

# Lawyering for Justice and the Inevitability of International Human Rights Clinics

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## I. INTRODUCTION

Globalization may be taken for granted, but is the U.S. legal profession prepared? A 1996 survey conducted by the American Bar Association (ABA) Section on International Law and Practice found that law schools are responding to the demand for global relevance in legal studies by offering multiple and diverse courses in international and comparative law.<sup>1</sup> Beginning

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1. *Results of ABA Survey Regarding Internationalization at United States Law Schools*, reprinted in John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT'L L. & POL'Y 975, app. (1997) [hereinafter *ABA Survey*]. Ninety percent of the schools surveyed offer five or more international law courses. This is a significant increase over the years, as shown in earlier surveys by John King Gamble and Richard W. Edwards. See Barrett, Jr., *supra*, at 991-96 (citing JOHN KING GAMBLE, *TEACHING INTERNATIONAL LAW IN THE 1990S* (1992); RICHARD W. EDWARDS, JR., *INTERNATIONAL LEGAL STUDIES: A SURVEY OF TEACHING IN AMERICAN LAW SCHOOLS 1963-1964* (1965)).

with the class of 2004, all students at the University of Michigan Law School must take a course in transnational law in order to graduate.<sup>2</sup> The theme of the American Association of Law Schools (AALS) 2003 Annual Meeting was *Legal Education Engages the World*; and the Spring 2003 Meeting of the ABA Section on International Law and Practice was titled, *Practicing Law—Inescapably Global*.<sup>3</sup> These examples indicate a growing recognition of the centrality of transnational frames of reference for the practice of law. Yet, as the ABA survey found, most students never take an international law course, and other opportunities for exposure to international law in law school are scant.<sup>4</sup>

How will law schools prepare students to participate in the “new” global society in a meaningful way? The answer is not simply offering more courses, or even making those already offered mandatory. While each of these measures would help, the better answer lies in a particular pedagogical approach—an approach that requires students to grasp and digest the inherently transnational dimension of legal practice. Notably absent from the universe of international educational opportunities at most law schools are clinics that focus on international human rights law.<sup>5</sup>

This Article presumes that lawyering in the twenty-first century requires a knowledge of international law. Globalization may be a still-unfolding process, but it is no longer merely a theoretical discourse. Rather, it is rapidly becoming the horizon for all disciplines. Globalization challenges traditional notions of state sovereignty through the transnationalization of legal, political, and economic systems, and of culture.<sup>6</sup> These transformations, in turn, have generated new global institutions, mechanisms, and transnational advocacy non-governmental organizations (NGOs).<sup>7</sup> Whether purposefully or passively,

2. UNIV. OF MICH. LAW SCHOOL, ACADEMIC REGULATIONS, § 1.b, <http://www.law.umich.edu/CurrentStudents/registration/JDregulations.htm> (last visited April 26, 2003).

3. Association of American Law Schools, *2003 Annual Meeting: Legal Education Engages the World*, <http://www.aals.org/am2003/theme.html> (last visited Apr. 26, 2003); American Bar Association, *Spring Meeting: Practicing Law Inescapably Global*, <http://www.abanet.org/intlaw/spring03/home.html> (last visited Apr. 26, 2003).

4. Barrett, Jr., *supra* note 1, at 996.

5. The 1996 ABA survey expanded its scope from that of previous, similar surveys to include non-traditional educational opportunities for student exposure to international law. Thus, it considered advanced degree programs, exchange and summer abroad programs, international law societies, law journals, and moot court competitions. The survey did include “clinic[s] (i.e., immigration/human rights)” among the twenty international law courses listed. Of the respondents, three schools offered such clinics more than once a year; five offered them once a year. The survey does not indicate what percentage of their curriculum is devoted to immigration/asylum services as compared to human rights practice. *See infra* Section IV.A. Nor does the Section Chair’s narrative of the survey results discuss clinics as among possible remedial approaches. *ABA Survey, supra* note 1, app. at 1001-13.

6. “[I]t is no exaggeration to suggest that virtually all areas of the domestic structure of states are covered by some kind of international standard-setting.” Chris Brown, *Universal Human Rights: A Critique*, in *HUMAN RIGHTS IN GLOBAL POLITICS* 103, 114 (Tim Dunne & Nicholas J. Wheeler eds., 1999) [hereinafter *GLOBAL POLITICS*].

7. *See, e.g., id.*; *see also* Adelle Blackett, *Globalization and its Ambiguities: Implications for Law School Curricular Reform*, 37 *COLUM. J. TRANSNAT’L L.* 57, 59, 63, 64 (1998):

[S]trikingly different visions of the shape that globalization, real or perceived, has taken or will continue to take have been captured under that one buzz-word. . . . In its more varied manifestations, globalization may entail a profound challenge—launched by transnational advocacy non-governmental organizations (TANGOs), often through the discourse of human rights—to the territorial notion of state sovereignty. For some

law schools are educating lawyers who will function in a transnational forum, not just a domestic one. Fifteen years ago, legal theorist Myres S. McDougal spoke about the effects of what we now call “globalization” on legal thought and education:

Today any notion of a national law that is independent of international law is a joke. All our problems are transnational and can be controlled only by transnational cooperation. There is a global constitutive process of authoritative decision in which public international law, private international law, and comparative law all combine into what Philip Jessup called “transnational law.” It is folly today to talk about a jurisprudence of national law. What is needed is a theory and procedure for inquiry about the whole global process of decision.<sup>8</sup>

New human rights problems are accompanying globalization. These include: transnational migration and associated humanitarian crises; trafficking in persons and drugs; expanded forms of economic colonialism;<sup>9</sup> and the drive for expanded markets and cheaper labor and materials, which force a race to the bottom.<sup>10</sup> Because of their inherently transnational character, these issues give rise to the notion that human rights—and violations of those rights—affect each member of the global community, no matter where the actual violation occurs. Indeed, some argue that this global sensibility has forged a new transnational moral and legal consensus.<sup>11</sup> We have begun to speak a language of global morality. And whether or not one agrees that this morality is universal,<sup>12</sup> the concern for justice inevitably

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thinkers, however, state sovereignty is also challenged by countervailing impulses in religion—relativism on the one hand and fundamentalism on the other—and culture—pluralism and identity politics contrasted with heightened xenophobia and narrow nationalism. . . . In a broad sense, . . . globalization may force legal actors to reassess notions of governing through state-made law and to deepen understandings of legal pluralism.

*Id.* at 57, 59, 63, 64.

8. *Special Feature: The State of International Legal Education in the United States*, 29 HARV. INT’L L.J. 239, 269 (1988) [hereinafter *State of International Legal Education*] (interview with Myres S. McDougal). This interview and others were part of a 1988 survey conducted by the *Harvard International Law Journal* of course offerings, extracurricular activities and placements programs (“three central features of international legal education”) and interviews with nine prominent scholars and teachers of international and comparative law who were among the most “deeply involved in developing what has come to be known as international legal studies.” *Id.* at 239. The *Journal* quoted the executive director of the International Law Students Association, who said that, in light of new developments such as international conventions on the discovery of evidence abroad, international trade, and the international implications of many child custody cases, among other things, domestic attorneys will increasingly “face international law issues in their practice for which they may be unprepared.” *Id.* at 305.

9. An example of this economic colonialism would be the exploitation of the domain of indigenous peoples by extractive industries.

10. See Alison Brysk, *Introduction* to GLOBALIZATION AND HUMAN RIGHTS 2 (Alison Brysk ed., 2002).

11. Christine Chinkin, *Human Rights in Global Politics*, 95 AM. J. INT’L L. 472, 477 (2001) (book review) (discussing Andrew Hurrell, *Power Principles and Prudence: Protecting Human Rights in a Deeply Divided World*, in GLOBAL POLITICS, *supra* note 6, at 299).

12. This Article accepts a “non-ethnocentric universalism.” See Bhikhu Parekh, *Non-Ethnocentric Universalism*, in GLOBAL POLITICS, *supra* note 6, at 128. Relativism admits no objective or universal criteria for judging moral beliefs—culture is all-important and the sole source of moral convictions. Universalism sees shared human nature as all-important and the sole source of morality, which is the basis for how we ought to live as a society and as individuals. From this perspective, cultural diversity is possible, but not moral diversity. *Id.* at 130-32; see also Hurrell, *supra* note 11, at 299.

implicates international human rights and international law. In view of this shifting landscape, lawyers today should be familiar, at the very least, with the components of international legal regimes and international human rights norms, if not the elements of a transnational legal ethic.

Our understanding of lawyering ethics must be similarly expanded in order to embrace a global ethic of responsibility. Relevant questions to be considered by legal educators include: What should law students in the United States know about other legal systems and multi-national systems (e.g., the European Union)?<sup>13</sup> And, how does globalization affect the way lawyers from the United States think about justice and rights? These two questions are clearly linked, but it is the latter that serves as the main point of departure for this Article.

Law schools cannot be indifferent to these issues and expect to instill in their students the value of responsible lawyering and a social justice ethic. As David Hall remarks:

If we are to give birth to a new century, then social justice cannot be an afterthought to a well-planned strategy for the 21st Century. It must be the core value of any viable policy or plan for the future. . . . It must be the core value through which we identify ourselves.<sup>14</sup>

The challenge for legal education today is, thus, how such a global ethic of responsibility<sup>15</sup> can most effectively be taught. International human rights law must be a part of any legal training that is relevant to the contemporary world. And, given the highly practical and fundamentally values-driven nature of human rights, learning is greatly enhanced through an applied—that is, clinical—component.

The law school clinic is a particularly effective medium for teaching international human rights lawyering. Correspondingly, in international human rights we find an extraordinary vehicle for the original social justice mission of clinical legal education. Moreover, international human rights clinics are uniquely poised to provide practice in transnational justice that will be both essential and inevitable to the world public order. Just as this country's first wave of public interest lawyers came out of the poverty law clinics of the 1970s and 1980s, a new generation of public interest lawyers with a sense of global justice will be trained in international human rights clinics.

There are benefits to be gained by law schools for being among the first to orient themselves in this direction. Law schools with a strong international program will attract broad-minded and civic-minded students and faculty—

13. The American Association of Law Schools (AALS) posed this question in framing the 2003 Annual Meeting, *Legal Education Engages the World*. See *American Association of Law Schools, 2003 Annual Meeting*, at <http://www.aals.org/am2003/theme.html>. Other questions raised by the AALS include: How should and does the expanding influence of international organizations affect lawyers and law teachers? Will our students be prepared to practice before the international forums that have been gaining increased importance? How will globalization affect human rights?

14. David Hall, *Giving Birth to a Racially Just Society in the 21st Century*, 21 U. ARK. LITTLE ROCK L. REV. 927, 934 (1999).

15. Mary Midgley, *Towards an Ethic of Global Responsibility*, in *GLOBAL POLITICS*, *supra* note 6, at 160; see also Chinkin, *supra* note 11, at 475-76 (reviewing Midgley's chapter and the book, *GLOBAL POLITICS*).

particularly as popular interest in global affairs continues to grow. And law schools with a meaningful international human rights clinical component will have a significant advantage in training the next generation of global leaders. Pointing to the function of law in the international political order,<sup>16</sup> Louis Henkin emphasized the value of international and comparative legal education in 1988:

[T]he United States can also learn from what goes on abroad. We should be playing a more effective role in international human rights and in other forms of international cooperation. . . . International cooperation is not only desirable, it is inevitable. Legal education ought to reflect that, and I think the good law schools do.<sup>17</sup>

The transnationalization of institutions, the human rights problems associated with globalization, the relevance of a global ethic of responsibility, and the need to educate lawyers about the processes of international cooperation all point to a growing role for international human rights clinics in U.S. legal education.

This Article begins by suggesting that human rights lawyering can be considered the twenty-first century's manifestation of the original social justice mission of clinical legal education. In so doing, it builds upon the fundamental premise that the practice of law should be guided by a moral obligation to social justice. In Part II, the Article explores the practical meaning and normative values of human rights lawyering in the context of both the development of the human rights movement and the objectives of legal education. Part III examines the pedagogical roots of the clinical legal education movement relative to teaching international human rights lawyering. Accordingly, it raises various questions including: (1) how human rights clinics can be both part of clinical legal education and, at the same time, different from traditional clinics; and (2) how non-clinical lecture and seminar courses are limited in their capacity to teach international human rights adequately. Part IV addresses these questions and analyzes international human rights clinics. It considers the structure and pedagogical goals of clinics that identify themselves as such and discusses aspects of projects that are most meaningful for teaching human rights advocacy. Finally, the Article considers some of the inherent tensions and challenges that give law school human rights clinics their pedagogical dynamism. The Article takes as a touchstone the premise that as globalization forces a deeper understanding of social and legal pluralism,<sup>18</sup> law schools must respond by redesigning their curricula to meet the challenges of a transnational public order and legal practice.

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16. *State of International Legal Education*, *supra* note 8, at 254 (interview with Louis Henkin).

17. *Id.* at 257-58.

18. Blackett, *supra* note 7, at 64.

II. THE PRACTICE OF INTERNATIONAL HUMAN RIGHTS<sup>19</sup>

The rights discourse in this country has been shaped first and foremost by the jurisprudence and legal thought about the civil liberties protections in the U.S. Constitution. By contrast, international human rights discourse in the United States is characterized by a doctrine of exceptionalism. Courts in particular are skeptical of, if not hostile towards, international law—and especially of any attempt to suggest that it might supercede or even supplement our domestic legal protections.<sup>20</sup> Yet, for nearly 200 years, U.S. courts have recognized a principle that domestic law should be construed to be consistent with international law whenever possible.<sup>21</sup> The Supreme Court has held, moreover, that the law of nations (as manifest in customary international law)<sup>22</sup> is part of our law.<sup>23</sup> And some current justices recognize the importance

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19. Human rights law, broadly defined, is the system of law that establishes fundamental individual and group rights, and the obligations of states relative to those rights. These rights are enumerated through binding principles, for example in international and regional treaties and customary international law, as well as through non-binding principles, for example, in U.N. resolutions and declarations. Signatory governments must respect these rights, protect against their violation by state and non-state actors, and take specific measures to enhance their fulfillment. Some rules of international law may be selectively complied with, but others may never be ignored. *Jus cogens* are rules for which no derogation is permitted, making them superior to both customary international law and treaties between and among states. *Jus cogens* norms might be considered rules of international morality, and although there is no general agreement on what is included, examples of widely recognized *jus cogens* norms include the prohibitions on slavery, piracy, genocide, and extrajudicial killing, and the principles of the equality of states and of self-determination. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 332, 344, 347 (hereinafter Vienna Convention); Statute of the International Court of Justice, June 26, 1945, art. 38, T.S. No. 993, 1031, 1060 (listing several sources of international law, including international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986) [hereinafter RESTATEMENT (THIRD)]; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 85 (1995) (discussing resolutions of the U.N. General Assembly as evidence of law).

20. Henry Steiner describes the particularly problematic role the United States plays in the global movement to enforce human rights:

Because of a bundle of historical, political, and cultural reasons that are sometimes today grouped as the basis for American exceptionalism in human rights, the United States has remained very resistant to ratifying human rights treaties or becoming deeply integrated in other ways into the human rights movement . . . . Partly as a consequence, the term “human rights” has little domestic currency. Human rights rhetoric rarely figures in political discourse, campaigns, or programs. The familiar national vocabulary of civil rights and liberties within a strong constitutional tradition has proven impermeable by the new rhetoric, partly because United States reservations to ratification of human rights treaties have often denied these treaties internal judicial effect, partly for more subtle historical reasons. The upshot is that in the United States, references to human rights problems mean occurrences in foreign countries.

Henry J. Steiner, *The University's Critical Role in the Human Rights Movement*, 15 HARV. HUM. RTS. J. 317, 320 (2002).

21. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (noting that “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”); *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (noting that the Ninth Circuit has upheld this “well-established” rule on several occasions). Further, customary international human rights norms can be understood as a subset of customary international law. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980) (interpreting “the law of nations” to mean “established norms of the international law of human rights”); see also *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998) (citing the *Filártiga* interpretation of the law of nations with approval).

