¹³

¹⁰ Piomelli and Grosberg quotes on clinical scholarship.

¹¹ SADKER & SADKER, *TEACHERS, SCHOOLS & SOCIETY* (5th ed. 2000), at 292.

¹² ROBERT B. WESTERBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 97 (1991). The Dewey school worked with nursery school through high school children.

¹³ Dewey is not easily categorized, in part because he wrote across such a long period of time. He is sometimes associated with cognitive developmental theory or with the functionalist school of psychological approaches. See e.g., N.A. Sprinthall, *Cognitive Developmental Theories of Teaching*, in *INTERNATIONAL ENCYCLOPEDIA OF TEACHING AND HIGHER EDUCATION* 101, 102 (Lorin W. Anderson ed., 2d ed. 1995); Alice M. Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal*

were set out in detail in *Democracy and Education: An Introduction to the Philosophy of Education* (1916), and summarized, after twenty years of application, revision and improvement, in a lecture series compiled into a short text called *Experience & Education* (1938). Dewey's ideas on education drew widespread attention, and progressive education practices had begun as early as 1875, spreading quickly after that.¹⁴ The earlier published work falls squarely within the progressive era of American history, at a time when Langdell's case method had already achieved widespread attention and imitation virtually throughout the legal academy.

It is impossible to give Dewey's philosophy or theories on education full justice in the narrow confines of this chapter, but one of the best succinct summaries can be found in Louis Menand's *The Metaphysical Club*. Dewey spoke of a "unity of knowledge," not in the sense that all knowledge is one, but that

knowledge is inseparably united with doing. Education at the Dewey School was based on the idea that knowledge is a by-product of activity: people do things in the world, and the doing results in learning something that, if deemed useful, gets carried along into the next activity. In the traditional method of education, in which the things considered worth knowing are handed down from teacher to pupil as disembodied information, knowledge is cut off from the activity in which it has its meaning, and becomes a false abstraction. One of the consequences (besides boredom) is that the invidious distinction between knowing and doing – a distinction that Dewey thought socially pernicious as well as philosophically erroneous – gets reinforced.¹⁵

Putting educational power into the hands of the learner, based on their interests and needs, is no moderate reform; it was radical in all the ways that made Dewey controversial, then and now. Dewey himself summarizes the principles of progressive education as a series of oppositions:

Education into Doctrinal Pedagogy, 6 Widener L. Symp. J. 49, 102, n. 258 (2000) (identifying Dewey with functionalism).

¹⁴ Id. at 292.

¹⁵ LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 322 (2001).

To imposition from above is opposed expression and cultivation of individuality; to external discipline is opposed free activity; to learning from texts and teachers, learning from experience; to acquisition of isolated skills and techniques by drill, is opposed acquisition of them as means of attaining ends which make direct vital appeal; to preparation for a more or less remote future is opposed making the most of the present life; to static aims and materials is opposed acquaintance with a changing world.¹⁶

It is hard to imagine an educational theory that contrasts more dramatically with the Langdellian vision of legal science. This is not to say that Langdell's method was improper or ineffective; time has proven it worthy. Nor is it to say, Menand notes, that Dewey was "proposing to elevate doing over thinking," but merely that by "condemning (as he did) the elevation of thinking over doing," he was revealing a "class bias," and that "there is no such thing as an individual without society. We think we know in order to do; Dewey taught that doing is why there is knowing."¹⁷

The core principles of experiential learning, as originally expounded in the thinking of Dewey and other early American and European educationalists, are relatively easy to articulate. I extract at least seven. First, as so often noted above, learning is experiential, by doing something rather than thinking about it or memorizing. Second, the student and learning, not the teacher and teaching, is where the educational focus lies. If students are focused and responsible they will learn. Third, because the focus is student learning, the professor does less professing and more guiding, facilitation and mentoring. Fourth, experience is immersed in life, and life is messy (particularly in the context of legal conflicts). There are social, political and moral dimensions to learning. Dewey cast this element in the crucible of American democracy. He believed in the radical educational concepts that "most citizens, not just the elite, can have a life of the mind," and that "a life that is only of the mind is inadequate to the challenges of American

