

**Doing like a Lawyer?
Criteria- Referenced Assessment, Outcome-Based Education, and Work-
Integrated Education in Law Studies for Non-Law Students**

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Do you measure land
With a barometer?
Can you understand
The law of gravity
By testing
The freezing point of mud
At its greatest density?

—Carol Lynn Pearson (1975)

Abstract: Outcome-based education (OBE), criteria-referenced assessment (CRA), and work-integrated education (WIE), although new terminologies, are not new ideas, but their iterations in contemporary education are producing some new thinking in terms of the postmodern globalized world. The difficulty arises in those areas where substantive subjects that are not the students' main subject curriculum are required and taught—the example here being mandatory legal studies for non-law, non-law school majors. How do OBE, CRA, and WIE apply, what are the criteria, and how are they articulated and measured? Students, who are universally concerned that their WIE experience be subject-specific and not merely a general experience in a working environment, are entitled to a clear articulation of the relevant OBE and CRA before they undertake WIE. These questions have not yet been thoroughly articulated or theorized in the existing literature on education in general, much less on legal education in particular. Calls for “curriculum revision” demand that we develop “all-round students” with “professional competencies” rife with OBE and CRA, yet we have difficulty stating just what those things might involve when it comes to non-law-school law—despite the fact that “thinking like a lawyer” remains in all cases a form of higher-order thinking. This article suggests some ways in which these tasks might be further deepened. If the academy requires non-law students to study the law of their professions, it stands to reason and is only fair that that study be fully integrated into their experiences of OBE, CRA, and WIE. Otherwise, it seems the institution is merely giving lip service to these criteria and is cheating itself of all that these programs might potentially deliver in a truly modern education.

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Introduction

If we think of “lawyer” as a verb form (as in “She lawyers in Hong Kong,” “knowing how to lawyer,” and “lawyering is difficult”), it is common knowledge that the traditional law school did not do much to teach its graduates such things. The old law school was designed solely to teach students how to “think like a lawyer” rather than to acquire the practice skills they would need to *be(come)* a lawyer—to act like a lawyer, to *do* lawyering, to conduct the daily work of “lawyering”—skills that usually come through practice, apprenticeship, and clerking.² Overwhelmingly, the model for the desired outcome of legal education was for the trainee to be able to demonstrate on a written examination (the LSAT, entrance exam, course exams, bar exam) that the student could manipulate the legal vocabulary, symbols, and thought processes that demonstrated this one skill.³ So long as that was the “outcome” of outcome-based education (OBE), or the “criterion” of criterion-referenced assessment (CRA), then legal education succeeded well enough, with some students measuring up so well as to join the law review, get their license to practice, and work in a top firm. Clearly this is not enough in the modern world, and it is not the direction of modern education—legal or otherwise. The law curriculum began to change two decades ago to include more in-school “practica” beyond theory⁴ and the ability to manipulate intellectual systems, the end desiderata, and the capability of graduates in them, could be stated, measured, and quantified comparatively easily.⁵ Globalization in the post-WTO world compels the conclusion that

² This article builds on Robert J. Morris, “Not Thinking Like a Nonlawyer: Implications of ‘Recognition’ for Legal Education” (2004) 53(2) *Journal of Legal Education* 267; Robert J. Morris, “Globalizing and De-Hermeticizing Legal Education” (2005) 2005(1) *Brigham Young University Education & Law Journal* 53; and Robert J. Morris, “Curriculum Design for Teaching Law to Non-Lawyers in Building Education and Research,” paper presented at the International Conference on Building Education and Research (BEAR 2006), 10-13 April 2006, Hong Kong. It is also grounded in the history presented in Neil Gold, “Professional Legal Education for Tomorrow’s Lawyers: The Evolution of the Postgraduate Certificate in Laws at the City Polytechnic of Hong Kong” (1991) 9(1) *Journal of Professional Legal Education* 45; hereafter Gold “Evolution.” In addition, it is also the result of numerous discussions with colleagues, to all of whom I am grateful, in a series of OBE, WIE, and CRA seminars sponsored by the Educational Development Centre (EDC) of the Hong Kong Polytechnic University (herein “Poly U”) during 2006. See also Eleanor Wong, “Designing a Legal Skills Curriculum for an Asian Law School: Lessons in Adaptation” (2006) 1(1), Article Five, *Asian Journal of Comparative Law*; and Wilson W. S. Chow, Richard W. S. Wu, and Felix W. H. Chan, “Developing Active Learning of Skills in Professional Legal Education in Hong Kong—From Theory to Ethnography” (2006) 1(1), Article Four, *Asian Journal of Comparative Law*

³ Edward Vickers, *In Search of an Identity: The Politics of History as a School Subject in Hong Kong, 1960s-2005* (Hong Kong: University of Hong Kong Comparative Education Research Centre, 2nd ed, 2005), explores this cluster of questions (and shortcomings) with regard to the teaching of history. Much of what his research finds is relevant to legal studies. See especially his pages xviii, 61, 107, 135, and 143 *passim* on language and critical thinking

⁴ See, e.g., Ontario Professional Engineers, “Pregraduation Experience Record Guide,” p. 2, which requires that the engineering student gain practical knowledge of the “importance of the codes, standards, regulation and laws that govern applicable engineering activities,” online at <www.peo.on.ca/registration/Guide_for_PreGraduation.pdf>; seen May 25, 2006.

