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Navigating the Moral Minefields of Human Rights Advocacy in the Global South

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Navigating the Moral Minefields of Human Rights Advocacy in the Global South

Sandra L. Babcock*

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INTRODUCTION

On the wall of the Legacy Museum in Montgomery, Alabama, the visitor’s eye is drawn to a striking photograph of black men who appear to be sleeping—or trying to sleep—side by side.¹ Crocheted together like a human blanket, one man’s head next to his neighbor’s feet, they cover the sleeping surface such that it is impossible to tell whether they are in the wooden galley of a slave ship, the packed dirt of a refugee camp, or the cement floor of a jail cell. If the visitor passed by quickly without reading the caption accompanying the photo, she would likely assume that the image was related to the slave trade: the word “kidnapped” appears prominently in the exhibit. One thing is certain: the men in the photo are suffering, and their suffering evokes in the visitor a visceral mix of horror and pity.

The photo was originally published by the New York Times on November 6, 2005. It appeared on the front page of the paper and accompanied a cover story about prison overcrowding in Africa.² The article focused on Malawi’s Maula

* Clinical Professor of Law, Cornell Law School. I would like to thank my clinic students, who have recognized the humanity of their clients and worked tirelessly to protect their dignity and promote their legal rights. I have obtained their express permission to include the excerpts from student journals reproduced below. I would also like to thank the clinic’s Malawian partners, especially the Paralegal Advisory Services Institute, for the many lessons they have taught me over the years. Finally, my thanks to colleagues at Cornell and Drexel law schools, who provided helpful comments on earlier drafts of this article, and to Tayler Woelke for her assistance with research and editing.

¹ The photo is also prominent on the museum’s home page. See Equal Just. Initiative, *The Legacy Museum: From Enslavement to Mass Incarceration*, <https://museumandmemorial.eji.org/museum> (last visited July 17, 2018).

² Michael Wines, *The Forgotten of Africa, Wasting Away in Jails Without Trial*, N.Y. TIMES (Nov. 6, 2005), <https://www.nytimes.com/2005/11/06/world/africa/the-forgotten-of-africa-wasting-away-in-jails-without-trial.html>.

prison, where the prison cells were so crowded that men slept on their sides, head to toe, with scarcely a millimeter of space between them. Once each night, an inmate would give the signal for everyone to turn over simultaneously; apart from that fleeting opportunity to stretch and turn, the crush of bodies surrounding them prevented all movement.³ Each cellblock, designed for 50–60 prisoners, contained approximately 150 men. They spent fourteen hours a day locked in the cell, where they shared a single toilet. Without clean water and soap, prisoners were unable to fend off disease, and many lost their lives.⁴

The Times explained that the overcrowding was attributable, in large part, to the backlog of pretrial, or “remand” cases.⁵ Malawi has no jail system. Rather, prisoners awaiting trial are housed in the same prison as convicted prisoners, separated only by a flimsy wire fence.⁶ Prisoners receive one meal per day consisting of boiled maize flour; occasionally, it comes with beans or peas.⁷ Sometimes they receive no food at all.⁸ Many of them await trial for years without ever speaking to a lawyer. Missing court files cause further delays; without a computerized case-tracking system, many prisoners simply get lost in the system.

Like many others, I was appalled by the conditions depicted in the photo and read the accompanying article with interest. At the time, I was preparing to take a new job directing the international human rights clinic at Northwestern University Pritzker School of Law. I was looking for potential clinical projects and wondered whether the clinic could assist with prison overcrowding in Malawi. I mentioned my interest to Tom Geraghty, the director of Northwestern’s Bluhm Legal Clinic. As it happened, Tom knew someone who was working in Malawi’s prisons with the international non-governmental organization Penal Reform International (PRI). He put us in touch. A little more than a year later, I headed to Malawi with six of my students after putting together a fairly free-form work plan with PRI’s assistance.

I have since returned to Malawi twenty times, bringing more than 60 students and 15 volunteer lawyers.⁹ Our work has led to the release of over 290 prisoners, most of whom had risked execution; others faced a lingering death from disease and malnutrition in Malawi’s prisons. The purpose of this article, however, is not to trumpet our clinic’s hard-won achievements, but to discuss some of the

³ *Id.*

⁴ A 2005 study found that tuberculosis, scabies, diarrhea, sexually transmitted infections, coughs, malnutrition, malaria and bilharzia were common diseases among the prison population. See FIDELIS EDGE KANYONGOLO, MALAWI: JUSTICE SECTOR AND THE RULE OF LAW 124 (2006).

⁵ Wines, *supra* note 3.

⁶ Vera Mlangazuwa Chirwa (Special Rapporteur on Prisons and Conditions of Detention in Africa), *Prisons in Malawi*, A.C.H.R. Ser. IV no. 9 (June 28, 2001).

⁷ Rachel Banning-Lover, *Behind the Walls of Malawi’s Harshest Prisons—In Pictures*, THE GUARDIAN (July 29, 2016, 5:21 PM), <https://www.theguardian.com/global-development-professionals-network/gallery/2016/jul/29/malawis-harshest-prisons-humanitarian-msf>. See Olivier De Schutter (Special Rapporteur on the Right to Food), *Mission to Malawi: 12–22 July, End of Mission Statement*, at 13 (July 22, 2013).

⁸ See De Schutter, *supra* note 7, at 13. *Masangano v Att'y Gen.*, High Court of Malawi [MWHC] 31 (Nov. 9, 2009) (Malawi).

⁹ In 2014, I began teaching an international human rights clinic at Cornell Law School, and brought the Malawi project with me.

complex ethical, moral, and political questions raised by my clinic's legal advocacy on behalf of Malawian prisoners.¹⁰ By describing scenarios from our fieldwork, I seek to illustrate the fraught strategic judgments and moral choices that permeate a certain kind of human rights advocacy. My analysis of these scenarios draws not only from the fields of legal ethics, critical theory, and law reform, but also from the observations of development economists.

This essay is guided by the concept of "reflective equilibrium," a process that "involves going back and forth between our beliefs in the form of carefully considered judgments in response to a range of cases, the ethical principles that underlie those judgments, and the general theoretical considerations that support the ethical principles."¹¹ At a more prosaic level, it is an attempt to put into narrative form a sometimes disjointed and confusing amalgamation of experiences. As Kennedy notes, this gives rise to certain narrative choices that may ultimately obscure "the muddle of practice, experienced as a mix of intuition, confusion, and quick thinking"¹² that sometimes characterizes human rights lawyering. But narrative choices are essential to any good story, and this article is, in essence, a tale about a human rights lawyer and her students who embarked on a journey of human rights advocacy in a foreign legal system. Along the way, they made good and bad decisions, were able to escape harm, and learned valuable lessons about their limits and potential. It is these lessons, many of them painful, that inspired this writing.

Part I of this article provides a short overview of Malawi's legal system. Part II is divided into three sections that describe some of the moral dilemmas and cultural challenges I have encountered during my field work with students. The first of these involves an ethical problem that arose during my initial visit to Malawi as a new clinical professor in 2007. The second addresses the clinic's role in perpetuating a donor-driven, aid-dependent legal culture. The third illustrates the very real dangers of cultural incompetence.

Part III lays out why, despite the imperfect nature of our clinical work in Malawi, the project could serve as a useful model for sustained human rights advocacy—particularly in the clinical context. Here, I describe a twelve-year project spearheaded by the clinic to obtain new sentencing hearings for approximately 175 death-sentenced prisoners after a critical change in the law allowed for the presentation of mitigating evidence at sentencing. I incorporate some of the lessons learned from scholars in the field of justice reform to support

¹⁰ This is not an easy article to write, in part because it exposes my own inadequacy in navigating the cultural barriers that separate me from my Malawian colleagues, and in part because it reveals my shortcomings as a clinical professor. But such is the nature of critical reflection, and it would be of little interest to anyone if the article failed to explore my ambivalence about the legacy of our multi-year engagement in Malawi. In this, I am the embodiment of the ambivalent human rights advocate described by Peter Rosenblum in his seminal article on our profession. Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 HARV. HUM. RTS. J. 301, 304-305 (2002).

¹¹ W. BRADLEY WENDEL, ETHICS AND LAW: AN INTRODUCTION 22 (2014).

¹² David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377, 1379 (1985).

an incremental, problem-based approach to clinical work in the Global South.¹³ I explain how the Malawi project has provided valuable learning opportunities for students, even though my pedagogical method consciously diverges from the favored clinical teaching model that emphasizes student autonomy and control over individual cases. I also address critiques of human rights advocacy in general, and human rights clinics in particular, in describing why I believe this model strikes an appropriate balance between pedagogical objectives and service to an underrepresented community. I conclude that the long-term nature of the clinic's collaboration with local partners in Malawi, combined with our focus on individual client representation, have allowed us to maximize the impact of the project on students and clients alike.¹⁴

I. MALAWI FACTS AND FIGURES¹⁵

Malawi is a gorgeous, land-locked country approximately the size of Pennsylvania sandwiched between Tanzania to the north, Zambia to the west, and Mozambique to the east and south. One long border lies adjacent to Lake Malawi, the third largest lake in Africa and the ninth largest lake in the world.¹⁶ Much of the country lies in the upland valley that is the southern end of the East African Rift Valley. The climate is pleasant in most regions of the country, without the punishing humidity of the coast. Since the fall of dictator Hastings Kamuzu Banda in 1994, the country has enjoyed twenty-five years of peace and relative stability,

¹³ In my view, “Global South” is the best term for countries that used to be referred to as “less developed” or “developing, for the same reasons identified by Hambergren.” See LINN A. HAMMERMREN, JUSTICE REFORM AND DEVELOPMENT 5 (2014). At the same time, I’m cognizant of the drawbacks to this terminology identified by Sarah Jackson. She notes that while she uses the term, she does so “with full recognition that this binary distinction is lacking. It negates power imbalances between countries within the Global North and Global South, concealing inequality, downplaying class and its intersection with gender, race, age and so on. It is a top-down construct.” Sarah Jackson, FROM CHARITY TO TRANSFORMATIVE SOLIDARITY – THE CHANGING PLACE OF INTERNATIONAL HUMAN RIGHTS WORK IN THE HUMAN RIGHTS ECO-SYSTEM 4 (Aug. 28, 2018).

¹⁴ In my research for this article, I revisited some of the classic critiques of the human rights movement. One in particular I found inspirational and maddening in equal measure: David Kennedy’s *Spring Break*, published in 1985. Kennedy’s piece was inspirational in its use of narrative storytelling techniques to reflect on his experience during a human rights investigation in Uruguay. It is maddening to the extent that Kennedy uses what was, in essence, a three-day trip to a foreign country as a launching pad for an essay that aims to expose the fraught moral choices confronting a human rights advocate. Kennedy, *supra* note 12, at 1377.

¹⁵ This thumbnail sketch fails to do justice to the complexity of Malawian culture and political development. Nevertheless, it attempts to highlight the more salient facts relevant to this paper without falling into the common pitfalls of Western writing about Africa. See Binyavanga Wainaina, *How to Write About Africa*, GRANTA, (Jan. 19, 2006), <https://granta.com/how-to-write-about-africa/>.

¹⁶ Scientists estimate that more than 1,000 different species live in Lake Malawi, many of them endemic. (This is more than the total number of species found in all of the lakes and rivers of Europe and North America combined.) See *10 Largest Lakes in the World*, WORLDATLAS, <https://www.worldatlas.com/articles/10-largest-lakes-in-the-world.html> (last visited Feb. 10, 2019).

despite an ethnically diverse population and struggling economy.¹⁷ It boasts a reputation as one of the friendliest countries in sub-Saharan Africa, proudly displaying the moniker “The Warm Heart of Africa” in tourist brochures. Residents are generally pleasant to outsiders, although quite reserved in rural areas. It is one of the most densely populated African countries, with a total population of approximately 18.6 million.¹⁸

Malawi is also the sixth poorest nation in the world, measured by gross domestic product at purchasing power parity.¹⁹ The per capita gross national income is \$320.²⁰ More than seventy percent of the population survives on just \$1.90 per day.²¹ According to the Special Rapporteur on Food, one-fourth of Malawi’s population is “ultra-poor,” meaning that they have an income “below the estimated cost of food providing the minimum daily recommended calorie intake.”²² Simply put, they don’t have enough to eat. About fifty percent of children show signs of chronic malnutrition, including stunted growth and wasting.²³

Malawi’s justice sector is largely dependent on outside aid to maintain operations.²⁴ Government allocations to the Ministry of Justice are grossly inadequate. A 2006 review of the justice sector noted that because of underfunding, justice sector institutions “cannot obtain material resources as basic as texts of legislation, law reports, vehicles, typewriters, computers and stationery—or even adequately maintained buildings.”²⁵ A lawyer’s attempt to file a simple legal document can be stymied by her inability to find a functioning photocopy machine that has sufficient paper and toner.²⁶

For Malawian lawyers, it can be difficult to ascertain precisely what the law *is*. Legislation may be published months after passage, and until recently was only available in hard copy. Judicial decisions are not routinely published. Record

¹⁷ James Chavula, *19-Year-Old Prayer for Peace*, THE NATION (May 15, 2013), <http://mwnation.com/19-year-old-prayer-for-peace/>.

¹⁸ WORLD BANK, MALAWI COUNTRY INDICATORS, <https://data.worldbank.org/country/malawi> (last visited June 7, 2018).

¹⁹ Jonathan Gregson, *Poorest Countries in the World*, GLOBAL FINANCE (Feb. 13, 2017), <https://www.gfmag.com/global-data/economic-data/the-poorest-countries-in-the-world?page=12>. According to Global Finance magazine, “PPP takes into account the relative cost of living and the inflation rates of countries, rather than using just exchange rates, which may distort the real differences in income.” Valentina Pasquali, *The Poorest Countries in the World*, GLOBAL FINANCE (Feb. 5, 2015), <https://www.gfmag.com/global-data/economic-data/the-poorest-countries-in-the-world> [<http://archive.is/jgOag>].

²⁰ WORLD BANK, *supra* note 18.

²¹ WORLD BANK, POVERTY AND EQUITY DATA PORTAL: MALAWI, <http://povertydata.worldbank.org/poverty/country/MWI> (last visited Feb. 28, 2019).

²² De Schutter, *supra* note 8, at 2.

²³ *Id.*

²⁴ See KANYONGOLO, *supra* note 4, at 10.

²⁵ *Id.*

²⁶ Once, in preparing for a training workshop, I went to three separate shops offering photocopying services. The copiers were broken in the first two. In the third, the copier was functioning, but the shop lacked electricity to power it. This is by no means unusual. For a good overview of the infrastructure problems and resource constraints that pervade many legal systems in the Global South, see Hambergren, *supra* note 13 at 28-29.

keeping as a whole is exceedingly poor.²⁷ Case-related information is manually transcribed, and filing systems are haphazard at best.²⁸

The legal aid system cannot begin to meet the needs of individuals detained on criminal charges. As of 2006, there were approximately 180 lawyers in private practice in the entire country, most of whom handled civil matters exclusively.²⁹ The only certified law school in the country graduates approximately 30–35 students a year³⁰—although during recent years, graduation was delayed as a result of lengthy student and faculty strikes.³¹ Over the last twelve years, the population has increased by more than 4 million while the number of lawyers has increased by at most 300.³²

At any given time, there are anywhere from 7–20 legal aid lawyers in the entire country.³³ Legal Aid is grossly under-funded, particularly when compared to the Director of Public Prosecutions, whose budget in 2006 was more than twice the amount allotted for Legal Aid.³⁴ Legal Aid lawyers spend most of their time on civil matters,³⁵ and often lack the time, resources, and motivation to visit prospective clients in prison. The vast majority of prisoners never speak to a lawyer and are unrepresented at trial.³⁶ Although Malawi's Constitution provides that an individual accused of a crime has the right “where it is required in the interests of justice to be provided with legal representation at the expense of the State,”³⁷ in practice, the State only provides legal aid in homicide cases.³⁸ Legal aid lawyers

²⁷ KANYONGOLO, *supra* note 4, at 11.