¹⁶ JOHN DEWEY, EXPERIENCE AND EDUCATION 19-20 (1938)

¹⁷ THE METAPHYSICAL CLUB, *supra*, n. 15, at 330.

democracy."¹⁸ Fifth, the social dimension includes a cooperative element; the individual cannot “do” without society, and the best learning must occur in the collective context. Sixth, the moral dimension involves some sense of awareness and caring for the poor and other outsiders, and to improving their lot, so that all may share in America's abundance. Seventh, and perhaps most important, learning is not an end in itself but a process, and school is the beginning of a life-long habit of learning how to learn. These seven components carry experiential learning far beyond a methodology and deeply into a theoretical structure. Moreover, while these concepts were the basis for the teaching of children, Dewey "was certain that there was no difference in the dynamics of the experience of children and adults":

Both were active beings who learned by confronting the problematic situations that arose in the course of the activities engaging their interests. For both, thinking was an instrument for solving the problems of experience, and knowledge was the accumulation of wisdom that such problem-solving generated.¹⁹

Early Educationalist Influence in Medical School Pedagogy

Despite parallel developments during the late 19th and early 20th centuries in the fields of legal education and general educational theory – a field grounded in clinical psychology, the philosophy of how people learn, and how best to maximize learning as a teacher – neither the legal nor medical academy seems to have knowingly taken anything from such theory at the time. Even today, it can be argued, “the intellectual complexity of teaching is almost completely unknown within academia.”²⁰ Medicine and law seem to have developed their most revolutionary academic revisions without any reference to educational theory itself. Of medical training, one of its leading (and few) historians, Kenneth Ludmerer, concludes that there

¹⁸ THOMAS ERLICH, CIVIC RESPONSIBILITY AND HIGHER EDUCATION v (2000).

¹⁹ Westbrook, supra n. 12, at 97.

²⁰ Fiona Cownie, *Searching for Theory in Teaching Law*, in THE LAW SCHOOL – GLOBAL ISSUES, LOCAL QUESTIONS 41, 44 (Fiona Cownie ed. 1999); Maryellen Weimer, *Assumptions that Devalue University Teaching*, 2 Int'l J. Acad. Dev. 52 (1997).

“appears to have been no direct intellectual connection between the pioneering medical educators and Dewey,” or any other educational theorist. Looking back from the present, Ludmerer concludes that there was a “logical relation” between developments in clinical teaching in medical schools and the philosophy of progressive education, and that the two fields “independently developed similar educational theories.”²¹ Abraham Flexner’s contemporaneous observations seem to bear this out.

Dewey’s philosophy was invoked repeatedly by Abraham Flexner in his study of medical education for the Carnegie Foundation. The Flexner Report made a clear connection between clinical pedagogy and educational theory, and Flexner’s contemporaneous writings emphasize the connection of clinical training in medicine to Dewey’s educational theories, though again without suggesting that the doctors themselves were aware of the theories. In his 1912 study of comparative medical training in the U.S. and Europe, he glowingly invokes “Professor Dewey” who had emphasized that in education “the initiative lies with the learner.” The shift from a focus on teaching to a focus on learning was complete, even then. “To begin by telling [the student], by pointing out, by calling his attention, is to deprive him of that initiative which is so highly educative. Learning is a game in which the student must move first.”²² Later, in 1925, he put the issue even more succinctly: “Though medicine can be learned, it cannot be taught.” “Active participation – doing things,” he opined, “is therefore the fundamental note of medical teaching.”²³

Flawed Attribution of Langdell's Methods to Early Educationalists

²¹ Ludmerer, *Learning*, at 67-68.

²² Flexner, 1912, at 168.

²³ Quoted in LUDMERER, *TIME TO HEAL: AMERICAN MEDICAL EDUCATION FROM THE TURN OF THE CENTURY TO THE ERA OF MANAGED CARE* 10 (1999).

