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#### Repository Citation

Bettinger-Lopez, Carol; Finger, Davida; Jain, Meetali; Newman, JoNel; and Paoletti, Sarah, "Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice" (2011). *Faculty Scholarship at Penn Law*. 536.  
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# **Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice**

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## I. INTRODUCTION

In recent years, human rights clinics have mushroomed across United States law schools, specializing in work ranging from direct representation of asylum seekers in U.S. courts, to international litigation, to project-based advocacy that includes fact-finding visits and production of reports documenting human rights violations throughout the world. Increasingly, those human rights clinics have

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\* The authors wish to thank the participants of the American Association of Law Schools (AALS) Clinical Conference Workshop in May 2010 in Baltimore, Maryland, the Society of American Law Teacher's Bi-Annual Teaching Conference panel on Redefining Human Rights Lawyering Through the Lens of Critical Theory in December 2010 in Honolulu, Hawaii, and the AALS Annual Meeting Panel on Fostering Justice and Public Service in January 2011 in San Francisco, California. © 2011, Caroline Bettinger-Lopez, Davida Finger, Meetali Jain, JoNel Newman, Sarah Paoletti, and Deborah M. Weissman.

begun to address human rights within the United States, and not just in places beyond our borders. At the same time, domestic poverty law clinics are increasingly looking to human rights norms in framing some of their advocacy, which often takes the forms of direct legal services, community lawyering, and law reform.

Critiques of international human rights lawyering point to imperialist narratives and “victim essentializing” often perpetuated by human rights lawyering. While these critiques may apply with equal force to the international and domestic human rights arenas, they are most often leveraged against advocacy directed outside of the United States that is project-based and norm-driven, or that involves the direct representation of individuals characterized by the law and advocates alike as “vulnerable victims.” Human rights clinical law professors often struggle alongside students to develop lawyering strategies that are responsive to those critiques yet still effective in achieving the goals of clients—be they individuals, groups, or organizations. Although these ethical, strategic, and pedagogic challenges may be relatively novel for human rights clinicians, they are familiar terrain for many poverty law clinicians who have long-struggled with similar challenges in the context of direct representation of poor, marginalized clients and engagement in law reform and impact advocacy efforts. Clinicians in other areas of social justice lawyering, particularly those working in the poverty law arena, have developed a rich body of scholarship in this area that has itself been influenced by the corpus of critical legal and social theory. Nevertheless, these challenges remain for poverty law clinicians, too.

We,<sup>1</sup> as human rights and poverty law clinicians, have felt encouraged to come together and initiate a rich exchange of ideas, lessons and strategies for grappling with these challenges, both independently and collectively. We initially presented the core themes addressed in this Article during a workshop we led as a group at the 2010 AALS Conference on Clinical Legal Education. Here, we seek to further develop these themes. We review the ways in which critical theory has been introduced to address vexing questions concerning “victim essentialization” and “othering” in poverty and community development law clinics in the United States. We then explore strategies for redefining human rights lawyering in a way that is responsive to critical theorists and that informs and expands our teaching, our advocacy, and our students’ sense of what it means to be a human rights lawyer. In the process, we examine the changing role that human rights law and advocacy have come to play in social justice initiatives within the United States.

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1. In this Article, the term ‘we’ refers to a collective of human rights clinicians and poverty law clinicians who came together to explore a constructive path forward from a set of shared frustrations and challenges to social justice lawyering. The process of presenting our thoughts at various workshops, as well as writing this Article, has been an incredibly useful exercise in collective self-reflection. We are grateful to many of our peers who have offered their honest feedback at various stages, and hope that a continued and robust discussion further contributes to the maturation of these ideas. We do not intend for any of the thoughts presented here to be prescriptive, but rather offer them in the spirit of recommendations.

By bridging international human rights lawyering with domestic poverty and community lawyering, we have found that our collective advocacy, and therefore the pedagogy we employ in teaching and supervising our students, can be enhanced by the contributions of critical legal theory. At the same time, we recognize that critical legal theory requires ongoing development in order to address human rights violations in ways that reduce the harm to those in whose names we struggle, and in order to hold the United States equally accountable for its contributions to those violations.

Section II of this Article reviews the historical and contemporary uses of human rights strategies by U.S. advocates and law school clinical programs addressing problems both abroad and here “at home.” We address critiques of this human rights work and its corollary in the U.S. law reform world, and examine how critical theory has helped to reconcile some of these dilemmas. In Section III, we identify the dilemmas that remain, including the ways in which we struggle against the perpetuation of an essentializing victim narrative, and the structural realities, normative limitations, and the difficulty in various fora of articulating the connection between complex historical determinants of human rights abuses and the violations themselves. In this section, we use case studies from our clinical courses to demonstrate the complexities of carrying out our work and the purposes for which we put critical theory into service. In Section IV, we embrace the lessons of critical theory to offer a proposed shift in how we teach human rights lawyering and advocacy in the clinical setting while recognizing the need to further deepen such lessons. Rather than focusing on the identification of the immediate circumstances of human rights violations, we explore how we might approach in both our teaching and our advocacy the structural realities that serve as the framework for those violations, how we might include the relevant ethical and professional responsibility principles, and how better to incorporate victims’/clients’ voices and goals into our advocacy. Here, we focus on teaching our students not only about human rights as protecting or vindicating rights in a way that recognizes our clients’ human dignity and agency, but also about the genesis of human rights violations. Moreover, we consider the opportunities and challenges for teaching this critical theory-influenced approach in human rights and poverty law clinics. In Section V, we offer final reflections on the opportunities critical theory offers for advancing our teaching and advocacy in the field of human rights, and the broader implications this may have on social justice lawyering and advocacy in the United States.

## II. HISTORICAL AND CONTEMPORARY USES AND MISUSES OF HUMAN RIGHTS PRINCIPLES

In this section, we provide a brief overview of the use of human rights principles and norms in domestic, international and transnational settings. We first explore what actually constitutes human rights work. We then reflect on its historical usages, both in domestic settings and looking outwards beyond the

territorial confines of the United States to examine how human rights principles have been utilized, tested, and developed over the years.

### A. *What Constitutes Human Rights Work?*

Human rights advocacy takes on many different forms, from litigation in domestic and international tribunals, to foreign policy initiatives aimed at advancing particular rights agendas, to grassroots advocacy campaigns aimed at advancing a particular right, on behalf of an individual, a group, or a community. Here we seek to identify the different approaches to human rights lawyering, in both domestic and international settings, highlighting their susceptibility to critique.

#### 1. Human Rights in the International Realm

Although the theoretical foundation for human rights principles dates back thousands of years, the modern conception of human rights took root with the creation of the United Nations (UN) and the drafting and adoption of the Universal Declaration of Human Rights in the immediate aftermath of World War II.<sup>2</sup> The historical events of the mid-twentieth century provided the momentum and the political will for the creation of the United Nations with a governing Charter that has as its centerpiece the protection and promotion of human rights, formally institutionalizing human rights at the international level. But the geopolitics of the post-World War II era and the Cold War dominated by Western political and cultural ideology led to the construction of a human rights regime focused largely on civil and political rights and directed at despotic regimes and countries that refused to espouse democracy and capitalism as the benchmarks of good governance.<sup>3</sup> And, while that construct was historically grounded in the evils of the Western hemisphere and specifically the Holocaust and subsequent

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2. See *A Brief History of Human Rights*, UNITED FOR HUMAN RIGHTS, <http://www.humanrights.com/what-are-human-rights/brief-history/cyrus-cylinder.html> (last visited Apr. 16, 2011) (referring to the Cyrus Cylinder (539 B.C.), in which Cyrus the Great's decrees freeing the slaves, granting all people the right to choose their own religion, and establishing racial equality, were recorded.) Scholars often cite to early conceptions of "natural law" as the foundation for human rights and also refer to historical religious texts in seeking to identify early conceptions of human rights. See, e.g., MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* (2004); DAVID WEISSBRODT AND CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 3, 13-14 (2007). For an overview of the contemporary human rights movement, see LOUIS HENKIN, *THE AGE OF RIGHTS* 1 (1990) (noting that the "contemporary idea of human rights was formulated and given content during the Second World War and its aftermath . . . [And t]he human rights idea found its contemporary expression in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, and in the numerous covenants and conventions derived from it").

3. Philip Alston argues lawyers played a critical role in the historic prioritization of civil and political rights over economic, social, and cultural rights, noting the normative-judicial model of human rights implementation is "dominated by lawyers whose tools are traditional legal reasoning, the use of legal institutions and techniques, and the pursuit of familiar types of remedies such as administrative regulations, legislative programs, and court judgments." Philip Alston, *Economic and Social Rights*, in

civil and political rights violations arising out of the West, it was not long before liberal democratic states, international governmental and non-governmental organizations alike, directed those constructs towards the global South, employing the human rights framework and mechanisms outward, seeking to use the norms against regimes assessed as non-liberal, authoritarian, and dictatorial.<sup>4</sup> While geopolitics played a key role in determining the extent to which human rights were pursued as part of a governmental foreign policy agenda, international non-governmental organizations whose core missions were to uphold and promote the human rights principles set forth in the UN Declaration on Human Rights and the core international human rights treaties, sought to advance human rights globally, sometimes despite the particular foreign policy objectives of the state.<sup>5</sup>

Lawyers seized upon the opportunities provided by emerging principles in contemporary human rights developments, and have tended to approach international human rights lawyering as cause lawyering, where the protection and promotion of a core set of international human rights principles is the driving cause. Included in the human rights advocacy toolkit were—and to a great extent continue to be—onsite fact-finding “missions.” Representatives from international non-governmental organizations (NGOs), deemed the experts, conduct on-site or country visits, often aided by pro bono lawyers and sometimes accompanied by congressional representatives or staff in hopes of engaging U.S. political pressure, to investigate and document a set of human rights abuses. Advocates then publish their findings framed in light of the target country’s human rights obligations. Core to the reporting is the issuance of a set of recommendations directed not only at the country at issue, but also at the intergovernmental organizations that operate—or, in the eyes of the report writers, should operate—in those countries. An additional set of recommendations are also directed to the United States government, urging that the findings become a part of the institutional operations and the state’s immigration, foreign policy and aid agenda for the country in question. Through the process often referred to as “naming and shaming,” followed by advocacy aimed at wielding the political and economic power of the Western developed states over

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HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 152-53 (Louis Henkin & John Lawrence Hargrove eds., 1994).

4. See Makua Matua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 214-17 (2001).

5. For example, the then Lawyers Committee for Human Rights (now Human Rights First) published an annual response to the U.S. State Department Reports on Human Rights, in which it sought to paint a more complete and accurate picture of the human rights situation, one that was not subject to the filters of the State Department’s foreign policy agenda. Importantly, too, those State Department reports are issued because of a Congressional mandate brought about by the advocacy of the leading human rights NGOs. See Michael Posner, *Human Rights and Non-Governmental Organizations on the Eve of the Next Century*, 66 FORDHAM L. REV. 627 (1997-98) (describing the activities of internationally-focused non-governmental organizations).

developing countries through foreign policy and sanctions, international NGOs have sought to bring about positive change on behalf of individuals and groups subjected to grievous rights violations.<sup>6</sup>

The human rights discourse and advocacy in the second half of the twentieth century described above has been vulnerable to critique, due partly to its generally limited substantive focus and unilateral approach. Despite their inclusion in the core founding documents of the United Nations, economic, social, and cultural rights as human rights were subsumed by the Western world's emphasis on civil and political rights, viewed as "First Generation Rights."<sup>7</sup> This focus on civil and political rights was resisted by many governments, particularly those governments subject to critique, who—in response to pressures to conform to the Western neoliberal democratic regimes—would argue that economic, social, and cultural rights should be given not just recognition, but primacy. The paradigmatic debate was framed in terms of determining a hierarchy of rights: did the right to vote and to freedom of expression trump the right to food and shelter?<sup>8</sup>

Both the scope of the human rights agenda as well as the methodology employed for pursuing that agenda has begun to evolve in the twenty-first century, as advocates have begun to internalize and respond to the critical theorists and others who resisted the didactic and largely Eurocentric nature of the movement that characterized—and sometimes caricaturized—the targets of their advocacy as disempowered victims helpless in their own pursuit of dignity.

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6. See Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689 (2008) (describing and analyzing the effectiveness of publicity based human rights strategies); see also Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 6 (2001).

7. See Frans Viljoen, *International Human Rights Law: A Short History*, UN CHRONICLE (2009), [http://www.un.org/wcm/content/site/chronicle/cache/bypass/home/archive/Issues2009/internationalhumanrightslawashorthistory?ctnscroll\\_articleContainerList=1\\_0&ctnlistpagination\\_articleContainerList=true](http://www.un.org/wcm/content/site/chronicle/cache/bypass/home/archive/Issues2009/internationalhumanrightslawashorthistory?ctnscroll_articleContainerList=1_0&ctnlistpagination_articleContainerList=true); see also Karel Vasak, *Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 11 (1977).

8. The debate over primacy of rights that does not fully account for the interdependence and intersectionality of rights was not unique in either time or place to the human rights discourse between the Western industrialized world and the Global South, but was also seen in the early rights debates across the United States and the then industrializing world, particularly among the working poor. See Paul Gordon Lauren, *A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad*, in 1 BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 13, 13 (Cynthia Soohoo et al. eds., 2008) ("[S]uch obvious and severe misery among the working class ignited new and profoundly serious questions about the very meaning of human rights. What good were the political rights of voting and holding office or the civil rights of freedom of speech and religion, asked those who suffered, to people like themselves who had no food to put on the table, no shelter to protect their families, no clothing, no medical care, or no prospect at all for themselves or their children to obtain a formal education?"); see also Catherine Albisa, *Economic and Social Rights in the United States: Six Rights, One Promise*, in 2 BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 25 (Cynthia Soohoo et al. eds., 2008).

## 2. Human Rights in the Domestic Social Justice Realm

Enthusiasm for using international human rights to frame the struggle for domestic social justice has undergone a recent resurgence, but it is not a new idea or strategy. The utilization of human rights principles in U.S.-based rights struggles has a long and mixed history. For example, attorneys for petitioners in *Yick Wo v. Hopkins* cited international treaties recognizing “the *inherent and inalienable right of man* to change his home and allegiance,”<sup>9</sup> and the abolitionist movement has been recognized by at least one legal scholar as “the first successful international human rights campaign.”<sup>10</sup> Although ultimately rejected as a strategy, W.E.B. Du Bois articulated an international human rights objection to domestic racial segregation as early as 1923.

Following the establishment of the United Nations and the adoption of the Universal Declaration on Human Rights after World War II, advocates presented their first petition to the United Nations challenging the domestic treatment of African-Americans, framing their struggles in light of the global fight for freedom.<sup>11</sup> But concerned with how the U.S. campaign for racial equality would play on the world stage, Eleanor Roosevelt herself urged the leaders of the movement to keep their struggle internal to the United States, marking the beginning of the practiced conception that human rights was something that happened outside of the United States, and civil rights is what happened inside the United States.<sup>12</sup> Indeed, civil rights activists were severely condemned as “un-American” and “communist” for linking domestic racial oppression with international human rights.<sup>13</sup> Moreover, the very meaning of human rights became distorted as it was severed from the “Soviet-inspired”<sup>14</sup> pursuit for

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9. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (citing Article V of the U.S.-China Treaty of 1868) (emphasis in original brief).

10. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 *YALE L.J.* 550, 554 (2008).

11. Hope Lewis, “New” *Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework*, in 1 *BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 115-16 (Cynthia Soohoo et al. eds., 2008); see also Carol Anderson, *A “Hollow Mockery”: African Americans, White Supremacy, and the Development of Human Rights in the United States*, in 1 *BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 89 (Cynthia Soohoo et al. eds., 2008).

12. Dorothy Q. Thomas, *Against American Supremacy: Rebuilding Human Rights Culture in the United States*, in 2 *BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 4-5 (Cynthia Soohoo et al. eds., 2008).

13. Anderson, *supra* note 11 at 90. For a complete and critical review of the twentieth century U.S. Civil Rights movement’s efforts to move from civil rights to human rights, see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN-AMERICANS AND THE STRUGGLE FOR HUMAN RIGHTS 1944-1954* (2003).

14. Gay McDougall, *Shame In Our Own House*, *THE AMERICAN PROSPECT* (Sept. 20, 2004), [http://prospect.org/cs/articles?article=shame\\_in\\_our\\_own\\_house](http://prospect.org/cs/articles?article=shame_in_our_own_house).



economic and social justice.<sup>15</sup> While social welfare programs expanded, there was no political constituency for framing these programs as human rights entitlements. The government signaled its hostility to efforts to construct economic and social matters as rights, as opposed to aspirations.<sup>16</sup> The impact of this deliberate dichotomizing of rights versus aspirations along lines of civil and political as distinct from economic, social, and cultural still lingers. Until recently, U.S. advocates implicitly acquiesced to governmental positions in terms of human rights agendas and strategies.<sup>17</sup>

But while the reliance on international human rights norms and standards in the successful challenge brought by the NAACP Legal Defense Fund in *Brown v. Board of Education* is well-documented,<sup>18</sup> it was also subject to critique. Ultimately, *Brown v. Board of Education* is most often referred to as a civil rights victory, and not as a human rights victory.<sup>19</sup> Throughout this mixed history, the reliance placed by advocates and adjudicators on the civil and political rights enshrined in the constitution subsumed international human rights norms as the domestic civil rights movement achieved success—or at least attention—in the U.S. courts.<sup>20</sup>

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15. *Id.*

16. Indeed, the U.S. government refused to ratify the International Covenant on Economic, Social and Cultural Rights, despite its enthusiastic support for the Universal Declaration. Philip Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417, 436 (2006). Gay McDougall notes too that President Eisenhower abandoned the United Nations human rights treaty system when he came into office in 1953, pledging that his administration would not seek future ratifications of international human rights treaties. McDougall, *supra* note 14.

17. The U.S. government's position resonated in the historical conduct of well-respected non-governmental organizations such as the American Bar Association and Human Rights Watch (HRW). The ABA opposed the Universal Declaration because it included economic and social rights, and HRW viewed socioeconomic violations as "misfortunes." *Id.* at 437.

18. Justice Richard J. Goldstone & Brian Ray, *The International Legacy of Brown v. Board of Education*, 35 MCGEORGE L. REV. 105, 111 (2004).

19. Many scholars and advocates committed to social justice issues question the "triumph" of global human rights in that case. Martha F. Davis, *Public Rights, Global Perspectives, and Common Law*, 36 FORDHAM URB. L.J. 653, 674 (2009) (noting that in *Brown* international norms were cited by litigators in their briefs to the court but not mentioned in the ultimate decision); Justice Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS. L. REV. 493, 502 (2005) (noting that "Brown both reflected and propelled the development of human rights protection internationally.").

20. See THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS: AN OVERVIEW AND RECOMMENDATIONS FOR LEGAL ADVOCACY (2008), available at [http://opportunityagenda.org/report\\_state\\_courts\\_and\\_human\\_rights\\_2008\\_edition](http://opportunityagenda.org/report_state_courts_and_human_rights_2008_edition) (noting the increase in state court cases citing to international human rights law from their 2007 report on the same topic). The 2008 report cites to a range of cases in which advocates have raised, with mixed success, international human rights law arguments. For example, the California Supreme Court cited to international human rights treaties and the Universal Declaration on Human Rights to find support for marriage as a fundamental human right. *In re Marriage Cases*, 43 Cal. 4th 757, 818 (Cal. 2008). In Connecticut, former Supreme Court Justice Peters issued a concurring opinion in which she used the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration on Human Rights to support the notion that the right to a social welfare safety net was enshrined in that state's constitution. See *infra* notes 30-35, for examples of Supreme Court cases in which international human rights legal norms and standards have been cited.