22. Customary international law is established through the widespread and consistent practice of states, followed out of a sense of legal obligation. RESTATEMENT (THIRD) § 102; see also Vienna

of international law as “persuasive authority in American courts” and, in some contexts, consider international and comparative law as interpretive guidance for our law.<sup>24</sup>

Domestic rights and civil liberties concerns are fundamentally similar to those of international human rights law; they focus on individual rights and freedoms and protection from government encroachment. Cutting-edge legal issues in the United States today “stand at the intersection of domestic civil rights law and the developing law of international human rights”<sup>25</sup>—and law school clinics actively contribute to efforts that reinforce international law as part of our domestic law.<sup>26</sup> Indeed, human rights are neither part of foreign

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Convention on the Law of Treaties, May 23, 1969, arts. 53, 64 (asserting the supremacy of *jus cogens* norms, or norms of international law accepted and recognized by the community of states, as those from which no derogation is permitted); Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3, para. 33 (Feb. 5) (Second Phase) (highlighting obligations *erga omnes*, which run not only to the injured state but to the international community as a whole); Christian Dominicé, *The International Responsibility of States for Breach of Multilateral Obligations*, 10 EUR. J. INT’L L. 353, 358 (1999) (asserting that *jus cogens* norms can be understood from the perspective of the relationship between the state and the norm itself: “the state may not do anything, be it a legal act or an action, that breaches a norm of *jus cogens*”).

23. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (noting that U.S. courts apply international law as part of U.S. law); The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations.”); *In re Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Filartiga*, 630 F.2d at 886 (holding that the law of nations is part of U.S. common law); see also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

24. Despite the skepticism of certain justices towards international law, others look to the practice and precedent of other countries and the view of international legal scholars:

Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.

Justice Sandra Day O’Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002); see also *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (examining the opinions of “the world community” to support its conclusions that execution of persons with mental retardation would offend standards of decency required by the Eighth Amendment); *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (noting that international and comparative law rulings on issues facing the Court “cast an empirical light on the consequences of different solutions to a common legal problem”); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (looking to international standards on execution of persons under 16 years of age); *Miranda v. Arizona*, 384 U.S. 436, 486-89 (1966) (considering law enforcement “experience . . . in other countries,” including England, Scotland, and India, in interpreting the Fifth Amendment).

25. Frank Askin, *Symposium: A Law School Where Students Don’t Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 865 (1999) (discussing the Rutgers Constitutional Litigation Clinic’s work on *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998)). Consider, for example, national security as a pretext for scaling back individual rights; the impact of terrorism on immigration law and policy and the criminalization of immigration in general; racial profiling and police brutality; racial discrimination and the death penalty; the treatment of gays and lesbians with respect to private consensual sexual activity, or their rights in the military; and the curtailment of due process rights for terrorist suspects, whether citizen or non-citizen.

26. In addition to the Rutgers Constitutional Litigation Clinic, for example, Columbia Law School has initiated a program through its Human Rights Institute, Human Rights at Home, which works closely with NGOs, particularly in providing student assistance in writing briefs for human rights related cases. In its first five years, Yale’s Lowenstein International Human Rights Clinic was almost

law nor are they limited to the realm of international law. The irony is that domestic legal systems are both integral to the functioning of international law<sup>27</sup> and increasingly subordinate to it.<sup>28</sup>

### A. *What Is Human Rights Lawyering?*

Some legal activists reject the image of the traditional scales of justice—calm, detached, neutral—in favor of a more prophetic image of the law as a turbulent struggle in which “a concept of a reality” is linked to an “imagined alternative.”<sup>29</sup> Such a vision of mobility and dynamism captures the nature of human rights law, with its intrinsic aim of making the aspirational a reality. It is a burgeoning field of practice—new principles and norms, new legislation and case law, new instruments and institutions have blossomed across the

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exclusively engaged in litigation of international human rights in U.S. courts. Many law school clinics provide assistance with *amicus* briefs, through research and writing on international law issues, and as *amicus curiae*. See, e.g., Brief of Amici Curiae Diplomats Morton Abramowitz et al., *McCarver v. North Carolina*, 535 U.S. 975 (2001) (No. 00-8727) (claiming that certiorari was improvidently granted) Brief of Amici Curiae NOW Legal Defense and Educational Fund et al., *Grutter v. Bollinger*, (U.S. filed 2003) (No. 02-241 & 02-516); Brief of Amici Curiae Mary Robinson et al., *Lawrence v. Texas*, (U.S. filed 2002) (No. 02-102); Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts, *U.S. v. Morrison*, 529 U.S. 598 (2000) (No. 99-0005).

27. U.S. CONST. art. VI, § 1, cl. 2 (recognizing treaties as supreme law of the land); RESTATEMENT (THIRD) § 111 (“Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that ‘a non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”); *id.* at cmt. h (“Whether an agreement is to be given effect without further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law.”); see also Harold Hongju Koh, *How Is International Human Rights Enforced?*, 74 IND. L.J. 1397 (1999); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 34 (2002) (“Domestic legal systems remain a crucial part of the enforcement process, filling part of the gap left by the dearth of international enforcement measures.”).

Some legal scholars and educators have argued for the integration of international perspectives into domestic law courses. “The more profound proposal for increasing global content in law school is that international, comparative and transnational legal study should not be compartmentalized and taught separately.” Blackett, *supra* note 7, at 69. Among the justifications for this are concern over marginalization, and the perception that “there are few significant legal or social problems today that are purely domestic.” John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 331 (1996); see also Barrett, Jr., *supra* note 1, at 998 (noting that an advantage of such integration is demonstrating to students that international legal issues can arise in the domestic arena); *State of International Legal Education*, *supra* note 8, at 296 (interview with Arthur T. von Mehren) (discussing the incorporation of a comparative dimension into basic law courses).

28. W. Michael Reisman, *Designing Law Curricula for a Transnational Industrial and Science-Based Civilization*, 46 J. LEGAL EDUC. 322, 324 (1996). Reisman explains:

In an increasing number of sectors of social organization, the transnationalization of critical activity is rendering the corresponding parts of the state’s governmental apparatus insufficient for the protection of public order. Whether we look at control of health, of criminal activity including terrorism and other forms of purposive political violence, of economic monopolization, of immigration or border control, of protection of intellectual and material property—whatever—a single state cannot accomplish what is expected of it without locking itself into increasingly complex and durable intergovernmental arrangements, each of which necessarily requires some yielding of national competence.

*Id.*

29. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1333 (1995) (quoting Robert M. Cover, *Supreme Court, 1982 Term—Foreword/Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983)). Cover was a Yale Law School professor, legal scholar, and committed activist. See, e.g., *Tributes to Robert M. Cover*, 96 YALE L.J. 1699 (1987).



globe. The concept of human rights has greatly expanded beyond the traditional, western framework of civil and political rights, to include non-conventional dimensions of economic and social rights—such as development, poverty, health, labor relations, and the politics of gender, indigeneity, disability, and sexuality. With this dynamic set of substantive concerns, human rights practice uses varied law. However, its fora are not limited to courts, but include ad hoc tribunals, treaty regimes, domestic and regional legislatures, intergovernmental assemblies (e.g., the United Nations, the World Trade Organization, and the Organisation for Security and Cooperation in Europe); the offices and conferences of non-governmental organizations (NGOs); corporate meetings; and also the media and public opinion.

Importantly, the field of international human rights is no longer only concerned with state accountability. Human rights advocacy has traditionally focused on the policies, conduct, and accountability of states, but as the role of non-state actors (e.g., corporations and armed opposition groups) in the international arena increases, so does their legal responsibility. Human rights lawyering focuses on the subjects of traditional poverty lawyering—the poor, the powerless and other marginalized groups<sup>30</sup>—in human rights terms, and formulates demands using tools of human rights accountability (e.g., the state's obligations to respect, protect, and fulfill individual and group rights).

Human rights lawyers embrace a broad range of advocacy strategies. Actions taken may be legal (e.g., impact litigation, legal assistance and counseling, or legislative advocacy), but much human rights work is also non-legal, such as community education, media outreach, fact-finding, and reporting. Human rights advocacy is accomplished by a wide variety of organizations, including traditional legal aid groups providing legal assistance, public defender offices, human rights NGOs, issue-focused NGOs, constituency-based NGOs, and law school clinics.<sup>31</sup> In fact, relatively little of what human rights lawyers actually do looks like traditional legal practice.

Yet, human rights law is concrete; it exists as a set of standards by which to measure state practices and seek to “enforce” norms or hold actors accountable—often by means that are as much political as legal.<sup>32</sup> Many countries have enacted or adopted laws that encompass concrete international human rights norms. In the United States, for example, several civil statutes enable suits in domestic courts for certain violations of international law—examples include the Alien Tort Claims Act,<sup>33</sup> the Torture Victim Protection

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30. RICHARD J. WILSON & JENNIFER RASMUSSEN, *PROMOTING JUSTICE: A PRACTICAL GUIDE TO STRATEGIC HUMAN RIGHTS LAWYERING I* (2001).

31. *Id.* at iii.

32. Koh, *supra* note 27, at 1406-08 (explaining nation's compliance with international human rights law as embodying “five explanatory strands [that] work together as complementary conceptual lenses.” *Id.* at 1406. Koh offers as an example, U.S. efforts to pressure China to follow norms of international human rights through: power or coercion (e.g., sanctions); self interest (e.g., economic incentives); liberal theories of political identity (e.g., calling Beijing's attention to Hong Kong's liberal policies); communitarian values of belonging (e.g., encouraging China to ratify international conventions and treaties); and legal process (e.g., “engage[ing] the Chinese people and groups in civil society in a variety of international interactions that will cause them to internalize norms of international human rights law”). *Id.* at 1408.

33. 28 U.S.C. § 1350 (1988); *Filártiga v. Peña-Irala*, 630 F.2d 876, 876 (2d Cir. 1980)

Act,<sup>34</sup> and the Foreign Sovereign Immunities Act.<sup>35</sup> In Belgium, a criminal statute establishes universal jurisdiction for the prosecution of war crimes, crimes against humanity and acts of genocide that occurred outside Belgium.<sup>36</sup>

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(providing federal court jurisdiction over causes in violation of the international law of human rights); see also *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002); *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001) (discussing arbitrary detention and kidnapping as actionable violations of customary international law); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (noting that certain forms of conduct violate the law of nations whether undertaken by those acting under state auspices or only as private individuals); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998) (U.S. Officials and private corporations can be sued for violating rights of asylum detainees); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (noting that the ATCA permits aliens to seek redress in federal court for violations of international law, including torture, arbitrary detention, summary execution, and disappearance). See generally BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996).

34. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)). The TVPA is limited by the requirement that the torture or extrajudicial execution must have been committed "under actual or apparent authority, or color of law, of any foreign nation." And, while the ATCA gives a right to sue only to non-U.S. citizens, this right is extended to U.S. citizens under the TVPA. See Stephens, *supra* note 27, at 9.

35. 28 U.S.C. § 1605(a)(3) (referring to international law for the takings exception to jurisdictional immunity of a foreign state); *Siderman de Blake v. Argentina*, 965 F. 2d 699, 711 (9th Cir. 1992) (analyzing international law governing the taking of property); *Crist v. Turkey*, 995 F. Supp. 5, 11 (D.D.C. 1998) (finding jurisdiction over claims alleging a taking of property in violation of international law); *Letelier v. Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (noting that assassination is not a legitimate use of the state's discretion under domestic or international law).

36. Loi relative à la répression des violations graves du droit international humanitaire (modifiée 4 février 1999) [Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (as amended 1999)], 38 I.L.M. 918 (16 Juin 1993) (Belg.). The statute gives Belgian courts universal jurisdiction over grave breaches of international humanitarian law as set out in the Geneva Conventions. The 1999 amendment added genocide and crimes against humanity, and was enacted to implement Belgium's obligations under the Genocide Convention, and to enable Belgium to take action in the face of the Rwandan genocide. The law defines genocide and crimes against humanity consistent with the Rome Statute for the International Criminal Court, making Belgium the first state to adapt its law to comply with the ICC Statute. FIONA MCKAY, *REDRESS, UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, TORTURE, AND GENOCIDE* 18, <http://www.redress.org/publications/unijeur.html> (last visited Apr. 26, 2003).

Recent cases brought under the Belgian universal jurisdiction statute against Israeli Prime Minister Ariel Sharon and others for their role in the 1982 Sabra and Chatilla refugee camp massacres, and against Abdulaye Yerodia Ndongbasi, Minister for Foreign Affairs of the Democratic Republic of Congo, have been the subject of significant political and legal debate. In the Sabra and Chatilla case, the Belgian Supreme Court (*Cour de Cassation*) overturned an Appeals Court ruling in February 2003, holding that investigations and a trial could proceed even if a suspect is not physically present in Belgium. The High Court upheld immunity for Sharon as long as he is head of state. *Cour de Cassation*, Section Française, 2e Chambre, No. JC032C1\_1; No. de rôle: P.02.1139.F/3, Feb. 12, 2003 (on file with the *Yale Journal of International Law*; see also Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, N.Y. TIMES, Feb. 13, 2003, at A12. The English translation of the Belgian Supreme Court Ruling of February 12, 2003 is available at <http://www.indictsharon.net>.

In a ruling almost one year prior, the International Court of Justice found that Belgium's arrest warrant against Yerodia (issued pursuant to the universal jurisdiction law) violated Yerodia's immunity as the Congo's Minister of Foreign Affairs and was "liable to affect the Congo's conduct of its international relations." Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), at para. 71. Notably, the ICJ limited its decision to the issue of immunity. The Court clarified that immunity is lifted after a person ceases to hold the office (para. 61), and further specified the limited areas in which such immunity may be invoked. It avoided the issue of legality of the universal jurisdiction law per se. See Alexander Orakhelashvili, *Arrest Warrant of 11 April 2000*, 96 AM. J. INT'L L. 677, 684 (2002).

In April 2003, under political pressure as a result of a growing number of suits against foreign leaders, the Belgian Parliament adopted several new provisions limiting the statute where there is no link with Belgium. See Human Rights Watch, *Belgium: Anti-Atrocity Law Limited But Case Against ex-*

In 2002, Germany adopted two new laws intended to bring domestic laws into compliance with the Rome Statute of the International Criminal Court (ICC). One provides an explicit and broad universality principle for international law crimes;<sup>37</sup> the other establishes procedural cooperation with the ICC.<sup>38</sup> Spain's *acción popular*, a procedural device by which citizens may file private criminal actions in certain circumstances, served as the impetus behind the Pinochet case.<sup>39</sup> The U.K. Human Rights Act of 1998 effectively incorporates the European Convention on Human Rights and Fundamental Freedoms into domestic law;<sup>40</sup> and the Criminal Justice Act of 1988 permits the prosecution of extraterritorial torture in the United Kingdom.<sup>41</sup> In many countries, international treaties and conventions become directly applicable upon ratification in domestic courts;<sup>42</sup> in some cases, they supercede the constitution.<sup>43</sup>

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*Chad Dictator Can Move Forward*, <http://hrw.org/press/2003/04/belgium040503.htm>.

37. Gesetz zur Einführung des Völkerstrafgesetzbuches, v. 26.6.2002 (BGBl I S. 2254) [Act to Introduce the Code of Crimes Against International Law] (English translation available at <http://www.bmj.bund.de/images/11461.pdf>). The German statute contains no nexus requirement, though it allows for government discretion to refrain from prosecution on pragmatic grounds of not overburdening the courts. Albin Eser, Presentation at the Yale Law School (Mar. 26 2003) (Mr. Eser is the Director of the Max Planck Institute for Foreign and International Criminal Law, an ICTY judge ad litem).

38. Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes, v. 21.06.2002 (BGBl I S 2144) [Law on Cooperation with the International Criminal Court] (English translation available at [http://www.bmj.bund.de/eng/themes/criminal\\_law](http://www.bmj.bund.de/eng/themes/criminal_law)).

39. Richard J. Wilson, *The Spanish Proceedings*, in THE PINOCHET PAPERS, THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 23, 23-24 (Reed Brody & Michael Ratner eds., 2000) (citing CONSTITUCION [C.E.] art. 125 (Spain); Ley de Enjuiciamiento Criminal [L.E.CRIM], arts. 101, 270 (Spain)). See generally Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 2000) [hereinafter *Ex parte Pinochet*].

40. Human Rights Act, 1998, c.42 (Eng.); Andrew Clapham, *The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS 148-52 (Philip Alston ed., 1999).

41. Criminal Justice Act, 1988, c.134 (Eng.) (making torture and conspiracy to torture extraterritorial offenses, thus implementing the U.K.'s obligations under the Convention Against Torture). In the *Ex parte Pinochet* proceedings, the House of Lords reaffirmed the principle of universal jurisdiction contained in the Criminal Justice Act, but found that only those violations that occurred after the date the legislation came into force were justiciable. *Ex parte Pinochet*, [2000] 1 A.C. at 148.

