"Think Glocal, Act Glocal": The Praxis of Social Justice Lawyering in the Global Era

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“THINK GLOCAL, ACT GLOCAL”: THE PRAXIS OF SOCIAL JUSTICE LAWYERING IN THE GLOBAL ERA
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For millions of people in the world already struggling to survive in extreme economic deprivation, conditions are deteriorating. At the same time, the unprecedented economic growth and increasing wealth stratification within and between nations1 has highlighted the failure of international development policies to lift millions of poor people out of grinding poverty.2 This poverty exacts the most insidious toll on women, children, people with disabilities, the rural poor, and those existing on the margins of society—people both economically and socially disenfranchised.3 Rather than making progress toward poverty eradication, we are witnessing a devastating “race to the bottom.”4 Many disillusioned advocates bristle at the seeming futility of addressing the structural underpinnings of poverty through traditional strategies. Instead, this economic reality demands a comprehensive approach to anti-poverty work that recognizes and addresses its global context and aims to ameliorate the dismal failure of global capitalism to create “a rising tide to lift all boats.” The complex, inextricable relationship among poor people across borders is increasingly apparent, reinforcing calls for a “glocal” response.5

∗ Clinical Professor of Law, Western New England College School of Law. Thanks to Jane Aiken, Bridgette Baldwin, Tina Cafaro, Beth Cohen, Lance Compa, Martha Davis and Taylor Flynn for offering insightful comments and encouragement on prior drafts. Thanks also to Dan Viederman of Verite for incubating this idea, to Dean Art Gaudio for supporting this work, and to Ryan Wyzik, for his invaluable assistance.

1 “Global inequalities in income increased in the twentieth century by orders of magnitude out of proportion to anything experienced before. The distance between the incomes of the richest and poorest country was about 3 to 1 in 1820 . . . 44 to 1 in 1973 and 72 to 1 in 1992.” U. N. HUMAN DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 6 (2000); see also Judith Goode & Jeff Maskovsky, Introduction to THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES 4 (Judith Goode & Jeff Maskovsky eds., 2001) (“At the economic level, the gap between rich and poor has widened to an unprecedented distance, both in the United States and worldwide, over the last three decades.”); Henry Rose, RETROSPECTIVE ON JUSTICE AND THE POOR IN THE UNITED STATES IN THE TWENTIETH CENTURY, 36 LOY. U. CHI. L.J. 591 (2005).

2 This article assumes an expansive definition of extreme poverty, extending beyond just the narrow definition of income deprivation to include human development poverty, which encompasses more general indicia of well-being such as “health, education, food, nutrition and other basic requirements for a decent life” and social exclusion, that plagues people who “are marginalized, discriminated [against] and left out in social relations, [who] lack basic security.” Arjun Sengupta, Extreme Poverty and Human Rights – A Mission Report on the United States (Soc. Sci. Research Network, Working Paper, 2007), available at http://ssrn.com/abstract=961230.

3 JEREMY BRECHER, ET AL., GLOBALIZATION FROM BELOW: THE POWER OF SOLIDARITY 7 (2000) (“The downward pressures of globalization have been focused most intensively on discriminated-against groups that have the least power to resist, including women, racial and ethnic minorities, and indigenous people.”).


5 A number of meanings have been attributed to the term “glocal.” This article relies on the simple definition that the local and global are no longer separable. It is not just poor people who are threatened by instability and poverty.
The movement to reckon with globalization has prompted the emergence of law school clinics that premise their advocacy on theories of global interconnectedness. As social justice lawyering strategies have evolved, human rights work is emerging at the forefront of recent advocacy efforts, and many visionary law school clinicians have integrated human rights theories into their clinical work. Under the human rights rubric, workers’ rights are gaining political currency as an integral component of anti-poverty work. Broad advocacy coalitions designed to advance workers’ rights rely on a few universally held foundational assumptions; the status quo is unconscionable, the eradication of poverty is a moral imperative, and a transnational, united force is necessary to agitate for redistributive justice and the valorization of human dignity.

This article suggests a clinical model that integrates social change theory and anti-poverty work in the global era with the hope that it will contribute to the discourse about and practice of promoting workers’ rights at home and abroad. The proposal envisions partnering with a law school clinic in China whose work would dovetail with the emerging imperative of approaching anti-poverty work through a global lens, by targeting widespread labor abuses in China. Working to eradicate sweatshop conditions in China is exigent, since its workers comprise approximately 25% of the global workforce. This economic influence is especially insidious because “the Chinese government violates workers’ fundamental rights in both law and practice, a fact widely accepted in multiple international arenas.” Because China commands unparalleled power in setting working conditions, the consequences of continued international indifference and inaction

Self-interest should be a motivating factor to reduce these inequities, since “[t]he all too apparent danger is that the world economic order, which does little or nothing to alleviate poverty or rectify the gross maldistribution of global income and wealth[,] . . . generates new dynamics of conflict that threaten world peace and security.” Karl E. Klare, The Horizons of Transformative Labour and Employment Law in Labour Law in an Era of Globalization: Transformative Practices & Possibilities 3, 6 (Joanne Conaghan, et al., eds, 2002).