This strategic emphasis on a civil rights, rather than a human rights, framework in *Brown* has not gone unnoticed by scholars. Derrick Bell,<sup>21</sup> Mary Dudziak,<sup>22</sup> Richard Delgado,<sup>23</sup> and Carol Anderson<sup>24</sup> each make compelling arguments that the plaintiffs' victory in *Brown*, as well as the landmark civil rights legislation that followed it, should be viewed critically as a reflection of a somewhat cynical move by elite whites in power who sought to gain an edge in the Cold War with the Soviet Union—a move that ultimately sacrificed the broader civil rights and economic justice goals that a true human rights agenda might have advanced.

Today, however, domestic poverty and social justice advocates in the United States find themselves at a unique historical moment for progressive lawyering and human rights advocacy. Over the past decade, in response to an increasingly conservative judiciary and the rollback of civil rights in the United States,<sup>25</sup> these advocates are incorporating with more frequency international human rights norms, language and strategies into their work within the U.S. borders.<sup>26</sup> This increase stems, in part, from international human rights bodies such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights providing accessible and credible opportunities for advocates to raise human rights concerns, while human rights advocates, and even some governmental actors, seek to restore the country's moral identity by casting the lens of human rights on violations occurring at home.<sup>27</sup> At the same time, U.S. courts are systematically closing the door on civil rights litigants, both through

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21. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

22. MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

23. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes-Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002).

24. Anderson, *supra* note 11, at 90.

25. Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violations*, 40 COLUM. HUM. RTS. L. REV. 19 (2008).

26. Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 895 (2008); Risa Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149 (2008).

27. Through the Universal Periodic Review, a process by which United Nations member states' human rights are reviewed before the United Nations Human Rights Council, the United States government and advocates from across the United States engaged in extensive consultations with civil society in which domestic human rights issues were presented, and then brought before the United Nations. See *infra* Sec. IV; *Universal Periodic Review*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/g/drl/upr/index.htm> (last visited Apr. 18, 2011) (explaining the Universal Periodic Review (UPR) process, outlining the U.S. government's participation in the process, and providing links the reports submitted by the U.S. government.); see also REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 2-3, available at <http://www.state.gov/documents/organization/146379.pdf> (explaining its participation in the process, the United States stated: "We associate ourselves with the many countries on all continents that are sincerely committed to advancing human rights, and we hope this UPR process will help us to strengthen our own system of human rights protections and encourage others to strengthen their commitments to human rights"). For information on civil society's participation in the UPR, and call for human rights accountability in the United States, see [www.ushrnetwork.org/campaign\\_upr](http://www.ushrnetwork.org/campaign_upr).

procedural rulings making it more difficult for plaintiffs to access the courts, as well as through a substantive narrowing of the scope of constitutional rights.<sup>28</sup>

The methodologies employed by domestic social justice advocates include the traditional “rights-based” enforcement methodologies—appeals to international human rights tribunals such as those mentioned above and efforts to enforce international human rights norms in U.S. courts, arguing that U.S. courts must interpret U.S. law consistently with international norms, or at a minimum should address international norms for their persuasive value.<sup>29</sup> The Supreme Court has signaled some receptivity to the latter advocacy strategy, citing international norms in its recent decisions overturning the sentencing of a subset of juvenile offenders to life without parole,<sup>30</sup> the juvenile death penalty,<sup>31</sup> and the criminalization of consensual homosexual acts.<sup>32</sup> In each of these cases, the Court was careful to explain that while international human rights and foreign law norms were not “dispositive,”<sup>33</sup> or “controlling,”<sup>34</sup> they were nonetheless persuasive in interpreting the parameters of domestic constitutional rights-based norms, “because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”<sup>35</sup>

Domestic advocates are also including human rights strategies that employ “broader activism such as documentation, organizing and education.”<sup>36</sup> In fact, some of the most successful recent examples of domestic human rights advocacy have been led by grassroots coalitions and social movements, rather than by

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28. Cummings, *supra* note 26.

29. Stanley A. Halpin, *Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT’L & COMP. L. REV. 1, 4 (2006).

30. See *Graham v. Florida*, 130 U.S. 2011, 2033-34 (2010).

31. See *Roper v. Simmons*, 543 U.S. 551, 576-78 (2005).

32. See *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003).

33. *Graham*, 130 U.S. at 2033.

34. *Roper*, 543 U.S. at 578.

35. *Graham*, 130 U.S. at 2034. For an excellent example of a district court’s articulation of the same principle, see *Lareau v. Manson*, 507 F.Supp. 1177, n.9 (D.Conn. 1980) (“Apart from Connecticut’s administrative adoption of the United Nations Standard Minimum Rules for the Treatment of Prisoners, those standards may be significant as expressions of the obligations to the international community of the member states of the United Nations, *cf.* *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980), and as part of the body of international law (including customary international law) concerning human rights which has been built upon the foundation of the United Nations Charter . . . . It is well established that customary international law is part of the law of the United States. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) . . . . [T]he Charter’s provisions on human rights are evidence of principles of customary international law recognized as part of the law of the United States. . . . The adoption of the Standard Minimum Rules by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders and its subsequent approval by the Economic and Social Council does not necessarily render them applicable here. However, these actions constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind. The standards embodied in this statement are relevant to the ‘canons of decency and fairness which express the notions of justice’ embodied in the Due Process Clause. . . .”).

36. Kaufman, *supra* note 26, at 149.

lawyers or established legal advocacy organizations,<sup>37</sup> suggesting that some of the increase in human rights work by domestic poverty lawyers is driven by the clients themselves. The Ford Foundation has chronicled the stories of several grassroots organizations such as the Kensington Welfare Rights Union in Philadelphia, the Women's Economic Agenda Project in Oakland, the Deaf and Deaf-Blind Committee for Human Rights in Ohio, and the national Poor People's Economic Human Rights Campaign, all of which remain movements led by poor people, but whose ranks have expanded to encompass students, social workers, human rights lawyers and others.<sup>38</sup> In light of the human rights agendas increasingly articulated by grassroots groups and public interest clients, if domestic social justice lawyers "are to partner with these clients on the issues they have identified, lawyers need to be able to work with human rights strategies and concepts."<sup>39</sup>

Some of these strategies involve efforts to expand domestic human rights lawyering beyond the realm of public "rights-based" law. As Martha Davis notes, even where lawyers and advocacy organizations are involved in domestic court proceedings, the high-profile constitutional rights-based adjudications such as *Roper* and *Graham* should not lead us to believe that "public rights litigation is inherently constitutional in nature, and that the importance of global context is only relevant in such cases."<sup>40</sup> There is, as Davis points out, much room and need to develop global human rights based advocacy strategies in litigating common law "private matters with public consequences, such as housing, consumer affairs and family law . . . [which] are often the bread-and-butter of federally funded legal services offices for the poor."<sup>41</sup> Thus, Davis argues, "the future of public rights litigation may look different than the immediate past, as litigants facing constricting federal rights discover—or rediscover—the potential of common law adjudication for social change and the role that global context can play in judicial common law reasoning."<sup>42</sup>

If the next generation of domestic social justice advocates is to fully realize the human rights movement's potential for realizing social justice,<sup>43</sup> it is imperative that they continue to think creatively and critically about their work.

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37. See Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391, 1410-11 (2007) (describing the recent success of the Coalition of Immokalee Workers, migrant workers in south Florida, who explicitly used human rights education in their successful economic justice campaign, as well as other grassroots organizations employing similar strategies around the nation). See also CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES, FORD FOUNDATION 50-56 (2004), available at [http://www.fordfoundation.org/pdfs/library/close\\_to\\_home.pdf](http://www.fordfoundation.org/pdfs/library/close_to_home.pdf) (describing grassroots organizations led by poor people who are adopting human rights education, organizing and advocacy strategies).

38. See FORD FOUNDATION, *supra* note 37.

39. Davis, *supra* note 37, at 1411-12.

40. Davis, *supra* note 19, at 655.

41. *Id.* at 656.

42. *Id.* at 661.

43. For an exhortation to this end, see Susan R. Jones, *Dr. Martin Luther King, Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH. U. J.L. & POL'Y 39 (2005).

### B. Critiques of Social Justice Lawyering

While not diminishing the important role human rights institutions and advocates have played over the past century in protecting fundamental freedoms across the world, the Eurocentric political and social construct of the human rights discourse historically grounded in the post-World War II era has failed to fully account for the interdependency of economic, social, and cultural rights with civil and political rights, and the complexities that arise in the balancing of those rights. It has also failed to acknowledge and give credit to human rights struggles that preceded the United Nations, such as independence and antislavery movements, and the women's suffragette movements across the world—struggles that did recognize the interdependence of economic, social, cultural, civil, and political freedoms as all being central components to the recognition of human dignity.<sup>44</sup> This has led to a human rights paradigm highly susceptible to charges of Western cultural and political imperialism.<sup>45</sup>

It is important, moving forward, to understand the theoretical developments that have addressed the substance and the scope of the human rights agenda. It is also equally important that advocates look to the lessons of the poverty law movement and the work of critical theorists in thinking about how to advance the newly defined agenda in a way that is thoughtful and self-reflective.

#### 1. Critical Theory

Critical Theory has contributed to a powerful intellectual and political movement that has influenced legal thought from which to critique law and legal institutions. Critical Theory is associated with the Frankfurt School theorists who, during the 1930s, urged the development of new forms of thinking to achieve enlightening and emancipatory knowledge for a practical purpose: “to liberate human beings from the circumstances that enslave them.”<sup>46</sup> Critical Theory seeks to articulate a theoretical approach to “unearth the false assumptions that had heretofore held humanity in its sway,”<sup>47</sup> to pursue “‘human emancipation’ in circumstances of domination and oppression,” and to be “explanatory, practical, and normative, all at the same time.”<sup>48</sup>

44. See generally Tracy E. Higgins, *Anti-essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002); Matua, *supra* note 4.

45. Matua, *supra* note 4.

46. James Bohman, *Critical Theory*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2005), <http://plato.stanford.edu/entries/critical-theory/>; see RAYMOND GEUSS, *THE IDEA OF CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 2 (1981).

47. Bohman, *supra* note 46; David M. Rasmussen, *Critical Theory and Philosophy*, in *THE HANDBOOK OF CRITICAL THEORY* 11, 13 (David M. Rasmussen ed., 1996).

48. Bohman, *supra* note 46 (referencing Horkheimer, the director of the Frankfurt's School's Institute for Social Research).

Critical Theory can also be properly described as “critical theories” which have emerged as progressive schools of thought associated with multiple social movements.<sup>49</sup> In the context of law and justice, critical legal theories are concerned with the ideology of law and the ways that law facilitates justice while revealing how it may serve as a pretense for justice.<sup>50</sup>

Modern critical legal theory has most often been identified as critical legal studies (CLS), described variously as an “intellectual current, an academic movement, a professional identity, and a loosely knit organization.”<sup>51</sup> CLS emerged in the 1970s to challenge conventional legal thought and expose the proposition of “neutral law” as myth.<sup>52</sup> CLS has attempted to expose as fallacy the “formalism” of legal thought and has challenged the concept of the determinacy of legal precedent by suggesting the ways in which prejudices and economic interests infect legal decision-making.<sup>53</sup>

While emphasizing the indeterminate and political nature of the practice of law, CLS deliberately resisted a unified theory.<sup>54</sup> At the same time, other critical legal theoretical movements emerged including, but not limited to, critical race theory (CRT), feminist legal theory, LatCrit theory, and queer theory, among other outsider conceptual developments.<sup>55</sup> These theoretical movements reflected

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49. Bohman, *supra* note 46; Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61, 71-72 (2010).

50. Jack M. Balkin, *Critical Legal Theory Today*, in ON PHILOSOPHY IN AMERICAN LAW 64 (Francis J. Mootz III ed., 2009).

51. Pierre Schlag, *Critical Legal Studies*, in THE OXFORD ENCYCLOPEDIA HISTORY OF LEGAL HISTORY 295 (Stanley N. Katz ed., 2009). For additional reviews of critical legal theory see James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 706 (1985); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 517 (1984); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515 (1991); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). Some have described CLS as bridging with the Frankfurt School and radical intellectual movements of the 1920s and 1930s. RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE 3 (1996). It is important to note, however, that some scholars argue that CLS has little in common with critical theory as articulated by Frankfurt School philosophers. See Tommy J. Curry, *Will the Real CRT Please Stand Up? The Dangers of Philosophical Contributions to CRT*, 2 THE CRIT: CRITICAL STUD. J. 1, 3-4 (2009).

52. See Boyle, *supra* note 51, at 706; Sparer, *supra* note 51, at 517 (noting that CLS focuses its critique on the contradictions in liberal philosophy and law).

53. See BAUMAN, *supra* note 51, at 3.

54. Schlag, *supra* note 51, at 296. Louis Michael Seidman, *Critical Constitutionalism Now*, 75 FORDHAM L. REV. 575, 579 (2006) (noting “the indeterminate meaning of critical legal studies itself”).

55. Defining these theoretical movements is both antithetical to their purposes, often postmodern in character, and is offensively narrowing. Instead of attempting to provide definitions, we refer here to literature that might help expand the reader’s sense of possibilities with regard to these conceptual developments. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 2-3 (2001) (focusing on the transformation of the relationship among race, racism, and power); Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371, 376 n.21 (2002) (“While queer theory, as a field of academic inquiry, is not subject to easy definitions, its origins can be traced to the dissatisfaction by many gay and lesbian academics with the identity politics of the gay rights movement”); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (suggesting that feminist legal theory is often defined by three components: (1) asking the “woman

a disillusionment with the “unemancipatory rationality of a masculinist radical politics” that was said to characterize CLS.<sup>56</sup> Nevertheless, critical legal theories and the various schools of jurisprudence with which they are associated might be said to have a common purpose: a “dedication to transforming legal practices to serve the values of equality and social solidarity.”<sup>57</sup>

As an analytical framework, these movements have problematized our capacity to theorize and implement justice in a politically effective manner, particularly in an age of globalization and growing interests in human rights practice.<sup>58</sup> The teachings of critical theory however, have not been applied with equal force to critique the human rights enterprise and to advance social and economic justice. In this section, we explore the utility in doing so.

#### a. Influence of Critical Theory on Domestic Poverty Lawyering

The pervasive influence of critical theory on domestic poverty law practice is perhaps most obvious in the “cause lawyering,” or “impact advocacy” areas and the more recent emergence of community lawyering. As Marc Feldman explains, for many years among legal services lawyers there were basically two practices—individual service cases and “impact” cases. Impact cases were “viewed as significant and special . . . seek[ing] to advance the interests of a number of poor persons by ‘reforming’ some widespread practice or abuse.”<sup>59</sup> Many thoughtful commentators have described this as a “false dichotomy,”<sup>60</sup> and even more poverty lawyers—including Feldman—recognize the importance of, and political power in, the representation of individuals.<sup>61</sup> In this Article, we too reject this dichotomy<sup>62</sup> and thus, as discussed below, refer to a type of lawyering with a newer name—community lawyering.

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question,” (2) feminist practical reasoning, and (3) consciousness raising); LATINA & LATINO CRITICAL LEGAL THEORY, INC., <http://www.latcrit.org> (last visited Apr. 18, 2011) (“critical, activist, and inter-disciplinary discourse on law and policy towards Latinas/os”).

56. Wendy Brown, *Feminist Theory and the Frankfurt School: Introduction*, 17 J. OF FEMINIST CULTURAL STUD. 1 (2006). Critical legal theory also includes feminist legal theory, critical race theory, Latcrit, and queer theory notwithstanding the important differences that caused the development of separate theoretical strands and identities. Katherine Hessler, *Bridge of Hope, Journey to Justice: An Essay*, 3 SEATTLE J. FOR SOC. JUST. 429 (2004) (noting that although there is no single definition of critical legal theory, it is generally associated with identifying forces of oppression). See *Critical Legal Studies: An Overview*, CORNELL LAW SCHOOL, [http://topics.law.cornell.edu/wex/Critical\\_legal\\_theory](http://topics.law.cornell.edu/wex/Critical_legal_theory) (last visited Apr. 13, 2011).

57. BAUMAN, *supra* note 51, at 4.

58. FRANCIS J. MOOTZ, RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY xiv (2006).

59. Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1538 (1995).

60. F. William McCalpin, *Individual Representation Versus Law Reform: A False Dichotomy*, in LEGAL SERVICES FOR THE POOR 85, 85-88 (Douglas J. Besharov ed., 1990).

61. See Feldman, *supra* note 59, at 1538; Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman’s Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1647-48 (1995).

62. Bellow & Charn, *supra* note 61, at 1647-48.

Beginning in the late 1970s and continuing through the early 1990s, scholars and poverty law practitioners took a critical look at the practice of poverty law.<sup>63</sup> The criticisms of lawyering for poor people that emerged focused both on the lawyers themselves as well as the methodologies they employed. Recurring themes in this critical analysis included poverty lawyers' failure to understand or acknowledge the limitations of litigation as a means of social change, with its concomitant diversion of resources away from more promising strategies.<sup>64</sup> Poverty lawyers were described as "out of touch with the needs and concerns of those they represent,"<sup>65</sup> and as "completely divorced from the realities of their clients or the communities those clients inhabited."<sup>66</sup> This literature also criticized the manner in which poverty lawyers related to their clients, in particular the problem of lawyer domination over client autonomy.<sup>67</sup> Poverty lawyering, when divorced from client and community context, and "led" by the lawyers themselves, was famously described by Gerald Lopez as "regnant."<sup>68</sup> As William Simon observed, "[i]n this literature, client empowerment means liberation from lawyers as much as obtaining leverage on the outside world."<sup>69</sup> Like the criticisms of human rights lawyering described in Section b. below, poverty lawyers were criticized for adopting strategies that imposed and perpetuated victimization narratives,<sup>70</sup> often based on the privileged lawyers' inaccurate assumptions about their clients.<sup>71</sup>

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63. See, e.g., JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978); SUSAN M. OLSON, *CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS* (1984); GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

64. Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 *B.U. PUB. INT. L.J.* 469 (1999) (citing Scheingold, *supra* note 63).

65. Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 *CAL. L. REV.* 575, 579 (2006).

66. Feldman, *supra* note 59.

67. E.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narratives*, 100 *YALE L.J.* 2107 (1991); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 *HOFSTRA L. REV.* 533 (1992); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFFALO L. REV.* 1 (1990).

68. Lopez, *supra* note 63.

69. William H. Simon, *The Dark Secret of Progressive Lawyering*, 48 *U. MIAMI L. REV.* 1099, 1099-1100 (1994).

70. Anthony V. Alfieri, *Disabled Clients, Disabled Lawyers*, 43 *HASTINGS L.J.* 769, 778 (1992) (describing "a victimization strategy of disability advocacy that is invented by lawyers and applied equally in administrative and judicial forums").

71. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 *GOLDEN GATE U. L. REV.* 345, 351 (1997) ("Perhaps unconsciously imitating traditional decision-making, clinicians and poverty lawyers have decided amongst themselves how best the 'poor and oppressed' can be empowered in the lawyering process. This decision continues to be made with little input from the 'oppressed' communities they hoped to help.").



There are obviously many possible narratives concerning the still-evolving legal services and poverty law movement, and we do not wish to oversimplify or overstate our thesis. We believe, however, that one credible narrative thread is that many aspects of the community lawyering movement are a response to critical analysis of poverty law practice. As critical theory considered poverty law methods, poverty lawyers struggled to develop both more effective and collaborative models and to engage with the very real moral and ethical dilemmas presented by their practice. Scholars were urged to produce bodies of work that would be relevant to legal practitioners and client communities.<sup>72</sup> Ethical challenges were explicitly confronted. The challenge inherent in the critic's imperative to respect "the client community's voice, vision, and humanity,"<sup>73</sup> was appropriately recognized to be a "vastly more complex undertaking than most lawyers ha[d] heretofore] supposed."<sup>74</sup> Derrick Bell's 1976 exhortation to engage in the "long overdue inquiry" about cause lawyering and professional responsibility,<sup>75</sup> raised questions such as: who is the "client?";<sup>76</sup> how should the lawyer navigate among "the often diverse interests of clients and class?";<sup>77</sup> and, ultimately, to whom or what value system does the lawyer owe allegiance?<sup>78</sup> These concerns are echoed in the ethical dilemmas confronting today's human rights practitioners and clinicians, and they have not disappeared from the scene in clinics and practices with a domestic focus.