42. For example, the United States functions on a dualist system, in which international law clearly forms a part of the domestic legal system, but must be ratified and incorporated into domestic law in order to be enforceable in U.S. courts. U.S. CONST. art VI; RESTATEMENT (THIRD), *supra* note 19, § 111. See also Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT'L L. 51, 52-53 (1999) (noting a category of states whose constitutions expressly declare that international law forms a part of the law of the land, but do not establish the hierarchical status of international rules in the domestic legal system, including the constitutions of states like Ukraine and Kyrgyzstan).

43. Danilenko, *supra* note 42, at 51-52 (noting that countries "rejecting the traditional dualist approach to international law in domestic legal systems, not only declaring international law to be part of domestic law, but asserting the supremacy of treaties over contrary domestic law" include Russia and Moldova). Danilenko also notes the relative inefficacy of this practice, given that the actual status of international law in such countries is dependent on the willingness of domestic courts to rely on that body of law. *Id.* at 53. See also Zoran Pajic, *A Critical Appraisal of the Human Rights Provisions of the Dayton Constitution of Bosnia & Herzegovina*, in HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA AFTER DAYTON 33, 35-36 (Wolfgang Benedek et al. eds., 1999) (noting that the Constitution of Bosnia and Herzegovina directly incorporates and gives "priority over all other law" to the European Convention on Human Rights and Fundamental Freedoms (art. II, para. 2), however controversial the manner of its inclusion in the document, and referring to a list of fifteen additional human rights agreements to be applied in Bosnia and Herzegovina (art. II, para. 7)); Eric Stein, *International Law in Internal Law:*

Generally speaking, courts and government agents enforce the law. Where governments are the predominant transgressors, however, as is often the case with human rights violations, the law must be enforced by other actors. Despite some progress, international, regional, and domestic enforcement mechanisms vary significantly in form and in effect—making teaching more complex.<sup>44</sup> Recourse and remedies are both legal and non-legal. The perception of human rights as weak law and relatively unenforceable also demands a different pedagogical approach compared to the teaching of domestic law. The blend of theory and practice in clinical legal education is particularly advantageous because it assists students to experience both the obstacles to the realization of human rights norms as well as the ways in which they are, in fact, applied and respected.

### B. *A Human Rights Approach to Advocacy*

Fundamental to both social justice and human rights advocacy is the empowerment of individuals and peoples. A person must know her rights in order to demand their protection or fulfillment. Human rights advocacy should involve the people who are affected by its consequences. In practice, this means that international advocates must work closely with their local counterparts and depend on the local political and cultural perspectives of the situation.<sup>45</sup> Making rights real for people involves an engaged “critical consciousness”<sup>46</sup> that is developed through education, training, and community organizing, as well as strategic lawyering. Alice Miller has

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*Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT’L L. 427, 429, 435 (1994) (noting that the Netherlands Constitution of 1953, as amended, made treaties superior to the Constitution, and discussing the drafting of similar provisions in the Constitution of the Czech and Slovak Federative Republic—later incorporated into the constitutional systems of the two successor Republics).

44. For a discussion of compliance in international law, see, for example, Koh, *supra* note 27. International human rights law is enforced through the transnational legal process, the institutional interaction whereby global norms of international human rights are debated, interpreted, and ultimately internalized by domestic legal systems. Koh offers five explanations for why nations obey: power; self-interest or rational choice; liberal explanations based on rule legitimacy or political identity; communitarian rationales; and legal process rationales at the state-to-state level (horizontal or international legal process) and at the international-to-national level (vertical or transnational legal process). He asserts the latter is the most effective form. See also COMMITMENT AND COMPLIANCE (Dinah Shelton ed., 2000); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

45. In addition to targeting governments, human rights advocacy must target the general population. The broader the consciousness of human rights norms among civil society, the more likely that social change will be durable. See WILSON & RASMUSSEN, *supra* note 30, at 74 (“As people are more aware of their rights, and as they are drawn into participation in institutions of government, they will experience the empowerment that lies at the core of all human rights.”).

46. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., 2000) (1970). A Brazilian educator, Freire coined the term “*conscientização*” (critical consciousness), which “refers to learning to perceive social, political, and economic contradictions, and to take action against the oppressive elements of reality.” *Id.* at 35 n.1. “[P]roblem-posing education affirms men and women as beings in the process of becoming. . . . Education is thus constantly remade in the praxis.” *Id.* at 84. See also PAULO FREIRE, *EDUCATION FOR CRITICAL CONSCIOUSNESS* (Myra Bergman Ramos trans., 1973); Garth Meintjes, *Human Rights Education as Empowerment: Reflections on Pedagogy*, in HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY 64 (George J. Andreopoulos & Richard Pierre Claude eds., 1997).

developed an analytic framework for understanding and applying a human rights approach to advocacy.<sup>47</sup> According to her framework, human rights lawyering requires analyzing the politics of power and causation, including an examination of who is in control and why. Such an analysis should be filtered through a “lens of diversity” to consider who the victims are, who might be missing from the analysis, and how factors such as gender, race, ethnicity, or language affect the way individuals experience the limitations of specific rights.<sup>48</sup> A consciousness of, and sensitivity to, the politics of social power must be integrated into the human rights pedagogy.<sup>49</sup> Not only must laws be changed, but so must “the underlying social structures that cause injustice to develop or that sustain injustice.”<sup>50</sup>

Applying this strategic human rights approach to an issue involves three steps: (1) describing the issue in human rights terms, (2) formulating demands using human rights tools of accountability, and (3) developing strategies that utilize key features of human rights advocacy, such as public accountability and transparency, non-discrimination and equality, involvement of the persons most affected in the process, and respect for human dignity whether in advocacy and monitoring or service provision.<sup>51</sup> These methods help one determine how to practice human rights lawyering in a given situation or case.

Thus, human rights advocacy is enormously dynamic; it goes beyond merely enforcing the law and seeks to remedy injustice through a wide range of advocacy strategies. Such advocacy invariably involves influencing public opinion, which is effectively accomplished through traditional documentation and report writing. It includes public education, as well as campaigns and advocacy on behalf of individual persons and particular norms. It also includes litigation. Both individual cases and impact or test cases can be powerful advocacy strategies. Other effective methods may include petitioning U.N. bodies, or drafting a platform for a global NGO symposium. The context of the specific situation will instruct which strategies make sense. Human rights lawyering, like other forms of justice lawyering, requires identifying the sectors and agents most susceptible to change. Which parties will support and nurture change is fundamentally contextual.<sup>52</sup>

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47. Alice Miller, A Methodological Framework for Applying ‘A Human Rights Approach’ to Advocacy on Women’s Issues, Law and Policy Project, Mailman School of Public Health, Columbia University (2002) (on file with author).

48. *Id.* at 1.

49. See, e.g., Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993) (arguing that good community lawyers need to be conscious of personal identification differences, and that most young lawyers need training on how to respond to personal identification issues); Ronen Shamir & Neta Ziv, *State-Oriented and Community-Oriented Lawyering for a Cause: A Tale of Two Strategies*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 288 (Austin Sarat & Stuart A. Scheingold eds., 2001) [hereinafter CAUSE LAWYERING] (“Lawyers are expected . . . to be reflexive of the power disparities between them and their clients. . .”).

50. WILSON & RASMUSSEN, *supra* note 30, at 55.

51. Miller, *supra* note 47.

52. WILSON & RASMUSSEN, *supra* note 30, at 51.

### C. *Human Rights Strategy in Context*

Cultural and political contexts necessarily influence advocacy. Human rights lawyering in countries with repressive regimes will differ from that in countries in transition to democratic governance—and both will be different from such work in developed democracies.<sup>53</sup> The issues may be quite similar, but the strategies will vary in a campaign for corporate accountability regarding the rights of indigenous populations in a developing country, such as Ecuador, in a “failed state,” such as the Sudan, or in a country with an autocratic regime, such as Burma. As such, there are many questions that human rights lawyers must consider at the outset of an intervention. For example, are local human rights defenders able to communicate and operate openly? Is there a functioning judicial system and rule of law? Is the local population actively resisting the government? Is there an armed opposition? Can international advocates safely enter the country? Is international opinion with or against the government? Is international attention focused on the conditions in the country? Is the intervention in response to a call for assistance from local civil society or other human rights defenders, and are there local partners with whom to collaborate?

Strategies that seem to get to the core of a particular human rights dilemma may have unanticipated consequences due to religious, moral, or social norms, or political context. Yet legal change requires local support to avoid the negative consequences of public backlash.<sup>54</sup> Accordingly, in considering which strategies to pursue, human rights lawyers must carefully consider which spheres are most susceptible to change, where the greatest

53. As Wilson and Rasmussen note:

Each phase in a country's development presents a vastly different array of issues for an effective human rights lawyering agenda. . . . Often, the courts are so compromised as to be without value as a place to seek vindication of rights. Similarly, political institutions often see human rights lawyers as a voice for opposition, thereby requiring their silencing or outright elimination. Lawyering in such times calls for a particular brand of courage, ingenuity and perseverance on the part of these advocates.

WILSON & RASMUSSEN, *supra* note 30, at 90-91. See also Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in CAUSE LAWYERING, *supra* note 49, at 3, 13; Stuart A. Scheingold, *Cause Lawyering and Democracy in Transnational Perspective: A Postscript*, in CAUSE LAWYERING, *supra* note 49, at 400; Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 CLINICAL L. REV. 515, 577 (2002) (asking: “[C]an we ever examine clinical education without close attention to externalities such as the political and legal-cultural environment in which they exist?”).

54. Wilson and Rasmussen discuss the strategic question of context at length, and consider the ways, both positive and negative, that law can change public opinion:

Traditionally, the laws of the community, whether codified or not, reflect shared social mores. Often when local actors seek to make local laws comply with international principles of human rights, especially on what are typically called private or family issues, they may be promoting legal change that is more progressive than cultural norms in that given locale. Such legislatively initiated social change may be met with resistance from the population on whom it is imposed, delaying or undermining the effectiveness of the law. In extreme cases, such a scenario fosters public backlash or other negative consequences. To support legal change, community buy-in is usually essential.

WILSON & RASMUSSEN, *supra* note 30, at 53-54. See also Noga Morag-Levine, *The Politics of Imported Rights, Transplantation and Transformation in an Israeli Environmental Cause—Lawyering Organization*, in CAUSE LAWYERING, *supra* note 49.

gains would lie, which social sectors can be helpful, and where resistance may be expected.<sup>55</sup>

At the end of the day, human rights standards must be seen as legitimate within the cultures where they will be implemented, but local communities are not always pre-disposed to embrace such norms. For example, in Bosnia-Herzegovina, the Dayton Peace Accords incorporated significant human rights principles into domestic law by appending to the constitutions a list of international treaties. Domestic lawyers and judges, however, had no knowledge of the treaties, no particular interest in their provisions, and certainly no commitment to their implementation. The International Human Rights Law Group, in response, designed a series of trainings for judges, lawyers and prosecutors on specific articles of the European Convention on Human Rights and Fundamental Freedoms. The trainings introduced various elements of the human rights provisions, explained how these rights would enhance existing domestic law, and provided summaries of European Court decisions on the specific articles. Participants discussed how the human rights provisions could be applied to present-day situations and were encouraged to include human rights arguments and cite the treaties in their court briefs. Yet, in several instances where Bosnian attorneys attempted to rely on international human rights provisions in court arguments, judges told them that such law was irrelevant. The attorneys had to be persistent just to have the international human rights references included in the court record.<sup>56</sup>

Human rights advocates must confront many additional hurdles, including a suspicion of law, lawyers, outsiders, and international advocates. Some of these problems are typical of social change lawyering—including cross-cultural dynamics and suspicion of legal systems that are perceived as racially, economically, and often politically biased. In many countries, formal law exists alongside a parallel system of customary law. Formal law is generally interpreted and enforced by the courts and government institutions, which may be economically privileged, male-controlled, and geographically inaccessible to large segments of the population. In contrast, customary law—rooted in social or religious tradition, and frequently controlling in the private sphere and among the socially marginalized—often has a tenuous coexistence with the state and formal legal systems. In many circumstances, formal law may not be the best instrument for change, particularly where women's rights or family issues are concerned.<sup>57</sup>

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55. See generally WILSON & RASMUSSEN, *supra* note 30, at 51-102; see also Shamir & Ziv, *supra* note 49, at 287, 300 (calling attention to "a broadening landscape of cause-lawyering activities and new possibilities for mobilizing the law for social change").

56. The Law Group began offering workshops in 1997, bringing together legal professionals from the two republics of Bosnia and Herzegovina, the Bosnian Federation, and the Republika Srpska, often for the first time since the war. The workshops were designed to reinforce the direct incorporation of the European Convention into the domestic law of Bosnia, and each workshop focused on a specific article from the Convention. None of the case law from the European Court of Human Rights had been translated into Bosnian when the Law Group began. Thus, participants were given a training manual, prepared by the Law Group in English and Bosnian, intended to provide them with the practical tools necessary to implement that right or set of rights before the domestic courts. During the workshops, Law Group staff explained the ways in which human rights advocates might utilize the European Court's case law to interpret and strengthen claims related to that article, and how to overcome defenses.

57. For example, Wilson and Rasmussen describe the experience of the International

Considering a given situation through a lens of diversity highlights concerns relative to the holder of rights, including who controls the advocacy strategy, as well as the nature of the rights under discussion. Here, the tensions between relativism and the universality of rights should not be avoided. On the one hand, we cannot deny the legitimacy, indeed the value, of cultural diversity, and the fact that varying custom, religion, and social tradition have served as reasonable foundations of ethical communities for time immemorial. On the other hand, the global human rights ethic comprises a consensual moral system that cannot allow religion and culture to be an excuse for violating rights.<sup>58</sup> Between these respective notions of relativism and universalism lies the concept of “minimum universalism,” which admits that moral life can be lived in different ways, but insists that it be judged on the basis of a universally valid set of values.<sup>59</sup> Certain fundamental elements of the global culture of human rights guide its universal practice—from such simple creeds as keeping promises and the respect for life and human dignity, to the abhorrence and prohibition of slavery, torture, and genocide.<sup>60</sup>

Yet cultural relativism does present human rights lawyers with certain fundamental challenges. Among those to consider are what moral imperative such lawyers possess; in whose interests their strategy lies; and by what measure or authority their set of rights is a priority, or for that matter, universal. Neglecting these questions ultimately undermines an important objective of human rights lawyering, which is to promote enduring protection of international human rights through local collaboration and commitment.

A further challenge lies in the fact that international human rights law obligates states to change customary and religious laws and practices that conflict with or undermine human rights law. In such cases, careful analysis is needed to determine what advocacy strategies will be most effective and least likely to provoke a backlash. As Wilson and Rasmussen note:

Key to promoting change that lacks popular support is a contextual understanding for the popular sentiment. Understanding why a practice that violates human rights is supported

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Federation of Women Lawyers (FIDA) in a pan-African campaign for gender equality in inheritance issues. They write:

Typically, in many West African countries, when the male head of household dies, his property—even his children in some cases—revert to his family, leaving his widow destitute and homeless. Initially, lawyers for FIDA identified the problem as an absence of equal protection under the law. From this analysis, FIDA developed a strategy of pushing for legislative change to provide legal rights to equal protection. However, FIDA found that in countries where the laws were changed to be gender neutral, inequality persisted. FIDA then began examining the cultural foundations for this practice and realized that changing public opinion was as important, if not more important, than changing the law. Currently, FIDA has a number of community awareness and education campaigns designed to influence and change public opinion on the issue of women’s inheritance, several of which involve local religious and community leaders.

WILSON & RASMUSSEN, *supra* note 30, at 97.

58. Parekh, *supra* note 12, at 151 (“[W]e cannot leave [societies] free to define and practice universal values as [they] please, for it might interpret them out of existence, subvert critical thrust, even claim their authority to justify unacceptable practices. This not only brings back relativism through the back door, but allows it to masquerade as universalism.”).

59. *Id.* at 130-31.

60. These and other “preemptory norms of general international law” are known as *jus cogens* norms—those that are so universally abhorrent that their breach is a violation of the law of nations. See *supra* note 19 (discussing *jus cogens* norms).



is essential to identifying the most critical approach to deconstructing it, whether through legislative reform, shifting popular opinion or enforcing existing laws.<sup>61</sup>

Human rights advocacy looks for the most effective strategies at the intersection of law, community attitudes, traditional practices, and social and political theories. In considering for themselves each of the issues discussed in this Section, students have a significant opportunity to think critically and approach problems from genuinely cross-cultural perspectives. Drawing on multiple disciplines and legal systems, students also have an opportunity to deepen their understanding of legal pluralism.<sup>62</sup> By responding to cultural difference, anticipating unexpected consequences, emphasizing transnational collaboration, and exploring the correlation between universality and relativism, students come closer to embracing the essence of human rights lawyering.