See Arturo J. Carillo, Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process, 35 COLUM. HUM. RTS. L. REV. 527, 586 (2004) (“[L]aw schools are realizing that the clinical training of transnational lawyers is an essential component of legal education in the age of globalization. . . . At the same time, HRCs and their members— instructors, students and cooperating attorneys—must become more aware of the novel contributions they make through clinical advocacy to promoting and enforcing international legal standards. They should challenge themselves to explore and develop their attributes further, thereby honoring the imperative of clinical work in international law by constantly questioning and expanding its boundaries . . . .”).


Brecher et al., supra note 3, at 54.


toward the abysmal labor standards in China will reverberate for low wage workers throughout the world.\(^{11}\)

A specialized labor rights clinic would be uniquely situated to capitalize on the incipient movement toward enhanced worker protection in China.\(^{12}\) The clinic would serve multiple goals. Working in collaboration with other NGOs, the clinic would provide legal representation in selected, strategic litigation, promote legal literacy, advance policy, and cultivate a commitment to public interest lawyering. By targeting the particularly vulnerable low-skilled migrant workforce, the clinic would incorporate advocacy and educational components that would help raise legal consciousness among workers and provide legal representation that begins to raise the floor for all workers. With careful design, the clinic would espouse explicit pedagogical and political goals aimed at enhancing the capacity of civil society to address fundamental concerns about widespread labor exploitation and develop distinct teaching methodologies aimed at achieving these particular goals that would be adaptable to other substantive and geographical areas. The clinic would also incorporate the lessons learned about cause and community lawyering in other venues. Traditional clinics, both in China and elsewhere, have often focused attention on advocacy in the context of individual clients, excluding more comprehensive advocacy strategies. Recognizing that it is equally important to identify and eliminate the structural impediments to ongoing and widespread enforcement of the rule of law and continued progress toward fair labor standards, the mission of this clinic would be extend far beyond representation in individual cases. After the clinic in China is operational, the next step would involve developing a US clinical component that advocates for global labor standards.

I am in the process of seeking out a law school in China for a clinical partnership with my home institution and possibly other U.S. laws schools: the goal would be to develop a clinical program in China with a corresponding clinical component at home. A crucial, additional partner is a non-governmental organization (NGO) with on-the-ground knowledge of the obstacles we are likely to encounter. Accordingly, I elected to work with Verite, an internationally recognized and widely respected NGO that promotes the universal adoption of workplace standards that


\(^{12}\) Developing legal Chinese law school clinics that are specifically focused on labor rights is a particularly timely and important response to the shortage of experienced labor law attorneys in China available to vindicate workers’ rights.
ensure fair and safe working conditions around the world, with a focus on emerging markets, and significant expertise in China.

Particularly in an authoritarian state that has historically tolerated little dissent, it is critical to pay careful attention to the development of social movements, and the considerable risks faced by its protagonists. Despite the very real dangers, China's continued interest in full integration into the global economy has provided some window of hope for incremental progress toward increased transparency, accountability and the development of a civil society. Recently, the clinical education movement has recently gained a foothold in China, starting most prominently with grants from the Ford Foundation in 2000, and China has begun to develop a system of legal aid. A clinical partnership focused on workers' rights could play an integral part in this unfolding domestic struggle.

The clinical proposal is conceptual. The gritty details are omitted with the hope and expectation that it will be vetted, modified, refined and ultimately adapted by clinical partners in China to better the condition of poor people in both the global south and north. Although it is fair to question whether making an initial proposal contravenes the stated intent of forming a collaborative partnership, the proposal is meant as a starting point for discussion rather than the preordained end result. This article’s prescriptive focus runs contrary to the precepts of clinical pedagogy, which tends to be reflective in nature. Given the dire circumstances facing an expanding number of people, efforts to palliate the ill-effects of globalization cannot wait until the details are perfected and the complexities resolved.

This article is divided into three parts. Part I briefly explores the interconnectedness between local and global poverty, the current movement to incorporate human rights norms into social justice lawyering, and the nexus between these strategies and clinical pedagogy. This section underscores the importance of a coherent and ambitious strategy to combat gross economic disparities. Part II explains the cogency of focusing these efforts on China, and provides a brief description of the legal conditions in China with respect to the “rule of law,” legal education and workers’ rights. Part III suggests culturally sensitive ways to apply lessons learned from US clinical and social justice lawyering to the incipient clinical education movement in China to advance the rights of workers spanning the globe.

As Leah Wortham notes, both the overarching vision and the nuts and bolts require careful deliberation. See Leah Wortham, Aiding Clinical Education Abroad: What Can be Gained and the Learning Curve on How to Do So Effectively, 12 CLINICAL L. REV. 615 (2006).
I. THE CALL TO GLOBAL ACTION

A. Anti-Poverty Advocacy Across Borders

Widespread lament about the vastly unequal distribution of benefits under globalization has come to dominate contemporary discourse about international injustice.\(^\text{14}\) Poverty law is undergoing a new renaissance, reconceptualizing advocacy for the poor and disenfranchised as “innately broad, global, interdisciplinary, and focused on social change.”\(^\text{15}\) In view of this new political, economic and social reality, “[l]awyers cannot address poverty by themselves or in a vacuum bound by national boundaries.”\(^\text{16}\) Under these conditions, global economic interdependence precludes a localized approach and requires instead strategies that reckon with the transnational nature of capitalism.\(^\text{17}\) Louise Trubek argues convincingly that “[t]he future of lawyering for lower income people will be linked both to understanding the global economy and cooperating with lawyers for indigent clients across national borders.”\(^\text{18}\) These transnational advocacy coalitions must also unite stakeholders in the vision of a global response.\(^\text{19}\)

\(^{14}\) Despite the ubiquity of voices criticizing globalization, the articulation of an alternative model is in its infancy. See Brecher et al., supra note 3, at 61.