²⁸ In 2013, a volunteer lawyer helped the clinic search for the files of approximately 192 prisoners who had been given mandatory death sentences. The file room of one of the High Courts was located in an unused latrine where files were stacked on the floor. After searching for seven months, he was only able to locate 86 of the 192 case files. The reliance on paper files, and the lack of systematic case tracking methods, are commonplace in much of the Global South. *See* Hambergren, *supra* n. 13, at 26.

²⁹ David McQuoid-Mason, *Assessment of Legal Aid in the Criminal Justice System in Malawi*, June 2006, ¶¶7.1–7.2 (on file with author).

³⁰ *Id.* at ¶7.5.

³¹ *See, e.g.*, Hummy Humphreys, *Breaking News: Chancellor College Has Been Shut Down*, NEWS WATCH REVIEWS (July 19, 2016), <http://newswatchreviews.com/breaking-news-chancellor-college-has-been-shut-down/>; *Malawi: Court Overrules President on Lecturer Strike*, U. WORLD NEWS (Mar. 27, 2011), <http://www.universityworldnews.com/article.php?story=20110326123235692>.

³² WORLD BANK, MALAWI COUNTRY INDICATORS, <https://data.worldbank.org/country/malawi> (last visited June 7, 2018); Membership Directory, MALAWI LAW SOCIETY, <http://malawilawsociety.net/index.php/membership/membership-directory/file>, (last visited June 7, 2018).

³³ In 2006, McQuoid-Mason noted that there were five lawyers in the southern region, and nine in the central region—of whom four had been in the office for less than four months. *Supra* note 29, at ¶8.2. In 2005, Kanyongolo reported that the Legal Aid department had only 10 lawyers. KANYONGOLO, *supra* note 4, at 112.

³⁴ McQuoid-Mason, *supra* note 29, at ¶8.1. McQuoid-Mason observed that at the time of his study, Legal Aid had five vehicles, four of which were “beyond repair and not used.” *Id.* at ¶8.3.

³⁵ *Id.* at ¶8.5.

³⁶ 2006, one report estimated that fewer than ten percent of criminal defendants were represented at trial. KANYONGOLO, *supra* note 4, at 112.

³⁷ CONSTITUTION OF MALAWI, § 42(2)(f)(v).

³⁸ KANYONGOLO, *supra* note 4, at 112.

are often inexperienced and poorly trained, and turnover is high.³⁹ In March 2016, the Legal Aid Bureau announced that it had run out of money and could no longer represent indigent criminal defendants in homicide cases.⁴⁰

English is the official language of the courts, although only one percent of the country's population understands it.⁴¹ Interpretation is typically provided by the court clerk, who simultaneously transcribes the proceedings (in longhand).

II. LESSONS LEARNED—AND RE-LEARNED

Working in Malawi has never been easy for me. To get there, my students and I take an exhausting and expensive series of flights over two full days. Working conditions are less than ideal. We have twice run training conferences with no electricity at all. During catastrophic flooding in early 2015, we had no running water for two days. Malawians have a flexible concept of time, and the lack of a reliable internet network makes communication difficult—factors that make it challenging to organize our work in advance of our visits. My students and I have periodically fallen sick, mainly from food and water-borne bacteria. We are at risk of exposure to tuberculosis and other diseases through our work in the prisons, and malaria is a constant concern. But the work has a profound impact on both the students who are fortunate enough to travel to Malawi, as well as on the prison population we serve.

Over the course of the twelve years that I have worked in Malawi, I have learned a great deal about the challenges of direct engagement with a foreign legal system in one of the poorest countries in the world. This section describes three situations that illustrate the ethical, moral, and pedagogical challenges presented by our Malawi advocacy.

A. Ethics, Shmethics

My first trip to Malawi was off to a bad start. I had gotten a stomach bug as soon as I landed, and was sharing a room with a student I didn't know very well. One of my students announced that she was an insectophobe, and became slightly hysterical every time we saw a large fly or a spider. Another student had a panic attack shortly after we arrived. A third student forgot his computer at airport security, and was inexplicably walking around without shoelaces. On our first day of work, when our local partner arrived to pick us up at our cockroach-infested lodge, two of my students had to be woken, as they had slept through their alarm. My stress level was, shall we say, slightly elevated.

After everyone finally piled into two Range Rovers, we drove to the offices of the Paralegal Advisory Services Institute (PASI)⁴² to discuss how we would

³⁹ *Id.* at 112–113.

⁴⁰ See Owen Khamula, *Malawi Legal Aid Bureau Puts on Hold Murder Cases: No Funds*, NYASA TIMES, Mar. 30, 2016, <http://www.nyasatimes.com/malawi-legal-aid-bureau-puts-on-hold-murder-cases-no-funds/>.

⁴¹ KANYONGOLO, *supra* note 4, at 114.

⁴² PASI is the premier organization of paralegals in Malawi, and perhaps in Sub-Saharan Africa. For a discussion of the role of paralegals in Sub-Saharan Africa, see Hambergren, *supra* n. 13, at 140.

organize our work for the duration of our visit. PASI is a non-governmental organization that trains paralegals to educate prisoners about their legal rights. Their teams of paralegals visit the prisons every day, conducting interactive workshops using skits and role-playing to instruct prisoners (many of whom are illiterate) about criminal law and procedure. Over the years, they have educated thousands of prisoners, helping them seek bail and sentence reductions, and facilitating their access to courts. Their work has led to a dramatic reduction in the size of the remand population.⁴³

The PASI paralegals identified fourteen prisoners who had been held on remand for several years. Each was charged with murder, which carried the mandatory death penalty. None of them had ever spoken to a lawyer. Our task was to meet with the prisoners, interview them, and ascertain whether they were interested in pleading guilty if the prosecution reduced the charges from murder to manslaughter.

Adam Stapleton, a British lawyer working with PRI, announced that the students would be divided into two groups. One group would work with the state's advocates in the office of the Director of Public Prosecutions (DPP). Another group would work with Legal Aid. The group working with the DPP would review the prisoners' case files and write memos analyzing the evidence in reference to the Malawi Penal Code and the Criminal Procedure and Evidence Code. These memoranda would also recommend a course of action: either prosecution for murder, reduction of the charges in exchange for a guilty plea, or dismissal. The group assigned to Legal Aid would interview the prisoners and write up memos for defense lawyers based on the information they gathered. In cooperation with the judiciary, Adam and PASI had also scheduled court dates at which point the prisoners' cases could be heard.

I listened with growing dismay as Adam explained our mission. His plan sounded perfectly logical, except for the *massive* conflict of interest presented by his proposed division of labor. Clinic students would simultaneously be assisting both sides in the same case. Adam assured me that both the DPP and Legal Aid were fully aware of our work plan and welcomed our participation. Moreover, if we only worked for one side, we would jeopardize the prisoners' ability to obtain prompt judicial review of their cases. He explained that neither the DPP nor Legal Aid had the capacity to staff the cases. Some of the prisoners had been languishing for years in pretrial detention, and if we didn't take advantage of this opportunity now, they might not be back before the courts for years to come.

At the time, I had no access to the rules of ethics governing Malawian lawyers.⁴⁴ Malawi has an adversarial criminal justice system founded on rules of

⁴³ See Clifford Msiska, *On the Front Lines: Insights from Malawi's Paralegal Advisory Service*, in OPEN SOCIETY JUSTICE INITIATIVE, PRETRIAL DETENTION 2008, at 77–78.

⁴⁴ In 2016, I finally obtained a copy of the rules of professional responsibility that govern Malawian lawyers. Chapter 7 of the Malawi Law Society Code of Ethics addresses conflicts of interest: “A lawyer must not act when there is a conflict or potential conflict of interest between lawyer and client unless the client consents and it is in the client’s best interest that the lawyer so acts.” CODE OF ETHICS ch. 7, r. 7 (MALAWI L. SOC. 2006). Our work was consistent with this provision, as we obtained the prisoners’ permission to act on their behalf, and it was in the prisoners’ best interest that we do so.

procedure inherited from the British colonial regime. Both defense counsel and the prosecution had not only consented to our participation, but actively welcomed our involvement. I decided that we could go ahead, provided that the students obtained the prisoners' consent to our arrangement.⁴⁵ I also forbade the students to speak to their classmates who were assisting the other party. The students reported directly to lawyers working for the DPP and Legal Aid, but they all came to me, as the sole faculty supervisor, with questions about their respective work.

I randomly assigned the students to either the prosecution or legal aid. Those who had the task of reviewing prosecution case files were initially envious of their peers who were interviewing actual clients in the prisons. But they soon realized the impact they were having. One enthusiastic student wrote in her journal:

I cannot believe it. I cannot believe it. The Director of Public Prosecutions agreed with the 3 opinions my team and I wrote. Oh my goodness. I can't believe it. My head is reeling and I can't sit still. Can you believe this? I can't. It is amazing. . . . We are bouncing off the walls and can't wait to dig into more of the files and write more opinions. Bring on the files, bring on the files. My team is ready to write opinions until our fingertips bleed. I do not want lunch, I just want another file. The more files we can review, the more opinions we write, the more opinions the DPP can review and possibly approve, and the more remanded inmates we can provide with an opportunity to have their day in court before we leave.⁴⁶

After one week, the students switched sides and began working on a new set of cases. Those who were formerly prosecutors' aides started working with the defense, and vice versa. Once again, our local partners found this perfectly acceptable. Adam pointed out that in the United Kingdom, it is not uncommon for prosecutors to work simultaneously as defense attorneys (although certainly not on the same cases).⁴⁷ But in the United States, I would have been fiercely critical of such a practice as inimical to the best interests of the defendants.

By the end of our two-week stay, four prisoners had pleaded guilty to manslaughter and were sentenced to time served. All were immediately released. Two others were released on bail. In the weeks after we returned home, six more prisoners were released after pleading guilty. The students were ecstatic, and our local partners pronounced the project a success.

I returned to Malawi a year later and replicated the same model, with similar results. But the following year, our partners requested our assistance with four capital murder trials. I explained that in the trial setting, my students would not be

⁴⁵ One of my colleagues insightfully pointed out that the prisoners' "consent" could not be considered truly free and informed, owing to the inherently coercive circumstances of their detention and the lack of alternative options for legal representation.

⁴⁶ M.S., Student Journal (Spring 2007) (on file with Author).

⁴⁷ There is no universal consensus on what constitutes a conflict of interest. In her article on attorney ethics at the International Criminal Tribunal for the Former Yugoslavia, Judith A. McMorrow describes a case in which a former prosecutor was allowed to join a defense team for a client notwithstanding his prior involvement as a prosecutor in two cases against the accused. Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139, 164 (2007).

able to assist both sides. This time, we worked exclusively with the defense, interviewing the prisoners, conducting investigations, and transporting witnesses to court. The legal aid lawyers had not even spoken to their clients before we arrived and had done no investigation. We prepped the cases during our first week in the country, and the capital trials were held during the second week.⁴⁸

So why was it acceptable for the students to work on both sides of the fence when we were negotiating guilty pleas, but not when we went to trial? As an initial matter, the negotiation process is less adversarial than a trial. Both sides were working together to settle the cases. Although pretrial negotiations are certainly part of the adversarial process, the nature of a trial is fundamentally different. There is no collaboration, and each side works independently to develop a theory of the case, prepare its witnesses, and implement its trial strategy. Moreover, these were death penalty trials, and I would never have allowed my students to work on the prosecution side in a capital case.

As I write this, it strikes me that my decisions in the field were guided by little more than my internal moral compass, cloaked in flimsy rationalization. This is a danger inherent in human rights work, and one that has been noted by a number of scholars: there are few ethical rules that bind international human rights lawyers operating in foreign jurisdictions.⁴⁹ Are we, in essence, acting as cowboy lawyers, free-wheeling through a foreign jurisdiction where we make up the rules as we go along?

I think not. At all times, we acted in accordance with the requests of our local partners, consistent with local practices and customs. In 2006—one year before our first Malawi trip—an independent consultant noted that there was a backlog of 500 homicide cases in Malawi.⁵⁰ At the time, paralegals and legal interns were “drafting alternative murder and manslaughter charges and recommendations for consideration by the DPP” in an attempt to clear the backlog.⁵¹ The DPP

⁴⁸ The idea that clinic students would help investigate and defend four capital murder cases over the course of two weeks would undoubtedly raise eyebrows in the U.S. capital defense community. This illustrates another conundrum inherent in the clinic’s Malawi work: we never have the time or the resources to handle cases in accordance with established guidelines for capital case representation. See generally American Bar Association: *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). Notwithstanding these constraints, the results were positive: one defendant was acquitted, the prosecution dismissed the charges against another, one pleaded guilty and received a 5-year sentence, and a fourth was convicted and sentenced to 15 years.

⁴⁹ See Laura Notess, *Current Developments 2013–2014: Preserving the Human in Human Rights: Incorporating Informed Consent into the Work of International Human Rights NGOs*, 27 GEO. J. LEGAL ETHICS 765 (2014); Nell Moley, *Confronting the Challenges of Ethical Accountability in International Human Rights Lawyering*, 50 STAN. J. INT’L L. 359, 361–64 (2014); Caroline Bettinger-Lopez et. al, *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL’Y 337, 384 (2011). On the ethical hazards of international legal practice generally (without focusing explicitly on human rights practice), see Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT’L L. J. 53 (1992/1993); Detlev Vagts, *International Legal Ethics and Professional Responsibility*, 92 AM. SOC’Y INT’L L. PROC. 378, 378 (1998).

⁵⁰ McQuoid-Mason *supra* note 29 at ¶6.2.

⁵¹ *Id.* at ¶21.5.

requested, and the consultant recommended, that donors provide funding for twenty legal interns to assist prosecutors in processing the homicide cases. Our work was in line with ongoing efforts to ensure access to justice for prisoners and filled an unmet need in the Malawian legal system.

As noted above, all of our partners not only consented to this arrangement but welcomed our participation. Their informed consent was critical to my decision to set aside concerns over the clinic team's conflict of interest. The Model Rules of Professional Responsibility allow lawyers to represent parties with adverse interests if the client provides informed consent,⁵² and scholars have emphasized the centrality of informed consent to international human rights advocacy.⁵³ As Notess points out, "Because informed consent resonates both with principles found in the *Model Rules* and with general human rights values such as voice and participation, it can provide an important means for American lawyers to consider international legal ethical issues."⁵⁴

Was our facilitation of plea agreements consistent with international best practices? Clearly not. Students in the same clinic should not be obtaining privileged information from prisoners, while other students simultaneously advise the prosecution on a course of action in the prisoner's case that best serves the public interest. The greatest problem lay in my supervision of both sides. Technically, the students reported to senior prosecutors and legal aid attorneys. But I was aware of the work that each side was conducting, and I reviewed each memo written by the students assisting the prosecution. Had there been two supervisors, and two teams of students that maintained a strict separation, the arrangement would have been far less problematic. But at the time, I felt I owed a pedagogical duty of supervision to my students since I had no way to gauge the quality of instruction they would receive from our Malawian partners.

This created a significant pedagogical challenge that, as a new clinical professor, I struggled to address. With my students, I was frank about the conflict and my discomfort with the situation, explaining that there was a difference between "best practices" in the United States and "best practices under the circumstances" in Malawi. But to a large extent, my teaching "moment" was lost to my own confusion about whether what we were doing was ethical. In my early days of teaching, I was less inclined to share my own apprehensions with my students, as I thought I needed to project confidence and leadership. Today, I would handle it slightly differently, by creating greater opportunities for discussion about the issue at hand with students and partners alike.

Would I do it again? Yes—although I would be sure to bring two supervisors so that we could have a stricter separation between the two sides. This would not only be consistent with Malawi's ethical rules⁵⁵ but with broader

⁵² MODEL RULES OF PROFESSIONAL CONDUCT, r. 1.7. (AM. BAR ASS'N 2018).