#### D. *Normative Values of Human Rights Lawyering*

The preceding discussion suggests normative values that can be considered part of the pedagogy of international human rights lawyering. Human rights advocacy is fundamentally participatory and equitable. That is, it requires active collaboration between lawyers, advocates, and those affected by the work (who may or may not be the clients). It should be non-ethnocentric, based on a “pluralistic universalism” that allows for cultural mediation while ensuring the integrity of universal values.<sup>63</sup> This is not merely a matter of sensitivity. It is also a strategic imperative in analyzing the structures of social control and assessing the most effective strategies for durable change. Though it has always been true, teaching effective advocacy in the highly globalized world of today certainly places greater significance on multicultural sensitivity and the “subtleties of foreign legal systems.”<sup>64</sup>

The law is hardly neutral to the social, political, and economic forces that contribute to its creation. It responds to them and, in turn, shapes social values as well. Learning to practice law involves much more than acquiring a set of skills; it requires developing a set of fundamental values. Some would argue that central to these values is the belief that the law should be an instrument of justice and, further, that legal education should imbue aspiring lawyers with the notion that the profession is guided by truth, reason, fairness, and equity. Given the transnational intersection of the law and rights, lawyers cannot be indifferent to social justice. These values should be accompanied by

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61. WILSON & RASMUSSEN, *supra* note 30, at 54.

62. Blackett, *supra* note 7, at 64.

63. Parekh, *supra* note 12, at 158.

64. Margaret Martin Barry, et al., *Clinical Education for This Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 59-60 (2000). See also Blackett, *supra* note 7, at 77 (rejecting “the reductionist image of globalization as inducing homogeneity” and “recogniz[ing] that the eventual structure of law teaching in a globalizing environment is a contested site . . . Its success or failure depends on the ability to coexist with, and be responsive to, domestic particularities”); *State of International Legal Education*, *supra* note 8, at 257 (interview with Louis Henkin) (“No one can teach international law honestly without paying attention to the proliferation of new states, to the positions of the Third World, and to ideological conflict.”); *id.* at 268 (interview with Myres S. McDougal) (“[C]omparative constitutional law should be a part of any decent educational program today.”).

a sense of responsibility to use the law to better society—that is, a sense of moral obligation toward global justice.

David Hall affirms that social justice must be a core value, integral to lawyering, and internalized by practitioners:

Social justice is not charity. It is not something we give to others, it is something we do for ourselves. . . . Justice is a virtue that . . . serves as the basis of our integrity and legitimacy as individuals and as a society. . . . Social justice is not a static state. It is not a place we reach. It is a process that we are constantly and forever engaged in.<sup>65</sup>

But what does that mean in practice? For one thing, individuals have a right to participate to their fullest in the realization of justice. The Universal Declaration of Human Rights and, for that matter, all international human rights instruments, recognize that the first obligations of the state are to respect, protect, and fulfill the rights and fundamental freedoms of individuals and to create conditions whereby individuals may enjoy their rights without discrimination of any kind.<sup>66</sup>

International human rights is a fundamentally values-driven area of the law, and studying and working on human rights can stimulate a sense of justice in students. How can law schools teach international human rights lawyering in a way that maximizes the process by which students integrate these values? A social justice pedagogy must impress upon new lawyers the systemic nature of most persecution. Human rights lawyering, to that end, demands active engagement. Lawyers should seek not only to observe and understand the transnational legal process and the role of international human rights norms, but to influence them as well.<sup>67</sup>

Human rights lawyering, like all social justice advocacy, also requires empathy. Typically, this involves being able to view the legal system through the client's eyes, which can mean crossing a wide metaphorical, cultural, and geographical chasm.<sup>68</sup> While such advocacy presumes a kind of altruism, there is at the same time an inevitable "otherness" to the undertaking. As such, Jane Aiken notes, that compassion is something of a skill:

In the social justice context, the skill of compassion is the ability to appreciate that we

65. Hall, *supra* note 14, at 93-94.

66. See, e.g., Universal Declaration of Human Rights, pmbl., art. 2, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, pmbl., arts. 1, 2, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, pmbl., arts. 1, 2, Dec. 19, 1966, 993 U.N.T.S. 3; African Charter on Human and Peoples' Rights, pmbl., arts. 1, 2, Oct. 21, 1986, 21 I.L.M. 58; American Convention on Human Rights, pmbl., arts. 1, 2, July 8, 1978, 1144 U.N.T.S. 123; Convention on the Elimination of All Forms of Discrimination Against Women, pmbl., art. 2, G.A. Res. 180, U.N. GAOR, 34th Sess., Annex, Agenda Item 75, U.N. Doc. A/Res/34/180 (1980).

67. Harold Koh notes:

[A] lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it. Once one comes to understand the process by which international human rights norms can be generated and internalized into domestic legal systems, one acquires a concomitant duty . . . to try to influence that process, to try to change the feelings of the body politic to promote greater obedience with international human rights norms.

Koh, *supra* note 27, at 1416.

68. Philip Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 277 (2000).

operate with only a partial perspective and to recognize that many of us, law students and practicing attorneys, have privileges—most of them not earned through any personal effort on our part—which color our perceptions both of the client and the legal claim.<sup>69</sup>

Empathic lawyering is fundamentally engaged and requires an ability to overcome one's own needs and limitations of perspective to experience the world as others do. More than intellectual curiosity, empathetic lawyering requires sympathetic identification and knowledge of others' experiences.<sup>70</sup>

### III. TAPPING THE PEDAGOGICAL ROOTS OF CLINICAL LEGAL EDUCATION

#### A. *Demands for Relevance in Legal Education: The Social Justice Mission*

Clinical legal education is a method of learning, the purpose of which is to teach law as a mechanism for pursuing social objectives. Despite the common belief that its origins in the United States lie in the anti-poverty movement of the 1960s, at least three decades earlier, legal realists such as Jerome Frank and Karl Llewellyn began espousing a theory of learning that rejected the Langdellian "science of law" casebook method in favor of contextual or experiential learning.<sup>71</sup> Rather than teaching rules and doctrine, they believed that legal education "should involve the constant interaction of theory and practice."<sup>72</sup> For the legal realists, law was a means to an end rather than an end in itself.<sup>73</sup> The end was, and still is, a values-driven legal curriculum that conceives of the law as an instrument of social justice.

In the 1960s and 1970s, a second wave embraced this demand for relevance in legal education.<sup>74</sup> This movement, spearheaded by Arthur Kinoy, among others, urged legal educators to "tak[e] on major cases and situations involving the relationship of the processes of the law to the fundamental problems of contemporary society."<sup>75</sup> Not coincidentally, this movement built upon the social justice ideals and the War on Poverty that engaged the United States at the time. It was then that the traditional legal services clinic took firm root, "making access to justice a reality for many low-income people,"<sup>76</sup>

69. Jane Harris Aiken, *Striving To Teach "Justice, Fairness and Morality,"* 4 CLINICAL L. REV. 1, 11 (1997).

70. Johanna Bond, *The Global Classroom: International Human Rights Fact-Finding as Clinical Method*, 28 WM. MITCHELL L. REV. 317, 332 (2001).

71. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Karl Llewellyn, *On What's Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935). See also Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1931 (2002). Wizner notes:

The problem with Langdell's approach to legal education was that it was static and unreal; static because it focused entirely on past judicial decisions and not on the underlying principles and methods of legal thought and law reform; unreal because the law is constantly growing and changing in ways that cannot be predicted through the study of past appellate court opinions.

*Id.* This perspective is especially relevant to the teaching of international human rights law.

72. Wizner, *supra* note 71, at 1933.

73. Barry, et al., *supra* note 64, at 12.

74. *Id.* at 12 (describing three waves in clinical legal education).

75. Arthur Kinoy, *The Present Crisis in Legal Education*, 24 RUTGERS L. REV. 1, 7 (1969).

76. Barry, et al., *supra* note 64, at 15. See also Martha Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 AM. U. J. GENDER

providing resources for sorely under-resourced organizations, and exposing law students to legal problems faced by the poor.

In the 1980s and early 1990s, following the important ABA report of the Task Force on Law Schools and the Profession,<sup>77</sup> known as the MacCrate Report after the committee chairperson, clinical legal education experienced a shift away from a justice mission and towards an emphasis on lawyering skills such as interviewing, negotiation, oral advocacy, and brief writing. The shift has been described as a reflection of a less ideological, more pragmatic and career-oriented student body (and era).<sup>78</sup> The pros and cons of the MacCrate Report—and its (over) emphasis on legal skills in general—have been well debated,<sup>79</sup> but it is worth noting that this shift corresponded to a heightened institutionalization of clinical legal education and an increased integration of clinical faculty into the regular faculty ranks.<sup>80</sup> The MacCrate Report did exhort law schools to promote and teach “justice, fairness and morality” — albeit without a great deal of specificity as to what that might mean in practice.<sup>81</sup>

Academic interest in international human rights law followed trends not unlike those of legal services clinics. The Carter administration’s emphasis on human rights in the late 1970s helped foster interest within law schools as well as non-governmental organizations.<sup>82</sup> Notably, a 1979 conference on Teaching International Human Rights Law in Law Schools and Universities—organized by the International Human Rights Law Group<sup>83</sup> of the Procedural Aspects of International Law Institute (PAIL)—concluded, among other things, that there should be more international human rights courses and that they should:

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SOC. POL’Y & L. 119, 122 (2001) (“The early concept of Legal Services, in many people’s minds, was to provide foot soldiers for the war on poverty and address the needs one by one through the use of a massive army of social service workers that included lawyers.”).

77. AMERICAN BAR ASS’N SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

78. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1466-67 (1998).

79. See, e.g., Aiken, *supra* note 69; Brook Baker, *Beyond MacCrate: The Role of Context, Experience, Theory and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994).

80. Dubin, *supra* note 78, at 1467. See also Barry, et al., *supra* note 64, at 21-22 (“In 1996, the ABA amended its accreditation standards to recognize the value of clinical legal education by requiring every ABA accredited law school to offer live-client ‘or other real-life practice experience.’”).

81. Aiken, *supra* note 69, at 4. Paragraph 2.3 of the MacCrate Report calls upon law schools to “contribut[e] to the profession’s fulfillment of its responsibilities to enhance the capacity of law and legal institutions to do justice.” MACCRATE REPORT, *supra* note 77, at 213.

82. Richard B. Lillich, *The Teaching of International Human Rights Law in U.S. Law Schools*, 77 AM. J. INT’L L. 855 (1983). President Carter’s “embrace of human rights as a priority for American foreign policy” also helped to separate international human rights from Cold War political paradigms, “giving new momentum and legitimacy to the work of human rights advocates throughout the world.” Jack Donnelly, *The Social Construction of International Human Rights*, in GLOBAL POLITICS, *supra* note 6, at 76.

83. This was one of the first initiatives of what has become an important human rights NGO, based in Washington, D.C., with projects and offices in 12 countries. See International Human Rights Law Group website, <http://www.hrlawgroup.org>.

strike a balance between introducing students to the substantive law of international human rights and familiarizing them with international and domestic procedures for enforcing this law. A clinical component, field work, or internship, should be offered whenever possible, as this would teach needed skills and show students that international human rights law has a practical application.<sup>84</sup>

That same year, the first formal international human rights clinic was established, at SUNY Buffalo School of Law. It operated until 1986, when it was transformed into an asylum and immigration clinic.<sup>85</sup> Although the number of international human rights courses and seminars at U.S. law schools grew throughout the 1980s, it was not until 1989 that another law school human rights clinic was offered for credit, at Yale.<sup>86</sup> Reflecting on the downtrend in public interest lawyering and legal services clinics, the PAIL conference concluded that among other obstacles,

lack of student demand and interested instructors were the principal reasons for the relatively few international human rights law offerings. . . . Law students were worried about passing their bar examination and getting good jobs; international human rights law did not appear to be helpful in either regard. Peer group pressure and the mistaken belief that international human rights law was not 'law' also militated against such offerings.<sup>87</sup>

A similar sentiment prompted the *Harvard International Law Journal* to conduct a survey in 1988 on three central features of international legal education—course offerings, extracurricular activities, and placement

84. Lillich, *supra* note 82, at 857. Participants at the PAIL meeting discussed the pros and cons of clinical human rights programs. Skeptics pointed out that rather than strengthening the law, turning students loose on high stakes cases, such as death penalty cases, could make bad law with disastrous consequences. Telephone Interview with Dinah Shelton, Professor, Notre Dame Law School (Nov. 13, 2002).

85. The founders of the Buffalo clinic were Virginia Leary and Cathy Rimar. E-mail from Claude Welch, Professor, SUNY Buffalo Law School, to author (Feb. 14, 2003); Telephone Interview with Nils Olsen, Dean, SUNY Buffalo Law School and former Director, Clinic Programs, SUNY Buffalo Law School (Apr. 23, 2003).

86. The founders of the Allard K. Lowenstein International Human Rights Clinic were Harold Koh and Michael Ratner. Other human rights "clinics" offered in the 1970s, for example at NYU, were more like applied human rights courses that engaged students in lawsuits, applied legal or policy studies, field missions (e.g., to U.N. Human Rights Commission sessions or on behalf of NGOs like Amnesty International and the International Commission of Jurists), and summer internships with U.N. agencies (e.g., the U.N. Human Rights Center). For the most part, they were not formal, credit-bearing human rights clinical courses, and they were decidedly linked to individual academic practitioners. This model is still more common than actual human rights clinics, with faculty engaging students in center-based or individual applied human rights research or missions. In the early 1970s, individual civil rights attorneys and some NGOs, notably the Center for Constitutional Rights (New York) and the Lawyers Committee for Civil Rights Under Law (Washington, D.C.), initiated human rights-related lawsuits, for example, against the U.S. government for violating the U.N. trade embargo against Southern Rhodesia in *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), and against the *New York Times* for violating New York City's anti-discrimination laws by publishing advertisements for employment in South Africa in *New York Times Co. v. N.Y. Comm'n on Human Rights, et al.*, 393 N.Y.S.2d 312 (1977). Other important human rights NGOs, such as the Lawyers Committee for Human Rights and the International Human Rights Law Group, started around this time with seed grants from the Ford Foundation. Telephone Interviews with Virginia Leary, Professor of Law Emeritus and SUNY Distinguished Service Professor, SUNY Buffalo Law School (Nov. 18, 2002); Bert Lockwood, Director, Urban Morgan Institute for Human Rights, University of Cincinnati College of Law (Nov. 14, 2002); Dinah Shelton, Professor, Notre Dame Law School (Nov. 13, 2002).

87. Lillich, *supra* note 82, at 856. See also Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 HARV. HUM. RTS. J. 301, 301 (2002) ("[H]uman rights is one of those subjects that has had to justify its place in the curriculum.").

programs. The journal's premise was that beginning law students had only a vague notion of international law; in those days "virtually none actually devote[d] . . . their legal education to the study of international law," and "even fewer . . . end[ed] up international lawyers."<sup>88</sup> The survey concluded that the reason for this was the paucity of jobs in international law. At the same time, the journal noted that international law courses expanded throughout the 1980s, citing a 1987 ABA survey of law school curricula that found broad offerings in international, foreign, and comparative law courses.<sup>89</sup>

Despite the ambivalence inside the academy, the broader human rights movement—comprised of international and domestic NGOs and independent advocates—flourished through the 1980s and 1990s.<sup>90</sup> As a result, when law schools and practitioners renewed their interest in public service toward the end of the 1990s and the beginning of the twenty-first century with a pro bono movement in the formal bar and the academy, human rights concerns were well positioned for new attention.<sup>91</sup> Among the developments in this era of legal education has been an increase in the establishment of human rights clinics.

These days, human rights courses are ubiquitous, and other disciplines are increasingly informed by human rights norms.<sup>92</sup> Michael Ignatieff, director of the Carr Center for Human Rights Policy at Harvard's Kennedy School of Government, "attributes the attraction [of human rights] to the fact that the subject provides a systematic way for students to examine ethics in public policy."<sup>93</sup> In the words of Kenneth Roth, executive director of Human Rights Watch, "[t]here's been an explosion in human rights programs. . . . In many ways, this is the civil rights movement of the 60's made global."<sup>94</sup>

88. *State of International Legal Education*, *supra* note 8, at 299. The journal also interviewed nine prominent scholars and teachers of international and comparative law who were among the "most deeply involved [in developing] what has come to be known as 'international legal studies.'" *Id.* at 239.