⁵ Edwin H. W. Chan and Liyin Shen, “Scoring System for Measuring Contractor’s Environmental Performance” (2004) 5(1) *Journal of Construction Research* 139, 141, suggests the importance of measuring such factors as “environmental control law and environmental education.” This would, of course, implicate both practitioners and future practitioners (students). See also Edwin H. W. Chan and Esther H. K. Yung, “Is the Development

every student in every professional track (doctors, dentists, broadcasters, astrophysicists, pilots, bankers, mechanics) must study the law relevant to that profession. Doing this would reduce malpractice, malpractice lawsuits, and the costs of malpractice insurance. In any case, the foremost *outcome* which must be accurately *assessed* by any *criterion* is the graduate's *knowledge* of the law. An error or lacuna there cannot be compensated for by anything the law graduate may subsequently *do*. Indeed, any kind of doing without the prerequisite knowing may result in malpractice. It is a question of having and using the right tools.

Law has variously been assigned to the sciences (social, natural, and political) and to the humanities (Popper, 1952), but except in jurisprudence and ethics classes, pure theory is beginning to share the stage with practice.⁶ Today, there is greater and greater emphasis not only on in-school practica, but also on student learning outside the school. (Schwartz, 2001) And now some innovative non-law schools combine their professional degrees with a law degree in double programs. For example, the City University of Hong Kong's Department of Building and Construction states as follows:

“Construction is one of the main pillars of the economy of Hong Kong. Construction works are of high-value, long production duration and dispute prone. The complexities resulting from the myriad contractual web and the potential liabilities in construction activities necessitate the regular service of the legal profession. In these contexts, the construction industry has been described as litigious. Moreover, handling construction disputes demands not just legal know how but also requires sound technical knowledge. Having skills and knowledge in construction and law, two respectful [*sic*] and complementary disciplines shall be valued by prospective employers.

“Students who have completed one of the building engineering degree programmes or the surveying programme may choose to pursue the self-financing Bachelor of Laws with Honours ("LLB") degree offered by the School of Law, City University of Hong Kong. The double degree programme is a pioneering arrangement to give students an invaluable edge in the volatile business environment. Having two degrees will certainly make graduates more competitive. Graduates of the double degree may choose to practise as construction or legal professionals. Dual qualifications in construction and law are not uncommon. For instance, nearly all notable international law firms have an engineering and construction arm staffed with specialists having dual qualifications in law and construction. Likewise, many practising construction professionals have formal academic training in law.”⁷

This is at once a syllabus of the program and its mission statement. But what if anything becomes of these desiderata when the students in question are in other disciplines *alone*—are

Control Legal Framework Conducive to a Sustainable Dense urban Development in Hong Kong?" (2004) 28 *Habitat International* 409.

⁶ Karl Popper argues that modern Christianity opposes “in every case the voice of conscience to mere formal obedience and the fulfilment of the law.” Karl Popper, *The Open Society and Its Enemies: The Spell of Plato* (London: Routledge, vol 1, 1995), p. 67.

⁷ At the Department's Web page: <http://bccw.cityu.edu.hk/main/wp_program_double.asp>; seen May 21, 2006. Another example of such a statement in the context of business law is that of the BI Norwegian School of Management, which may be read at <www.bi.no/templates/studium_new____25553.aspx>; seen May 24, 2006.

not students in the law school or in combined degrees, are not on the law track to graduation, and do not intend to become practicing lawyers after graduation? (Tyler, 1995) When, in other words, we teach “specialisms to non-specialists”?⁸ Do the goals, paradigms, and tools change?⁹ Ward and Salter have argued:

“[I]n general where specialist subject matter is ‘translated’ into a version designed for non-specialist consumption, then the translated version should be regarded as something *sui generis*, to be critically assessed on its own merits. This exercise will often testify...that something (albeit of a detrimental nature) may be *gained* as well as lost in the translation process. (Ward and Salter)

If such a version of legal studies is *sui generis*, and if OBE and CRA include practical skills beyond “mere” knowledge and understanding (Allen, 2005), how can the academy demonstrate that it is achieving any such skills? Do any such skills even exist? Does the study of law retain any *inherent* importance in or out of the law school?¹⁰ If we adopt the educational taxonomy of Bloom that learning has three domains (cognitive, affective, and psychomotor)¹¹, how do these apply if at all in law-school and non-law-school legal education? The proliferation of courses and programs in law for non-law track students attests to a growing consensus that they are important—even necessary. (Christudason, 2006) Even so, their proponents have not always clearly articulated why they are important or necessary. They have not always clearly articulated their *mission*—the first and fundamental step that underlies all the rest.¹² Nor have they always clearly articulated what bearing such courses have, or must take, from the law-school curriculum, if at all. (Edwin H. W. Chan, M. W. Chan, David Scott, and Antony T. S. Chan, 2002) Hence, faculties and curricula committees are not always sure what to do with non-law school law courses. For example, the Ontario Secondary School Teachers’ Federation (OSSTF) in 2002 reviewed and changed

⁸ John Ward and Michael Salter, “Law for Professional Accounting Education” (1990) 24 *The Law Teacher: Journal of the Association of Law Teachers* 208.

