

EDUCATION: AMERICAN MODELS FOR ASIAN POLICY?

EDUCAÇÃO: MODELOS AMERICANOS PARA A POLÍTICA ASIÁTICA?

William Henry Clune¹

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Nota ao leitor: Este artigo foi escrito pelo Prof. William Clune, da Universidade de Wisconsin, Madison, EUA, em 1993. O professor é grande especialista em Direito e Políticas Públicas, um dos raros pesquisadores no mundo a ter produção teórica específica sobre a fundamentação desta abordagem. Seus principais trabalhos, publicados nos anos 1980 e 1990, foram redescobertos recentemente e vem sendo traduzidos para publicação no Brasil.

Este artigo traz um interessante registro de viagem do Prof. Clune à China, no início da década de 1990, na condição de consultor na área educacional, com um riquíssimo depoimento sobre o diálogo intercultural em que os chineses indicam a possibilidade de abertura para a educação privada, a crença na ausência de vies dos testes educacionais e muitas questões que permanecem atuais e desafiadoras. Trata-se de artigo inédito no mundo, cedido à Profa. Maria Paula Dallari Bucci durante seu período como Visiting Scholar em Madison, em fevereiro de 2022.

1. INTRODUCTION

I served as the foreign law expert on educational law and policy. The idea of an American giving advice to Asians about education may strike Americans, certainly, as somewhat strange {Stevenson). One way of summarizing my own involvement in American policy is dealing with problems that China doesn't have (poverty, a weak curriculum, students and families indifferent toward education) and trying to adapt educational policies which China does have (especially what we now call "systemic educational policy" -- an ambitious curriculum supported by rigorous examinations for students, teacher training, and monitoring of course quality).

Of course, I was expected to analyze the experience of other countries, not just the United States (which I did, particularly in urging the maintenance of ambitious standards). But experience in the United States did turn out to be surprisingly relevant in ways I hope to develop in this chapter. First, the U.S. has much that the Chinese would like to have, particularly a large and successful system of higher education (only about 2% of Chinese attend college -- still a large number in a nation of 1.2 billion people). Second, China is undergoing a massive set of institutional

¹ University of Wisconsin, March, 1993

changes necessary for a market economy, and these changes clearly will demand extensive modifications in educational policy (for example, a comprehensive, uniform system of taxation and an educational system with enough flexibility for open and constantly changing labor markets). Finally, and sadly, I had the feeling that China probably will inherit many of the social problems now facing the United States -- for example, poverty (in a wealthier society), materialism, and social disorganization (concomitant with the immense organizing dynamics of a modern economy).

I hope that the intellectual discovery and energizing quality of the consultation comes through in the discussion which follows. For me, this was a surprising and sometimes poignant experience which, besides teaching me much about China, cast new light on the reasons for our educational institutions and their roots in social structure and history.

The rest of the chapter will be organized as follows: first, a brief description of the process in our small workshop; second, the main conclusions and most important issues of educational policy identified by the group; third, some points about comparative law methodology; and, last, a short conclusion.

2. PROCESS

In terms of agenda, prior to our meetings, the Chinese had begun work on defining the scope of a proposed "basic education law" and identified various chapters or areas for consideration. On first glance, this list struck me as a grab bag of incommensurate issues. I gradually came to see the problem of creating a liberal legal order {Max Weber vol 1 & vol 2; Unger?) (decentralized yet accountable institutions operating under somewhat objective rules) as a crosscutting theme (see below). I also came to see that each area raised fundamental and basically familiar issues of policy. Organizing the discussion around policy issues fit with the Seidmans' problem-solutions approach to the memo of law, and the Chinese understood the issues almost immediately (thanks, in part, to our excellent translator, Mr. Hu Wenbin).

Nonetheless, I have no way of telling how much "social construction" of the problem was going on in our discussions. I knew relatively little about China and Chinese education and thus depended on my Chinese colleagues for almost all my information.

They seemed exceptionally well informed and deeply committed to the quality of education in their country (in the manner of educational policy makers all over the world). The representatives from the State Education Commission had command of statistics and details of the education system, while those from the Bureau of Legislative

Affairs added a breadth of perspective. But I had no real way of testing facts or knowledge about implicit agendas of public officials in their position.

In terms of format, our group, like the others, had to decide between lecturing or dialogue. I was firm both that the task should be broken up into manageable pieces and that we should work in a dialogue rich in detail. We settled on a procedure whereby the Chinese experts would outline an area in the morning; I would comment on policy issues in the early afternoon, which would provoke discussion for the rest of the afternoon. We continued this way 6 days a week for the 2 1/2 weeks of the workshop.