89. *Id.* at 301. In 1988, Harvard offered over thirty courses in various areas of international and comparative law. Yale was considered more "traditional," placing more emphasis on public international law and human rights than on international tax, trade, and business law. *Id.* at 301-02. Interestingly, one year after this survey was conducted, Yale initiated one of the first human rights clinical programs.

90. Rosenblum notes:

With the end of the Cold War, the rise of human rights law and discourse appeared to be unstoppable: new Constitutions around the world, new and newly reinvigorated treaties and treaty bodies, world conferences, a growing array of professionalized, non-governmental organizations (NGOs), a U.N. High Commissioner for Human Rights, and seemingly inexorable pressure to incorporate human rights into health, trade and development. These elements formed the basis of a powerful triumph narrative for human rights: the age of human [rights] had arrived.

Rosenblum, *supra* note 87, at 302-03.

91. Dubin, *supra* note 78, at 1471-72. The ABA has formalized a pro bono recommendation through Rule 6.1 of the Model Rules of Professional Conduct. Davis, *supra* note 76, at 122.

92. As Steiner notes:

Human rights themes race through the curriculum. . . . [T]he once compact field becomes a lens through which to see diverse phenomena some of which earlier appeared (perhaps only to the West) untouched and likely untouchable by the human rights corpus. The study of economic development, gender issues, terrorism, religious teachings, or pandemics is increasingly informed by human rights issues.

Steiner, *supra* note 20, at 319.

93. Karen W. Arenson, *New Soldiers in the Fight for Human Rights*, N.Y. TIMES, Apr. 14, 2002, § 4A (Educational Life Supplement), at 9.

94. *Id.*

Though it might be an exaggeration to call it an explosion, law schools have unquestionably experienced a significant growth in human rights programming. Ten years ago, only three law schools offered clinical programs in international human rights.<sup>95</sup> Today, there are about a dozen human rights clinics and over twenty human rights centers in law schools across the country.<sup>96</sup>

In addition, as Jon Dubin noted, “notwithstanding the indeterminacy of principles like ‘justice,’ ‘to many people the relationship between clinical programs and the justice mission of American law schools is so clear as to be self-evident.’”<sup>97</sup> While this works to the great advantage of new and existing human rights clinics, human rights clinicians still find themselves having to explain the practice and justify its legitimacy to fellow clinicians and non-clinical faculty alike.

### B. *Experiential Learning: Blending Theory with Practice*

It is axiomatic in clinical education that experiential learning is critical to training effective lawyers. Indeed, clinical legal education has been defined as “first and foremost a method of teaching”<sup>98</sup>—a method of “learning to learn from experience.”<sup>99</sup> Traditional pedagogical goals of the clinical method include: exposing students to the challenges and skills of acting in the role of an attorney in the sort of unstructured situations that lawyers confront in practice; providing opportunities for collaborative learning; imparting the obligation for service to clients; and critiquing the capacities and limitations of lawyers and the legal system.<sup>100</sup> These goals have been debated and refined over the past decades and, though they are well established, they have been appropriately broadened to reflect changing values and a contemporary, heightened sense of justice. Thus, there is increasing emphasis on, for example, issues of difference and privilege, and inter-disciplinary and comparative approaches to legal problems.<sup>101</sup> Underlying all of this, of course, is the fundamental concern for social justice, and the appreciation that

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95. The first law schools to offer international human rights clinics for credit, where the clinics continue today, were Yale Law School in 1989, American University/Washington College of Law in 1990, and CUNY Queens School of Law in 1992.

96. See *infra* app. The AALS International Human Rights Law Section has undertaken a survey of international human rights activities (including clinics and academic centers) serving students at U.S. law schools. The purpose is “to provide potential law students as well as international human rights institutions and victims of violations with information about the activities and services available in the legal academy.” Initiated in the summer of 2002, the survey is ongoing, allowing AALS to incorporate as many responses as possible, particularly as new programs are established. See *AALS International Human Rights Law Section Survey of Human Rights Activities in U.S. Law Schools*, at <http://vls.law.villanova.edu/clinics/aals/humanrightssurvey.htm> [hereinafter *AALS Survey*].

97. Dubin, *supra* note 78, at 1462.

98. Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J.LEGAL EDUC. 508, 511 (1992).

99. Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 11 (1993).

100. Dinerstein, *supra* note 98, at 509; see also Bond, *supra* note 70, at 1462-63 n.4; Dubin, *supra* note 78, at n.4; Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

101. See Bond, *supra* note 70, at 327.

students should “develop their skills and craft in putting law, facts, and values together.”<sup>102</sup>

The blend of theory and practice that is the essence of clinical legal education plays a particularly significant role in the teaching of international human rights. In part, this is because of the “mistaken belief that international human rights law [is] not ‘law,’” as the PAIL conference itself noted nearly a quarter century ago,<sup>103</sup> and in part because of enforcement challenges. As Henry Steiner put it, “[t]he unmistakable value of clinical human rights work stems partly from its leading students to experience the dilemmas in and sheer obstacles to the realization of human rights norms.”<sup>104</sup> The dynamic, developing nature of this field of law makes it particularly well-suited to practical learning. In addition, there is value for students in seeing how international human rights standards are, in fact, applied and respected in diverse domestic, regional, and international settings. Indeed, one of the aspects that distinguishes clinical human rights from conventional lecture or seminar courses is just that opportunity for students to participate in “making rights real” —for them to experience the utility of norms as applied to real world situations.

Students can, and should, learn the legal standards, mechanisms, and institutions that comprise the international human rights system in the traditional classroom.<sup>105</sup> But such study should not make them complacent about their knowledge of human rights; such knowledge is merely academic, arguably incomplete, outside the context of the struggle to secure and defend those rights. Obviously one can learn from reading human rights reports. Yet the fundamental objective of such reports is not simply to inform—it is to mobilize, to engage the reader’s empathy to act for justice where rights are endangered or violated. Thus, human rights should not be studied solely from an intellectual distance; they should be *experienced* from the perspective of difference and privilege.<sup>106</sup>

International human rights clinics, just like direct service clinics, emphasize the real world utility of projects and provide opportunities for students to have real social impact. They demonstrate to students that rights

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102. Menkel-Meadow, *supra* note 79, at 602.

103. Lillich, *supra* note 82, at 856.

104. Steiner, *supra* note 20, at 326.

105. The question of pre-requisites to enrollment in an international human rights clinic is handled differently by various institutions. The Boalt Hall clinic does not require clinic students to have taken or to be concurrently enrolled in a course in international law or human rights, because that would greatly reduce the pool of students. Telephone Interview with Laurel Fletcher, Acting Director, International Human Rights Law Clinic, University of California, Berkeley School of Law/Boalt Hall (Feb. 26, 2003). American/Washington College of Law requires the completion of the first year curriculum and has as co-requisites an international law course and a course in evidence. E-mail from Prof. Elliott Milstein to author (Apr. 10, 2003) (on file with author). NYU’s International Human Rights Clinic states that a course in human rights or humanitarian law is recommended, and permission of the instructor is required to register. See New York University School of Law Clinical Law Center, Fall 2002-2003 Clinical Course Offerings, <http://www.law.nyu.edu/clinicallawcenter/clinicpacket0203/>. Columbia’s Human Rights Clinic has no pre-requisite. Telephone Interview with Arturo Carrillo, Columbia Law School Human Rights Clinic Director 2002-2003 (Mar. 10, 2003). Yale has possibly the most liberal enrollment policy for its clinics: all second-semester first-year law students are eligible to enroll in a clinical course, and there are no pre- or co-requisites.

106. See Bond, *supra* note 70, at 332-34.



violations can be seen and acted upon as legal problems. Students learn from clinics lessons that they will not get from a regular academic course—including how to develop and apply legal theories to real situations impacting real people, and to use the legal system to seek social change.<sup>107</sup> Indeed, with international human rights law, students have the opportunity to help create new norms and laws, and to discover the “limits of law in solving individual and social problems.”<sup>108</sup>

### C. *Thinking Like an Advocate*

The clinical movement has shaken loose the old notion that law schools teach students how to “think like a lawyer,” a conception “used by doctrinal teachers for a collection of textual interpretation skills and heightened forms of skepticism.”<sup>109</sup> This traditional doctrine applies a theory of abstract analysis that ostensibly allows the development of “detached, neutral, partisan stoics who . . . share the assumptions of professional ethics.”<sup>110</sup> Teaching about social justice requires, however, an understanding that justice and the law are rarely impartial. Even the most fundamental of legal skills, the exercise of judgment, is “inherently value laden.”<sup>111</sup> As Stephen Wizner writes:

The practice of law is as much about power as it is about legal knowledge. Law schools have a responsibility to teach students about their social and professional responsibilities in exercising the power of law. . . . Law students need to be reminded that “justice” is not something that emerges *ipso facto* from the existing legal system.<sup>112</sup>

International human rights practice can facilitate an understanding of the ways in which law and legal power are distributed and exercised, to what ends, and in whose interests.<sup>113</sup> Johanna Bond discusses the view that empathetic lawyering requires knowledge of others’ experience, concluding that field experience is the ideal pedagogical method for human rights.<sup>114</sup> Such

107. See Askin, *supra* note 25, at 856; Wizner, *supra* note 71, at 1935.

108. See Wizner, *supra* note 71, at 1935.

109. Richard K. Neumann, Jr. & Donald Schön, *The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 405 (2000). Neumann and Schön argue further that “[t]hinking like a lawyer” is not the same thing as “solving problems like a professional.” *Id.*

110. RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 44-45 (1989). In addition, Aiken notes:

The assumption [is] that once one learns to “think like a lawyer,” one has managed to achieve the state of neutrality common to all lawyers, regardless of their background and experience. This is the idea that a distinctly legal mode of analysis exists, and if applied to a given situation, it will assist one in arriving at just results in a particular case. One way to undermine that forced neutrality is to demonstrate to students that there is difference among their peers.

Aiken, *supra* note 69, at 49.

111. Aiken, *supra* note 69, at 6.

112. Wizner, *supra* note 71, at 1936.

113. Stephen Wizner, *Is Learning to “Think Like a Lawyer” Enough?*, 17 YALE L. & POL’Y REV. 583, 591 (1998).

114. Bond, *supra* note 70, at 328, 332 (describing a vision of lawyering that is capable of overcoming personal limitations of perspective to experience the world as others do: despite differences of race, gender, class, culture, identity, empathetic lawyering requires more than intellectual curiosity, it needs sympathetic identification and cross-cultural collaboration).

knowledge can be gained through direct experience (e.g., by means of a fact-finding mission) or through academics (e.g., researching the factual context of persecution and the abuses a particular group has suffered to determine if the facts fit within the legal definition of genocide or other specific violations).

What makes the practice different from the mere study of international human rights, of course, is the *engaged* nature of the activity on behalf of a set of moral principles and ethical objectives, as well as on behalf of individual victims.<sup>115</sup> Such engaged lawyering questions the notion of neutrality in the law. The decision to represent a particular client or to engage in a certain project is the ultimate departure from neutrality. Clinical legal education emphasizes that the choice to become engaged is an entirely ethical and moral one. Human rights clinics draw the line in an equally normative way. For example, some human rights clinics might choose not to work for or with any government. They may rationalize this choice on the basis that international human rights law concerns the protection of individual and group rights that are either violated or unprotected by governments; governments are not the subjects of the protection.<sup>116</sup>

#### D. *Advocacy in the Academy: The Clinic in Relation to Social Movements*

Thus, by design, law school clinics are a part of legal reform and social change. The idea is to inculcate into the profession and its training a notion of pro bono or cause lawyering that is both “relevant to the pressing and fundamental problems of contemporary [] society . . . and relevant to the solution of those central issues which dominate” our lives.<sup>117</sup> The question for clinical legal education is not whether students should be taught that lawyers ought to use law for social good, but how that lesson can be most effectively taught.<sup>118</sup>

The value of students participating in a pro bono movement that provides “access to justice for marginalized groups [and] fill[s] in the gaps in legal services”<sup>119</sup> should not be underestimated, particularly given the current political and economic climate in the United States and the world at large. In the same manner, by providing assistance via a cadre of students, human rights clinics serve institutions, organizations, and individuals that play important, if undervalued, roles in promoting and protecting human rights.<sup>120</sup>

115. See, e.g., Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605 (1999). Margulies notes that finding an ethical stance within the conundrum of empathy as a motivator and a pedagogical objective “calls for the commitment that underlies clinical education generally: the commitment to doing,” and he describes “the struggle with merging the micro-version of empathy, which focuses on interpersonal relationships, with the macro form, which focuses on distributive issues in society.” *Id.* at 606.

116. See *infra* Part IV.C.

117. Kinoy, *supra* note 74, at 2-3.

118. Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 330 (2001).

119. Davis, *supra* note 76, at 126. See also *id.* at 122 (“Even if all the lawyers in the country met the fifty-hour a year rule for donating pro bono services recommended by the ABA’s Model Rule of Professional Conduct, there would not be enough lawyers providing services on the ground for low-income people who need them.”).

120. Although not every student who takes an international human rights course will choose a career as a human rights lawyer, this sort of clinic augments the capacity for social change and, it is hoped, engages students far beyond the semester or two they spend in the clinic. See *id.* at 125 (“[P]ro

This role is not without controversy. There is a constant tension in the academy between scholarship and advocacy, and the use of institutional resources for advocacy purposes in clinical legal education has generated political consequences in some cases.<sup>121</sup> But is it inherently subversive?<sup>122</sup> Henry Steiner asserts that the university as an institution is not the movement's advocate.<sup>123</sup> At the same time, Steiner recognizes that the suspicion cast upon advocacy work within academic institutions "stems from a belief that university studies should remain pure in their devotion to classroom teaching and research—a realm of relative detachment from the surrounding society that permits deeper thought."<sup>124</sup> Such attitudes are antithetical to the fundamental purpose of clinical legal education and, moreover, Steiner believes, "are out of both place and date as applied to human rights studies in the United States and several other countries. . . . Action and reflection, participation and study, engagement and distance, the graphic and the abstract become complementary facets of a richer education."<sup>125</sup>

Through reflection and intellectual debate, universities—students and faculty alike—can and do influence the movements they assist. This may be all the more true for a norm-driven field such as human rights, both because it is not predominantly beholden to individual clients, and because it is constantly evolving—a perpetual work in progress. Students are well-situated to engage in critical inquiry about the presumptions and directions of the human rights movement—an activity that meets an important pedagogical goal and also serves as a catalyst in the development of the movement itself.<sup>126</sup>

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bono work helps public interest organizations train a group of lawyers about these issues and connects them to the movement with the hopes of enlisting them as political allies.").

121. For example, the environmental law clinics at Tulane University and the University of Oregon have been the target of controversy and political interference because of lawsuits—in the former case challenging the construction of a polyvinyl chloride plant and, in the latter, against government policies impacting forest conservation and endangered species. The governor of Louisiana denounced the Tulane clinic as an enemy of economic development, and called on alumni to stop donating to the university. Furthermore, as a consequence, the Louisiana Supreme Court undertook a review of all state law clinics (which failed to uncover any violations), and revised its student practice rule, in particular with regard to indigence and first contact with clients. See Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions: Some Questions and Answers*, 32 ENVTL. L. REP. 11476 (2002); Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 CLINICAL. L. REV. 531 (1998); Megan Kamerick, *Hostile Environment: Tulane Law Clinic Continues Work Despite Limits on Student Attorneys*, NEW ORLEANS CITY BUS., Nov. 18, 2002, at A10, <http://www.tulane.edu/~telc/City%20Business.pdf>. As another example, from 1992 to 1993, the Yale Lowenstein Human Rights Law Clinic initiated and litigated a complex set of cases on behalf of Haitian refugees held in a U.S. detention camp in Guantanamo Bay, Cuba. Victoria Clawson, Elizabeth Detweiler, & Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994). At one point in the proceedings, the government filed a motion for Rule 11 sanctions, arguing that the lawsuit was frivolous, and a motion to dismiss. In addition, the government's request for a \$10 million bond against the plaintiffs' motion for a temporary restraining order (TRO) was ten times larger than the largest TRO bond in the history of the Second Circuit. *Id.* at 2355 n.85.

122. Davis, *supra* note 76, at 124-25.

123. Steiner, *supra* note 20, at 324.

124. *Id.* at 325-26.

125. *Id.* at 326.