\(^{16}\) Id.

\(^{17}\) Lauren Carasik, Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission, 16 S. Cal. Rev. L. & Soc. Just. 23, 78 (2006); see also Lucie White, Facing South: Lawyering for Poor Communities in the Twenty-first Century, 25 Fordham Urb. L.J. 813, 814 (1998) (“to talk realistically about ‘Lawyering for Poor Communities in the Twenty-first Century,’ we must expand our frame of reference beyond the world of service-eligible client groups that we have traditionally represented in poverty law practices . . . to include all of the people who are being rendered destitute by current policies of global economic integration, regardless of which side of the territorial borders of the United States and other rich countries their bodies happen to fall on at any particular moment of time . . . we must add the idea of global equity to the core normative commitments that motivate our work.”).

\(^{18}\) Louise G. Trubek, U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective, 5 Md. J. Contemp. Legal Issues 381 (1994) [hereinafter Legal Education and Services for the Indigent].

\(^{19}\) As Fran Ansely urgently recognizes, “[u]nless working-class people in the world’s North achieve the capacity to see themselves in a global context, it will be flatly impossible for them to build organizations that are strong enough to defend their interests or to carry out successful campaigns for economic justice.” Fran Ansley, Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in Global World, 150 U. Pa. L. Rev. 353, 405-06 (2001); see also Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, Clinical Education for This Millennium: The Third Wave, 7 Clinical L. Rev. 1, 59.

Whether focused on private law and international economic relationships, public law and transnational problems, or public interest or poverty law implications, the inevitable move towards globalization will require that lawyers acquire the skills needed for these new practice settings. . . . As the division of the academy that focuses on professional skill development, clinical education will inevitably play a crucial role in imparting the new skills and values needed for competent, ethical and reflective practice of law in the increasing number of settings and situations created by globalization.

Id.
Poverty law advocacy that focuses exclusively on local issues will ultimately fail unless advocates address areas of critical importance to economic and social justice in their global context. Accordingly, interest in the area of international workplace justice flows naturally out of local poverty work. In encouraging solidarity between affected constituencies, workers’ rights advocates share overlapping interests with those working in the areas of poverty law. These strategies must acknowledge and address the complex interrelationship between the challenges facing low-wage workers here and those confronting workers abroad. While this collaboration does not demand “a single, integrated cross-border low-wage and poverty policy…we must challenge ourselves to look beyond our limited or narrowly defined constituencies, to frame new questions about labour and welfare strategy within an increasingly globalized economy.”

One avenue for challenging the ill-effects and disparate impact of global economic integration focuses on challenging the structure of low wage markets by advocating for democratic accountability and increased social control over the world of work on an international scale. That reality requires carefully considered choices, as “[t]actical decisions – how to advocate – are framed by locational decisions – where to advocate…lawyers [must] move to multiple arenas, where they are required to undertake fine-grained calculations of strategic costs and benefits, weighing which venues offer the greatest possibilities for politically meaningful intervention.”

Grassroots resistance to the top-down structure of economic integration has created a

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21 See Carasik, supra note 17, at 90 (“[M]any issues facing low-wage workers straddle the typically separate, and occasionally conflicting, spheres of employment law and poverty law.” To be effective however, lawyers must transcend those differences and develop legal and other strategies to build coalitions that address the multiple issues that affect both constituencies.).


23 Brecher et al., supra note 3, at 13 (noting that although the US labor movement initially promoted economic liberalization policies, “[o]rganized labor increasingly moved toward demanding reform of the global economy as a whole, symbolized by demands for labor rights and environmental standards in international trade agreements to protect all the world’s workers and communities from the race to the bottom.”).

24 Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. (forthcoming 2007) [hereinafter *Internationalization of Public Interest*].
movement to foster “globalization from below.”25 Although globalization has been occurring for generations on a much smaller and less noticeable scale, opposition to its destructive forces became the rallying cry in the “Battle for Seattle” in 1999, where anti-globalization became the mantra for many social movements actors.26 Many have argued that the goals of global economic integration, underpinned by a staunch belief in the development potential of unbridled capitalism, will ultimately trickle down to the world’s poor.27 The proponents of globalization believe that free markets will ultimately generate economic development in poor countries.28 As opponents vociferously point out, instead of the promised trajectory into the developed world for countries in the global south, wealth has become more concentrated and poverty more rampant.29 Social justice lawyers can help catalyze social movements that target the exacerbation of economic injustice under globalization.

B. The Ascendence of International Human Rights Norms

In the history of rights discourse, human rights have conventionally been attributed to three distinct iterations: first generation, referring to civil and political rights; second generation, incorporating economic, social and cultural rights; and third generation, defined generally as collective rights.30 The first generation civil and political rights have been characterized as essentially negative, individual rights, predicated on the right to be free from government interference in various matters. Second generation rights are those delineated by their focus on economic, social and cultural rights.31 These have been characterized as positive rights,
requiring affirmative action by states, and include the right to work, fair and equitable working conditions, the right to health care and social security. Collective rights, such as the right to development and self-determination, are defined as third generation rights. The demarcations between generations of rights are not absolute or self-evident, but instead they reflect the political priorities attributed to them by various state and non-state actors. Ascribing rights to various generations has in effect suggested an implicit order and value of these rights. In response to the stark new economic reality, revitalized advocates are beginning to reframe the poverty law agenda by striving to integrate social and economic rights more fully into the human rights rubric on an international level.