In law, on the other hand, both contemporaneous and later conclusions about the relationship of Langdell's case method to existing educational theory are deeply flawed. Langdell himself, who spoke or wrote little on the method, provides no information on sources or the theories that underlie for his methodological innovations. His great advocate and supporter, Harvard president Charles Eliot, made only one oblique statement regarding Langdell's theoretical sources. "Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Séguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives."²⁴ Eliot's invocation of a group of Europeans shows his awareness of the nascent field of educational theory, but his defense of Langdell's application of their theories is dead wrong.

It does not require extended analysis of the educational philosophies of the four educators invoked by Eliot – Friedrich Froebel, Johan Pestalozzi, Edouard Seguin and Maria Montessori – to rebut his assertion that Langdell's case method draws in any way from any of them. It is enough to know that they *all* are adherents of experience-based learning, in which students are given "concrete experiences from which to construct their understanding" of the subject at hand. In advocating such learning for grade-school citizenship courses in the 1970s, a group of educational scholars asserted that the experiential approach was, "of course, not new. It has been advocated by Pestalozzi, Froebel, Montessori, Dewey and Piaget, among others."²⁵

Maria Montessori (1870-1952), the Italian doctor and educator, is probably the best known of these European originators of "new" or progressive education. Montessori schools still

²⁴ Charles W. Eliot, *Langdell and the Law School – 1895*, in Sheppard, vol. 1, at 509, 512. The reference to "defectives" is the then-current, if politically incorrect, term for patients or children with mental illness or mental disabilities.

²⁵ Richard C. Remy, Lee F. Anderson & Richard C. Snyder, *Citizenship Education in Elementary Schools*, 15 *Theory into Practice* 31, 32 (Feb. 1976).

flourish throughout the United States. Her theories unquestionably influenced Dewey, but not C.C. Langdell. Starting with an awareness that the senses play a strong role in the development of personality and knowledge, Montessori made the starting point of the educational process “the inclinations and interests of the children themselves.” A key element in her method was “independent activity,” in which the student is given freedom to decide intellectual direction, when that freedom is exercised “hand in hand with discipline and responsibility.” The role of the teacher, then, also changes. “Instead of talking he must learn to be silent; instead of instructing he must observe; instead of presenting the proud dignity of one who desires to appear infallible he must don the robe of humility.” Her theories also included a moral element, where moral relationships “define and mark the beginning of a new life as a moral individual,” causing her to focus her work on “help for the weak, the aged and the infirm.”²⁶ These concepts hardly echo in the teaching methods of Langdell, but they resonate strongly with modern clinical legal education.

President Eliot, like many other scholars then and now, tried to wedge Langdell’s methods into the realm of what is called “learning by doing.” Such was the essence of the theorists he invoked. Others since that time have attempted to make the same comparison. In 1892, Prof. Christopher Tiedeman of the University of the City of New York argued that the case method was “clinical” in its design. Tiedeman’s conception of the case method as clinical is actually not uncommon; even today, some argue that the case method is a form of “learning by doing.”²⁷ “Whether consciously or not, then,” argues William LaPiana, “Langdell was in tune

²⁶ All quotes from Montessori herself, or her biographer. Hermann Röhrs, *Maria Montessori*, XXIV Prospects 169-183 (UNESCO, International Bureau of Education 1994).

²⁷ Logic and Experience, at 26 (By giving students cases, Langdell’s “students learned by doing what professionals did in practice.”); see also, FLEURIE NIEVELSTEIN, *LEARNING LAW: EXPERTISE DIFFERENCES AND THE EFFECT OF INSTRUCTIONAL SUPPORT* (2009) (doctoral dissertation published through the Interuniversity Center for Educational Research, Open University, Netherlands) (arguing that “solving” legal cases constitutes learning by doing, at 11).

with new theories of pedagogy that emphasized doing rather than memorizing.”²⁸ Anthony Chase, another scholar of the era, finds a “homologous relationship” between legal education via the case method, “the innovations of Pestalozzi, and the birth of clinical instruction.”²⁹ Examples of this erroneous attribution, in short, abound.