Significantly, a unifying theme emerged from the application of critical theory to both scholarship and practice—a call to community. In his 1994 call for change to poverty law practice, Edgar Cahn describes disassociation from the client community by legal services offices and civil rights groups as parallel problems that cause lawyers must address:

It is important to note how far legal services attorneys and legal services programs have come since the mid-sixties. On all fronts, we have tended to move away from community, away from the poor, away from collective efforts to mobilize resources . . . We lost contact with anything remotely like a constituency . . . It is no coincidence that the NAACP Legal Defense and Educational Fund did the same thing: it severed all connection with the NAACP—and continued its lone and valiant representation, increasingly

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72. Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1092-93 (1994) (arguing that critical scholarship in the field of poverty law should address questions of what could or should be done about the problems the scholarship documents, from which can be derived an ongoing collective theoretical dialogue about practice among communities of poor people and their allies).

73. John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1955 (1999).

74. Simon, *supra* note 69, at 1114.

75. Bell, *supra* note 63, at 471.

76. *Id.*

77. *Id.*

78. *Id.* at 492-505.

isolated from those it sought to help, only to discover somewhat belatedly the emergence of an underclass for whom most of its past victories were irrelevant.<sup>79</sup>

Community lawyering, described more extensively in Part C of this Section, entails understanding that lawyers and the client community are engaging in a “collective fight for social change.”<sup>80</sup> John Calmore, who was a veteran poverty lawyer and critical race scholar, explained the professional duty of poverty lawyers is to cultivate:

[R]espectful regard and comprehensive understanding of a world that is foreign to us, even as we practice within it. Practicing law in the community is not a tourist adventure and, therefore, we must eschew the routine of the autonomous, interloping advocate who dreams up cases in the home office and then tests them on the community. That is, we must search for invitation, opportunity, and connection that legitimate our very presence and committed practice . . . . Only through this approach will advocates effectively become incorporated within the client community.<sup>81</sup>

Advocates are encouraged to explore and to engage collaboratively with client groups in non-traditional legal fora to advance the clients’ objectives, such as organizing for political action.<sup>82</sup> Progressive lawyers are called upon “to step outside law and put their faith, however partial and reticent, in community,”<sup>83</sup> to partner with communities in determining an agenda, and to concentrate on “building community resources and mobilizing community action.”<sup>84</sup> The lawyers who are part of “this emerging tradition act not as saviors or champions, but rather as partners in collective ventures to change the world.”<sup>85</sup>

The extent to which the present generation of poverty law advocates have internalized and adopted some of the lessons learned from critical self-reflection and legal theory can be seen in Deborah Rhode’s exhaustive 2008 survey of public interest practitioners.<sup>86</sup> The survey reveals that poverty lawyers increasingly measure their success in terms of client empowerment, community integration, advances in public awareness and social attitudes,<sup>87</sup> and that the

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79. Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, n.46 (1994).

80. Lopez, *supra* note 63.

81. Calmore, *supra* note 73, at 1956.

82. Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 953-56 (1992).

83. Anthony V. Alfieri, *Faith in Community: Representing “Colored Town,”* 95 CAL. L. REV. 1829, 1830 (2007).

84. *Id.* at 1877.

85. Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 544 (2006).

86. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008).

87. *Id.* at 2036.

lawyers have taken steps not to over-rely on litigation as the sole or even primary means to effect change, instead employing multiple approaches.<sup>88</sup> Rhode's report emphasizes that collaboration with grassroots organizations is "widely perceived as critical in securing sustainable social change," with many legal organizations, including law school clinics,<sup>89</sup> working in partnership with community groups or coalitions to provide services to secure legal and policy reforms.<sup>90</sup> While poverty law, including that practiced by law school clinics, has internalized and incorporated many elements of critical theory into its day-to-day practices, we continue to struggle with victimization narratives, with the dignity a client must often relinquish to claim a legal benefit, and with how and when to teach these issues to our clinical students.

b. Influence of Critical Theory on the International Human Rights Movement

As referenced above, the human rights movement, as it developed in the second half of the twentieth century, was susceptible to a range of criticisms, including charges of cultural imperialism from those against whom the norms and paradigm were employed, from important voices within the critical theory movement, and from cultural relativists who challenged the concept of the universality of human rights.<sup>91</sup> Makau Matua, a leading critical theorist in this realm, has provided a useful framework for assessing the human rights paradigm, setting forth what he has called the human rights movement's "damning metaphor," in which the "Savages-Victims-Saviors" triad drives the human rights paradigm.<sup>92</sup> As Matua explains, the human rights rhetoric has historically approached governments in a stark black and white framework, in which the "evil" State, "expresses itself through an illiberal, anti-democratic, or other authoritarian culture," and works as the "operational instrument of savagery" when it deviates from cultural practices of the West.<sup>93</sup> The Victim within the human rights metaphor is characterized as "a powerless, helpless innocent whose naturalist attributes have been negated by the primitive and offensive actions of

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88. *Id.* at 2043-44, 2046.

89. See Alfieri, *supra* note 70; Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Rhode, *supra* note 86, at 2064.

90. Rhode, *supra* note 86, at 2064. Interestingly, this movement itself has spawned additional critical analysis. See Cummings & Eagly, *supra* note 89, at 490 (cautioning poverty lawyers about, *inter alia*, "tradeoffs between organizing and conventional legal practice, role confusion among lawyer-organizers, and the potential for client coercion in the law and organizing context").

91. See generally Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 217 (1999); see, e.g., Hilary Charlesworth et. al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 595, 625 (1991); L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997); Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461 (1997).

92. Matua, *supra* note 4.

93. *Id.* at 203.

the state or the cultural foundation of the state.”<sup>94</sup> And the Savior is the “victim’s bulwark against tyranny.” Matua elaborates:

The simple, yet complex promise of the savior is freedom: freedom from the tyrannies of the state, tradition, and culture. But it is also the freedom to create a better society based on particular values. In the human rights story, the savior is the human rights corpus itself, with the United Nations, Western governments, INGOs, and Western charities as the actual rescuers, redeemers of a benighted world. In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy.<sup>95</sup>

Matua’s metaphor provides an illustrative framework for grounding critiques of the human rights movement as an inherently Eurocentric movement that seeks to shame “other” cultures as the inferior savage for operating outside of Western cultural norms promoted under the guise of human rights.<sup>96</sup>

Other critical theorists have warned human rights advocates that narratives constructed for the specific purpose of assisting clients with their asylum claims, for example, may contribute to cultural essentialism.<sup>97</sup> Ratna Kapur has cautioned feminists about the post-colonial construction of the Third World victim subject aided in part by the deployment of feminist politics in the realm of international human rights.<sup>98</sup> Critical theory has served as a cautionary note that asylum claims may function, as observed by Michelle McKinley, as “the paradigmatic example of post-colonial rescue and the contemporary extension of the maternal imperialist project,” thus contributing to a racialized discourse of victimhood.<sup>99</sup> Isabelle Gunning has critiqued the hypocritical manner with which international human rights norms are exposed and the ways in which issues involving asylum, particularly those that are gender based, function to penalize others while exempting similar harmful acts committed in the United States from condemnation.<sup>100</sup> Other scholars, drawing on the work of Angela Harris who upended the idea that “a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation,”<sup>101</sup> have demonstrated the way that problematic notions of essentialism have been embedded in

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94. *Id.*

95. *Id.* at 204.

96. *Id.* at 205.

97. Michelle A. McKinley, *Cultural Culprits*, 24 BERKELEY J. GENDER L. & JUST. 91, 98 (2009).

98. Kapur, *supra* note 44, at 2.

99. McKinley, *supra* note 97, at 103.

100. Isabelle R. Gunning, *Global Feminism at the Local Level: Criminal and Asylum Laws Regarding Female Genital Surgeries*, 3 J. GENDER RACE & JUST. 45, 61 (1991).

101. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

international human rights work generally.<sup>102</sup> Critics have also paid attention to lawyering methodologies and have warned against a top-down approach where legal strategies and decisions are determined by elites who deliberate and debate separate and apart from client communities. They have urged the need to pay attention to clients' stories while recognizing clients' needs and abilities to employ "strategic uses of victimhood narratives."<sup>103</sup>

Many of the important critiques offered by these critical theorists have begun to insert themselves into human rights work to produce new ways of thinking and conducting legal advocacy based on human rights principles. Increasingly, scholars and practitioners have recognized the need to reconstruct human rights theory through the application of critical theory.<sup>104</sup> The harsh assessment of human rights work that portrays "human rights activists [as] . . . thoughtless, shortsighted, Anglo/Eurocentric, Western Imperialists, perpetuating colonialist stereotypes, and glorifying autonomy (. . . label[ed] a Western construct) over collectivism" has fostered the development of a more reflective approach to human rights work.<sup>105</sup> Northern/Western perspectives on human rights norms are now more likely to be interrogated for their questionable assumptions of universality, colonial legacies, and the voices they exclude.<sup>106</sup> Scholars have exposed the cultural arrogance in those human rights discourses that characterize violations as discrimination (us/here) and persecution (other/there).<sup>107</sup>

Moreover, influenced by critical theories, many U.S. human rights attorneys are circumspect about their roles as elites within the legal system. Many have endeavored to develop a client-centered, non-hierarchical approach in their work in order to accomplish a "redistribution of power" within their own relationships as they simultaneously seek such a goal for their clients.<sup>108</sup> Critical theorists have also contributed to an expanded human rights framework that now includes economic, social, and cultural rights as human rights along with the traditional focus on civil and political rights. As human rights practitioners have exposed the

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102. Higgins, *supra* note 44.

103. *Id.* at 115; Matua *supra* note 4 (critiquing the essentialist construction of savages-victims and saviors).

104. Berta Esperanza Hernandez-Truyol, *The Gender Bend: Culture, Sex, and Sexuality—a Latcritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283, 1330 (2008).

105. Dina Francesca Haynes, *Client Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379, 386 (2006).

106. Berta Esperanza Hernandez-Truyol, *Beyond the First Decade: A Forward-looking History of Latcrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L.J. 169, 204 (2006); Berta Esperanza Hernandez-Truyol, *Culture, Nationhood, and the Human Rights Ideal*, 5 MICH. J. RACE & L. 817, 819, 829 (2000).

107. Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS.J. 155, 163 (2002); see FROM THE MARGINS OF GLOBALIZATION, CRITICAL PERSPECTIVES ON HUMAN RIGHTS 5 (Neve Gordon ed., 2004) (challenging human rights' conceptual cultural superiority).

108. See Haynes, *supra* note 105, at 394; Hessler, *supra* note 56, at 3.

false dichotomy that privileged civil and political rights to the exclusion of other categories of rights, they have incorporated poverty law and domestic civil rights issues within their docket and have applied international legal norms to their analysis of a range of national and local issues.<sup>109</sup> A network of human rights advocates has stepped forward to monitor and report on the United States' failure to implement treaty obligations at home.<sup>110</sup>

As Berta Esperanza Hernández-Truyol has observed, “[c]ritical theory offers the concepts of multidimensionality, interconnectivity, multiplicity, intersectionality, and anti-essentialism. Human rights theory offers both an expanded rights-base and the interdependence and indivisibility ideal. These strands together offer fertile ground to refute, reject, and invalidate the monocular approach that atomizes our deliciously complex selves.”<sup>111</sup> Nonetheless, as we demonstrate below, the contribution that critical theory can make to social justice lawyering and teaching remains underdeveloped.

### III. UNFINISHED BUSINESS; DILEMMAS THAT REMAIN

Teaching and practicing human rights law, whether internationally or domestically, have a purpose. As a conceptual matter, the paramount goal of our collective work is the alleviation of human suffering.<sup>112</sup> Teachers and practitioners identify cases and events where the human dignity of vulnerable groups has not been recognized and where individuals have been denied protection from

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109. See *supra*, Part III.A.2; See generally, Bettinger-Lopez, *supra* note 25 (seeking government accountability for failure to enforce a domestic violence protection order); Meetal Jain, *Bringing Human Rights Home: The DC Right to Housing Campaign*, 17 No. 3 HUM. RTS. BRIEF 10; Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79 (2008) (showing that the rights of prisoners subjected to sexual violence); Cynthia Soohoo, *Close to Home: Social Justice Activism and Human Rights*, 40 COLUM. HUM. RTS. L. REV. 7 (2008).

110. The U.S. Human Rights Network, a national network of over 200 civil and human rights organizations, has coordinated broad-based civil society participation in the various UN treaty-compliance review processes, including the review of the United States before the UN Human Rights Committee under the International Covenant on Civil and Political Rights, and the UN Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). See *About Us*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/node/5> (last visited Apr. 18, 2011). For information on the coordinated work of the U.S. Human Rights Network and its members around the U.S. ICERD review and U.S. implementation of its obligations under ICERD, see *Elimination of All Forms of Racial Discrimination*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/content/campaignproject/elimination-all-forms-racial-discrimination-icerd> (last visited Apr. 18, 2011). The U.S. Human Rights Network also served as the coordinating body for civil society participation as the United States underwent its first Universal Periodic Review before the UN Human Rights Council, through which more than 300 advocacy organizations, grassroots advocates, and academics contributed. See *See Universal Product Review Product*, U.S. HUMAN RIGHTS NETWORK, [http://www.ushrnetwork.org/campaign\\_upr](http://www.ushrnetwork.org/campaign_upr) (last visited Apr. 18, 2011).

111. Hernandez-Truyol, *supra* note 104, at 1330.

112. Kenneth Paul Kinuya, *The Accountability of Multinational Corporations for Human Rights Violations: A Critical Analysis of Select Mechanisms and Their Potential to Protect Economic, Social and Cultural Rights in Developing Countries* (2009), available at [http://ssrn.com/abstract\\_1599842](http://ssrn.com/abstract_1599842).

harm. To accept a case or cause is to signal our judgment that circumstances indicate human rights abuses. In the international and domestic framework in which we as clinical professors carry out our analysis and assignments, we describe atrocities and degradation ranging from femicide (*feminicidio*)<sup>113</sup> in Latin America to the hurricane-related disasters and aftermath of displaced persons in New Orleans. As social justice lawyers, by our presentation of the facts and our demands for remedy, we expose a brutality or deprivation suffered by individuals and/or communities, depict their circumstances as dehumanizing, and seek to identify and hold accountable individual actors, groups, institutions, or states.<sup>114</sup>

As described in Part II, in the context of international and transnational human rights work, critical legal theory has influenced our efforts to avoid portraying human rights violations in other parts of the world (East and South) as cultural pathologies. Human rights advocacy is informed by a recognition that individuals and groups in the United States also suffer human rights violations comparable to violations abroad, thus avoiding the “our culture and theirs” bifurcation.<sup>115</sup> Critical legal theory contributes to the dialogue challenging the presumption of U.S. exceptionalism, a long-standing obstacle to the application of a human-rights law approach to domestic rights deprivations,<sup>116</sup> as progressive advocates have begun to inscribe social justice lawyering at home within a human rights framework. At the same time, some teach the practice of asylum law for the purpose of pursuing individualized relief, and struggle with how to apply critical theory in attempts to avoid stereotypes and eschew the “victimhood/agency dichotomy”<sup>117</sup> the legal system calls upon us to provide.

Critical approaches have greatly transformed the field both conceptually and in practice, yet all too often, human rights lawyers fail to sufficiently problematize the inequities we seek to redress. At the same time, we have not sufficiently counteracted the distorted victim and other narratives that we, and the systems in which we operate, create and perpetuate. Moreover, we have failed to close the gap that affects relationships between clients and lawyers. Our work sometimes falls short of an approach that exemplifies solidarity with the very communities and individuals we call our clients.

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113. TERRORIZING WOMEN: FEMINICIDE IN THE AMERICAS (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010).

114. See Peter Benson, Edward F. Fisher & Kedron Thomas, *Resocializing Suffering: Neoliberalism, Accusation, and the Sociopolitical Context of Guatemala's New Violence*, 35 *LATIN AM. PERSP.* 38, 40 (2008) (describing typical responses to violence as “the erosion of social awareness”).

115. See Bhabha, *supra* note 107, at 163 (noting similar domestic violence rates in countries from which asylum seekers flee to those from which they seek refuge); McKinley, *supra* note 97, at 111 (identifying the ways that cultural essentialism and other critical questions are framed in the context of asylum and cultural defense cases).

116. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 *FORDHAM L. REV.* 459, 461, 470 (2008).

117. See McKinley, *supra* note 97, at 114.

*A. Addressing the Historical and Complicated Determinants of Human Rights Abuses: Challenging Post-Colonial/U.S. Imperialist Power at Home and Abroad*

As a matter of teaching and practice, human rights advocates often neglect to examine the structural-historical sources of human rights crises. Human rights abuses often occur in post-colonial contexts, in disintegrating states or states with alternative forms of security (e.g., warlordism), and in places where there is fierce competition for resources. In the United States (and elsewhere), systemic inequities are often manifested in social relationships that unravel, whereby, as Boaventura de Sousa Santos has recognized, “large bodies of populations are irreversibly kept outside or thrown out of any kind of social contract.”<sup>118</sup> In these circumstances, violence and persecution can more easily take hold and systemic deprivation of basic human needs is common. And while it is true that human rights scholars and lawyers have begun to name social, economic, and cultural rights (in addition to political and civil) as human rights, as clinical law professors engaged in social justice lawyering, we have yet to examine sufficiently or consistently in our teaching or our practice the relationship between socio-cultural and political-economic conditions on the one hand, and human rights violations on the other. Our efforts to link the consequences of a market economy, as articulated in the form of domestic politics and foreign policies, with human rights violations are wanting.

In our international and transnational work, we do not adequately confront the ways in which the United States’ attempts to order the world around its strategic needs and economic interests have contributed to the conditions that produce human rights violations committed abroad. As Louise Arbor has noted, although the root causes of violence, including torture, often involve economic and social deprivations, human rights activists continue to obscure the nature of this relationship.<sup>119</sup> These circumstances are largely a function of U.S. power and control over the world’s global economy. Chris Patten, Chancellor of Oxford University, has observed, “[f]or all the talk about multipolarity and a post-American world, the U.S. remains the only superpower, the only country that matters everywhere . . . [with] apparent complete military mastery of the global commons.”<sup>120</sup> As human rights advocates in the United States, we have first-hand “deep knowledge of the beast,” and thus an opportunity, and indeed an

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118. Boaventura de Sousa Santos, *Nuestra America: Reinventing a Subaltern Paradigm of Recognition and Redistribution*, 54 RUTGERS L. REV. 1049, 1050 (2002); see also Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 2d 303, 308 (2009) (describing, for example, warlordism as “a legally illegitimate form of security”).

119. LOUISE ARBOR, *ATTACKING THE ROOT CAUSES OF TORTURE, POVERTY, INEQUALITY AND VIOLENCE* 9 (Thomas E. McCarthy ed., 2006).

120. Chris Patten, *What is Europe to Do?* NEW YORK REV. BOOKS (2010), available at <http://www.nybooks.com/articles/archives/2010/mar/11/what-is-europe-to-do/>.



obligation, to set in relief the sources of vulnerability and violence that emanate from within.<sup>121</sup>

Certainly in our domestic human rights work, U.S. institutions and corporate actors are often targets of complaints and petitions. However, this usually takes the form of idiosyncratic relief and not a systemic or enduring remedy. In our direct client representation, we do not explicitly challenge the liberal political theory that sustains a welfare system that relies in the first instance on economic and market factors, and secondarily, on kinship systems, community ties, and private charities to sustain its citizens.<sup>122</sup> The assumption that the market is the optimal regulatory mechanism for the distribution of goods and services, which in turn forecloses the need for safety-net programs except through a residualist welfare system, is usually left uncontested.<sup>123</sup> While we may focus on poverty, the question of the relationship between inequality and rights violations has not sufficiently garnered our attention or efforts.<sup>124</sup> Although we address the consequential poverty, violence, and suffering as human rights issues, liberal political and economic theories as contributors to human rights abuses remain largely outside of the human rights dialectic.