As they are commonly conceptualized, the second and third generation rights shed their dependence on concrete wrongs inflicted on individuals by their governments and move progressively toward positive societal obligations toward collective groups of people. These rights reflect the recognition of our common humanity that is enshrined in the Universal Declaration of Human Rights. Correspondingly, recent human rights advocacy has witnessed an escalating movement to recognize that fundamental human dignity requires more than just the right to be free from certain intrusions from the state. Progressive human rights discourse has stretched beyond the dominant forces exalting civil and political rights, by amplifying the voices of those demanding more expansive concepts of economic, social rights and cultural rights that are necessary to a full realization of their civil and political siblings. This broad conception of rights includes those that impact “development, poverty, health, labor relations, and the politics counterproductive and potentially destructive victim/savior dyad. See Dina Francesca Haynes, Client-Centered Human Rights Advocacy, 13 CLINICAL L. REV. 379, 386 (2006)

32 Some have pointed out the irony that advocates arguing that economic rights are inseparable from the more exalted civil and political rights risk reconstituting power in the government they previously opposed.


34 The Pendulum Swings Back, supra note 15, at 1395.

35 The distinction between positive and negative rights presents a false dichotomy, as a deeper analysis uncovers the positive and negative aspects in each of the defined categories. Jeanne M. Woods, Justiciable Social Right as a Critique of the Liberal Paradigm, 38 TEX. INT’L J. 763 (2003).

of gender, indigeneity, disability and sexuality.”

Eliminating the normative distinction between these rights provides at least tacit recognition of their inseparability. Idealistic notions suggest that economic development and respect for human rights are not mutually exclusive ideals, and “if theoretical debate does not settle the indivisibility question, simple reality should.” Given the political hegemony of developed countries in articulating the norms advanced by international human rights institutions, the articulated priorities often reflect Western values. However, developing countries are increasingly assertive in challenging the dominant paradigm.

Some critics have derided the tendency of human rights activism to focus more on civil and political rights than social, cultural and economic rights. Deena Haynes suggests this preference derives in part from “the visceral appeal of exposing abuse that produces an immediate and identifiable (and usually female) victim . . . .” Addressing her comments primarily to advocates that focus on vindicating individual rights violations, Professor Haynes argues that “[a]dvocates centered in the privileged West, or even advocates who are members of privileged classes of the victimized persons’ own culture could have no proper conception of the persons on behalf of whom they advocate.” Her point is well taken, and clinicians undertaking international human rights work must do so only after careful examination of their motives and methodologies. For example, some critics argue that human rights efforts targeted at specific acts perpetrated against individual “victims,” such as female genital cutting, are destined to fail if advocates do not identify and address more pervasive conditions that preclude women from full and equal participation in society. These criticisms and cautions seem slightly less salient when leveled at those advocating for general principles of equitable resource distribution contained within Economic, Cultural and Social Rights. US clinicians and progressive lawyers have a rich history of careful self-reflection, and at times self-flagellation, borne of mixed

37 Hurwitz, supra note 7, at 512.
40 ISHAY, supra note 30 at 257 (“Poor countries . . . continue to challenge IMF austerity policies and press for a right to sustainable development.”).
41 HAYNES, supra note 31 at 386.
42 Id. at 380.
43 Id. at 380.
44 See Isabelle R. Gunning, Global Feminism at the Local Level: Criminal and Asylum Laws Regarding Female Genital Surgeries, 3 J. GENDER RACE & JUST. 45, 61(1999).
success in addressing our domestic poverty. Those habits and insights are particularly relevant in this endeavor.