These positions misstate both the pedagogy by which Langdell taught and the theories that purportedly underlay it. Langdell’s was not a pedagogy of doing but a pedagogy of thinking; there is some truth to the assertion that using the case method trains students to “think like lawyers.” The student who follows Langdell’s method, however, whether then or now, is “doing” only a small element of what a lawyer does, and that doing is without any human contact or interaction at all. Langdell’s method was and is immersion in books containing cases – if there is an element of doing, it is in the library, not in life outside. That reading is followed by the student’s discovery of the principles of those cases through classroom dialog with a teacher who guides the student to understanding, not through fact-gathering fraught with emotion, but through careful and supposedly neutral analytical reasoning. The case method is bereft of all human contact and interaction. The law student is applying reasoning skills to find an accurate statement of the case’s holding (or statute’s interpretation, or treaty’s application), and to find relevant cases to advance particular legal or factual propositions. This may be analogous to the scientist in the laboratory, but it is hardly fully analogous to the lawyer in practice.

The lawyer’s work can only be accomplished through physical experience, through real human interaction. It involves both rational thinking and active engagement with law and life through experience. As Dewey so presciently asserted, “doing is why there is knowing.” The doctors of Langdell’s time seemed to be closer to this revelation than the lawyers. John Shaw

²⁸ Ibid.

²⁹ Anthony Chase, *The Birth of the Modern Law School*, 23 Am. J. Legal Hist. 329, 346 (1979).

Billings, the chief administrator at Johns Hopkins Medical School, properly invokes a theory of experiential learning when he argued, in 1880, that the role of higher education “in modern times is the teaching how to increase knowledge; and the best way of teaching this, as of many other things, is by doing it, and by causing the pupils to do it.”³⁰ It was the role of medicine, concluded Billings and other leading doctors of the time, “not only to give information as to the facts but as to how to ascertain facts, to teach [students] how to investigate, how to think, where he is to look for information, and thus arouse and direct the desire for knowledge.” Billings in not talking about learning from books or cases, he is talking about true learning by doing.

Is Experiential Learning Universal?

At some risk of falling prey to the cultural relativism critique, or to the alleged common law-civil law distinction, I argue here, as I have elsewhere, that experiential learning is universally effective as a structure and philosophy of teaching and learning. One cross-national study of nine mostly Western countries found that rote learning had consistently negative variables for its effectiveness, while independent student work variables consistently were positive.³¹ Another more recent study shows the dramatic spread of progressive education, with its core reliance on experiential learning, to areas in Africa, Eastern Europe, Israel, Japan and South America.³²

There is remarkably little written about experiential learning theory in legal education outside of the United States. This is at least partially accounted for by the general lack of theoretical literature on clinics abroad, but also may be attributable both to the relatively recent

³⁰ Learning to Heal, 64.

³¹ J. TORNEY, A. OPPENHEIM & R. FARNNET, CIVIC EDUCATION IN TEN COUNTRIES: AN EMPIRICAL STUDY 151-153 (1975). The ten countries surveyed were Germany (Federal Republic), Finland, Iran, Ireland, Israel, Italy, the Netherlands, New Zealand, Sweden and the United States. The Iran data were withdrawn from the analysis.