⁵³ Cf. Notess, *supra* note 49, at 775 (advocating for the adoption of an informed consent standard in international human rights litigation). Notess observes, however, that clients in civil law countries generally cannot waive conflicts of interest, even if they expressly wish to do so. *Id.* at 777.

⁵⁴ *Id.* at 777.

⁵⁵ See CODE OF ETHICS , *supra* n. 44.

principles of moral choice.⁵⁶ On balance, the “good” that we achieved—the liberation of twelve prisoners who had been subjected to cruel and inhuman treatment as well as arbitrary and prolonged detention—outweighed our potential conflict of interest, particularly given that all parties consented to our participation. This consequentialist approach⁵⁷ may seem overly simplistic, but it coheres with the reality of practicing law in a country whose legal institutions are incapable of protecting the constitutional rights of individuals caught up in the criminal justice system. It is also broadly consistent with ethical principles promoted by scholars in the field.⁵⁸ Finally, by giving voice to prisoners who were otherwise powerless to tell their stories, our clinic fulfilled what is perhaps the highest ethical duty of any legal professional: to uphold her client’s human dignity.⁵⁹

B. Advancing Human Rights, or Reinforcing Donor Dependence?

Anyone who works in Sub-Saharan Africa over time becomes accustomed to the particular vocabulary employed by the vast network of donors that underwrite development projects.⁶⁰ As a general rule, legal reform work falls under the incongruous heading of “governance” assistance.⁶¹ When you organize a training workshop, you are “building capacity.”⁶² When you share your experience with

⁵⁶ See WENDEL, *supra* note 11, at 49.

⁵⁷ As summarized by W. Bradley Wendel in his helpful primer on legal ethics, “[c]onsequentialism is a moral theory holding that the right thing to do in any particular situation is that which will produce the best outcome, the greatest net balance of good over evil.” *Id.*

⁵⁸ The discussion of ethical constraints on human rights lawyers and NGOs generally takes place in a different context than the one I’m describing. Often, NGOs and human rights lawyers engage in advocacy without any formal attorney-client relationship with those whose rights they seek to vindicate. In the absence of any code of professional conduct to guide their actions, some organizations have adopted their own internal codes of ethics. See, e.g., *Code of Conduct*, INT’L FED’N OF RED CROSS AND RED CRESCENT SOCIETIES, <http://www.ifrc.org/en/publications-and-reports/code-of-conduct/> (last visited Feb. 27, 2019); *12 Accountability Commitments*, ACCOUNTABLE NOW, https://accountablenow.org/wp-content/uploads/2017/10/12Comm_Booklet SCREEN.pdf (last visited Feb. 27, 2019). One of the most comprehensive codes of ethics for human rights practitioners was developed in a paper drafted by Columbia law student Rachel Barish. Barish draws from the ethical rules that govern diverse professions, including international lawyers, journalists, human subject researchers, and NGOs, and proposes a code of ethics guided by the following eleven principles: exercise competence; undertake effective communication; maintain independence; engage in zealous advocacy; do no harm; protect life, health, and dignity; assess risks/benefits to the population; guarantee fully informed consent; ensure accuracy and objectivity; practice cultural sensitivity; avoid conflicts of interest; and take steps to ensure accountability. Bettinger-Lopez et. al., *supra* note 49, at 384 (citing Rachel Barish, *Professional Responsibility for International Human Rights Lawyers: A Proposed Paradigm* (2007) (unpublished manuscript) (on file with authors)).

⁵⁹ See David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 815 (2005).

⁶⁰ Ferguson argues that the “development” discourse has profound political and social effects. JAMES FERGUSON, THE ANTI-POLITICS MACHINE: “DEVELOPMENT,” DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO xiii-xvi (1990).

⁶¹ See HAMMERMREN, *supra* note 13, at 9.

⁶² See, e.g., *Organize Capacity Development Activities to Learn the Basic Concepts of Safe Cities for Women and Violence Against Women and Girls*, U.N. WOMEN (Dec. 3, 2010),

local partners, or aid in the drafting of a report, you are providing “technical assistance.”⁶³ If you propose a short-term project that aims to address a particular need at a particular time, you may be chastised for failing to consider the “sustainability” of your intervention.⁶⁴ If you draft a grant proposal, you must include the specific “outputs” that you aim to generate.⁶⁵ I don’t mean to sound disparaging. The individuals engaged in development work have learned the hard way that projects lacking these elements will fail to achieve lasting change.⁶⁶

Malawi depends on international aid for about forty percent of its national budget, far more than is considered optimal by development economists.⁶⁷ On a drive through the country, the visitor regularly sees billboards proclaiming that this school, that clinic, or this stretch of highway has been constructed with funds provided by an international donor. Local NGOs are completely dependent on foreign aid to survive.⁶⁸

There is no question that the quantity of aid provided has had a profound effect on local institutions, and not all for the good. In 2013, Malawi was rocked by a major corruption scandal in which public servants—including the Minister of Justice—were implicated in the theft of approximately 32 million dollars in public funds, or about one percent of Malawi’s GDP.⁶⁹ Major donors quickly froze pending transactions, and Malawi spiraled into a political and economic crisis from which it has not yet recovered. So what does our clinic work have to do with all this?

The level of deprivation in Malawi—and its effects on the justice system—permeates the nature of our advocacy and our relationships with local partners. My

<http://www.endvawnow.org/en/articles/378-organize-capacity-development-activities-to-learn-the-basic-concepts-of-safe-cities-for-women-and-violence-against-women-and-girls.html>.

⁶³ See, e.g., *The Reality of Aid 2016 Report Theme Statement*, THE REALITY OF AID (Nov. 24, 2015), <http://www.realityofaid.org/2015/11/the-reality-of-aid-2016-report-theme-statement-technical-cooperation-and-capacity-development-as-an-aid-modality/>.

⁶⁴ See generally Ben Taylor, *Who Wants to Give Forever? Giving Meaning to Sustainability in Development*, 26 J. INT’L DEVELOPMENT (2014), <https://onlinelibrary.wiley.com/doi/10.1002/jid.3033>.

⁶⁵ *Understanding the Difference Between Outputs and Outcomes*, PROFESSIONAL GRANT WRITERS (Aug. 15, 2017), <https://www.professionalgrantwriter.org/understanding-difference-outputs-outcomes>.

⁶⁶ For a pithy description of the shortcomings of typical donor-funded projects, see Nancy Birdsall, *Seven Deadly Sins: Reflections on Donor Failings*, in REINVENTING FOREIGN AID 515 (William Easterly ed., 2008).

⁶⁷ Jacey Fortin, *Cashgate: Malawi Faces a Ticking Time Bomb as International Aid Dries Up Over Pervasive Corruption*, INT’L BUS. TIMES (Nov. 19, 2013, 11:55 AM), <http://www.ibtimes.com/cashgate-malawi-faces-ticking-time-bomb-international-aid-dries-over-pervasive-corruption-1476658>.

⁶⁸ Moss, Pettersson and van de Walle contend that because NGOs receive the bulk of their funding from donors, “they are less likely to seek to build up their own memberships, or autonomy. Because they help donors implement projects that governments fail to undertake, they actually help governments escape accountability for their developmental failures.” Todd Moss, Gunilla Pettersson & Nicolas van de Walle, *An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa*, in REINVENTING FOREIGN AID 274 (William Easterly ed., 2008).

⁶⁹ See J.O’S., *The \$32m Heist*, THE ECONOMIST (Feb. 27, 2014), <http://www.economist.com/blogs/baobab/2014/02/malawi-s-cashgate-scandal>.

students have reacted to this in a variety of ways. Upon witnessing the primitive filing systems used by court clerks, one of my students suggested pooling our resources to buy filing cabinets. Others have expressed a desire to send second-hand laptops or books to local lawyers. With respect to our clients and their families, whose poverty is wrenching to witness, one feels an overwhelming desire to do *something* to help—even if the effects are fleeting. This often takes the form of small donations for food, housing, or transportation. Yet these small gestures do little to offset the feeling of helplessness that my students often feel in the face of overwhelming human suffering.

For a lawyer with no technical or scholarly background in the field of development aid, I have sometimes struggled to explain why buying filing cabinets for every courthouse in Malawi would not solve the problem of missing case files in Malawi. And my students' responses are not so different from those of donors who have funded the construction of courthouses after observing the dilapidated state of courtrooms.⁷⁰ Providing material resources offers a quick and easy "fix" for perceived problem. What it does not address, however, are the less tangible obstacles to legal reform, including organizational incompetence, resistance to change, lack of ongoing training, and procedural rigidity.⁷¹

The first year I took clinic students to Malawi, it never occurred to me that our local partner—the Paralegal Advisory Services Institute—might expect me to provide funding for its role in our joint project. After all, we were doing work that fit comfortably within PASI's mandate: educating prisoners about their legal rights and reducing prison overcrowding. I was oblivious to the added burden that our presence imposed. I didn't see that every time they drove us to the prison, they used up some of their fuel supplies. I didn't realize that when they copied case files for us, they used up precious paper and toner for their copy machine. And when they called me to discuss the day's agenda, they paid for the "air time" required for those calls. If I had stopped to think about these expenses, I might have told myself that these were all part and parcel of an NGO's daily work.

After our first visit, however, I asked Adam Stapleton—the lawyer working for Penal Reform International who had conceived of our project—whether I should make a donation to PASI in conjunction with future visits. PASI was struggling to survive, and their paralegals were doing heroic work. From what I could tell, PASI was the only NGO that regularly visited the prisons. By contrast, most lawyers never set foot in the prison, in part because they lacked transportation (or money for fuel). I also got the sense that some lawyers felt it was beneath them to spend time in prisons. The paralegals, by contrast, knew the prisoners by name and treated them with dignity and respect, even risking their own health to help the prisoners vindicate their rights.

⁷⁰ For an explanation of why the construction of new courthouses is usually not the most efficient use of donor funds, *see* HAMMERGREN, *supra* note 13, at 111.

⁷¹ *See* HAMMERGREN, *supra* note 13, at 29. Providing equipment and software to facilitate case tracking would seem to be another easy solution, but as Hammergren explains, most donors fail to ensure that aid recipients are using the equipment for its intended purpose, that staff are adequately trained, and that personnel are monitoring the quality of data entered into the system. As a result, "the system 'collapses' for lack of attention." *Id.* at 94.

Adam thought it was an excellent suggestion, so on my next clinic trip to Malawi, I decided to allocate \$1,500 to PASI as recognition for the support they provided to our team during our two-week visit.⁷² At the end of our visit, however, PASI's legal director took me aside and suggested that in the future, PASI should prepare a budget reflecting its actual costs—which he implied were much higher than the amount I had donated. I agreed that this would be a sensible way to proceed. Consequently, before our next visit, PASI sent me a \$2,500 budget that included allocations for the following: copy paper; toner; fuel for driving us around town; airtime for the paralegals' cell phones; labor costs; lunch allowances for paralegals working with us; and the costs of servicing their vehicles. At first, I was taken aback. It didn't seem appropriate for us to cover some of these expenses. But Adam explained that these were standard costs that would be included in any budget submitted to a donor in conjunction with a development assistance project. Moreover, I learned that PASI was completely dependent on donor aid for survival, and that paralegals often went months without receiving a salary because of bureaucratic delays caused by donors' own bureaucratic inefficiencies.⁷³

I learned my next lesson in donor culture when my students and I organized a workshop on the rights of individuals with mental disabilities in Zomba, the former British colonial capital in southern Malawi. We had received a small grant from the UN Office on Drugs and Crime to cover the workshop expenses, including travel and accommodation for out-of-town participants. We had invited a few individuals to the workshop who lived in Zomba, including a local magistrate judge. He approached me during a coffee break to demand a per diem for attending the workshop. When I explained that local participants would not be granted a per diem, he became irate. His expectation was that he would be paid for attending the training workshop, in addition to receiving training materials, a free lunch, and beverages. At the time, I found this both inexplicable and outrageous (particularly since he snoozed throughout the afternoon sessions). I have since learned, however, that it is not uncommon for donors to provide allowances—sometimes called “sitting fees”—for all participants attending conferences and workshops.⁷⁴

But the extent to which the justice system depends on outside aid goes much deeper than these examples illustrate.⁷⁵ Homicide trials in Malawi had long been funded by foreign governments, including the Department for International Development (DFID), the British equivalent of the U.S. Agency for International

⁷² For the first few years that I brought students to Malawi, Northwestern refused to provide financial support for the project; I raised money for the trip from fee-generating legal services I performed. After I noticed that Northwestern had prominently featured our Malawi work in an alumni brochure, I successfully petitioned the Dean to provide financial resources to cover student travel and other expenses.

⁷³ As Hambergren notes, donor funding to non-governmental organizations is often unpredictable, leading to complaints from organizations dependent on such funding to survive. HAMMERMREN, *supra* note 13, at 138, 146.

⁷⁴ As one article on the effects of aid policies observed, “The common practice of paying cash ‘sitting fees’ for civil servants attending donor-funded workshops, where the daily rates can exceed regular monthly salaries, even turns training into a rent to be distributed.” Moss, Pettersson & van de Walle, *supra* note 68, at 263.

⁷⁵ See KANYONGOLO, *supra* note 4, at 10.

Development (USAID).⁷⁶ When aid dried up in the late 2000s, homicide trials stopped—and the prison population skyrocketed. When aid resumed, the courts continued holding trials.⁷⁷

The clinic has played a direct role in perpetuating this donor-dependent system. In November 2012 and November 2013, our clinic participated in “camp courts” in Kasungu prison, about two hours north of the nation’s capital. Camp courts are an innovative response to prison overcrowding.⁷⁸ Magistrates, who hear misdemeanor and felony matters (with the exception of homicide and treason cases), travel to the prisons along with their clerks to hear bail arguments on behalf of the prisoners.⁷⁹ The prisoners are unrepresented at these hearings. They cannot afford legal representation, and as noted above, the right to free legal aid is only recognized in homicide cases. There are often no lawyers present during these hearings: most magistrates lack a law degree,⁸⁰ while the prosecution is represented by a police officer, and the prisoners represent themselves.

I had previously met with the presiding magistrate in Kasungu along with the local police prosecutor and PASI paralegals to propose that clinic students participate in a camp court. I suggested that the students represent the prisoners and train paralegals in the story-telling style of advocacy prevalent in criminal defense work in the United States. The prisoners would benefit from the students’ advocacy skills, the other participants would gain exposure to a new form of advocacy, and the students would learn valuable lawyering skills. Everyone thought it was a great idea.

In November 2011, the day before the hearings, we traveled to the prison in Kasungu to interview our clients. We arrived at the appointed time for the camp court the following day, and I was informed that the magistrate’s car had broken down. I went to find him, and after the magistrate and his clerk hailed me down by the side of the road, we drove together to the prison. The prison officers took us through the prison yard—a dirt enclosure where prisoners played bawo,⁸¹ ate, and squeezed together in the sliver of shade adjoining one of the prison walls—and brought us to a small classroom. The classroom, which opened directly onto the yard, would serve as our courtroom for the day. Inside was a table and chair for the

⁷⁶ *Malawi Abolishes Jury System in Homicide Cases*, THE ZIMBABWEAN (Aug. 11, 2009), <http://www.thezimbabwean.co/2009/08/malawi-abolishes-jury-system-in-homicide-cases/>.

⁷⁷ *Funding Delays 2,000 Murder Cases*, THE NATION (Oct. 1, 2012), <https://mwnation.com/funding-delays-2-000-murder-cases/>. The government eventually allocated funds in the national budget for homicide trials, but trials are continually disrupted by funding shortfalls. For example, in 2016 the Director of the Legal Aid Bureau informed the Chief Justice of the Supreme Court that his office would no longer represent defendants in homicide trials, as they had not received necessary funding from the state. Jameson Chauluka, *No Money for Murder Cases*, TIMES ONLINE (Aug. 24, 2016), <https://www.times.mw/no-money-for-murder-cases/>.

⁷⁸ *Camp Courts, Malawi*, IRISH RULE OF LAW: INTERNATIONAL (Oct. 17, 2011), <http://irishruleoflaw.ie/camp-courts-malawi/>.

