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AIDING CLINICAL EDUCATION ABROAD: WHAT CAN BE GAINED AND THE LEARNING CURVE ON HOW TO DO SO EFFECTIVELY

LEAH WORTHAM*

The author advocates donor support for clinical education projects abroad and outlines the minimal requisites that she would have for such projects – direct experience with disadvantaged clients, faculty involvement, and sincerity and integrity of organizers. She cautions against funders and consultants pressing new clinics to fit American clinical models. She provides sample reporting questions that would require projects to reflect on goals sought and results achieved. She draws lessons for efforts to assist clinics abroad from critiques of: the law and development movement (LDM), the last major international initiative in legal education reform; more recent efforts termed the New LDM; and studies of democracy assistance and rule-of-law projects, the rubrics under which many of today’s current legal education initiatives have been funded.

TABLE OF CONTENTS

INTRODUCTION	616
I. CLINICS ABROAD	618
A. <i>My Experience with Support of Clinics Abroad</i>	618
B. <i>Examples of Clinical Models Developed Outside the U.S.</i>	623
1. <i>Jagiellonian University in Kraków, Poland</i>	624
2. <i>Three Clinical Programs in Samara, Russia</i>	627
II. PAST AND PRESENT INTERNATIONAL INITIATIVES RELATED TO LEGAL EDUCATION REFORM	632
A. <i>The Law and Development Movement</i>	632
B. <i>The New Law and Development Movement</i>	637
C. <i>Foreign Assistance Initiatives to Promote Democracy</i>	

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and the Rule of Law 644

III. WHAT KIND OF CLINICAL PROGRAMS SHOULD BE ENCOURAGED? HOW AND WHY SHOULD SUCH PROGRAMS BE ENCOURAGED? 654

A. *Background*..... 654

B. *What, How, and Why I Would Support Clinics Abroad* 655

1. *Three Requisites: Direct Experience with Poor Clients; Faculty Involvement; Competence and Sincerity in Those Responsible* 655

2. *Flexibility in Clinical Model*..... 670

3. *Reporting Questions* 671

4. *Analysis of the Institutional Framework in Which Clinical Education Can Be Encouraged and Sustained* 671

C. *Implications for Encouragement of Clinical Education from the Law and Development, New Law and Development, Democracy Promotion, and Rule-of-Law Movements* 673

1. *Focus on Ends To Be Achieved Rather Than Institutions as an End in Themselves* 673

2. *Do Not Seek To Replicate a Home Country Model*..... 674

3. *Learn About the Countries in Which One Works and Realize What This Has to Teach About One's Own*..... 675

4. *Consider Economic, Political, and Social Forces That Cause Things To Be as They Are*..... 676

5. *Clinical Education Should Not Be a Value-Free, Technocratic Endeavor* 676

6. *Recognize the Importance of Human Relationships and Build Long-Term Collaborative Connections* 677

D. *Assessing Results*..... 678

CONCLUSION 681

APPENDIX A. REPORTING QUESTIONS 683

INTRODUCTION

In the 1950s and 60s, a number of U.S. law professors set out as legal missionaries of the Law and Development Movement (LDM) to convert legal systems in Latin America, Africa, and Asia to legal education approaches believed to assist in a march toward modernization

through economic development.¹ Primarily supported by the U.S. government and the Ford Foundation, the LDM spent millions of dollars and involved many U.S. law professors in efforts to reform legal education in the countries in which it worked, the primary focus being on introduction of the problem, case, and Socratic methods. The LDM's balloon of enthusiasm deflated in the Viet Nam era's political and economic climate. Some of the LDM's own practitioners labeled the movement as a naïve and ethnocentric one, thus helping to nail its coffin.²

Since the 1980s, donor interest has returned to projects directed toward law and the legal system, and to some degree to legal education. Rather than the LDM's stated goals of modernization and economic development, much of the recent multilateral and bilateral aid to legal projects has flowed through the rubrics of rule of law, democracy promotion, governance, anti-corruption, advancing human rights, poverty alleviation, and access to justice. To the degree such efforts have focused on legal education, clinical education often has played a prominent role, but the total funds spent on legal education as part of recent initiatives to affect law and legal systems has been miniscule in relation to total funds expended.³ Nonetheless, a number of U.S. law professors again have headed to foreign lands to work in legal education projects as well as in other law reform efforts.⁴

Section I describes the experience with clinical education abroad that made me a strong proponent of its potential in countries outside the U.S. Embarrassingly far into that experience, however, I discovered the LDM and the rich scholarly trove debating its failings and accomplishments.⁵ Section II reviews parts of the LDM literature that

¹ The reference to missionaries, pejorative in this context, is the characterization of a former Ford Foundation officer involved in funding these programs. JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 8 (1980).

² See *infra* text accompanying notes 67-84.

³ See *infra* note 150.

⁴ Peggy Maisel, *International Cross-Cultural Collaboration in Clinical Education: The Role of U.S. Clinicians in Developing Countries* (Oct. 10, 2005) (draft article), available at <http://www.law.ucla.edu/home/index.asp?page=1949> (reviewing the work of a number of U.S. clinical teachers who have worked abroad). Maisel's article draws upon data from Roy T. Stuckey, *Compilation of Clinical Law Teachers with International Teaching or Consulting Experience*, (report) (June 15, 2005), available at <http://www.law.sc.edu/clinic/compile.htm>.

⁵ This is all the more embarrassing because I worked for almost two years in the Carter administration in the U.S. International Development Cooperation Agency, an umbrella agency, recently created at that time, to coordinate U.S. foreign assistance efforts including those of the U.S. Agency for International Development. The lack of historical awareness that I have observed among at least some of those working in clinical education abroad regarding past law-related foreign assistance efforts reminds me of the oft-repeated quote, "Those who cannot remember the past are condemned to repeat it." GEORGE

I find instructive to today's clinical legal education initiatives. This summary includes revisionist views of the LDM's demise, as well as later ventures dubbed the New LDM (NLDM). Section II also incorporates assessments of more recent legal reform projects based in the foreign assistance goals common in the last 25 years. Combining insights from the literature in Section II with my personal experience, Section III outlines the types of clinical programs abroad that I think funders and in-country resources should support and the impact that I think such clinics can have. Section III concludes with lessons to be learned from past legal education reform ventures and a plea for more reporting on and assessment of results from clinical education programs around the world.

This article's title is derived from Thomas Carothers' *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE*, an assessment of U.S. foreign assistance efforts in the 1980s and 1990s, which is discussed in Section II.⁶ I believe it mistaken to cast working in clinics abroad, or other foreign assistance efforts, solely as a consultant-client or teacher-student relationship. The reference to what can be gained in the title refers not only to potential rewards for students, professors, clients, and law schools abroad and the societies in which they are based. "Gains" also refers to clinical education's potential contribution to the goals of foreign assistance donors. No less significantly, though, it refers to the benefits to the foreign "experts" who work with clinics abroad.

I. CLINICS ABROAD

A. *My Experience with Support of Clinics Abroad*

In a 2000 article, Richard Wilson identified "five major international efforts . . . to promote clinical legal education in the global South."⁷ These were the American Bar Association Central and Eurasian Law Initiative (ABA CEELI), the Public Interest Law Initiative at Columbia University (PILI) operating with funding from the Open Society Institute, the Ford Foundation, and refugee and asylum seeker assistance projects funded by the United Nations High Commissioner for Refugees (UNHCR). In a 2004 article, he added the World Bank, Inter-American Development Bank, and other international financial institutions to the list of clinic funders, but commented there is insuffi-

SANTAYANA, 1 *THE LIFE OF REASON* 284 (Charles Scribner's Sons 1905).

⁶ THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999) [hereinafter CAROTHERS, *LEARNING CURVE*].

⁷ Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 *CLIN. L. REV.* 515, 518 n.8 (2002) [hereinafter Wilson, *Three Law School Clinics*].

cient available written information about their activities to allow an observer to count and assess what these additional donors have done.⁸

Wilson uses the term “global South” to avoid “the use of more pejorative phrases such as ‘third world’ or ‘developing countries’.”⁹ He describes the global South as not only Latin America, Africa and most of Asia, but also says the term has “an element of economic or political evolution and status in the term . . . which also can bring central and eastern Europe, as well as Russia and the rest of the former Soviet Union into the ambit of ‘South’ as well.”¹⁰ Wilson cites another author’s use of “the West and the Rest” to distinguish rich and poor countries.¹¹

I likewise avoid the use of the term developing countries in this article. My focus is on cooperative ventures with countries interested in clinical education where it is not now a common part of the curriculum. That potentially encompasses some very rich countries in the world, e.g., those in Western Europe and Japan. Up to now, Western Europe, outside of the U.K., has shown little interest, but some Japanese law schools have created legal clinics as part of broader legal education reform.¹² Much of the article argues that foreign assistance should support clinical education projects, and in that aspect, it looks at the category of countries likely to be recipients of bilateral or multilateral aid, although foundations sometimes support projects in rich countries as well.

My initial personal experience with clinics abroad was supported by a Ford Foundation grant. In 1997, The Catholic University of America (CUA) received a Ford grant to support establishment of a clinical program at Jagiellonian University (JU) in Kraków, Poland, and the clinic established has now operated for nine academic years.¹³

⁸ Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT’L L. REV. 421, 424-27 (2004). The article inadvertently lists the “International Development Bank” rather than the Inter-American Development Bank. E-mail from Richard J. Wilson, Professor, American University, to Leah Wortham (January 23, 2006, 1:57 p.m. EST) (on file with author).

⁹ Wilson, *Three Law School Clinics*, *supra* note 7, at 517 n.5.

¹⁰ *Id.*

¹¹ *Id.* citing DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME NATIONS ARE RICH AND OTHERS ARE POOR* xx (1998).

¹² Peter A. Joy, Shigeo Miyagawa, Takao Suami, & Charles D. Weisselberg, *Building Legal Education in a Country Without a Tradition of Graduate Professional Legal Education: Japanese Educational Reform as a Case Study*, 13 CLIN. L. REV. (forthcoming December 2006), draft available at <http://www.law.ucla.edu/home/index.asp?page=1949>.

¹³ Working with the U.S. Consulate in Kraków, JU faculty secured funding for a conference on clinical education funded by the Organization for Security and Cooperation in Europe (OSCE) in December 1996. My colleague Catherine Klein, Karen Tokarz from Washington University, Robert Dinerstein from American University, and Roger Burridge from Warwick University in the U.K., attended the conference. The CUA partnership with

The JU/CUA partnership was facilitated by a previous history of cooperation between the two institutions. JU/CUA cooperation on a summer program¹⁴ and in clinical education now has expanded to include an American law certificate program taught by CUA faculty¹⁵ and an LL.M. program taught by CUA faculty, primarily in JU's facilities in Poland.¹⁶ As mentioned later, I believe that many of the most mutually beneficial relationships are likely to occur when law schools cooperate over long spans of time in multiple ventures such that personal bonds are formed among multiple faculty and students.

JU quickly established the first successful clinic in Central Europe and developed the model described in the next section.¹⁷ Its establishment came just as the Constitutional and Legal Policy Institute (COLPI) of the Soros Foundation became interested in clinical legal education.¹⁸ Working with PILI, COLPI provided seed money to a

the JU clinics began by hosting their faculty for a study visit in the U.S. and consulting with them in Poland as well as by phone, fax, and e-mail. With the rapid establishment of their clinic, the relationship evolved to one of working side-by-side with JU faculty, and often students as well, on teaching, mentoring, and consulting to assist others in the region interested in clinical education.

¹⁴ The summer program was founded in 1992 by CUA Professor Rett Ludwikowski, who formerly had been on the JU faculty. Each summer it enrolls about 25 American students and a comparable number of Polish students selected from the law schools throughout Poland. For more information, see <http://law.cua.edu/academic/cracow/>.

¹⁵ <http://law.cua.edu/academic/jagiellonian/>.

¹⁶ <http://llm.law.edu/>.

¹⁷ By "successful," I mean a clinic that is still in operation. The Ford Foundation funded two clinical efforts in the Czech Republic, prior to the founding of the JU clinic, but they did not take root. While JU was the first successful client service clinic in Central Europe, I understand the first client service clinic in the former Soviet sphere to have been established at Petrozavodsk State University in Karelia, Russia in November 1995, with assistance from the Vermont Law School Vermont/Karelia Rule of Law Project (VKROLP) and supported by USAID. James C. May, *Creating Russia's First Law School Legal Clinic*, VT. BAR J. & L. DIG. 43 (Aug. 1997). Karelia is an autonomous Republic of the Russian Federation, with whom the state of Vermont has had a sister state relationship since 1989. *Id.* at 43. Cooperation between not only the higher education institutions of Karelia and Vermont, but also the courts and lawyers' associations has grown under the umbrella of the Vermont/Karelia Rule of Law Project. *Id.* See also Alan W. Houseman, *Evaluation of the Legal Aid Program in the Republic of Karelia*, assessing a 20-month project of IREX (International Research and Exchanges Board) in cooperation with VKROLP to create a demonstration project to provide poor people in Petrozavodsk with civil legal assistance (unpublished paper on file with the author). VKROLP has evolved to the Russian American Rule of Law Consortium. <http://www.rarolc.net/>. See John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89 (2002) (describing Burman's experience in the Petrozavodsk clinic as a Fulbright fellow in 1998). Prior to the establishment of the JU clinic, Monika Platek of Warsaw University had begun a "street law" program, which was taking her law students into high schools and prisons, and Halina Nieć, one of the founders of the JU clinic, had worked with students on a human rights curriculum for high schools and involved law students in assisting refugees in adjustment to life in Poland.

¹⁸ The activities of COLPI were transferred to the Justice Initiative of the Soros Open Society Institute, which was created in October 2002. Activities Report of the Open Soci-

number of clinics in the former Soviet sphere and supported clinics through encouragement of intracountry and regional exchange.¹⁹ In association with COLPI and PILI, Catherine Klein and I worked, sometimes with JU faculty, on planning and implementation of four colloquia for representatives of clinical programs COLPI funded or was considering funding.²⁰ Much of the training of foreign clinical teachers and students that I have done concerns teaching of professional responsibility in the clinic as well as its integration in other parts of the curriculum.²¹

Soon after its creation, JU's Human Rights clinic persuaded UNHCR to provide financial support for the JU clinic's efforts in representing asylum seekers and other refugees.²² In November 1999, JU helped to organize a conference sponsored by the UNHCR, along with COLPI and PILI, which led to clinics being adopted as a part of the UNHCR strategy for providing legal representation to refugees in Central Europe and the former Soviet Union (and Western Europe as well).

United States government funds have supported a number of clinics, particularly in Russia, through ABA CEELI.²³ ABA CEELI has sent a number of American lawyers and law teachers to the region to work in a host of activities regarding the legal profession and the

ety Justice Initiative, available at http://www.soros.org/resources/articles_publications/publications/activities_20040503/osji_2003_activities. In this article, I continue to refer to COLPI with regard to events that occurred when COLPI was the entity involved.

¹⁹ In 2001, PILI published *PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS*, (EDS. EDWIN REKOSH, KYRA A. BUCHKO, AND VESSELA TERZIEVA), which includes a chapter on clinical legal education in addition to chapters on setting up a public interest organization, guidelines for monitoring in the public interest, strategic litigation, campaigning for the public interest, NGO advocacy before international governmental organizations, access to justice, and public education through street law. PILI maintains a website, which provides a venue for exchange of clinical teaching materials. www.pili.org.

²⁰ New York City, New York and Washington, D.C. (September-October 1998); Warsaw & Kraków, Poland (March 1999); Sofia and Varna, Bulgaria (June 2000); Riga, Latvia (October 2001).

²¹ In most other parts of the world, aside from the U.K. and parts of the Commonwealth, professional responsibility is not thought of as a body of law to be studied in law school and mastered by practitioners. To assist teachers abroad in conceptualizing the subject and making choices about what to teach, I wrote Leah Wortham, *Teaching Professional Responsibility in Legal Clinics Around the World*, *KLINIKA* 241 (Fall 1999) [hereinafter *Teaching*], available at: <http://www.juhrc.org/en/resources/articles/teachingresponsibility>.

²² Stephan Anagnost, *The Challenge of Providing High Quality Low Cost Legal Aid for Asylum Seekers and Refugees*, 12 *INT'L J. REFUGEE L.* 577, 583 (2001) (describing the development of other legal clinics serving refugees in the Central European and Baltic States subsequent to the first UNHCR supported effort at JU).

²³ <http://www.abanet.org/ceeli>. ABA CEELI initially was called the Central and Eastern European Law Initiative. ABA CEELI receives funding from the U.S. Agency for International Development, other programs of the U.S. Department of State, and the U.S. Department of Justice. <http://www.abanet.org/ceeli/about/funders.html>.

legal system. Some of that assistance has concentrated on clinical education.²⁴ Many American clinical teachers have spent time in residence in other countries as ABA CEELI staff or volunteers, but I have never done so.²⁵

As in the United States, pressure of students for education that they think will better prepare them for practice and allow them to offer service to their societies has been a force pushing for clinical education in at least parts of the former Soviet sphere. In the first year of the JU clinic's establishment, the Polish European Law Students Association (ELSA) sponsored a conference on encouragement of clinics.²⁶ Some clinics in Poland and elsewhere in the region remain essentially student projects.

My primary opportunity to meet participants in clinical programs in countries beyond Central Europe, the Baltics, and the former Soviet Union has come through the Global Alliance for Justice Education (GAJE). GAJE has sponsored three international conferences since 1999.²⁷ GAJE initially identified interested legal educators and activists around the world in large part by tapping bilateral relationships among particular law teachers and law schools in the U.S. and Commonwealth countries with counterparts in other regions – the Subcontinent, Africa, Latin America, the former Soviet sphere, and China. Some parts of the world already had active regional cooperation networks, and GAJE has fostered more of those. The most recent GAJE conference, in Kraków, Poland in 2004, was attended by 168 participants from 43 countries, including every inhabited continent.²⁸ GAJE, like PILI, has made more visible the long clinical edu-

²⁴ Lawrence Grosberg reports that Russian legal educators indicated to CEELI early on that they were interested only in information on what American law schools did to prepare their graduates to practice law and that, since 1995, almost all CEELI legal education specialists in Russia have been clinical teachers. Lawrence M. Grosberg, *Clinical Education in Russia: "Da and Nyet,"* 7 CLIN. L. REV. 469, 477 (2001).

²⁵ I have worked with CEELI on some training events in the region: a workshop for Balkan law teachers involved in a CEELI-administered Department of State sister school exchange with American law schools in Skopje, Macedonia in December 2002, http://www.abanet.org/ceeli/special_projects/blsli.html (information on Balkan Legal Initiative); a workshop on teaching legal ethics for clinics from "newly independent states" of the former Soviet Union, Jan 26-28, 2003, Moscow, Russia; a workshop for legal ethics teachers from the Central Asian Republics in Kazakhstan, May 24-25, 2005, Almaty, Kazakhstan; participation since 1992 in CEELI's program of expert review of ethical codes of conduct and statutes regarding the legal professions and judges; contribution to PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE (Maya Goldstein Bolocan ed., 2002) (CEELI Concept Paper Series), available at http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional_legal_ethics_concept_paper.pdf.

²⁶ National Seminar on *Reform of Legal Education, Development of the Idea of Legal Clinics*, May 8-10, 1998, Szczecin & Świnoujście, Poland.

²⁷ www.gaje.org.

²⁸ GLOBAL ALLIANCE FOR JUSTICE EDUCATION, THIRD INTERNATIONAL CONFERENCE

cation histories of countries outside the U.S. in places such as Australia, Chile, India, and South Africa, thus offering a breadth of clinical experience for people across the world to draw upon and challenging the notion of clinics as an American phenomenon.