³² PROGRESSIVE EDUCATION ACROSS THE CONTINENTS: A HANDBOOK (Hermann Rohrs & Volker Lenhart eds. 1996).

arrival of clinics in other countries, particularly in the global South, and to the greater emphasis there on the service and justice role of clinics, which may play a much greater role in providing essential legal services to the poor than is the case in the developed world. One can certainly find reliance on the literature of experiential learning theory, with repeated references to Dewey, in the more extended writing on clinics in the United Kingdom,³³ Australia³⁴ and even India.³⁵

The closest example that comes to us from the global South may lie in the theories of the Brazilian educator Paulo Freire, and his *Pedagogy of the Oppressed* (1970). In the English-language literature on educational theory in Britain, Spain and Canada, his name is most often associated with that of John Dewey or with one of Dewey's modern counterparts.³⁶ The cornerstone of Freire's work lies in the notion of liberatory education, accomplished through *praxis*, the union of reflection and practice. Rather than using the concept of "banking education," by which the teacher "makes deposits which the students patiently receive, memorize, and repeat," true education begins with "the solution to the teacher-student contradiction, by reconciling the poles of the contradiction so that both are simultaneously teachers *and* students."³⁷ The object of all education is what Freire calls, in Portuguese, *conscientização*, roughly translated as consciousness-raising or critical consciousness. This

³³ ROGER BURRIDGE ET AL., EFFECTIVE LEARNING & TEACHING IN LAW 28-30 (2002).

³⁴ MARLENE LE BRUNE & RICHARD JOHNSTONE, THE QUIET (R)EVOLUTION: IMPROVING STUDENT LEARNING IN LAW 54, 78-80 (1994).

³⁵ N.R. Madhava Menon, *Clinical Legal Education: Concept and Concerns*, in A HANDBOOK ON CLINICAL LEGAL EDUCATION 1, 10-11 (N.R. Madhava Menon ed. 1998)

³⁶ See e.g., Sprinthall, supra n. 13, at 102 (grouping Freire and Dewey among the cognitive theorists); Fiona Cownie, *The Importance of Theory in Law Teaching*, 7 Int'l J. Legal Prof. 225, 231 (2000) (British author identifying Freire's influence); Cownie, supra n. 23, at 49, 52 (discussing Dewey, Freire and Kolb); Julian Webb, *Where the Action Is: Developing Artistry in Legal Education*, 2 Int'l J. Legal Prof. 187, 187, 193 (1995) (British author discussing Schön and Dewey); Julian Webb, *Why Theory Matters*, in TEACHING LAWYERS' SKILLS 23, 39, 42 (Julian Webb & Caroline Maughan eds. 1996) (discussing Schön and Kolb); Julie MacFarlane, *Look Before you Leap: Knowledge and Learning in Legal Skills Education*, 19 J. Law & Soc'y 293, 301-302, 304 (1992) (Canadian author discussing Dewey and Kolb); Gloria Braga Blanco, *Coping with Contradictions of Reflecting on Praxis: A Spanish Case*, 3 Teaching in Higher Ed. 299, 301 (1998) (Spanish author discussing Schön); Rose Voyvodic, "Considerable Promise and Troublesome Aspects": *Theory and Methodology of Clinical Education*, 20 Windsor Y.B. Access to Just. 111, 127, 128 (Canadian author discussing Knowles and Schön).

³⁷ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 58, 59 (1970).

happens through "generative" experiences, experiences that give shape to an idea or word that expresses that experience. For the largely peasant audience with which Freire worked for much of his professional life, this powerful model provided both a way to become literate and a way to become a person fully engaged in the national polity. As I have written elsewhere, these theories played a strong role in both the liberation theology movement of the 1970s and '80s, and in the progressive wing of the Catholic church's expression of a "preferential option for the poor" during the same time.³⁸

Aside from empirical and historical data, it is hoped that the evidence offered in this book of the rapid spread of clinical legal education throughout the world, regardless of local legal culture or tradition, constitutes further practical proof of the viability of experiential learning as universal, rather than a mere US transplant.³⁹

There is, of course, a need to balance the extreme universalist position, mostly propounded by psychology and biology, against a pure "uniqueness" perspective, promoted by some anthropologists and multiculturalists. The best education relies on "the latest insights about psychology, neurology, biology, and anthropology; and we must seek to synthesize these findings from science with time-honored lore in ways that serve the individuals with whose education we are charged."⁴⁰ Let us move, then, to more recent innovations in educational theory, noting that, in the case of clinical legal education, these innovations are carried out within the basic framework of the experiential principles articulated here.