⁷⁹ *Id.* In recent years, High Court judges have begun to conduct camp courts as well. See Gabriel Kamlomo, *Malawi Judge Releases 84 Prisoners from 1 Prison*, ZODIAK ONLINE (Oct. 9, 2018), <https://zodiakmalawi.com/malawi-national-news/malawi-judge-releases-84-prisoners-from-1-prison>.

⁸⁰ McQuoid-Mason, *supra* note 29, at ¶7.7.

⁸¹ Bawo is a variation on the game known in the United States as mancala.

magistrate and clerk, and benches for the police-prosecutor, the detainees, and the students.

The students represented a total of eight prisoners. They sat waiting their turn in the dirt outside our “courtroom.” As each case was called, the prisoner entered barefoot and took his place on a bench sandwiched between a student and a paralegal. As each case was called, a student stood up and argued why her client was entitled to be released on bail. The magistrate listened attentively to each, occasionally asking questions, while the court clerk translated the arguments into Chichewa for the prisoners. Curious prisoners occasionally poked their heads inside. At the end of the day, the magistrate signed orders directing the immediate release of three prisoners. The students were thrilled, the prisoners were grateful, and all of the local participants praised the students’ work and expressed a desire to repeat the exercise.

As we left the prison, I noticed the PASI paralegal handing out stacks of Malawian kwacha (the local currency) to the magistrate, his clerk, and the police prosecutor. My students noticed as well, and in whispers, asked what was going on. Later, our paralegal partner explained that after every camp court, the participants received allowances for lunch and transport costs—even if they lived locally, and even though participation in bail hearings fell squarely within the job description of those involved. The funds that PASI distributed came out of the money that the clinic had given PASI to organize and provide support for our clinic work.

From an American lawyer’s perspective, this practice raised uncomfortable questions about the relationship between money and justice. I have no reason to believe that the magistrate’s receipt of what is called, in local parlance, a “daily subsistence allowance,” affected his evaluation of the merits of each argument. These were not bribes. They were (and are) a standard aspect of the criminal justice system in Malawi.⁸² And in the United States, it can hardly be said that money plays no role in the quality of justice received by individual defendants.⁸³ At least in Malawi, the funding we provided served a group of defendants who were all equally poor and equally deserving of access to the courts. Nevertheless, it was disconcerting to see money passing hands to those entrusted with the administration of justice.

The clinic became fully immersed in the local donor culture when, in 2012, my students and I drafted a funding proposal on behalf of our local partner, the Malawi Human Rights Commission, for a large-scale project designed to implement *Kafantayeni and Others v. Attorney General*, a 2007 judgment of the Malawi High Court striking down the mandatory death penalty.⁸⁴ Prior to *Kafantayeni*, the Malawian Penal Code provided that all prisoners convicted of murder or treason would automatically be sentenced to death without regard for

⁸² *Supra* note 77 (noting that the cost of the average homicide trial includes “allowances for judges, the prosecution team from the State Advocate Department and the defence team from Legal Aid Department as they travel from one district to another for trials”).

⁸³ Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 47 (1997).

⁸⁴ *Kafantayeni v. Att'y Gen.*, 46 I.L.M. 566, 571 (2007).

their personal background or the facts of the crime.⁸⁵ But in 2007, following a wave of similar judgments in the Commonwealth Caribbean, Uganda, and elsewhere, the Malawi High Court held that the mandatory death penalty was unconstitutional.⁸⁶ In 2010, the Malawi Supreme Court of Appeal held that all prisoners sentenced to the mandatory death penalty were entitled to be resentenced at hearings where they could present mitigating evidence relating to the facts of the crime and their individual life circumstances.⁸⁷

In the wake of these decisions, I met with the Director of Public Prosecutions, the Chief Legal Aid Advocate, human rights organizations, and judges from both the Supreme Court and High Court to explore how the clinic might assist in implementing the High Court's mandate. Lawyers in Malawi had no experience with the investigation and presentation of mitigating evidence, and judges had never had occasion to consider what mitigating circumstances might be relevant in the capital sentencing context. I thought we could contribute to the development of a workable model for the resentencing hearings. All of the relevant actors concurred that the prisoners were entitled to be resentenced.

In 2010, in preparation for the resentencing hearings, my students and I interviewed approximately 170 prisoners who had been given mandatory death sentences. The Commissioner of Prisons gave us a week to complete this task. We arrived at the prison early each morning. The prisoners—many of whom had been incarcerated for decades—sat patiently in a line next to each student, waiting for their chance to be interviewed. Some were clearly mentally ill, others sick with AIDS, many weak and malnourished. We made no promises, but informed them about the *Kafantayeni* decision and our efforts to obtain new sentencing hearings. Yet, no matter how many meetings we held with relevant stakeholders, there was no forward movement. As of December 2012, only one prisoner had been resentenced—the lead plaintiff in the original court challenge in 2007.⁸⁸ In the meantime, most prisoners lost hope, while others died.

I finally realized that without funding, the resentencing hearings would likely never take place. It had seemed self-evident that the courts (along with prosecutors and defense attorneys) would take responsibility for giving effect to a binding legal decision by the High Court, which was later ratified by the Supreme Court. My erroneous assumption parallels the misconceptions of the “liberal legalist” paradigm that governed early scholars in the law and development movement.⁸⁹ Like those early scholars, I believed that a change in the law would lead to a corresponding change in the law’s application. Because of my inexperience on the ground, I assumed that local partners, having expressed agreement as to the desirable outcome, would take the necessary steps to achieve

⁸⁵ PENAL CODE, arts. 40, 210 (1960) (Malawi).

⁸⁶ *Kafantayeni*, 46 I.L.M. at 571.

⁸⁷ *Yasini v. Republic*, [2010] MSCA Crim. App. No. 29 of 2005 (Malawi) (unreported).

⁸⁸ See Sandra Babcock & Ellen Wight McLaughlin, *Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of Kafantayeni v. Attorney General*, in CAPITAL PUNISHMENT: NEW PERSPECTIVES 181, 181, 197 (Peter Hodgkinson ed., 2013).

⁸⁹ See 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, 1079 (1974).

it. What I failed to see was the lack of commitment and consensus as to the manner in which that end would be achieved—a failure common to many development assistance projects.⁹⁰ As it turned out, without designated funding for investigations and court hearings, the parties lacked an incentive to make the resentencing hearings a priority.⁹¹

In early 2013, the clinic drafted a funding proposal in collaboration with the Malawi Human Rights Commission. The funding would all go to local actors who would be charged with implementing the court’s decision: the Malawi Human Rights Commission, the judiciary, the Director of Public Prosecutions, Legal Aid, *pro bono* lawyers, PASI, the law school, and others. The budget included, among other things, allocations for stationery; laptop computers; transportation; fuel; and accommodation and meal costs for judges, prosecutors, defense counsel, and paralegals. It even provided for meal allowances and fuel costs for the prison guards responsible for transporting the prisoners to the sentencing hearings. The Malawi Human Rights Commission agreed to serve as coordinator for the project.

Tilitonse, a Malawian grant-making authority supported by a group of European governments, approved our proposal in late 2013. The allocation of funding for what became known as the “Kafantayeni Resentencing Project” was transformative. Stakeholder meetings were held, plans were made, and things seemed to be moving forward. The clinic helped organize a series of trainings for lawyers, judges, paralegals, prison officers, and mental health workers on the nature and relevance of mitigating evidence to capital sentencing decisions. Working with the London-based NGO Reprieve and PASI, the clinic coordinated investigations into the life history of each prisoner. We brought in mental health experts from the United States and South Africa to assess over twenty-five prisoners who seemed to be mentally ill or intellectually disabled. Working closely with Malawian attorneys and international legal fellows funded by Reprieve, clinic students drafted legal arguments in support of reduced sentences in dozens of cases.

We prioritized the cases of the most vulnerable prisoners, including those who were sick, elderly, or very youthful at the time of the offense for which they were sentenced to death. After investigation, we discovered that a number of prisoners were juveniles at the time of the offense—a fact that should have exempted them from the death penalty altogether. Others were innocent of the crimes for which they had been convicted. Many had caused the death of another human being, but under circumstances that mitigated the severity of the offense. For example, several had been condemned to die for killing persons who had attacked their loved ones.

In preparing for the resentencing process, the Malawi judiciary adopted several innovative procedures to expedite the hearings. For example, all of the hearings were held in Zomba, the former colonial capital where the maximum

⁹⁰ See HAMMERGREN, *supra* note 13, at 223.

⁹¹ See Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 9-10 (Carnegie Endowment for International Peace, Working Paper No. 34, 2003) (“[A]id providers should not presume change will naturally occur once institutions are introduced to the right way of doing things. Instead, change will occur when some of the key people inside the system want it to occur and those people are given enabling assistance that allows them to carry out their will.”).

security prison was located. The courts agreed to accept evidence by affidavit, rather than requiring the defense to bring in live witnesses—a concession that made it possible to conduct the hearings within the budget approved by Tilitonse. A strike by the judiciary support staff derailed the project in late 2014, as the courts closed down completely for two months.⁹² But in February 2015, the courts finally began to hold the first hearings.⁹³

The first prisoners were released in February 2015. The news of their release traveled quickly through the prison. Prison officers reported that as the prisoners began to hope that their sentences would be reduced, their behavior improved. The prison officers themselves became the strongest supporters of the resentencing project. They provided affidavits attesting to the good behavior of nearly every prisoner and celebrated with us at the news of each release. They informed us when prisoners were mentally or physically unwell. Their concern for the prisoners contrasted starkly with the hostility and distrust that marks relations between prison guards and prisoners in the United States.⁹⁴

By September 2018, the courts had conducted resentencing hearings in all but a handful of cases. The great majority of prisoners received dramatically reduced sentences with the prospect of early release.⁹⁵ As of this writing, 138 prisoners have been released, and nineteen more have been given determinate sentences.⁹⁶ Only one prisoner received a life sentence, and none received a death sentence. Less than ten prisoners are still awaiting resentencing.

The project is viewed by many as a tremendous success.⁹⁷ Innocent people have been freed as a result of our work, as well as many others who did not deserve to remain in prison. I am proud of the role the clinic has played in its development and implementation. But at the same time, the justice system's dependence on donor support to implement a binding legal judgment is deeply troubling.

There is a voluminous literature in the field of development economics and political science that discusses the paradox of foreign aid.⁹⁸ Most of the literature

⁹² George Mkondiwa Confirms that Judiciary Strike Over, Malawi Courts Open Today, MARAVI POST (Jan. 9, 2015), <http://www.maravipost.com/george-mkondiwa-confirms-that-judiciary-strike-over-malawi-courts-open-today>.

⁹³ Daniel Mababa, *Courts Begin Re-Sentencing of Death Row Prisoners*, ZODIAK ONLINE (Feb. 10, 2015), <https://zodiakmalawi.com/top-stories/courts-begin-re-sentencing-of-death-row-prisoners>.

⁹⁴ While it would be naïve to believe that Malawian prison officers are unfailingly kind and courteous, we have received remarkably few reports from prisoners of serious violence within Zomba prison.

⁹⁵ The death sentences of approximately 150 prisoners had been commuted to life imprisonment without the possibility of parole by presidential decree. Unquestionably, all would have died in prison had it not been for the project.

⁹⁶ See Sandra Babcock, *Malawian Prisoner Released After Twelve Years on Death Row*, DEATH PENALTY WORLDWIDE (June 28, 2017), <http://blog.deathpenaltyworldwide.org/2017/06/malawian-prisoner-released-after-twelve-years-on-death-row.html>.

⁹⁷ See *The Death Penalty Does Not Work; Politicians Should Listen*, WEEKEND NATION, June 10, 2018, at 7; Justin K. Dzonzi, The Work of the Malawi Human Rights Commission on the Death Penalty, presented at the 6th World International Congress on the Death Penalty (June 23, 2016) (transcript available at http://congres.abolition.fr/wp-content/uploads/2016/06/NHRI-Presentation-J-Dzonzi_-Malawi-Human-Rights-Commission_230616.pdf).

⁹⁸ See, e.g., WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD (2006); Moss, Pettersson & van de Walle,

discusses the failure of foreign aid programs to achieve their desired objectives; namely, economic growth. Relatively little scholarship has focused on the effects of development aid on the justice sector.⁹⁹ This lack of scholarly attention is in part attributable to the relatively low level of international aid devoted to the justice sector in comparison to the health, environmental, educational, transport, communication and agricultural sectors.¹⁰⁰ In addition, many legal scholars lack the practical experience and time to reflect on the complex array of factors that affect the outcomes of rule-of-law projects.¹⁰¹

I question the relevance of certain aspects of the development aid paradigm to our clinic work. We are not a donor agency like the World Bank or IMF, and our work should not be judged by the same standards. Moreover, our clinic provides client-centered legal services, and I'm resistant to the idea that our work should be judged by our success or failure in achieving institutional reform. This perspective is consistent with the perspective of many other international non-governmental organizations (INGOs) and institutions that engage in human rights advocacy, who tend not to conceptualize their projects as a form of development aid.¹⁰² Nevertheless, some foreign aid agencies would view our Malawi project as falling within the category of "law reform,"¹⁰³ and it is worth reflecting on whether our clinic's engagement in Malawi has helped perpetuate a donor-driven, aid-dependent culture.

Moss, Pettersson and van de Walle have observed that large aid flows can reduce governmental accountability:¹⁰⁴ "A reliance on aid as a substitute for local resources means the flow of revenues to the state is not affected by government efficiency, so there will be a tendency for governments to underinvest in developmental capacity."¹⁰⁵ The authors describe this as a "moral hazard" effect of aid dependence.¹⁰⁶ A related critique posits that aid reduces a government's incentive to adopt good policies and reform inefficient institutions.¹⁰⁷ A number of scholars have found that governments actually spend *less* on certain sectors when donor funding is made available, particularly when the donor's priorities are not

⁹⁸ *supra* note 68; James Ferguson, THE ANTI-POLITICS MACHINE: "DEVELOPMENT," DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO (1990).

⁹⁹ One notable exception is Linn Hammergren's book on the effectiveness of aid to the justice sector. See Hammergren, *supra* note 13; Carothers, *supra* note 91.

¹⁰⁰ See Hammergren, *supra* note 13, at 3, 9 ("[A]s compared to other assistance areas, donors' investments in justice are not large").

¹⁰¹ Carothers, *supra* note 91, at 13 ("[T]his kind of research is eminently applied in nature and thus tends not to attract scholars, who have few professional incentives to tackle questions that arise from and relate to aid activities. Remarkably little writing has come out of the academy about the burgeoning field of rule-of-law promotion in the last twenty years. And only a small part of that existing literature is written by scholars who have had significant contact with actual aid programs.).

¹⁰² See INT'L COUNCIL ON HUMAN RIGHTS, POLICY, LOCAL PERSPECTIVES: FOREIGN AID TO THE JUSTICE SECTOR 19 (2000) (noting that donors tended to treat development aid and human rights as separate issues).

¹⁰³ See generally Hammergren, *supra* note 13, at 7-8.

¹⁰⁴ Moss, Pettersson & van de Walle, *supra* note 68, at 269.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 268.

¹⁰⁷ See Peter S. Heller & Sanjeev Gupta, *Challenges in Expanding Development Assistance*, 20 (IMF Policy Discussion Paper, Working Paper No. 02/5, 2002).

shared by the recipient government.¹⁰⁸ This is sometimes referred to as the “fungibility” of aid.¹⁰⁹

In the context of our clinic’s work, it could easily be argued that the influx of external funding for the Kafantayeni Resentencing Project removed any incentive for the state to build institutional capacity to implement the *Kafantayeni* judgment. Put differently, our project absolved the government of its responsibility to allocate necessary funding to the justice sector that would enable the courts, legal aid, and the prosecution to meet international fair trial standards in death penalty cases. Moreover, our project arguably allowed the government to escape accountability for its failure to comply with the rule of law.