I have been to Poland fourteen times since 1997 as well as to Bulgaria, Croatia, the Czech Republic, Hungary, Kazakhstan, Japan, Latvia, Macedonia, Montenegro, Russia, and Ukraine, associated with ventures in teaching about clinical education and professional responsibility (both in the clinic and elsewhere in the curriculum). I have met many faculty and students currently working in clinics or interested in starting them from countries throughout Central and Eastern Europe and the former Soviet Union, but primarily through GAJE, I have worked with people from other regions of the world as well. Two people with whom I have worked in clinical education have come as Fulbright scholars to CUA.²⁹ I have long and deep associations with colleagues from Poland, but I have worked with faculty from some other countries a number of times and have seen individuals evolve from being interested in learning about clinical education and legal ethics to becoming experienced teachers with awesome ability as trainers of others.³⁰

B. Examples of Clinical Models Developed Outside the U.S.

Unfortunately, very little analytical work is available on clinical programs outside the U.S. I cannot attest to everything written in all languages, but I can say with some certainty that few studies exist in English language sources. Some works in English talk about aspirations for clinics or describe clinics getting started, but little has de-

REPORT, STRUCTURING A JUSTICE CURRICULUM FOR THE FUTURE 2, KRAKÓW, POLAND, JULY 21-30, 2004, [hereinafter *GAJE Third Conference Report*], <http://www.gaje.org>.

²⁹ Biljana Djuricin, University of Podgorica, Podgorica, Montenegro, visited in the spring semester of 2005, and Fryderyk Zoll, Jagiellonian University, Kraków, Poland, visited in the fall semester of 2003.

³⁰ Grosberg, *supra* note 24, at 488-89 describes how things he learned in a two-day workshop with Lidia Voskobitova, the "incredibly enthusiastic and dynamic dean" from the North Caucasus State Technical University Law School in Stavropol, helped him in opening a new mediation clinic at his law school. I have been fortunate to watch Dean Voskobitova teach and to participate in several events with classes taught by Lyudmila Mikhailova, the founding director of the clinic at Tver State University, who are both creative and inspirational clinical teachers. I also can cite Lusine Hovhannisian, from Armenia, whom I first met when she was a young Ph.D. candidate at the second COLPI/PILI colloquium in 1999, just learning about clinical education. She became interested in legal ethics, developed a course, taught a clinic, became a highly effective workshop leader in teaching other clinical teachers in COLPI/PILI and CEELI training events, and now works for PILI in Budapest. See also the notes on the work of Oleg Anishchik, Director of the Legal Clinic at Samara State University, *infra* Section I.B.2. These examples merely illustrate that "the region" and other non U.S. and Commonwealth countries already have highly capable clinical teachers with well developed expertise from which "the West" can learn.

scribed clinics over time, looked at their effect on legal education in a country, or considered the clinics in the context of a legal system.³¹

The following briefly describes the clinics at Jagiellonian University, with which I have worked since their initial design in 1996, primarily emphasizing ways in which their model of operation differs from that of many U.S. clinics.³² I also give information on the history and development of clinics at three law schools in Samara, Russia, which I visited in January 2003 as part of an evaluation of a U.S. Department of State sister-school grant between them and the Rutgers University (Newark) Law School. The initial clinical models at the Samara schools in many ways resembled the JU mode of operation, information about which was widely disseminated when clinics in the region began to start up. As described below, at least one of the clinics in Samara has moved more toward the American model of full client representation. Russian law, which allows anyone to represent another in civil cases, makes implementation of that model easier than it would be in many countries.

1. Jagiellonian University in Kraków, Poland

Founded in 1364, Jagiellonian University has a long and distinguished history, claiming among its graduates Nicolaus Copernicus, Pope John Paul II, and Nobel Prize winning poet Wisława Szymborska. JU's home, Kraków, has a population of just over 750,000, with estimates of 100,000 to 150,000 students enrolled in the several universities located there.³³ JU's law faculty has been ranked at the top in Poland for the past five years by POLITYKA weekly.³⁴ Supporters of

³¹ For works about the potential of clinics, see John M. Burman, *supra* note 17; Grosberg, *supra* note 24; Grady Jessup, *Symbiotic Relations: Clinical Methodology – Fostering New Paradigms in African Legal Education*, 8 CLIN. L. REV. 377 (2002); Karen A. Lash, *Establishing Legal Clinics in Moldova: Lessons in Volunteerism and Legal Education*, USC L. 40 (Spring 2000); James C. May, *supra* note 17; Lee Dexter Schnasi, *Globalizing Clinical Legal Education: Successful Under-Developed Country Experiences*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 129 (2003). One notable exception is Richard J. Wilson's excellent work on Chile, which traces the development of clinics at the University of Chile Law School, the Catholic University of Chile Law School, and the Diego Portales University Law School. Wilson, *Three Law School Clinics*, *supra* note 7. Wilson comments how his perspective differs from that of a "short-term academic visitor from abroad," based on his more than a decade of experience in Chile and his familiarity with that country's unique body of scholarly literature. *Id.* at 571.

³² For additional information on the JU clinics, see material distributed at the *Clinics Abroad* program, AALS Conference in Clinical Legal Education, May 18-22, 2002, Pittsburgh, Pennsylvania, available at <http://www.aals.org/profdev/clinical2002/wortham.pdf>.

³³ Central Statistical Office of Poland, *Statistical Bulletin of Malopolskie Voivodship*, 71, table 36, (2005), available at http://www.stat.gov.pl/urzedy/krak/nowe/biuletyn_3.pdf (population of the City of Kraków); <http://www.krakow-info.com/people.htm> (one student population estimate).

³⁴ E-mail from Katarzyna Kłaczynska, JU Ph.D. candidate, to Leah Wortham (March

the JU clinic ascribe the notoriety of JU's clinic as a significant factor in that ranking.

In 1997, JU commenced three in-house clinical programs: civil law, criminal law, and human rights/refugee law. The following school year a labor law clinic was added.

The civil clinic provides written opinions to people on the legal issues in their cases. In American terms, that part of its operation might be termed an advice only service, but in Poland, this service has greater implications. The Polish legal system, at least in theory, affords a broad right to counsel for indigents in civil cases, and petitions prepared by the students can be used to assert this right. The civil clinic also has found two ways to appear in court: through representation as guardians for absent people and by forming a non-profit association, which is empowered by Polish law to represent people in consumer, alimony, and child support cases. The clinic also represents some clients through a negotiation stage.

The labor law clinic operates through opinions in a manner similar to the civil clinic. Labor law in Poland refers to a range of legal matters on regulation of the employment relation and social security.

The criminal clinic also provides advice about proceedings in the criminal justice system to those accused and in some instances to victims who are seeking redress in the court system, particularly in domestic violence cases. The clinic also advises prison inmates, including referral to the other clinics as necessary for the legal issues raised. Until a recent statutory change, students were able to appear in the lowest court in minor criminal matters.

The human rights/refugee clinic originally represented people primarily from a refugee center outside Kraków. With that center's closing, the students travel monthly to a refugee center in Lublin. As the clinic has become well known, refugees have found their way to it. Working with the clinic's cooperating advocate, the students represent refugees in the Polish administrative procedure. Students also advise clients in making human rights complaints to the European Court for Human Rights in Strasbourg.

Like faculty in most parts of the civil law world, JU faculty have many competing obligations. From the outset, JU has appointed one or two student assistants in each clinic to take on much of the burden of day-to-day administration of student work. Assistants also sometimes have worked on design of simulations for teaching and provided some first-level advice to fellow students.

The criminal, human rights, and labor law clinics included a con-

sulting practicing attorney in their weekly classes, who provided some advice to students. In the human rights clinic, the attorney occasionally pursued a case in court that required a licensed advocate. From the outset, the two supervising civil law clinic faculty have done all their own case supervision.

The JU Clinic signed a cooperation agreement with the Polish Ombudsman in 2001, and subsequently similar agreements were entered with other Polish clinics as well.³⁵ The Ombudsman employs former clinic students who refer matters to clinics for investigation when there is a question of infringement of human rights and from clinics when it appears that intervention by that office would be beneficial.³⁶ The Ombudsman also has funded publication of almost thirty information booklets, written by clinical students, which instruct the public on their legal rights in areas including consumer, labor law, social security, family law, landlord tenant, and human rights. Refugee booklets are published in English and Russian as well as Polish.³⁷

In 1999, the clinic founded KLINIKA, the first student-edited journal in Poland, focusing on questions of poverty law, clinical education, legal ethics, and legal education. The journal published four issues in Polish, English, and Russian to be accessible to other law schools in Central Europe and the former Soviet Union, but this effort proved difficult to sustain.

In 2002, representatives of clinics in Poland joined to found Fundacja Uniwersyteckich Poradni Prawnych, a Legal Clinics Foundation, to encourage the growth of quality clinical legal education.³⁸ The Foundation established standards for clinic activity.³⁹ The Foundation solicits funds and in-kind donations, and legal clinics meeting the established standards can apply for grants from these funds.⁴⁰ The Foundation sponsors training conferences and recently published a book on establishing legal clinics.⁴¹ All public universities in Poland

³⁵ Presentation by Rafał Pelc, Assistant to the Polish Ombudsman, *GAJE Third Conference Report*, *supra* note 28 at 23.

³⁶ Stephen Golub, *Forging the Future: Engaging Law Students and Young Lawyers in Public Service, Human Rights, and Poverty Alleviation* 6 (2004) (an Open Society Justice Initiative Issues Paper) [hereinafter Golub, *Forging the Future*], available at <http://www.grc-exchange.org/docs/EB100.pdf> (describing the clinic-Ombudsman cooperation and referring to the clinic liaison positions filled by former clinic students).

³⁷ *Id.*

³⁸ See http://www.fupp.org.pl/index_eng.php?id=history for background on clinics in Poland and the Legal Clinics Foundation.

³⁹ Polish Legal Clinics Foundation, standards for legal clinics activity, available at http://www.fupp.org.pl/index_eng.php?id=standards.

⁴⁰ http://www.fupp.org.pl/index_eng.php?id=grants.

⁴¹ STUDENCKA PORADNIA PRAWNA: IDEA, ORGANIZACJA, METODOLOGIA 16 (2005) (Dariusz Łomowski ed.), English translation available at http://www.fupp.org.pl/down/legal_clinic.pdf.

now have a legal clinic, and the first recently was established at a private law school.⁴²

2. *Three Clinical Programs in Samara, Russia*

Samara, Russia, is an industrial city located on the Volga River about 700 miles southeast of Moscow. The population of the city, capital of the Samara Region, is about 1,179,200.⁴³ In January 2003, as a contractor for PILI, I wrote an evaluation of a sister school relationship, funded by the U.S. Department of State, between Rutgers University (Newark) and clinics at three Samara law faculties: Samara State University (SSU); Ministry of Internal Affairs of Russia, Institute of Law (MVD); Samara Humanities Academy (SHA). Marcia Levy, then on the Rutgers faculty, had come to know the Samara schools as an ABA CEELI liaison based in Moscow and initiated the grant.

a. *Samara State University (SSU)*

By the accounts of teachers at all three schools, SSU is a highly prestigious institution with a well-respected faculty. I was told that about 1,500 full-time and 1,000 part-time students were enrolled in the law school when I visited. I understand that today about half of the students pay tuition while the others still enjoy the free tuition that was once the norm in public universities.⁴⁴ The SSU law school has more than 100 faculty organized in six departments: criminal procedure and forensics, criminal law and criminology, civil law and procedure, civil procedure and entrepreneurship law, constitutional and administrative law, and theory and history of law and international law.

While appointment at SSU is highly prestigious, it is not lucrative. In 2003, I was told that beginning faculty made about \$35 per month for an expected 750 hours of work per year while senior faculty might range up to \$300 per month. In 2005, I understand the range now to be between \$80 and \$300.⁴⁵

⁴² Interview with Filip Czernicki, President of the Polish Legal Clinics Foundation, Warsaw, Poland (February 24, 2005).

⁴³ <http://www.samaratour.com>. During the Second World War, Samara was the second capital of the USSR, with many foreign embassies moving there because of the threat that the Germans might take Moscow. Indeed, one of Samara's major tourist attractions today is an underground bunker created for Stalin if he were forced to relocate from Moscow. In the Soviet era, Samara was known as Kuybyshev.

⁴⁴ E-mail from Oleg Anishchik, Director of Samara State University Legal Clinic and Executive Board Chair of the Russian Legal Clinics Foundation, to Leah Wortham (December 12, 2005, 4:23 a.m. EST) (on file with author).

⁴⁵ *Id.*

Two practicing advocates on the law school faculty became interested in clinical education and enlisted a Ph.D. candidate, teaching assistant Oleg Anishchik, to attend an ABA CEELI sponsored training session. Anishchik recruited two recent Ph.D.s to go as well. After the training, these three young teachers recruited six students, and the clinic began to operate in 2001-2002. Five of these six students stayed on to help with supervision of new students in 2002-2003. The clinic received some support from the Open Society Institute.

In April of 2002, SSU organizers put up flyers about the clinic for the following year and received 60 applicants. From those 60, they selected 20 students from the third year. In 2002-2003, the clinic was in its first full cycle at the size they expected to maintain.

Mr. Anishchik subsequently became one of the founders and Executive Board Chair of the Russian Clinical Legal Education Foundation (CLEF) described below. At a planning meeting for CLEF's first training conference, he reported the SSU clinic to be thriving. He had developed a mechanism to address a major challenge of fledgling clinics, generating resources to support themselves, by working out with the university a separate tuition payment for a fourteen-month clinical education program commenced by an intense 150-hour training program in the first two months and followed by 380 hours of practice in the next twelve months.⁴⁶ The diploma of students completing the program shows a certification resulting from this specialized training.⁴⁷ Like clinics in Poland and elsewhere in the region, the SSU clinic addresses some of the faculty time-bind by the use of two student assistants, who have completed the clinic, whom the clinic pays from the tuition revenues generated.⁴⁸

The SSU clinic, like the others in Samara, began with the model of primarily preparing legal advice memos and assisting clients in assembling documents. Recently SSU has moved considerably in the direction of the full representation model of most American in-house clinics. Its students regularly appear for clients and have filed one case in the European Court of Human Rights with three more in process.⁴⁹ Russian law allowing anyone to represent another in a civil case offers more scope to move in that direction than would be possible in other countries, including Poland.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

b. *Ministry of Internal Affairs of Russia, Institute of Law (MVD)*

The MVD Institute in Samara was founded as a branch of the Saratov Ministry of Internal Affairs of Russia, Institute of Law.⁵⁰ Three of the five schools comprising the Samara MVD enroll police cadets, who wear uniforms while in training, and the cost of whose education is paid by the state. A fourth school provides one- to three-month continuing education courses for people already in law enforcement jobs. The fifth school is a civilian law academy, which was established in 1996. At the time of my visit, the civilian law school had about 1,000 students. The overall institution has 90 faculty, all of whom are full-time, and 70 percent of whom are police officers.

At the time of my visit, civilian law students at MVD paid about \$400 tuition per year. The Dean and Vice-Director of the school took me on a tour of the building that was being renovated a floor at a time and proudly told me that money generated from tuition was going into creating a pleasant and functional building for law study. By regional standards, the classrooms I visited indeed were very nice – freshly painted, well-lighted, newly furnished, and including walls of windows providing natural light. The library in this building, supplementing libraries on the main campus, appeared to be well organized and outfitted with technology.

I understand the Director of the MVD Institute, Ivan Karpov, to have been a primary impetus for the clinic getting started, along with the encouragement of ABA CEELI-Samara.⁵¹ The Vice-Director of MVD, Igor Korshikov, made the 45-minute trip from the main campus to talk to me, and his willingness to spend considerable time with me, evidenced support from the top. Indeed, he seemed disappointed that my schedule did not permit time to go to the main campus and meet with administrators there, and he was quite interested in talking about the organization and administrative structure of American law schools. I understand from a study of Russian law clinics for the United States Agency for International Development (USAID) that the director of the Saratov MVD also was a strong supporter of establishment of a law clinic there.

Korshikov told me that he and Karpov believed that with the change from the command and control structure of the police in the old governmental system, a new type of education was needed. In the

⁵⁰ MVD is an acronym for the Russian name of the ministry of police forces. At this point, Samara MVD seems to be relatively autonomous from Saratov although the Director still has a reporting line to Saratov.

⁵¹ Burman, *supra* note 17, at 114-15 (discussing the founding of a clinic at a branch of the Saratov MVD Academy in Samara).

new legal system, the role of defense lawyers was more important, and the MVD leadership believed different education for these lawyers was needed. MVD administrators also deemed clinics to provide important training in attitude, *e.g.*, how to talk to people respectfully. But they reported that the Ministry of Education and Finance regulations make it difficult to fund clinics properly and require administrators to bend the system to provide even close to adequate funding.

In 2005, I was told that the MVD clinic remained active with strong support of the parent university.⁵²

c. Samara Humanities Academy (SHA)

Samara Humanities Academy is a private institution founded in 1992. SHA has five schools including: the law school with an enrollment of about 1,000; an economics school with an Institute of Tax Service; a philology school, including literary criticism, philosophy and translation programs; a psychology program geared in particular to people entering jobs in business. The law school had about 30 full-time and about 30 part-time faculty. Many part-time faculty came from SSU. I was told they teach at SHA as a supplementary source of income at a rate of about \$3 per 40-minute hour for junior faculty, up to \$6 per 40-minute hour for senior faculty. The law school had just moved into a new building, where I visited. SHA law students paid about \$700 per year when I visited in 2003.

The SHA clinic began in July 2001, staffed by SHA Dean Olga Serova and three other faculty members, two of whom were no longer in the clinic at the time of my visit. Beginning in the spring of 2002, an advocate was added to the clinic staff. The SHA clinic was seeking to expand work with NGO clients, and I was told students were encouraged to take questions related to those clients to an economist, accountant, and auditor who taught SHA courses for accountants returning for some legal education.

Russian law allows anyone to represent a person in court in a civil case, but only licensed advocates can represent people in criminal cases. The MVD and SSU clinics were supervised by faculty who taught criminal law and procedure, but the clinic caseloads primarily were civil matters, including seeking to establish right of occupancy for an apartment, seeking repairs to rental property, family law, pension cases, and people wishing to bring actions under a new "insult to dignity" statute. Some administrative violations that did not rise to the level of crimes also had been handled.

⁵² Interview with Oleg Anishchik, Director of Samara State University Legal Clinic and Executive Board Chair of the Russian Legal Clinics Foundation, St. Petersburg, Russia (Nov. 7, 2005).

Most of the representation provided at all three clinics was analysis of the client's legal rights and advice on how the client could proceed. In many cases, the students prepared the documents that the client needed to proceed in court. SSU students appeared in court in 14 of their 91 cases, but MVD students had appeared in only one or two cases per year. The SHA clinic had not represented any clients in court. When asked how the decision to represent a client in court was made, SSU and MVD cited client preference, student readiness, and whether there was something about the client, *e.g.*, deafness, which made it difficult or impossible for the client to represent herself.

During my visit, the three clinics had some opposing views on whether student representation would likely provide a better outcome for a client than if a client represented himself with clinic assistance to be sure that all the correct written documentation had been assembled. While SHA said clients might be worse off with student representatives because a judge might be hostile, supervisors in all three clinics thought there were many cases in which a client who had been assisted in assembling all the proper written documentation would do just as well without a representative as with one. I recommended, as part of my evaluation report, that an agenda item for a conference among the three schools include an exchange on whether increasing student court representation would be desirable.

In fall 2005, I was told the SHA clinic had foundered.⁵³

d. Support for Russian Clinics

Various players supporting clinical education in Russia – the Soros organizations, PILI, ABA CEELI, and the Ford Foundation – have coordinated efforts.⁵⁴ CEELI's Russian office has focused on developing training materials for clinics.⁵⁵ Working with PILI, St. Petersburg Prince Oldenburgsky Law Institute developed a web site of supporting materials, and the ABA CEELI directory of clinics includes a number of administrative forms used by Russian clinics.⁵⁶ All three clinics that I visited in 2003 had very professional case manage-

⁵³ *Id.*

⁵⁴ Golub, *Forging the Future*, *supra* note 36, at 5 (describing complementary efforts in Russia among the Justice Initiative, Soros Foundation Network national foundations, the Public Interest Law Initiative, the Ford Foundation, USAID, and ABA CEELI).