3. MAIN CONCLUSIONS

Identifying the conclusions of an extended dialogue like the one described above could be difficult. Our group was committed to produce one draft memo of law (on school finance, as it turned out), which would serve as an adequate summary of that area; but I pushed for some kind of synthesis of all of our discussions; and my Chinese colleagues readily agreed. Indeed, as analysts/ drafters themselves, the Chinese experts seemed very comfortable with all aspects of organizing and recording the results of meetings.

The result was a list of main points, or conclusions, as summarized by our leader, Mr. Li Lianning, after he talked with the group. While this list ignores much of the subtlety of the discussion, it is a very useful overview and effective introduction for the rest of this chapter. The conclusions are phrased in terms of what was useful or what the Chinese concluded they "should" do. I stressed that should was too strong a word and that we had really identified policy issues and options usually requiring further research. The Chinese colleagues seemed amused at such hesitancy (which is, indeed, a nuance of the separation of policy and politics in our political culture). In any event, western readers might wish to translate the "shoulds"

into less obligatory terms; and, indeed, Mr. Li did conclude by saying that these were summary points, all requiring further analysis and research.

Here are the conclusions as summarized by Mr. Li (from my notes of his verbal presentation):

1) The memorandum of law approach worked well as a foundation for drafting legislation.

2) Education should be changed to fit the market, for example introduction of more choice by students, but in a way which compensates for the disadvantages of market forces, especially problems with equity. The discussions of equity problems in choice systems were extremely helpful.

3) The education system should be decentralized with each level assigned functions most appropriate to that level.

4) But decentralization should not proceed too far; in particular, China should not lose the efficiency and effectiveness of its national curriculum and system of school inspection.

5) The basic education law should be drafted in terms of the power and authority of different units to solve problems, rather than any attempt to solve all problems through detailed legislation. This idea -- defining scope of authority -- was extremely helpful as a general approach to legislation.

6) For teacher salaries, there should be a national benchmark based on supply and demand at the national level, with supplements reflecting differences in regional supply and demand.

7) A strong system of taxation and tuition should be established for the support of education. Further research and comparative research is required on the best design of tax systems, for example, a general tax, special surtax for education, issues of stability, and so forth.

8) After compulsory education, families should be asked to pay for tuition, with tuition set according to market principles. Universities should begin setting up systems for seeking private donations.

9) China should continue to analyze the advantages and disadvantages of private education. Policies should be designed to encourage private schools in selected places.

10) There should be greater separation of schools and profit-making enterprises which support these schools financially. School personnel should not be involved in running these enterprises directly.

11) China should consider the use of governing boards to administer public universities (boards selected by regional authorities such as our state governments). Registration of students in higher education should be more flexible to fit the market.

12) China should consider developing more comprehensive high schools, rather than such a strict separation of academic and applied education.

13) There should be greater involvement of the "social forces" in education, especially bringing businessmen into policy making. This is an important way to reform education to fit the market.

Mr. Li also said that the workshop did not spend much time on the following issues, which would require further discussion, perhaps in future sessions (I agree with Mr. Li's assessment):

1) The school's legal status, that is, its status in civil law (power to sue and be sued, enter contracts, etc.).

2) The legal responsibilities of schools. (Questions by me established that this referred to the regulation of private schools, e.g., academic standards, fiscal responsibility, admissions).

3) Schools opened by foreigners.

4) The exact structure or framework for the education law (for example, the division into chapters as opposed to the general approach referred to above).

4) MOST IMPORTANT ISSUES OF EDUCATIONAL POLICY

This part of the chapter will expand the above by going into greater depth and adding detail. As mentioned, our most fruitful discussions dealt with structural policy issues.

General themes identified by Chinese. The Chinese experts identified several themes which cut across particular issues: flexibility v. rigidity, market orientation (both in the products and process of education); the jurisprudential methodology of basic laws or constitutions -- a discussion eventually converging on delegation of powers and accountability).

Across these general themes is an even more general "megatheme" of the liberal legal order. Gradually we began to discuss how a set of interlocking institutions could combine autonomy, differentiation, accountability, flexibility & choice. For example, we discussed how universities in the United States were supported and governed by trustees or legislatures, could hire and fire employees and decide what students to accept within legal limits, and exercise broad authority over students within the limits of student rights.