126. *Id.*

## IV. WHAT IS AN INTERNATIONAL HUMAN RIGHTS CLINIC?

Legal educators conceive of three basic clinical models: in-house live-client clinics (for example, asylum clinics), externship programs (which place students in law offices or organizations outside the academic institution), and simulation courses.<sup>127</sup> The innovative international human rights clinic is none of these.

To be sure, human rights clinics are not an entirely different breed from traditional (i.e., direct services or live-client) clinics. They are grounded in the same pedagogical social justice principles and committed to cases that are directly related to contemporary social problems. They share the experiential learning theory—that students should be engaged in aspects of the learning process that distinguish the clinical experience from simple applied research. Both view the law as “a process of struggle rather than a collection of substantive rules or ‘mere norms.’”<sup>128</sup> What is more, both clinical models are activist, engaged in what Robert Cover viewed as “the clash between the state seeking to enforce its rules and the activist communities seeking to create, or preserve an alternative vision of justice.”<sup>129</sup>

Students learn many of the same skills in a human rights clinic as they would in traditional clinics—with the added dimension of transnationalism. They are exposed to a specific body of law and learn to do research in both international and domestic law. They acquire legal, factual, and advocacy writing skills, and practice oral communication. Students are required to apply critical thinking skills in close readings of facts and law, and learn to develop effective strategies and solve problems creatively. They learn to integrate theory and practice. All clinics also place a premium on professionalism and competence. Working collaboratively, students must develop the capacity to be organized under pressure, with competing demands, and to produce quality work. Clinical legal education thus presents students with the opportunity to experience and reflect upon the skills and challenges of the lawyer’s role in practice. In addition, clinics give students the opportunity to critique the role of the lawyer, which can be disputed or even suspect, along with the particular strategy and the role of the movement in general—a luxury of time and objectivity typically lacking in social movements.

So, what distinguishes human rights clinics from the traditional clinical curriculum? Besides the distinct area of law,<sup>130</sup> the perception of human rights as soft or weak law makes teaching it different, since the fora and methods for applying the law are different. Indeed, the main difference has much to do with the instrumental particularities of human rights lawyering. International human rights clinics can be distinguished from traditional lawyering clinics in

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127. Elliott Milstein, *Clinical Legal Education in the United States*, 51 J. LEGAL EDUC. 375, 376 (2001).

128. Lobel, *supra* note 29, at 1333 (describing the value of “prophetic litigation” as a dynamic process of using the law to push for structural change, with an eye to history, not victory).

129. *Id.* at 1333 (attributing this view to Cover’s 1982 *Harvard Law Review*, *Foreword*, *supra* note 29).

130. As noted above, human rights law should not be misconstrued as purely international law. See *supra* text accompanying note 25.

terms of the client, the lawyering process, and the fora in which the law is practiced.

Unlike direct services clinics, where the client is the object of the case, international human rights clinics are not a client-centered program. They support, instead, a norm-centered pedagogy. With human rights advocacy, the object may be the articulation or clarification of a norm or set of standards, as much as, if not more often than, representation of an aggrieved individual or group. The subject may be a variety of legal and non-legal strategies. "Clients" are rarely individuals, and they are often physically distant from the clinic itself. Indeed, although projects generally are organized through non-governmental organizations, it is more accurate to refer to these as partner organizations than as clients.

Certainly, some projects will be more directly client-oriented; for example, many human rights clinics undertake litigation or fact-finding missions. However, where human rights lawyering is the general focus, the clinic will more likely partner with an NGO that is involved or has been contacted by the individual victims, rather than being in direct contact with the clients itself. For example, Amnesty International asked the Allard K. Lowenstein International Human Rights Clinic ("Lowenstein Clinic") at Yale to assist with a project to encourage the U.S. State Department to include the rights of lesbian, gay, bisexual, and transgendered (LGBT) persons in their annual Human Rights Country Reports. The Clinic's task was to research violations and relevant laws in some twenty countries. In this case, Amnesty International was the Clinic's partner organization; the Clinic's mutual clients were the anonymous, or certainly distant, people whose cases we were highlighting. The Clinic had minimal contact with local advocacy groups who work with LGBT persons in those countries.

Human rights norms or principles can even *be* the underlying "client." Seen from this perspective, the client in the above project could be considered to be the rights of LGBT persons. In another example, the Lowenstein Clinic wanted to develop a project on the global AIDS pandemic. After significant exploration, it was decided that India was of particular importance due to the potential scale of its epidemic and the watershed moment in the course of HIV/AIDS there.<sup>131</sup> Because of the need to focus international attention and resources on this situation and because of the intersection of human rights and HIV/AIDS generally, it was decided that a report on human rights aspects of the HIV/AIDS crisis in India could make a valuable contribution to advocacy around these issues. The Clinic then found a partner organization in India with whom to work, the Lawyer's Collective in Mumbai, which has been a pioneer in India and around the world in addressing human rights and HIV/AIDS through litigation and advocacy.

The ways in which human rights lawyering is conducted obviously shape a clinic's curriculum, and those who teach clinical human rights have a range of pedagogical choices. Human rights advocacy has expanded

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131. After South Africa, India has the greatest number of persons infected with HIV/AIDS. Yet, due to India's enormous population, the percentage infected is far less, and India may still be able to avert the degree of devastation experienced by many in South Africa.

significantly from its early days when the primary mode of practice was shaming governments into change through detailed investigative reports with first-hand testimony of human rights violations. The type of work human rights clinics may choose to do now falls into four general categories of practice: litigation, legislative policy, fact-finding missions, and the catch-all category of general advocacy.

Some clinics may focus on one type of practice. For example, students in the Georgetown International Women's Human Rights Clinic and Fordham's Crowley Program in International Human Rights have spent full semesters preparing for and carrying out investigative missions.<sup>132</sup> One main goal of these programs has been to apply the objectives of direct services clinical education to a human rights context—through client contact, interview techniques, and a writing project that is both descriptive and advocacy-oriented.<sup>133</sup> Without a doubt, fact-finding missions such as these provide "live" human rights work; they are exciting and literally engage students in the field.<sup>134</sup> But they also offer a limited experience of human rights lawyering, which in reality makes use of widely diverse fora. Clinics should reflect this diversity. For this reason, in recent years, Yale's Lowenstein Clinic has expanded its curriculum from what once was a nearly exclusive litigation practice based on the Alien Tort Claims Act (ATCA).

#### A. *The Ambiguous Position of Asylum Practice Within International Human Rights*

Many law school human rights clinics offer a hybrid program, combining asylum/immigration law with human rights practice. In fact, at least fifty percent of international human rights clinics handle asylum cases. The others offer a "pure" international human rights clinic, separating asylum and immigration into a discrete clinical course.<sup>135</sup> In some schools, such as the University of Connecticut Law School and Seton Hall Law School, the human rights clinic currently does only asylum practice.

The hybrid model reflects a certain logic from the clinical point of view, particularly if the program embraces the principle that client-centered

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132. Bond, *supra* note 70, at 320-21. Although the Georgetown International Women's Human Rights Clinic has conducted intensive investigative missions, they also pursue other types of clinical projects. See Georgetown University Law Center, The International Women's Human Rights Clinic, at <http://www.law.georgetown.edu/clinics/iwhrc>. For information on the Crowley program, see *AALS Survey*, *supra* note 96 (response of Joseph R. Crowley Program in International Human Rights at Fordham Law School) ("The Program's elements include . . . an annual student fact-finding mission to another country. The students involved in the mission participate in course work, independent research, planning and conducting the mission, and writing and publishing a post-mission report."). Mission sites have included Bolivia (2003), Malaysia (2002), Ghana (2001), Mexico (2000), Hong Kong (1999), and Turkey (1998). For more information on the Crowley Program, see Fordham Law School, Joseph R. Crowley Program in International Human Rights, at <http://law.fordham.edu/crowley.htm>. It should be noted that the Crowley Program is not a formal human rights clinic.

133. Bond, *supra* note 70, at 327-28.

134. *Id.* at 333.

135. Those that do include Yale's Lowenstein Clinic, Columbia's Human Rights Clinic, NYU's International Human Rights Clinic, CUNY Queens International Women's Human Rights Clinic, the University of San Francisco International Human Rights Clinic, and the Georgetown Women's International Human Rights Clinic. See *AALS Survey*, *supra* note 96.

lawyering is “the ideological core of clinical [legal] education.”<sup>136</sup> Where resources are limited, asylum clinics provide an opportunity to teach certain important aspects of human rights lawyering in a practical, skills-oriented curriculum. Understanding the international treaty standards and the applicable domestic law; researching country conditions to establish the basis for a human rights violation; applying legal definitions of persecution as an individual and systemic problem; helping a victim to describe unspeakable horrors that she has suffered—all of these are human rights dimensions of asylum practice. Regarding the focus on political asylum cases in the International Human Rights Clinic at St. Mary’s University School of Law, Jon Dubin explains:

The unmistakable influence of political and economic trends in Mexico and Central America on conditions in South Texas and the Texas border regions presents unusual opportunities for clinical advocacy and study of the practical role of international law and international institutions in addressing conditions of poverty and human suffering. San Antonio and South Texas receive a steady influx of political and economic refugees from Mexico and other developing countries of Latin America and the Caribbean.<sup>137</sup>

Yet Jacqueline Bhabha rightly calls attention to the ambiguous position that asylum occupies within the human rights movement.<sup>138</sup> Despite the correlation, a pedagogical argument can be made against conflating the practice of international human rights with that of asylum and immigration. Like the legal services clinics, asylum clinics are entirely live client-oriented, and most are focused on administrative procedures and litigation. The teaching and supervision are more akin to traditional clinical education—concerned as much with interviewing and negotiation skills and trial preparation as with advocacy, research, and writing. The skills developed in a human rights clinic are not dissimilar, but the client is rarely an individual and seldom requires direct service. The body of law is fundamentally different (asylum practice is grounded in domestic law), the approach to teaching is different, and the strategic, critical thinking will be different. Perhaps most significantly, where law schools conflate asylum and international human rights, the curricular focus and resources tend to be split, dividing students’ exposure to both.<sup>139</sup>

Another way to consider the difference between asylum and human rights practice is that human rights lawyering focuses on improving the conditions in the place where violations occur. It seeks to empower

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136. Milstein, *supra* note 127, at 378. In 1995, responding to active student interest in international affairs and international human rights clinics, Philip Schrag and David Koplow redirected the focus of their long-standing Center for Applied Legal Studies, located at Georgetown Law Center, from social security and disability cases to asylum litigation. They chose this focus because “only asylum cases could meet [the] need to enable students to handle complete cases within a semester.” Philip Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 195 (1996).

137. Dubin, *supra* note 78, at 1496.

138. See, e.g., Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (2002).

139. It should be noted that the International Human Rights Law Clinic at American University/Washington College of Law is a full year course (offering seven credits each semester for a total of fourteen credits per academic year). Such a substantial time commitment certainly helps to address concerns about undercutting students’ exposure to the two general areas of practice.

individuals and groups to claim their rights and to hold the state accountable for meeting its obligations with respect to those rights. Asylum practice, on the other hand, is concerned with helping people who have left abusive conditions behind to remake their lives in a safer environment.

B. *How the Practice Shapes the Pedagogy of Clinical Human Rights*

The added value of an international human rights clinic over a lecture or seminar course is the exposure students get to the range of lawyering activities—and the chance to be engaged in the process of developing and promoting human rights norms. Students learn that lawyering can be pursued in many places in a variety of ways. This exposure is especially meaningful given that international law is constantly evolving and subject to change as customs change.<sup>140</sup> Like impact litigation, where the purpose is to create new (and better) law, much of human rights work is ground-breaking. Thus, students have a unique opportunity to look critically at existing law and to participate in the struggle to create an alternative vision of global justice. Of additional, tangible value, students are able to contribute to the protection and promotion of human rights by assisting various NGOs, agencies, and individuals in their work. This provides an invaluable lesson in “making rights real” —and in recognizing that human rights law has a practical, concrete application that can be enforced.

On the other hand, human rights law and practice are full of inconclusive dilemmas. In conventional legal practice, a lawyer goes to court, obtains a judgment, and expects it to be enforced or to have recourse through the state. With human rights, however, the court may or may not be the locus of the case; a judgment or conclusion may or may not be forthcoming. Often, there is no recourse where the state is the perpetrator. As such, human rights lawyers recognize the diminished value of the formal legal system to the protection of rights. In fact, “one of the main goals of human rights lawyers is to increase access to justice through the elimination of formality (and even lawyers) whenever possible.”<sup>141</sup>

Thus, students of human rights advocacy must also learn to determine objectives from inconclusive evidence, and to anticipate elusive victories and uncertain outcomes.<sup>142</sup> Students should always adopt a healthy skepticism, questioning the underlying assumptions on which they build their strategies.

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140. See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Beharry v. Reno*, 183 F. Supp. 2d 584, 597 (E.D.N.Y. 2002).

141. Thus, human rights lawyering embraces a range of advocacy strategies, and lawyers are often engaged in non-legal work. Consequently, as Wilson and Rasmussen note:

[L]awyers use their legal knowledge and expertise to analyze the system and encourage reform toward a more people-oriented process. While there are instances when legal training is required, there are proportionally more instances where bureaucratic regulations, geographical restrictions, or rudimentary educational barriers are what make a lawyer necessary. Human rights lawyers have been creative about designing systematic reform that meets the needs of the community and increases accessibility for the average citizen. Such efforts are often met with resistance from the local governments and bar associations.

WILSON & RASMUSSEN, *supra* note 30, at 57.

142. Rosenblum, *supra* note 87, at 304-05.



For this reason, Peter Rosenblum describes human rights lawyering as “a realm of advocacy tools, not abstract truths—a dynamic amalgam of norms, procedures, and fora, full of tensions and contradictions.”<sup>143</sup> Rosenblum’s goal in teaching his students is to train “ambivalent advocates.” Cognizant that human rights advocacy is a “process of strategic decision-making in a realm of uncertainty,” students should learn to be “committed to action, but alert to the multiple consequences” that sometimes, though often unintentionally, accompany such action as part of the advocacy strategy.<sup>144</sup>

By way of example, in the late 1990s, the Boalt Hall (Berkeley) International Human Rights Clinic became involved in trying to stop the mass expulsions of ethnic Haitians and their children from the Dominican Republic. In 1998, following a field mission, members of the Clinic testified before the Inter-American Commission on Human Rights regarding conditions of Haitians and Dominicans of Haitian descent in the Dominican Republic. The Commission held a country condition briefing on the Dominican Republic as a follow-up to its 1997 on-site visit, and to gather additional information for its country report. A Clinic student testified alongside Dominican representatives of NGOs and North American-based Haitian advocacy groups. The Report, issued in October 1999, cited the Clinic extensively. The Dominican government reacted to that section of the Report containing the Clinic’s testimony, and, within a week of its release, expelled from the country between 5,000 and 20,000 Haitian migrant workers and those suspected of being undocumented workers. The Clinic worked feverishly to file a Request for Precautionary Measures<sup>145</sup> with the Commission, both to demonstrate to their contacts a sense of responsibility for the backlash and as an attempt to stop the Dominican government from forcing further expulsions.<sup>146</sup>

Another example, from the Lowenstein Clinic at Yale, highlights the pedagogical value of actively questioning the underlying assumptions that we bring to our work. The Lowenstein Clinic was asked by the U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, to compile a report on violence against women in the United States over the ten years of her tenure. The team of students tasked with outlining the report initially defined the category of religious extremism to include the practice of polygamy by break-away fundamentalist religious sects. However, when a different group of students finished the report the following semester, the student responsible for drafting this section disagreed with the premise that polygamy is *per se* violence against women any more than marriage as an institution manifests violence. She asserted, and the Clinic concurred, that polygamy’s illegality was not an argument for its inclusion as a human rights violation. Polygamists are a small minority with a morally atypical practice; the student argued that their religious freedom was under attack, and further compared intolerance of polygamy with intolerance of homosexuality. This generated significant discussion and disagreement, causing us to reexamine

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143. *Id.* at 305.

144. *Id.* at 304-05.

145. Such a request is akin to a motion for injunctive relief.

146. Telephone Interview with Laurel Fletcher, *supra* note 105.

our initial approach to the issue. We agreed that domestic violence, underage and forced marriage, statutory rape, incest, and above all, the subordination of women and girls are manifest within polygamy. Yet it is unclear whether polygamy is an institutional form of violence, or merely violence-prone as practiced. If it were practiced in a gender-neutral form (i.e., polyandry, in which both women and men actively take multiple spouses), perhaps these problems would disappear. Furthermore, the paucity of evidence of polygamy led us to question the scope of the practice in this country, and whether it was extensive enough to legitimately include in the report. If it was, what exactly were the relevant concerns for the U.N. Special Rapporteur on Violence Against Women?