Although the resources that our clinic has brought to the Malawian justice sector may have provided a disincentive for the state to allocate funding for resentencing hearings, the likelihood that the government would have devoted the necessary resources to securing justice for murder convicts was exceedingly remote.¹¹⁰ For this reason, the concerns raised by development economists over the fungibility of aid are largely inapplicable.¹¹¹ In other words, the funding we obtained for the resentencing hearings likely had no effect on budgetary allocations for this purpose, since no allocations were forthcoming. Improving access to justice for prisoners is never high on any government’s priority list, particularly in a country whose population is constantly at risk of famine and where HIV prevalence rates stand at 9.2% of the adult population.¹¹² If we had stood by and waited for the justice sector to find its own solution, dozens of men and women—some of them wrongly convicted of crimes they did not commit—would have died in prison.¹¹³ As it stands, 10 prisoners died between 2009 and the start of resentencing hearings in 2015.

¹⁰⁸ See Marwa Farag et. al, *Does Funding from Donors Displace Government Spending for Health in Developing Countries?*, 28 HEALTH AFFAIRS 1045, 1052 (2009).

¹⁰⁹ See *id.*; Dominic van de Walle & Ren Mu, *Fungibility and the Flypaper Effect of Project Aid: Micro-Evidence for Vietnam*, 84 J. DEV. ECON. 667, 668 (2007) (“[M]ost economists appear to think that fungibility is the norm, while most aid donors behave as though there is no fungibility.”); Kelly Jones, *Moving Money: Aid Fungibility in Africa*, SAIS REV. INT’L AFF., Summer–Fall 2005, at 167, 167–69; Farag, et al., *supra* note 108, at 1046. (“(1) [A]t the macro level (how do changes in total foreign aid for development affect total public expenditures?); (2) at the sector or meso level (how does donor aid for one sector(s) affect public expenditures for this sector?); and (3) at the micro (within-sector) level (how does aid for an intervention within one sector affect public spending for this intervention?””).

¹¹⁰ See KANYONGOLO, *supra* note 4, at 65 (“[T]he justice sector is a low priority area for government”) (citing MALAWI JUDICIARY, MALAWI JUDICIARY DEVELOPMENT PROGRAMME 31 (2003)).

¹¹¹ See INT’L COUNCIL ON HUMAN RIGHTS, POLICY, *supra* note 102, at 32–33.

¹¹² Malawi: HIV and AIDS Overview, UN AIDS, <http://www.unaids.org/en/regionscountries/countries/malawi> (last visited May 31, 2018).

¹¹³ Amnesty International reported that more than 180 people died in Malawian prisons in 2004 and that “[m]any of the deaths were HIV-related; others were the result of preventable illnesses caused or exacerbated by overcrowding, poor diet, unsanitary conditions and medical neglect.” Amnesty International, AMNESTY INTERNATIONAL REPORT – 2005: MALAWI (May 25, 2005), <http://www.refworld.org/docid/429b27ef11.html>. In 2005, the New York Times reported that in Zomba prison, which houses death row, one out of every 20 prisoners died each year. Wines, *supra* note 2.

The response to this argument, however, is that governments should be free to make these judgments for themselves.¹¹⁴ If a government decides that its resources should go toward reducing food insecurity and implementing measures to prevent malaria infection in children, human rights advocates have no right to meddle in those decisions.¹¹⁵ Similarly, if the judiciary prioritizes the hearing of civil disputes and homicide trials over the resentencing of prisoners convicted many years ago, that is a decision of theirs alone.¹¹⁶

The international donor community has been harshly criticized for setting priorities without regard to local concerns.¹¹⁷ A number of scholars have framed the debate over priority setting as a question of *legitimacy*.¹¹⁸ Kapiriri lists a number of factors that undermine the legitimacy of donors' tendency to set priorities without local input:

- (i) [M]ost of these organizations are not elected or appointed by the host countries,
- (ii) they are not representative of the general population they seek to serve,
- (iii) in most cases, they lack any legal frameworks for their activities and
- (iv) sometimes they may not conform to or respect the local values and norms.¹¹⁹

Both Kapiriri and Lister conclude that legitimacy is directly related to the degree of "representativeness" of the institution engaged in strategic decision-making.¹²⁰ In the field of NGO advocacy, this "relates to the *right* to represent and the *consent* of the represented."¹²¹

Here again, Kapiri and Lister's challenge seems only marginally relevant to our clinic work on behalf of individual clients. The prisoners affected by the *Kafantayeni* judgment gave us their unconditional consent to represent their interests (in conjunction with local lawyers). But if we view the *Kafantayeni* Resentencing Project as a law reform effort anchored to a larger objective of facilitating prisoners' access to the courts, our intervention is more problematic. By writing a successful grant proposal for the resentencing hearings, our clinic diverted

¹¹⁴ INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 102, at 23.

¹¹⁵ For example, in 2013 the UN Special Rapporteur on the Right to Food praised Malawi's government for having allocated ten percent of its national budget to agriculture, a key step in the fight against food insecurity. See De Schutter, *supra* note 8, at 4.

¹¹⁶ On the other hand, some authors argue that is precisely in those areas where the government's commitment to reform is weakest that international donors should focus their attention (and funds). INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 102, at 28–29. See also Easterly, *supra* note 98.

¹¹⁷ INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 102, at 70–71, 75; Lydia Kapiriri et al., *Is Cost-Effectiveness Analysis Preferred to Severity of Disease as the Main Guiding Principle in Priority Setting in Resource Poor Settings? The Case of Uganda*, 2 COST EFFECTIVENESS & RESOURCE ALLOCATION 1 (2004).

¹¹⁸ See, e.g., Sarah Lister, *NGO Legitimacy: Technical Issue or Social Construct?*, 23 CRITIQUE ANTHROPOLOGY 175 (2003); See *infra* note 122, at 67; Hugo Slim, *By Whose Authority? The Legitimacy and Accountability of Non-Governmental Organizations*, INT'L COUNCIL ON HUM. RTS. POL'Y (2002), <http://www.gdrc.org/ngo/accountability/by-what-authority.html>.

¹¹⁹ See *infra* note 122, at 68–69.

¹²⁰ Lister, *supra* note 118, at 177.

¹²¹ *Id.*; see also Slim, *supra* note 118.

human resources from other legal disputes whose resolution may now be postponed.¹²²

The tradeoff described above is inherent in any type of legal advocacy. What makes it more fraught, in the context of international human rights fieldwork, is that we are working within a system that is not our own. As an American lawyer working in Malawi, I have no stake in the justice sector. Why should my priorities matter? I care about prisoners' rights, and am deeply opposed to the death penalty—passions that have fueled many years of litigation in the United States, where I take particular glee in foiling prosecutors' efforts to have my clients killed as expeditiously as possible. But in Malawi, it's different. In part, I think, it's because Malawi's legal system truly is struggling to survive. When lawyers say that they can't visit their clients, it's often because their office only has one car, and it has a broken axle. The salaries of legal aid lawyers are not high enough for them to own their own cars and pay for their own fuel. The budget constraints are real.

Alex de Waal's critique of international humanitarian aid agencies focuses on the problem of accountability in a context that may be more directly relevant to the work of human rights clinics. A social anthropologist and human rights researcher, he has challenged the lack of accountability among what he terms the "humanitarian international."¹²³ According to de Waal, "the expansion of internationalized humanitarianism in the 1980s and 1990s reflects a retreat from accountability, akin to the dominance of neo-liberalism."¹²⁴ This "retreat from accountability" has two dimensions. As an initial matter, the internationalization of responsibility for humanitarian crises has reduced the accountability of local governments by shifting power to a vast array of non-governmental and inter-governmental agencies engaged in the fight against famine.¹²⁵ At the same time, this network of international organizations has no more than a "vague and easily evaded moral responsibility—nothing more than an aspiration" to accomplish their declared objectives. Moreover, they cannot be "called to account" for their failures.¹²⁶ "Moral outrage plus technical proficiency does not equal accountability for results."¹²⁷

Granted, de Waal's venom is directed primarily at the vast bureaucracies of the United Nations and large NGOs involved in humanitarian crises. But his appraisal of their shortcomings is undoubtedly relevant to NGOs and clinics engaged in human rights advocacy, especially since human rights clinics are a component of an increasingly active and well-financed international human rights movement. Clinics may choose their international projects based, in part, on the interests of their students and the priorities of their professors. They operate with little external scrutiny. If they deem a project to be unsatisfactory—either because it doesn't meet the pedagogical goals of the professor, or for a host of other

¹²² See L. Kapiriri, *Priority Setting in Low Income Countries: The Roles and Legitimacy of Development Assistance Partners*, 5 PUB. HEALTH ETHICS 67, 70 (2012).

¹²³ ALEX DE WAAL, FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA 66 (1997).

¹²⁴ *Id.*

¹²⁵ *Id.* at 70.

¹²⁶ *Id.*

¹²⁷ *Id.*

reasons—the clinic may simply withdraw from the country. This, of course, is overly simplistic. Most clinical professors are acutely sensitive to the importance of responding to local needs and seek to avoid imposing their own agendas on partners in foreign countries. But there is a core truth to de Waal's charge that we lack accountability for our actions.

Scholars within the human rights movement have leveled similar charges of illegitimacy and inappropriate priority setting against the human rights movement as a whole.¹²⁸ As put by Makau Wa Mutua:

[O]ften, Northern activists with little familiarity with the continent descend on the capital city, interrogate local activists and a few victims and fly back to the West to release and publicize their report. There is little continuing contact with local groups and individuals until the next mission. In the meantime, the experts from the North influence funding trends and choices and determine the issues and groups deserving of support. Usually, the advice to funders—most of whom cannot independently verify the information—strengthens the hand of the advisors and leaves them in a superior position against their African counterparts. This model represents the biggest long-term threat to the relationship between African activists and their friends in the North.¹²⁹

Other scholars have criticized human rights clinics in particular for monopolizing control over strategic decisions and exacerbating power imbalances between institutions located in the global north and their counterparts in the global south.¹³⁰

These are all valid critiques. My clinic has tried to avoid the pitfalls described by de Waal and Mutua by creating long-term, collaborative relationships with local partners on the ground. Over the course of the last twelve years, we have painstakingly built relationships with civil society organizations, prosecutors, defense lawyers, judges, law professors, and magistrates. We take an interest in the challenges they face and try to assist where we can. By visiting time and again, we have developed a deep appreciation for the strengths and weaknesses of the Malawian justice sector. With regard to the *Kafantayeni* project, our Malawian partners controlled the funding and decision-making—even though the clinic coordinated much of the legal work along with an able crew of volunteer lawyers from the United Kingdom, the Netherlands, the United States and Australia. In Malawi, more than 40 judges, 20 paralegals, 10 prosecutors and 20 defense lawyers participated in the resentencing hearings and/or attended training workshops on the investigation, presentation, and consideration of mitigating evidence in capital

¹²⁸ See, e.g., Makau Wa Mutua, *Domestic Human Rights Organizations in Africa: Problems and Perspectives*, 22 ISSUE: J. OPINION 30 (1994) [hereinafter Mutua, *Domestic Human Rights Organizations in Africa*]; Makau Wa Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) [hereinafter Mutua, *Savages, Victims and Saviors*].

¹²⁹ Makau Wa Mutua, *African Human Rights Organizations: Questions of Context and Legitimacy*, in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA 191, 195–96 (Paul Tiyambe Zeleza & Philip J. McConaughay eds., 2004).

¹³⁰ See Daniel Bonilla, *Legal Clinics in the Global North and South: Between Equality and Subordination—An Essay*, 16 YALE HUM. RTS. & DEV. L.J. 1, 6–9 (2013).

cases.¹³¹ While the clinic gave the project a much-needed push to get off the ground, the *Kafantayeni* project now has broad support from a wide range of stakeholders.

Nevertheless, the clinic cannot avoid entirely the unequal power dynamics inherent in any north-south collaboration. One of my students, reflecting on our Malawi work in the context of Mutua's critique,¹³² observed:

What would happen, for example, if [the clinic] was not involved in assisting the prisoners in Malawi to help alleviate prison overcrowding? Would our clients continue to languish in jail forever, or would the overcrowding conditions eventually stimulate a pooling of resources in Malawi to educate and train more lawyers in order to have a functional judicial system? This is a difficult question, and the most frequent answer, at least within the international human rights community, raises the specter of the Western "savior" and places [the clinic] squarely in that role – completely incapacitated by their inferior economic and societal structures, Malawi prisoners and their attorneys are dependent on [the clinic] to provide the knowledge, manpower, and "civilized" determination to assess individual defendants' unique circumstances when meting out punishment. Clearly, that is an oversimplification of the situation, but the savior-dynamic is certainly present to some effect.¹³³

This is an entirely valid critique, and one that is difficult to refute. From a pedagogical perspective, it is essential to raise these questions with students, and to explore how we can best mitigate the risk. From a tactical perspective, it compels careful, ongoing consultation with our partners to build a truly collaborative relationship—one that recognizes that each partner brings value and expertise to the table.¹³⁴

C. The Dangers of Cultural Incompetence

"Cultural competency" is a term that has garnered substantial attention within the clinical community over the last few decades. The notion of cultural competence encompasses a wide skill-set, including self-reflection and awareness of existing biases, identification of cultural differences, and the development of

¹³¹ Most experts on development aid are skeptical that judicial training serves to promote judicial reform. See Carothers, *supra* note 91, at 12. In the *Kafantayeni* Project, however, we combined training with litigation in which judges presided over actual cases that resembled the hypothetical scenario addressed in our training. Over the course of the project, we observed a marked change in the reasoning of certain judges, who became increasingly receptive to considering a wide range of mitigating evidence. Of course, it is impossible to establish with certainty that the training contributed to this evolution in judicial outcomes. It is equally plausible that the cumulative impact of case-related litigation—during which judges received expert reports on mental health, trauma, malnutrition, witchcraft, and other factors—was primarily responsible for judges' increased receptivity to such evidence.

¹³² Mutua, *Savages, Victims and Saviors*, *supra* note 128.

¹³³ K.M., Student Journal (Oct. 5, 2010) (on file with author).

¹³⁴ See Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLINICAL L. REV. 255, 266-67 (2014). Hoffman and Vahlsing observe that each partner in a collaborative relationship may have different priorities. The key, they say, is to "focus on their convergence around a shared vision rather than come together with an identical goal." *Id.* at 266.

tools to bridge the gap between lawyers and clients from diverse racial, ethnic, and socio-economic origins.¹³⁵ Educators and scholars have emphasized the importance of training culturally competent lawyers—that is, lawyers prepared to recognize and navigate cultural barriers with sensitivity and compassion.¹³⁶ Workshops on teaching cultural competency are a standard feature at clinical education conferences.

In the context of international human rights advocacy, the notion of cultural competency is often linked to clinical work on behalf of foreign-born populations, including field work in foreign countries.¹³⁷ As Janus and Smythe have observed, “the ability to effectively navigate culture is at the core of effective human rights advocacy.”¹³⁸ This is undeniably true, but knowledge of its truth does not always translate into effective cross-cultural lawyering.

Over the years, my clinic developed close, collaborative relationships with a number of Malawian partners. Everything we do on the ground is linked to a local partner. My students interview prisoners alongside Malawian law students; they travel to villages to interview prisoners’ family members with Malawian paralegals; and they work hand-in-hand with Malawian legal aid lawyers to draft legal arguments on behalf of prisoners seeking sentence reductions on appeal. Students have also helped lead human rights training workshops in partnership with our Malawian colleagues. These experiences have helped to build our knowledge of Malawian legal system.

I have learned and applied many superficial lessons about Malawian culture in our work with local partners. Before every meeting, I remind myself to sit back in my chair, to assume the laid-back rhythm of Malawian conversations, and to listen between the lines. I have learned that Malawians dislike saying “no” when

¹³⁵ See, e.g., Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993) (discussing specific techniques such as interactive video simulations, controversial readings and lectures, self-reflective journals, and small group discussions to train students to be conscious and sensitive to diversity in clinical practice settings).