⁵⁵ Katerina Shugrina, *Legal Clinical Education in Russia: Helping Young Lawyers Gain the Practical Skills They Need*, 12 CEELI UPDATE No. 3, Fall 2002, at 3, available at <http://www.abanet.org/ceeli/publications/update/02fa.pdf> (describing materials available to Russian clinical teachers in Russian language including two clinical textbooks, a text on legal research and writing, and a text on management of clinical programs then underway and now completed). Through January 2003, CEELI has held five conferences and more than 45 train-the-trainers workshops and seminars on topics related to legal clinics. *Id.*

⁵⁶ <http://www.lawclinic.ru>.

ment client record forms and client retainer forms (which were translated for me), and all three reported developing the forms from models available on the clinical web site.

In March 2005, a Russian Clinical Education Foundation (CLEF) was established as a result a project on strategic development of Russian clinical education implemented by St. Petersburg Prince Oldenburgsky Institute of Law and PILI, with the support of the Ford Foundation.⁵⁷ This project seeks to support public interest law clinics, meaning clinics where a central goal is the

education of socially oriented lawyers who are able and willing to protect human rights and provide access to justice, and who promote positive social change through the use of legal tools and their professional knowledge and skills.⁵⁸

Oleg Anishchik, from the Samara State clinic, is one of the founders of CLEF and chair of its executive board. In November 2005, I attended a planning session in St. Petersburg for a training session to be conducted for twenty-three Russians, selected in a competition among applicants interested in developing public interest clinical education projects.

In part through an exchange visit supported by the Department of State Sister School grant, Mr. Anishchik had steeped himself in clinical education theory. He will be teaching case theory for the public interest clinic training sessions. He described the teaching objectives that he uses in his own clinic as:

Students can conceptualize:

- law not a given;
- facts not a given;
- no single way of looking at a case.

Students can understand:

- case theory evolutionary over time;
- case theory limited only by imagination and creativity.⁵⁹

While this view of case theory will be familiar to American clinicians, it represents a dramatically different approach to lawyering than that common in the civil law world.

II. PAST AND PRESENT INTERNATIONAL INITIATIVES RELATED TO LEGAL EDUCATION REFORM

A. *The Law and Development Movement*

My introduction to the LDM came when Jane Schukoske asked

⁵⁷ <http://www.pili.org/2005r/content/view/96/74/>.

⁵⁸ *Id.*

⁵⁹ Notes by Leah Wortham on planning meeting for clinical teacher training, St. Petersburg, Russia, November 7, 2005 (on file with the author).

me to read a thought-provoking draft of her book chapter on what American clinicians might learn from thirty-plus years of Indian clinical legal education experience.⁶⁰ Schukoske's chapter briefly reviewed LDM literature and recent revisionist views.⁶¹ She noted that the U.S. clinical movement was getting underway just as the LDM met its demise in U.S. policy.⁶² Although occasionally mentioned in LDM literature, clinical education was not a significant part of that legal education reform thrust. Rather, the LDM's pedagogical foci were the problem, case, and Socratic methods.⁶³

In this section, I briefly outline the primary activities of the LDM. I then review two scholarly works important in its demise⁶⁴ and two retrospectives on the scholarship it produced.⁶⁵ I end this section looking at the work of three recent authors on legal reform efforts outside the United States in the post-LDM era.⁶⁶

In 1980, James A. Gardner published a history of the LDM in Latin America.⁶⁷ Gardner's book focused on law and development efforts in Latin America with case studies of Brazil, Colombia, and Chile, but also reviewed the history of the movement more generally.

⁶⁰ Jane E. Schukoske, *Meaningful Exchange: Collaboration among clinicians and law teachers in India and the United States*, in EDUCATING FOR JUSTICE AROUND THE WORLD: LEGAL EDUCATION, LEGAL PRACTICE AND THE COMMUNITY 233 (Louise G. Trubek & Jeremy Cooper eds., 1999). Shukoske's article is a plea for Americans to see working with clinical teachers in another country as an opportunity for exchange and collaboration, from which the U.S. teachers could learn a great deal.

⁶¹ *Id.* at 235-37.

⁶² *Id.* at 235-36.

⁶³ GARDNER, *supra* note 1, at 249 (criticizing the LDM for putting too much emphasis on a "particular American model" and ignoring new methods being explored such as clinical education).

⁶⁴ David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974) [hereinafter Trubek & Galanter, *Self-Estrangement*]; David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1 (1972) [hereinafter *Social Theory*].

⁶⁵ Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of "Scholars in Self-Estrangement"*, 25 AM. J. COMP. L. 492 (1977); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

⁶⁶ Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC'Y REV. 93 (1998); Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L. L. 470 (1995) (reviewing LAW AND DEVELOPMENT (Anthony Carty ed., 1992), and LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1993)) [hereinafter Tamanaha, *Lessons*]; Richard J. Wilson, *The New Legal Education in North and South America*, 2 STAN. J. INT'L L. 375 (1989) [hereinafter Wilson, *New Legal Education*]; Wilson, *Three Law School Clinics*, *supra* note 7.

⁶⁷ GARDNER, *supra* note 1. Gardner had worked with law projects for the Ford Foundation since 1970 and, at time of publication, was the chief executive officer responsible for Ford law and development projects in Brazil.

He reported the LDM's beginning in the "Third World" in the mid to late 1950s with a focus in India (along with some efforts in Burma and Japan). Initial LDM field projects largely were oriented toward legal research and teaching.⁶⁸ By the early 1960s, the LDM expanded into Africa and activities included law conferences, legal research, training programs for lawyers, judges, and law professors, and various programs to "strengthen" African legal education.⁶⁹ In the 1960s, legal education reform projects were launched in Costa Rica (1965), Brazil (1966), Chile (1967), Peru (1968), and Colombia (1969).⁷⁰ Law and development funders spent five million dollars on Asian projects, fifteen million on African, and another five million on Latin American.⁷¹ Gardner reports that 50 law teachers and consultants (whom he dubs legal missionaries) went to Asia, 150 to Africa, and 50 to Latin America. Hundreds of lawyers from those countries were trained in American law schools, and perhaps thousands of students were trained by the trainers in local institutions.⁷²

Carol Rose has characterized Gardner's outline of the four-part LDM framework as follows:

(1) methodological, specifically, exporting the American case law and Socratic method of teaching law; (2) educational, as U.S. legal scholars attempted to replicate the U.S. legal education system in other countries; (3) the model of the lawyer as a professional or social engineer; and (4) jurisprudential, which Gardner describes as an "anti-formal, 'rule skeptical' and 'instrumental' vision of law drawn largely from American realism."⁷³

Gardner concluded law and development efforts to have been "misconceived, disappointing to lawyers in the United States and in the Third World, participant and observer, funder and funded alike."⁷⁴ He cited the reasons for lack of success as principally "the ethnocentric, Trojan-colt style of the legal assistance endeavor, the difficulty of legal transfer generally, the crucial role of deep rooted legal cultures, and the underlying vulnerabilities of American legal models carried abroad."⁷⁵ Most damning was his view of the LDM's promotion of an American model of lawyer as pragmatic problem-solver and social engineer with a rule-skeptical, instrumental view of law. He charged this

⁶⁸ GARDNER, *supra* note 1, at 7, 39.

⁶⁹ *Id.* at 7, 43.

⁷⁰ *Id.* at 60.

⁷¹ *Id.* at 8.

⁷² *Id.* See also, Merryman, *supra* note 65, at 457-60 and nn.4 & 8a (describing the funding history of the movement, with the U.S. Agency for International Development, the Ford Foundation, and the Asia Foundation being the primary donors).

⁷³ Rose, *supra* note 66, at 122, citing GARDNER, *supra* note 1, at 4.

⁷⁴ GARDNER, *supra* note 1, at 283.

⁷⁵ *Id.*

model countered a historical Latin American view of formalities of law, which had offered a potential check to authoritarianism, and that the instrumental lawyer facilitated the rise of authoritarian Latin American governments with repressive policies.⁷⁶

Gardner's concerns about the misguided focus of the LDM echoed critiques by David Trubek and Marc Galanter, two American professors active in the movement's early years.⁷⁷ Trubek identified the LDM's "core conception of modern law" as an "ethnocentric and evolutionist generalization from Western history," which "cannot deal effectively with the realities of legal life in the Third World."⁷⁸ Trubek agreed with Gardner that the emphasis in legal education reform on instrumental thought promoted consolidation of authoritarian regimes.⁷⁹ Trubek and Galanter's 1974 work dubbed the LDM's core conception to be "liberal legalism."⁸⁰ They asserted that the LDM's "legal profession studies *started* from the assumption that a strengthened legal profession would foster development"⁸¹ and challenged that assumption on several grounds. They questioned whether more formalized decision-making and a modernized legal profession would benefit have-nots, asserting instead that social inequality might increase through raising the cost of legal services and erecting more barriers to participation. Second, guarantees of individual rights might be weakened if the bar abandoned formalistic modes of thought. Third, well-trained legal talent might better serve the society's elites in effectively resisting reforms benefiting the poor rather than enhancing the

⁷⁶ *Id.* at 5-6 (general conclusions on technocratic views of law and lawyering being vulnerable to ordering by governments and authoritarian abuse); *id.* at 99-125 (on ways the Brazilian rule of law movement may have "facilitated the ability of an authoritarian government selectively to control, avoid, and coexist under the formal legal system, and use it to its own ends;") *id.* at 124, 126-90 (concluding Chilean lawyers adoption of the model of lawyer as proficient state engineer and state instrumentalism furthered the authoritarianism of the Pinochet regime); *id.* at 247-281 (questioning export of value-neutral models of American legal education); *id.* at 253 (suggesting what legal education directed toward "analytical skills,' and 'thinking like a lawyer'. . . might suggest for professionals confronting rapid and massive change processes, as well as difficult ideological and ethical choices.") *Contra*, Dennis O. Lynch, *Hundred Months of Solitude: Myth or Reality in Law and Development?*, 1983 AM. B. FOUND. RES. J. 223 (book review) (finding Gardner to have oversimplified both South American formalism and North American pragmatism); Francis G. Snyder, *The Failure of "Law and Development,"* 1982 WIS. L. REV. 373 (book review) (finding Gardner's conclusion about the LDM's relationship to support by lawyers for authoritarian regimes overstated).

⁷⁷ Trubek & Galanter, *Self-Estrangement*, *supra* note 64, at 1070-72; Trubek, *Social Theory*, *supra* note 64, at 1.

⁷⁸ Trubek, *Social Theory*, *supra* note 64, at 2, 4, 16.

⁷⁹ *Id.* at 47.

⁸⁰ Trubek & Galanter, *Self-Estrangement*, *supra* note 64 at 1070.

⁸¹ *Id.* at 1075 (1974) [emphasis in the original].

legal situation of disadvantaged people.⁸² Trubek and Galanter also disputed the underlying assumptions of projects aimed at increasing access to formal court structures through provision of professional legal services. They disputed whether: professional skills would be equalized; lawyers hired to work for the poor would promote rule change; even if pressed for rule change by lawyers, courts would make such change; even if courts issued opinions on rule change, behavior in the society would conform to the decisions.⁸³ Trubek and Galanter argued that deformalizing and deprofessionalizing dispute settlement might be more effective than seeking to put more lawyers for the poor into the existing formal court structure.⁸⁴ The last point, of course, anticipates the argument in the United States about the value of alternative dispute resolution processes.

A second pair of articles from the LDM "canon," written by John Henry Merryman and Elliot M. Burg in the movement's "post-demise" phase, reviewed its voluminous scholarship.⁸⁵ Merryman traced the funding history of the movement and its intellectual antecedents and cousins.⁸⁶ His article included an appended bibliography of 124 works that he termed a "representative sample of the body of published work by authors who were consciously concerned with law and development"⁸⁷ as well as an appended list of "law and development activities."⁸⁸ Merryman classified the "intellectual style" of the movement as more strongly oriented to action than to inquiry,⁸⁹ inclined to proceed on implicit working assumptions without a need for or interest in theory,⁹⁰ and more concentrated in qualitative than quantitative analysis.⁹¹ Merryman attributed the qualitative focus to the prevailing style of American legal scholarship at the time, with a lesser spirit of inquiry and concern for theory than humanities and social science research and lesser interest in quantitative methods than the hard sciences.⁹² He also pointed out that Americans often were writing about countries strongly influenced by the European civil law tradition,

⁸² *Id.* at 1076.

⁸³ *Id.* at 1077.

⁸⁴ *Id.* at 1078.

⁸⁵ Burg, *supra* note 65; Merryman, *supra* note 65.

⁸⁶ Merryman, *supra* note 65, at 457-58.

⁸⁷ *Id.* at 484, Author's Note & app. A.

⁸⁸ *Id.* at 490-91 app. B.

⁸⁹ *Id.* at 474 (classifying 93 (74%) as action oriented and 32 (26%) as expressing a significant interest in inquiry, *i.e.*, interested in inquiry only or both action and inquiry).

⁹⁰ *Id.* at 475 (classifying only 25 (20%) of the articles as showing any significant concern with theory).

⁹¹ *Id.* at 477 (classifying 99 articles (79%) as "free of any quantitative taint," while 26 (21%) were found to display quantitative interests).

⁹² *Id.* at 478.

where scholarship is more concerned with conceptual system and theory, or about countries with a British colonial history, the British academic style being a “more modest and more philosophical legal order” than the American.⁹³

Merryman’s reflections on shortcomings of the LDM included: “unfamiliarity with the target culture and society (including its legal system), innocence of theory, artificially privileged access to power, and relative immunity to consequences.”⁹⁴ His 1977 article, coming after the “crisis” and “demise” works of Trubek and Galanter, argued for a revival with a focus on “inquiry and the pursuit of theory” regarding law and social change rather than the past concentration on reform abroad.⁹⁵

Elliott M. Burg’s reappraisal of the LDM literature found that past efforts to develop a general theory on the relationship of law to development revealed a “notable lack of consensus on *everything*.”⁹⁶ He suggested a more productive approach toward more general theories of law and development would be to work from the “specific to general,” recognizing “law as a culturally specific phenomenon.”⁹⁷ He advocated as more useful “substance specific works” on particular “real world” problems abroad, *e.g.*, studies of customary courts in Africa, effects on agricultural output of particular alterations in the land tenure system.⁹⁸

B. *The New Law and Development Movement*

With the mid-1970s LDM demise, a funding rationale for projects directed toward law’s role in economic development lost steam. Nonetheless, people working in the trenches with economies and political systems outside the wealthy North continued to consider how law, lawyers, and legal institutions should function in those societies and contribute to change within them. Some practitioners in this New LDM reexamined the sweeping critique of the LDM’s estranged former disciples.

Brian Z. Tamanaha’s 1995 200+ page bibliography of law and development scholarship showed considerable work ongoing throughout the 1970s-90s.⁹⁹ In a 1995 book review of two article collections on law and development published in the early 1990s, Tamanaha assessed

⁹³ *Id.* at 478-79.

⁹⁴ *Id.* at 481.

⁹⁵ *Id.*

⁹⁶ Burg, *supra* note 65, at 528 [emphasis in the original].

⁹⁷ *Id.* at 529-30.

⁹⁸ *Id.* at 529.

⁹⁹ BRIAN Z. TAMANAHA, *BIBLIOGRAPHY ON LAW AND DEVELOPING COUNTRIES* (1995).

the field for the “major lessons it has produced.”¹⁰⁰ He acknowledged the Trubek & Galanter *Self-Estrangement* article to be the “single most influential piece in law-and-development studies,” but he decried it as “[c]ritique alone, without an equal or greater effort at positive construction, leav[ing] only a legacy of destruction.”¹⁰¹ Tamanaha faulted the Trubek and Galanter critique as having far more to do with events in the United States than the situation in developing countries.¹⁰² He commented that while U.S. legal academics declared the death of law and development, French, English, African, Latin American, and Indian scholars continued research and writing in the field, and cited examples of indigenous and expatriate lawyers in developing countries borrowing laws and legal institutions from Western models, as well as United Nations efforts to draft model contracts and codes of conduct designed to protect the interests of developing countries.¹⁰³ He cited examples of “globalization of law” in worldwide legal regimes like GATT and the law of the sea and increasing uniformity of national laws in areas like contract, commercial, and constitutional law.¹⁰⁴

Tamanaha summarized Trubek and Galanter’s description of “legal liberalism,” their term for the what they saw as the LDM’s rule-of-law model:

- 1) society is made up of individuals who consent to the state for their own welfare;
- 2) the state exercises control over individuals through law, and it is constrained by law;
- 3) laws are designed to achieve social purposes and do not offer a special advantage to any individuals or groups within the society;
- 4) laws are applied equally to all citizens;
- 5) courts are the primary legal institutions with the responsibility for defining and applying the law;
- 6) adjudication is based upon a comprehensive body of authoritative rules and doctrines, and judicial decisions are not subject to outside influence;

¹⁰⁰ Tamanaha, *Lessons*, *supra* note 66, at 471.

¹⁰¹ *Id.* at 474. For contemporary criticism of *Self-Estrangement* and Trubek & Galanter’s response, see Robert B. Seidman, *The Lessons of Self-Estrangement: On the Methodology of Law and Development*, 1 RES. IN LAW & SOC. 1 (1978) [hereinafter *Seidman I*]; David M. Trubek & Marc Galanter, *Scholars in the Fun House: A Reply to Professor Seidman*, 1 RES. IN LAW & SOC. 31 (1978); Robert B. Seidman, *A Reply to Professors Trubek and Galanter*, 1 RES. IN LAW & SOC. 41 (1978) [hereinafter *Seidman II*].

¹⁰² Tamanaha, *Lessons*, *supra* note 66, at 475 (citing “four sources for the challenge to legal liberalism” listed by Trubek and Galanter: “(1) ‘empirical knowledge of the third world’; (2) ‘loss of faith in liberal legalism as a picture of United States society’; (3) ‘doubts about the universality or desirability of the American experience’; and (4) ‘skepticism about policy motives [of the U.S. and Third World governments]’” and commenting that three of the four “were primarily or exclusively related to events in the United States”), quoting Trubek & Galanter, *Self-Estrangement*, *supra* note 64, at 1089.

¹⁰³ Tamanaha, *Lessons*, *supra* note 66, at 474.

¹⁰⁴ *Id.*

and 7) legal actors follow the restraining rules and most of the population has internalized the laws, and where there are violations of the rules, enforcement actions will guarantee conformity.¹⁰⁵

Tamanaha reviewed Trubek and Galanter's two bases for their labeling of the legal liberal model as ethnocentric. The first contrasted the model's assumption of political pluralism with a developing country reality of government weaker than clan or village, "social stratification, sharp class differences, and authoritarian governments," legal rules favoring an economic elite, no internalization of the norms in legal rules among the majority of the population, and weak or irrelevant courts.¹⁰⁶ The second was the previously mentioned charge that the LDM's instrumental view of law was harmful because when the state is captured by authoritarian groups, an instrumental view of law provides no restraint.¹⁰⁷

In contrast, Tamanaha argued that "powerful social forces" and "respect for the rule of law" are the only effective restraints on authoritarian rulers.¹⁰⁸ He found an "established and functioning, formalistic-oriented rule-of-law system" to be the best potential foil to a purely instrumental view of law.¹⁰⁹ His formulation of a "minimalist account of the rule of law" required "only that the government abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral (to the extent achievable) decision-maker or judiciary to hear claims or resolve disputes."¹¹⁰ He described his conception of rule of law as "more of a bundle of ideals than a specific or necessary set of institutional arrangements" and ideals that can coexist "with individualist-oriented as well as communitarian-oriented cultures."¹¹¹ He called for law and development theorists to seek rule-of-law models "adapted to local circumstances and nurtured into maturity, rather than expending the bulk of their efforts in tearing this model down."¹¹²

Tamanaha labeled ethnocentrism as a "charge easily leveled, difficult to defend against, and malleable enough to support almost any claim."¹¹³ He cited "two core postmodern insights" as defanging the

¹⁰⁵ *Id.* at 473.

¹⁰⁶ *Id.* at 473-74.

¹⁰⁷ *Id.* at 474.