A small story will perhaps illustrate the pervasiveness of the liberal legal order as a theme. In the middle of one session, Mr. Li received a phone call and afterwards asked me a question. An "overseas Chinese," he explained had offered to donate 2 million dollars to establish an elementary school. How could this be done? First, note the oddity in a Western context of a potential donor calling a high government official rather than, say, a lawyer specializing in education law. But both this hypothetical lawyer and law are non-existent in China -- a common situation leaving enterprisers no choice but to negotiate with such public authorities as they can find. Second, in our conversation I found myself sketching in the basic law of trusts in the West: a trust fund, a board of trustees with legal title administering the funds for the good of the beneficiaries, methods for selecting the trustees, sanctions for abuse of fiduciary duty. According to Mr.

Li, no such basic law of trusts exists in China, and banks lack the capacity to hold trust accounts. Third, we discussed briefly the advisability of some legal regulation of private schools, ranging from health and safety, through achievement testing, to inclusion of private schools in the mandatory national curriculum. This law, also, did not presently exist.

The general point is that the entire structure of authority and regulation supporting private schools was lacking because prior to that point all schools had been publicly owned and administered through a system of complex administrative regulation, negotiation and micro-management. Dredging up old knowledge about trusts was the last thing I expected to do before coming to China (I quipped to my colleagues that I never dreamed I would be using old knowledge from teaching Trusts & Estates and felt like Lord Mansfield). But the liberal legal order really is, more than I realized, a seamless web depending on interlocking parts.

The problem of transition. A second general theme was the problem of making a transition from a socialist regime which was generally quite successful in

education to a new, more flexible system without hurting the quality of Chinese education. Without the benefit of capitalism, China had achieved universal literacy, compulsory education through middle school, and generally high performance on international comparisons of the achievement of various age groups. Indeed, China's entry into world markets undoubtedly would be aided by a disciplined work force well prepared for at least entry level positions.

But the transition to free markets could hurt the quality of education in various ways, for example, undermining the fiscal capacity of the central government to support education at a time of rapidly increasing disparities of local wealth (see school finance discussion immediately below), breaking down the emphasis on a rigorous curriculum through decentralized decision making (similar to the problem of fragmented local control in the U.S.), and eroding both the broad job responsibilities of teachers and their strong moral authority over children. Furthermore, both extensive vocational education and greater flexibility in educational choices could easily be managed in ways producing low educational quality and enormous inequities.

The primacy of school finance. Perhaps the greatest surprise for me in the workshop was the importance of school finance. Educational policy in the U.S. has been preoccupied for some time with student achievement and upgrading the curriculum (Smith, Cohen, Oday, National Standards). Educational finance has been the province of courts under equity standards. Having worked on in school finance myself, I was able to address the issues and ended up using a great deal of what I knew. Because of its importance, the Chinese experts decided to do our one memo of law on this topic (attached as Appendix).

China is facing a school finance crisis analogous to the U.S. in its period of rapid industrialization (Tyack, *Managers of Virtue*), but with added twists. On the one hand, more revenue from the central government is needed for various reasons. Student enrollments are increasing rapidly, economic growth in other sectors threatens to pull qualified teachers out of education, different regions of the country are experiencing vastly different rates of economic growth and wealth at the same time that the work force becomes mobile across the entire country. Also, like other countries, to attain higher levels of productivity, China must try to increase the education of its work force over time (high skills or low wages). This represents a

"quadruple whammy" for education finance: more students, more expensive teachers, more need for equalization across geographical areas, and higher levels of compulsory education.

Unfortunately, the revenue raising (fiscal) capacity of governments is moving in the other direction. As I understand the situation, greater freedom for enterprises and increased local control has interfered with the ability of the central government to retain a portion of enterprise profits. Meanwhile, the taxing powers of regional governments are not well developed. The system of allowing schools (all grade levels) to run enterprises appealed to my Chinese colleagues as a convenient source of revenue in a tight budgetary situation, but I was skeptical on grounds that revenues would be very uneven across schools and the efficiency of the teaching budget could be compromised by the profit motive.

My conclusion was the need for a Clinton-like commitment to education as a key element of social investment. In its rush to encourage private enterprise, China must not lose the advantage of its excellent system of education. Research should be done on whether decentralization will require stable, comprehensive, uniform tax systems at both the national and regional levels, with the central government providing equalizing aid. Obviously, the development of tax systems has significance far beyond education.

I will cover higher education finance, with its parallel issue of the need to develop a tuition system, in the section on higher education.