Confronting human rights abuses implies the need to challenge the political and economic arrangements that create them. Without attention to the structural inequalities and political economic conditions that foster rights deprivations and render particular groups vulnerable to repression, our advocacy may fail to advance beyond the immediate situation of our clients' suffering, and fail to imbue our students with a comprehensive understanding of the source of clients' problems. Our task, to be sure, is to provide redress to those who have endured rights violations. But we ought not to elide from view the historically contingent manner in which human rights violators are produced. While we may identify abuses as the by-product of oppressive regimes, we may fail to lay bare their determinants, thus diminishing efforts to challenge larger oppressive structures from which they originate.<sup>125</sup> Without an effort to understand and unpack the genesis of human rights violations, we will contribute to a human rights discourse limited to victims and perpetrators, and a depiction of barbaric regions of the

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121. Santos, *supra* note 118, at 1075.

122. ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* 41, 88 (1999) (observing that liberals conceive of liberty as "freedom 'from' interference by other human agents in one's own pursuits").

123. See Anthony Giddens & Will Hutton, *Conversation*, in *GLOBAL CAPITALISM* 44 (Will Hutton & Anthony Giddens eds., 2000) (noting that markets are considered superior in all regards compared to government and that markets foreclose the need for social justice programs).

124. See Margot E. Salomon, *Why Should it Matter that Others Have More?—Poverty, Inequality and the Potential of International Human Rights Law* 2 (London Sch. Econ. & Political Sci., Law Dep't, Law, Soc'y & Econ., Working Paper No. 15, 2010), available at [http://www.lse.ac.uk/collections/law/wps/WPS2010-15\\_Salomon.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2010-15_Salomon.pdf).

125. NEVE GORDON, *FROM THE MARGINS OF GLOBALIZATION, CRITICAL PERSPECTIVES ON HUMAN RIGHTS* 8 (2004).

world or blameworthy neighborhoods in our communities, notwithstanding the lessons of critical theory.

*B. Addressing the Failure to Merge Critical Theory with Critical Practice*

Critical legal theory has attempted to mediate the power dynamics between poverty and civil rights lawyers and clients. For example, practitioners have considered ways to shift from paradigmatic individual case/litigation strategies to legal work that is grounded in community alliances and grassroots networks.<sup>126</sup> However, even as the influence of critical legal theory expanded, especially through the late 1980s, and with greater attention on issues of systemic discrimination and framing of civil rights as human rights, traditional poverty lawyering continues to struggle with a top-down provision of legal services to individuals in need. Local programs suffer from a lack of shared long-term vision, bureaucracy, quality controls, and productivity measures that often fail to meaningfully engage and involve clients.<sup>127</sup>

Poverty lawyers continue to grapple with these issues, particularly in the provision of individual services, where the isolation of legal services organizations from the communities they serve often perpetuates the top-down service delivery model. In addition, a legal services organization's focus on professionalism, together with limitations on the types of legal practice permitted under funding rules and the lack of a clear, comprehensive vision for productive community involvement, has channeled much of the work of legal services lawyers into the courts instead of the communities. Race, class, and other divisions between lawyers and the community members they serve have historically existed, and continue to exist today.

In many areas, critical legal theory, and more specifically, critical race theory analyses, did not seep into the legal practices mode in any sustained or comprehensive fashion. This failure is not a critique of legal services organizations alone, which aim to meet ever-increasing legal needs of individuals in local communities. Much critical theory has been and remains inaccessible to the poverty lawyers it criticizes.<sup>128</sup> "Failure to attend to those engaged 'on the ground' is one reason for the mismatch between theory and practice."<sup>129</sup> As a result, critical theory and literature, including that regarding structural conditions

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126. Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV 109, 118 (2009).

127. Alan Houseman, *The War on Poverty*, 83 GEO. L.J. 1669, 1688-1708 (1995).

128. Blasi, *supra* note 72, at 1087 ("[A]s currently constituted . . . the 'new poverty law scholarship' suffers from flaws that prevent it from being of much practical consequence for poverty law practice . . . Never has so much theory rested on so little practice. The total factual content of all of this scholarship consists of perhaps a dozen remembered episodes about individual clients in the former practices of the respective authors.").

129. COREY SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* xiii (2009).

that enable the persistence of poverty, has been divorced from the everyday practice of poverty law. As Michelle Jacobs has observed, since clinical legal education developed partially as a reflection of the legal services model of lawyering, deficiencies and challenges facing poverty lawyers in legal services offices are likely to exist in law school clinics as well.<sup>130</sup>

Perhaps most notable among the ongoing critiques of traditional poverty lawyering is that, while aimed at a fundamental but unrealized ideal in the legal services structure, critique focused on developing an attorney-client relationship premised on a mutual respect and responsibility between attorney and client. This ideal is challenging to achieve in practice and requires both a systemic vision and lawyering practice that focuses on relationship-building and personal investment of time and attention in a local community. It also requires attorneys to develop and maintain viewpoints on lawyering that may deviate from mainstream ideas about the lawyer's traditional role.<sup>131</sup> Even then, issues such as race, class, gender, and systemic power are paramount—and must be navigated and negotiated as lawyers seek to practice in a way that does not perpetuate a top-down model. In particular, the concept of client autonomy in an attorney-client relationship is burdened by a variety of limitations even when the attorney and client are committed together on a path of risk and uncertainty—after all, any negative result of that risk impacts the two in vastly different ways.

### C. *Examples from Clinical Practice*

For us as teachers and practitioners, the conceptual concerns addressed above imply entering into the realm of praxis to better understand the challenges they raise for our pedagogy and for our methods of practice in the different fora where we work. These concerns affect our relationships with clients and communities, and are no less serious for those of us engaged in practicing and teaching in the domestic social justice field. We collectively have found it is often in the context of a law school clinical setting where these persistent dilemmas manifest themselves most starkly, and where we have an opportunity to engage in a deliberate self-reflective analysis about the complexities of carrying out our work and the purposes for which we put critical theory into practice.

#### 1. Brief Background: The Work of Human Rights Clinics

Since they came into existence in the 1990s, human rights clinics in the United States have traditionally focused the majority of their work on human rights

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130. Jacobs, *supra* note 71, at 352.

131. See, e.g., John O. Calmore, "Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167 (2004); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002).

problems outside of the United States.<sup>132</sup> Clinic projects varied from representation of individuals before human rights bodies (regional commissions, international courts, ad hoc international tribunals, United Nations treaty bodies), to writing human rights reports in the style of (and sometimes in collaboration with) Human Rights Watch, Amnesty International, and others, to representing foreign-born individuals in asylum claims before U.S. immigration courts or in Alien Tort Claims Act (ATCA) cases against foreign dictators, corporations, and other “human rights bad guys” before U.S. federal courts.<sup>133</sup> Periodically, human rights clinics dabbled in cases and projects oriented toward the enforcement of human rights against the United States,<sup>134</sup> but historically, clinical instructors usually eschewed such initiatives, in light of the United States’ failure to ratify most international human rights treaties and its refusal to subject itself to scrutiny before international human rights bodies.<sup>135</sup> This was perhaps a practical pedagogic response to a concrete reality, but it also served to reinforce the notion (to students, amongst others) that the United States was “above” the scrutiny of international law. Moreover, it sent a message to students that human rights lawyering and advocacy had a “fly-in, fly-out” quality to it—and that carried along with it all of the top-down baggage explored in greater detail above.

While human rights clinicians may have felt constrained geographically, many, in contrast to clinicians in other areas of the law, populated their dockets with cases and projects that might be characterized by a lack of normative constraints. The aspirational nature of the human rights norms expressed in the International Bill of Rights and other more recently drafted international and regional human rights instruments made for meaty clinic projects. As recent conceptual developments, the treaty provisions needed analysis and application. Human rights clinics routinely seized the opportunities to take on cases of first impression, and to push for expansive interpretations of principles that incorporated language far more progressive, in many circumstances, than U.S. law.

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132. Arturo J. Carillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505, 526 (2003). For an overview of the structure and methodology of the first human rights clinic in the United States (the International Human Rights Law Clinic at American University Washington College of Law), see Richard J. Wilson, *Clinical Legal Education for Human Rights Advocates*, in HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY 261-277 (George Andreopoulos & Richard Pierre Claude eds., 1997).

133. The authors of this Article informally polled human rights clinics based in the United States, and learned that while the trend is shifting, many clinics still include as a large part of their dockets cases and projects arising from human rights violations outside the United States.

134. See, e.g., BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005) (describing a case brought by Yale’s Lowenstein International Human Rights Clinic on behalf of Haitian asylum seekers; the case was brought on constitutional law grounds but infused with human rights principles).

135. Cynthia Soohoo, *Human Rights and the Transformation of the ‘Civil Rights’ and ‘Civil Liberties’ Lawyer*, in 2 BRINGING HUMAN RIGHTS HOME 71-93 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

Human rights clinicians enthusiastically pursued developing a set of norms under international law, and indeed had notable success.<sup>136</sup> This group of clinicians focused on addressing an urgent set of problems with an exciting new set of tools that, for many, reflected their own moral and political codes. But without serious reflection on the structures left unchallenged in some forms of human rights advocacy (an area that is often criticized for prioritizing the development of norms over a client-centered perspective), these clinicians risked replicating the discriminatory or unfair structures they sought to eradicate. There was also the more obvious and practical problem of the efficacy of human rights strategies, of the lack of respect that human rights regimes commanded in the world political order, and especially at the domestic level in many countries.

## 2. Brief Background: The Work of Poverty Law Clinics

Poverty law clinics emerged as the dominant clinic law school model during the 1970s.<sup>137</sup> They were created to provide students with a broad range of practical legal experiences and skills, as well as provide students with a chance to learn social justice concepts while providing much-needed legal services to poor clients who lacked access to justice.<sup>138</sup> These clinics endeavored to provide services in a holistic manner.<sup>139</sup>

The law school clinical model, with a heavy focus on poverty law clinics, continued to develop while traditional legal services organizations experienced increasing limitations on allowable practice and access to funding.<sup>140</sup> Receptive federal courts, together with a growing body of civil rights laws and associated, enforceable remedies, fueled the development of the clinical movement. As these dynamics have shifted and restrictions have grown, social justice and poverty law clinics and practitioners are increasingly incorporating human rights language, strategies, and claims in their work with poor clients and community organizations. As lawyers operating in the domestic realm, poverty law clinicians are attracted to the “newness” of the human rights approach and the exciting opportunities it provides for reframing what had previously been considered civil rights and domestic issues, particularly as domestic courts and legal rhetoric have become increasingly inhospitable to many claims advanced by the most

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136. See, e.g., Hurwitz, *supra* note 132, at 539-48 (2003); Richard J. Wilson et al., *The Work of the International Human Rights Law Clinic at American University: Twelve Years of Operation*, AM. UNIV. WASH. COLL. LAW (May 2002), [http://www.wcl.american.edu/clinical/annual\\_2002.pdf?rd\\_1](http://www.wcl.american.edu/clinical/annual_2002.pdf?rd_1).

137. Kimberly E. O’Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 CLINICAL L. REV. 335, 337 n.8 (citing Antoinette Sedillo Lopez).

138. Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 38 (1995).

139. Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 317 (2001).

140. See *supra* Part II.

vulnerable among us—persons displaced by catastrophe, undocumented domestic workers, the disabled and uninsured, and others. As with international and transnational focused clinical projects, however, the incorporation of a human rights framework has not necessarily led to a more client-centered, non-hierarchical lawyering approach. Indeed, the challenges chronicled above apply with equal force to this new area of poverty law practice.

As poverty lawyers, poverty law clinicians are also concerned that emphasizing human rights claims in traditional domestic poverty work may raise additional concerns that warrant critical reflection and analysis. The undertaking may be very attractive to the lawyers and clinical students who have the opportunity to employ new legal strategies and develop and test new legal theories. However, cases and projects that are undertaken without sufficient consideration of the amorphous, symbolic, and often unenforceable nature of the human rights remedy may leave clients with little by way of concrete relief.<sup>141</sup>

### 3. Clinical Case Studies

The following are examples of cases and projects undertaken in our law school clinical programs. They serve to highlight the tensions, indeterminacies, and synchronicities that exist in our respective international and transnational human rights clinics and in our domestic poverty and community lawyering clinics. In reflecting on these case studies through the lens of critical theory, we raise more questions than answers. Specifically, critical theory calls on us to inquire how, in our individual client representation, we can avoid client victimization and address the broader socio-economic and political factors underlying the client's search for relief. In our broader human rights impact work, critical theory highlights the need for a broader understanding and a more systemic challenge to the immediately apparent rights violations. And, when seeking to apply international human rights norms domestically, we are called upon to navigate the relationships between the client communities and the professional advocates in pursuit of a shared strategy, while at the same time, being mindful of the limitations of a human rights strategy to meet the immediate needs of the client community. Our final case study raises concerns of the unintended consequences of our human rights advocacy, and we must constantly reflect, assess, and adjust as we strive to work collaboratively with our clients in achieving their ultimate goals. Taken together, these case studies, and others interspersed throughout this Article, also illustrate the interconnectedness of our fields (poverty, community, and human rights lawyering) and challenge us to locate these types of lawyering both at home and abroad.

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141. For example, *see infra* Part III(C)(3)(d) for case study detailing a human rights strategy that was utilized in 2009 on behalf of uninsured immigrants in the greater Atlanta region.

a. Representing Immigrants with U Visa/Asylum Cases: Individualized Domestic Advocacy Addressing Human Rights Violations Abroad

The Victims of Trafficking and Violence Protection Act (VTVPA) of 2000 included a new form of immigration relief that may provide legal status to undocumented immigrant victims of crimes if they have suffered substantial physical or mental abuse as a result of the crime, and if they have helped law enforcement officials investigate or prosecute the crime.<sup>142</sup> An additional element of the U visa case is the requirement to establish hardship to the client if she were to be returned to her home country.<sup>143</sup>

Advocates increasingly include escalating and brutal violence in Mexico associated with the drug cartel wars as an important factor that weighs in favor of proving hardship in U visa cases. Furthermore, advocates are now representing increasing numbers of Mexicans who seek asylum because of the fear of violence and reprisals relating to drug war violence.<sup>144</sup> The immediate goal is to assemble a strong case based on the horrendous circumstances unfolding in Mexico on behalf of clients who are seeking protection from individual and collective forms of repression.

Atrocities, systematic decapitations, and charred bodies, all apparent byproducts of the drug wars, are part of the daily news.<sup>145</sup> As evidence of our clients' claims, a typical submission might be journalistic accounts of the violence with headlines that read, "*The Drug War at our Doorstep*"<sup>146</sup> or "*Mexico Under Siege: Families Want Answers from Man Who Says He Dissolved 300 People*,"<sup>147</sup> as well as State Department reports that describe the brutal violence.<sup>148</sup>

Due to the constraints of the legal structures within which these claims are developed, we necessarily omit from U visa and asylum narratives the historical and structural determinants of Mexico's drug war, particularly those that implicate U.S. policies as contributing to drug trade violence. For example, facts setting forth the relationship between the drug violence in Mexico and the

142. Victims of Trafficking and Violence Protection Act of 2000, 8 U.S.C.A. § 1101 (West 2011); see also Immigration and Nationality Act, 8 U.S.C.A. §§ 1551-1552 (West 2011).

143. 8 C.F.R. § 1240.58(c) (2011); see Gail Pendleton, *Overcoming Inadmissibility for U Visa Applicants*, available at [www.asistahelp.org/. . . /Overcoming\\_Inadmissibility\\_C3C0CAF47A2F8.doc](http://www.asistahelp.org/. . . /Overcoming_Inadmissibility_C3C0CAF47A2F8.doc).

144. Andrew Becker & Patrick J. McDonnell, *Drug War Creates New Class of Refugees*, L.A. TIMES, Mar. 9, 2009, <http://articles.latimes.com/2009/mar/04/nation/na-asylum4>.

145. Mark Lacey, *With Force, Mexican Drug Cartels Get Their Way*, N.Y. TIMES, Mar. 1, 2009; Richard Marosi, *Mexico under Siege, Mystery Man Blamed for Gruesome Tijuana Deaths*, L.A. TIMES, Dec. 18, 2008.

146. *Mexico Under Siege: The Drug War at Our Doorstep*, L.A. TIMES, available at <http://projects.latimes.com/mexico-drug-war/#/its-a-war> (last visited Apr. 13, 2011).

147. Richard Marosi, *Mexico Under Siege: Families Want Answers From Man Who Says He Dissolved 300 People*, L.A. TIMES, Feb. 9, 2009, available at <http://articles.latimes.com/2009/feb/09/world/fg-missing9>.

148. 2009 HUMAN RIGHTS REPORT: MEXICO, U.S. DEP'T OF STATE (Mar. 11, 2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136119.htm>.

aftermath of the Washington Consensus are not addressed.<sup>149</sup> That tens of thousands of displaced workers have moved into drug-trade related activities as a consequence of NAFTA has no apparent relevance in these cases.<sup>150</sup> The U.S. trade in guns and the U.S. demand for drugs as factors that contribute to drug violence in Mexico, as well as the knowledge that the perpetrators of some of the most brutal acts of criminal violence include U.S.-trained elite members of the Mexican armed forces, are also not relevant to U visa cases or in asylum proceedings.<sup>151</sup>

The following questions therefore have surfaced from our work on such cases: (1) what are the broader socioeconomic-political determinants at play that we want to teach our students to educate them about the context in which these cases arise, and (2) how would addressing those broader sociopolitical determinants affect our lawyering, or would they? What can we do in the individual client representation that seeks to incorporate that broader context in our overarching strategy, and how can we challenge the problematic Savage-Victim-Savior narrative?

b. Gender Violence in Mexico and Guatemala: Looking for Room to Apply Critical Theory in Systemic Advocacy Addressing Human Rights Violations Outside the United States

As described above, human rights practitioners not only represent individuals who suffer rights violations, but also often work in the realm of cause lawyering and policy to develop reports, manuals, and best legal practice guides pertaining to human rights. One example of such a policy project involved the development of a best legal practices guide to prevent and respond to domestic violence in Mexico and Guatemala.<sup>152</sup> The project was initiated at the request of a nongovernmental organization in the United States in coalition with human rights advocacy groups in Mexico and Guatemala. Clinic students developed two policy papers on best practices: the first relating to advocacy, law enforcement and judicial responses to domestic violence, and the second relating to evidentiary concerns in sexual abuse cases. The request for the project was in response to the recent epidemic of increased domestic violence and killings of women in Ciudad Juárez and the urban areas of Guatemala.

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149. Laura Carlsen, *Armoring NAFTA: The Battleground for Mexico's Future*, in NACLA REPORT ON THE AMERICAS 17 (2008), available at [https://nacla.org/files/A04105017\\_1.pdf](https://nacla.org/files/A04105017_1.pdf).

150. EDUARDO ZEPEDA ET. AL, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, RETHINKING TRADE POLICY FOR DEVELOPMENT: LESSONS FROM MEXICO UNDER NAFTA (2009), available at <http://www.ase.tufts.edu/gdae/Pubs/rp/CarnegieNAFTADec09.pdf>.

151. ENRIQUE DUSSEL PETERS, POLARIZING MEXICO: THE IMPACT OF LIBERALIZATION STRATEGY 68 (2000); Todd Miller, *Mexico: Corporate Hit Men Find New Ways to Turn a Profit*, N. AM. CONG. ON LATIN AM. (Jan. 20, 2010), <https://nacla.org/node/6369>.