¹⁰⁸ *Id.* at 476.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 483.

ethnocentrism charge.¹¹⁴ First, people inevitably see things within a perspective shaped by their interpretive community and paradigms shaped by ethnicity, culture, class, profession, and philosophy. Second, the postmodern view rejects ultimate standards or foundations to determine the superiority of one perspective-based view over another.¹¹⁵ Thus, Tamanaha called for accepting that we all function in “interpretive communities” with shared interpretations of the world and ways of expressing them; when people move beyond those communities, they unavoidably see new experiences through ethnocentric interpretive lenses. Tamanaha found the real question to be “which ideals and visions of the world should be adopted, knowing that they lack ultimate foundations and aware that the only sources of support are to be found in their real-life consequences.”¹¹⁶ He pointed to human rights, and rights of women in particular, as widely supported by law-and-development scholars, while “undeniably Western and liberal in origin and content.”¹¹⁷

Tamanaha’s piece focused on critique of theory. Carol Rose and Richard Wilson have provided three useful case studies of legal reform in action to test some of the assumptions of the “old” LDM.¹¹⁸

Carol Rose titled her in-depth empirical study of international legal assistance in one country as *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*.¹¹⁹ She took the title from a 1996 panel presentation by David Trubek, in which he gave his own reappraisal of LDM, including the perception that “developing countries no longer have alternatives to the adoption of a ‘democratic market model of state, economy and society’.”¹²⁰ Rose summarized Trubek’s 1996 analysis of the rise of the “new” law and development movement as involving the following factors as well:

- (1) the emergence of human rights discourse in both the foreign policy and domestic political discourses in many countries, particularly the United States; (2) globalization, defined as the combination of political pressure for human rights and the need to reform legal systems to make them capable of functioning in a globalized market; and finally (3) the “Washington consensus” which “privileges markets as allocative institutions, favors privatization, and promotes closer linkages to the global economy. . . . Thus legal re-

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 482.

¹¹⁸ Most of the early literature wave on law and development was published between 1965 and 1975. *Id.* citing Burg, *supra* note 65 at 496-98 nn. 17, 18, 22.

¹¹⁹ Rose, *supra* note 66.

¹²⁰ *Id.* at 125, quoting David M. Trubek, *Law and Development Then and Now*, 90 AM. SOC’Y INT’L L. PROC. 223, 224 (1996) [hereinafter Trubek, *Then and Now*].

form becomes important to make the domestic economy work once state control is reduced, and also make it attractive for foreign investors.”¹²¹

Rose found the situation of the Vietnamese government working with legal reform donors in the 1990s to differ from the LDM in a number of ways. First, a number of bilateral and multilateral donors were involved rather than a single dominant U.S. funder.¹²² Second, the Vietnamese government had sufficient access to information not only about the U.S. model, but also about Asian countries taking a different path from Western market capitalism.¹²³ Third, the client government’s history encouraged an insistence on *exchange* with foreign lawyers rather than foreign legal *assistance*.¹²⁴ Fourth, rather than the U.S. academics with a consistent philosophy who dominated the “old” LDM, the NLDM advisers were a mix of academics, lawyers from private firms, and employees of national governments and international organizations. This resulted in more potentially conflicting views and agendas, even among advisers from the same country.¹²⁵ She also commented that legal academics visiting today may hold considerably differing theories of law.¹²⁶

Even with these differences, Rose found some criticisms of the LDM as having equal force in the NLDM.¹²⁷ She cautioned against the assumption that Western models of lawyers and legal professionalism function effectively in all cultural contexts. Second, she warned about “essentializing,” defined as imposing a “reified identity” on the host counterparts while providing a similar simplified caricature of Western law and lawyers, which may “magnify cultural gaps that, in reality, may be only differences in degree.”¹²⁸ Third, she cautioned that a more coherent and court-centered legal system could reinforce authoritarian structures – strengthen the one-party state’s power over private and local initiatives and human rights repression.¹²⁹ She saw this as a particular danger in government channeled legal assistance in

¹²¹ Rose, *supra* note 66, at 125-26, quoting Trubek, *Then and Now*, *supra* note 120, at 224-25.

¹²² Rose, *supra* note 66, at 126.

¹²³ *Id.* at 126-27.

¹²⁴ *Id.* at 127.

¹²⁵ *Id.* at 126-28 (1998).

¹²⁶ *Id.* (citing “fierce jurisprudential debates” among varying approaches including Law and Economics, Critical Legal Studies, Critical Race Studies and Feminist Legal Theory).

¹²⁷ *Id.* at 128.

¹²⁸ *Id.* at 130 (giving an example of a characterization ignoring generational differences among Vietnamese lawyers, between those trained in common law versus civil law, and between those employed in the private versus public sector).

¹²⁹ *Id.* at 131-32.

which donor officials “rarely talk to local, ordinary Vietnamese.”¹³⁰ Nonetheless, Rose found legal reform in Vietnam to have had a liberalizing impact giving more power to the National Assembly and Ministry of Justice versus the Communist party and other government offices. She also reported greater citizen participation in the legislative process and calls for civil rights, religious freedom, private property ownership, and “justice” as well as rapid growth of voluntary organizations.¹³¹ Finally, she considered how legal reform supporting market capitalism may exacerbate income inequality and unequal access to justice.¹³² Reminiscent of the LDM’s critics, Rose also raised a concern about lawyers adopting “Western instrumental and clientist notions of legal practice without also adopting basic tenets of professional responsibility.”¹³³

Richard Wilson’s work on legal education in South America provides a lonely example of thoughtful, in-depth analysis and case study on the development of clinical legal education abroad. A 1989 work focused on “new legal education” trends in North and South America, with a number of examples from Colombia.¹³⁴ His 2002 study looked back at more than thirty years of history regarding clinical education in Chile.¹³⁵

In his 1989 work, Wilson identified the principal criticisms of the LDM’s effort to export legal education methods. One was U.S. scholars’ ethnocentrism and insensitive attitudes.¹³⁶ A second was Latin American lack of comfort with the styles of teaching advocated and with “alien concepts of law which were not part of their own historical tradition.”¹³⁷ Like Carol Rose, he found differences in the contemporary environment to open doors for a new cross-cultural exchange,¹³⁸ Wilson’s interest being in active pedagogy in law schools.¹³⁹ Wilson first identified the evolution in American political thought from a pre-Vietnam “manifest destiny” to a “temper[ing] by reality” of events such as the Vietnam war and Watergate.¹⁴⁰ He described American

¹³⁰ *Id.* at 132-33.

¹³¹ *Id.* at 131.

¹³² *Id.* at 133-34.

¹³³ *Id.* at 134.

¹³⁴ Wilson, *New Legal Education*, *supra* note 66.

¹³⁵ Wilson, *Three Law School Clinics*, *supra* note 7.

¹³⁶ Wilson, *New Legal Education*, *supra* note 66, at 438.

¹³⁷ *Id.*

¹³⁸ *Id.* at 439-444.

¹³⁹ *Id.* at 377 (defining “[a]ctive legal education” as “experiential, student-focused pedagogies such as free discussion, student panels and teaching, moot courts, games, role-playing, simulation and clinical representation”).

¹⁴⁰ *Id.* at 439. Of course, much water has flowed under the foreign policy bridge since Wilson’s 1988 work so the comment about American political thought likely might be a different one today.

academics as having become generally “more introspective and self-aware.”¹⁴¹ He cited a second environmental difference in the many political transitions in Latin America in the 1970s and 1980s – thirteen countries experimenting with abandonment of military regimes and election of new civil governments, strong consciousness regarding human rights, and societies like Nicaragua and Cuba with conceptions of law, legal education, and the legal profession that do not precisely follow the common or civil law tradition or that of socialist countries. Third, he found more American awareness regarding Latin American legal culture, noting the irony that much of that knowledge comes from the work of those who participated in the LDM.¹⁴² Fourth, he cited the growth of clinical education in both North and South America, which began to rise just as the LDM entered its proclaimed demise.

Wilson focused on “contemporary active teaching movements” in both continents, which he said reflected a “shared disaffection with the dominant views of law and lawyering.”¹⁴³ He identified two new trends in Latin American legal practice that attempt to define development in more constructive ways than the LDM’s approach. The first was a new legal services movement that focused on assisting disenfranchised people to find mechanisms for self-help and to be less reliant on law and lawyers, and that emphasized direct introduction of social change.¹⁴⁴ Wilson ascribed this shift in strategy to a “reexamination of the premises of both the Law and Development movement and a sister concept, the access to justice movement.”¹⁴⁵ The other trend was a focus on human rights with an insistence on basic civil liberties and a willingness to look to judicial mechanisms to settle even very “volatile political disputes.”¹⁴⁶

Wilson’s 2002 study of thirty years of clinical legal education in Chile found the method’s success there not to be attributable to “export from the United States” but rather to the “personal will and persuasion of its founders at each of the three law schools” he studied.¹⁴⁷ He described clinical models that have developed indigenously and looked at those models “in the broader patterns of operation of law,

¹⁴¹ *Id.*

¹⁴² *Id.* at 440. This article still uses the term “Third World,” but in a later article Wilson switches to the term “global South” to “avoid the use of a more pejorative phrase.” Wilson, *Three Law School Clinics*, *supra* note 7, at 571 & n.5.

¹⁴³ Wilson, *New Legal Education*, *supra* note 66, at 441.

¹⁴⁴ *Id.* at 432-34.

¹⁴⁵ *Id.* at 432.

¹⁴⁶ *Id.* at 433-34.

¹⁴⁷ Wilson, *Three Law School Clinics*, *supra* note 7, at 559.

the legal profession and society at large.”¹⁴⁸

C. *Foreign Assistance Initiatives to Promote Democracy and the Rule of Law*

After the LDM's demise, significant foreign assistance funding directed toward reform of law and legal institutions did not begin to flow again until the 1980s when it reappeared as a subcomponent of democracy assistance initiatives. “Rule of law” eventually crystallized as a subcategory of democracy assistance.¹⁴⁹ Since the 1980s money spent toward democracy assistance can be measured in billions of dollars.¹⁵⁰ While still often aligned with democracy promotion, rule-of-law assistance has gained its own independent status as a foreign assistance goal.

It is beyond the scope of this article to join the debate on promotion of democracy and rule of law as desirable goals of foreign assistance.¹⁵¹ I take them as givens in the current foreign assistance goals of the U.S. and other bilateral and multilateral donors and lenders. I acknowledge, however, that the appeal of rule of law as a goal may be that the breadth and imprecision of the term provides a big tent under which many interests that otherwise do not agree can join.¹⁵² The following reports a bit of the literature on contradictions in meanings of rule of law and the implications those contradictions have for legal reform initiatives.

My brief review of assessments of the LDM, NLDM, and more recent legal reform initiatives is directed to the lessons they may offer

¹⁴⁸ *Id.* at 519.

¹⁴⁹ See *infra* notes 155-59 and accompanying text and Figure One.

¹⁵⁰ RACHEL KLEINFELD BELTON, *COMPETING DEFINITIONS OF THE RULE OF LAW: IMPLICATIONS FOR PRACTITIONERS* 4 & n.1 (Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace No. 55, January 2005) (reporting well in excess of a billion dollars spent on rule-of-law assistance alone), citing Thomas Carothers, *The Rule of Law Revival*, 77 *FOREIGN AFFAIRS*, March/April 1998 at 95; CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 49-51 (providing a chart and tables on 1991-1999 USAID funding for democracy assistance with break-down by sector, including rule of law, and region, and showing expenditures in excess of three billion dollars for that period). See also Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 *WORLD BANK RES. OBSERVER* 117, 117 (1999) (reporting \$500 million in loans for judicial reform projects in 26 countries from multilateral development banks since 1994 until the article's publication in 1999 plus \$200 million in USAID funding on similar projects in the previous ten years).

¹⁵¹ See generally CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 19-58 (short history of the evolution of democracy assistance as a U.S. foreign assistance goal); *id.* 59-64 (common skepticisms about democracy assistance as a goal).

¹⁵² See Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China*, 18 *UCLA Pac. Basin L.J.* 64, 74-78 (2000) (quoting various academic and U.S. government officials on the appeal of rule-of-law rhetoric in China).

to those interested in supporting clinical legal education initiatives abroad. One of those lessons is to avoid over-promising results, but I argue that clinical legal education initiatives should receive more resources because of their potential toward the bundle of aspirations that democracy assistance and rule-of-law projects seek.

Thomas Carothers, a lawyer and political scientist, is founder and director of the Democracy and Rule of Law Project of the Carnegie Endowment for International Peace. He has worked in foreign assistance programs focused on democracy promotion and conducted field research on democracy aid in a number of parts of the world.¹⁵³ He authored *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE*, from which the title of this article is derived, as well as earlier books on democracy promotion in Romania and Latin America.¹⁵⁴ The Carnegie project he directs has produced a series of recent papers on rule-of-law assistance.¹⁵⁵

While supporting rule-of-law and democracy promotion goals, Carothers challenges scholars, practitioners, and donors to search for more information about the benefits, pitfalls, and practice of assistance efforts toward these goals. Personally, and in the Carnegie series he edits, Carothers speaks candidly about the limits of knowledge about, and unclear definitions of, democracy promotion and rule of law.

Carothers refers to a “democracy template” that had emerged in democracy assistance work.¹⁵⁶ Three categories comprise the template: “elections, state institutions, and civil society.”¹⁵⁷ The category concentrating on state institutions includes five targets of aid, namely constitutions, judiciaries, legislatures, local government, civil-military relations. Within the state institution category, however, he also identifies a “Rule-of-Law Assistance Standard Menu,” reproduced as Fig-

¹⁵³ CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 409.

¹⁵⁴ THOMAS CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA* (1996) [hereinafter *ROMANIA*]; THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* (1991).

¹⁵⁵ BELTON, *supra* note 150; STEPHEN GOLUB, *BEYOND RULE OF LAW ORTHODOXY: THE LEGAL EMPOWERMENT ALTERNATIVE* (Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace No. 41, October 2003) [hereinafter *LEGAL EMPOWERMENT*]; THOMAS CAROTHERS, *PROMOTING THE RULE OF LAW ABROAD: THE PROBLEM OF KNOWLEDGE* (Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace No. 34, January 2003) [hereinafter *KNOWLEDGE*]; FRANK UPHAM, *MYTHMAKING IN THE RULE OF LAW ORTHODOXY* (Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace No. 30, September 2002); JOHN HEWKO, *FOREIGN DIRECT INVESTMENT: DOES THE RULE OF LAW MATTER?* (Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace No. 26, April 2002).

¹⁵⁶ CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 86.

¹⁵⁷ *Id.*

FIGURE ONE: Rule-of-Law Assistance Standard Menu from
 THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD*¹⁵⁸

Rule-of-Law Assistance Standard Menu

Reforming institutions

- Judicial reform
- Legislative strengthening*
- Refraining prosecutors
- Police and prison reform
- Bolstering public defenders
- Introducing alternative dispute resolution

Rewriting laws

- Modernizing criminal laws
- Updating civil laws
- Introducing new commercial laws

Upgrading the legal profession

- Strengthening bar associations
- Improving legal education*** [emphasis added]

Increasing legal access and advocacy

- Stimulating public interest law reforms
- Supporting advocacy NGOs that use law to pursue social and economic goals
- Aiding NGOs that promote judicial and legal reform
- Training journalists to cover legal matters
- Underwriting legal aid clinics

* Legislative strengthening relates to rule-of-law change but also serves political process goals; accordingly, it is often treated by USAID and other donors as a separate category of aid.

¹⁵⁸ *Id.* at 168.

ure One, in which improving legal education becomes slotted as a subcategory of “upgrading the legal profession.”¹⁵⁹

Carothers looks back to LDM history in which efforts to reshape legal education and the role of the lawyer took central stage.¹⁶⁰ In describing the approach to rule of law in place when the book was published in 1999, he says legal education “is also sometimes a focus, although U.S. aid providers have not emphasized it in most of their programs, believing it to be too indirect a way to effect change.”¹⁶¹ The only mention of clinical law programs that I found in Carothers’ book was its inclusion in a list of legal education initiatives along with curriculum reform, professorial exchanges, and updating of law libraries.¹⁶² Clinical programs are referred to only as giving “students hands-on experience.”¹⁶³

Carothers refers to two “controlling axioms” that seem to be central to the “burgeoning belief in the value of rule-of-law work” – the necessity of rule of law to economic development and its necessity for democracy.¹⁶⁴ Carothers cites several examples questioning whether rule of law is in fact necessary for economic development and democracy, as well as to foreign investment, and, if there is a correlation with rule of law and the other conditions, which way the causal relationship runs.¹⁶⁵

He finds a more accurate statement of the relationship between rule of law and democracy to be:

the rule of law and democracy are closely intertwined but that major shortcomings in the rule of law often exist within reasonably democratic political systems. Countries struggling to become democratic do not face a dramatic choice of “no rule of law, no democracy” but rather a series of smaller, more complicated choices about what elements of their legal systems they wish to try to improve with the expectation of achieving what political benefits.¹⁶⁶

He concludes that rule-of-law programs probably can be prescribed “with a safe belief that these initiatives may well be helpful to

¹⁵⁹ *Id.* at 163.

¹⁶⁰ *Id.* at 168.

¹⁶¹ *Id.* at 167-69.

¹⁶² *Id.* at 169.

¹⁶³ *Id.*

¹⁶⁴ CAROTHERS, KNOWLEDGE, *supra* note 155, at 6.

¹⁶⁵ *Id.* at 6-7. Carothers cites China as the “largest recipient of foreign direct investment in the developing world . . . [while] notorious for its lack of Western-style rule of law,” *citing* HEWKO, *supra* note 155. Carothers refers to another Carnegie paper’s questioning of the “supposed relationship between an idealized apolitical, rule-based system of law and the economic development of the United States and Japan . . .” *citing* UPHAM, *supra* note 155.

¹⁶⁶ CAROTHERS, KNOWLEDGE, *supra* note 155, at 7.

both economic development and democratization,” but there is not knowledge of “to what extent there are direct causal connections at work and whether similar resources directed elsewhere might produce greater effect on economic and political conditions.”¹⁶⁷

Carothers identifies one item in the “learning curve” regarding democracy promotion as the need to synthesize the top-down approach of working with government institutions with the bottom-up approach of working to strengthen civil society.¹⁶⁸ While acknowledging a debate regarding definition, he cites as a consensus definition of civil society:

an associational realm between state and family populated by organizations which are separate from the state, enjoy autonomy in relation to the state and are formed voluntarily by members of society to protect or extend their interests and values.¹⁶⁹

Such voluntary groups include churches, labor unions, social clubs, informal groups based on social identity, and a broad range of NGOs to name only a few. He reports democracy assistance to have focused on one narrow slice of that realm – advocacy NGOs targeting sociopolitical issues such as human rights, the environment, women’s rights, anticorruption, and on civic education, media assistance, and aid to labor unions.

In a 2005 Carnegie paper, Rachel Kleinfeld Belton points out the critical difference between defining the goal of a rule-of-law project by the end to be achieved versus considering creating or strengthening an institution as an end in itself.¹⁷⁰ She joins most legal scholars in defining rule of law by the end to be achieved, *e.g.*, upholding human rights, but observes that aid programs often define their goals in terms of institutional attributes, *e.g.*, a strengthened judiciary supported by magistrates’ schools. Legal institutions, however, are at most a means to rule of law rather than ends in themselves.¹⁷¹ She summarizes contemporary ends-definitions of rule of law as encompassing “at least five different goals: making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights.”¹⁷²

¹⁶⁷ *Id.*

¹⁶⁸ CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 342.

¹⁶⁹ *Id.* at 209, quoting Gordon White, *Civil Society, Democratization and Development (I): Clearing the Analytical Ground*, *DEMOCRATIZATION*, vol. 1, no. 3, Autumn 1994, at 379.

¹⁷⁰ BELTON, *supra* note 150, at 7-20.

¹⁷¹ *Id.* at 15-16.