The Progeny of Dewey's Theories of Experiential Education

³⁸ Richard J. Wilson, *The New Legal Education in North and South America*, 25 *Stan. J. Int'l L.* 375, 425-427 (1988-1989).

³⁹ See Richard J. Wilson, *Beyond Imperialism: U.S. Clinical Legal Education and the New Law and Development*, in *THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* (Frank S. Bloch ed., forthcoming 2010).

⁴⁰ HOWARD GARDNER, *THE DISCIPLINED MIND: WHAT ALL STUDENTS SHOULD UNDERSTAND* 99-102, 114 (1999).

The literature on theories of lawyering, and on adult learning applied to law, is rich, varied and voluminous. This is not, as the Carnegie report suggests, because it is incoherent, but because those who have written on theory – mostly clinicians themselves – have let a hundred flowers blossom.⁴¹ They have experimented with various theories, some successful and some not, as is inherent in the nature of indeterminate law practice. Some theories have endured, while others have slipped into obscurity. Clinical teaching itself is dynamic, reinventing itself over and over as the dynamic world outside of the law school itself evolves. Clinical scholars have reached far beyond the field of law into interdisciplinary theories grounded in psychology, adult learning, cognition and brain science, business management, sociology and anthropology, political economy, literature and literary criticism, moral philosophy, and more.

Clinical scholarship has tended to the practical rather than purely theoretical, and much of it includes an empirical, or certainly an anecdotal element, as well it should be. Stories often embody deep theory. If clinicians have any influence at all within the legal profession, it is because their scholarship is at once practical and accessible, both within the academy and to the practicing bar.⁴² Since the legal realists held sway in law schools, legal scholarship legitimately has been criticized as the theoretical musings of academics writing to and for other academics,⁴³ rather than for practitioners.

The central dilemma in applying experiential theory – true learning by doing – to law is the question of *what lawyers do*, so that students can be about the task of doing that while still in law school. One strains to find any significant writing within either the academy or the legal profession, other than a smattering from the Realists, that purports even to anecdotally describe what lawyers do, let alone systematically study or offer a theory for their actions. Jerome Frank,

⁴¹ The aphorism is attributed to Chairman Mao Zedong of China, but carries no explicit political content here.

⁴² Peter Hoffman, cited in Peter Joy.

⁴³ Roscoe Pound, cited in Joy or Bloch or both.

writing in the Realist tradition in 1933, proposes a “clinical law school,” offering this withering critique of the shortcomings of Langdell’s case method in a kind of offhanded defense of experiential learning:

Students trained under the Langdell system are like future horticulturalists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble dog breeders who never see anything but stuffed animals. And it is beginning to be suspected that there is some correlation between that kind of stuffed-animal study and the overprotection of stuffed shirts within the legal profession.⁴⁴

One of the earliest works purporting to be about what lawyers do is *How Lawyers Think*, written by Prof. Clarence Morris in 1937.⁴⁵ The book is written entirely without footnotes, offered as a remedy for the failure of law school instruction to address “instruction on the nature of the solution of legal problems.”⁴⁶ Morris himself notes that “[n]othing of the sort has ever been tried.”⁴⁷ Whatever may have been Morris’ skills as a practicing lawyer, however, his book develops more as an exegesis of lawyerly reasoning skills through syllogism, logic and inductive reasoning than any aspect of attorney-client interaction. Emotion and lawyering context are entirely absent. In fact, the absence of the centrality of facts, ethical and moral issues, and the nature of the attorney-client relationship make even more apparent just how different the much later, newly emergent writing by clinical teachers would be.

In perhaps the single most helpful passage of *How Lawyers Think*, Professor Morris draws on an extended metaphor to learning the game of golf (a lawyer’s game, if ever there was one!). One can begin with practice, he notes, swinging the club at a ball repeatedly in hopes of

⁴⁴ Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907, 912 (1933).