Further complicating the picture within human rights advocacy is the dialectic surrounding the concepts of cultural relativism and universalism, causing lawyers to closely examine whether advocacy for first generation rights is simply a “Trojan horse” for the export of US cultural and economic imperialism.\footnote{Matthew C. Stephenson, A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China, 18 UCLA PAC. BASIN L.J. 64 (2000).} Several critics of human rights advocacy lament that the subtle vestiges of cultural imperialism, colonialism and paternalism suffusing human rights discourse can be particularly insidious and even counterproductive when applied to gender issues.\footnote{See generally Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism, 117 HARV. L. REV. 2365 (2004) (noting that human rights activists focused on post-colonialist states should exercise caution in reviving the language and attitudes of colonialism).} Although exploring and confronting these ambiguities and complexities is both essential and troubling, the indeterminancy should not serve as a deterrent from joining the battle in support of the global poor. These uncertainties surely have not stopped developed countries from seeking to impose market fundamentalism on their developing counterparts, multinational corporations from pursuing and exploiting sources of cheap labor, the apparatus of international finance, including the International Monetary Fund and World Bank and other International Financial Institutions (IFIs) from setting policies that perpetuate the primacy of the neoliberal economic agenda,\footnote{These institutions espouse policies promoting trade liberalization, minimal state intervention and private sector growth. More recently, the World Bank has enunciated a perceptible shift away from pure market fundamentalism.\footnote{Although the ‘rule of law’ initiatives have begun to heed the admonitions to correct past policy failures attributable to cultural insensitivity, some argue that their primary purpose is to ensure market access.\footnote{See, e.g., Justin Cummins, Invigorating Labor: A Human Rights Approach in the United States, 19 EMORY INT’L L. REV. 1 (2005); Neil A. Friedman, A Human Rights Approach to the Labor Rights of Undocumented Workers, 74 CAL. L. REV. 1715 (1986); Maria Pabon Lopez, The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm, 44 BRANDEIS L.J. 611 (2006).}} and “rule of law” initiatives from pushing forward to restructure legal systems based on embedded normative assumptions.\footnote{Yet despite the need for cautious self-reflection, clinicians must resist paralysis by considerations of postmodernism and cultural relativity, and assert that certain principles of human dignity transcend the sovereignty and cultural predispositions of particular nation states.}\footnote{See, e.g., Justin Cummins, Invigorating Labor: A Human Rights Approach in the United States, 19 EMORY INT’L L. REV. 1 (2005); Neil A. Friedman, A Human Rights Approach to the Labor Rights of Undocumented Workers, 74 CAL. L. REV. 1715 (1986); Maria Pabon Lopez, The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm, 44 BRANDEIS L.J. 611 (2006).} One emerging anti-poverty strategy focuses on using human rights as a conceptual framework for vindicating workplace violations to advance economic and social justice.\footnote{Yet despite the need for cautious self-reflection, clinicians must resist paralysis by considerations of postmodernism and cultural relativity, and assert that certain principles of human dignity transcend the sovereignty and cultural predispositions of particular nation states.} This approach is premised on the axiom that universally accepted labor rights are contained within the...
sphere of economic rights. These principles are even recognized, at least nominally, by prominent members of the business world. And in recognizing those rights, “China’s impact on the global economy is so huge that workers in the rest of the world have a right and a duty to argue, cajole, and fight for the adoption of internationally recognized labor rights in China.” Philosophically, China’s history has supported some notion of positive, economic rights, as demonstrated by the “iron rice bowl,” a policy of providing minimum guarantees to everyone. More recently, that policy has been supplanted by the new rights of employers to hire and fire employees, and implement performance based compensation policies. The “iron rice bowl” was further eroded in response to the unyielding drive toward economic development. If China truly values Economic, Social and Cultural rights, it must promulgate laws, support enforcement mechanisms and muster the political will to constrain the unfettered exploitation of workers rather than pay mere lip service to these ideals.

In the face of human rights advocacy, nations entrench themselves behind conceptions of identity and sovereignty. Western democracies that exalt civil and political rights decry China’s authoritarian oppression of these rights. In contrast, China has argued that economic development requires an initial sacrifice of civil and political rights. As the debate becomes refractory and seemingly impervious to consensus, it eclipses a universal respect for the dignity of all people. To forestall this retreat into immutable and self-righteous positions, some have

50 Certain workplace rights are often widely accepted in general terms, consensus often collapses with respect to the specifics, frustrating attempts to implement and enforce policies based on those rights. Edward E. Potter, A Pragmatic Assessment from the Employers’ Perspective, in WORKERS’ RIGHTS AS HUMAN RIGHTS 120 (James A. Gross ed., 2003).
51 The United Nations Global Compact, a corporate citizen initiative aimed at encouraging businesses to adhere to ten basic human rights principles of ethical entrepreneurship, four of which directly the core labor rights of: freedom of association and the right to bargain collectively, the elimination of forced labor, the abolition of child labor, and the elimination of employment discrimination. United Nations Global Compact, Labour Standards, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/labourStandards.html (last visited Jan. 1, 2008).
52 UNDUE INFLUENCE, supra note 11, at 39.
53 Jill E. Monnin, supra note 53. Extending the Reach of the Chinese Labor Law: How Does the Supreme People’s Court’s 2006 Interpretation Transform Labor Dispute Resolution? 16 PAC. RIM L. & POL’Y J. 753, 755 (2007) (describing the “iron rice bowl” as a policy of providing “lifetime job security for people working in state owned enterprises.”). Under China’s Marxist heritage, people were collectively entitled to a decent floor that ensured some measure of security. In contrast, the US has recently revisited retrogressive debates about the deserving and undeserving poor, with its racialized and gendered implications, that allows “the haves” to have little sympathy for the “have nots.”
55 Ronald C. Brown, China’s Employment Discrimination Laws During Economic Transition, 19 COLUM. J. ASIAN L. 361, 41-20 (2006) (“Economic development, privatization, and the need to be profitable to all argue for cutting costs (often labor costs) and pulling away from the welfare state’s iron rice bowl approach.”).
56 ISHAY, supra note 30, at 260.
suggested a transcendent paradigm of global citizenship that “centrally maps human rights, delimits sovereignty, redefines legitimacy of states under the rule of law and the concept of territoriality and revalorizes humanity irrespective of borders and boundaries.”\textsuperscript{57} This paradigm would embrace a universally held “idea of a global citizenry sharing ascendant values of human rights and dignity.”\textsuperscript{58} This new human rights ideology presages a movement that extends beyond national boundaries, suggesting and inspiring new theories of advocacy and solidarity both domestically and abroad.\textsuperscript{59} Innovative advocates are finding ways to leverage the lexicon of human rights to forge innovative strategies to advance their causes domestically.\textsuperscript{60}

C. Social Justice Lawyering

Definitions of social justice lawyering are fluid, contextual and contested. This article assumes a definition that envisions working for subordinated people to create conditions that precipitate or consolidate social change and economic justice. Implicit in this concept is that lawyers assume neither a central nor a peripheral role in the process but instead participate as fully engaged, equal partners with requisite humility.