Curriculum: Chinese excellence and a need for change. As I mean it, curriculum is a large topic equivalent to what we call systemic educational policy {smith & o'day), including curriculum standards, instructional materials, student testing, and teacher training. The paradox in China is that there already are high standards, high achievement, a supportive culture, a beautifully articulated set of systemic policies; yet there is need for change in the same direction as other countries (including the U.S.) -- away from rote learning toward more flexible problem solving {New standards stuff in my course materials).

As for the existing systemic policy, the Chinese have a national curriculum coordinated with an extensive system of student examinations, teacher training, teachers at the school level who serve as subject matter leaders, and a recently implemented system combining inspection and technical assistance. But my Chinese colleagues did not seem aware of the worldwide movement toward higher order

thinking and problem solving in the curriculum (though they were acutely interested in it). And a powerful system of traditional education may be especially difficult to change {Cohen, Mrs. O}. Out-of-date curriculum philosophy also appears in the next area: vocational education emphasizing occupationally specific rather than general skills.

The familiar problem of vocational education. The Chinese have gone for vocational education in a big way, seeing it as a primary means of adapting schooling to a market economy. According to data furnished to me, 50% of middle schoolers go on to vocational training rather than senior high school. Vocational education is enjoying something of a rejuvenation in the U.S. as well (tech prep, etc.), but it is an area fraught with familiar problems. Any kind of job-specific training can create mismatches (and thus be very inefficient) for students who must choose entry occupations and who as workers may often switch jobs in a lifetime.

Both of these conditions are likely to increase in frequency as China switches from its command-control labor system. Specific training also does not match the general problem-solving requirements which cut across many kinds of jobs in a modern economy, leading most authorities recommend the kind of general skills training provided in academic or applied academic courses {SCANS; Rob Meyer vocational paper}. Vocational education also may suffer serious problems of quality because the required equipment is unaffordable, and the skills taught in schools may have already become obsolete in the marketplace (e.g., electric typewriters in an age of word processing).

Finally, since, on average, vocational training is no more effective and more expensive than general academic training, it is usually far less cost-effective. The cost factor was of serious concern for the Chinese given the crisis in school finance.

For these reasons, I recommended that the Chinese give serious consideration to developing a vocational curriculum with a high proportion of academic and thinking skills (of the type now recommended for the modern work place){SCANS}. Another option would be place more students in academic high schools.

Privatization: myths & realities. My Chinese colleagues seemed almost bewitched by the promise of private schools; and it became important to disentangle myth from reality. First, a school finance point. The Chinese mistakenly believed that tuition for K-12 would open up a vast new source of revenue and help solve the fiscal

crisis. They were disappointed, I think, to learn that countries with large choice systems all subsidize the schools with government revenues {Charles Glenn book, new paper). Unfamiliar with market economies, and especially with the resulting stratification of wealth, they had not appreciated the foundational fact that unsubsidized choice systems are for people with money. They did seem to be quite conversant with the more subtle virtues of competition, variety, and flexibility and remained enthusiastic about experimenting with private education.

Discovering the value of flexible educational pathways. This was an area of inquiry which led me to see our own system in a new light and wonder if there is a hidden logic in a frequently criticized aspect of U.S. education. The present system of student assignment in China is rigid: a competitive examination system leads to assignment to various kinds of educational institutions (academic, including both general and normal, vocational, etc.).

Students who once enter one type of training cannot enter another track (especially relevant to vocational students who later could benefit from higher academic training). My Chinese colleagues mentioned, with respect to a different problem, that many students assigned to normal schools were dissatisfied with teaching as a career (see more complete discussion below). In what seemed to be an obvious adjustment, the system now has a rapidly growing, ill-defined division of "adult education" apparently designed to meet the expanding needs of the work force for more and different training. The Chinese also seem to be introducing more flexibility into the examination system. Just before I left, I saw an article in the newspaper saying that students who scored just below the cutoff on the college entrance exam could attend higher education by paying their own fees.

I suggested that a modern economy needs open access to different kinds of educational institutions, in other words, that the system of post-compulsory education should itself operate on some kind of market principle. The problem is that China lacks several of the essential pieces of such a system. Even assuming that the rules of admission were changed to allow voluntary choice by both schools and students, no system of application presently exists. In our discussions, we reviewed how an admissions process works. Also, the examination system would need to be changed to accommodate choice, either by ranking among applicants, or by giving greater discretion about entrance criteria to the institutions themselves. With greater discretion, would there be some compromise of the strength of the examination

system as a force maintaining the national standard curriculum (making it something like the SAT, for example)?