¹⁷² *Id.* at 7. As discussed at text accompanying *supra* notes 108-12, Brian Tamanaha rejected LDM critics dismissal of the “liberal legalism” by arguing that rule of law is the only effective restraint on authoritarian rules in powerful social forces or respect for rule of law. Tamanaha, *Lessons*, *supra* note 66, at 476. In a recent work, Tamanaha finds an expressed support for the rule of law from governments and political leaders worldwide that

Her primary points are two. First, the international development community should articulate rule-of-law goals by ends sought, not institutions created or strengthened. Second, however, actors promoting rule of law must recognize that goals defined by ends, like those listed above, are “manifold, separable, often in tension, and affect different segments of the society.”¹⁷³

She lists the institutions to which aid practitioners often look in assessing rule of law in a state as:

- **Laws** themselves, which are publicly known and relatively settled;
- A **judiciary** schooled in legal reasoning, knowledgeable about the law, reasonably efficient, and independent of political manipulation and corruption;
- A **force able to enforce laws**, execute judgments, and maintain public peace and safety: usually police, bailiffs, and other law enforcement bodies.¹⁷⁴

Change in these “primary institutions” requires well functioning “supporting institutions” such as judicial clerks and administrators, prisons, bail systems, bar associations – and most particularly for this article – legal professionals and entities that train them.¹⁷⁵ But, results must be assessed against what people actually do and what comes of those actions. Institutions are merely “humanly devised constraints” that seek to “shape human interaction.”¹⁷⁶ Instead of looking anew at the way legal institutions interact in a particular society and what might make a difference there, time-squeezed foreign aid practitioners are tempted to skip that step and go directly to creating or reforming institutions.¹⁷⁷ In her words, a project seeking to support human rights may find it “simply easier to write human rights laws, train police in human rights norms, and establish legal clinics that enable the poor to enforce their rights” than to consider how the “organizations, cultural interactions, and government agencies” can be made to function to support the end goal.¹⁷⁸

Belton identifies several problems with equating rule of law with

is “unparalleled in history.” BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3 (2004). He acknowledges “understandable skepticism” about the sincerity of some of those claims but, nonetheless, finds it significant “that government officials worldwide advocate the rule of law and, equally significantly, that none make a point of defiantly rejecting the rule of law.” *Id.* He then devotes his book to an exploration of the meaning of rule of law including his view of its values, limitations, and contradictions.

¹⁷³ BELTON, *supra* note 150, at 21.

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 17.

¹⁷⁷ *Id.* at 16.

¹⁷⁸ *Id.* at 17.

creation of institutions. First, practitioners are likely to move directly toward replicating law and institutions like those they know in their home country.¹⁷⁹ This encourages practitioners to ignore the cultural and political dimensions of rule of law and instead approach rule of law as a technocratic endeavor focused on institutions.¹⁸⁰ The institutional focus deters practitioners from probing “why institutions are so bad – and whose interests are served through weak rule-of-law institutions.”¹⁸¹ Furthermore, practitioners often idealize their home institutions and ignore the flaws, citing the U.S. example of “intense political involvement in the picking of the U.S. judiciary.”¹⁸² Practitioners sometimes press past minimal rule-of-law ends toward values and institutions that have only recently been accepted in donor countries or are not agreed upon at all in donor countries.¹⁸³ Thus, aid practitioners open themselves to charges of hypocrisy. She explains how a reform may undermine a rule-of-law end citing the Romanian example of businessmen arguing that they would prefer stable bad laws to constantly changing property laws supported by donor’s redrafting projects.¹⁸⁴

With her two key points regarding defining the rule-of-law goal as the end sought rather than an institution created and the separable and potentially conflicting nature of ends-goals, she identifies five implications.¹⁸⁵ First, achieving any rule-of-law end requires reform of more than one part of the system. For example, improvement in predictable and efficient justice requires reform not only of the judiciary, but also reform of law and police. Second, “achieving rule-of-law ends requires political and cultural, not only institutional change.”¹⁸⁶ Third, legal institution reform should not be confused with rule-of-law reform.¹⁸⁷ Fourth, improvement in one rule-of-law end may diminish success in another, “particularly in poor societies or societies with a

¹⁷⁹ *Id.* at 18-19.

¹⁸⁰ *Id.* at 18.

¹⁸¹ *Id.* at 19.

¹⁸² *Id.* at 18; see UPHAM, *supra* note 155 (challenging that the Japanese and the U.S. legal systems represent the apolitical formalist rule of law that they are depicted to be in ROL orthodoxy).

¹⁸³ BELTON, *supra* note 150, at 19-20 (citing insistence on free legal counsel in criminal cases when this only became an accepted right in the U.S. in the 1960s and human rights laws exceeding those of the U.S., which are considered “essential for legal reform in Europe”).

¹⁸⁴ *Id.* at 20.

¹⁸⁵ *Id.* at 21.

¹⁸⁶ *Id.* at 21-22.

¹⁸⁷ *Id.* at 23. She points out that donors may pursue change labeled as rule-of-law reform for reasons other than promoting rule-of-law ends in the country, *e.g.*, the donor country’s self-interest in police reform and antiterrorist laws that may conflict with human rights or due process concerns. *Id.* at 16.

weak rule of law.”¹⁸⁸ Fifth, accomplishments of rule-of-law initiatives should be assessed using a particular definition of rule of law, rather than a catchall category – with the realization that differing rule-of-law definitions may be in tension.¹⁸⁹

We probably all can understand the pressures that push toward defining rule-of-law progress by creation of institutions. Indeed, such an approach may help clinic creation because a clinic is an institution. But one must look at what a clinic actually does and what impact the clinic’s work has before being able to say any of the definitions of rule of law ends have been furthered. Furthermore, taking Belton’s five common definitions of rule of law, one can recognize not only the potential for tension among them, but also for debate about what constitutes achievement of the end. For example, what does equality before the law mean for people with different economic or social positions?

Readers familiar with clinical education probably have been thinking about how clinical education could support the ends-definitions of rule of law previously outlined and bristled at quotes on the narrow conception of clinical education’s potential. Stephen Golub advocates a law and development approach that would move away from what he terms rule of law orthodoxy (ROL orthodoxy) to an alternative vision in which the potential contribution of clinical education is more apparent.¹⁹⁰ I also will refer to Golub’s work specifically directed to employing clinical education in efforts to “engage law students and young lawyers in public service,” which explores clinical education’s potential to advance foreign assistance goals, not only in public interest law, human rights and justice, but also in poverty alleviation, good governance, and sector-specific development goals in such areas as gender, children’s rights, and the environment.¹⁹¹

In a 2003 Carnegie paper, Golub argues for replacing, or at least supplementing, the dominant rule-of-law paradigm as the main means of integrating law and development with “legal empowerment – the use of legal services and related development activities to increase disadvantaged populations’ control over their lives.”¹⁹² He criticizes ROL orthodoxy as a top-down, state-centered approach.¹⁹³ Consis-

¹⁸⁸ *Id.* at 24.

¹⁸⁹ *Id.* at 26-28.

¹⁹⁰ GOLUB, LEGAL EMPOWERMENT, *supra* note 155, at 5 (defining “rule of law orthodoxy” as a “‘top-down,’ state-centered approach through which development agency personnel design and implement law-oriented projects in cooperation with high government officials”).

¹⁹¹ Golub, *Forging the Future*, *supra* note 36.

¹⁹² GOLUB, LEGAL EMPOWERMENT, *supra* note 155, at 5.

¹⁹³ *Id.*

tent with Carothers' 1999 recommendation to synthesize top-down and bottom-up approaches, he considers how legal empowerment is "more balanced" between approaches focusing on government institutions and those working at the citizen level – being "grounded in grassroots needs" and "strengthen[ing] civil society" while also often involving cooperation with government.¹⁹⁴

Golub distinguishes rule of law based in a government bound by law, equal treatment under the law, recognition and protection of individual human dignity, and accessible justice, from ROL orthodoxy which he defines as "a set of ideas, activities, and strategies geared toward bringing about the rule of law, often as a means toward ends such as economic growth, good governance, and poverty alleviation."¹⁹⁵ He cites legal empowerment as addressing "a central reality that ROL orthodoxy overlooks: In many developing countries, laws benefiting the poor exist on paper but not in practice unless the poor or their allies push for the laws' enforcement."¹⁹⁶ He considers legal empowerment an approach that should be integrated into socioeconomic development efforts such as natural resources management, public health, land reform, or gender equity. In other words, legal services directed toward empowering disadvantaged populations should be considered one part of a strategy to achieve sector-specific goals, and projects directed to lawyers and law students should not be considered only as efforts toward rule of law or legal needs of the poor.¹⁹⁷

Golub describes his proposed legal empowerment as differing from ROL orthodoxy in that: lawyers act as partners with clients rather than dominating them; disadvantaged clients "play a role in setting priorities, rather than government officials and donor personnel dictating the agenda;" the working mode goes beyond judicial strategies and "transcend[s] narrow ideas of legal systems, justice sectors and institution building; . . . even more broadly, the use of law is often just part of integrated strategies that include other development activities."¹⁹⁸ These aspirations for roles lawyers working with poor clients might play, of course, will sound very familiar to clinical legal educators.

Golub cites studies by the Asia Foundation, the World Bank, and the Ford Foundation showing benefits of a legal empowerment ap-

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 7.

¹⁹⁶ *Id.* at 3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 4.

proach.¹⁹⁹ With regard to a Ford Foundation eighteen-month review of legal services and related work to which he refers and in which he participated as an investigator and editor, Golub cites the resulting description of the “impact of university-based legal aid clinics, paralegals, public interest litigation, and law-related research, even in China, Eastern Europe, and other areas where civil society is relatively weak.”²⁰⁰ Working from a legal empowerment perspective, Golub devotes a section specifically to “Law Students: Expanding Legal Empowerment’s Pool of Attorneys.”²⁰¹ He says the “best way to engage attorneys” in legal empowerment work to strengthen disadvantaged populations’ control over their lives is to expose law students to such activities and perspectives while in law school through clinical education and related activities.²⁰² He refers not only to the service provided but also to the expansion of student “perspectives, experience, and contacts in ways that enable many to work with the disadvantaged over the long haul.”²⁰³

In a 2004 Open Society Justice Initiatives Issues Paper, Golub cites research demonstrating how the work of lawyers to aid disadvantaged people, build their legal capacities, and advance their interests in other ways transcends the contribution to individual client need.²⁰⁴ Projects referenced address both “individual access to justice and public interest law . . . contribut[ing] to the rule of law, good governance, human rights, empowerment of the poor, and poverty alleviation.”²⁰⁵ He describes clinical legal education (which he refers to as CLE) as a “cost-effective set of tools for forging the future of legal services and legal systems across the globe” to which the development and human rights communities have paid “insufficient heed.”²⁰⁶

Golub’s paper distinguishes recent CLE and related activities²⁰⁷ from the LDM’s legal education efforts.²⁰⁸ Rather than focusing on dramatic goals to “transform legal education or entire legal systems,” CLE and related activities work with law students and young lawyers to advance justice, human rights, and development in the short term

¹⁹⁹ *Id.* at 30-37.

²⁰⁰ *Id.* at 29-30.

²⁰¹ *Id.* at 36-37.

²⁰² *Id.* at 36.

²⁰³ *Id.*

²⁰⁴ See authorities cited in Stephen Golub, *Forging the Future*, *supra* note 36, at n.2.

²⁰⁵ *Id.* at 2.

²⁰⁶ *Id.* at 2-3.

²⁰⁷ Golub defines “related activities” as “[s]imilarly oriented efforts involv[ing] a host of related initiatives by law schools, NGOs, and other institutions, involving either law students or young lawyers, but not necessarily including classroom instruction.” *Id.* at 3.

²⁰⁸ *Id.*

with efforts that also may have powerful long term effect.²⁰⁹ He describes CLE as working in “gradual ways that are significant but not sweeping.”²¹⁰

III. WHAT KIND OF CLINICAL PROGRAMS SHOULD BE ENCOURAGED? HOW AND WHY SHOULD SUCH PROGRAMS BE ENCOURAGED?

A. Background

The urge to write this article arose from my disagreements with Rodney Uphoff's 1999 article, *Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinician Educator*.²¹¹ Uphoff contended that in-house clinics could not work in Romania in terms broad enough to extend to the entire Soviet sphere²¹² and argued that funders encouraging creation of in-house clinics were dead wrong. He advocated that money available from outside funders instead should be spent on funding law professors to add simulation components to their courses²¹³ and already licensed lawyers to provide legal services to the poor.²¹⁴

In response to an early draft, a colleague observed that my view of *why* I thought Uphoff was wrong was more useful than the analysis of *what* I thought he got wrong.²¹⁵ For Uphoff's assertion that clinics could not work in a country like Romania, a *why* could be found in the lack of readily available literature documenting that such clinics were working in countries sharing characteristics that he found fatal in Romania.²¹⁶ Some of that gap has been filled since, but this article pleads for much more to appear.

Uphoff also did not probe what could be learned from past legal education reform efforts and how to avoid some of their errors. The previous section and last part of this one seek to remedy that gap. One such lesson is to avoid being wedded to home-country models. A second is that the question of to what ends students will put their new

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Rodney J. Uphoff, *Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinician Educator*, 6 CLIN. L. REV. 315 (1999).

²¹² *Id.* at 316 (asserting in-house clinics are “not viable in Romania or in most of the other economically struggling countries of the region”); *id.* at 321 (describing clinics as cost prohibitive “in Romania—and for the other countries of the region as well”).

²¹³ *Id.* at 344-45.

²¹⁴ *Id.* at 343.

²¹⁵ Thanks to Richard Wilson, Washington College of Law, American University, for this insight.

²¹⁶ Uphoff's article cites to no literature or interviews regarding clinical ventures in any country except the United States. Uphoff, *supra* note 211.

and improved education should be central to a legal education reform project.²¹⁷ I thought Uphoff got off-track by seeing the options in externship, simulation, and in-house clinics as they might exist in the U.S, rather than models that had been developed in other countries with conditions and legal systems more like that in Romania. His article spends little time discussing goals for the educational reform that he favors, referring a few times to “skills and values” without further explanation.²¹⁸

These history-of-the-article paragraphs explain why I think those encouraging clinical education abroad with funding and technical assistance should be open to broad flexibility in clinical model. At the same time, I press for one semi-directive approach – reporting questions. Such questions would press clinical projects to look critically at the law, legal system, and how lawyers function in it, not just to develop better skills for negotiating the existing system. Reporting questions also would require articulation of educational goals because it is so easy for those goals to be swamped in service needs. With this hands-off approach of broad flexibility in model but hands-on approach of reporting questions, I have only three requirements for clinics to be funded.

*B. What, How, and Why I Would Support Clinics Abroad*²¹⁹

1. Three Requisites: Direct Experience with Poor Clients or Otherwise Under-Served Interests; Faculty Involvement; Competence and Sincerity in Those Responsible

First, clinical programs should be based in students’ live experi-

²¹⁷ I do not suggest this is something one could or should control directly, but I believe the focus of the clinical program can have some impact in this regard.

²¹⁸ *Id.* at 325, 343. Uphoff recognizes that clinics are about more than skills training, *id.* at 327 n.34, but in arguing about the impact clinics can have in Eastern Europe, he reverts to treating them as if skills training were all they had to offer. *Id.* at 325, 343. One detour in the path to this article reminded me of how my own views, shaped by Gary Bellow, differ. Leah Wortham, *Thanks for the Book and the Movie*, 10 CLIN. L. REV. 399 (2003), [hereinafter *Thanks*] a contribution to a symposium honoring the 25th anniversary of the publication of GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978). There I describe the emphasis in both Gary Bellow’s course I took, as well as the book, on a critical perspective regarding conformity to conventional lawyer’s role, what makes lawyering effective, the goals sought by representation, and consequences to client, lawyer, third parties affected by a client representation, as well as the book’s pioneering work in legal ethics. My rationale for clinics abroad extends beyond developing a critical perspective on the exercise of a lawyer’s skill to student and teachers’ focus on fairness of the substantive law and legal system as well.

²¹⁹ While phrased as advice to outside funders, most points can be applied to clinics funded by law schools themselves, government ministries, or other in-country support. Of course, it is desirable for law school or foreign government entities to create and fund clinics on their own initiative and with their own funds. Outside funding, however, can

ence providing legal service to poor people or under-served interests. Second, law school faculty must play a significant role in the design, administration, and teaching of the program. Third, the funder should assess the competence and sincerity of those seeking to implement the program and make a subsequent assessment of the clinic's operation.²²⁰

a. Direct Experience with Poor Clients or Other Under-Served Interests

Early on, I realized that I found work abroad exciting in part because clinics there seemed to offer more potential for effect on the law and legal systems in their societies than was often the case in the U.S. The fall of the Soviet Union put legal systems, along with other facets of the society, into flux. While countries in the region varied widely in their prior contact outside the Soviet bloc, all saw a major increase in exposure to foreign ideas. With change abounding, there seemed to be more openings to shape what should happen next. Today the first transformations have occurred in post-Communist societies, but pressure for change persists with volatility in government, integration into the global economy, and, for some, accession to the European Union. Similar kinds of pressures exist in other parts of the world as well. I earlier quoted David Trubek's attribution of the New LDM to: a worldwide increase in human rights discourse; globalization; and the "Washington consensus" favoring markets, privatization, integration in the global economy, lessening of state control, and encouragement of foreign investment.²²¹

Clients coming to clinics in many countries seem to me to bring problems that affect a greater segment of the society than cases coming into American clinics. The nature of the American economy and legal system somewhat segregates the concerns of poor people from the mainstream. Issues coming to clinics in countries with different economic and legal histories may be more likely to be common to broader segments of the population. In past times in Soviet countries,

play a critical role in getting a clinical program off the ground. Faculties the world over are good at skeptical critique, and thus can give a litany of reasons why clinical education cannot or should not work in their schools. In my experience, however, when there is outside money available to an interested colleague to start a clinic, fellow faculty are willing to acquiesce, particularly if nothing is being asked of them. The reaction likely would be quite different if the initial question presented to the faculty or administration was devotion of scarce law school resources to an untested idea.

²²⁰ Richard Wilson's study of thirty years of clinical legal education history in Chile found the critical variables for the long-term success in that country to be "clarity of objectives and personal commitment" of "key institutional actors." Wilson, *Three Law School Clinics*, *supra* note 7, at 582.

²²¹ See *supra* note 121 and accompanying text.

income disparity was not so great – few were doing well economically but, in at least some countries, many were meeting at least the basic necessities with a considerable governmental role. Many problems that clients bring to the JU clinic, *e.g.*, workers' rights with regard to closed enterprises or government pensions, seem likely to affect broad segments of the society struggling to adjust to a market economy with less protection from the government.

Whether or not it is true that clinic cases in other countries affect a larger percentage of the population than in the U.S., I do not think any economic or legal system, left to its own devices, treats those with the least money and least political clout equally with the rich and powerful. In clinics the world over, students and faculty face every day the reality of how the legal system and laws actually treat disadvantaged people, which usually differs from law on the books and idealized notions of justice.

Outside the United States, clinics created to serve these needs often are standing alone and taking the first steps in this regard. In the U.S., at least to some degree, legal service institutions beyond clinics exist to meet the same needs – indigent representation, public interest advocacy. That is not the case in many other countries. In some countries in the former Soviet sphere, an independent vigorous legal profession was almost nonexistent. Unlike the U.S., many countries provide a right to legal services in at least some civil matters, but much of the actual service may be a fairly minimal form of legal aid without much thought to pressing system reform. While there may have been some efforts by lawyers in many countries to use the legal system to advance the rights of the disenfranchised, clinics abroad generally do not have the footsteps of past role models in which to walk. When students and teachers press new claims or try to practice in new ways, they often will be the pioneers – both for the difficulty it entails and for the potential benefit it brings.

A competent clinic must provide professional skills training. The clinic must be sure that students have the skills they need to provide client service. But professional skills training should not be regarded as the definition of clinical education or the sole or first-stated objective. Professional skills training should be combined with consideration of the ends for which those skills are being used, the ethical implications of using the skills in that manner, and a critical analysis of how effective the skills will be toward achieving client goals, given possible shortcomings in the justice system.

Clinics mindful of their practice inevitably will raise questions of

legal ethics.²²² The rationale for the Ford Foundation's funding of the clinical programs that spurred the broad establishment of clinical programs in the U.S. was their potential for education in professional responsibility.²²³ Clinics offer a chance for explicit teaching focusing students on professional values, reconciliation with personal values, and questions of justice.²²⁴ When the Diego Portales law school in Chile founded a clinical program in 1987, one of its four stated objectives was that "the student will critically confront the ethical problems that are presented by the practice of law."²²⁵

Clinical education works from the particular problem that a client brings to the clinic, and this helps to avoid what LDM critics saw as its flawed mission of imposing a U.S. vision of desirable laws and legal institutions. Each local law teacher, student, and foreign consultant probably holds at least fragments of a theory of the relation of law to society and the role lawyers should play, although they may not think about this very consciously. But a poor client's case defines a point of view on the society, which may well be a different vantage point than that which a law teacher or student otherwise would have taken.²²⁶ The reporting questions found in Appendix A press clinics to take the time to think about the common threads in problems clients bring and obstacles to improvement as well as issues regarding how lawyers should behave in representation. It is likely that individual law teachers, students, clients, and critics of the society often will disagree about the underlying reasons for clients' problems and the best solutions for them. The point is to draw out those assumptions so that debate can take place.