In the face of devastating failures to realize ambitious social justice agendas, many progressive lawyers have turned the microscope on their methods, both in terms of overarching strategies and the relational dynamics contained within those efforts.\textsuperscript{61} Among committed cause lawyers, there is significant discord as to the proper goals and strategies that should be employed in the battle to enhance the rights and lives of constituents. Strategies focused exclusively on using the courts to vindicate rights has increasingly come under fire, and many lawyers advocate

\textsuperscript{57} Berta Esperanza Hernandez-Truyol, \textit{Globalized Citizenship: Sovereignty, Security and Soul}, 50 VILL. L. REV. 1009, 1027 (2005). See also the Universal Declaration of Human Rights, Article 2, which holds that “no distinction shall be made on the political, jurisdictional or international status of the country or territory to which a person belongs.”

\textsuperscript{58} ISHAY, \textit{supra} note 30, at 247.

\textsuperscript{59} \textit{The Pendulum Swings Back, supra} note 15, at 1415; see also Rebecca Smith, \textit{Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities}, 3 STAN. J. C.R. & C.L. 285, 287-88 (2007) (“[T]he issue of labor rights as human rights and highlight ongoing (and much-needed) efforts to expand the body of international human rights law, forge respect for human rights within the United States, build bridges between different communities of low-wage workers, and lift up the voices of ordinary working people.”).

\textsuperscript{60} See Martha F. Davis, \textit{The Spirit of Our Times: State Constitutions and International Human Rights}, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) (“State courts have a responsibility to consider international human rights norms and other transnational law in rendering state constitutional decisions.”). \textit{See generally CLOSE TO HOME, CASE STUDIES OF HUMAN RIGHTS WORK IN THE US} (Larry Cox & Dorothy Q. Thomas eds., Ford Foundation, 2004), available at \url{http://www.fordfound.org/publications/recent_articles/close_to_home.cfm}. A secondary benefit of the increasing profile of human rights norms in the US is that it may serve to mitigate charges of hypocrisy legitimately leveled at the US for taking foreign governments to task on issues while ignoring its own internal failures.

\textsuperscript{61} See \textit{generally} Carasik, \textit{supra} note 17.
for the adoption of strategies that embrace a “tactical pluralism,” wherein “litigation is viewed as part of a broader repertoire of advocacy techniques that lawyers bring to bear, often in complimentary and politically sophisticated ways, to solve problems. Rather than the monolithic pursuit of legal rights through courts, lawyers readily incorporate non-legal techniques such as community organizing, policy advocacy and publicity to advance goals.”\(^{62}\) Other commentators argue that the pendulum has swung too far away from rights discourse, and that by minimizing their contributions to social change strategies, lawyers are failing to utilize their expertise\(^{63}\) to provide a “vantage point from which to engage in meaningful politics.”\(^{64}\) No monolithic strategies have emanated from these debates. Although history has highlighted the danger of over-relying on rights discourse, most lawyers believe that the law has some role to play as a tool in the arsenal of social change. Rather than rely on incremental change through individual legal victories, the law can be a part of a more visionary strategy that endeavors to forge alliances with a diverse range of actors to challenge the structural underpinnings of injustice and inequality. As part of these efforts, Professor Lucy Williams urges advocates in seemingly disparate and disconnected fields to reconceive of their roles, arguing persuasively that “through lack of interdisciplinary and cross-border dialogue, we fail to effectively criticize our own positions and re-imagine broad-based redistributive political agendas.”\(^{65}\)

In contemplating the parameters of social justice lawyering, it is important to remember that the status and power of lawyers in China is markedly different than the prestige enjoyed by their US counterparts. Although China does not share the rich tradition of US progressive lawyering, certain lessons may have some transcultural applicability related to fostering social movements. In building coalitions and developing tactics designed to address pervasive social and economic inequities, it is important to be mindful of criticisms leveled at lawyering strategies that inadvertently reinforce power imbalances and embody priorities set by lawyer elites. Resisting the urge to control the decision-making, lawyers must join forces in

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\(^{62}\) Internationalization of Public Interest, supra note 24.

\(^{63}\) Lobel, supra note 26 at 987 (“In the triangular conundrum of ‘law and social change,’ law is regularly the first to be questioned, deconstructed, and then critically dismissed” and that while it is worthwhile to understand and acknowledge the limits of legal activism, marginalized groups have often leveraged the law successfully against more entrenched, powerful interests.).

\(^{64}\) Internationalization of Public Interest, supra note 24.