⁹ A remarkably frank and insightful discussion of these issues may be read in Vida Allen, “A Reflection on Delivering Legal Education to Business Students” (2005), Paper presented at the Annual Conference of the Society for Research into Higher Education, University of Edinburgh, 13-15 December; available online at <www.ukcle.ac.uk/interact/lili/2006/papers/allen.html>; seen August 3, 2006. The presentation was associated with The Learning in Law Initiative (LILI). See also Ruth Soetendorp and Linda Byles, “Law for Non-Lawyers: Facilitating Inter-Professional Dialogue” (2000), with an excellent bibliography, which may be read online at <www.ukcle.ac.uk/interact/lili/2000/soetendorp.html>; seen August 3, 2006.

¹⁰ Mary M. Kennedy, *Inside Teaching: How Classroom Life Undermines Reform* (Cambridge, MA: Harvard University Press, 2005), p. 54; hereafter *Kennedy Teaching*. Kennedy’s book deals with primary (elementary) education in the United States, but one is struck by the similarities of the problems it describes with those elsewhere, as well as the similarities of the problems with those that exist throughout a student’s educational life, including the postgraduate level. This is a point that Gregory S. Munro, *Outcomes Assessment for Law Schools* (Spokane, WA: Institute for Law School Teaching/Gonzaga University Law School of Law, 2000), p. 7, makes as well; hereafter *Munro Assessment*. See also Chang-fa Lo, “Possible Reform for Legal Education in Taiwan: A Refined ‘J.D. System’?” (2006) 1(1), Article Seven, *Asian Journal of Comparative Law*; Michael Josephson, *Learning & Evaluation in Law School* (American Association of Law Schools, 2 vols, 1984), particularly Josephson’s “ascending learning pyramid” at p. 58 *passim*.

¹¹ Benjamin S. Bloom (ed), *Taxonomy of Educational Objectives: The Classification of Educational Goals* (New York: David McKay, 2 vols, 1956). I cite the taxonomy with caution for as *Kennedy Teaching*, p. 43, points out, actual teaching rarely fits into idealized taxonomic categories.

¹² *Kennedy Teaching* makes this point repeatedly.

policy considerations regarding such courses: “Law courses are presently [*sic*] not deemed to be a ‘specific subject area’ as defined [in the regulations].” (OSSTF Provincial Office, 2002)

Among the dangers in adopting the new models of OBE and CRE is an increasingly mechanistic approach to teaching (more guidelines, more rule books, more lists of desiderata, more checklists) that all but ignore the mystical element of teaching that recognizes the charisma and natural talent of a good teacher. Hence, a recent article provides numerous such checklists and concludes: “If the model is valid, we can then assume that a teacher who is doing everything on the list is probably teaching well.” (Allen C. Estes, Ronald W. Welch, and Stephen J. Ressler, 2006) I argue that in fact we cannot assume any such thing—as anyone who has endured the classes of such a clockwork but uninspired teacher can witness. (report, 2006) Because law and legal thinking remain a form of “higher-order thinking” (Tan, 2005) whether taught in the legal academy or another academy, these concerns are fundamental to our understanding of the pedagogy involved and the tools required.

Law in the Law School: The Point of Departure

At the outset it is important to note some things about in-school, pedagogical, doctrinal law that are ever and always true but that may nevertheless be insufficient or misplaced in the new paradigms. The subject of law, of taught law, is not wholly a creature of, nor is it altogether malleable by, the academy or the profession. In common-law systems, “law” is what the courts and the legislatures do, or rather what they create.¹³ It comes to the academy and the profession in this sense pre-packaged. This fact substantially limits what the academy and the profession can do with it, and it is something less than what they can do with many other subjects and disciplines. We comment on the law and argue about it in law reviews and books, and we sometimes have input regarding it in the legislatures and the courts, but we do not make the law. In the classroom we must teach it *as it is* at the moment. If there is any room for creativity or autonomy, it is in our pedagogical methods, not our subject. These realities have certain implications for any *a priori* determination of criteria and outcomes, as well as for the scope of possibilities for curriculum revision. (Munro) In sum, we are not as much at liberty to engage in any of these activities as many other disciplines may be. And even this generalization may be in the process of becoming less true as other disciplines come more and more to be controlled themselves by positive law and case decisions.