¹³⁶ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 37 (2001). I am somewhat skeptical about our ability to teach cultural “competence,” because I believe that a lawyer’s ability to successfully navigate cultural barriers is heavily dependent on personality traits such as humility, patience, and tolerance. But I do believe we can encourage students to reflect on their own biases and beliefs that color their views of clients (and colleagues) from diverse backgrounds.

¹³⁷ Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 N.Y. L. SCH. L. REV. 445 (2011). See also Paoletti, *supra* note 150, at 445-46.

¹³⁸ Janus & Smythe, *supra* note 137, at 452. Bettinger-Lopez et al. provide a useful definition of cross cultural lawyering:

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

Bettinger-Lopez et al., *supra* note 49, at 392 n.238.

they disagree, so I am careful to inquire about the challenges they foresee in any particular course of action. At the same time, my students and I continually struggle to understand and respond appropriately to aspects of Malawi's complex and diverse local culture. Kennedy describes this phenomenon in his 1985 essay, *Spring Break*, where he evokes "the activist's sense of not knowing what things mean or where they are going in human rights work . . . and the ways our inability to know what [is] intrusive . . . [leaves] us confused about our connections and responsibilities."¹³⁹

The vignette that I am about to relate provides the starker example of how cultural incompetence can not only hamper advocacy goals but can also endanger the safety of both students and our local partners.

In March 2013, prior to the start of the *Kafantayeni* resentencing hearings, my clinic was engaged in appellate advocacy on behalf of a small number of prisoners who had been sentenced to death. None of the prisoners were represented on appeal. I proposed to the Chief Legal Aid Advocate that my students interview the prisoners, review their case files, identify potential legal arguments, and draft the appellate briefs. One of the prisoners we identified was a man named Gift Nkwenda.¹⁴⁰ When I first interviewed him in 2009, I noticed that he was disheveled and unkempt. He had never been to school and had difficulty spelling his name. Although we could only communicate through an interpreter, I thought he could be intellectually disabled.

Gift had been convicted of a particularly violent offense. In Malawi, most homicides are the result of spontaneous conflicts fueled by alcohol. The use of guns is exceedingly rare, and many deaths could be avoided if Malawi's villages had access to decent medical care. Gift, however, had been convicted of killing his nine-year-old niece. Her dismembered body was still in his hut when the police came looking for her. It was the type of crime that immediately gave rise to suspicions that Gift was very mentally ill. Yet we had no information about his life prior to his arrest, since his trial lawyer had failed to conduct any investigation. His mental status was key to our efforts to identify potential legal arguments on appeal, since international law prohibits the execution of individuals with severe mental illnesses or intellectual disabilities.¹⁴¹

The students and I discussed the case with the PASI paralegals. We decided that a team of two students and two paralegals would visit his village and interview his parents to obtain information about his life history. We developed a questionnaire that explored issues of poverty, health, his mother's pregnancy, and family history of mental illness. The team set out for the village, while I traveled to a nearby city to give a lecture on mitigating evidence to Malawian law students.

On my way back from the lecture, one of my students called. She sounded breathless and agitated. She explained that they had just left the village, and that the interviews had not gone well. This is what she told me:

¹³⁹ Kennedy, *supra* note 12, at 1378.

¹⁴⁰ Not his real name.

¹⁴¹ See Sandra Babcock, *Capital Punishment, Mental Illness, and Intellectual Disability: The Failure to Protect Individuals With Mental Disorders Facing Execution*, in DEATH PENALTY AND THE VICTIMS (2016).

The team arrived at the village, and after asking around, were able to identify Gift's family home on the outskirts of the village. His parents were poor, even by Malawian standards. While many Malawian families have a small stool for honored guests, Gift's parents had no furniture whatsoever. The team sat on the packed dirt floor. The students and paralegals explained the purpose of their visit, and Gift's parents said that they would be happy to share whatever information would be helpful.

Soon after they began the interviews, the team noticed that village children had begun to gather around the edges of the dirt yard where the students were conducting the interviews. This in itself was not uncommon, but nonetheless the paralegals tried to shoo them away to maintain as much privacy as possible. Shortly thereafter, some women arrived, and sat down within a few yards of where the students were speaking to Gift's parents. The paralegals could not persuade them to leave. The students noticed that there was some activity in the fields surrounding the house. There was also some shouting, but they didn't speak Chichewa and couldn't understand what was being said.

Gift's parents had begun to share important information relating to Gift's childhood. They explained that he had never been to school. He had worked to help his family by collecting firewood and catching mice, which the family would make into a stew to supplement their meager diet. He had a hard time making friends. His brother was severely developmentally delayed.

Suddenly, the students were interrupted in their work by the arrival of the village chief. She was obviously deeply disturbed by their presence. She demanded to know why the students were talking to "her people" without having first sought her permission. She told them they had to leave.

At the same time, men and women had begun to gather around the team's car. Some of the men, just returning from their fields, carried machetes. To the students, they seemed hostile. The village chief cleared a way through the crowd. The students and paralegals squeezed into their car with the village chief, and their visibly riled driver slowly backed out. The crowd parted, and they made their way to the chief's home. Once they were away from suspicious onlookers, the chief explained that the villagers did not understand the purpose of the team's visit. They feared the team was working to free Gift, and that he would be released back into their community.

The chief further explained that if the paralegal/student team had come to her first, she could have taken steps to ensure their safety and facilitate the interviews with Gift's family. She would have brought the family members to her home, where students could interview them in privacy. In bypassing this step, the paralegal/student team had created a potentially volatile situation.

In the end, no one was harmed—although my students were shaken by the experience. For my part, it was a painful lesson in the limits of my own cultural competency. I relied on the presence and local knowledge of the paralegals to ensure my students' safety, but failed to discuss with them just how villagers might react to the students' visit. Similarly, we failed to discuss what measures to take to mitigate any risk. We agreed that in all future visits to villages, we would always meet first with the village chief. We also agreed that in most cases, the crimes

committed would not arouse the same degree of community outrage. Nevertheless, we refrained from conducting any additional investigation during the trip.

In retrospect, I think it was highly unlikely that the students would have been harmed by the villagers. On the other hand, after eight years of work in Malawi, I now have a much greater appreciation of the dangers of mob violence. In rural areas, mob violence is not an uncommon response to crime.¹⁴² Thieves and suspected witches have been beaten to death, and some of the prisoners our clinic has defended were convicted of similar crimes. Even accidental injuries can spark mob violence; for example, I have repeatedly been instructed that if I were ever to injure a pedestrian in a road accident, I should not stop, but should instead drive straight to the closest police station. Once, when I was driving with my students in southern Malawi, we saw a truck hit a woman on her bike. The truck stopped, as did we, to see if we could offer any aid. As I was offering to drive the victim to the hospital, people began pouring out of their shops and homes and running toward the truck. I saw them pull open the passenger-side door, at which point I got back in the car and quickly left the scene.¹⁴³

I still send students into villages to conduct mitigation investigation, but only after taking a number of precautions. First, we obtain as much information as possible about the nature of the crime, when it occurred, the location of the victim's family, and the degree of hostility between the defendant's and victim's families. Often, the paralegals will contact the village chief, as well as regional traditional authorities, in advance of their visit. Second, the students are always accompanied by a team of at least two paralegals. Third, they will always visit the chief in person before conducting any interviews. Finally, I no longer allow the students to conduct investigations in recent cases involving highly aggravated homicides. After implementing these protocols, we have not had any further problems, and the students often say that the village mitigation investigation is the most rewarding part of our Malawi field work.

III. THE MALAWI PROJECT: A MODEL FOR HUMAN RIGHTS ADVOCACY?

Over the last two decades, the number of international human rights clinics at U.S. law schools has grown exponentially. As Hurwitz and others have documented, the first human rights clinics came into existence in the late 1980s.¹⁴⁴ As of 2011, there were 45 international human rights clinics at 42 law schools in the U.S. and Canada,¹⁴⁵ including 13 out of the top 15 U.S. law schools in the

¹⁴² See *Surge in Mob Killings in Malawi Draws Serious Concern of UN Human Rights Office*, UN NEWS (Apr. 16, 2016), <https://news.un.org/en/story/2016/04/526022-surge-mob-killings-malawi-draws-serious-concern-un-human-rights-office>.

¹⁴³ Another driver took the injured woman to a nearby clinic.

¹⁴⁴ Deena Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 549 (2003).

¹⁴⁵ Janus & Smythe, *supra* note 137, at 483 app. Since then, University of Chicago has added an international human rights clinic. INTERNATIONAL HUMAN RIGHTS CLINIC, <https://ihrcclinic.uchicago.edu/> (last visited Aut. 26, 2018). Moreover, the University of Michigan Law School has had an Anti-Trafficking Clinic since 2009 that engages in international advocacy. HUMAN TRAFFICKING CLINIC, <https://www.law.umich.edu/clinical/humantraffickingclinicalprogram/Pages/humantraffickingclinic.aspx> (last visited Aug. 26, 2018).

rankings provided by U.S. News and World Report.¹⁴⁶ In addition, there are many clinical programs that do not define themselves as human rights clinics nonetheless engage in international human rights advocacy.¹⁴⁷

Human rights clinicians have adopted diverse approaches to clinic project selection.¹⁴⁸ Many early clinics followed the model of human rights monitoring and reporting pioneered by organizations such as Human Rights Watch and Amnesty International.¹⁴⁹ Clinics would partner with international or local non-governmental organizations to expose human rights violations through investigation, report-writing, and media advocacy.¹⁵⁰ Other clinics focused on the representation of individuals seeking asylum, highlighting human rights abuses in the clients' home countries in an effort to persuade immigration courts that they were entitled to refugee status under the 1951 Convention on the Status of Refugees.¹⁵¹ Still others filed lawsuits under the Alien Tort Statute to seek redress for human rights violations perpetrated against foreign nationals residing in the United States.¹⁵²

Today, human rights clinics are engaged in a wide spectrum of projects and cases both in the United States and abroad, to the extent that it is no longer possible to capture their work in a few short sentences.¹⁵³ As human rights clinics have become increasingly commonplace, critiques of their work have inevitably emerged. On the one hand, conservative scholars such as Eric Posner have questioned the effectiveness and appropriateness of human rights clinics.¹⁵⁴ On the other, progressive scholars have accused clinics of perpetuating the "dynamics of domination and subordination" that have long characterized relations between international institutions and local actors in the global south.¹⁵⁵

Human rights clinicians have also begun to engage in an internal dialogue about the merits of different approaches to international clinical work. Clinicians are increasingly questioning the value of short-term projects in which clinic students "parachute in" to a country with little consideration for the long-term consequences of their engagement.¹⁵⁶ As Bonilla has observed, "these types of clinical projects are sustained by a questionable attitude rooted in the beliefs that

¹⁴⁶ Best Law Schools, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings>.

¹⁴⁷ For example, my colleague Angela Cornell runs a labor law clinic in which she has taken students to Cambodia to investigate unsafe working conditions.

¹⁴⁸ See, *supra* note 144, at 540.

¹⁴⁹ See Deena Hurwitz, *Remarks by Deena R. Hurwitz*, 104 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 95, 96 (2010).

¹⁵⁰ See Sarah H. Paoletti, *Finding the Pearls When the World is Your Oyster: Case and Project Selection in Clinic Design*, 5 DREXEL L. REV. 423, 437 (2013).

¹⁵¹ See *id.* at 459-60.

¹⁵² See Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 568-69 (2004); Hurwitz *supra* note 149, at 96.

¹⁵³ The wide-ranging scope of this work has been described in recent articles by Paoletti and Bettinger-Lopez et. al. See Paoletti, *supra* note 150, at 434-35, 437; Bettinger-Lopez, et. al., *supra* note 49, at 363.

¹⁵⁴ Eric A. Posner, *The Human Rights Charade*, THE CHRONICLE OF HIGHER EDUC. (Nov. 17, 2014).

¹⁵⁵ See Bonilla, *supra* n. 130.

¹⁵⁶ See *id.* at 22-23; Bettinger-Lopez et. al., *supra* note 49, at 363; Jeena Shah, *Rebellious Lawyering in Big Case Clinics*, 23 CLINICAL L. REV. 775, 791 (2017).

the legal academia of the Global North is so solid that it can produce knowledge after a tangential direct contact with the reality being studied and that a week or two is enough time within which to determine what the problems are, how to evaluate them and how to fix them.”¹⁵⁷

Ferguson echoes Bonilla’s critique, albeit in the context of foreign development aid. In *The Anti-Politics Machine*, Ferguson recounts his surprise in learning that a development consultant was to arrive in Zimbabwe with no prior experience in the region.¹⁵⁸ When he questioned the qualifications of the consultant, he was assured that “he *knows development.*”¹⁵⁹ Ferguson observes that this sort of “free-floating” expertise, “untied to any specific context,” is characteristic of many development programs.¹⁶⁰ In much the same way, a human rights clinic’s expertise in the field of *human rights*, when untethered to specific knowledge about a region, falls short of the contextualized knowledge essential for effective analysis and advocacy.¹⁶¹

These critiques echo those of scholars immersed in the fields of “law and development” and “justice reform.”¹⁶² Yet, few clinicians have integrated this scholarship into their teaching and writing. Human rights clinicians do not typically view themselves as being part of donor agencies—myself included. But our local partners may well view us through the prism of their previous relationships with donor agencies. Our work is also subject to many of the same pitfalls that beset donor/partner relations. Linn Hambergen, a prominent international expert in the field of justice reform, explains that many efforts at justice reform fail because of conflicting agendas between donors and their local counterparts.¹⁶³ “Doing this,” she emphasizes, “requires understanding the perspectives on the other side.”¹⁶⁴ Many human rights clinicians can also attest that signing an MOU with a local partner defining the parameters of their collaboration does not guarantee that both sides will approach the project with the same objectives. Similarly, consultants working with donor agencies:

often arrive at the project site only to discover that their counterparts have little idea of what is intended, what their presumed role is, or what this implies for their usual activities. Whoever agreed to the program may be

¹⁵⁷ Bonilla, *supra* note 130, at 23.

¹⁵⁸ James Ferguson, THE ANTI-POLITICS MACHINE: “DEVELOPMENT,” DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO 258 (1990).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 258-59.

¹⁶¹ To overcome this knowledge deficit, many human rights clinics partner with local organizations that provide critical support and expertise. *See, e.g.*, Paoletti, *supra* note 150, at 472.

¹⁶² The field of law and development emerged in the 1960s in response to the upsurge in development assistance by the United States. Government and foundations alike sought the assistance of scholars to understand the relationship between law and development, leading to an inter-disciplinary field of law and development studies. *See generally* David Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062-68 (1974). “Justice reform,” as I use it here, refers more broadly to the field of practitioners and scholars engaged in contemporary assessment of development assistance tied to law-reform initiatives. *See* Hambergren, *supra* note 13, at 211.

¹⁶³ Hambergren, *supra* note 13, at 203.

¹⁶⁴ *Id.*

located organizationally far away from the targeted institutions, may have already left his or her position, or may have understood that agreement as only letting the donors spend their own funds on whatever they proposed to do. This happens in all areas of donor assistance, but is more common in justice projects¹⁶⁵

To avoid such misunderstandings, external consultants—like human rights clinics—must take the necessary time to build cooperation, consensus, and commitment with local partners—a step that most donors short-circuit.¹⁶⁶

Notwithstanding the shortcomings of short-term projects, relatively few clinics have opted to limit their work to sustained engagements with a small number of partners in a single country. The reasons for this merit further exploration. Many clinicians have an understandable desire to expose their students to a variety of projects in different substantive issue areas. In specializing in one project or country, clinicians may be worried about “[r]isking [b]readth for [d]epth.”¹⁶⁷ I have worried at times that my clinic may not attract the same numbers of students if I don’t provide a range of projects on different issues affecting different countries.