Seeing the connections between various aspects of choice in a system of occupational training gave me a new perspective on the U.S. system of education. Our system frequently is criticized for lack of high standards and an abundance of mediocre educational choices, both within and between institutions {Powell, Cohen,

Farrar, shopping mall). Yet, if young people are to maintain a high degree of flexibility in their educational choices well into adulthood, large numbers of students presumably must be promoted through the system in a manner which keeps them eligible for multiple options at each level. Both vocational and academic tracking based on competitive examinations are problematic in such a system because they represent, at best, crude guesses about what the market will require of various cohorts of students. The U.S. system is one possible answer -- a breathtaking variety of educational institutions (everything from the Ivy League to hair styling schools) and uneasy efforts to have quality education without leaving too many students behind.

Those who claim that our young people wait too long before entering a serious job may simply not understand the complicated process of match-making which is occurring between employers seeking qualified workers and young people seeking to become more qualified. Of course, China is not even close to developing such a system, and I could not even imagine the kind of transition which would be necessary. Here, again, the system is the solution (the system in the sense of a liberal legal order). Once market forces were allowed to operate on both sides (choice by both educational institutions and students), options probably would be gradually developed through market forces.

Profscam revisited: separating schools and revenue producing enterprises. While schools in China typically are associated with some level of government, they often support themselves not so much through government revenues as by operating business enterprises {cite paper on this I got from Canadian AEFA guy). As I understand it, such partnerships are a logical part of the complex system of state enterprise in the country. Since government owns and operates almost all business in the country, there is nothing incongruent about public schools doing so. Concerned about the fiscal crisis, and enthusiastic about market principles, my Chinese

colleagues thought that perhaps this system of school enterprises should be greatly expanded.

I was very skeptical. As a method of school finance, the system seemed certain to produce enormous inequities (each school being its own little tax district stuck with whatever enterprise it happened to have), while the revenue raising potential seemed no better than uniform taxation of these same enterprises. I also suggested a serious danger of subsidizing enterprises through the educational or teaching budget. Our own system of higher education is now under heavy (and seemingly accurate) criticism for blurring of the lines between teaching and research {Hauptman book, massey cpre brief). We discussed taxation as an alternative to relying on enterprise revenue and various methods of accounting and accountability designed to maintain a separation between education and business activity (e.g., separate staff and budgets and having the business buy teaching time at an appropriate rate).

In this area, too, one senses the problem of shifting to a entire new system, many of the pieces of which are presently missing, and the related one of transition. I had no way of estimating the feasibility and costs of simultaneously disentangling enterprises from schools, building a system of uniform taxes, and getting people used to "rational" accounting of time in a society which seems characterized by complex, organic, cooperative behavior. Fortunately, I could leave such problems with my Chinese colleagues.

The birth of equity after socialism. In our discussions, I made the surprising (for me) discovery that my socialist colleagues were largely naive about the equity problems which so dominate U,S. educational policy. For example, the Chinese did not seem familiar with the idea that competitive examinations could reinforce advantages from family income, education, and social status {Coleman 1966; jencks; olneck who gets ahead). We discussed the following equity issues: inequities in school finance (see above), need to subsidize vouchers of poor families if choice were adopted, the fairness of asking wealthier families to pay and students to borrow for college tuition, and the basic idea of poverty as a special educational need justifying extra assistance.

Reinventing business history and politics. If equity was a surprise topic, this was even more so. I never expected to spend a full day on role of business in

education, yet the topic turned out to be central and revealing about the uniqueness of each country's history as it affects education.

The practical problem was how to get business support for school finance. In market economies, business support of education is important and usually available because business depends on skilled workers. This was a new idea to the Chinese who said it would be difficult, because government and business are not accustomed to a cooperative relationship. Business has not been welcome in government, and government usually is nothing but cost and trouble for Chinese business. As part of this discussion, I described the part of the history of education in which businesses became very active in educational politics (Tyack. *One Best System*; Tyack, *Managers of Virtue*). Bob Seidman, who happened to be attending the session, mentioned Ann Seidman's grandfather who as a businessman took an active part on the School Board in New York City. But business participation in China is tricky because of the need to simultaneously deregulate and tax. The United States had an entire century of *laissez faire* policies and subsidies (e.g., of public lands)(Hurst) before the period of large growth in public school expenditures.