Law school has its own built-in rationale and motivation: its graduates intend to become some sort of legal practitioners. They must learn to be lawyers: to think like lawyers and to do like lawyers. This is true whether the law school is a traditional “one-dimensional approach to legal education” or has modernized its curriculum to include such things as practica, clinics, symposia, and so on. (Solomon, 1992) It is even true where the law school no longer has a physical campus but exists in cyberspace. (Rosen, 2001) Thus, in the law school, outcome-based education (OBE) and the concomitant criteria-referenced assessment

¹³ The common law inheres in the English language, and this fact has been the subject of not a little dispute in countries which have adopted the common law but whose primary language is one other than English. The dispute is beyond the scope of this paper, but see, e.g., Po-king Choi, “The Best Students Will Learn English: Ultra-Utilitarianism and Linguistic Imperialism in Education in Post-1997 Hong Kong” in Ho, Morris, and Chung *Reform* pp. 147-70, arguing that students who are forced to study in a language which is not their native language suffer academically. The common-law as a worldwide system or network of related systems with its own traditional values has implications for educational policy in terms of inculcating local values that may not be consonant. See, e.g., Paul Morris, Flora Kan, and Esther Morris, “Education, Civic Participation and Identity: Continuity and Change in Hong Kong” (2000) 30(2) *Cambridge Journal of Education* 243.

(CRA) are obvious and easy to state, measure, and quantify—even though they may differ from school to school. They are driven and defined by the actual end-game necessity for the student to graduate, pass some form of entrance examination, and practice some form of law. Teaching, learning, and doing are conceived of as a loop. Yet even here we find problems in the realm of doing, because doing is often defined as formulating, analyzing, or “demonstrating an understanding of”—all skills that are really not doing in the real of work but are instead *reported* from the realm of work back to the professor in the office or the classroom—as an anthropologist brings a report back from the field. But just as the map is not the territory, the report is not the field. Students in WIE programs will report to their academic supervisors, but the reports are, in other words, *statements about* work, not the work itself. And since it is the report that the academy evaluates, it is not really evaluating the work itself beyond the report. The evaluation will inevitably be second-hand. Perhaps the employer or supervisor of the work in the field has also written an assessment or report of the student’s work, but again the professors are evaluating that report. They were not there to observe the work in person. Some of the students may have worked overseas. Suppose the supervisor’s report and the student’s report substantially disagree? As a cross-examination question would ask, “Which one is lying?” In either case, to quote the law of evidence, the reports are hearsay.¹⁴ Is it appropriate to base the assessment of outcomes and criteria on these bases?

This may be inescapable since the classroom is not the office, and the teacher is not the boss. The “deliverables” of the two arenas are not coextensive. In the classroom, the student is essentially a knower and a demonstrator of knowledge, while in the office the future employee is a worker of skills in a role. The latter are the realities that lie behind the classroom report. At the most, the classroom can only simulate the professional or industrial office. In professions that are largely cognitive, the simulation-to-practice ratio may be very close—people sitting at desks producing thought-work look pretty much the same whether they are in the classroom or the office. However, in professions that are largely practical (construction, building management, surveying, engineering), the disjunctions grow larger.

Law in the Non-Law School

What of the graduate who is not set to become a legal professional but who is required to study a large cohort of legal subjects as part of professional schooling? Is there anything practical that s/he can or must do other than merely having the acquired legal knowledge running in the background like restaurant music? Do the above analyses apply? For students not in law school whose curriculum is some other subject to which law is merely another component, these structures are far from apparent. Such students do not intend to graduate as law students, pass any law-related examinations, or practice law. Their degrees are in medicine, business, construction, surveying, media broadcasting—anything other than law *per se*. Furthermore, we do not want them attempting in any way to practice law *as if* they were mini-solicitors. All jurisdictions rightly have laws that prohibit the “unauthorized practice of law”—a concern that is especially salient in the globalized cross-jurisdictional world.¹⁵ What role then, if any, do OBE and CRA have in their educational program absent

¹⁴ Hearsay is a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), *Federal Rules of Evidence* (US). In Hong Kong, hearsay is a “statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated.” Evidence Ordinance, Cap. 8, Sec 46, Part IV.

¹⁵ As, for example in the United States, where the American Bar Association’s *Rules of Professional Conduct* prohibit the “unauthorized practice of law.” See, e.g., the definitions of “practice of law” and “unauthorized

the typical law-school mission statement? What simulation are they to undertake? Munro points out:

“It is common in undergraduate education for students to perform a variety of tasks, each of which might in some way be evaluated. For example, students in a business course may take weekly quizzes, make a classroom presentation, work with a partner to formulate a business plan, write a report, and take a final exam. An architecture student may submit multiple drawings, design and build models, make a classroom presentation, and take a final exam. In those cases, the students’ final grades in the course represent a synthesis of the multiple evaluations of their performance.” (Munro, 2002)