152. In 2006, the UNC Immigration/Human Rights Policy Clinic collaborated with the Washington Office on Latin America to produce a report on a best practices guide pertaining to legal intervention in gender-based violence matters in cooperation with NGOs in Mexico and Guatemala. Report on file with authors.



Students were immersed in the details of *feminicidio*, rape, and domestic violence cases. They read through Special Rapporteur and human rights reports describing the impunity characterizing the state's response to crimes against women. They collected best practices and commentary from various programs in the United States, international ad hoc tribunals, developing practices from the International Criminal Court, and protocols from several other Latin American and European countries. The end product was both specific and comprehensive, and addressed all realms of legal intervention in these matters.

Not addressed were the historical and structural sources of gender crimes. Not addressed was the impact of structural adjustment program directives and the North American Free Trade Agreement, as factors that contributed to the exodus of the unemployed to Ciudad Juárez and the diminished capacity of the Mexican government to respond to the unraveling of the city's social fabric.<sup>153</sup> Not addressed was the history of Guatemala's intermittent violence with its antecedents in the CIA-sponsored coup in 1954.<sup>154</sup> Not addressed were the deaths and disappearances of the hundreds of thousands of Guatemalans during the period of civil war following the coup, a quarter of whom were women.<sup>155</sup>

Introducing the historical and political complexities of Mexico's drug violence or the murders of women provides students with the opportunity to problematize how rights abuses are shaped by existing power relationships.<sup>156</sup> Examining the gender violence in Guatemala as a historically-specific social process in which the United States is implicated, particularly where it endeavored to thwart the prospect of socio-economic reforms, creates opportunities for a politically radical discourse.<sup>157</sup> Classroom discussions and reading assignments that go beyond the formalistic structures of the case aid the goals of teaching critical thinking about lawyering.<sup>158</sup> This expands the teaching of law from a set of technological skills

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153. Deborah M. Weissman, *The Political Economy of Violence: Toward an Understanding of the Gender-Based Murders of Ciudad Juárez*, 30 N.C. J. INT'L L. & COMM. REG. 795, 843-848 (2005).

154. Deborah M. Weissman, *Global Economics and Their Progenies: Theorizing Femicide in Context*, in TERRORIZING WOMEN, FEMICIDE IN THE AMERICAS 225, 228-230 (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010).

155. Rape and sexual violence were integral parts of the strategy to destroy civil resistance. *Id.*

156. See Neve Gordon, *Introduction: Human Rights as Being-Marginal-in-the-World*, in FROM THE MARGINS OF GLOBALIZATION, CRITICAL PERSPECTIVES ON HUMAN RIGHTS 8 (Neve Gordon ed., 2004) (noting that human rights are informed by compassion and an obligation to oppose hierarchical power relations); Benson et al., *supra* note 114, at 40 (arguing in support of the goal of "resocial[izing]" human rights violations by "tracing their origins to sociopolitical and economic conditions").

157. Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 1, 27 (Mark Goodale & Sally Engle Merry eds., 2007); Schlag, *supra* note 51, at 296.

158. See Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice and Pedagogy*, 34 N.Y.U. REV. OF LAW & SOCIAL CHANGE 455 (2010) (referring to "critical reflective ethics through practice"); Juliet M. Brodie, *Little Cases On The Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 334 (2009) (describing how to achieve the goals of clinical education: "service and teaching, social justice and pedagogy").

to a multidisciplinary approach that includes sociology and politics.<sup>159</sup>

Expanding our discussions with clients to include theories about the larger circumstances of their experiences with violence provides an opportunity for meaningful consideration of long-term solutions.<sup>160</sup> A fuller exchange of information beyond eliciting the specific facts for their individual cases enables clients to assess whether the truncated narratives employed on their behalf may exacerbate anti-immigrant sentiments and contribute to sensationalized accounts of violent Mexicans.<sup>161</sup>

The limitations of client-specific cases can be offset by working with grassroots initiatives and transnational advocacy networks, some of whom offer an alternative discourse about drug violence in Mexico or gender violence in the region.<sup>162</sup> And while directly presenting these ideas to case adjudicators may be problematic for individual-level advocacy and zealous client representation, human rights advocates can act in the capacity of public intellectual to disseminate their ideas in scholarly works, newspaper opinion columns, and other public forums. We continually reflect, however, and encourage our students to do so, on what it means in such projects to adopt a client-centered approach to lawyering, as well as consider whose interests are furthered by this sort of expansive advocacy.

c. Gulf Coast Hurricanes and Public Housing in New Orleans:  
The Challenges and Limitations of Using International Human  
Rights in Domestic Community Lawyering

The 2005 Gulf Coast hurricanes Katrina and Rita and the aftermath of disaster justice issues that followed brought a notable resurgence in domestic advocates' use of international human rights norms. Social movement focus and activity on housing justice issues in New Orleans was anchored to a particular struggle over the post-disaster demolition of public housing. More than 5,000 units of public housing in the "Big 4" public housing communities were at stake.<sup>163</sup> The demographics of pre-hurricane public housing heavily favored African-

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159. See FRANK UPHAM, MYTHMAKING IN THE RULE OF LAW ORTHODOXY 8 (2002).

160. See Robert Ashford, *Eliminating the Underlying Cause of Poverty as a Means to Global Economic Recovery*, (Syracuse Univ., Coll. of Law Faculty Scholarship, Working Paper No. 8, 2010), available at [http://ssrn.com/abstract\\_1583653](http://ssrn.com/abstract_1583653) (arguing that it is the highest duty of a lawyer to address clients' most immediate problems, but also to address fundamental, systemic causes of and solutions to such issues).

161. James C. McKinley, Jr., *Fleeing Drug Violence, Mexicans Pour Into the U.S.*, N.Y. TIMES, Apr. 18, 2010, at A1 (noting unsubstantiated suggestions that Mexicans entering the United States were fleeing from Mexico because they were participating in drug cartel violence and now fear rival cartel revenge).

162. *Mexico News and Analysis*, MEXICO SOLIDARITY NETWORK, Aug. 2-8, 2010, available at <http://www.mexicosolidarity.org/post/2010/august/mexiconewsandanalysisaugust282010> (reporting that drug violence has decreased and warning against a reductive interpretation of drug violence).

163. See Gwen Filosa, *Demolition is Development's Destiny*, TIMES PICAYUNE, Oct. 18, 2006, at National 1; Susan Saulny, *5,000 Public Housing Units in New Orleans are to be Razed*, N.Y. TIMES, June 15, 2006, at A1.

Americans (99%) and women.<sup>164</sup> The movement to save public housing sought to stop the demolitions and when that effort failed, focused demands on replacing one-for-one demolished units and gaining input from displaced public housing residents on the proposed redevelopments. Eventually, the redevelopment of newer, less dense mixed-income housing to replace demolished public housing included far fewer affordable units.<sup>165</sup>

Local organizing and advocacy efforts focused on the benefits of a disaster response governed by human rights such as the UN Guiding Principles on Internal Displacement, which guarantee post-disaster shelter along with the dignified treatment of displaced persons.<sup>166</sup> Efforts to frame the disasters according to the protections of the Guiding Principles highlighted failures of the U.S. government's domestic disaster response under the Stafford Act and bolstered the domestic Gulf South grassroots' movement for displaced persons.<sup>167</sup> While the United States chose not to utilize this human rights framework in its disaster policy, the broad-based protections of the Guiding Principles led key movement demands: the right to return for all displaced persons, and just and equitable reconstruction with a focus on race, class, and gender.

Professional advocates, local and national, explicitly introduced human rights concepts to bolster demands for housing justice by providing information and training on use of the Guiding Principles in a top-down fashion. The experiences of displaced people informed popular education, grassroots organizing, local and regional trainings, and countless discussions at community meetings over the post-hurricane years. Formal human rights mechanisms were also utilized in hurricane-impacted communities to document and raise awareness about post-disaster housing barriers, including shadow reports, Special Rapporteur visits, tribunals, and use of the Universal Periodic Review process.<sup>168</sup> The human rights framework proved to be a strong organizing mechanism exposing policy inequities and disaster capitalism that left poor people worse off in terms of housing justice.

Social justice lawyers allied with those in the public housing movement aimed to develop a collaborative model of lawyering alongside impacted community members. The movement included lawyers working to build political power outside of the courtroom in, for example, community meetings and protests, and

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164. See Jane M. Henrici et al., *Mounting Losses: Women and Public Housing After Hurricane Katrina*, INST. FOR WOMEN'S POLICY RESEARCH FACT SHEET D491 (Aug. 2010), <http://iwpr.org/pdf/D491.pdf>.

165. HANO, Total Units Scheduled to be Available by Dec. 2010 (on file with the author).

166. U.N. Office of Humanitarian Affairs, U.N. Guiding Principles on Internal Displacement (1998), available at <http://www.brookings.edu/fp/projects/idp/resources/GPsEnglish.pdf>.

167. See, e.g., *U.S. Disaster Response Law vs. Human Rights Standards on Internal Displacement*, ADVOCATES FOR ENVIRONMENTAL HUMAN RIGHTS, available at [http://www.ehumanrights.org/ourwork\\_residents\\_USDRLvHRS.html](http://www.ehumanrights.org/ourwork_residents_USDRLvHRS.html) (last visited Apr. 15, 2011).

168. See *Advisory Group on Forced Evictions in New Orleans & UN Advocacy Documents*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, available at <http://wiki.nlchp.org/display/Manual/New+Orleans+and+Gulf+Coast> (last visited Apr 15, 2011).

through demands on public officials and advocacy with government policymakers. During this process, lawyers straddled the needs of clients who had lost their housing and the collective call of the social movement with which they were involved.

With a mindfully directed “community lawyering” approach, attorneys grappled with power dynamics that favored lawyers’ choices; their own limited ability to control needed resources such as housing and funds for former public housing residents; challenges of enabling resident leadership in the movement; and entrenched structural conditions at every turn. Even reflecting on circumstances and relationships from the lawyer’s perspective alone might draw attention away from an authentic client-centered approach. This collaborative process was complex with new needs constantly emerging and a wide range of involvement in the movement. Lessons learned point to the necessity of ongoing, critical self-reflection with close attention on power dynamics and the multilayered struggles of impacted community members that lawyers are not likely to experience themselves. As described above, mobilizing community action is a long-term process. Though former public housing residents and lawyers were tethered together, the kind of leverage needed to realize post-disaster housing justice was not easily achieved.

Eventually, lawyers filed a federal class action suit to try to halt the demolitions.<sup>169</sup> Notably, that complaint brought a claim under international law and specifically UN Guiding Principle 28 explaining that, “the United States must allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence.”<sup>170</sup> The filing of the lawsuit seemed to refocus the movement’s attention and/or coincided with shifting movement efforts. The legal case became a focal point, possibly drawing energy away from organizing efforts. Lawyers’ energies were increasingly focused on meeting the needs of individual clients and class members, and on litigating the case.

The suit to save public housing clearly demonstrated some limits with the power of traditional litigation. With no domestic right to housing or meaningful political commitment to the plight of the most vulnerable post-Katrina residents, the federal court, at the urging of the federal and local housing agencies, allowed the demolitions to proceed. The national policy geared toward mixed income redevelopment, preconditioned on scattering residents and severing social networks, prevailed. Some residents were never able to return home—not even to return belongings and personal possessions before their apartments were bulldozed. As of this writing, approximately 2,600 affordable units in New Orleans were occupied and urgent housing needs for many thousands remained

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169. *Anderson v. Jackson*, No. 06-3298, 2007 U.S. Dist. LEXIS 9074 (E.D. La. Feb. 6, 2007).

170. *Id.* at \*12; *U.N. Guiding Principles on Internal Displacement*, UNITED NATIONS OFFICE OF HUMANITARIAN AFFAIRS No. 28(1998), available at <http://www.brookings.edu/fp/projects/idp/resources/GPsEnglish.pdf>.

unmet.<sup>171</sup> Once the demolitions were authorized and completed, the ongoing litigation was not an effective focal point for the movement.<sup>172</sup>

The guarantees of the Guiding Principles, even when coupled with strong movement organizing, could not provide displaced persons with necessary short or long term housing relief following the hurricanes. Lack of enforceability of the relevant human rights norms was at odds with displaced persons' urgency for immediate safe and affordable shelter. This amplified a basic tension with pursuing human rights in the United States. Without government acceptance and commitment to enforcement and oversight, the visionary Guiding Principles could not offer hurricane survivors the realization of decent post-disaster housing.

There is an implicit understanding that grassroots movements require time to build capacity and develop effective strategies and tactics for sustainable social change. Thus, the momentum generated from extensive post-disaster movement efforts cannot be measured exclusively in terms of immediate benefit for individuals or changes in domestic disaster policies. The human rights framework offered a long-term vision and promise, provided those most impacted by the hurricanes a departure point for discourse and demands, and crucially, allowed displaced persons (and their advocates) a measure of hope.

As community lawyers, we struggled with the following issues: (1) how do we achieve balance between litigation and non-litigation advocacy techniques within the frame of human rights, (2) how can community lawyering that incorporates the frame of human rights best serve the interests of clients with urgent needs and social movement capacity building; (3) how does the human rights framework serve to build local social movement capacity in the context of domestic justice issues; and (4) why do we, or do we at all, want to encourage our disenfranchised clients to adopt a human rights framework to address the myriad of problems they face?

d. Denial of Funding for Dialysis Treatment for Immigrants in Miami:  
Questioning the Value of an International Human Rights Strategy  
in Domestic Poverty Lawyering

In Miami, Florida, the Health and Elder Law Clinic struggled with the question of whether, and how, to incorporate a human rights strategy in its representation of poor immigrants with end-stage renal failure whose very survival depended on ongoing access to dialysis treatments. On August 22, 1996, the United States Congress enacted the Personal Responsibility and Work Opportunity Reconcilia-

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171. HANO Occupancy Report (Jan. 31, 2011) (on file with the author).

172. In 2011, the lawsuit was still pending on non-demolition issues. *See Anderson v. Jackson*, No. 06-3298, 2007 U.S. Dist. LEXIS 9074 (E.D. La. Feb. 6, 2007), Order and Reasons, Apr. 5, 2011.

tion Act (PRWORA).<sup>173</sup> The Act barred many “qualified”<sup>174</sup> and all “non-qualified” immigrants and non-immigrants from receiving most means-tested federal public benefits, including virtually all safety-net programs for the poor such as Medicaid, Medicare and Social Security Supplemental Income.<sup>175</sup> The only exception permitting use of federal Medicaid funds for this population is through the limited emergency Medicaid program.<sup>176</sup> Emergency for these purposes is defined as a:

[M]edical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected result in—(A) placing the patient’s health in serious jeopardy,(B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part.<sup>177</sup>

States and localities were left to shoulder the burden of providing unqualified immigrants medical care out of their own funds, often at great expense, or to choose to deny immigrants life-sustaining and medically necessary treatment.<sup>178</sup> In 2010, the public health care system in Miami-Dade County terminated its provision of outpatient dialysis for the poor.<sup>179</sup> The Health and Elder Law Clinic, along with local legal services agencies, worked to address this crisis through negotiating a streamlined emergency Medicaid application procedure with State officials and by conducting an intensive screening of each individual whose

173. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 21 U.S.C. § 862a (2000).

174. Qualified aliens, defined in § 431 of PRWORA, as amended, include: 1) Aliens lawfully admitted for permanent residence under the Immigration and Nationality Act (INA), 8 USC 1101 et seq.; 2) Refugees, admitted under § 207 of the INA; 3) Aliens granted asylum under § 208 of the INA; 4) Cuban and Haitian Entrants, as defined in § 501(e) of the Refugee Education Assistance Act of 1980; 5) Aliens granted parole for at least one year under § 212(d)(5) of the INA; 6) Aliens whose deportation is being withheld under (1) § 243(h) of the INA as in effect prior to April 1, 1997; or (2) § 241(b)(3) of the INA, as amended; 7) Aliens granted conditional entry under § 203(a)(7) of the INA in effect before April 1, 1980; 8) Battered aliens, who meet the conditions set forth in § 431(c) of PRWORA, as added by § 501 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208 (IIRIRA), and amended by § 5571 of the Balanced Budget Act of 1997, P.L. 105-33 (BBA), and § 1508 of the Violence against Women Act of 2000, P.L. 106-386. Section 431(c) of PRWORA, as amended, is codified at 8 USC 1641(c); 9) Victims of a severe form of trafficking, in accordance with § 107(b)(1) of the Trafficking Victims Protection Act of 2000, P.L. 106-386.

175. 8 U.S.C. §§ 1611 (“Means-tested federal public benefits are defined as: “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.”).

176. 42 U.S.C. § 1396(b) (2010).

177. 42 U.S.C. § 1396b(v)(3) (2010).

178. Michelle Weinberg, et al., *Migration, Law, and the Public’s Health*, 33 J.L. MED. & ETHICS 109 (2005).

179. Kevin Sack, *Hospital Cuts Dialysis Care for the Poor in Miami*, N.Y. TIMES, Jan. 7, 2010.

dialysis services were being terminated to determine whether they were eligible for other insurance to pay for the services.

Our clinic was also mindful of the only other highly publicized occurrence of termination of this care, also in the South. Only months before, the public health care entity for the greater Atlanta region had announced that it would no longer fund outpatient dialysis treatments for end-stage renal failure for uninsured immigrants.<sup>180</sup> In that case, we had watched as poverty lawyers filed a series of unsuccessful challenges in state courts based on federal and state domestic law. They then filed a petition requesting precautionary measures with the Inter-American Commission on Human Rights (IACHR), alleging human rights violations.<sup>181</sup>

By many standards, this advocacy was a resounding success. The IACHR issued precautionary measures under its Article 25 authority on behalf of “31 undocumented immigrants residing in Atlanta, Georgia.” The Commission asked “the United States to instruct the competent authorities to take the urgent measures necessary to ensure that the beneficiaries have access to the medical treatment that may be required for their condition.”<sup>182</sup> Despite this success, the victory did not change the rights of the patients to life-sustaining treatment, and several died after they were sent home from the hospital to Mexico.<sup>183</sup>

In Miami, when virtually the same action was taken by our public hospital, the clinic originally thought to pursue the same strategy, and clinic students began to draft an IACHR petition. Our efforts broke down in this regard for three reasons: First, the clinic had developed a close attorney-client relationship with the individuals we counseled and screened whose dialysis treatments were being terminated. The clinic found it difficult to articulate to these clients a real benefit in pursuing the human rights strategy, particularly if it diverted our already over-extended legal resources down an avenue that we knew would not secure any enforceable order for them to receive care.

Second, our clinic believed that raising international human rights violations, going through the exercise of “naming and shaming” might poison our relationship, and our clients’ relationships, with the very entities they depended upon to survive. In this regard, the clinic made a calculated decision that we would get further by negotiating procedures, and requesting assistance for sympathetic individuals, than by making accusations of violation of human rights.

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180. *Id.*; see also Kevin Sack, *Hospital Falters as Refuge for Illegal Immigrants*, N.Y. TIMES, Nov. 20, 2009.

181. Shelia M. Poole & Craig Schneider, *Human Rights Group Looks at Grady Dialysis Clinic Closure*, ATLANTA J. CONST., Jan. 8, 2010, available at <http://www.ajc.com/news/atlanta/human-rights-group-looks-270874.html>.

182. Inter-Am. Comm’n H.R. (PM) No. 385-09-31 (Jan. 29, 2010).

183. Kevin Sack & Catrin Einhorn, *Deal Would Provide Dialysis to Illegal Immigrants in Atlanta*, N.Y. TIMES, Aug. 31, 2010.