To help look for a solution, Seidman and I recommended broader participation of business on commissions, school boards, etc., and a careful balancing of investment and deregulation more familiar to us in age of Federal deficit than the 19th century heyday of cowboy capitalism.

Educational personnel: teacher shortages, job security and performance. The United States is perennially plagued with personnel issues, for example, tenure and compensation in a time of budget shortages and greater emphasis on performance. China has parallel issues complicated by structural change.

First, teacher shortages. It was hard for me to get the facts clear, but it appears China is beginning to experience a drain on the teaching force from other parts of the economy. Students in normal schools in China come from the top 10% of high school students (actually from the 90th to the 95th percentile). We had an interesting discussion with me trying to understand what Chinese meant in complaining about "quality" of these students entering teaching, since Schools of Education in the United States would be deliriously happy with the top 10% of high school graduates. Eventually, the Chinese conceded that the problem was more attitude than ability or academic performance; Normal School students really wanted

to get into academic universities. It seemed obvious that the pressures on these well educated students to go elsewhere would only grow stronger with rapid economic growth, perhaps requiring expansion of higher education and substantial increases in teachers' salaries.

Our group also spent more time than perhaps it deserved on the related issue of minban (community) teachers in rural areas, a system being rapidly phased out by government. Minbans are talented high school graduates (for now, the government is retaining only those who get further training beyond high school). I saw this also as an example of conflicts between traditional policy and the new labor markets. The insistence on a college education for teachers is good as a general policy, but need for teachers in rural areas may become even more acute during modernization, because of the preference of highly educated class for urban areas.

The second big personnel problem was job security and performance. There was a moment of confusion for me when the Chinese colleagues said teachers couldn't be fired, which I took as referring to tenure in our sense. It turned out they also meant that teachers could not, in our terms, be laid off, because the policy of the "iron rice bowl" in China guarantees everyone a job. Schools are no exception, and many schools and universities carry extra staff, some of whom I understand do not even show up for work. We reviewed (as best I could) the procedures for reductions in force at the elementary level and the variations on lay offs recently experienced by many universities (fiscal exigency, and so forth).

The Chinese government appears to be moving aggressively to create powers of staff reduction, as well as personnel evaluation. One wonders, in this respect, how long it will be before there is a movement for employee rights under the new regime and through what institutions such rights might be enacted. I was not told about any union activity or association of teachers with an interest in such matters. Teachers were given the right to job security under the old regime but nothing else which translates into right or power under the emerging order. Courts in China do not seem presently authorized to develop quasi-tenure rights, as in the U.S. I also wondered whether the diminished job security would be offset by a some kind of unemployment compensation, a topic, again, far afield yet logically related to education.

Student rights: rediscovering substantive due process. When I first heard Bob Seidman mention the topic of education law, I imagined that such things as student rights would be a major part of the enterprise (because of the distinction between

educational policy and law the way it is made in the U.S.). As it turned out, we spent only part of an afternoon on this topic. Interestingly, prior to discussion, the Chinese had classified the "right to transfer" as a student right, whereas I normally would classify it as fundamental aspect of educational organization (whether the system as a whole is set up to allow transfers) and secondarily as an aspect of educational administration ("rights" being associated with legislation and courts in the U.S.). We did discuss the practice in the U.S. of each institution deciding whom to admit and which course credits to recognize.

In terms of student rights as student discipline, the Chinese colleagues used the example of students who were barred from ever attending college for practicing an examination illicitly obtained by their teacher and the practice of publishing everyone's test scores under the theory of raising motivation. My response to both of these was, first, to recommend the development of a student code of rights, whether at governmental or school levels, and second to walk through a type of balancing test which I recognized as coming from substantive due process in Constitutional Law (also equal protection and first amendment). On the cheating, I said that the strong state interest in preventing cheating could probably be accomplished by severe punishments for major wrongdoers (such as teachers who obtained an exam illegally and drilled students on the content) but that lesser punishment should be received by students, who were, in some sense, victimized by their teacher.

On publication of test scores, it seemed to me that the strong consequences of the test for the individual (grade promotion, college entrance, and so forth) probably made it unnecessary to take the additional step of invading the students' privacy. This notion of a disciplinary action which serves a legitimate state interest in a way least harmful to the interests of students is fundamental to constitutional balancing under U.S. law and seemed to make intuitive sense to my Chinese colleagues.