If the both the business student and the architecture student are required to study the law of their professions,¹⁶ what will they do to show a “synthesis of the multiple evaluations of their performance”? Where will their respective faculty’s mission statements reflect this, and how will it be included in the assessment loop? For example, a typical course description in “contract administration” for non-law students gives its “subject aim” as follows: “Introduce students to the legal aspects of construction contracts and provide them with the *ability to critically apply* the practices and procedures involved.” (Poly U BRE 351; emphasis added.) Another in construction-contract law states: “Provide a practical knowledge of modern development in construction contract law and *application* of laws and *procedures* relating to construction contracts and *their administration*.” (Poly U BRE 329; emphasis added.) A third in property law states: “Evaluate and *apply* property law to *factual situations*.” (Poly U BRE 337; emphasis added) These statements raise what I call the What-Questions: *To what* do you “apply” these things—what is the direct object of the verb apply? These relate in turn to a series of Why-Questions. Mission statements for most classes typically state that the goal is for the students to “possess” the requisite knowledge and intellectual skills, both theoretical and practical, in order to think properly about legal issues and evaluate them. (Poly U BRE 206, 336, 541) Some mission statements combine the questions: Consolidate knowledge, identify legal problems, build up a firm foundation for advancing further legal studies, *and* use legal knowledge and research skills to respond appropriately to construction-related issues. (Poly U BRE 544) All of these are fairly typical examples,¹⁷ and all of them bear the same kinds of questions: What? and Why?

practice of law” at <www.abanet.org/rppt/section_info/upl/home.html>; as well as the discussion of ABA Report 201B online at <www.abanet.org/cpr/mjp/201b.doc>; seen June 6, 2006. Such requirements are necessary to protect the profession and the public, and all typically require some form of legal education, preparation, and qualification for admission to practice. See, e.g., the Hong Kong *Barristers (Qualification) Rules*, Cap. 159E and related ordinances.

¹⁶ Lillian Corbin, “Teaching Business Law to Non-Law Students” (2002) 9(1) *Murdoch University Electronic Journal of Law*, online at <www.murdoch.edu.au/elaw/issues/v9n1/corbin91_text.html>; seen August 4, 2006; Anne C. Woodcock, “Using Legal Case Studies with BTEC Students” (1989) 13(2) *Journal of Further and Higher Education* 62; Ann Ridley, “Legal Skills for Non-Law Students: Added Value or Irrelevant Diversion?” (1994) 28 *The Law Teacher: Journal of the Association of Law Teachers* 281; hereafter Ridley “Diversion.” As I will discuss, the law-for-business model is only partially applicable to non-business disciplines.

¹⁷ As but one example, see City University of Hong Kong’s Department of Building and Construction, the requirements for which may be read online at <www.cityu.edu.hk/cityu/prgm/index.htm>; seen June 3, 2006. Their course description for BC4312 (Construction Contracts II) adds as an objective that the student should be able to “handle contractual issues arising from the administration of building contracts.” How this would differ from what a solicitor or barrister would do is not stated.

Both OBE and CRA stress that “mere” knowledge of a subject is not enough—the student must have learning experiences in learning environments that facilitate the solving of complex, real-world problems by providing opportunities for hands-on work. The stress is on practice which is aligned with pedagogy, the learning of abilities, attributes, and skills (all transferable) *plus* ideas and knowledge in courses and experiences that are interrelated. Indeed, such stress often goes beyond the immediate curriculum to include global outlook, social and national responsibility, cultural appreciation, entrepreneurship, and life-long learning (Hong Kong Polytechnic University Working Group on Curriculum Revision, 2004)—all things that are not fully measurable while the student is at the university.¹⁸ This latter point is crucial because it is necessary to distinguish ultimate outcomes (the profession itself) from the immediate outcomes (this class). The former remain hypothetical until the student graduates and enters the profession.¹⁹ But here is the problem with regard to all the desiderata in the stated course outcomes given above: There is as yet no praxis by which the student can demonstrate a “knowledge” of the law of surveying and the ability to “apply” it. Such requirements are still classroom-bound and theoretical. The “application” being talked about is application on an examination in a classroom. Even if we hypothetically excise from the learning experience all written examinations, how else can the teacher assess the student’s knowledge? Even labs, case studies, and the like are ultimately reduced to forms that can be returned to and reported in the classroom—and therefore remain essentially doctrinal. Even written examinations do not totally simulate real-life problems because the student faced with an examination paper makes the ineluctable assumption that “there is a problem here, and all I have to do is find it and analyze it properly in my written answer.” In real life the situation from moment to moment may or may not be pregnant with real problems. A “true” written examination might conceivably present the student with a non-problem, but what could s/he write except “There is no problem here”? How could the professor assign marks for such an answer?

There is a danger lurking in problem-based educational experience, however, that must be addressed as well. It is the temptation to allow students to teach themselves and each other where the teacher abdicates the role of master and director of the learning process. If students are free to “make mistakes in a controlled, safe environment,”²⁰ then at some point *those mistakes must be unlearned by remedial teaching*. This can be a fatally-flawed process in the teaching of law where what seems to be “common sensical” or logical to the untrained mind is often wrong. There is good reason in legal studies why the traditional paradigm of “sitting at the feet of the master” has been successful and should be retained.

Two Cross-Over Problems

At this point, it becomes important to note two other apparent problems that suggest difficulties in law-school teaching that has implications for non-law-school law teaching.

¹⁸ Nor are they totally without controversy in pedagogical debates. See, e.g., the chapters in Ho, Morris, and Chung *Reform*.