Instead of simply reporting on the limited information available, based on a set of general assumptions about polygamy, students began to operate from a new framework and with a kind of skepticism that freed them from their prior suppositions. Eventually, the Clinic concluded that the inherent gender-based hierarchy of religious polygamists, the geographic and social isolation of polygamist communities, and the forced secrecy of behavior within these families—whether intentional or circumstantial—resulted in a lack of information about the extent and nature of the practice and, more importantly, the failure of authorities to enforce the law in a way that protects women and girls from violence and the threat of violence.<sup>147</sup>

In sum, clinics teach international human rights through applying the law and norms to concrete, contemporary problems, while instilling in students the value of “ambivalent advocacy”—that is, being committed to the process but always critically reflective of its context and consequences. Human rights clinics aim to develop in students a sense of the global ethic of responsibility and to facilitate their grasp of the dilemmas and obstacles associated with enforcement, while exposing them to the real potential for successful human rights advocacy.

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147. The process of conducting this inquiry within the Clinic also resembled a fact-finding mission in that students embarked upon the study with a sense that a violation existed but were unable to locate it concretely. They had to find people with direct knowledge and experience of the problem—a task that required some creativity. Eventually, they found organizations and individuals who had been personally impacted by violence. These sources did provide anecdotal evidence of violence, but also had their own agendas. Thus, the students still lacked objective evidence to support the link between polygamy and violence against women. Ultimately, they had to grapple with how to present the information in an objective and definitive manner, and with what conclusions and recommendations could be rightly drawn. See ALLARD K. LOWENSTEIN *INT’L HUM. RTS. CLINIC, VIOLENCE AGAINST WOMEN IN THE UNITED STATES, A REPORT OF TRENDS, LEGAL DEVELOPMENTS AND BEST PRACTICES 1993-2002*, at 68-75.

C. *Selecting Clinic Projects: The Substance of Human Rights Pedagogy and the Value in Normative Tension*<sup>148</sup>

As this Article has discussed, the skepticism fostered by international human rights law has clear drawbacks, but it can also be quite advantageous to a pedagogy of human rights lawyering. True, international human rights can be difficult to enforce and readily ignored; but that is, in large part, due to their inherently consensual and evolving nature. The field embraces multiple discourses that are embedded in the international law instruments themselves.<sup>149</sup> Rights may be conceived in negative (“injunctions against state interference”)<sup>150</sup> or positive terms (“affirmative duties of states to ‘respect, protect, and fulfill’” their treaty obligations), or both.<sup>151</sup> Human rights may either be viewed as universal or culturally relative. Human rights law is not even “practiced” in conventional ways, leading faculty to resist considering it a priority or even a legitimate clinical offering.

Those who teach international human rights must come to terms with these and other dilemmas—not to resolve them for students, but to present them as an integral part of the field. For this very reason, the practice of human rights is brimming with pedagogical opportunity. As a teacher of human rights advocacy, Peter Rosenblum exalts these “myriad possibilities:”

The human rights field is one of normative and strategic entrepreneurs, who use human rights as a tool of social change, of individual emancipation. They mine the discourses that are made possible by the human rights texts and, like advocates in any field, they push arguments beyond established boundaries. But unlike most other legal disciplines, human rights has no ultimate arbiter. Hence, diversity is likely to remain an essential element of the field for the foreseeable future. The goal of my teaching is to capture and convey the dynamism and diversity of the field.<sup>152</sup>

One fundamental tension that pervades the human rights community—and certainly finds its way into pedagogical thought and discourse—exists between traditional civil and political rights and more recently recognized economic and social rights. Particularly controversial are emerging notions of economic and social rights falling under the rubric of group/collective rights (e.g., the rights of indigenous peoples or the right to self-determination), corporate accountability, and other aspects of globalization. These tensions

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148. The various tensions discussed in this section were first articulated by my colleague, Jim Silk, and discussed by participants at a meeting of Law School Human Rights Clinics and Human Rights Centers held at American University/Washington College of Law in May 2002. See also Richard J. Wilson et al., *The Work of the International Human Rights Law Clinic at American University, Twelve Years of Operation 8* (May 2002) (unpublished manuscript, on file with author) [hereinafter AU/WCL Report].

149. Rosenblum, *supra* note 87, at 305. Rosenblum explains:

There are group rights and individual rights; rights to keep what is yours and to have a part of what belongs to someone else. And there is no grand court to balance, contrast, and resolve these tensions. . . . These four themes—the individual, the group, conservation, and transformation—constitute more than a discrete set of rights in the treaties, providing the bases of separate ideologies or discourses within the rights movement.

*Id.* at 306. See also *id.* at 306-08.

150. *Id.* at 308.

151. *Id.* at 309.

152. *Id.* at 315.

manifest themselves in the way clinics choose their programmatic focus. Most human rights clinics adopt a generalist approach to curriculum design, but some pursue a single-issue program focus (e.g., women's rights at the CUNY Queens Law School and Georgetown clinics; and U.N. mechanisms at the University of San Francisco International Human Rights Clinic).

How do international human rights clinics select projects to maximize their pedagogical goals? Some place a high priority on lawyering skills as a component of human rights advocacy. For example, as noted above, the Georgetown Women's International Human Rights Clinic and Fordham's Crowley Program in International Human Rights focus on fact-finding missions in order to bridge the distance between the students and the subjects of their work and afford students a chance to apply traditional lawyering skills in the context of human rights.<sup>153</sup> Some programs instead use simulation; for example, the course description for NYU's International Human Rights Clinic explains that "students address theoretical and methodological problems through simulations based on case studies related to HIV/AIDS."<sup>154</sup> Other clinicians feel that:

excessive concern with the teaching of lawyering skills and the nuances of attorney-client relationships have distracted our attention and that of our students from the social and political functions of law [. . .] stifling their passion and creativity, . . . [and] failing to nurture their capacity for moral indignation at injustice.<sup>155</sup>

That is, skills can just as well be taught through project supervision and classroom reflection on the work in progress.

All clinics are selective as to the pedagogical value of their cases, within the confines of practicality. Some direct services clinics are, by design, accessible to any clients who come through the door asking for assistance; many instead use some screening mechanism (e.g., referrals from non-profit agencies, or requests for particular kinds of cases). Others—including community development, constitutional litigation, and environmental clinics—are able to choose particular cases for their specific pedagogical value and socio-political impact. Not having individual clients likewise affords human rights clinics the freedom to design a comprehensive program.

In addition to the substantive tensions, there are instrumental tensions, which human rights clinicians inevitably encounter. These tensions are not necessarily unique to human rights clinics, but they present themselves in ways particular to the area of law. For example, clinics must decide whether they are educating human rights lawyers or educating lawyers about human rights. How a particular clinic resolves these questions may affect students in terms of prerequisites for enrolling in the clinic, student expectations with respect to the nature of the clinical experience (e.g., regarding client contact), motivation in the clinic projects, and individual long-term commitment to the issues. For human rights clinicians, the question raises other tensions (e.g., between advocacy and academia). They must decide, for instance, how much

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153. Bond, *supra* note 70, at 321.

154. Paul Chevigny, NYU International Human Rights Clinic Course Description, <http://www.law.nyu.edu/clinics/semester/humanrights/index.html> (last visited Apr. 27, 2003).

155. Wizner, *supra* note 118, at 330.

(if any) substantive international human rights law should be taught in a clinical class. Likewise, they must determine the importance of a background in international law as a prerequisite to the human rights clinic. Finally, they must choose whether students with demonstrated commitment to human rights deserve priority in space-limited clinics, or whether clinics strive for a balance in student profile.

If the increased globalization of law is inevitable, as I have argued it is, then all lawyers should have some basic knowledge of international human rights law. Those who intend to work in corporations or governments, above all, should experience the dynamism of human rights norms and mechanisms at work. In law school, as in practice, students with an interest in domestic legal services and civil rights identify themselves and their career options as distinct from human rights; but they too should be exposed to international human rights and the connections to “their issues” should be made more evident. This disjuncture is probably more pronounced in the United States, due to a hypersensitivity to constitutional rights.<sup>156</sup> For that reason alone, it is a challenge that must be addressed in U.S. legal education.

Client-related dilemmas abound in human rights clinics. Where there is no individual or live client, there is always a question of how to stay connected to the people who are the subjects of the work—and the higher risk that the project will feel like applied research. Human rights clinics can address this dilemma by selecting projects with a concrete, real-world application, for which the partner can state clearly how the work will be used. Another possible solution is to involve students as much as possible in the process—through regular contact (e.g., conference calls and meetings) with the partner organization or clients, and participation in hearings or seminars where the strategies and issues are discussed. Where resources are available, clinics can also send students into the field, or bring people impacted by the case or issues to the law school.

Empathetic lawyering will be more theoretical when the client is anonymous, invisible, or distant. This is one reason why some clinics choose to focus on fact-finding missions. But cultural immersion is not always practicable, and human rights clinics need to find ways to stimulate students’ identification with the subjects of their work, respect for difference, and critical reflection on the premises upon which law is based. Moreover, human rights clinics face a tension between training students to use the law and developing a sensitivity to situations where lawyers and the rule of law may be suspect, or where a legal response might not even be required. Law students, whose lives are otherwise consumed with learning how to research the law and fashion cogent legal arguments, must also learn to relay legal standards and rulings in simple, non-legal terms. This is one of the advantages

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156. Indeed, clinical legal education outside the United States often conceives of human rights in domestic terms. For example, the Human Rights Clinical Program at Tel Aviv University emphasizes legal representation for disempowered groups, the rights of Israel’s Arab minority, advancement of the right to health care and education, and cases of discrimination based on gender, sexual orientation, and disability. Tel Aviv University Faculty of Law Human Rights Clinical Program website, <http://www.tau.ac.il/law/clinics>; see also Stephen Meili, *Latin American Cause-Lawyering Networks*, in CAUSE LAWYERING, *supra* note 49, at 317-21; Wilson, *Three Law School Clinics in Chile*, *supra* note 53.

of clinical legal education. The fact that the process requires students to think about both the principles and the people is evidence that it is a clinic.

For example, with the Lowenstein Clinic-initiated AIDS/India project, students have had the experience of developing a real advocacy strategy. But the Clinic also ran the risk of getting too far into the work without a local partner organization. This would have been a problem logistically and politically with respect to the ultimate product, but also in terms of fulfilling the guiding principle that the Clinic should work collaboratively with partner organizations or clients. The Clinic also faced a dilemma over whether to send students into a potential conflict zone. A field mission was planned for June 2002, when India and Pakistan were on the brink of war over Kashmir. The situation was precarious, and we decided to postpone the mission. Needless to say, these sorts of situations go to the heart of empathetic lawyering: knowing that friends, colleagues, and the people who are the subjects of our advocacy generally cannot choose to avoid such dangers.

Norm-driven projects generate their own challenges. Sometimes a case provides an opportunity to work on particularly exciting issues, but the context or the clients behind the case may make clinicians uneasy. For example, the Lowenstein Clinic was asked to assist with a case that concerned the right to national self-determination and the right of the group to control the land and resources. However, the Clinic's partner attorney was working with a quasi-governmental national liberation movement with a particular political agenda. We were especially interested in, and agreed to work on, the normative questions as they related to the national group, but declined to pursue the project further in a way that more directly served the organization's specific political strategy.

The Lowenstein Clinic encountered another dilemma when it was asked to write an *amicus curiae* brief in support of a pro se suit brought in the federal district court of the United States Virgin Islands. The plaintiff challenged the constitutionality of the status of the Virgin Islands as a non-self-governing territory, and the Clinic briefed the Court on how this status violates residents' rights under the International Covenant on Civil and Political Rights and other international law binding on the United States. This case raised intriguing and complex problems related to the international law of non-self-governing territories and the application of treaty law in domestic courts, and offered a terrific opportunity for student practice. It also generated some initial apprehension as we considered the propriety of being contacted by the Court to write the *amicus* brief. The students researched this question and resolved it first, before the Clinic made a commitment to the case.

In yet another case, the Lowenstein Clinic had an opportunity to work on aspects of what may be an emerging norm of universal jurisdiction. We assisted the plaintiffs' lawyers in a Belgian suit against Israeli Prime Minister Ariel Sharon and others for war crimes and other human rights abuses during the 1982 siege of the Sabra and Shatilla refugee camps in Lebanon.<sup>157</sup> The questions we were asked to examine included some with which the Clinic had considerable prior experience (e.g., command responsibility), as well as

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157. See *supra* note 36 and accompanying text.

significant new legal issues (e.g., universal jurisdiction and retroactivity). As we anticipated, the highly politicized nature of the case proved a lightning rod for criticism. The Clinic found itself involved in a dispute at the center of the Palestinian-Israeli conflict, even though some considered the case against Sharon to be a separate legal issue. Critics of the Clinic's involvement considered the case anti-Israel. It provoked the question of whether a clinic has an obligation to balance the political content of its cases. And, if so, what would that mean in practice?

Clinics, and indeed most lawyers, that participate in impact litigation frequently worry about creating "bad law."<sup>158</sup> This was an issue in the early discussions about enlisting students in human rights litigation that focused on the death penalty.<sup>159</sup> Likewise, this is a serious concern for those involved with Alien Tort Claims Act cases, particularly when the government and the Supreme Court are hostile to international law. It is a dilemma, given the number of such cases that arise and the fact that they provide students with unique opportunities to litigate human rights.

There is sometimes a tension between the clinic and its partner organization when the results or conclusions of the work are not what the partner anticipated. In one such case, the Center for Justice in International Law (CEJIL) asked the Lowenstein Clinic for assistance in writing a brief for the Inter-American Commission on Human Rights on behalf of an NGO that sought redress following a massacre involving the Peruvian military. In the course of the project, the Clinic considered some of the procedural problems that arise when military courts prosecute their own officers for human rights abuses. The students worked through the particularly complicated issue of whether there are limits to the principle of *non bis in idem* (double jeopardy) where it conflicts with the victim's right to a remedy and the state's obligation to adequately investigate, prosecute, and punish human rights violations. Ultimately, CEJIL and the Clinic came to different conclusions as to whether such military proceedings are illegitimate per se, or illegitimate only where military courts are incapable of functioning independently. As a result, we agreed that the Clinic would submit the work as an *amicus curiae* rather than CEJIL using it for their main brief, as originally intended.

Another example of a project not meeting the original intentions of the partner organization comes from Columbia Law School's International Human Rights Clinic. In 1999, the Columbia Clinic began a project with the Women's Rights Division of Human Rights Watch (HRW) to develop advocacy initiatives to address discrimination against pregnant women and gender discrimination in general in the *maquiladoras* in Mexico near the U.S. border. Columbia students traveled to the site on a mission to interview possible victims. By the end of the visit, the Clinic members determined that discrimination was not only not a priority for the Mexicans, it was not even on their minds. They were much more concerned with health and safety conditions, job training, and obtaining jobs. Although there was evidence of discrimination against pregnant women, it just was not an issue the women

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158. See, e.g., Lobel, *supra* note 29, at 1336.

159. See *supra* note 84 and accompanying text.

wanted to pursue. In writing up their report, the Clinic students concluded that an advocacy strategy should start at the grassroots level to promote awareness among workers of gender discrimination as an actionable legal problem, rather than a cultural dynamic they take for granted.<sup>160</sup>

A common dilemma with clinic-based advocacy concerns whether the project is sufficiently “legal” to be a useful pedagogical experience for law students. Given that so much of human rights advocacy is non-legal, this is a constant tension for human rights clinics. Clinic directors must ask: Is the project mere research? Mere taxonomy? By way of example, the Lowenstein Clinic undertook a project with the Commission for Reception, Truth and Reconciliation in East Timor to assist in the documentation of the abuses that took place in the early years of Indonesia’s occupation (1975-1983). Very little has been written about this period and the Commission asked the Clinic to go through the many documents and bibliographies on the conflict and to analyze the information regarding the level of abuse and complicity of various actors. The Commission’s objective in this ongoing project to produce a major report by 2004 is compelling, and the work is ground-breaking. However, the materials are voluminous, the advocacy strategy began to recede at times, and students became overwhelmed with preparing what was essentially an annotated bibliography. Fortunately, the students were able to meet personally with our contact from the partner-organization, resulting in a renewed sense of the context and direct utility of the project. And what is more, they were encouraged to think about spending a summer working with the Commission in East Timor.