Higher education finance and governance: raising money and accountability. As mentioned earlier, the Chinese are very interested in rapid expansion of their system of higher education and feel that this cannot be done without new sources of revenue (e.g., tuition) and new kinds of autonomous governance. Some of our most interesting sessions concerned how American universities are financed and governed. While higher education has not been my area of expertise, on finance I was able to specify four sources: taxes, tuition, donations, and research grants. We

spent time going over how each of these sources works, for example, the fairness of charging tuition (because of the private benefit received) and the kind of long-run institutional structure which is necessary to build effective alumni contributions.

There was also much curiosity about educational governance. If universities are not completely run by the government, how and to whom are they accountable? I realized here that our own system seems to rely on three main mechanisms of accountability: the power to appoint chief administrative officers (held, e.g., by boards of regents and trustees), the power of the budget (ultimately held by the same groups), and, in the case of public universities at least, the reserve police power, that is, the authority of the legal system to intervene at any moment about any thing. The last point about the police power, with its potentially infinite scope, made me realize that the difference between a liberal order with relatively little government interference and a socialist order, where everything is regulated, is not as clear as I supposed and obviously depends on some set of mediating cultures about the appropriateness of interventions, micro management, and the like.

I mentioned that at my own university, questions of accountability versus autonomy of the university are debated literally every year, showing, I think, that this is "contested ground" and a matter of cultural conflict and adjustment.

Moments of dread and the Trojan Horse of western education. At various times during the discussion, I experienced qualms about "selling" the Western system of individual liberty and autonomous institutions because of all the associated problems we are familiar with. This idea of problems hiding beneath solutions Ed Rubin referred to as the "Trojan horse." For example, it is impossible to imagine that this diverse and still poor country can avoid the problems of isolated poverty while acquiring the enormous wealth brought by capitalism. One also senses the beginnings of materialistic values undermining the culture of discipline and sacrifice. The Chinese are already good at business (producing) and presumably must become good at consuming as well. Our experience tells us that wealth brings both poverty and the culture of consumerism.

Several of these themes came home to me when I mentioned the problem of teenage pregnancy in the U.S. My Chinese colleagues told me that teenage pregnancy is rare in China because middle and high school teachers have broad moral authority over their students and usually prohibit them from even dating until they are out of high school. Meanwhile, on the television in our hotel I saw

advertisements with typically Western themes emphasizing wealth, consumption, and personal freedom. One commercial, for example, showed a handsome, very young man driving up to a sumptuous house in a convertible and calling out to a beautiful, very young woman looking out a window to come with him for a ride. I remarked to my Chinese colleagues that this commercial did not look like anything I had seen in China; they laughed and said it was from Taiwan. I told them to try to maintain the sense of dedication in teachers and discipline among students as long as they could, because the typical influence of materialism is to diminish such values. But I had a sinking feeling that the long run cultural impact of pervasive commercial advertising would be very hard to appreciate in a culture where it is just beginning.

5. COMPARATIVE LAW AND POLICY

This part of the paper is an effort to draw some generalizations about comparative law methodology from the discussions and recommendations which emerged in our group. Based on this experience, what can be said about the attempt to draw conclusions and borrow institutions from one culture another?

The balance of contextual detail and policy analytics. Here I would make two seemingly contradictory points: that policy analysis became the common language of our discussions but that the discussions could not have proceeded in the absence of rich contextual detail. On the first point, I am reminded of what a lawyer-consultant said about working on the transition to capitalism in Poland -- the solutions are different but the problems are the same. On the importance of detail, the only way to understand the problem -- the point at which the light bulb goes off as it were -- is to discuss issues in enough detail that it is possible to recognize the policy issues. Again and again in our discussions we would exchange analysis and facts until we reached a point of Eureka-like discovery, "Oh, you mean..... "

Institutional v. implementation analysis. This section concerns whether there is a common analytical framework useful across policy areas. The basic problem-solution framework developed by the Seidman's for the memorandum of law was certainly very useful. Beginning with a problem to be solved, rather than, say, a presumptively useful legal structure, focussed the discussion on what needed to be done in China. I did not find Seidman's so-called ROCCUPI model as useful. Roccupi

seemed appropriate to a model of regulatory compliance in which there is a goal for changing behavior and a series of identifiable obstacles. I found an institutional framework more useful. This sense of "institutional" is difficult to define, but refers to practices and organizations in a complex society which are capable of producing the type of general welfare desired as well as operating within an environment of politics and other autonomous institutions {Clune, law & pub pol article}. Examples discussed here are comprehensive tax systems, powers of regional governments, university governance, a system of student selection and

The magnified problem of the second best in comparative law under conditions of ignorance. The greatest problem I experienced could be characterized -- accurately I hope -- as a magnified problem of the second best in a comparative context {Tom Heller Wis L Rev article}. The problem of the second best is that when one of more elements of a superior system is missing (e.g., freedom of entry in a competitive market model), some other imperfect system may serve equally well. In general, policy analysis often seems to consist of careful weighing of imperfect alternatives {Clune, Yale book review}.