Even if the clinical approach does not seek to impose a particular theory concerning a desirable legal system, a pressure toward representing disadvantaged people in ways that look critically at how law, legal institutions, and lawyers function could be characterized as an American imposition. One could debate how uniquely Western or American this orientation is, but I acknowledge it meshes with goals

²²² See Wortham, *Teaching*, *supra* note 21 (outlining an approach to legal ethics instructions for people teaching in clinics in various parts of the world).

²²³ For an account of CLEPR's role in "jump-starting" clinical legal education, see Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 18-20 (2000).

²²⁴ *Id.* at 12-17.

²²⁵ Wilson, *Three Law School Clinics*, *supra* note 7, at 550. The other three objectives were student assumption of obligations of the legal profession, student learning of "complete professional activities and tasks which are difficult to teach in theoretical classes," and provision of social services to the most needy. *Id.*

²²⁶ See Seidman, *Seidman I*, *supra* note 101, at 25-26 (arguing that an alternative to Trubek & Galanter's self-estrangement could be found in problem-solving practice, which explicitly selects the point of view of poor people for analysis of the problem).

frequently espoused in legal education in the U.S., even if the reality of our practice often fails to take this critical approach and do much to act on it. Using Tamanaha's postmodern perspective, I will not argue for the universality of valuing this point of view.²²⁷ Rather, I admit it is one I value, based in my own cultural experience. I seek to put these views in the global market-place of ideas and see who agrees.

Thus far, I have found a number of law students and at least some law faculty from many countries who seem to value this point of view.²²⁸ The focus also offers a way to advance goals espoused by various funders. Consider for example Belton's formulation of the five dimensions most commonly used to define rule of law: government accountability to law; equality before the law; supplying law and order; providing efficient and impartial justice; upholding human rights. Other funders aspire to greater participation for the disenfranchised, poverty alleviation or sector-specific goals in areas like public health, gender equity or the environment. A critical perspective on how disadvantaged people are treated in the law directs teachers and students to the society's reality on something like equality before the law or obstacles to receiving adequate health care.

Comments on this article at the CUA October 2004 colloquium, suggested that my direct representation criteria may be unduly limiting, with examples of clinics focused on NGOs, environmental issues, and fighting corruption.²²⁹ Work with NGOs is another route to look at the impact of the law and legal system on the less powerful in the society, and it offers an opportunity to consider models for how lawyers can assist in the NGO's work. In at least most societies, I expect environmental law or civil liberties work is an under-served interest, even if all clients may not be poor. I would hope, however, that a clinic looking broadly at a public interest issue in the society, *e.g.*, the environment, at least would consider as one dimension the particular ways that poor people are affected.

I assume that corruption falls particularly hard on poor and other powerless or unpopular groups, so such a clinic furthers the objectives I wish to support.²³⁰ A legal services clinic of the type I urge presuma-

²²⁷ See *supra* notes 113-17 and accompanying text.

²²⁸ GAJE defines itself as committed to achieving justice through education. www.gaje.org.

²²⁹ Colloquium, *Worldwide Clinical Education: Experiences, Perspectives, and Reflections* (October 8, 2004) presented in conjunction with the award of The Catholic University of America President's Medal to William Pincus, former President of the Council on Legal Education for Professional Responsibility. Thanks to Barbara Schatz of Columbia University for these thoughtful comments.

²³⁰ I believe no legal system, including that of the U.S., is corruption free, but rather that corruption differs in type and degree.

bly should think carefully about what it is modeling with regard to corruption and how it will interact with a corrupt legal system.²³¹ While the NGO or environmental clinic seem to me to fall within my criteria, the corruption-fighting clinic might not involve direct representation of individuals but rather some of the broader strategies of public interest advocacy, *e.g.*, coordination with other advocacy groups, legislative initiatives, media strategies. I framed some of my colloquium talk on this paper with “If I were George Soros” If I were, I might fund a clinic focused on fighting corruption, even if it did not work through individual client representation, but I still would want some clinics in the country involved in this type of representation. Lawyering as a subject of inquiry regarding its effectiveness, ethics, and consequences is ignored in many countries’ systems of legal education, and I think pushing attention to those topics should be a high priority. I also am concerned about fledgling clinics taking on, at least at the outset, topics that push most directly at the power structure of a country. Perhaps universities in some countries are autonomous enough to make them the best place to do this, but I would need to know a lot more about the political dynamics of a country to conclude that.

A number of law schools abroad have developed innovative street law programs.²³² Teaching students, prisoners, people in poor neighborhoods, and many other possible audiences about the law and legal system offers potential benefits in advancing goals of democracy promotion, rule of law, and legal empowerment as well as serving educational goals for law students who do the teaching. As with U.S. clinics, street law (sometimes termed community education) might be a component of a clinic, which also provides legal services to clients. I believe street law programs can accomplish a great deal for all those who participate, and I favor their support by funders. They, however, are not a focus of this article.

Given the practicum requirement in most countries, some interested in introducing clinical education abroad think of strengthening it to more closely resemble U.S. externship pedagogy rather than direct

²³¹ I was at first taken aback when a law clinic in Riga, Latvia, said that they refused chocolates or even home-baked goods from clients and instead had placed a nicely bound book in the reception area where clients could write notes of thanks. My first reaction was that clients might feel devalued when tokens, which to my U.S. eyes seemed “harmless,” were refused. The clinic personnel explained, however, that their system had been based on the notion that gifts of varying value were necessary to grease the wheels of the system, including the justice system, and they wished to make the point that their services were not given with the expectation of gifts.

²³² See Grosberg, *supra* note 24, at 485 (describing the impressive street law program at the St. Petersburg Prince Oldenburgsky Law Institute of Law directed by Arkady Gutnikov).

representation clinics serving poor people. U.S. externship clinicians likely have some useful experience to share with foreign faculty interested in that approach, but I would put a greater funding priority on encouragement of in-house clinics involving faculty and students more directly in client work for poor people. I emphasize the critical reflection mission of the university as important to clinical work. Getting students to look critically at the work of a placement rather than seeing their goal as uncritically "fitting in" is a challenge in the U.S.²³³ Issues of time, interest, and political vulnerability make that an even greater challenge in other countries. I believe critical reflection on practice more easily can be achieved in clinics grappling with the problems of their own clients and when students are supervised by faculty or practitioners working with faculty in the law school setting. Finding ways to turn existing practica or other external placements into more valuable learning experiences is an objective worth supporting, but like street law and NGO clinics, I would not substitute this for development of direct service clinics.

While growing access to justice movements around the world may be valuable partners and allies for clinics, clinical programs should be careful where volume of service ranks in clinic priorities. Legal clinics serving poor people and other under-served groups and interests provide needed valuable service. If countries try to expand access to legal aid for people not served by the normal private market, law school clinics may be considered a part of that strategy and government support could come along with it.²³⁴ I believe, however, that a clinic within a law school should not let the education objectives of the clinic be swamped by many clients who need service.²³⁵ If all clinic faculty and student time is absorbed by responding to clients, there will be no time and energy to think about what the clinic is trying to teach students and how to teach that well. Likewise, it will be difficult to find

²³³ Wortham, *Thanks, supra* note 218, at 419-20, 432-36, 464-68 (reflecting on Gary Bellow's central concern to challenge law students not to mindlessly conform to prevailing lawyer roles).

²³⁴ Richard Wilson reports that one-quarter of the clinic funds of the Catholic University of Chile come from the Ministry of Justice for provision of legal services in jails. Wilson, *Three Law School Clinics, supra* note 7, at 547.

²³⁵ Aubrey McCutcheon, *University Legal Aid Clinics: A Growing International Presence with Manifold Benefits*, in *MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* 267, 274 (Ford Foundation, Mary McClymont & Stephen Golub eds., 2000) (citing Ford Foundation consultant M. Shanara Gilbert's warning about the tension between service and education goals in South Africa). For a different view, see Frank S. Bloch & Iqbal S. Ishaq, *Legal Aid, Public Service and Clinical Legal Education: Future Directions from India and the United States*, 12 *MICH. J. OF INT'L LAW* 92 *passim* (1990) (arguing that the primary role Indian clinics take in provision of legal aid is a better outcome than American clinics' focus on traditional goals of legal education).

time to reflect critically on why the law and legal system and society generally may not serve poor people well, to consider alternatives to the current system, and to consider alternative models of lawyering.

Clinics also have a role to play in widening the gates to small and closed bar associations, and in the process, enhancing access to justice for the disadvantaged through the work of law graduates. While an independent bar can provide a check to government power, in many countries the bar's independence from regulation and scrutiny allows bar members to protect their own economic advantage. When bars have unfettered control of bar exams and apprenticeship programs that are the gateways to the profession, the result may be a small and homogeneous bar, often with strong family and social ties to existing bar members. Examples from Poland and South Africa describe ways that clinics can play a role in expanding the number of qualified lawyers interested and trained to serve the needs of underserved client populations.

When I first taught a legal profession course in Poland in 1997, I learned about the annual admission test to the advocates' apprenticeship, which generally allowed only 25-50 law graduates in Kraków and Warsaw respectively, to pass. I said repeatedly, "It will have to change eventually. It's too blatantly wrong, and it's too bad for the country." The response of most of the students then was, "Oh, nothing ever happens in Poland. No one cares about law students. The advocates are too powerful. It won't change."

In 2001, Michał Kłaczynski, a 1999 JU graduate who had studied with Dr. Halina Nieć, founder of the human rights clinic, brought a constitutional challenge to the Polish bar admission system.²³⁶ After arguing his own case before the Supreme Administrative Court, he, along with a group of other frustrated applicants and public interest advocates in Poland, learned to talk to the media, including reporters for Poland's two most influential newspapers who became interested in the issue.²³⁷ The Administrative Court referred the case to the Constitutional Court, which ruled that the existing system was in violation of Poland's constitution.²³⁸ Mr. Kłaczynski then shifted to legis-

²³⁶ A previous challenge by Dominik Tomaszewski, one of the student assistants in the civil clinic, provided only the remedy of quashing the administrative decision in his case.

²³⁷ In March 2002, a group called FairPlay was formed, largely in response to people who came forward after *GAZETA WYBORCZA*, one of the two most prominent newspapers in Poland, publicized Michał Kłaczynski's argument before the Administrative Court. Ewa Siedlecka, *Draft Law in Sejm, 2003: Opening up the Bar – "anti-advocate law" in Sejm*, *GAZETA WYBORCZA*, July 7, 2003, English translation available at http://legalprofessionpoland.blogspot.com/2005_07_01_legalprofessionpoland_archive.html.

²³⁸ Judgment of the Polish Constitutional Court, full panel, of February 18, 2004, P-21/02, English summary, available at http://www.trybunal.gov.pl/eng/summaries/P_21_02_GB.pdf.

lative advocacy with the Polish parliament to influence the drafting and passage of a new law. By the time the new law had passed the lower chamber of the Sejm and the upper chamber by one vote, the supporters of change had become adept at energizing many sources of political support.²³⁹ President Kwasniewski signed the new law on August 15, 2005.²⁴⁰

The new law loosens the bar's hold on entry to the advocate and legal advisor professions by transferring the bar exam function to the state and expanding the places where apprenticeships can be completed beyond the bar-run programs.²⁴¹ The expansion, however, is limited to people who get a Ph.D. in the university or work as lawyers for five years. This represents a missed opportunity for clinics to play a role in professional training like the South African example described in the next paragraph.

At least partially as a result of statistics published about the racially discriminatory demographics of entry to South African apprenticeships, law school clinics in that country became additional places where law graduates could article and qualify for the bar.²⁴² This served the multiple purposes of opening apprenticeship spaces for people of color, training apprentices with a substantive focus on the needs of poor people, and providing additional person power to the clinics.

A system of this type allows law graduate apprentices, with prior clinical training in law school or initial training at the clinic, to provide a first level of supervision for law students, much as fellows in American law schools sometimes do. Furthermore, because apprentices in

²³⁹ <http://legalprofessionpoland.blogspot.com>.

²⁴⁰ The Act Amending the Laws on Advocates, Legal Advisors, Notaries and Court Executors, of July 30, 2005, published in the Official Journal, 2005, no. 202, item 2067, came into force on September 10, 2005.

²⁴¹ Involving the practicing bar in training new practitioners is a reasonable thing to do when there are ethical and competent practitioners who are interested in sharing their expertise and in teaching. Uphoff, *supra* note 211, at 331 n.45 (referring to Romanian lawyers' reluctance to share practice "secrets" with new lawyers); Kandis Scott, *Commentary: Additional Thoughts on Romanian Clinical Education: A Comment on Uphoff's "Confessions of a Clinician Educator,"* 6 CLIN. L. REV. 531, 535 (2000) (acknowledging Uphoff's concern and suggesting using lawyers from other counties to teach). Even when such practitioners are available, however, I would not like to let university law faculties off the hook with only a responsibility to teach about substantive law.

²⁴² McCutcheon, *supra* note 235, at 267. See also Golub, *Forging the Future, supra* note 36, at 12 (referring to primarily black and female law graduates who have served as "candidate attorneys" at the Legal Resources Center (LRC), "South Africa's premier public interest law NGO"). For two recent articles describing the South African candidate attorney system and its history, see Peggy Maisel, *An Alternative Model to the United States Bar Examinations: The South African Community Service Experience in Licensing Attorney*, 20 GA. ST. U. L. REV. 977 (2004) and Thuli Mhlungu, *Educating and Licensing Attorneys in South Africa*, 20 GA. ST. U. L. REV. 1005 (2004).

many countries pay for their training, training programs based in clinics could provide a source of revenue for programs to defray the costs of equipment, supplies, and faculty and supervisor salaries.²⁴³ A country looking to reform its apprenticeship system could request proposals from entities that might provide a curriculum of practice-based training.²⁴⁴

A measure of a clinic's success is what its graduates do with what they have learned. One dimension is the skill level demonstrated including the quality of ethical decision-making. Equally important is their concern for fairness in operation of the law and its impact on the poor and disenfranchised. Uphoff dismissed the suggestion of a Soros representative that exposing law students to the needs of poor people may encourage reform or stimulate students to work for the disadvantaged following graduation.²⁴⁵ Nonetheless, a 2002 study compiled by the Budapest-based Legal Assistance through Refugee Clinics (LARC) organization funded by UNHCR to work with refugee clinics found nearly 100 students who had worked in UNHCR-supported asylum clinics in the region stayed engaged in refugee work after leaving the clinics.²⁴⁶ Many law graduates abroad will not go into law practice, but one also can look to see whether their clinical experience stayed with them in their government careers.

More abstractly, but no less important, it seems that clinical education may encourage students to think that something can and should be done about injustice. Legal nihilism and seeing law as irrelevant or

²⁴³ Interview with Anna Bluszcz-Balcerowska, Legal Advisor, Kraków, Poland (February 26, 2005) (reporting that participants in the three-and-one-half year legal advisor apprenticeship pay 7000 zloty per year – about \$2,300 at today's exchange rate – for their enrollment including a course, which usually meets once a week for four hours and largely repeats coverage of substantive law topics studied at the university); interview with Filip Wejman, Advocate, Ph.D. candidate and Teaching Assistant, Jagiellonian University, Kraków, Poland (February 26, 2005) (reporting the similar content in the advocate's apprenticeship); E-mail from Filip Wejman to Leah Wortham (September 6, 1:13 p.m. EST) (on file with author) (reporting a cost to advocate apprentices of \$96 per year in a basic fee and \$378 per year for the training course over the three-and-one-half year course).

²⁴⁴ See generally Nigel Duncan, *Gatekeepers Training Hurdlers: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911, 918-21 (2004) (describing the one-year Legal Practice Course required to become a British solicitor and the one-year Bar Vocational Course required to be a barrister).

²⁴⁵ Uphoff, *supra* note 211, at 343 & n.77.

²⁴⁶ LARC, *Refugee Law Clinic Graduates Working in the Asylum Field*, August 1, 2002, cited in Golub, *Forging the Future*, *supra* note 36, at 10. See also Howard S. Erlanger, Charles R. Epp, Mia Cahill, Kathleen M. Haines, *Law Students' Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC'Y REV. 851, 860-61 (1996) (citing their own data and studies of others regarding clinics as one source of "subcultural support" in maintaining law student interest in a public interest careers); Duncan, *supra* note 245, at 938 & nn.74-80 (studies regarding the impact of clinical programs on interest in later doing public interest work).

a negative is often cited as a legacy of the past to be overcome in many countries of the world. Law students seem one important target group for an effort to see law differently.

b. Faculty Involvement

My second requisite, involving faculty, has three bases – faculty members' place in the university's mission of teaching and scholarship, the important role of law faculty in the legal system in at least some civil law countries, and the importance to clinic sustainability of having insiders involved.

First, universities everywhere articulate their mission as student learning, furthering knowledge through research and critical inquiry, and service to society through educating students and scholarship.²⁴⁷ University law faculty have at least a degree of detachment from things as they are and thus offer at least some potential to suggest a different way they might be.²⁴⁸ With clinical education, they also have the stimulation of new generations of students seeing things afresh, with less vested interest in things as they are, with idealism, and with a capacity for outrage one sometimes loses as one ages. Particularly in the small, homogeneous practicing bars of many countries, there is little incentive or time to be critical of how things are done or to consider new ways to practice. A young Slovakian teacher also commented to me that education has been one of the “strongholds of public service in that country, and that faculty are somewhat independent from various interest groups in the society.”²⁴⁹

Faculty members the world over usually, at least in part, identify themselves as *teachers*, but the civil law world generally has not given much attention to pedagogy.²⁵⁰ In at least most of the civil law world,

²⁴⁷ For further development of this idea, see Leah Wortham & Catherine F. Klein, *Legal Clinics and University Mission*, in Łomowski, *supra* note 41 at 16.

²⁴⁸ In some countries in the civil law tradition, law professors are academics first although their low salaries require supplementation through teaching at private law schools, publication, or consulting. Some such countries do not permit law professors to practice law. In many countries in Latin America, most law professors are practitioners and law teaching is a side endeavor, albeit with some prestige.

²⁴⁹ Written comments from Darina Macková, Trnava Law School, Trnava, Slovakia (May 2003) (on file with the author).

²⁵⁰ While American law professors generally receive no training in teaching methods as part of their preparatory education, the law professoriate has focused a fair amount of attention on pedagogy in recent years. See, e.g. GERALD. H. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* (1999); J.P. Ogilvy with Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography (third edition)*, CLIN. L. REV. (SPECIAL ISSUE) 1 (Spring 2005); J.P. Ogilvy & Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography (second edition)*, CLIN. L. REV. (SPECIAL ISSUE) 1 (Spring 2001); Arthur L. Torres & Mary Kay Lundwall, *Moving Beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching*, GONZ. L. REV. (SPECIAL EDITION) 1 (2000); Gerald F.

lecture is assumed to be *the* method, perhaps supplemented with some discussion sections taught by Ph.D. candidates or young faculty as one might find in a U.S. graduate school. Nonetheless, senior faculty odd enough to have come to teaching workshops that I have led on clinical education or interactive teaching methods have seemed quite interested in effective teaching and have demonstrated considerable teaching talent and creativity. Furthermore, previously free public law schools charging tuition and increasing competition from private law schools means students are more likely to choose among law schools than in the past. Thus, student opinion about an education's value is more likely to have weight than in the past.