Nevertheless, there is much to be gained by a limited geographic focus. Hambergren notes that the potential for most clinics to effect long-term change is “severely limited” because they “frequently know little about the circumstances in which they propose to work.”¹⁶⁸ She notes that clinics “working off a long history in a single country or region” are likely to be more effective.¹⁶⁹

Since student interest is a factor in maintaining a stable of diverse clinic projects, it is worth asking whether the Malawi model is attractive to students, and whether their engagement in a long-term project offers an experience that is fundamentally different from what they would receive in a semester-long project. This is, of course, impossible to gauge with any objective measure. Short-term projects can be immensely satisfying for students, particularly when students can see the project through to its conclusion during the course of a single semester. Some of my students were lucky enough to witness the release of a prisoner whose case they had worked on—and this sort of positive “closure” is extremely rewarding. Early in the project, one student ended her journal with the following note:

The morning that we received notice that 11 of the prisoners were being recommended for immediate release after negotiations between the defense and the DPP, and the fact that they had relied so heavily on the factors identified through our work, was one of the most gratifying and proud moments of my life.¹⁷⁰

¹⁶⁵ *Id.* at 203-04.

¹⁶⁶ *Id.* at 223.

¹⁶⁷ Jocelyn Getgen Kestenbaum, Esteban Hoyos-Ceballos & Melissa C. del Aguila Talvadkar, *Catalysts for Change: A Proposed Framework for Human Rights Clinical Teaching and Advocacy*, 18 CLINICAL L. REV. 459, 497 (2012).

¹⁶⁸ Hambergren, *supra* n. 13, at 235.

¹⁶⁹ *Id.*

¹⁷⁰ M.K., Student Journal, (Spring 2014) (on file with Author).

Another student, who had expressed doubt about the significance of her contribution to the project, expressed her happiness once her “client” was released from prison:

I came back from our trip to Malawi feeling . . . frustrated that . . . given the short length of the trip, we did not accomplish as much as I had initially thought we would Though I did form more of a personal connection to the work by meeting some of the prisoners, I was still unsure of how to measure my contribution to the project without having yet seen any tangible results.

It was thus extremely exciting (and great timing!) that [my client] was released a week after we got back. I was happy because I truly believed he should not be imprisoned for what he did, and also because I could finally point to a tangible outcome that I worked to produce¹⁷¹

Another student expressed her gratitude for all of those who had worked on the project for years before her, while acknowledging the unique gratification that comes from seeing actual “results” in a project:

I have to admit, I feel extremely lucky to be working at this stage of the Malawi project (i.e. results stage) As I work on these submissions, I see the relentlessness and hard work in every prepared document (i.e. case summaries, prisoner interviews, mitigating factors memo) I feel extremely honored to be writing a submission that encapsulates the hard work of the other individuals who have worked on the prisoner’s behalf.¹⁷²

While witnessing a client’s release from prison is a rare pleasure, students have also discussed the value of litigating cases within Malawi’s criminal justice system to fully grasp the barriers to justice there. One student remarked:

It was also very helpful to see *why exactly* getting things done in Malawi is difficult. It is easy to look at the tasks to be done through the lens of our limited experience in the US and say “it should be easy- why can’t the Malawian’s get it together?” But experiencing the difficulties in-country made it much more difficult to level that criticism. Cars get stuck in the mud, rides have to be arranged to economize on fuel, it is difficult to travel after dark, you have to focus on the availability of resources we take for granted: paper, internet, email-sharing. I think understanding these very basic constraints is incredibly important when making requests of local partners. That’s why I value the chance to see it. . . .¹⁷³

In reviewing my students’ journals over the years, there is often little to indicate that the length and depth of our engagement in Malawi affected their own subjective experience. There are some exceptions, however. One student described a moment in the trip when she was thanked by a client’s mother for helping secure his release:

As our eyes teared up together, I was overwhelmed by the sense of being

¹⁷¹ M.H., Student Journal (Fall 2015) (on file with Author).

¹⁷² B.B., Student Journal (April 27, 2015) (on file with Author).

¹⁷³ A.K., Student Journal (Spring 2015) (on file with author) (emphasis in original).

a part of something so much larger than myself. It was a wonderful experience working in a clinic with other students who shared my desire to do public-interest work, but in that moment, I was struck by how humbling it was to be part of a much larger community of people I will never meet who have all worked on the same project at various stages in time . . . This experience served as a profound reminder that victories often only come after a series of small steps. It may be difficult to see progress or measure success in the moment, but over time, the incremental efforts of many different people can produce significant results.¹⁷⁴

Many of my students have likewise commented on the importance of relationship building. One student observed:

I was struck by how willing the Malawians seemed to be about including us in their work. I think I expected our purpose or motive to be questioned more than it was. . . . That's one important thing I took away from the whole trip – the importance of building relationships doing this kind of work. Trust is not instant, especially across cultures.¹⁷⁵

Another student, after describing the endless meetings we had attended with local partners, remarked: “This project proved just how important it is to establish solid relationships within the country in which you want to work.”¹⁷⁶ Another student similarly observed: “[G]etting to see how a relationship with local partners in a foreign country is built is, I think, one of the more valuable lessons I’m learning from the Malawi project.”¹⁷⁷ Yet another stated: “There were many lessons that I took from Malawi, but two stood out: the importance of building relationships and the importance of being creative while understanding the limitation of resources.”¹⁷⁸ And when I read the following journal entry I raised my fists in a victory salute: “[T]he goal is ultimately to empower Malawi’s legal community to create strategies and implement reforms on their own, rather than for American lawyers to identify problems, swoop in to try to fix them, and then disappear again.”¹⁷⁹

My clinic students also derive great satisfaction from representing individual clients. One student observed:

The case of Mr. Mtambo was a great opportunity to participate in a true “human rights work” – I interviewed him; I interviewed his relatives; and I contributed for a man to hopefully be released from prison. There is a famous sentence in Judaism that says: *“Whoever saves one life, saves the world entire.”* I know I didn’t save the world, but it definitely feels like I made a difference; and it feels great.¹⁸⁰

Another student, discussing our Malawi work in the context of Makau Mutua’s

¹⁷⁴ L.H., Student Journal (Fall 2016) (on file with author).

¹⁷⁵ A.M., Student Journal (Dec. 11, 2009) (on file with author).

¹⁷⁶ J.D., Student Journal (Dec. 22, 2012) (on file with author).

¹⁷⁷ K.P.W., Student Journal (Oct. 14, 2011) (on file with author).

¹⁷⁸ E.S., Student Journal (Spring 2010) (on file with author).

¹⁷⁹ K.M., Student Journal (May 6, 2011) (on file with author).

¹⁸⁰ I.G., Student Journal (Spring 2014) (on file with author).

critique of human rights advocacy, observed:

We have individual clients with very specific problems that we actually have the capacity to help in very substantive ways – i.e. winning their release from prison or a reduction in their sentence. These goals seem to be universally-recognized as important legal services to which efforts defendants are entitled. And the value we are pursuing – fairness in punishment for individuals convicted of crimes, and the right of accused persons to present a defense – doesn't seem to be so foreign that a non-Western society would resist it.¹⁸¹

Another student reaffirmed how client representation solidified her commitment to human rights work:

[R]eally the most important thing that clinic did for me, was to connect me with clients, and to do so in a way that was really humanity-affirming. By putting faces to names and images to locations, it really brought life and depth to the causes that we're working on.¹⁸²

This focus on direct client representation is different from the approach adopted by many early human rights clinics.¹⁸³ For example, I have intentionally refrained from engaging in systemic challenges to government policy. Over the years that our clinic has been working in Malawi, we have consciously refrained from publishing reports or taking any steps to expose the inadequacy of Malawi's justice sector. In the Malawian context, I believe that public "shaming" of the country by highlighting its abysmal prison conditions or unfair trials would have jeopardized the relationships that we worked so hard to build with government officials, judges, and other justice sector stakeholders. These relationships were crucial to obtaining the outcomes we sought for our clients. Moreover, given the paucity of resources in Malawi, the traditional human rights approach of naming and shaming¹⁸⁴ would have been far less effective in achieving concrete results. By forgoing such an approach, we have been able to work closely with judges, prosecutors, defense lawyers, and non-governmental organizations to develop creative strategies to address entrenched problems.¹⁸⁵ As opposed to traditional

¹⁸¹ K.M., Student Journal (Oct. 5, 2010) (on file with author).

¹⁸² K.T., Student Journal (May 6, 2011) (on file with Author).

¹⁸³ In her 2003 article on the growth of human rights clinics, Hurwitz asserts that "[i]nternational human rights clinics are not a client-centered program. . . With human rights advocacy, the object may be the articulation or clarification of a norm or set of standards, as much as, if not more often than, representation of an aggrieved individual or group. . . . "Clients" are rarely individuals. . ." Since then, clinics have adopted diverse approaches to human rights clinical advocacy. Hurwitz, *supra* n. 144, at 533.

¹⁸⁴ As Bettinger Lopez, et. al, *supra* n. 49, at 341-42, explains, "naming and shaming" is the approach embraced by many human rights organizations that engage in fact-finding "missions," then publicize the results of their research in the hope of bringing about change.

¹⁸⁵ This approach seems consistent with Ferguson's observation that "the most important transformations, the changes that really matter, are not simply 'introduced' by benevolent technocrats, but fought for and made through a complex process that involves not only states and their agents, but all those with something at stake, all the diverse categories of people who craft their everyday tactics of coping with, adapting to, and, in their various ways, resisting the established

monitoring, which “identifies and announces abuses,”¹⁸⁶ we have engaged in direct assistance to “propose solutions, and intervene directly in a country’s courts, police, [and] prisons.”¹⁸⁷ While I aim to provide training and support for lawyers and others who may become agents for change in Malawi, our work is decidedly focused on obtaining good outcomes for individuals through litigation and other forms of advocacy. In this sense as well, it is vulnerable to critique.

Critical legal theorists Nitzah Berkovitch and Neve Gordon have argued:

While legal accomplishments can sometimes challenge social structures, they are usually confined to mitigating the structure’s excesses (i.e., unintended results that constitute violations). Consequently, they often also end up strengthening the system itself, since by correcting some of the structure’s ‘dysfunctions,’ direct litigation helps produce the belief that there is an impartial system that adjudicates between parties and corrects wrongs. In this way it helps silence structural criticism.¹⁸⁸

Applying this logic, our clinic has lost a critical opportunity to expose deeper structural dysfunctions and governmental oppression of marginalized communities (in this case, the prison population) by litigating on behalf of individuals.

This argument reminds me of some of the early debates over the value of *pro bono* legal representation of prisoners facing execution in southern U.S. states. Some advocates argued that lawyers should not absolve the state of responsibility for ensuring prisoners were provided legal counsel on appeal.¹⁸⁹ If prisoners were executed without lawyers, it would only showcase the depravity of the justice system and hasten the demise of the death penalty.¹⁹⁰ Moreover, states should be forced to expend as many resources as possible on the death penalty, since the sheer economic cost of capital punishment would deter lawmakers from expanding its reach.¹⁹¹

Others believed (I among them) that the defense bar had a moral obligation to try to prevent as many executions as possible, even if it allowed the state to disingenuously argue that death row prisoners had been the beneficiaries of rigorous procedural safeguards.¹⁹² The complexities of this debate are beyond the scope of the present article. In a sense, it is not so different from the divide between “cause” lawyering and client-centered lawyering.¹⁹³ The latter prioritizes individual

social order.” See James Ferguson, *THE ANTI-POLITICS MACHINE: “DEVELOPMENT,” DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO* 281 (1990).

¹⁸⁶ INT’L COUNCIL ON HUM. RTS. POL’Y, *supra* note 102, at 35.

¹⁸⁷ *Id.*

¹⁸⁸ Nitzah Berkovitch & Neve Gordon, *The Political Economy of Transnational Regimes: The Case of Human Rights*, 52 INT’L STUD. Q. 881, 894 (2008).

¹⁸⁹ See, e.g., Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFFALO L. REV. 329, 427–40 (1995).

¹⁹⁰ See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1872–1877 (1994).

¹⁹¹ See Cara H. Drinan, *The Revitalization of Ake: A Capital Defendant’s Right to Expert Assistance*, 60 OKLA. L. REV. 283, 307–14 (2007).

¹⁹² See, e.g., Laura Gatland, *Pro Bono on Death Row*, 23 BARRISTER 13, 13 (1996).

¹⁹³ See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1196 (2005).

client objectives over those that benefit a larger movement. Where there is a conflict between the cause and the client, the client always prevails.¹⁹⁴

Drawing on the work of critical legal scholars such as Berkovitch and Gordon, a group of clinical professors has challenged the clinical community to integrate the lessons of the critical legal theory movement into project selection.¹⁹⁵ In particular, they have suggested that human rights clinicians (and others) should “choose projects, whether domestic or international, that go beyond the readily apparent violations, beyond the moralistic, and which provide opportunities to pressure hegemonic power and the consequences of the ideology of neoliberalism.”¹⁹⁶ While I embrace many of the arguments raised by the authors, their suggested criteria for project selection strike me as overly ambitious. Moreover, when clinics are engaging in social justice work in foreign countries, the authors’ suggestion seems positively unwise. They cite with approval the conclusions of Vasuki Nesiah and Alan Keenan that “strategies designed to ameliorate human rights abuses are not likely to be effective unless they challenge hegemonic ideologies and dominant political structures.”¹⁹⁷ But as foreign academics/lawyers/activists/students, are we really best placed to challenge dominant political structures in a country that is not our own?¹⁹⁸ Can’t we be more effective in addressing discrete human rights violations that are within our power to ameliorate? I wonder whether human rights clinicians risk falling into the trap that has ensnared certain development aid agencies seeking to “transform” a country’s legal system (or agricultural output, or provision of health care services). In Easterly’s words:

As far as the “transformational” approach, its ambitions are certainly understandable given the realities of poverty and suffering in Africa. But these understandable ambitions seem to have created an intellectual bias that exaggerates the importance and potential for benevolent action of outside actors, as well as exaggerating Africa’s negatives and inability to fix itself.¹⁹⁹

¹⁹⁴ See Monroe H. Freedman, *Client-Centered Lawyering—What it Isn’t*, 40 HOFSTRA L. REV. 349, 354 (2011) (citing MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (AM. BAR ASS’N 1986)).

¹⁹⁵ See Bettinger-Lopez, *supra* note 49.

¹⁹⁶ *Id.* at 380.

¹⁹⁷ *Id.* at 382 (citing Vasuki Nesiah & Alan Keenan, *Human Rights and Sacred Cows, Framing Violence, Disappearing Struggles*, in FROM THE MARGINS OF GLOBALIZATION, CRITICAL PERSPECTIVES ON HUMAN RIGHTS 261, 284 (Neve Gordon ed., 2004)).

¹⁹⁸ For these same reasons, I have reservations about certain elements of the “rebellious lawyering” framework first articulated by Gerald López. See Gerald P. Lopez, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE (1992). Lopez’s conceptualization of progressive lawyering presupposes that lawyers aim to dismantle systems of oppression in collaboration with community.