¹⁹ A problem touched upon in Chi-kuen Lau, “Between Egalitarianism and Elitism: Media Perception of Education Reform in Post-1997 Hong Kong” in Ho, Morris, and Chung *Reform*, pp. 191-215.

²⁰ The purported desideratum of a recent two-year research project in Hong Kong. Will Clem, “Problem-based learning forces students to teach themselves” (Saturday, June 24, 2006) *South China Morning Post*, p. E4. The project was sponsored by the Hong Kong government’s Quality Education Fund (優質教育基金), which may be seen online at <<http://qef.org.hk/eng/index.htm>>; seen July 3, 2006.

A recent article suggests that some progressive law-school programs are now attempting to “require or allow its law students to read a certain number of non-law subjects.” (Tan, Bell, Dang, Kim, Teo, Thiruvengadam, Vijayakumar & Wang, 2006) This integrative or conjunctive study is alleged to “broaden the perspective of law students in the belief that such an education will ultimately lead to a better legal professional,” (*Id*) all because of the perceived interaction and interdependence of law and society. Students may read law and non-law subjects together in a single law curriculum, or they may pursue another degree in conjunction with, and at the same time as, their law degree. However, after summarizing these various efforts at integration, the authors then present this disturbing finding:

“Although there are good reasons for exposing law students to other disciplines, *it is unclear to what extent students benefit from such exposure in practice*. While it is reasonable *to assume* that they acquire a better understanding of, say, economics, sociology and history, *and this is valuable in itself*, the *extent* to which this leads to a deeper understanding of how the law has developed and evolved (and therefore a deeper understanding of the law itself) is *unclear*. There is a danger that their law studies and their study of other disciplines will be kept in separate and distinct compartments.... [S]tudents have great difficulty integrating other non-legal perspectives with their study and understanding of law.... The outcome was mixed. Many students did not feel that they benefited much from being required to read a certain number of non-law subjects. It could also not be said that their study of non-law subjects *in any way materially enhanced* their understanding and appreciation of their legal studies.” (*Id*, original emphasis).

If these matters are “unclear,” and if the integration and mutual “understanding and appreciation” of law *cum* non-law subjects cannot be demonstrated *for law students in law school*, then any counterpart assumptions about teaching law to non-law students in other major subjects (i.e., the construction industry) must *a fortiori* also be called into question. It would seem that the problem situations are mirror images of each other. Compartmentalization will still be the rule. If the “good reasons” cannot be stated or demonstrated other than the assumption that they are somehow *valuable in and of themselves*, then more thought is needed in curriculum design on all fronts. Students, teachers, and institutions pressed on all sides for time and resources cannot be expected to take such unsupported assertions at face value.

In addition to this, there may be a perception that law schools in non-traditional universities, such as (poly)technical and vocational schools, may not be first-rate schools, may have forsaken the “learning for learning’s sake” ideal, and may lack the best students and teachers required for preparation in the legal profession.²¹ Often, the difference is expressed in terms of producing graduates who are either “technicians” or “intellectuals.” These concerns would seem to be potentiated in such settings that teach law to students who are not intending to become lawyers and who are seeking to enter a technical profession. On the other hand, does the association of non-law-track programs with existing law schools somehow make them, or imply that they are, a cut above counterpart programs which are not associated with existing law schools? Is the intention to produce a kind of general “legal

²¹ Gold “Evolution” p. 53. Gold’s reference to the “City Polytechnic of Hong Kong” is to the predecessor, founded in 1984, of the present City University of Hong Kong, which became such with the name change in 1995. It is an institution distinct from the present Hong Kong Polytechnic University, which became such in 1994.

literacy” (as one might speak of computer literacy or media literacy) without producing a full-blown professionalism? What and how much, then, constitutes “literacy”? WIE provides a promising source of answers to these kinds of questions.

Work-Integrated Education (WIE)

One significant aspect of this study that (hopefully) may provide a way out of these dilemmas is closely supervised Work Integrated Education (WIE)—the ultimate form of situational learning where the business, office, or factory becomes one of the classrooms—or an extension of the classrooms, and the student’s work there is monitored and graded by the academy.²² WIE has, if anything, made all legal training more central and important for students and faculty as well.²³ Traditional law students usually do this when they work summers and part-time as clerks in law firms—they observe actual lawyers lawyering and participate with them to a limited extent. But the difference is that non-law students in WIE are not primarily, if at all, dealing with legal matters in the businesses, offices, or factories where they work.²⁴ Any exposure to legal matters will likely be tangential to the main purposes for which they are working. (Kuh, Kinzie, Schuh, & Whitt, 2005) What, then, would be an acceptable intended learning outcome for a non-law student studying law and going into a WIE experience (or even actual employment), and by what criteria would it be assessed?