The application of this principle to comparative law is particularly unnerving, because the existing alternatives to a full liberal legal order are complex and poorly understood by foreign experts, such as myself, while the full potential of the liberal institutions in a different society are also poorly understood. For example, it struck me at several points that, while the complex, particularistic Chinese system of raising revenues seemed rife with problems, problems for which a comprehensive tax system seemed the obvious answer, I really did not understand how well or poorly the existing system worked and what adaptations had been made to compensate for its apparent weaknesses; nor could I be confident that a western-style tax system as adopted and adapted in China would perform in the way it does in the West.

I think I am restating in policy terms the usual reservations about the transferability of institutions and culture in comparative law. Of course, there was little I could do to alleviate the concern except rely on the dialogue model of the workshop, that the foreign experts would suggest a solution which would then be evaluated by the Chinese for appropriateness and feasibility in their society. I did find that my Chinese colleagues were very receptive to rigorous and skeptical policy analysis and the suggestion of multiple obstacles.

The need for a research mentality and institutions. Many studies could be spun off seminar. What is Chinese tax system, and how could it be improved? How large are the developing fiscal inequities between schools? How well does the system of vocational training work, and what cost? Does the system of school enterprises really produce inequities and reduce the efficiency off the teaching budget? Is there a need for more flexible systems of student assignment to meet the needs of a dynamic labor market?

Anyone familiar with such questions in Western systems knows that each one is not a simple problem but a long-range research program requiring continuous study. In this respect, the idea of "research questions" in the memo of law is woefully inadequate -- "research areas" would be more apt. What is required, then, is not just isolated studies or even a program of research: but a whole set of interlocking institutions -- data, data bases, conceptual models, universities, research centers and think tanks.

My Chinese colleagues did mention that they had contact with several educational research institutes in China and regularly asked me to send them copies of research I mentioned (which I did after I got back). I also mentioned how strange it seemed that I as university professors from the West, but no Chinese professors, took part in the workshops. I pointed out that a national research enterprise requires networks of university professors. Rumors had it that the absence of Chinese professors could be explained by political tensions between the government and universities in the aftermath of the riots in Tiananmen Square.

Rediscovering the uniqueness of our own history. A final point for comparative law is how an experience like the workshop is a forceful reminder that our system is not a set of logically constructed strategies but a complex cultural product built up in a distinctive historical sequence. Probably the greatest example of this I encountered was the problem the Chinese have in reinventing a role for business without a long history in which such a role was constructed over time. The prosperity of American business, the erection of an immense institutional infrastructure, depended on a long period of political dominance of the government which is simply unavailable to the Chinese. The Chinese must tax business for an effective modern educational system without stifling the energy for economic growth.

And they must create a political role for business people in a system which has barely begun to allow such people to exist on a large scale.

Other examples were: autonomous universities and a national research network would bring profound changes in the structure of authority in the society; vocational education must be rethought in the context of sweeping changes in the structure of labor markets.

5. CONCLUSION

In retrospect, I'm not sure what I got into as the "expert consultant" for education. The problems of institutional transfer, compounded by my own ignorance of the country seem more serious problems than they did in the friendly discussions we had in the hotel conference room. In most cases, the factual foundation for believing I understood "the problem" in China was pretty thin. The explanations of my Chinese colleagues seemed both clear and familiar, but how much did I read into their remarks? Even more serious was the problem of how U.S. and Western-style policies and institutions would be transferred and evolve in a very different society undergoing rapid structural change.

Yet my Chinese colleagues seemed to find many of the ideas useful and helpful, and they do understand the society and its problems. Also, our dialogue will continue in the future – for example, during a visit to the U.S. by the education group (Spring, 1993).

The most surprising aspect of the experience for me was how I used a large part of my knowledge of educational law, policy, history and finance. I had not served as a foreign consultant previously and vaguely imagined a series of technical questions. The reality was profoundly the opposite. I found myself trying to understand the most basic structural features and functions of our own institutions; and I came away full of new questions and insights about our own society. I hope the Chinese learned as much as I did.