Expectations can create tensions with students, too, particularly when they have preconceived notions of human rights advocacy. As Laurel Fletcher experienced with her students in the Boalt Hall/Berkeley Clinic, when students say they want to use the law as a tool for social justice, what they often want is impact litigation experience or legal research and writing on issues that matter to them. She described what she calls a “slip and fall project” —one that just did not meet expectations. The Clinic organized a trip for a group of U.S. trade unionists to Tijuana, Mexico, to tour toxic waste dump sites and worker communities on the border. The purpose of the project was to show U.S. workers the effects of NAFTA at “ground zero,” and to encourage U.S. workers to see the Mexican workers as allies. Students were required to research and understand NAFTA, in order to speak about it in lay terms to working-class Americans.

In short, according to Fletcher, the students revolted; they felt their assignment was not legal work. Instead, they wanted to “do something useful,” which to them required a conventional legal dimension, such as filing a NAFTA complaint. In an attempt to meet their needs, Fletcher asked the students to review interview transcripts with Mexican labor activists who participated in the trip to identify human rights issues and themes with an eye toward identifying possible future interventions to which the Clinic could contribute. Many of the ideas that Mexican activists identified did not involve

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160. Telephone Interview with Arturo Carrillo, Columbia Law School Human Rights Clinic Director, 2002-2003 (Mar. 10, 2003).



filing law suits; indeed, the absence of legal protections was a central problem. Students became frustrated. They wanted to become involved in the issues, but did not see a role for themselves in the priority areas identified by the interview subjects. They felt the project was unfocused and lacked an advocacy outcome or a role for them as lawyers.<sup>161</sup>

Who a clinic works with—clients or partner organizations—is a common ethical issue for all clinics. A particular question for human rights advocates is whether to work for, or with, governments. Governments, of course, bear the fundamental responsibility for protecting and fulfilling rights, and where they are not the primary perpetrators of violations, they are nonetheless responsible for protecting against violations by non-state actors. Where non-state actors are involved, government responsibility must be found. If the clinic's single focus is helping the marginalized and the powerless, then taking projects with governments may mean compromising the clinic's purpose. Some governments may appear, or have a reputation as, rights-respecting and deserving of human rights-related assistance. But even the most "democratic" governments have questionable practices which, given time, will surface. As such, there may be negative implications for human rights clinics, as for NGOs, in being associated with governments.

On the other hand, some governmental agencies may be pursuing exciting and educational human rights-related projects. Why not, for example, work with a municipal or state commission seeking to draft an ordinance incorporating the protections of the Women's Convention or the Convention on the Elimination of Racial Discrimination? If the new government of East Timor requested assistance in drafting an equitable compulsory land acquisition statute that would take into consideration the rights of non-traditional land-holders, should the clinic decline to participate as a matter of principle? Human rights clinics must be selective about the specific agencies they work with, but they should carefully consider their choices so that they can use their projects for positive public relations, without enabling governments to continue violating rights. Clinics should avoid being a human rights technical services organization; instead, they should function in the role of guardian or advocate of rights and critic of abusers. Clinics should be committed to pro bono service—and organizations and agencies that can pay should.

Is the human rights clinic best understood as a model law firm (as reflected in the "professional," client-based mode of practice), an NGO (which uses the law to advocate an identified set of objectives in support of a particular agenda), neither, or both? Clinics resolve this question in different

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161. Telephone Interview with Laurel Fletcher (Feb. 26, 2003), *supra* note 105. Fletcher later elaborated:

[T]he project was the first in the Clinic's efforts to work on issues of globalization. In this sense, the work [the students] did was more like an "assessment" project combined with some field work. Sometimes assessment projects work well because they give students the chance to think about the big picture questions of advocacy and strategy. In this case, it backfired, I think because the ideas that Mexican activists generated didn't mesh well with what the students wanted to be doing.

E-mail from Laurel Fletcher, Acting Director, International Human Rights Law Clinic, University of California, Berkeley School of Law/Boalt Hall, to Author (Apr. 10, 2003) (on file with author).

ways. Among the underlying issues are standards of professionalism and the supervisory relationships between professor and student, and student and "client." But the distinction need not be so stark if one agrees that the quality of work should be, and often is, as important to NGOs and legal services organizations as it is to firms with high-paying clients.

How the clinic conceives of its identity also determines its choice of projects. For example, the International Human Rights Law Clinic at American University's Washington College of Law purposefully declines to participate as an *amicus curiae* in its own name, unless representing a client. The Clinic "does not have a program or agenda on the issues to push in the field of human rights, but instead provides advocacy services to clients who need a resolution to a legal problem."<sup>162</sup>

A related issue is the question of how much lawyering skill the human rights clinic should seek to impart to its students, and how much supervision to provide in the process. Some clinicians, like Frank Askin, consider this question in terms of the law firm paradigm. Treating students as associates, Askin prefers "the old-fashioned model of tossing students into the water and letting them swim. (Although [he is] always close enough to throw a line if necessary.)"<sup>163</sup> The Lowenstein Clinic follows this non-directive approach as well. Askin acknowledges that this model may not be suited for the average student, but "it has been effective for [Rutgers's] bright, motivated crew. We do not waste a lot of time teaching what is, to most of these students, obvious and self-evident."<sup>164</sup> Though students' aptitude plays a role, their motivation is at least as important, if not more. Lowenstein Clinic students vary considerably in the quality of their participation and work product, depending on their attitudes towards the particular project or the Clinic in general. Preliminary instruction or skills-building sessions would not make the difference.

What does make a difference is the nature of the project and students' sense of its value. If they feel they are contributing to the promotion or actual protection of human rights, however small their role, they will view the clinic as a successful learning experience. For the majority of projects that are less finite or less triumphant, it is important that students still see how their work matters. The capacity to galvanize students is, thus, a critical aspect of a meaningful human rights clinic. Without individual clients, human rights clinics may seem less compelling than direct services clinics. Student motivation should come from the sense that the clinic is involved in critical social justice work.

Among the most basic tensions in clinical education is that between pedagogy and service. As discussed earlier, this dilemma captures the ambivalence toward activism within the academy, to which the clinical movement itself is an answer. But it also reflects the contrast between the client services lawyering model (embodied, for example, in the American

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162. AU/WCL Report, *supra* note 148.

163. Askin, *supra* note 25 (describing the model and experience of the Rutgers School of Law-Newark Constitutional Litigation Clinic).

164. *Id.*

University/Washington College of Law Human Rights Clinic)<sup>165</sup> and the human rights advocacy model (embodied, for example, in Yale's Lowenstein Clinic or the Harvard Human Rights Program). The curricular emphasis and the choice of projects are driven in slightly different ways, depending on the clinic's priority. Directors therefore must take care to determine whether projects will be selected primarily for their pedagogical value or for their contribution to the goals of human rights advocacy. Likewise, they must decide what to do when a key or high-profile human rights case requires assistance but the clinic is over-extended.<sup>166</sup> The clinical teacher may feel a strong pull to meet the needs of a certain group or to participate in a groundbreaking case, but the work may not fit into the semester's plan. Additional questions abound. For one, what happens when a particular project is politically controversial? Should a human rights clinic author or sign amicus briefs?<sup>167</sup> Should a clinic be a movement's advocate? Naturally, there are no bright line answers to these questions, and various clinics respond to them differently.

What then, in the final analysis, constitutes a "good" project for international human rights clinics? Generally, students should have a clinical experience that reflects the range of activities that constitute human rights lawyering, and that allows them to develop key practical skills. Projects should raise concrete ethical issues and dilemmas. Above all, clinical projects must have pedagogical value and real world application; they should provide a connection to partner organizations in a way that allows students to feel an association with the larger human rights movement and its objectives. Projects should also be concrete and discrete enough to be accomplished in a timely fashion (one semester if possible) so that students can have some sense of fulfillment, however small. For example, American University/Washington College of Law's International Human Rights Clinic passes up ATCA cases because the Clinic prioritizes student-directed cases, and ATCA cases are generally too complex for students to manage on their own and in a short time frame.<sup>168</sup>

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165. See Richard J. Wilson, *Clinical Legal Education for Human Rights Advocates*, in HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY 267 (George Andreopoulos & Richard Pierre Claude eds., 1997).

166. The AU/Washington College of Law International Human Rights Clinic addressed this question in an overview of the twelve years of the school's human rights operations:

What are the adverse effects of handling a high-profile case? The [American University] Clinic has grappled with this issue most prominently in the *Kasinga* case, involving the issue of female genital mutilation, and the Pinochet case, during which our students flew to London to assist the Crown Prosecutor in preparing to argue against a claim of immunity interposed by Chile's Senator for Life. We have found that high-profile cases come with an enormous price of intense media focus that saps the limited resources of the clinic and involves a level of sophistication in response that may be difficult for some students to handle. Would we do it again? Probably.

AU/WCL Report, *supra* note 148, at 8.

167. See FRANCISCO FORREST MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: CASES, TREATIES AND MATERIALS 1343-45 (Kluwer Law International, 1997), *Part Five, Chapter 1(D): The Use of Amicus Curiae Briefs as Part of a Litigation Strategy*. See also AU/WCL Report, *supra* note 148, at 8 (discussing Washington College of Law's policy concerning amicus practice).

168. AU/WCL Report, *supra* note 148, at 9.

Like the substantive dilemmas within international human rights law, few, if any, of the instrumental tensions ever really get resolved in clinical practice. However, to the extent that clinicians are cognizant and creative about the options for addressing them, human rights clinics and their students will benefit greatly.

## V. CONCLUSION

As legal, political, economic, and social institutions become increasingly transnational, international law and human rights norms and mechanisms become increasingly ubiquitous and central to the fulfillment of justice. If we agree that the legal profession has a responsibility to “enhance the capacity of law and legal institutions to do justice,” and that law schools are called upon to contribute to the fulfillment of this responsibility,<sup>169</sup> then the principal concern is how to make this objective meaningful and relevant for the next generation of lawyers.

This concern is reflected in the expansion of international and comparative law offerings in law schools across the country—more courses, externships, programmatic centers, and significantly, international human rights clinics. Legal educators no longer debate the value of clinical education for the inculcation of skills and professional ethics with justice at their core. Thus, inevitably, the international human rights clinic will emerge as a prominent method for preparing law students for meaningful practice in the contemporary, and manifestly global, legal landscape.

Particularly today, in the wake of the U.S. invasion of Iraq, the role of—and respect due to—international law is far from settled. Given U.S. exceptionalism and the American role in recent world events, U.S. lawyers and political leaders can and should play a more active, and certainly more effective, role in promoting international human rights and international cooperation. To this end, international human rights clinics offer enormous potential, for students to experience the integration of law and policy, the dynamic nature of international law, and the possibilities for participating in its development and enforcement. Equally important, international human rights clinics give students an opportunity to help protect the rights of those with limited or no access to justice, and to strengthen the mechanisms of global justice. This is, after all, where clinical legal education has its roots.

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169. MACCRATE REPORT, *supra* note 77, para. 23.

APPENDIX: INTERNATIONAL HUMAN RIGHTS CLINICS AND CENTERS IN U.S.  
LAW SCHOOLS<sup>170</sup>

International Human Rights Clinics

Yale Law School, Allard K. Lowenstein International Human Rights Clinic (1989)  
 American University, Washington College of Law, International Human Rights Law Clinic (1990)  
 CUNY Queens School of Law, International Women's Human Rights Clinic (1992)  
 Columbia University School of Law, Human Rights Clinic (1998)  
 Georgetown University Law Center, Women's International Human Rights Clinic (1998)  
 New York University School of Law, International Human Rights Clinic (1998)  
 University of California, Boalt Hall, International Human Rights Law Clinic (1998)  
 University of San Francisco, International Human Rights Law Clinic (1998)  
 University of Illinois College of Law, International Human Rights Clinic (2001)  
 Harvard Law School Human Rights Clinic (2002)<sup>171</sup>  
 Seattle University School of Law, International Human Rights Clinic (2003)  
 University of Virginia School of Law (expected date of establishment: Fall 2003)  
 George Washington University School of Law (expected date of establishment: Spring 2004)

International Human Rights Centers Engaged in Applied or Clinical Projects

University of Notre Dame Law School, Center for Civil and Human Rights (1973)  
 (<http://www.nd.edu/~cchr/>)  
 University of Cincinnati College of Law, Urban Morgan Institute for Human Rights (1979)  
 (<http://www.law.uc.edu/morgan2/>)  
 SUNY, University at Buffalo Law School, Buffalo Human Rights Center (1984)  
 (<http://wings.buffalo.edu/law/bhrc>)  
 Harvard Law School Human Rights Program (1984)  
 (<http://www.law.harvard.edu/programs/HRP>)  
 University of Minnesota Law School, Human Rights Center (1988)  
 (<http://www.law.umn.edu/centers/hrcenter.htm>)  
 Yale Law School, Orville H. Schell, Jr. Center for International Human Rights (1989)  
 (<http://www.law.yale.edu/outside/html/Centers/cen-schellctr.htm>)  
 American University/Washington College of Law, Center for Human Rights & Humanitarian Law  
 (1990) (<http://www.wcl.american.edu/humright/center.cfm>)

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170. The list is drawn in part from a survey initiated by the AALS International Human Rights Law Section in spring 2002. The Survey is ongoing; as schools respond, their survey submissions are posted on the Section website. See <http://vls.law.villanova.edu/clinics/aals/humanrightssurvey.html>. I am especially indebted to Beth Lyon, AALS Section Chair (2003-2004), for her considerable assistance with the survey.

This Appendix reflects a specific characterization of international human rights work, encompassing those clinics that use international human rights law and mechanisms exclusively or predominantly in their projects and strategy. Thus, some forty asylum and immigration clinics in U.S. law schools—more than a third of which incorporate aspects of human rights practice in their curricula—are not included. See *supra* section IV.A for discussion. Thanks to Susan Akram, associate clinical professor at Boston University School of Law, for this information; see also Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1427 n.18 (1998). Also not included here are other types of clinics that devote some part of their curriculum to domestic human rights work (e.g., Rutgers School of Law-Newark's Constitutional Litigation Clinic, which was established in 1970, but has been litigating human rights issues domestically and internationally since 1994). Further, only current clinics and centers are listed. This leaves out such pioneers as SUNY Buffalo's International Human Rights Law Clinic, which was founded in 1979, but ceased to exist after 1986.

171. Although the Harvard Human Rights Program is about to celebrate its twentieth year, Harvard Law School's human rights clinic is relatively new. Peter Rosenblum, formerly Program Director (1996-2002), was appointed Clinical Director in 2002, and the course he developed, Human Rights Advocacy, became a clinical seminar.

- DePaul University College of Law, International Human Rights Law Institute (1990)  
([http://www.law.depaul.edu/opportunities/institutes\\_centers/ihrli/default.asp](http://www.law.depaul.edu/opportunities/institutes_centers/ihrli/default.asp))
- Case Western Reserve University School of Law, Frederick K. Cox International Law Center (1991)  
(<http://law.cwru.edu/academic/cox/>)
- University of Baltimore Law School, Center for International and Comparative Law (1994)  
(<http://law.ubalt.edu/centers/cicl.html>)
- New England School of Law, Center for International Law and Policy (1996)  
(<http://www.nesl.edu/center/>)
- Fordham Law School, Joseph R. Crowley Program in International Human Rights (1997)  
(<http://law.fordham.edu/crowley.htm>)
- Indiana University School of Law at Indianapolis, Program in International Human Rights Law (1997)  
(<http://www.indylaw.indiana.edu/humanrights>)
- Columbia Law School, Human Rights Institute (1998)  
([http://www.law.columbia.edu/misc/sitemap?redirect\\_=404](http://www.law.columbia.edu/misc/sitemap?redirect_=404))
- Northwestern University School of Law, International Human Rights Law Institute (1998)  
(<http://www.law.northwestern.edu/humanrights/>)
- University of Denver, College of Law, International Human Rights Advocacy Center (1998)  
(<https://www.du.edu/intl/humanrights>)
- University of Michigan School of Law, Center for International & Comparative Law (1998)  
(<http://www.law.umich.edu/CentersandPrograms/cicl/center.htm>)
- University of Iowa School of Law, Center for Human Rights (1999)  
(<http://www.uichr.org/>)
- University of San Francisco Center for Law and Global Justice (1999)  
(<http://www.usfca.edu/law/globaljustice/>)
- Florida State University College of Law, Center for the Advancement of Human Rights (2000)  
(<http://www.cahr.fsu.edu/>)
- NYU Center for Human Rights and Global Justice (2002)  
(<http://www.law.nyu.edu/centers/humanrights/>)