Conscientious students often ask whether their WIE experience will be subject-specific to their studies or merely a general exposure to the work environment such as they could obtain in any “summer job.” The student really has a double question here: (a) Will the WIE experience be subject-specific to my primary area of study, *and* (b) will it be relevant yet limited specifically to my needs as a non-law student who is studying law? These are legitimate and difficult questions. True WIE is supposed to be subject-specific to the intended profession. However, the extent to which the curriculum that provides that exposure partakes of the traditional law-school methods, it will reflect the traditional law-school weaknesses. As Neil Gold observes: “A profession whose members have almost all been tested only by unseen, closed-book examination cannot realistically be asked to visualize another system.” (Gold, 1991) All sources, supported by empirical research, have long agreed that the traditional lecture-tutorial system, assessed by a final written essay examination, is not appropriate to the task (Woodcock, 1988), yet those methods stubbornly remain, not the least because the lawyers who teach the courses to the non-law students are wary of any methodology or assessment that may lower the “high hurdles that they themselves had to jump when they entered the profession.” (Ridley, 1994) Absent

²² Hong Kong Polytechnic University Department of Building and Real Estate, “Guidebook for Work-Integrated Education,” May 2006; hereafter “Guidebook.” See also the 90+-page National Council for Work Experience, “The Placement Tutor’s Handbook: A Guide to Higher Education Institutions on Arranging Placements and a Compendium of Current Best Practice in the UK,” online at <www.prospects.ac.uk/downloads/workexperience/guides/Placement_Tutors_Handbook.pdf>, for numerous references to the legal implications both *of* and *within* WIE and the need for legal knowledge on the part of everyone involved; seen May 30, 2006.

²³ The primary resource for those involved in WIE at Poly U is the Work-Integrated Education Resource Bank at <www.polyu.edu.hk/wie/>. See also the resources available from the Ontario Co-Operative Education Association online at <www.ocea.on.ca/>; seen June 4, 2006.

²⁴ Another difference is that the traditional law-clerking situation was entirely voluntary and independent on the part of the student. There was no official connection with or monitoring of the experience by the law school or the professors.

requirements and motives for innovation, what, then, are students supposed to do in their WIE on-the-job-training that would demonstrate their acquisition of abilities, attributes, and skills as a result of their having studied the law of their discipline, and how would the academy measure and demonstrate such acquisition?

As we saw earlier, typically the syllabi for non-law school law courses state that students are expected to learn the law of the subject (for example, property law), and to “evaluate and apply” such knowledge to “factual situations” in order to “solve legal problems.” (Poly U BRE 206; 337) But these terms do not refer to practice in the professional field. They refer to the doctrinal manipulation of knowledge and abstract theorizing in response to in-class discussions and final examination questions—in other words, the traditional approach of the traditional law school. (Solomon, 1992) Labs, case studies, and seminars all still remain classroom-bound. Calls for “curriculum revision” demand that we develop “all-round students” with “professional competencies” rife with OBE and CRA (*Curriculum Revision Resource Handbook*), yet we have difficulty stating just what those things might involve when it comes to non-law school law in the WIE context. Once the students have acquired such knowledge, what are they supposed to *do* with it—other than have it run like a software program in the back of their “real” professional activities (the general “legal literacy” approach)? We have difficulty articulating the mission statement on either side of the hourglass. If we cannot answer these questions satisfactorily, then the justification for the study of law in non-law track curricula remains remote, abstract, and theoretical. As Munro notes, “An assessment program must have its roots in the mission of the law school. (Munro, 2000) This applies *a fortiori* to the non-law-track law curriculum. Hence, the initial question remains: What *is* the mission of the non-law school teaching law to non-law students?

Thus, while OBE and CRA have been well imagined, thought through, and in some places implemented, WIE needs further theorization—and all three need further integration. As Munro further observes, the assessment movement generally has been afoot for at least the past fifteen years, and it is “knocking at the door” of legal education. (Munro, 2000) It is knocking at the door of legal education outside the law school as well, but there it has not been so well articulated. Particularly with regard to “phase two” of such education, WIE, what could we imagine might be the consequences if such matters were neglected? What if a WIE program were to make no provision for the integration or assessment of legal education in the program? This would be unfortunate from a simple economic standpoint since a non-law program that requires all its students to undertake a substantial number of law classes as a requirement for graduation would remain pedagogical law, classroom law, alone without the subsequent practicum in industry.

For example, in programs in the built environment, students will undertake WIE in their respective major fields: surveying, property management, engineering, etc. Their industry experience and supervision will be managed within those contexts by practitioners and academic advisors with expertise in those fields and with the intended learning outcomes defined beforehand. The criteria for technical, professional, and generic skills are that they will be “valuable in *that* profession.” Surveying students will practice surveying, management students will practice management, and so on. However, if there is no concrete provision specifically for the law component to be integrated within the scheme, or to be reported and evaluated, the students’ legal training will be largely wasted. WIE is supposed to give the students the opportunity to “apply and practice” the theory they have learned in class. What, then, is the mechanism for doing that with regard to their law classes in the

professional workplace where they will encounter real legal situations?²⁵ Who there will supervise them, and how with they be evaluated on their *legal* knowledge and practice? What mechanism in the WIE program will guarantee that students will be exposed to the *legal* situations, problems, and concerns of their industry when they are involved in their WIE exercise? At the very least, it seems that their WIE experience should include interaction with a company's legal secretary and/or legal counsel. Absent any consideration of the law in the WIE scheme, at least some of the implicit messages to the students will be—