\(^{65}\) Williams, supra note 22, at 93. Some commentators bemoan the fragmentation into ‘identity politics’ that “politicize gender, race, and other social identities [that] has destabilized the binary capital-labour frame,” arguing that this divisiveness ultimately removes good minds and social movement actors away from the class struggle. Klare, supra note 5, at 5; see also ISHAY, supra note 30, at 245.
multidisciplinary, inclusive and visionary collaboratives that strive to enlist the participation of stakeholders and incorporate the disparate and potentially discordant voices clamoring for a place at the table. Advocates are charged with building grassroots movements that are defined with simple elegance as promoting “the collective withdrawal of consent to established institutions” that reinforce inequitable economic and social stratification.

As with human rights discourse, many social justice lawyers are articulating a vision of transnational collaboration and solidarity. Advocates and activists are challenging the concept of nation-state sovereignty that has served to engender blind patriotism and circumscribe concern only for those residing within the artificial boundaries of nationality. Recognizing that conditions for the poor across borders are inextricably interconnected, activists argue that divisive constructs should not provide insulation from a more global sense of responsibility. Under this new vision, “[t]he modern system of public interest law…[is] influenced by transnational economic and political relations, attentive to possibilities for extra-territorial advocacy, and concerned not just with domestic inequity but with a broader notion of transnational justice.”

D. Clinical Pedagogy and Social Justice

While clinical legal education envisions multiple goals, much has been written about the central role of a social justice mission in law school clinics. Many clinicians express dissatisfaction with a clinical model that does not elevate the importance of advancing social justice goals. In fact, “[m]ost clinical educators believe that educating the next generation to create social change – to bring about a more just society – is the core of what we do, why we do

66 Anecdotal evidence suggests that grassroots and advocacy groups are themselves adopting the language of human rights. See The Pendulum Swings Back, supra note 15, at 1410-11 (noting the efforts of a range of groups whose joint interests coalesced into the United States Human Rights Network, who “use human rights as a rallying cry in their economic justice campaigns.”).
67 BRECHER ET AL., supra note 3, at 21.
68 It is important to be mindful of the intense pressure on developing countries to maintain the competitive advantage that some believe is essential to promote further economic growth.
69 Internationalization of Public Interest, supra note 24.
71 See generally Carasik, supra note 17.
it, and how we do it.” In this context, globalization cannot be ignored, as “[t]he future of lawyering for lower income people will be linked both to understanding the global economy and cooperating with lawyers for poor people across national borders.” Many advocates believe that this “transnational legal process perspective confirms both the continuing value and imperative of clinical work and international law.”

The most effective method of leveraging clinical pedagogy to advance social justice goals is far from clear. As with all advocacy decisions, each choice implicates different compromises and potential pitfalls. The greatest failure would be complacency and complicity in the face of the unprecedented and manifestly unjust growth of income disparities and asset maldistribution worldwide. Engaging as a thoughtful, committed practitioner and clinician with a global conscience means striving to find a model, however imperfect, to push for justice, evaluate that model’s success and failures, incorporate those lessons, and forge on. As Johanna Bond notes, “[c]linicians in the United States have simply expanded beyond the notion of poverty in our metaphorical “back yard” to include poverty and oppression beyond our national borders.” But the focus of this proposal is also decidedly local. Collective political action relies on comparable experience to unite allies. Although arguably running afoul of the prior caution to avoid essentializing poor people, it seems reasonable to assert that low wage and exploited workers share some characteristics of disempowerment and would benefit from a collective strategy that

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72 Elizabeth B. Cooper, *Global Collaboration in Law Schools: Lessons to Learn*, 30 *Fordham Int’l L.J.* 346, 355 (2007). It can be argued that values laden education has no place in the law school curriculum, but the clinical community has never been shy about its commitment to advancing social justice.

73 *Legal Education and Services for the Indigent*, *supra* note 18, at 392; *see also* White, *supra* note 17, at 814. [T]o talk realistically about “Lawyering for Poor Communities in the Twenty-first Century,” we must expand our frame of reference beyond the world of service-eligible client groups that we have traditionally represented in poverty law practices . . . to include all of the people who are being rendered destitute by current policies of global economic integration, regardless of which side of the territorial borders of the United States and other rich countries their bodies happen to fall on at any particular moment of time . . . . [W]e must add the idea of global equity to the core normative commitments that motivate our work.


endeavors to bridge the divides. Accordingly, clinical advocates should seek to share knowledge and collaborate, across both borders and constituencies whose commonalities may not be immediately apparent.

As several commentators have noted, clinical pedagogy is well suited to human rights advocacy. Both contain the multiple and overlapping themes of progressive lawyering, a focus on the importance of empowering constituencies and engaging them in the process of reform, and questioning the efficacy of advocacy based exclusively on the vindication of rights. Taking to heart the charge to be “Provocateurs for Justice,” clinical and human rights advocacy is increasingly focused on the interconnectedness of global problems and the corresponding need to craft global responses. Recognizing benefits of internationalizing efforts to leverage the power of education for social justice goals, a diverse group of lawyers formed the Global Alliance of Justice Educators (GAJE) to “promote justice through education by bringing together persons from many countries and every inhabited continent in the world.”

77 Human rights advocates are increasingly realizing the importance of incorporating anti-subordination insights that recognize the intersectionality of multiple axes of oppression, including gender, race, religion, sexual orientation and class. Id. at 102. Further, some critics of postmodern thinking note that avoiding all attempts at finding commonality can impede the development of the collective narrative necessary to broader advocacy efforts. Gary L. Blasi, What’s a Theory For?: Notes on Reconstructing Poverty Law Scholarship, 48 U. MIAMI L. REV. 1063, 1093-94 (1994).