⁴⁵ CLARENCE MORRIS, *HOW LAWYERS THINK* (1937). Morris was on faculty of U. of Penn. – see works on him in JSTOR.

⁴⁶ *Id.* at xii.

⁴⁷ *Id.* at xiii.

improvement, or one can read all the how-to books on golf before picking up a club at all. He concludes the metaphor as follows:

The acquisition of useful golf habits is essential for successful play. Theory alone will not supply useful habits. Theory only points to habits which should be acquired. And its meaning cannot be appreciated by those who are not familiar with the behavior to which it points. Practice will invariably supply habits, but practice which does not happen to conform to good theory may result in obstructive habits. Theory first may be meaningless: practice first may be harmful. The escape from this dilemma is between the horns: the beginner should start with both theory and practice at the same time.⁴⁸

This is as good an explanation as one can find in support the concept of experiential learning theory.

In fact, John Dewey's theories on experiential learning have survived, in both classroom and clinical teaching today in several key theoretical frameworks, including, most significantly, those of David Kolb, Donald Schön and Malcolm Knowles. Experiential learning models come to us primarily through the writings of David Kolb. Kolb carries on the legacy of Dewey with his model of experiential learning - the four-stage sequence consisting of experience, reflection, theory and application - and his Learning-Style Inventory, which identifies learners as accommodators, divergers, assimilators or convergers.⁴⁹ Kolb has been a beacon for clinical scholarship.⁵⁰ It is but a short step from Kolb's planning, doing and reflecting model to that of reflection in action, the key concept in the writing on professional decision-making and problem-

⁴⁸ Morris, *supra* n. , at xi.

⁴⁹ DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS A SOURCE OF LEARNING AND DEVELOPMENT (1984); DAVID A. KOLB, LEARNING-STYLE INVENTORY (1985).

⁵⁰ See, e.g., Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum through Experiential Learning*, 51 J. Legal Educ. 51 (2001); Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 San Diego L. Rev. 1011 (2004); Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 Clinical L. Rev. 167 (1995-1996) (student perspective). Kolb's constructs were a core element in the opening plenary session of the annual AALS Conference on Clinical Legal Education. Mano Singham, Case Western Reserve University, *Learning Cycle and Learning Spaces* (Cleveland, OH, May 7, 2009) (PowerPoint presentation on file with the author).

solving of Donald Schön.⁵¹ Malcolm Knowles is known for his theories of andragogy, or adult learning, which situate adults as independent and self-directing personalities, ideal candidates for experiential learning.⁵² Knowles makes explicit the ideas that Dewey only suggested in his own writing, comparing adult and child learners.

Conclusion

In the conclusion to its chapter on "Bridges to Practice," the Carnegie Foundation report cited at the beginning of this chapter suggests that the teaching of case theory might provide a possible "conceptual pivot" to provide movement between the three key elements of legal education: doctrine, performance skills and problem-solving.⁵³ This is an intriguing suggestion, as I share the view that case theory lies at the heart of successful clinical instruction, teaching students that most difficult of skills, judgment in combining the legal elements of a cause of action with the client's factual story. The new writing on narrative and story-telling simply adds to that pedagogical richness.⁵⁴ I am struck, however, by the authors' invocation of the benefits of "the back-and-forth cycle of action and reflection" in devising case theory, which they note "characterizes most legal practice."⁵⁵ We should not lose sight of the profoundly important notion that the action-reflection cycle is, itself, an educational theory, one that has its roots in the work of John Dewey, and one that lives on today at the heart of clinical legal education everywhere.

⁵¹ DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983); Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 *Clinical L. Rev.* 231 (1995-1996); Richard L. Neumann Jr., *Donald Schon, the Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 *Clinical L. Rev.* 401 (2000).

⁵² MALCOLM KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: ANDRAGOGY VERSUS PEDAGOGY* (1970); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *Vand. L. Rev.* 321 (1982).

⁵³ Carnegie, *supra* n. 2, at 124.

⁵⁴ Ann's chapter in new book.

⁵⁵ Carnegie, at 124.

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