—Your study of law is actually irrelevant to your professional practice;

—It cannot be truly intergrated with your work; there is no real nexus, but rather a disjunction;

—It is therefore really not valuable in your profession;

—Nobody in your profession actually practices what they were required to learn in their law classes;

—Your study of law will remain theoretical only—the actual real-life problems you encounter in the profession and the industry will really have nothing to do with the law;

—Your study will be measured only in traditional in-school examinations—not by performative criteria in WIE;

—Hence, you can forget what you learn in the law as soon as you pass the final examination and leave those courses;

—There is nothing for you to write about regarding the law in your reflective journal;

—There will not be, and cannot be, any intended learning outcomes for workplace learning in the law because none have been stated;

—The skills you learned in your law classes are not transferable;

—For all these reasons, there is no role for your academic *law* supervisor in WIE, and the academic supervisor in your major subject cannot evaluate anything you might glean regarding the law.

If these realities are correct, they violate one of the basic tenets of WIE, namely, that WIE should be “purposefully designed to provide intentional learning aimed at the attainment of the intended outcomes, that is, *learning should not be left to occur incidentally as a side effect of work.*” (“Guidebook.”) Without this, the legal component of their study will be sidelined as incidental and trivial, if not completely erased. Furthermore, if the student is required to keep some sort of diary, portfolio, or reflective journal of the WIE experience, the

²⁵ Linda Winder, Sonia Stih, and Jim O'Connor, *Transitions: A Practical Guide to the Workplace* (Don Mills, Ontario: Maxwell Macmillan Canada, 2000), and the book's accompanying *Teacher's Resource Book*. The entire text is saturated with law-related concepts, examples, and exercises.

situation of WIE with no legal content violates a fundamental criterion of that exercise: “Express your idea on the *association* between academic studies in the University and industry.” In a WIE program, there must be such “association” between their academic study of the law in the University and industry. Otherwise, none of them will have anything to “express” with regard to their law classes. In the name “work integrated education,” *integrated* is the operative word linking, and to some extent dissolving, the boundaries between, work on the one hand and education on the other. One might wish for a more active verb form in the middle position: *integrating*, because WIE is not a “machine that will go of itself.” It requires “riding herd” by all involved, and all involved are partners. The Conference Board of Canada, 2006; University of Waterloo, 2005; SUNY, 2006) In full-time law school, the connect between the school and the industry might be viewed as an hourglass: the size and shape of each side being pretty much identical, and the contents of each side flowing back and forth pretty much equally into the other. Such symmetry does not exist in the law-for-nonlawyers curriculum. The image there might be more like a stream flowing one way into a pond. For all of these reasons, the WIE program must incorporate a mandatory mechanism in the scheme that will ensure the law is adequately addressed, reported, and evaluated as a necessary and integral part of the WIE experience.

A Partial Solution: Tort Spotting and Contract Reviewing

Students who enter WIE programs in non-law subjects can still be involved in the legal issues of their respective workplaces. In connection with their basic classes in torts (and in some ways related to contracts, as well (University of Connecticut Women’s Studies Program, 2006; Li, 2006)), they can be assigned to look for potential “accidents waiting to happen” and tortious breaches of contracts on the premises of their employers. (Gross, 2005) This can be an extension of the same kinds of “clinical” and mooted assignments they should already have received in their classes. This adds real value because it reduces the likelihood of liability on the part of employers. (Ontario (Canada) Ministry of Labour, 2006) The students can also participate knowingly in the contractual obligations they undertake to both their university, their employer, and other stakeholders such as the community in general, and even help to improve those contracts.²⁶ They can also be made aware, during the course of their WIE experience, of such matters as privacy, proprietary knowledge and documents, intellectual property rights, workplace health and safety, harassment and discrimination, and insurance—to name a few. (Utah State Office of Education, 2006) All of these subjects impact them directly, are part and parcel of the larger subject they are pursuing, and do not involve them in the unauthorized practice of law.

Conclusion

If the academy requires non-law students to study the law of their professions, it stands to reason and is only fair that that study be fully integrated into their experiences of OBE, CRA, and WIE. Otherwise, it seems the institution is merely giving lip service to these criteria and is cheating itself of all they might potentially deliver in a true modern education. Students have a right to know at the outset what the requirements are and how they will be fulfilled. Those who advocate “curriculum revision,” and demand that the academy develop “all-round students” with globalized “professional competencies” rife with OBE and CRA, must

²⁶ State University of New York (SUNY)/Potsdam, “Faculty’s Guide to Establishing an Internship at SUNY Potsdam,” online at www.potsdam.edu/media/33AB8A0DFBE80021A146250F0735823BFacultyGuidelines.pdf; seen June 1, 2006, discusses ways in which this might be done.

overcome their difficulty stating just what those things might involve when it comes to non-law school law. They must articulate exactly what “doing law” in that context contemplates.

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