Despite his comment about the continuing widespread use of lecture, Wilson cites a new wave of reform efforts in Chilean legal education and mentions that all three law schools, whose clinics he studied, have "new curricular reforms under way."²⁵¹ He comments that the Catholic University law school in Chile has tried for several years to "penetrate the rest of the curriculum with clinical innovations" but finds the effort to "have foundered because responsibility for its momentum lay with an already overburdened clinical faculty, where energy for the project has ebbed among all but the few teachers with some remaining stamina."²⁵² Wilson quotes Dean Carlos Peña of Diego Portales who predicts that Chilean lawyers will begin to demand more from legal education in the future: skills training, ability to do information searches, training in alternative dispute resolution and in oral advocacy techniques.²⁵³

A second reason to require faculty involvement is the position of prestige that academics hold in the legal system of many countries in the civil law tradition. Faculty in civil law countries write the treatises suggesting how codes should be interpreted, which fill much of the function performed in this country by appellate courts.²⁵⁴ Academics often fill many or most of the slots on the new Constitutional Courts now found in many countries. In some countries, academics regularly practice law. In those where they are prohibited from doing so or

Hess, *Monographs on Teaching and Learning for Legal Educators*, GONZ. L. REV. (SPECIAL EDITION) 63 (2000); Arturo López Torr s & W. Clinton Sterling, *Will Law Schools Go the Distance? An Annotated Bibliography on Distance Education in Law*, 91 LAW. LIBR. J. 655 (1999); Arturo L pez Torr s, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998); Arthur L. Torres & Karen E. Harwood, *Moving Beyond Langdell: An Annotated Bibliography of Current Methods for Law Teaching*, GONZ. L. REV. (SPECIAL EDITION) 1 (1994).

²⁵¹ Wilson, *Three Law School Clinics*, *supra* note 7, at 560.

²⁵² *Id.*

²⁵³ *Id.* at 560-61.

²⁵⁴ John Henry Merryman, *THE CIVIL LAW TRADITION*, (2nd ed. 1985) 56-60.

otherwise do not, professors still may play a significant role in the definition of what the law is and should be.

For example, consider the career of one prominent Polish academic. Andrzej Zoll began teaching criminal law at Jagiellonian in 1964. In 1989, he chaired the legal sub-table of the 1989 Round Table negotiations as a Solidarity representative.²⁵⁵ While Chair of Criminal Law at JU, he co-authored the Polish criminal code enacted in 1997.²⁵⁶ He was the President of the Polish Constitutional Court from 1993-1997.²⁵⁷ From 1998 through June 2000, he served as Chair of the Legislative Council for the Polish Prime Minister. Professor Zoll became the Polish Commissioner for Civil Rights Protection (Polish Ombudsman) in 2000. The cooperative arrangements between the Ombudsman and legal clinics in Poland were previously described.²⁵⁸ Professor Zoll served in all the previously described offices while remaining on the faculty at JU, although he stepped down as Chair of Criminal Law in 2000. The biographies of the four previous Polish Ombudsmen, available on the office's website, show all of them to have been law professors as well.²⁵⁹

While Andrzej Zoll has not worked directly in the JU clinic, his son Fryderyk Zoll, on the JU civil law faculty, was the co-founder of the civil law clinic. Andrzej Zoll has supported the clinic, not only in the cooperation established with the Ombudsman's office, but also in his role on the Advisory Board of the Polish Legal Clinics Foundation.²⁶⁰

Third, law professors vote in faculty meetings, and become deans and even university rectors.²⁶¹ Insiders must figure out how to win internal funding allocation battles for money for clinic administration,

²⁵⁵ Solidarity was outlawed when martial law was declared in Poland in 1981. After almost a decade of turmoil, the Communist government agreed to meet with leaders of the underground Solidarity movement in the Round-Table Negotiations, which commenced in February 1989 and led to re-legalization of Solidarity and elections in June 1989. BRIAN PORTER, DONNA PARMALEE, & MARGARITA NAFAKITIS, *TEACHING NEGOTIATION: THE END OF COMMUNISM AND THE POLISH ROUND TABLE OF 1989* (2001), <http://www.umich.edu/~iinet/PolishRoundTable/teachingnegotiation>.

²⁵⁶ Polish Commissioner for Civil Rights Protection, <http://www.brpo.gov.pl/index.php?e=1&poz=370&id=10> (biographical data on Professor Dr. Andrzej Zoll).

²⁵⁷ For an analysis of the power of constitutional courts, see generally HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000).

²⁵⁸ See *supra* notes 35-37 and accompanying text.

²⁵⁹ Polish Commissioner for Civil Rights Protection, <http://www.brpo.gov.pl/index.php?e=1&poz=370>.

²⁶⁰ Polish Legal Clinics Foundation, http://www.fupp.org.pl/index_eng.php?id=bodies (list of advisory council members).

²⁶¹ Professor Maria Szewczyk, original Director of the Jagiellonian Clinic, is now Vice-Rector of Jagiellonian University.

allocation of salary stipends for clinical teaching and supervision, and adequate allocation of credit for clinics. A clinic hiring people from the outside with "soft" money has a much more difficult chance of long-term survival.²⁶² Even if popular with students, a program without strong faculty advocates will have a tough time competing for a law school's scarce funds.

Whether faculty are or can be licensed to practice law, and if so whether they are likely to have law practice experience, varies from country to country in civil law systems. Likewise definitions of practice of law and restrictions on who may engage in it vary as well. Such differences are relevant to how faculty can participate in clinical programs. Regardless of the variation, I urge that faculty play a significant role in the design, administration, and teaching of clinical programs, but others can play important roles as well. Student assistants have taken on larger shares of responsibility in foreign programs than would normally be the case in the United States. Practicing lawyers are used in varying degrees, and the practice restrictions in some countries require their involvement.²⁶³

While outside funding might provide sufficient money for a full-time salary for a practicing lawyer hired to teach and supervise in a clinic, the university system does not always allow for hiring someone on a teaching contract who is not a Ph.D. candidate or appointed to the faculty. One early project funded by the Ford Foundation hired a talented young practitioner to run a commercial law clinic, when no faculty apparently was willing to be involved or to identify themselves as qualified to supervise law practice. When other opportunities came for the young lawyer, the clinic disappeared because there was no faculty person with an investment.²⁶⁴

Furthermore, start-up clinics abroad usually do not have an obvious pool of practicing lawyers to which to look for staffing. Even if there were staffing candidates on the outside, the U.S. experience shows the downside of using outsiders rather than working with personnel already within the academy. Many of the first U.S. clinics looked to poverty lawyers and public defenders as clinical supervisors. The clinical attorneys hired frequently did not have tenure-track job security and received lower pay and lower benefits than tenure-track

²⁶² "Soft money" refers to external funding with a limited term as opposed to "hard money" from an institution's own annual budget.

²⁶³ See Grosberg, *supra* note 24, at 486-87 (describing involvement of private practitioners as part-time teachers in clinical programs at St. Petersburg Institute of Law and a tentative arrangement with a Moscow collegium of lawyers to provide supervision).

²⁶⁴ Interview with Edwin Rekosh, Director, Public Interest Law Initiative of Columbia University, in Osijek, Croatia (May 8, 2003) (regarding legal clinic at Palacky University in Olomuc, Czech Republic).

faculty. Still there were many well-qualified people, who were willing to take the positions. That trajectory of development eventually more or less worked out, at least at many schools, with the integration of clinics and clinical teachers within the law school. Law schools, often under pressure from the ABA, created tenure-track or long-term contract positions, which allowed these outsiders to become insiders. While these committed outsiders ultimately infused a new perspective, their outsider status slowed the mainstreaming of clinical education into the curriculum. Today's status of clinical education and teachers is indebted heavily to an alliance with the private bar in the politics of the ABA accreditation process.

Relying on their home country experience, American clinicians working in another country sometimes too quickly think of practicing lawyers as potential allies in the development of clinical legal education. In most countries, bars as entities have no role in the affairs of law schools while law schools have little role or influence in the admission process for entrants to the bar. Active hostility to clinics from the practicing bar may present a problem for clinics, but the bar's strong support may be much less important than in the United States. Ultimately some of the reforms in the legal system that may be greatly needed in countries may involve changes that the practicing bar will resist strongly.

All that said, some foreign clinics contract with practicing lawyers for part-time work, and some practitioners have been sufficiently interested in clinics to volunteer their time. Some practicing lawyers represent clinic clients in court cases where students cannot appear. Some practicing lawyers work in tandem with faculty to provide a considerable amount of practice supervision. Clinics must consider what kind of relationship with practicing lawyers is useful to the clinic, both substantively and politically. As a funder I would gather information on the variety of arrangements that clinics work out with practicing lawyers, but it is only faculty involvement that I would require.

c. Competence, Sincerity, and Integrity of Those Involved

My third criterion is competence, integrity, and sincerity in those who work in clinical programs. In the end, nothing is more important to a project's success than the talent and motivations of those working in it.²⁶⁵

²⁶⁵ Oleg Anishchik observes that "the only requisite for an effective clinic is good people – supervisor and students." E-mail from Oleg Anishchik, Director of Samara State University Legal Clinic and Executive Board Chair of the Russian Legal Clinics Foundation, St. Petersburg, Russia, to Leah Wortham (December 13, 2005, 7:48 a.m. EST) (on file with the author).

Sometimes our first impressions about others in our home setting are wrong. When one crosses cultural boundaries, our chance for error multiplies exponentially. I recall a person I originally met at a PILI conference about whom I formed an initial negative impression. Later I visited the law school where I observed the amazing clinical program the person had created and read a very positive evaluation of it by a respected American clinician. I then reflected how much my initial impression was affected by the person's less-than-fluent English, nervousness at being in a foreign setting, cultural differences in dress and self-presentation, and so on.

Critical variables in making sound judgments about people in whom to invest seem to me to be: (1) opportunities to assess people over time in multiple settings; (2) follow-up in home clinics to see what people actually do, as opposed to what they say at conferences; (3) judgments by people who share a common fluent language and understand the cultural setting. I have observed PILI and the Soros organizations winnow out putative clinical teachers who proved less able and committed, and assemble, over almost a decade, an international cadre of talented people with a sincere interest in clinical education and system reform. I ascribe their success in part to repeated interactions over time and on-site evaluations of clinics they have sponsored. In addition, PILI and Soros employ staff from the region with the language and cultural fluency to "read" others more accurately than an inexperienced American would and with access to additional in-country contacts through whom information on a person's accomplishments and potential can be gained.²⁶⁶

2. *Flexibility in Clinical Model*

With only these three basic criteria – live experience with poor clients, faculty involvement, sincere and competent staffing – funders should give maximum flexibility to local clinics to decide on substantive focus and service models, at least until there is enough experience for in-country teachers to reach shared views. A funder with a mission with regard to a particular group of clients appropriately will specify types of clients or cases to be addressed with their funds, *e.g.*, the United Nations High Commissioner for Refugees has funded clinics to serve refugees. Generally, however, I advocate wide flexibility in the types of work and delivery models that clinics employ.

Various factors might determine a clinic's focus. Perceptions of

²⁶⁶ See CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 255-74 (contrasting the USAID external project method, in which people from the donor country have a major role in every step of the aid process, with the Soros local foundation method in which in-country nationals play a major role).

client need, of course, could be a determinant. Faculty subject matter expertise and interest also might suggest the area in which to work. Civil law tradition faculty generally are even more subject-matter-identified than American faculty and may be interested only in developing a clinic in their academic field. Given my view of the importance of involving faculty and the usual situation in which many areas of law present legal needs for poor people and under-served interests, I think it is legitimate to focus a clinic in an area of faculty enthusiasm.

The JU civil clinic and the Samara clinics began operation taking what walked in the door. When JU planners were deciding what to do, Professor Klein and I talked with them quite a bit about the pros and cons of specialized versus general service clinics and our sense of the American experience. After one year of experience, the civil clinic determined there were a lot of labor cases coming in, and this was a sufficiently distinct specialization that a separate clinic should be created for that purpose. It seems reasonable for new clinics to learn from experience with what clients will bring to the clinic. Clinics can benefit from knowing the experience of clinics already operating in the same country.

3. *Reporting Questions*

The reporting questions, which appear as Appendix A, might be asked in a bi-annual or annual report from a funder regarding a clinic's activity. On the theory that people often shape their activity around what they later might be asked to report, the questions are meant to be somewhat directive without being prescriptive. In my ideal world, a Ministry of Education would fund clinical education in the same ways it funds other subject matter chairs. These questions might be asked by a Ministry, a law school of itself, a foundation funding clinics, or an association of clinical teachers.²⁶⁷ The questions press clinics in two primary directions: a focus on educational goals and method and a focus on critical assessment of functioning of the legal system. While American clinicians generally would acknowledge the importance of both these emphases, we also know how easy it is to lose focus on them in the press of daily client service needs and student anxiety about what to do right now.

4. *Analysis of the Institutional Framework in Which Clinical Education Can Be Encouraged and Sustained*

Effective encouragement of clinical programs involves more than

²⁶⁷ See *supra* Section I.B.1&2 regarding the development of legal clinics foundations in Poland and Russia. Such foundations can impose standards and reporting requirements as a condition to apply for funds and in-kind assistance from the foundation.

a focus on what the content of such programs should be. Attention also should be directed to: how courses get credit in the curriculum; how money gets allocated for space and equipment; how faculty teaching loads are calculated; where authority to determine how money and teaching load are allocated lies; what other actors in the university can encourage or constrain law school decisions on resource allocation, teaching credit, and curriculum; what policies or regulations (on funding, accreditation, ranking or otherwise) government ministries or other outside entities constrain, or if changed could encourage, the growth of sound clinical education; what flexibility law schools have to raise tuition revenues, retain that revenue, and direct it as they choose; whether there are government objectives in legal service in which clinics might assist and for which they might receive some funds in support; whether there are any barriers within a country to clinical programs receiving financial support from individuals or private organizations that would like to support the clinic.

I urge that outside funders support programs in which law school faculty are involved, in part because of the importance of this internal law school support for a secure place in the law school curriculum and a chance to gain a share of internal law school resources. Countries, however, may vary widely in the degree of authority and autonomy law schools have in raising, retaining, and allocating funds. Even when significant decisions about funding are made at the university level, there may be many different models for allocation of the funding.

An entity that has been involved in encouraging clinics, *e.g.*, ABA CEELI or the Soros Justice Initiative, quite usefully could commission a study of several countries to assess how criteria for allocating funds, setting curriculum, accrediting, and ranking with respect to law schools may present barriers (and opportunities) for clinical programs and changes would lead to a more supportive environment. An assessment also should be made of the criteria for professional advancement of faculty with consideration of whether there are ways to reward time spent in clinical teaching and scholarship. The previous discussions on implications for clinics from lessons learned in other foreign assistance programs raise the importance of assessing economic and political incentives. Over the long run, devotion to clinical education only may be sustained if faculty receive adequate compensation for time spent in clinical education and feel personally rewarded.

C. Implications for Encouragement of Clinical Education from the Law and Development, New Law and Development, Democracy Promotion, and Rule-of-Law Movements

The following part links lessons from Section II's review of past legal reform efforts to clinical education projects. Most points apply to both clinical teachers working in their home countries and those collaborating from abroad as well as to funders of such projects.

1. Focus on Ends To Be Achieved Rather Than Institutions as an End in Themselves

A grant manager easily can report that X judges were trained, a bill-docketing system for a legislature was created, or a legal clinic was commenced. Assessing the initiative's effect on the project's goal and on the society is much more complex. Pressures to define outcomes by institutions created can benefit clinics because the clinic itself is an institution. Training can be provided for faculty; materials can be translated; clients served can be counted. A young American lawyer working in a country that shall remain nameless ironically commented to me something like, "Yes, the U.S. government is funding my human rights clinic – in a country with no human rights. I and my fifteen students are going to bring human rights to _____."

The important question, of course, remains as to what ends the clinic ultimately contributes. Did the clinic achieve a benefit for particular clients? Even if individual clients did not achieve the ends sought, did the clinic help to assure a client's position was heard and the client was treated with dignity? Did the clinic make a difference, in the short or long term, on the fairness of treatment of the society's poor or unpopular people in the legal system? Even if clients' economic circumstances have not significantly improved, do clients feel more empowered to press for political and economic change? Are the faculty and law students able and motivated to act differently in the legal system than they were before working with the clinic? To what ends are they then motivated to act and how effective are they in their efforts? These are difficult points to measure, but a first step is directing clinics to assess and report information in these regards.

The previously cited assessments of foreign aid initiatives also point out that building democracy and better governance is a matter, not only of formal state institutions, but also of cultural and social attitudes. Clinical education works with law students as their professional identities are being formed. Their interaction with clients also may help to shape what their clients see as the potential for finding help in the legal system and seeking social change more generally. Assessments of effects on teachers, students, and clients should be

made, but we do not always do this very often in the U.S. either.

2. *Do Not Seek To Replicate a Home Country Model*

Sometimes almost the first words from American clinicians inquiring about clinics abroad are: “Is there a student practice rule?”²⁶⁸ The question suggests that the inquirer assumes that an in-house clinic cannot be valuable unless it looks like the prevailing U.S. model that takes a case through all representation stages. Recently, American legal service providers have talked more about advice-only programs and unbundling legal services. The JU clinics’ format of providing opinions to clients not only derived from limitations on the ability to represent clients in court, but also from the faculty members’ view that, in their legal system, such opinions often provide sufficient service. Sometimes a client, with the proper pleadings and documents, can proceed *pro se* in a court system in which the judge has more responsibility to direct the proceeding. In other circumstances, the clinic’s analysis of the validity of the legal claim can be used to force the system to provide the court-appointed lawyer to which the client is legally entitled – something without counterpart in the U.S. civil representation system. Cooperation with the Polish Ombudsman offers another clinical model that does not have a common counterpart in the U.S.

I previously described the differing views of the three clinics in Samara, Russia, on whether clients needed, or even would be assisted, by having students represent them in court.²⁶⁹ I had no basis for assessing the accuracy of their assertion that a lawyer (or law student) was not necessary if documents were properly assembled.²⁷⁰ The LDM critics appropriately cautioned that Americans working abroad should look for alternatives to justice systems that require advocates professionally trained in law to navigate.²⁷¹ More documentation and

²⁶⁸ For description of a student practice rule in a civil law system, see Wilson, *Three Law School Clinics*, *supra* note 7, at 536-37.

²⁶⁹ See Section I.B.2.

²⁷⁰ My own experience in the U.S. system suggests this is not the case in the U.S. For one study showing a significant difference in outcomes with a lawyer despite controlling for the merits of the case, see Carroll Seron, Gregg Van Ryzin & Martin Frankel, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOCIETY REV. 49 (2001).

²⁷¹ See Bloch & Ishar, *supra* note 235, at 97 (Indian legal aid system focused on community education and informal alternative dispute resolution rather than a litigation-based system); Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for Development of Clinical Legal Aid in China*, 24 FORDHAM INT’L L. J. S56 *passim* (2000) (arguing for indigenous models for clinical legal aid programs administered from “state-corporatist” entities like student unions or university-affiliated law firms rather than clinics more closely resembling Western models).

analysis is needed on how clinics actually function in other systems and what impact they have.

3. *Learn About the Countries in Which One Works and Realize What This Has To Teach About One's Own*

The more one learns about another country – culture, politics, laws, legal system – the more one recognizes one's own assumptions about how things are and should be. Our own culture usually remains invisible to us until we step outside to compare it to something else. To be effective in working with others, we need to be conscious of how another system differs from our own.

Gathering such information not only makes us more effective in working with others but also can help us to look at our own system more critically. Trubek and Galanter's famous article proclaimed their self-estrangement from the LDM movement, but the article is cited as one of the early works spawning the Critical Legal Studies movement.²⁷² Moving out of their own legal system apparently prompted the authors to take a critical look at assumptions within the U.S. legal system.²⁷³ Some years ago I read an anecdote, for which I no longer know the source. A British lawyer is going to study French law for six months. A wise person says, "At the end of six months, you will know some French law, but you will know a great deal more British law than you do today." I know something about the legal systems of countries in which I have worked, with the most knowledge of Poland, but I have gained far more insight into U.S. legal education and the U.S. legal profession in this process.

Lawrence Grosberg concludes his reflections on his experiences with ABA CEELI in Russia – which includes a number of thoughtful suggestions on supporting clinical education efforts abroad – by citing two observations by John Sexton, former Dean and now President of New York University. Sexton says, first, that the era of globalization requires a demonstration of ". . . a cultural humility uncharacteristic of Americans," and second, that "lawyers would do well to improve their listening skills."²⁷⁴

²⁷² Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L. J.* 461, 488 (1984).