¹⁹⁹ William Easterly, *Can the West Save Africa?* 106-07 (Nat’l Bureau of Econ. Research, Working Paper No. 14363, 2008). Easterly contrasts “planners” vs. “searchers.” “Planners” are those who “determine a big plan to reach the big goal and throw an endless supply of resources and a large administrative apparatus at that big goal.” A “searcher” has less ambitious goals, and is “on the lookout for favorable opportunities to solve problems—any problem no matter how big or small, whose solution will benefit themselves or others. Searchers must learn enough about each little problem to solve it, which means they must get feedback from the people affected by the problem

Easterly instead advocates for more modest projects that can lead to positive outcomes.²⁰⁰ Experts in the field of justice reform have likewise urged donors to focus on a “problem-oriented approach” to reform, rather than launching “grand programs that at best build an ideal structure without necessarily fixing any specific problems.”²⁰¹ At the same time, Hambergren notes that “small ideas” need to be grounded in a “larger vision (whether of the situation of a specific country or of the justice reform enterprise writ large).”²⁰²

To be clear, I fully support critical legal scholars’ suggestion that clinicians integrate into the clinic classroom a discussion of “the political-economic and historical sources of human rights crises,” including neo-liberal economic policies and colonialism.²⁰³ I have attempted to do that by inviting guest speakers in the field of development economics, and by assigning provocative background readings. I fear my efforts have fallen short in this regard, in part because of the complexity of the issue and the need to cover so many other topics in the clinic classroom. But when it comes to clinic project selection—particularly in the African context—it seems somehow grandiose to imagine that my clinic could (or should) “pressure hegemonic power” in the countries in which we work.²⁰⁴

Instead, I embrace projects that aim to promote the rights of individuals, even where it is uncertain that our efforts will lead to major systemic reform. When it comes to representing prisoners condemned to death, my aim is to prevent their execution and persuade a court to reduce their sentence. That, in truth, is the primary objective of our work in Malawi. If in the course of our litigation we are able to create ground-breaking precedent or influence policy-makers to implement meaningful reform, that is a bonus—but it is never the primary objective. As a client-centered lawyer, my primary objective is to ameliorate any harm my client has suffered as well as prevent future harm. On the other hand, I do look for opportunities to create precedent and affect policy if (and only if) it is consistent with my legal strategy on behalf of a client, and only after ensuring those efforts will not have unintended consequences.²⁰⁵

Representing individual prisoners also clarifies many of the moral ambiguities of working in foreign country. For example, in Kennedy’s account of a human rights mission to Uruguay, he ruminates over his “standing” to investigate

and what they need to fix it.” William Easterly, *Reinventing Foreign Aid* 6 (William Easterly ed., 2008).

²⁰⁰ William Easterly, *Can the West Save Africa?* 42 (Nat’l Bureau of Econ. Research, Working Paper No. 14363, 2008). Linn Hambergren, one of the few academics who has focused on justice reform, similarly advocates for “modest” projects that “pursu[e] concrete, measurable improvements in citizen services,” rather than radical attempts to transform society or the justice sector in its entirety. Hambergren, *supra* note 13, at 4.

²⁰¹ HAMMERMREN, *supra* note 13, at 215.

²⁰² *Id.* at 235.

²⁰³ Bettinger-Lopez and her colleagues make several excellent suggestions in their article, most of which I fully embrace. See, e.g., Bettinger-Lopez, et. al., *supra* note 49, at 381.

²⁰⁴ Bettinger-Lopez, et. al., *supra* note 49, at 380.

²⁰⁵ This approach is not so different from the “pragmatic problem solving” model described by Trubek and Galanter. See David M. Trubek and 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, 1097 (1974).

human rights violation in a foreign country. He asks, “what right had we to be there, asking these questions? Why should the Punta Rieles prison open its files to us?”²⁰⁶ But as a lawyer representing a client, these questions are easily resolved. The prison should open its files because we are representing a prisoner seeking recourse in the courts. We have a right to ask questions because the answers are necessary to properly defend our client.²⁰⁷ Further, by representing prisoners who have no access to legal counsel, I avoid one of the more common challenges raised by project selection; namely, whether clinicians should prioritize the pedagogical mission over the potential for service to a community.²⁰⁸ Individual client representation satisfies both criteria. Finally, as Haynes has argued, engaging in client-centered human rights advocacy provides “infinite possibilities for teaching how, precisely, a human rights advocate can and must confront questions of imperialism, essentialism, reduction of a person or group to a state of Victim Subject, and the unreflective advocate’s potential role in essentializing the very persons she is purporting to help.”²⁰⁹

Another key feature of the Malawi project, which fulfills one of my criteria for clinical project selection, is that it fills a much-needed gap in donor funding for the justice sector. I have found that donors are generally reluctant to fund litigation projects. On the other hand, they are much more receptive to training programs and conferences designed to “build the capacity” of local police, prosecutors, judges or defense attorneys. Yet as others have pointed out, the problem in many countries is not a lack of knowledge, but a lack of resources. Prison officials that preside over overcrowded penitentiaries where disease is rife and prisoners are denied adequate food may be intimately familiar with the U.N. Minimum Rules for the Treatment of Prisoners.²¹⁰ What they lack is the funding to construct additional dormitories and purchase necessary supplies of nutritionally adequate food—funding that international donors are unwilling to supply. Similarly, legal aid lawyers may know how to prepare a defense, but without funding for investigators they have little ability to track down witnesses and interview them. And without reliable access to law libraries, electronic databases, printers, and paper, producing a well-researched appellate brief becomes a daunting task.

My clinic has recently embarked on another long-term clinical project in Tanzania. Building on the model we developed in Malawi, we are now partnering with the Legal and Human Rights Centre (LHRC) in Dar Es Salaam, the UK-based NGO Reprieve, the Pan-African Lawyers’ Union (PALU), the East African Law Society (EALS), the Tanganyika Law Society, Zanzibar Law Society, and the African Court on Human and Peoples’ Rights to provide legal representation to unrepresented Tanzanian death row prisoners. I envision this as a ten-year project. I chose the project based on its potential for long-term partnerships, the unmet need

²⁰⁶ Kennedy, *supra* note 12, at 1398.

²⁰⁷ Others have made similar arguments. See Dina Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379 (2006); Arturo J. Carrillo & Nicolás Espejo Yaksic, *Re-imaging the Human Rights Clinic*, 26 MD. J. INT’L L. 80, 106-07 (2011).

²⁰⁸ See Paoletti, *supra* note 150, at 475.

²⁰⁹ Haynes, *supra* note 208, at 416.

²¹⁰ See G.A. Res. 70/175, at 7–33 (Dec. 17, 2015).

we will address (providing representation for those without lawyers), our ability to provide unique expertise that is unavailable locally, and the opportunities it presents for students to engage in direct representation of clients. For the first two years of the project, we will focus primarily on building relationships with our partners, as well as with Tanzanian prosecutors, defense attorneys, government officials, and prison officers. We will also determine the scope of the project by gathering information on prisoners facing the death penalty, a process that will take years because those prisoners are dispersed throughout prisons in various regions.

In the representation of each client, we will partner with lawyers from PALU, EALS, LHRC, or the private criminal defense bar. Together we will develop an investigation plan and litigation strategy. We will train paralegals on the mechanics of conducting capital case investigations, including interviewing skills training. We will train lawyers in essential advocacy skills and international law regarding the application of the death penalty. And we will work closely with government lawyers on the eventual implementation of any favorable decisions of the African Court, beginning long before any decision is issued. It is my hope that after ten years, we will have succeeded in obtaining favorable judgments from the African Court for at least a dozen prisoners, and will be able to work with the Tanzanian government to implement those decisions by removing our clients from death row—and possibly releasing them. In the course of that work, we hope to be able to train Tanzanian lawyers to be better advocates for their clients, and help prison officers, prosecutors and judges understand the relevance of mental health and mitigation in capital case proceedings. These goals are realistic with a long time horizon, but would be impossible to achieve over the course of one or two semesters.

In reflecting on how best to describe my approach to clinical partnerships in the Global South, I have found Sarah Jackson's conception of "transformative solidarity" to be a useful paradigm.²¹¹ Jackson explains that some human rights activists in the Global North view victims of human rights violations as "objects" of their solidarity, taking campaign actions "for people."²¹² She calls this "charitable solidarity."²¹³ By contrast, activists that exercise "transformative solidarity" respect the agency of those whose rights are violated, taking actions "with [] people, rather than for" them, "to leverage each other's respective strengths in addressing interconnected struggles."²¹⁴ Transformative solidarity presupposes a level of understanding and empathy that can only be achieved through deep engagement over a period of years. As Jackson concludes, "working in a participatory way that fully respects agency takes more time."²¹⁵

²¹¹ Sarah Jackson, *From Charity to Transformative Solidarity – The Changing Place of International Human Rights Work in the Human Rights Eco-system* (Aug. 28, 2018) (unpublished manuscript) (on file with author).

²¹² *Id.* at 3.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 8.

IV. PEDAGOGICAL APPROACHES

Over the years, I have realized that our Malawi work is challenging to students on multiple levels. Students must navigate significant cultural barriers, maintain professional standards despite physical discomfort, and accept their limited ability to effect change in a foreign legal system with severe resource constraints. My students are often shaken by the poverty they witness in Malawian villages. They are horrified by the prison conditions. They are frustrated by their inability to lessen the suffering of their clients. And all of this can contribute to secondary trauma.

One student described her first interview with a client in Malawi's Zomba prison as follows:

It was my first client interview in the prison, and I felt so much weight and hurt. As I contemplated the day's experiences that night, I told myself that hearing sad client stories would probably get easier with time and that it was just my inexperience that made the process so difficult. But as I reflected more, I realized that I didn't want it to get easier. I don't ever want to sit with a client and hear a story of injustice and not feel a raw ache. I think the ability to harness that ache into effective advocacy probably improves vastly with time. And while I look forward to building those advocacy skills, I hope I never lose that fresh feeling of shock and anger about wrongs that I see.²¹⁶

Another described her feelings of guilt after returning to the United States:

I've thought a lot about the men on death row since the trip, especially those who I feel are truly in there by mistake. There's a certain guilt that seems to come with swooping in to take their information down and give them a bit of hope that someone is working for them and then hopping back on a plane and coming home to necessarily think of other things, like finals. While I feel like there must be more good than harm to come from this, it still nagged at me a bit. We made sure to limit any expectations or hope by telling the men that we were unsure of what we could do or what would come out of the interviews but it is hard to believe that they don't take some hope from our presence. After all, most receive few visitors at all, let alone visitors who talk about their case with them. With nothing but time to think and little else to hold onto, I fear they felt hopeful after we were there. And now, as the days have passed by, I wonder what they feel – lingering hope, disappointment, anger?²¹⁷

I sometimes forget how disturbing it can be for a student to interview prisoners and witness their suffering. I have been a capital defense lawyer for more than 25 years, and have been to more prisons than I can count. While I am far from immune to trauma, I no longer experience the same sense of shock when I speak to

²¹⁶ L.H. Student Journal (Fall 2016) (on file with author).

²¹⁷ A.M., Student Journal (Dec. 11, 2009) (on file with author). Kennedy describes similar feelings in *Spring Break*: "At the end of a trip such as this, I always feel a little guilty. As I realize that I am leaving, returning to my classes and to my library in Cambridge, I feel I am betraying those I came to serve and will be unable to respond successfully or completely to their problems." Kennedy, *supra* note 12, at 1412.

prisoners and hear them recount a litany of humiliations and injustices. As a result, I gave little thought as a new clinical teacher to my students' need to process their feelings. But for the last several years, I try to meet with the students every evening during the trip to discuss issues that have come up. I do this by means of a "circle process."

The circle process draws from Native American traditions, adapted for contemporary use in a variety of settings, from misdemeanor sentencing proceedings to therapy groups.²¹⁸ During the circle process, a "talking piece" is passed from one participant in the circle to the next. Only the person who holds the talking piece may speak, while everyone else listens. Talking circles provide space for students to share personal reflections with the group in a supportive, non-judgmental setting. The "unhurried pace"²¹⁹ of the circle encourages even quiet students to process their reactions to our work at a time when they are still fresh.

While I encourage student reflection and engagement in our death penalty case work, my students are never primarily responsible for strategic decisions that affect the lives of their clients. In death penalty cases, it is professionally indefensible to allow students to make such decisions without significant input and consultation with their supervisors. Moreover, by assuring students that I have their back, I relieve them of at least some of the overwhelming dread that often accompanies capital litigation. This is vital, in my view, to minimize the risk of secondary trauma.

It must be said, however, that my students miss out on an important learning opportunity because of my decision to assume ultimate responsibility for strategic decisions in their cases. In *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*,²²⁰ a former Georgetown Law School clinic student describes her agonizing search for a critical witness in her client's asylum case, and her frustration at her professor's refusal to tell her precisely how to find him.²²¹ At the end of the essay, the student acknowledges that by allowing her to develop her own strategy (which involved a good deal of fruitless effort before she found her witness and won the case), her professor allowed her to develop confidence in her own judgment.²²² She concludes that if her professor had acted as her boss, it would have been helpful to her at the time, but would not have given her the opportunity to revel in her own creativity and resourcefulness:

If, instead of being a catalyst and a resource, Phil had acted as our boss, Dan and I would probably still have found Dr. Dekyakandi, and we would probably have won the case. But what would happen the next time I had to represent a client, work on a project with someone, or undertake a

²¹⁸ See KAY PRANIS, THE LITTLE BOOK OF CIRCLE PROCESSES 7-10 (2005). I am indebted to my former Northwestern colleague Lynn Cohn for teaching me the value of the circle process as a pedagogical method.

²¹⁹ *Id.* at 12.

²²⁰ Agata Szyszak, *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*, 21 IMMIGR. & NAT'LITY L. REV. 125 (2000).

²²¹ *Id.* at 134.

²²² *Id.* at 138.

seemingly impossible task?²²³

While I do give my students leeway to propose a case theory or narrative, and to conceive of investigative strategies, I would never allow a student to go out in the field without first reviewing her investigation plan and ensuring she maximizes opportunities to obtain information necessary for the defense of her client. And that means taking a more active role in supervision than is typically recommended by experts on clinical pedagogy.²²⁴

CONCLUSION

Over the last twelve years, I have learned much about the nature of north-south collaboration, the world of development aid, and my clinic's role in a fraught political environment. For those interested in developing long-term human rights projects in a single foreign country with a limited group of partners, I hope that the Malawi project provides an instructive template. What follows is a short list of the lessons I've learned, with the hope that they will be useful to others contemplating this approach.

1. There is no substitute for repeated country visits over a long period of time. Trust develops slowly.
2. During each visit, take time to build relationships with current and future partners.
3. Be flexible. Your objectives may not align with those of your local partners.
4. Be open with your local partners about finances. When partners will be spending a significant amount of time with your team, ask them in advance to prepare a budget for your review. Understand that you may need to transfer funds in advance, rather than reimbursing them after the fact. Do not take for granted their ability to cover any expenses or provide materials (even copies of documents) without compensation.
5. Bring your own portable printer, toner, and paper if you will need to print documents.
6. Conceptions of time vary greatly by culture, and influence expectations of when meetings will begin. If students and supervisors are not aware of this (and even when they are), delays can lead to frustration.
7. Be humble. You will make mistakes (repeatedly).
8. If you are a human rights clinician, take no more than 4-5 students at a time. A larger group is difficult to mobilize quickly and can overwhelm local partners.

²²³ *Id.*

²²⁴ See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 144 (2007) (“The goal of most clinical teachers is to allow students to carry complete responsibility for their cases while the teacher serves as a resource when needed.”); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 487 (1995) (“[c]linical education is partly based on the premise that the more independence the student can assume in representing people, the better their learning will be.”)

9. Promote trust among the team members through frequent meetings and team bonding exercises before the trip.
10. Build in time for reflection with partners and team members throughout the trip.²²⁵

In conclusion, I think it important to recognize the unique nature of every clinic collaboration. The success of our Malawi project is attributable as much to the receptiveness and creativity of our partners as it is to the quality of our advocacy. Whatever knowledge the clinic has imparted pales in comparison to what they have taught us. As one of my students observed during the first year of the Malawi project:

While no doubt there are numerous complex factors that explain [our clinic's] accomplishments, the conclusion that I drew was that, like any successful project, these achievements occurred because of a unique collaborative effort that thrives in the Malawi criminal justice system. Every person whose case was heard while I was in Malawi had been aided and supported by Legal Aid, the Department of Public Prosecutions, our clinic, Penal Reform International, prison guards, police officers, magistrate and high court judges, and the prisoners themselves. If any piece of that network had been absent, less would have been accomplished and some Malawians would still be sitting in an overcrowded prison facing inappropriate charges. In this way I see the Malawian criminal justice system as a model for reform in the United States.²²⁶

²²⁵ To this list I would add one practical tip for clinicians: try to arrive at least one full day before your students, so that you are rested and ready by the time their flight lands. You will be better able to address their concerns without struggling to manage your own fatigue.

²²⁶ L.S., Student Journal (March 30, 2007) (on file with author).