Third, the clinic became bogged down in the sheer size of the real enterprise. Any honest assessment of why our clients were being deprived of their life-sustaining care necessarily entailed attacking our entire federal welfare scheme, and especially PRWORA, as a violation of human rights. To fail to raise this seemed disingenuous. Yet, to raise it seemed too enormous an undertaking, and one bound to become mired in process while our clients might die. One year later, the clinic continues to struggle with these issues, and constantly re-weighs the options, as the clinic and our clients go hat in hand to increasingly less sympathetic and poorly funded social services agencies and healthcare providers requesting the needed care.

e. Ethnic Individuals of Haitian Descent in the Dominican Republic:  
The Unintended Consequences of Naming and Shaming and the Move  
Toward Collaborative Transnational Human Rights Lawyering

Over the past three decades, the government of the Dominican Republic has, on a regular and systematic basis, discriminated against Haitian immigrants and Dominicans of Haitian descent living in the country. Such discrimination takes the form of periodic collective roundups and mass expulsions of persons presumed to be Haitian solely on the basis of their skin color and appearance, as well as the denial of birth certificates to individuals born to parents of Haitian origin.<sup>184</sup>

International attention from human rights groups to the situation of Haitian migrants in the Dominican Republic emerged in the 1980s.<sup>185</sup> Advocates focused their efforts on shaming the Dominican Republic before the international community and generating pressure through U.S. State Department human rights country reports.<sup>186</sup> Three cases focusing on Haitian rights were filed against the Dominican Republic before the Inter-American Commission and Court of Human Rights. In 2005, in the case *Yean & Bosico Children v. The Dominican Republic*, the Inter-American Court found the Dominican government respon-

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184. The 1937 Dominican Constitution granted citizenship to all individuals born in the Dominican Republic, with the exception of those born to foreign diplomats or persons “in transit,” Constitución Política de la República Dominicana art. 11 (1937). Through a clever yet disingenuous interpretation of this *ius soli* citizenship provision, the Dominican government has argued that in most cases, the “in transit” exception applies to all individuals who entered or stayed in the country illegally, along with any and all of their descendents. According to the United States State Department, in 2007, an estimated 600,000 to one million Dominicans of Haitian descent had been denied birth certificates and, functionally, Dominican citizenship as a result of this policy. *Dominican Republic Country Report on Human Rights Practices 2007*, U.S. STATE DEPARTMENT (Mar. 2008). In 2009, the Dominican Republic amended its constitution to officially incorporate this interpretation of the “in transit” provision. See Elizabeth Eames Roebling, *Protests Surround New Constitution*, IPS NEWS, Oct. 23, 2009, available at <http://ipsnews.net/news.asp?idnews=48977>.

185. See, e.g., MINORITY RIGHTS GROUP INTERNATIONAL, *MIGRATION IN THE CARIBBEAN: HAITI, THE DOMINICAN REPUBLIC AND BEYOND* 11 (2003).

186. NATIONAL COALITION FOR HAITIAN REFUGEES, *A TROUBLED YEAR: HAITIANS IN THE DOMINICAN REPUBLIC* 1 (1992).



sible for racial discrimination in its citizenship policy, in violation of the American Convention on Human Rights, and ordered the Dominican citizenship law changed.<sup>187</sup> Despite this international condemnation of the Dominican Republic's treatment of individuals of Haitian descent, the country's citizenship laws and policies have ironically become more restrictive, threatening to "further entrench the problem of systematic discrimination identified by the [Inter-American Court]."<sup>188</sup> Moreover, the Dominican government has successfully used the Court's decision as an entrée for preaching nationalist rhetoric and emphasizing the existence of an "international conspiracy" to undermine Dominican sovereignty.<sup>189</sup>

American and Canadian law school professors and human rights clinics have been involved in international human rights litigation, report-writing, and other advocacy related to the plight of individuals of Haitian descent living in the Dominican Republic for more than a decade. The work has presented exciting opportunities for human rights advocacy, but this work also has had troubling implications. What were the unintended real-life consequences for Dominico-Haitians of a laudable human rights campaign designed to shame a government, but which may have worked to the opposite effect? What lessons did the students learn about the role of a human rights lawyer who flies in and out of a distant island periodically to meet (often through a translator) with local partners and clients, and does his/her best to stay abreast of local context in the interim? How did students see themselves vis-à-vis clients and partners who, in most cases, came from a different racial, ethnic, linguistic, geographic, and socio-economic background than their North American representatives/partners? How did students come to define their ethical responsibilities to the individuals identified as "petitioners" in a case or as "victims" in a report? Was there (or could there be) a conflict between the goals of the cause and the goals of client(s)? And was a human rights shaming campaign the most effective or sensible response to the counter-narrative offered by the Dominican government that, as a poor country itself, the Dominican Republic was simply trying to develop sensible immigration measures (and, for that matter, was looking to the U.S. for inspiration)?

More recently, the Columbia Law School Human Rights Clinic, upon reassessing its advocacy on this issue, considered how it might address the

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187. *The Yean and Bosico Children v. The Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

188. David C. Baluarte & Christian M. De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, OPEN SOCIETY FOUNDATIONS 70 (Nov. 2010), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/from-judgment-to-justice20101122](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/from-judgment-to-justice20101122); Hurwitz, *supra* note 132, at 537 (describing how the Dominican Republic reacted to the Boalt Law School International Human Rights Clinic's advocacy on the issue before the Inter-American Commission on Human Rights by expelling between 5000 and 20,000 Haitian migrant workers and those suspected of being undocumented workers).

189. David C. Baluarte, *Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash*, 13 AM. U. HUM. RIGHTS BR. 25 (2006).

Dominican government's grievances that the international community was unfairly picking on an easy target rather than focusing attention on the impact of international trade and investment regimes of the world's empires on small developing countries, and on the migration crisis from Haiti to the Dominican Republic. The clinic examined the practice of collective expulsions and violence against ethnic Haitians in the border zone between the Dominican Republic and Haiti from a foreign policy perspective, and learned that the United States was partially funding, equipping, and training a new elite unit of the Dominican Armed Forces, "CESFRONT," whose mission was to secure the border between the Dominican Republic and Haiti.<sup>190</sup> Local NGOs in the two countries had extensively documented human rights abuses committed or facilitated by CESFRONT, including violence, corruption, and human trafficking.

The clinic is currently pursuing advocacy before the State Department and Congress to draw attention to the human rights violations committed on the border by this military force connected with the United States. Underscoring the transnational dimension to the issue of mass expulsions and violence against Haitians brought coherence to the advocacy, created new alliances between local Dominican Republic-Haiti border NGOs, U.S. NGOs, and the Columbia Human Rights Clinic. It also eased some of the political and strategic discomfort that students and instructors alike had felt with a sole focus on the international litigation against the Dominican Republic.

#### *D. Observations*

The concerns illuminated in the case studies may not be easily resolved within the forums where we practice. The human rights systems within which we work are formal legal systems.<sup>191</sup> The nature of the legal claims sometimes seems to foreclose the possibility of introducing the historical and structural questions, particularly those that address U.S. complicity in human rights abuses. Similarly, with regard to policy projects, human rights work often requires choices based on resources and other realpolitik considerations, including the desire to achieve a concrete and realizable goal.<sup>192</sup> However, the knowledge that we omit from the pages of our immigration applications and policy briefs must nonetheless be broadly advanced through multi-dimensional forms of advocacy—in the classroom, with our clients, with community allies, and in the public discourse generally.

These case studies suggest that there will be no immediate answers forthcoming or easy consensus achieved as to the causes of human rights violations or how

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190. President of the Republic, Decreto No. 325-06, Que Crea el Cuerpo Especializado de Seguridad Fronteriza Terrestre (CESFRONT), Dependiente de la Secretaría de Estado de las Fuerzas Armadas (Aug. 8, 2006).

191. Goodale *supra* note 157, at 51.

192. *Id.* at 48.

to address them. But as one critical social theorist has noted, “CST in education does not ask students to wait until answers to difficult social problems are available to them before they critique them.”<sup>193</sup> For human rights advocates to constrain abuses, they must “consider the ways in which the knowledge they produce is located in global networks of power.”<sup>194</sup> The next section provides a revised approach for teaching and practicing that may further the efforts to more fully realize the lessons of critical theory.

#### IV. CLINICAL LEGAL EDUCATION AS A SITE FOR SHIFTING FROM CIRCUMSTANCES TO STRUCTURE

It is indeed exciting that we have now come to this historical crossroads in which many clinical disciplines are engaging with some form of human rights work. Because clinics often serve as a laboratory for thought processes, analysis, and the practical application of theory, a focus on clinics provides the opportunity to set out and test guides, if not goals, for human rights lawyering generally.

Above we have reviewed the historical and present-day dilemmas engendered by many forms of human rights lawyering and advocacy, particularly those led by groups and individuals in the global North/West. Inspired by the lessons of critical legal theory, as witness to many of our colleagues who have long struggled with incorporating those lessons into their work, and in a quest to further deepen our own understanding of those teachings, we propose a self-reflective, goal-driven approach to clinical teaching and practice in human rights work. We recognize this is an ongoing project, that no clinical discipline has “mastered” a critical approach to its work, but in the spirit of engendering a conversation between disciplines, we lay out here some lessons that we, as poverty law, community lawyering, and human rights clinicians, can learn from each other about how to strengthen our respective approaches to conducting human rights work. In so doing, we are challenged to rethink the entire structure of how we teach lawyering, from encouraging a rigorous practice of self-reflective lawyering amongst our students and building a pedagogy around teaching the genesis of human rights violations, to examining economic and political processes, power relationships, and the mechanics of human rights practice. At the end of this section, we offer some concrete lessons we have learned in order to generate additional discussion about the teaching and practice of human rights and social justice work in law school clinics.

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193. Zeus Leonardo, *Critical Social Theory and Transformative Knowledge: The Functions of Criticism in Quality Education*, 33 EDUC. RES. 11, 31 (2004).

194. Anne Orford, *The Subject of Globalization: Economics, Identity and Human Rights*, 94 AM SOC. OF INT’L LAW PROC. 146, 148 (2000).

A. *Applying Critical Legal Theory to Ambivalent Advocacy*

The process of questioning our assumptions about justice and advocacy strategies, and challenging our methodologies, approaches, and class and project design, is not easy, comfortable, or certain. How does one teach human rights lawyering—an endeavor that Peter Rosenblum has described as “a realm of advocacy tools, not abstract truths—a dynamic amalgam of norms, procedures, and fora, full of tensions and contradictions”<sup>195</sup>—to clinic students? Because human rights advocacy is a “process of strategic decision-making in a realm of uncertainty,” Rosenblum’s pedagogic goal is to train “ambivalent advocates”—that is, students who are “committed to action, but alert to the multiple consequences’ that sometimes, though often unintentionally, accompany such action as part of the advocacy strategy.”<sup>196</sup>

To be clear, our use of the term “ambivalent advocacy” does not imply that we train our students to be ambivalent about a shared social justice mission of alleviating human suffering. Rather, we encourage students to become comfortable when thinking about advocacy beyond the rigid legal frameworks in which they have been immersed and beyond the trial paradigm they have been taught to master, and instead to view human rights lawyering as a matrix that offers several tools to make strategic decisions. Indeed, amongst clinicians, there appears to be a growing recognition of the importance of encouraging students to “think outside the trial paradigm and master the informal encounter.”<sup>197</sup> It is with this orientation toward teaching “ambivalent advocacy” that we reflect on the previous set of case studies to suggest places where we may encounter ethical, moral, and strategic “crossroads” in our work as clinicians, and how critical legal theory may help us to navigate those crossroads to reflect our larger goals as teachers, advocates, and scholars.

B. *Lessons Learned Among Human Rights, Poverty Law, and Community Lawyering Clinicians*

Our initial impetus for beginning this project grew from the malaise amongst the human rights clinicians among us with the dominant manner in which human rights theory and practice has traditionally been conducted and taught to future generations of lawyers in the United States. It seemed that human rights

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195. Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 HARV. HUM. RTS. J. 301, 305 (2002).

196. Hurwitz, *supra* note 132, at 537 (citing Rosenblum, *supra* note 195, at 304-05).

197. Mark Aaronson, Michele Pistone, Jayesh Rathod, & Meetali Jain, Colloquium, *Thinking Outside the Trial Paradigm: Mastering the Informal Encounter*, at AALS Clinical Conference (May 2009). In the session, the presenters also discussed the work of Leah Christensen, who distinguishes between “performance-oriented” learning in law schools and “mastery-oriented” learning, stating that the latter style of teaching and learning allows adult learners to perform better in law school.

clinicians at times distinguished our enterprise from that of our poverty law and community lawyering counterparts in a way that “excepted” us from exploring, whether in the classroom or through project selection, our own replication of privilege and hierarchy, or our own unexamined perpetuation of simplistic imperialist narratives and victim essentialization. Those of us who teach in human rights clinics therefore looked to others of us who teach in poverty law and community lawyering clinics for rich lessons based on years of struggling to incorporate the lessons of critical legal theory into our work. What we have discovered through our conversations are a number of lessons learned, as well as a number of shared challenges and new questions. Here we offer some of those reflections, recognizing that this is the beginning of what we hope to be an ongoing exploration and collaboration.

In particular, we highlight four areas in which our poverty law and community lawyering clinical colleagues have stimulated our thinking about the application of critical legal theory, both in our practice and in our pedagogy: (1) careful selection of cases and projects that reflects a commitment to taking on riskier endeavors that we situate in their social, political, and historical contexts; (2) creating and adopting an ethical framework that is responsive to the challenges we face in our work; (3) redefining community lawyering to include different kinds of collaborative partnerships, from working with communities, to identifying transnational dimensions to our work, to working with non-legal professionals; and (4) creating an ongoing self-awareness about power differentials and how that informs our work with respect to race, class, culture, gender, ethnicity, disability, sexual orientation, and sexual identity. Answers are not easy or forthcoming in any of these areas, but engaging with the questions, and teaching our students to identify and engage with these questions, is as critical, we believe, as the answers themselves.

### 1. Carefully Selecting Cases/Projects and Situating Them Within a Broader Context

Above, we discussed the collective failure of traditional human rights clinics to find a place for teaching students about the socio-political and historical determinants giving rise to the violations they endeavor to remedy. This dialogue has clarified that poverty law clinics have similarly long struggled with teaching students about the structural inequalities in which their individual clients are positioned. So how then do we achieve this, and for what purpose? One strategy by which to do this may be to choose projects, whether domestic or international, that go beyond the readily apparent violations, beyond the moralistic, and which provide opportunities to pressure hegemonic power and the consequences of the ideology of neoliberalism. Of course, this should be done in consultation with communities, identifying the issues that they, through their representatives, feel

are most important to address. Also, in thinking about where our clinics are situated, it may be strategic to consider selecting projects in which U.S. misuse/abuse of power can be highlighted and exposed. We must then be prepared to respond to the next question: for what purpose are we choosing cases and projects that are richly layered in this way? Do we seek simply to teach about the determinants of a case for its pedagogical value or its intellectual challenge, or is there a tangible advocacy opportunity that may present itself? Even if advocacy opportunities present themselves, are they consistent with the client's advocacy goals? If not, should we nevertheless seize these opportunities outside the context of that particular client, and how? And can we always know in advance which projects and cases will lend themselves to this sort of scrutiny?

a. Pedagogical Strategies:

“[T]he point is not just to explain the world but to change it”<sup>198</sup>

We suggest a rethinking of our pedagogical strategies to include the political-economic and historical sources of human rights crises at the same time we seek to remedy their consequences. By doing so, we contribute to the reevaluation of the relationship between law and rights on the one hand, and socio-economic structures on the other. Attention to the ideological logic of the market provides students with the opportunity to examine the ways that the excesses of capitalism contribute to “normalizing” human rights abuses. While progress has been made in teaching cross-cultural competence, the development of explicit conceptual frameworks for an understanding of the sources of harm has lagged behind.<sup>199</sup> It might be helpful also to include in our teaching the global “emancipatory experiences” and successful movements to better appreciate the promises of an alternative world.<sup>200</sup>

Attention should be given to perspectives that include issues of colonialism, post-colonialism, global economics, and imperialism. Students should be encouraged to consider the ways in which U.S. interests preclude the development of a consistent set of human rights norms. This may encourage students to deepen their analysis and consider the ways in which economic globalization has contributed to global human rights harms.

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198. Robert W. Cox, *The Point is Not Just to Explain The World but to Change It*, in OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 86 (Christian Reus-Smit & Duncan Snidal eds., 2008).

199. Agarwal & Simonson, *supra* note 159, at 489 (noting that public interest legal organizations do not necessarily have clear conceptions of social justice).

200. Santos, *supra* note 118 (identifying for example, Haitian independence in 1804, the Indigenous movement—Quintin Lame in Colombia, the Sandinistas, the Cuban Revolution, Landless Movement in Brazil, Zapatistas in Mexico).

b. Developing the Capacity for “[R]iskier projects that are more aligned with the transformative goals of empowerment, social justice”<sup>201</sup>

Vasuke Nesiah and Alan Keenan have persuasively argued that strategies designed to ameliorate human rights abuses are not likely to be effective unless they challenge hegemonic ideologies and dominant political structures.<sup>202</sup> Such strategies require the engagement of projects to confront the economic and political factors that shape the violations and, at the same time, respond to the needs of victims.

Nitzah Berkovitch and Neve Gordon describe the limitations present in much of human rights work:

While legal accomplishments can sometimes challenge social structures, they are usually confined to mitigating the structure’s excesses (i.e., unintended results that constitute violations). Consequently, they often also end up strengthening the system itself, since by correcting some of the structure’s ‘dysfunction,’ direct litigation helps produce the belief that there is an impartial system that adjudicates between parties and corrects wrongs. In this way it helps silence structural criticism.<sup>203</sup>

Berkovitch’s and Gordon’s critique is at the core of critical legal theory. This does not mean that legal strategies—as confined as they might be—ought to be abandoned. However, without responding to the structural issues that may be silenced, critical theory often fails to serve practice in any meaningful way. As others who study human rights abuses have admonished, addressing violence without recognizing it as “a broad condition in which endemic poverty, rapid structural adjustment, and a lack of law enforcement are clustered risks compounding rather than ameliorating it.”<sup>204</sup>

Client-specific cases and prototype human rights policy projects may present constraints on our ability to address the structural realities that give rise to the claims we undertake. Of course, these cases and projects are important, and we will continue to undertake them despite limitations. The gains to be had, for example, in representing individuals fleeing persecution or providing guidance for responding to gender-based violence cannot be overstated. However, we might consider projects that create spaces for both immediate response and long-term transformative changes. Such projects would reflect the same tensions contained within social justice movements outside of the realm of law. If we represent individuals fleeing escalating drug-cartel violence in Mexico, or the

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201. McKinley, *supra* note 97, at 101.

202. Vasuke Nesiah & Alan Keenan, *Human Rights and Sacred Cows, Framing Violence, Disappearing Struggles*, in *FROM THE MARGINS OF GLOBALIZATION, CRITICAL PERSPECTIVES ON HUMAN RIGHTS* 261, 284 (Neve Gordon ed., 2004).

203. Nitzah Berkovitch & Neve Gordon, *The Political Economy of Transnational Regimes: The Case of Human Rights*, 52 *INT’L STUDIES. Q.* 881, 894 (2008).

204. Benson et al., *supra* note 114.

crisis of gender violence in Latin America, we might join forces with transnational networks and local social movements, as discussed below, that are seeking ways to oppose to current models of free trade.<sup>205</sup> There are clearly many more possibilities, and, in fact, some human rights practitioners have undertaken projects that address sources of impunity and endeavor to affect fundamental social change.