²⁷³ Galanter also spent more than 25 years studying the Indian legal system. Clark D. Cunningham, *Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey*, 16 *LAW & SOC. INQUIRY* 777, 777 (1991) (reviewing MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* (1989)). A review of a collection of Galanter's essays on the topic cites Galanter's assessment of the "most profound lesson" learned from time spent in India as the "unlearning of many of his fundamental assumptions and conceptual frameworks." *Id.* at 780.

²⁷⁴ Grosberg, *supra* note 24, at 496 n.109 (quoting John Sexton, *Thinking About Training Lawyers for the Next Millennium*, *NYU LAW SCHOOL MAGAZINE*, Autumn 2000, at 35).

The importance of knowledge about a country and the potential benefit to the clinician from this knowledge highlight the advantage of long-term relationships over one-shot visits. Long-term relationships evolve more in a mode of collaboration, which Jane Schukoske describes as one “. . . which connotes interaction, effort and mutual benefit, contrast[ing] with that of outside expertise on or export of clinical legal education methodology” and one which “. . . may beneficially affect the teachers’ work [meaning teachers from both countries] at home and abroad.”²⁷⁵

4. *Consider Economic, Political, and Social Forces That Cause Things To Be as They Are*

Carothers points out that those seeking to bring about change must consider who benefits from things as they are.²⁷⁶ He advises that merely pointing out an alternative way of thinking does not mean that those who gain wealth, power, prestige, or some other important value will voluntarily give that up easily. Thus, he argues that aid practitioners should look at forces that explain why things are as they are and how incentives would have to differ to support change. This point applies both to the way clinics consider how the law and legal systems deal with their clients and how those seeking to promote clinical education look at systems of legal education.

5. *Clinical Education Should Not Be a Value-Free, Technocratic Endeavor*

My vision of clinical education has a normative and critical dimension, the omission of which was one of the LDM’s most damning flaws. The LDM’s promotion of instrumental lawyering was attacked as one that could be hijacked by elites and authoritarian governments to create less rather than more just societies. While it is debated whether the instrumental approach to lawyering preached in the LDM actually lent support to authoritarian regimes or was likely to have that effect,²⁷⁷ the philosophical point regarding divorcing approaches to lawyering from the ends served by the lawyering is an important one.

Political and ethical questions are at least somewhat more visible in debates on promoting democracy and encouraging the rule of law than they were in the LDM. Developing better professional skills in students, with no discussion of the ends for which those skills might be used, how legal talent is distributed, and ethical dimensions of effec-

²⁷⁵ Schukoske, *supra* note 60, at 235.

²⁷⁶ CAROTHERS, *LEARNING CURVE*, *supra* note 6, at 101-02, 105-08, 342-43.

²⁷⁷ See *supra* note 76.

tive lawyering can be criticized analogously to criticisms of the LDM effort to develop lawyers as better problem solvers or social engineers. I am explicit about a more values-driven purpose for the programs I advocate. My resistance to professional skills as a *raison d'être* resonates with the LDM critique that enhanced professional skills in the most powerful interests in a society can be a further detriment to the position of poor people in that society.

6. *Recognize the Importance of Human Relationships and Build Long-Term Collaborative Connections*

I am dubious about the value of a drop-in lecture from a foreign “expert,” which is not part of a more sustained relationship. I urge Americans interested in getting involved in this type of work first to consider hosting visitors to the U.S., which gives the host a chance to learn about the other legal culture through conversation and comparison of what the visitor is seeing. Such hosting may lead to opportunities for longer-term relationships. In general, I think it a more useful expenditure of travel funds to bring foreign law teachers to the U.S. than to send Americans abroad, at least if the Americans have little experience in working in other legal systems. Seeing how a clinic functions and its function within the society is a more powerful learning experience than having a single American describe what happens in the U.S. When someone comes to the U.S. from abroad, the visitor usually will be able to see more than one clinical program and get perspectives from several people.²⁷⁸

Long-term relationships may provide benefits beyond specific content exchanged. In Thomas Carothers’ case study on democracy assistance in Romania, he notes an unexpected, and often ignored, effect of democracy promotion programs in the “psychological, moral, and emotional support” that Romanians reported finding in having foreigners interested in their problems and working with them.²⁷⁹

²⁷⁸ Foreign clinicians also may gain a great deal from in-country exchange and visits to places with legal systems, obstacles, and opportunities more like those in the home country than those of the U.S. Such intra country and regional exchange may offer some of the same kinds of peer support that clinical conferences have provided for U.S. teachers. See McCutcheon, *supra* note 235, at 268-269 (visits to clinics in Nepal, Sri Lanka and India critical in influencing law faculty in Bangladesh to start a clinic); *id* at 269 (citing network of eight university-based clinics in Argentina, Chile, and Peru to develop broader approaches to public interest law in cooperation with NGOs). See also Golub, *Forging the Future*, *supra* note 36, at 6 (referring to avoiding “the trap of simply relying on Western expertise to build up local capacities” and describing exchanges involving clinicians from other parts of the world); Grosberg, *supra* note 24, at 495 (recommending funding for national or regional conferences of Russian clinical teachers).

²⁷⁹ THOMAS CAROTHERS, ROMANIA, *supra* note 154, at 95-97; *but see* CAROTHERS, LEARNING CURVE, *supra* note 6, at 312-13 (cautioning against an assumption that valuable

Those interviewed distinguished foreign aid practitioners who kept coming back, and thus seemed to display more of a commitment, from those coming for one-shot visits.²⁸⁰ Carothers stresses the value people expressed in feeling that they were not alone in their quest to make change.²⁸¹ U.S. clinical teachers, who felt isolated and underappreciated in their own law schools for many years, often have attested to the sustenance gained from the broader community of clinical teachers, to which the American Association of Law Schools (AALS) Clinical Section, Clinical Legal Education Association (CLEA), and regional clinical teacher groups helped them connect.

Carothers cautions that benefits in this type of moral support should not be invoked to support every democracy assistance program for which more tangible results cannot be found.²⁸² Nonetheless, we should remember that successful projects usually require respectful, mutually supportive relationships among those involved, and that a variety of benefits can result from these relationships.

D. *Assessing Results*

Carothers has summarized the LDM's failing as a "too-obvious gap between its ambitions and its achievements."²⁸³ In grant proposals, it is tempting to argue that a utopia can be achieved if only the funding request is granted. I am cautious about inflated promises and assertions about inevitable causal effects. Previously cited scholars of democracy and rule-of-law assistance point out the need for more knowledge on what the effects of such assistance have been but still support initiatives toward these ends, acknowledging that the basic approach is largely grounded in "instincts."²⁸⁴ My advocacy for clinical education is based in analogous intuitions, bolstered by a fair amount of anecdotal experience. I find the intuitions supporting clinical education's potential to be strong enough to urge a broader and more concerted effort to support its introduction and encourage its institutionalization, but I also urge collecting data on clinical activity abroad and more analysis of such efforts.

Still, much of this article can be criticized on the same basis I have criticized others – a focus on what could be rather than providing

"psychological, attitudinal, and educational" change occurs in every project because badly designed and run projects can be "devoid of such effects or may even result in negative ones").

²⁸⁰ CAROTHERS, ROMANIA, *supra* note 154, 109-10.

²⁸¹ *Id.* at 95.

²⁸² CAROTHERS, LEARNING CURVE, *supra* note 6, at 312-313.

²⁸³ CAROTHERS, KNOWLEDGE, *supra* note 155, at 5.

²⁸⁴ CAROTHERS, LEARNING CURVE, *supra* note 6, at 333 (describing the "core strategy" in U.S. democracy assistance as based on "three interrelated instincts").

much solid information on what has been and assessing those results more than anecdotally. Whatever the LDM's weaknesses, it spawned a considerable burst of scholarship – much of it including significant data on the nature of development efforts and the situation in various countries. As Richard Wilson has pointed out, experience gained in the LDM helped to make recent efforts in legal education abroad more sensitive to local conditions and the ways they vary from the United States.²⁸⁵

Thomas Carrothers observed in the democracy and rule-of-law movements the pressure to act rather than to spend time and money on analysis and studies.²⁸⁶ He also commented that many of the foot soldiers in both efforts relied on their own personal experience rather than looking at what research existed.²⁸⁷

With this article, I hope to encourage those who work in clinical programs abroad – Americans involved, home country personnel, and funders who support them – to spend the time and money to do some thoughtful reporting and assessment of actual experience and results. As I began writing this article, Richard Wilson's two studies from Latin America offered lonely examples of that kind of work, based in careful study of what actually has occurred. Just as I was completing this piece, I found two new articles about clinical education efforts in Iraq and China of the type of which we need many more.²⁸⁸

While there certainly were a number of challenges in establishing Polish clinics, and their acceptance and support is not yet what it is in the U.S., reading Haider Hamoudi's article about his efforts in Iraq makes working in Poland seem no more difficult than setting up a clinic in Washington, D.C., with a slightly reluctant American faculty.²⁸⁹ As one might expect, Hamoudi describes conditions in-

²⁸⁵ See *supra* note 142 and accompanying text.

²⁸⁶ CAROTHERS, KNOWLEDGE, *supra* note 155, at 12-13 (identifying five “obstacles to knowledge” about rule-of-law programs and commenting that “[r]emarkably little writing has come out of the academy about the burgeoning field of rule-of-law promotion in the last twenty years” with only a small part of that coming from “scholars who have had significant contact with actual aid programs”); see also GOLUB, LEGAL EMPOWERMENT, *supra* note 155, at 41 (need for research on most effective strategies and activities in a legal empowerment program).

²⁸⁷ CAROTHERS, LEARNING CURVE, *supra* note 6, at 93-94 (citing the differing objectives and dissimilar enterprises between the worlds of academics engaged in democracy theory and practitioners engaged in democracy aid).

²⁸⁸ Haider Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education in Iraqi Law Schools*, 23 BERK. J. INT'L L. 112 (2005); Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and Mission of Social Justice*, 8 YALE HUM. RTS. & DEV. L. J. 117 (2005).

²⁸⁹ All public universities in Poland now have a clinic and the most prestigious private law school has created a clinic as well. *Supra* note 42 and accompanying text. The Polish Legal Clinics Foundation is established and able to provide support to clinics in various

cluding wariness toward the United States, law schools with devastated buildings that were looted of equipment and books, and clinical experiences thwarted because of fear of “car bombs, theft, and kidnapping.”²⁹⁰

I cite Hamoudi’s work, and Pamela Phan’s on her experience in Wuhan, China, as examples of the kinds of thoughtful case studies and analyses of attempts to introduce clinical education that are needed. Hamoudi describes why he had scaled back his original vision of immediately setting up an in-house clinic at three Iraqi law schools to a more modest experience-based learning opportunity for the students at those schools. Senior faculty Hamoudi encountered recited a litany of reasons that clinical education just “couldn’t work” in Iraq, the list sounding very familiar to those that senior faculty often repeat in many parts of the world (including, at least historically, in the U.S.).²⁹¹ Paralleling patterns I have seen elsewhere, the oldest and most prestigious school was the least enthusiastic; a newer law school was more interested.²⁹² Younger faculty were more open.²⁹³ Mirroring experience elsewhere, Hamoudi reports the “most satisfying aspect of the program” at all three law schools was the “overwhelming degree of interest” of the students.²⁹⁴ Faculty previously had commented repeatedly on how unmotivated their students were.²⁹⁵ Indeed, faculty had been so pessimistic about students participating in the program that they had urged Hamoudi to pay students to participate as an inducement (which he declined to do).²⁹⁶ The student response, how-

ways. *Supra* notes 38-41. Establishing JU’s pioneering clinic, the first in Central Europe and second in the former Soviet sphere, in fact, was a tremendous accomplishment, which overcame enormous skepticism that clinical education was appropriate in a civil law system, and in the former Soviet sphere. *See, e.g.,* Uphoff, *supra* note 211 (inventorying reasons clinics won’t work in Romania and its neighboring countries). The point is not to minimize the Polish example or that of many other countries where clinics are taking hold, but rather to show that challenges in a war-torn country like Iraq are exponentially more daunting. Hamoudi reports being unsure whether he will proceed in trying to set up in-house clinics in 2005-06, so one could say that his clinical work does not meet my “three requisites.” But I see the description of his work, including the careful prospecting to find supportive faculty, to be quite reasonable progress to the kind of clinic I would like to see supported, given the challenges of where he is working.

²⁹⁰ Hamoudi, *supra* note 288, at 120-21.

²⁹¹ *Id.* at 116-17 (quoting faculty at Baghdad University, Iraq’s “oldest and most prestigious institution of higher education” saying that “clinical education methodologies are untested and unorthodox and therefore not worthy of the University’s high standards”).

²⁹² *Id.* at 116-117 (contrasting the resistance of Baghdad University founded in 1908 with Suleymania University founded in 1998).

²⁹³ *Id.* at 123 (describing more flexible attitudes of junior faculty but pointing out that the highly hierarchical nature of Iraqi law schools rendered the opinions of junior faculty of little impact).

²⁹⁴ *Id.* at 131.

²⁹⁵ *Id.* at 117-22.

²⁹⁶ *Id.* at n.73.

ever, was very different from the faculty prediction. At the Suleyman University, the university where organizers had the most concern over lack of attendance at a nonmandatory program, over 150 of the 220 eligible students signed up on the first day of a three-day registration period.²⁹⁷ At Baghdad University, Hamoudi reports numerous inquiries from nonparticipating students about how they could get in.²⁹⁸ Basra faculty commented on how much better attended the classes with a practice-based component were than regular classes.²⁹⁹

While I have met many faculty dubious about clinical education, I recall few, if any, students who told me why it “just can’t work.” Likewise, I know of few clinics, if an effort were made to publicize their existence, which lacked for clients.

CONCLUSION

First, this article joins the chorus of other observers of recent law-related foreign assistance efforts who question the efficacy of resources poured into judicial training, writing new codes, and strengthening existing institutions while ignoring other possibilities. I argue that clinical legal education should not be dismissed as too remote and indirect a way to have an impact in a society. Rather it should be recognized that clinics can have effects not only on students, but also on the outlook of academics and practicing lawyers who work in them and the clients whom they serve. These effects can reap benefits in people’s attitudes about their own efficacy, singly and with others, which go beyond the results in a particular case.

Second, the article presents a view on clinic support that would afford considerable flexibility in clinical models, heeding lessons from past foreign assistance efforts not to assume that replication of home-country institutions is the goal.

Third, the article hopes to inspire those who work in clinics – Americans and home country people – to find the time to report their experience in a disciplined, critical manner, preferably putting it in context of the theory, observations, and considerations of previous works. Particularly for time-strapped and underpaid foreign academics, this is most likely to happen if funders support not only creation of the clinics but some assessment of their work. Borrowing Thomas Carothers’ conclusion regarding rule-of-law assistance, we have a “knowledge problem” about clinics abroad.³⁰⁰

²⁹⁷ *Id.* at 131-32.

²⁹⁸ *Id.* at 131.

²⁹⁹ *Id.*

³⁰⁰ CAROTHERS, KNOWLEDGE, *supra* note 155 (referring to the monograph’s title and overall thesis).

Heeding the LDM lesson of its “too-obvious gap between its ambitions and its achievements,”³⁰¹ I am wary of over promising that clinical education is the answer, which will miraculously make legal systems fairer, thus engendering respect for rule-of-law, providing equality of treatment for the less powerful, improving their material circumstances and so on. But I am willing to say that inspirational clinical legal education programs have a better shot at making an improvement in these regards than many other strategies.

I believe that, the world over, there are many students who are hungry for experience-based education in becoming lawyers and are idealistic about making their country a better and fairer place. While law faculty, with a greater investment in the system as it is, usually present more of a challenge, my experience suggests that enough faculty interested in change can be found and nurtured by student enthusiasm and financial and moral support from abroad to work toward institutionalization of clinical education in their own law schools. I urge funders to augment or shift some of the considerable resources now focused on state institutions to supporting clinical education programs of the type here advocated. I also urge, however, that time and money be devoted to study and analysis necessary to enhance the learning curve on whether intuitions about benefits prove to be true, as well as assessing which support strategies work most effectively.

³⁰¹ *Id.* at 5.

APPENDIX A—REPORTING QUESTIONS

The italicized text following the questions comments on what the question seeks.

a. What does the clinic consider most important that students learn from their experience? Please answer this question in terms of things that students should be able to do and motivated to do as a result of their experience in the clinic. *As a first inquiry, this question emphasizes the primary purpose of law schools as education of students. It pushes clinical teachers to articulate with specificity what they want students to learn within the context of a particular clinic without mandating what those objectives should be.*

b. What services to clients does the clinic provide? The answer should explain the types of cases accepted by the clinic and the specific services provided by the clinic on those cases. If the clinic provides varying levels of representation from case to case, *e.g.*, advice only in some cases but court representation in others, explain how those decisions are made. Explain what tasks students perform on cases. If there are some tasks that are performed by supervising faculty or practitioners with student assistance, please specify. *This question assumes that models appropriately will vary among countries, universities, and particular clinics on factors such as subject matter. This question is meant to elicit information regarding the subject matters in which the clinic works and the particular services that students provide.*

c. What training do students receive to meet the educational objectives of the clinic and to provide client service effectively? Describe (and attach copies) of the curriculum, materials, and methods used to teach students regarding substantive law, professional skills, and ethical issues that the clinic deems necessary in order to provide high quality service to clients. Areas of law, professional skills, and values on which instruction is provided should be identified along with an explanation of the method and materials used to teach. Please include an identification of the ethical issues on which students receive instruction and an explanation of how it is provided. *This question is first directed toward encouraging busy teachers to take the time to think about what they need to do to meet their teaching objectives while providing adequate client service. It also encourages a program to develop materials to have something to provide. The questions emphasize that training in ethical issues should be integrated with training in substantive law and professional skills deemed necessary to provide client service. The reporting approach requires programs to provide copies of materials used, and funders should consider mechanisms to encourage and assist such materials being shared.*

d. In what areas would you like to be able to provide additional or improved instruction, and what are the ideas you have for new materials or methods? *As discussed previously, time is at a great premium for faculty in many law schools abroad. Entities like PILI, CEELI, and the Polish Legal Clinics Foundation already provide a very useful service in collecting and disseminating materials developed within clinics and prodding additional materials to be developed through workshops and other mechanisms. This question is meant to encourage clinical teachers to think about things they might want to do themselves and to inform a funder of the types of materials that clinics would find most helpful.*

e. Within subject matter categories, what are the specific types of problems that your clients have brought most frequently to the clinic? *This question seeks to encourage clinics to step back from their caseload and consider the substance of the problems that clients are bringing, not just the categories into which their cases fall, e.g., landlord tenant vs. consumer.*

f. How effective has your clinic been in helping clients get the remedies they seek in the legal system? When the clinic has not been able to help clients to find help with those problems in the legal system, what are the reasons? Reasons given might include problems in the substantive law, in legal institutions administering the law, limitations regarding the services offered by the clinic, or that other social institutions were more effective in addressing the problems. If the clinic refers clients to other institutions that can more effectively address the problems, to what entities are clients referred and for what problems? *These questions urge reflection on both what alternatives the clinic might consider to address client problems and what issues within the legal system block it from providing effective remedies to clients. The funder should be careful to project that the measure of clinic success is not necessarily that the clinic always has been successful in getting the client's remedy. Clinics should be encouraged to identify obstacles to remedies apparently afforded by law on the books, but not in practice, as well as injustices without an apparent remedy. Identification of problems within the system is an important step toward seeking to remedy them or looking for alternative paths to client goals.*

g. Describe any efforts undertaken by your clinic (or its students and faculty through their scholarship or other activities) to make improvements in the law, legal system, public awareness of law, or any other initiative that you believe would benefit the segments of society from whom your clients normally come or the population more generally. *I would not require clinics to undertake activities beyond client service but asking the question reinforces this as a legitimate activity for*

a clinic to contemplate. The question suggests that the work of the clinic might stimulate faculty scholarship that in turn would improve the law or legal system or encourage public debate.