Human rights projects are difficult to identify in the abstract; they are often dependent on extending our knowledge beyond that with which we are familiar and they are most useful if they are determined and planned from the bottom up. Boaventura de Sousa Santos cautions about the limitations of critical theory as it is conceived in the global North and the practices it engenders. He states that “a wide variety of new left practices occur in unfamiliar places carried out by strange people; they also speak very strange non-colonial languages (aymara, quechua, guarani, indi, urdi, isiZulu, kikongo or kiswahili) or less hegemonic colonial languages such as Spanish and Portuguese and their cultural and political references are non-Western.”<sup>206</sup> He suggests that the work of human rights advocates must include a process of developing a transnational socio-political legal culture that identifies alternatives undertaken in solidarity with resistance movements throughout the globe. Indeed, critical theory, together with transformative practices, calls for nothing less than such initiatives.<sup>207</sup>

## 2. Adopting a Meaningful Ethical Framework

A lesson that resonates strongly from the Gulf Coast case study is the need for rigorous accountability. Often, questions of our accountability emerge primarily in discussions of the ethical parameters constraining our work. A challenge we face, however, is that there is no professional code of conduct explicitly designed for human rights practitioners, no commonly agreed-upon ethical rules. Many of the professionals who work in the field of human rights may be governed by ethical codes corresponding to their profession. But how far does this go towards providing guidance or governance in employing the full range of human rights advocacy tools?

Once we set afoot on this exploration, we discover that a series of ethical questions emerge, questions with which our poverty law and community lawyering colleagues have also struggled. It is important for us to dwell on the lawyer-client relationship because it is at the heart of the common understanding of the lawyer's role and the basis for traditional ethical analysis. How do we

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205. For a review of coalitions involved in such work, see ALLIANCE FOR RESPONSIBLE TRADE, <http://www.art-us.org/content/what-alliance-responsible-trade-art>.

206. Boaventura de Sousa Santos, *The World Social Forum and the Global Left*, 36 POL. & SOC. 247, 258 (2008).

207. *Id.* at 253 (arguing that the conception and the struggle for an alternative society has been the core of critical theory).



maintain a client-centered approach in our work and what does that entail, whether it is about how we portray our clients publicly or about how we address cross-cultural competencies? We also need to explore the more common circumstances in human rights advocacy where the client is not technically an individual. Then we must consider our relationship with our client vis-à-vis our relationship with the larger human rights movement. If we do not have such a relationship, how do we avoid becoming free agent activists beholden only to a certain set of aspirational norms?<sup>208</sup>

In the Dominican Republic/Haiti case study, the Human Rights Clinic's experience with the advocacy itself became the basis of a pedagogical exercise in exploring ethical dilemmas. As demonstrated from heated debates amongst students that ensued in the classroom, "legal ethics," as defined by the Model Rules of Professional Conduct or any given state bar's rules of ethics, was not always a sufficient lens for examining various ethical dilemmas in human rights practice. What value then is there in exploring the ethical codes of other professions (medical, academic, journalism, humanitarian)?<sup>209</sup> One proposal by a student in the Columbia Law School Human Rights Clinic suggests adopting the following eleven principles from various professions to guide the ethical behavior of international human rights lawyers: exercise competence; undertake effective communication; maintain independence; engage in zealous advocacy; do no harm; protect life, health and dignity; assess risks/benefits to the population; guarantee fully informed consent; ensure accuracy and objectivity; practice cultural sensitivity; avoid conflicts of interest; and take steps to ensure accountability.<sup>210</sup>

While we do not have space here to develop these principles in great depth, we plan to do so in the future. For now, we think they serve as useful guideposts for a consideration of the place of diverse ethics norms in our work.

### 3. Rethinking Community Lawyering: Local and Global

One transformative practice centers on the lawyer's own focus and attention to "collaborative lawyering." As discussed in the domestic context, there is a strong role for international/human rights lawyering that prioritizes a pedagogy based on collaboration with impacted people otherwise known as "the clients." This model envisions a type of lawyering that cedes control and decision-making to

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208. These were amongst the framing questions posed during the March 2008 Human Rights Clinicians' Meeting at Columbia Law School.

209. This analysis was developed through a series of classes taught at Columbia Law School and in other institutions by Caroline Bettinger-Lopez and Peter Rosenblum, and a series of discussions between several of us and our human rights clinical colleagues at, *inter alia*, the March 2008 Human Rights Clinicians' Meeting at Columbia Law School and the May 2010 AALS Clinicians' Conference workshop mentioned in the introduction to this Article.

210. See Rachel Barish, *Professional Responsibility for International Human Rights Lawyers: A Proposed Paradigm* (2007) (unpublished manuscript) (on file with authors).

non-attorney, local actors working for equitable, social change and recognizes the systemic and structural inequalities. In this model, the lawyer must tailor his or her own practices to cultivate meaningful and trusting relationships with the client while remaining conscious of the process of collective mobilization and cognizant of the broader social movement goals. In short, it is the essence of one type of shared vision for justice that can have lasting and meaningful impact in the kind of broad and deep system change that social movements are most concerned about.<sup>211</sup> How is this model achieved? We offer some tentative suggestions for theory and approach.

a. Building Solidarity and Developing Broad Challenges to Injustice

Critical to this lawyering practice in both domestic and global settings is an understanding that there is no single, monolithic “community” with which lawyers interact. “Community” is often built by complex coalitions and alliances that can include numerous actors and leaders, intentional partnerships, and various relationships (or history of relationships) with government actors. Lawyering based on respect for those within a community holds the people—those people who are impacted the most by policies and decision-making—as indispensable to and for a successful lawyering process. In this respect, the term “collaborative lawyering” rather than “community lawyering” might better describe the central values, relationship and alliance, between lawyer and client in a participatory lawyering model aimed at tactical coordination, community mobilization and large-scale transformation for justice.

Key approaches point lawyers toward realizing this model, which turns traditional lawyering on its head. Rather than focusing on primarily individually-centered goals, “collaborative lawyering” seeks to advance collective mobilization and establish and build networks with participant control. To accomplish this, lawyers should have a sophisticated understanding of the underpinnings of critical legal theory: race, gender, and class oppression. In the international human rights context, lawyers must also develop and monitor their own ideas, discourse, and actions in light of social and cultural values; local economic and political forces; needs of vulnerable populations involved (or not involved) in decision-making; the community’s past experiences with collective action; and the spectrum of movement priorities.

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211. The limitations of traditional lawyering have been amply described in the literature. The civil legal aid model has aimed to address the lack of lawyers and court access for poor people. In this way, the model does not challenge the inherent systemic injustices. Working within the system, “[p]overty lawyers have been described as oppressors, as domineering, as unreflective, as poor lawyers, or as unfeeling bureaucrats.” Paul R. Tremblay, *supra* note 82, at 949 (1992) (focusing on the services poverty lawyers provide and the structure of their relationships with clients, these types of critiques question the long-term benefits of the traditional lawyering model whereby systemic oppression continues unchecked even as an individual case might have a successful outcome).

Lawyers should be adaptive to an often-chaotic social movement response that is, by nature, fluid. Goals, strategies, and tactics vary and morph depending on circumstances and grievances. In the international human rights context where a “transnational lawyering” approach continues to grow, this premise is critical. As donors invest heavily in reforming place-based politics, lawyers working for large-scale law reform and those engaged in international advocacy that tests new theories and claims in an increasingly-internationalizing context will firsthand the legacies of opportunistic colonialism, globalization, and the impact of neo-liberal economic and political forces. Lawyers should be ready to learn and should expect to practice law with dramatically different boundaries. Specific considerations emerge from the “collaborative lawyering” model as it is applied in the international human rights context.

Importantly, lawyers must be cautious not to usurp or diminish community power in any community process. “The risk that legal strategies will increase the community’s ideological subjugation, rather than build its power, can only be countered if the lawyer consciously identifies himself with ‘ground level organization’ within the community . . . .”<sup>212</sup> Even as the lawyer mindfully works in an intentionally-collaborative process, the very fact that the lawyer is engaged in *lawyering* within and on behalf of a vulnerable community itself presents challenging questions about power and calls into question the limitations and authenticity of the lawyer’s relationships with community members:

Lawyering relationships—like all relationships—cannot be purged of power or the possibility of coercion and complicity with the group domination. The issue of power pervades all aspects of the community lawyer’s job, from decisions about whether to take on a case to the nature of the lawyer-client relationship to tactical and strategic issues within a particular case.<sup>213</sup>

This tension around power calls into question inherent challenges with lawyering and in particular, “collaborative lawyering” for justice. The lawyer must confront not only power dynamics but also the legacy that “lawyers can be and often are destructive of real justice.”<sup>214</sup> Whether the “collaborative lawyering” model can be developed to its potential so that lawyers and the law are actually used reliably as tools for social change by those who will benefit from systemic social justice reforms is uncertain. The lawyer’s ability to actively reflect on the dynamics of the profession in the world order and vis-à-vis social justice goals must be part of a process that frees the lawyer from relationships driven by power and privilege. This requires reflection on the profession as a

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212. Lucie White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 742 (1988).

213. Angela Harris et al., *From “The Art of War” to “Being Peace”: Mindfulness and Community Lawyering in a Neo-Liberal Age*, 95 CALIF. L. REV. 2073 (2007).

214. William Quigley, *Revolutionary Lawyering*, 20 WASH. U. J.L. & POL’Y 101 (2006).

whole: “Current professional responsibility courses do not address justice or fundamental inequality and the lawyer’s role in fashioning and maintaining that inequality.”<sup>215</sup>

In the international human rights context, there are also serious risks of reprisal and harm for lawyers in challenging the state’s authority or failures, but the primary risks are borne by the people they serve who have no escape route from the community in conflict. While the grave risks underscore the tremendous transformative potential of involvement with global struggles, the dynamic of risk creates natural tensions in the lawyer’s professional engagement in international human rights issues and conflicts. As the scale of advocacy increases, pressure in and on the local community also increasingly calls into question whether the potential positive impacts of “collaborative lawyering” can withstand and sustain. And for the participants—those with grievances about systemic forces interfering with their own lives, they must also be able to endure co-optation and conformation through an extremely pressurized process. As Lucie White has noted, “social groups risk stunting their own aspiration. Eventually they may find themselves pleading for permission to conform to the status quo.”<sup>216</sup> This caution resonated with those of us struggling with the denial of life-sustaining health care in Miami, as we very much feared alienating the providers on which our clients depended for survival with charges that they had violated international human rights norms.

Finally, lawyers working in an international human rights context must consider their own motivations and re-imagine what is possible. “[L]awyering success is not measured by whether a case is won. It is rather measured by such factors as whether the case widens the public imagination about right and wrong, mobilizes political action behind new social arrangements, or pressures those in power to make concessions.”<sup>217</sup> This ideal is one that can carry lawyers forward in strategic work for justice.

#### b. Creating Transnational Partnerships

Building on the importance of collaborative lawyering as a model for our work, and reflecting on the importance of the partnership between human rights lawyers and grassroots social movements, as underscored in the Gulf Coast case study, we understand even more the critical importance of building transnational alliances in our work, and where our work requires domestic, subnational alliances. These transnational and subnational links allow us to remain grounded in local realities, and constrain opportunities to subvert the agenda of those most affected by replacing it with our own agendas as “outsiders,” or “foreigners.” Moreover, these transnational links are imperative because of the possible

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215. *Id.*

216. White, *supra* note 212, at 757.

217. *Id.*

far-reaching impact of the work we do, and so to not consider these links is to act irresponsibly in terms of anticipating all possible consequences and impacts of our work. Thinking and acting transnationally thus is one antidote to a myopic view of human rights.

To adequately respond to an increasingly interconnected, global world in which the historical and structural determinants of human rights violations are growing in complexity, human rights advocates, with human rights clinics at the forefront, are well-positioned to strategically build transnational alliances. Arguments that justice is fundamentally to be debated and delivered upon within national borders have lost appeal as the social processes shaping peoples' lives routinely overflow territorial borders.<sup>218</sup> The call to build transnational networks extends beyond the development of universal norms to address shared human rights concerns; it demands a vibrant and ongoing relationship between social justice advocates as well as those most affected by human rights violations themselves to engage each other in discussion of the challenges they face and their opportunities for moving forward together. As Scott Cummings and Louise Trubek note, transnationalism "acknowledge[s] the ultimate limits of state power and assert[s] the need for globalized social justice strategies."<sup>219</sup>

Transnationalism serves multiple purposes. First, it serves to strengthen and render more effective the overall human rights project by amplifying within an international context human rights concerns that may be seen as isolated domestic or local concerns. Framing human rights violations as internationally-occurring transgressions, for which all countries must be held accountable, allows activists and advocates to mediate the tension between competing conceptions of rights, often between national governments and locally-affected persons and communities. This approach is particularly compelling in our increasingly-globalized world, in which specific violations or transgressions are so often not solely attributable (if they ever were) to one particular state actor, but rather may be attributable to one or more state and non-state actors, including international financial or political institutions.<sup>220</sup>

Second, the shared language of human rights allows advocates to converse with each other and expand possibilities for their own advocacy. In certain political contexts, such as the United States, in which global exceptionalism continues to carry much currency within public discourse, advocates are able to learn from their global counterparts as they build their campaigns even if they

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218. Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 NEW LEFT REV. 71 (Nov.-Dec. 2005).

219. Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 1 (2008).

220. See, e.g., NYU School of Law Center for Human Rights & Global Justice et al., *Wòch nan Soley: The Denial of the Right to Water in Haiti* (2008), [http://www.law.nyu.edu/ecm\\_dlv2/groups/public/@nyu\\_law\\_website\\_\\_alumni/documents/documents/ecm\\_pro\\_067267.pdf](http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__alumni/documents/documents/ecm_pro_067267.pdf) (examining accountability of not only Haiti, but also the international community, including the Inter-American Development Bank and the countries that guide it, for the lack of safe drinking water in Haiti).

ultimately strategically eschew the language of human rights. For example, the Women's Institute for Leadership and Development (WILD) for Human Rights used the Convention to End Discrimination Against Women to advocate for the incorporation of a human rights framework at the local level in San Francisco, although it used the language of "discrimination," not "human rights," to connect with an audience that was unfamiliar with the terrain of international human rights law.<sup>221</sup>

Additionally, transnational engagement allows movements struggling for recognition within their own contexts another platform for such recognition, through legitimizing their efforts abroad and then carrying that badge of legitimacy home.<sup>222</sup> Finally, advocates are increasingly realizing that without transnational engagement, local or national claims for redistribution are inadequate and in fact, effective remedies extend beyond national economies and institutions.<sup>223</sup> Where decisions made in one territorial state have ripple effects elsewhere, the call for concerted action is not just an ideal, it is imperative to adequately address the violations. Transnationalism therefore becomes a means by which to provide representation to the many who are denied the chance to press their claims of misdistribution and misrecognition within borders outside of their own, even though the forces that perpetrate injustice flow across borders.<sup>224</sup>

Advocates and students can learn from transnational alliances built amongst people and communities affected by violations themselves. Many of these transnational alliances have been built around regional free trade agreements, workers' rights, and corporate exploitation.<sup>225</sup> At the grassroots level, local groups sought out international allies to challenge government restructuring and corporate projects stimulated by neoliberalism.<sup>226</sup> One widely noted example was the movement of people displaced by the World Bank-funded Narmada River dams, in which mass resistance worked together with domestic litigation and international advocacy before the World Bank and International Labor Organization.<sup>227</sup>

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221. Anu Menon, HUMAN RIGHTS IN ACTION: SAN FRANCISCO'S LOCAL IMPLEMENTATION OF THE UNITED NATIONS' WOMEN'S TREATY (CEDAW), S.F. DEP'T ON THE STATUS OF WOMEN, CITY AND CNTY. OF S.F. (2010), <http://www.sfgov3.org/Modules/ShowDocument.aspx?documentid=314>.

222. Fraser, *supra* note 218, at 72. Nancy Fraser cites the example of feminists throughout the world who are linking their struggles against local patriarchal practices to campaigns to reform international law. Deborah Weissman describes such a network of feminists from Latin American and the Caribbean who gather every few years for the Feminist Encuentros, in which thousands of feminist activists share and design strategies to develop their political agenda on behalf of women's rights. Deborah Weissman, *Gender and Human Rights: Between Morals and Politics*, in GENDER EQUALITY 413-414 (McClain & Grossman eds., 2009).

223. Fraser, *supra* note 218, at 72.

224. *Id.* at 78, 81.

225. Cummings & Trubek, *supra* note 219.

226. *Id.*

227. Smita Narula, *The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle Against the World Bank* (N.Y. Univ. Pub. Law & Legal Theory Working Papers, Paper No. 106, 2008), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1106&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1106&context=nyu_plltwp).

Another transnational development has emerged with the growth of Alien Tort Claims Act litigation, in response to global outsourcing and resource extraction by transnational corporations.<sup>228</sup> Such litigation has afforded human rights lawyers in the North the opportunity to work closely with survivors and NGOs in the countries in which the violations occurred. For example, the Khulumani Alien Tort Statute (ATS) litigation sought to hold liable dozens of foreign multinational corporations and banks for their complicity in perpetrating the horrors of the apartheid regime in South Africa.<sup>229</sup> The plaintiff, a grassroots NGO entitled the Khulumani Support Group, is comprised of members who are self-identified “victims” and “survivors” of gross human rights violations under apartheid who routinely engage in broad-based advocacy nationally and internationally.<sup>230</sup>

We clinicians must join this trend of transnationalism as we devise human rights advocacy strategies. Moreover, we must encourage our students to engage in the analysis of why transnational networks are important, how best to operationalize them to achieve intended purposes, and to anticipate unintended consequences.

Recently, U.S. clinics have started to build transnational networks with clinics and human rights centers in the Global South. For example, the Global Alliance for Justice Education was founded in the late 1990s to facilitate the network of clinical and practice-oriented law school professors from around the world interested in promoting social justice pedagogy. The Legal Resource Centre in Ghana’s collaboration with U.S. law schools provides another interesting example in that the partnership promotes alternative forms of public interest practice geared toward reforming development.<sup>231</sup> Another recent example is found in the North-South Consortium between Diego Portales University School of Law (Chile), University of the Andes School of Law (Colombia), University of Miami School of Law, Columbia Law School, and Harvard Law School. In February 2011, Diego Portales and Miami law schools hosted a convening, *Gender Justice in the Americas: A Transnational Dialogue on Sexuality, Reproduction, Violence, and Human Rights*, with the goal of promoting a transnational exchange among advocates and scholars, including amongst law school clinics, working on gender and sexuality issues from over twenty countries throughout North, South, and Central America, and the Caribbean.<sup>232</sup>

Finally, we must identify possible opportunities to partner on cases with transnational implications. Indeed, it is the rare human rights case or cause that exists in a geographic vacuum. While a transnational perspective may not always

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228. Cummings & Trubek, *supra* note 219. The ATCA provides federal court jurisdiction in the United States for noncitizens bringing tort claims alleging a violation of international law. *Id.*

229. See KHULUMANI SUPPORT GROUP PAGE, <http://www.khulumani.net/reparations/corporate/222-lawsuit-overview.html> (last visited Mar. 4, 2011).

230. *Id.*

231. Cummings & Trubek, *supra* note 219.

232. See [www.law.miami.edu/genderjustice](http://www.law.miami.edu/genderjustice) for additional information.

be appropriate in a given case, it is a good idea for lawyers and clinicians to always at least consider as much when pursuing a given case or legal strategy. Indeed, the United States Supreme Court has in recent years cited to foreign law in a number of its decisions, often accepting amicus briefs from foreign individuals, NGOs, and entities that have an interest in the outcome of domestic litigation in the United States.<sup>233</sup> Embracing a transnational perspective does not always come easy for U.S. lawyers, but it is important for advocates to understand the implications of our country's laws and policies abroad, and vice versa – even if this information does not enter into a particular case or campaign.

Thus, for instance, in the case of *Jessica Lenahan (Gonzales) v. United States* before the Inter-American Commission on Human Rights, involving the affirmative obligations of the government to protect a domestic violence victim and her children, an amicus brief submitted by twenty-nine amici from Latin America, the Caribbean, and Canada underscored the potential normative impact of the case at the regional level.<sup>234</sup> In another example, students from the American University Washington College of Law (WCL) worked together with students from the Human Rights Centre at the University of Pretoria in South Africa to make a joint submission and presentation to the African Commission on Human and Peoples' Rights advocating for the recognition of access to essential medicines as part of the right to health.<sup>235</sup> With the WCL students focused on lessons from the jurisprudence of the Inter-American Human Rights System and the Pretoria students focused on the African Human Rights System and domestic jurisprudence throughout Africa, this project signaled the potential of opening up further conversations between regional human rights systems.

### c. Developing a Framework for Lawyering that May Have Applicability Across Different Disciplines/Realms

Truly embracing a collaborative lawyering model also allows us lawyers to work alongside other professionals. The identification of the structural determinants of human rights violations may enable an examination of the sources of other social problems that may not generally be regarded as human rights concerns. For example, one might move from the individual and idiosyncratic explanations for deviant behavior to the structural/socio-economic promises to

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233. See, e.g., Brief for Christopher Simmons, et al. as Amici Curiae Supporting Respondents, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), available at [http://www.njdc.info/pdf/death\\_penalty/48%20nations.pdf](http://www.njdc.info/pdf/death_penalty/48%20nations.pdf).

234. See Brief for the Ctr. of Justice and Int'l Law et. al. as Amici Curiae Supporting Petitioner, ¶ 1, *Jessica Gonzales v. United States*, (No. 1490-05); Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007), [http://www.law.columbia.edu/center\\_program/human\\_rights/InterAmer/GonzalesvUS](http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS); see also Bettinger-Lopez, *supra* note 25.

235. ACHPR, *Resolution on Access to Health and needed Medicines in Africa*, Res.141 (XXXXIII)08 (Nov. 24, 2008), available at [http://www.achpr.org/english/resolutions/resolution141\\_en.htm](http://www.achpr.org/english/resolutions/resolution141_en.htm) (last visited Apr. 9, 2011).



enhance critical criminal law, domestic violence law, and provide for broader solutions. Victim and violator alike are formed by social arrangements that are historically contingent and subject to variable factors. In the realm of socio-economic rights, the work of human rights lawyers would be amplified by working with economists and political scientists in examining development-based approaches in tandem with right-based approaches to issues.<sup>236</sup> By enriching our pedagogical, theoretical, and practical approach to challenge the systems that produce anti-social norms, we may contribute to a better understanding of the relationship between institutional and individual behaviors and thus assume “a more complex recognition of shared responsibility” for the production of rights violations.<sup>237</sup>

#### 4. Create an Ongoing Self-Awareness Amongst Our Students

Much ink has been spilled in creating a rich corpus of scholarship about how to create a pedagogy that explores power differentials between students, clients, communities, institutions, supervisors, and the academy. As we dialogue with our colleagues, however, we are reminded that these teachings have not become entrenched in the pedagogy of human rights clinics. This is true despite the fact that often these differences are striking and likely inform the lawyering in either beneficial or adverse ways. We think it critical to engage in this reflective practice of building cross-cultural competencies because it encourages students to create a practice of self-awareness and self-improvement, day-to-day, in cross-cultural lawyering<sup>238</sup> interactions and it also creates a common vocabulary for a shared discussion of these practices in individual, group and classroom settings.<sup>239</sup> It is all the more important for human rights students to squarely locate themselves in the lawyering process, as the international human rights movement traditionally allowed lawyers to disassociate themselves from their clients and causes, either because of the distance involved, cultural barriers, or the implicit moral

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236. See, e.g., Vivek Maru, *Allies Unknown: Social Accountability and Legal Empowerment*, 12 HEALTH & HUM. RTS. J. 83 (2010), available at <http://www.hhrjournal.org/index.php/hhr/article/view/205/300>.

237. Alan Rosenthal & Elaine Wolf, *Unlocking the Potential of Reentry and Reintegration* 6 (Ctr. for Cmty. Alt., Just. Strategies Working Paper, 2004), available at [http://www.communityalternatives.org/pdf/unlocking\\_potential.pdf](http://www.communityalternatives.org/pdf/unlocking_potential.pdf).

238. Cross-cultural lawyering occurs when lawyers and clients have different ethnic or cultural heritages and when they are socialized by different subsets within ethnic groups. Thus, everyone is multi-cultural to some degree. Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color, or a variety of other characteristics.

239. Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY & LAW (Kimberly Barrett & William George eds., 2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. R. 33 (2001); Susan Bryant & Jean Koh Peters, *Reflecting on the Habits after Ten Years: Teaching About Race, Identity, Culture, Language and Difference* (forthcoming chapter in an anthology on clinical pedagogy).

justification of their role as identified with the “universally accepted” agenda of the human rights framework.

Ten years ago, Sue Bryant and Jean Koh Peters developed the Five Habits of Cross-Cultural Lawyering that offer a workable pedagogy for teaching and reflecting on cross-cultural lawyering. These Habits<sup>240</sup> (Habit One: Degrees of Separation and Connection, Habit Two: The Three Rings, Habit Three: Parallel Universes, Habit Four: Red Flags and Correctives, and Habit Five: The Camel’s Back) are based on three principles: “1) [T]hat all lawyering is cross-cultural, 2) that the competent cross-cultural lawyer remains present with this client, ever respecting her dignity, voice and story, and 3) that the cross-cultural lawyer must know oneself as a cultural being to understand his or her biases and ethnocentric world views.”<sup>241</sup>

Acknowledging these principles are important to avoiding diving into the “Savage-Victim-Savior” metaphor described by Matua.<sup>242</sup> Through these practices, students explore and address not only the power differentials that inform their lawyering, but also confront the fact that culture is everywhere; indeed, the law itself is a culture which cannot be taken for granted, especially transnationally or amongst communities who have been shaped by differing values and behavior. These practices allow students to understand concepts like implicit bias and ethnocentric thinking, which, in turn, allow them to comprehend the ways that all people misjudge, mishear and use their power inappropriately. Importantly, students are shaken out of rigid ways of thinking, for even as we teach them about cultural theory, we reinforce the notion that culture should not be thought of as determinative, as a perfect predictor of individual or community behavior. Indeed, when students early on understand to look for the cultural complexities and nuances within each person as an individual, we, as a human rights movement, can effectively answer the critiques levied against us in terms of essentializing victims and perpetuating imperialist narratives.

In this practice, it is critical not to depoliticize the role that race and culture play in perpetuating systemic injustice and creating the material inequalities that our clients and partners confront. Teaching about race, ethnicity, and culture also improves our students’ ability to understand how other vectors of oppression operate in the legal system, and to learn how to use this understanding to achieve justice and find legal solutions for individuals and communities. It also enables

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240. In brief, Habit One encourages students to consciously identify similarities and differences between clients and themselves, and assess both the impact and significance of these on the attorney/client relationship. Habit Two asks students to go further and assess how these similarities and differences influence interactions between clients, legal decision-makers, opponents, and the lawyers. Habit Three invites students to identify multiple alternate explanations for clients’ behavior. Habit Four encourages cross-cultural communications. Habit Five prompts students to recognize other factors that impact on attorney/client interactions, and if necessary, to take corrective actions to remedy a derailed relationship. *Reflecting on the Habits After Ten Years*, *supra*, note 239, at 51-59.

241. *Id.* at 3.

242. *See* Matua, *supra* note 4.

them to become leaders on these issues in the profession and broader society, as well as provides them a safe space where they can explore their own racial identity and how it shapes their lawyering process. Our reticence to make these lessons an explicit part of our pedagogy will signal to our students that these issues are not important or should not be discussed within the context of their work. We will have failed to prepare them to be the kind of self-reflective professionals necessary to transform the human rights field.

## 5. Lessons Learned and Offered

### a. What Human Rights Clinicians Have Learned

Perhaps most importantly, what we as human rights clinicians have learned from our colleagues practicing in the area of poverty law and community lawyering is that the justification for an “exceptionalism” for human rights within the clinical field—that human rights clinics are different and therefore require a different pedagogy and set of lawyering tools—is overinflated. We fully recognize that as a newer clinical discipline, human rights clinics have yet to incorporate many of the traditional critical legal theory principles in scholarship and in practice, but we find the theoretical underpinnings of critical legal theory allow the principles to be extended and applied to the work we do.

### b. What Poverty Law and Community Lawyering Clinicians Have Learned

Based on our conversations with our human rights clinical colleagues, we as poverty law and community lawyering clinicians are energized by the expansiveness and creativity that routinely informs human rights lawyering. One of the outgrowths of not having as many strict legal constraints on the work, in terms of available claims or possible fora, appears to have been to encourage human rights practitioners to think outside the box, to view the law ultimately as a construct, and to push for interpretations and outcomes that are more consistent with our clients’ objectives and the objectives of grassroots social movements. It is important to be strategic about when to use human rights, though, and when it is used, of how to talk about it with clients, the public, and decision-makers. Social movements have responded well to embracing the language of human rights, as the manner in which human rights principles are articulated more effectively speak to client and constituent interests and how they define the injustices they face.<sup>243</sup>

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243. The Border Network of Human Rights and the Coalition of Immokalee Workers, amongst other movements, have readily utilized the human rights discourse as an effective organizing principle. Indeed, the Coalition of Immokalee Workers has for years waged powerful Fair Food and Anti-Slavery Campaigns, which have resulted in some notable successes, including most recently a signed agreement with the Florida Tomato Growers Exchange to extend the Fair Food principles, including a strict code of conduct. Although in many respects, the worker-members in CIW fall outside traditional federal and state labor protections, they have strategically used human rights principles, treaties and instruments to include

While the lessons many poverty lawyers have internalized about ethical questions such as who is the client and to whom or what value system does the lawyer owe allegiance continue to reverberate, they take on more urgency and new meaning as we struggle to digest the possibilities of incorporating human rights strategies into our work. We look to the ethical questions raised by our human rights colleagues with great interest as they navigate new but seemingly-familiar territory. Similarly, the admonition of John Calmore that poverty law “is not a tourist adventure” and that “we must eschew the routine of the autonomous, interloping advocate” strikes us as particularly important to bear in mind as we embark on new strategies.<sup>244</sup> We are challenged by our human rights colleagues to employ and to consider the lessons of “ambivalent advocacy” that may be called for in teaching our students about employing human rights strategies as well as more traditional advocacy strategies, in domestic social justice clinics.

### c. The Universal Periodic Review Process: Promises, Limitations and Challenges

In 2010, human rights advocates, poverty lawyers, grassroots advocates and members of communities confronted by the United States’ failure to achieve the fulfillment of human rights for all, participated in various capacities as the United States underwent its first ever Universal Periodic Review (UPR), a process that provides a unique opportunity for applying the critiques put forth in this Article.<sup>245</sup> Their experiences demonstrate both the promises and limitations of collaborative lawyering aimed at bringing human rights home, and the challenges associated with concretizing critical theory in the development and implementation of advocacy strategies.

In creating the UPR, a process through which all United Nations member countries submit themselves to a review of their human rights record and receive a series of recommendations upon which they will be assessed again on a four-year cycle, the UN Human Rights Council (HRC) explicitly set forth the following objectives: “fulfillment of a State’s human rights obligations and commitments and an assessment of positive developments and challenges faced by the State;”<sup>246</sup> and, ultimately, “the improvement of the human rights situation on the ground.”<sup>247</sup> The HRC also explicitly resolved that a core principle of the

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provisions regarding rights and protections in a Code of Conduct that exceed those found in U.S. law. Greg Asbed, Coalition of Immokalee Workers: “*Golpear a Uno es Golpear a Todos!*” *To Beat One of Us is to Beat Us All!*, in 3 BRINGING HUMAN RIGHTS HOME 1-24 (Cynthia Soohoo, Catherine Albisa, Martha F. Davis, eds., 2008); Kristofer Rios, *After Long Fight, Farmworkers in Florida Win an Increase in Pay*, N.Y. TIMES, Jan. 18, 2011, available at [http://www.nytimes.com/2011/01/19/us/19farm.html?\\_r=1&scp=1&sq=coalition%20immokalee%20workers&st=cse](http://www.nytimes.com/2011/01/19/us/19farm.html?_r=1&scp=1&sq=coalition%20immokalee%20workers&st=cse).

244. Calmore, *supra* note 73, at 1956.

245. See *supra* note 27 for more information on the UPR.

246. Human Rights Council Res. 5/1, Annex B.2.4(b) (June 18, 2007).

247. *Id.* at Annex B.2.4(a).

UPR be the recognition of “the universality, interdependence, indivisibility and interrelatedness of all human rights.”<sup>248</sup> And, critically, the HRC articulated that “participation of all relevant stakeholders” must serve as a central component of the process.<sup>249</sup>

The U.S. Human Rights Network (USHRN), under the guidance of the UPR Planning Committee, pursued a collective advocacy approach wherein advocates would coordinate with others across their respective advocacy silos to build a more inclusive human rights movement that accounted for the interdependence and intersectionality of rights, and made room for voices of communities across the United States not often heard in Washington, D.C., much less across the Atlantic Ocean in Geneva. The ultimate goal in seeking to support and strengthen a broad-based human rights movement was to ensure a movement that would transcend the episodic advocacy around the Geneva-based UPR, and would reach back to the communities engaged in the struggle to achieve the promise of human rights in a meaningful and concrete way.<sup>250</sup> In this consciously collaborative approach, a broad cross-section of the advocacy community came together in pursuit of a range of human rights issues from housing rights, criminal justice, environmental justice, health care, immigration, to national security and human rights, among others.

While the UPR is unique among the human rights advocacy mechanisms in that it allows advocates to address all of the rights contained in the Universal Declaration of Human Rights, including economic, social, and cultural rights, in addition to the traditional civil and political rights enshrined in the U.S. Constitution and Bill of Rights, it is not the panacea for all human rights ills communities across the United States confront. Instead, advocates embraced it as one additional mechanism for engaging in an interdisciplinary discourse on human rights.

But challenges persist in realizing the promise of a truly collaborative, community-based advocacy movement. Disparities in resources, experience, and access between the professional advocates and the communities on whose behalf they purport to advocate are real. The ability to take the time away from local struggles against eviction, denial of health care, lack of access to a quality education, or discrimination—often under the threat of retaliation—is, in many ways, representative of a privilege not equally shared. As professional advocates, we must then spend more time reaching out to community representatives, listening to their concerns and priorities, and in every way, work to ensure meaningful, rather than token, participation. The participation of community

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248. *Id.* at Annex B.1.3(a).

249. *Id.* at Annex B.1.3(m).

250. See *UPR Goals Document*, USHRN (Feb. 9, 2011), available at <http://www.ushrnetwork.org/content/articles/ushrn-upr-goals>.

lawyers has helped to bridge the divide between the national and international non-governmental organizations and the communities across the United States, but that bridge is only as strong as the underlying supports that allow for full inclusion of affected community members themselves.

The on-site consultations conducted by the United States Government in preparation of their UPR Report to the UN Human Rights Council brought into focus the challenges in bridging the advocacy divide and the need for ongoing critical reflection and challenges to the existing power structures. While the UPR process calls upon governments to consult with civil society, to engage the relevant stakeholders, nowhere is it defined who are the “relevant stakeholders,” and who is “civil society.” Are these categories comprised of national and international human rights NGOs, or does it also include members of communities excluded from existing legal and power structures in the United States, such as prisoners, undocumented migrants, indigenous peoples, sex workers, domestic workers, and agricultural workers? And what constitutes “participation” in the process? Is it enough for representatives of marginalized communities or “experts” in the field to speak on their behalf? Is it enough to have one meeting with the government at which individuals are given five minutes to present their concerns? Is it enough for people to be given the opportunity to submit written interventions or to participate in a teleconference, rather than engage in a meaningful dialogue during which all participants are given an opportunity to be heard, and where answers and action can be expected? The answer to all of these questions from the communities in which the consultations occurred—and more importantly, in the communities left out of consultations—was a resounding “no.”

Perhaps even more confounding than the questions above, are questions related to the crafting of advocacy strategy and messaging, both within the advocacy movement and in engaging the external world. In conducting human rights trainings related to the UPR, the goals were to encourage broader participation and engage more advocates in the process, while at the same time managing expectations for a process that requires long-term engagement and rarely will result in immediate, concrete changes to the human rights situation on the ground. In the advocacy strategies and external messaging, questions persist as to how much should we allow ourselves to be confined to what we deem to be politically viable asks, framed in existing legal structures, rather than attempt to upend those structures, and challenge the premises underlying perceptions of viability, and at what risk to our credibility and our seat at the table? The study of critical theory leaves us to struggle with these questions as we seek to bring outsider voices in. But as advocates and clinicians, we must constantly question our assumptions and our roles, and always work to ensure we use our privilege to create room and access for those voices that are so often excluded, rather than to fill the space ourselves. And we must simultaneously ensure that we are teaching the why and how of these lessons to our students.

V. LOOKING AHEAD TOWARDS A NEW CRITICAL APPROACH TO HUMAN RIGHTS  
ADVOCACY: BUILDING A DISCOURSE OF HOPE

By way of conclusion, we distill the pedagogical lessons we have collectively learned from our discussions and reflections, and offer them as teaching guides for human rights practice. Although these concerns are certainly incomplete, and are meant to encourage further questions and debate, they reflect the lessons we feel have been most critical to us at this stage of our exploration. We have learned it is important in doing this work to: critically examine the utility of a human rights approach on a case-by-case basis; carefully select cases and projects considering the unique positioning of the clinic; situate human rights work within a broader grassroots social movement; identify the distinct roles of different players in a human rights advocacy strategy; broaden a litigation strategy with non-litigation endeavors; include a focus on economic, social and cultural rights; adopt a client-centered approach that uncovers and embraces authentic client narrative; develop a framework for ethics in human rights practice; build transnational alliances and consider transnational dimensions of work; teach socio-historic determinants to highlight advocacy opportunities; engage students in routine practice of self-reflective lawyering, particularly encouraging explorations of power differentials, strategically attempt to map the goals and benchmarks of a human rights campaign; and, anticipate any unintended consequences of human rights work.

Critical theory has provided guidance in teaching and advocacy in the field of human rights both in the international/transnational realm and social justice lawyering in the United States. The concerns raised in this Article suggest, however, that the potential of critical theory has not been fully realized. Undoubtedly, the very nature of critical theory cautions against a totalizing theoretical frame or the usefulness of a template praxis. The effort to improve our approach to human rights is not a call to develop a monolithic response nor does it suggest that improvement comes easily. Rather, it acknowledges that a critical approach to general legal principles embedded in human rights law provides an opportunity for “a shared vision of justice [which] can be forged through dialogue; in which questions of value can be posed, the exercise of power challenged and the cold logic of the market subordinated to broader human needs.”<sup>251</sup>

Engaging in human rights work signifies a commitment to international solidarity. One educator has described the benefits of teaching critical theory, noting the dependency of such pedagogy on engagement with the social world and states:

Thus it comes with a certain discourse of hope . . . . [C]ritical social theorists are also accustomed to optimistic phrases, such as “pedagogy of hope” (Freire,

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251. Tor Krever, *Calling Power to Reason*, 65 NEW LEFT REV. 141, 143 (2010).

1994), “pedagogy of love” (Darder, 2002), “curriculum for utopia” (Stanley, 1992), “care of the self” (Foucault, 1986), “democracy and education” (Dewey, 1916), “school reform as if democracy matters” (Fraser, 1997), and “women teaching for change” (Weiler, 1994b).<sup>252</sup>

In reflecting on the aftermath of the 2005 Gulf Coast disasters, Bill Quigley underscored the importance of hope in the life of social justice advocates:

Hope is also crucial to this work. Those who want to continue the unjust status quo spend lots of time trying to convince the rest of us that change is impossible. Challenging injustice is impossible they say. Because the merchants of the status quo are constantly selling us hopelessness and diversions, we must actively seek out hope. When we find hope, we must drink deeply of its energy and stay connected to that source. When hope is alive, change is possible.<sup>253</sup>

Critical theory that encompasses the complex historical determinants of rights violations creates the potential for the efficacy of new modes of practice. Moreover, it opens the field further to new interpretations and new solidarities.

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252. Leonardo, *supra* note 193.

253. William Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 27 (2007).