78 Many models of cross-cultural clinical collaborations have achieved laudable success, while others have been less fruitful. See, e.g., Margaret Martin Barry et al., supra note 19; Lawrence M. Grosberg, Clinical Education in Russia: “Da and NYET”, 7 CLINICAL L. REV. 69 (2001); Lee Dexter Schnasi, Globalizing Clinical Legal Education: Successful Under-Developed Country Experiences, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 129 (2003); Rodney J. Uphoff, Why In-House Live Client Clinics Won’t Work in Romania: Confessions of a Clinical Educator, 6 CLINICAL L. REV. 315 (1999); Richard J. Wilson, Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South, 8 CLINICAL L. REV. 515 (2002). Although it is clearly preferable to spend time in the country in advance of developing a proposal, a range of pragmatic obstacles may limit the viability of significant travel for individuals interested in developing transnational lawyering strategies. For example, a small law school with considerable resource constraints may not be in the position to offer institutional support, at least with respect to financial assistance. On a more personal level, for logistical and familial reasons, some advocates might find it difficult to spend a significant time abroad. While it may require more attention to learning about the other culture, my hope is that it does not render efforts to collaborate entirely ethnocentric, irrelevant or inconsequential.

79 Hurwitz, supra note 7, at 509 (“[H]uman rights lawyering can be considered the twenty-first century’s manifestation of the original social justice mission of clinical legal education.”).

80 Jane H. Aiken, Provocateurs for Justice, 7 CLINICAL L. REV. 287, 288 (2001) (“A provocateur for justice actively imbues . . . students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice.”). Ultimately, the hope is to nurture law students to be “revolutionaries” for legal change, peaceful change, pluralistic, democratic and cultural change.” Schnasi, supra note 78, at 133.

81 GAJE’s mission includes the belief that “Justice education addresses all forms of social, economic, political and human rights and includes not only education of law students but also education of practicing lawyers, judges, non-governmental organizations and the lay public.” The goals of GAJE include the following:

(1) To facilitate international information sharing and collaboration on justice education.
Given the history of US ethnocentrism in exporting legal and clinical models, it is important to look critically at clinical pedagogy, social justice lawyering, human rights advocacy and democratization efforts to ensure that they are conceptualized and implemented with acute sensitivity to the context, needs, and priorities of the targeted community. This model proposes a new paradigm of “rule of law” that incorporates explicit social justice goals. As Pamela Phan observed after her field work in Chinese clinical education, “the American model of clinical education and its “social justice” tradition can play a significant role in the development of Chinese legal education, in turn strengthening legal culture and reform in China.”

II. China

A. The Human Costs of China’s “Economic Miracle”

Rising like a phoenix from the ashes of the Cultural Revolution, China has emerged as a global economic powerhouse. Despite laudable progress toward elevating the standard of living for millions of its citizens, China’s rapid industrialization has come at a considerable cost for rural peasants and urban workers both within and outside its borders. Increasing income inequality within China belies its socialist roots, and that disparity is most evident in the

(2) To convene global conferences, workshops and training sessions on justice education at locations accessible and affordable for persons from developing countries.
(3) To receive and administer funds to support the development of innovative justice education, especially in developing countries.
(4) To serve as a clearinghouse of teaching methods and materials.


83 In 2006, China’s GDP was 2.755 trillion; the GDP real growth rate was 11.1%. U.S. Dep’t of State, Background Note: China, http://www.state.gov/r/pa/ei/bgn/18902.htm (last visited Jan. 2, 2008). Note however the distinction between economic development, characterized as the general wealth of a society as measured by GDP, and human development, which focuses on the freedom of individuals to enhance their own capabilities. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 2002; 84 Since implementing reforms, China has made remarkable improvement in certain areas of the Human Development Index. See U.N. DEV. PROGRAMME, CHINA HUMAN DEV. REPORT 2005, at 7 (2005) [hereinafter CHINA HUMAN DEV. REPORT]; see also U.N. DEV. PROGRAMME, OVERCOMING HUMAN POVERTY: POVERTY REPORT 2000, at 115 (2000), available at http://www.undp.org/povertyreport/ENGLISH/ARprofil.pdf. (noting that China has made impressive strides toward decreasing the number of its citizens that live below the international poverty line, pushing 160 million over the threshold.).
86 HUMAN RIGHTS WATCH, WORLD REPORT 2006, at 244 (2006) [hereinafter World Report 2006]; see also CHINA DEVELOPMENT BRIEF, HOW MUCH INEQUALITY CAN CHINA STAND? (2007), available at http://www.chinadevelopmentbrief.com/node/1001 (follow “Download full report” hyperlink) [hereinafter HOW MUCH INEQUALITY] (noting that China has witnessed the emergence of a middle bulge, although it does not even
contrast between rural and urban areas,\textsuperscript{87} significant inter-regional disparities,\textsuperscript{88} and a notable gender gap.\textsuperscript{89} In light of the international ramifications of sweatshop conditions that plague many Chinese citizens, collaborative efforts are necessary to devise an approach that “promises simultaneously to protect American [and other] workers’ standards and aid Chinese workers in their struggle to gain basic rights in the workplace.”\textsuperscript{90}

China’s rapid ascent to the apex of developing countries leaves even some of its critics with grudging admiration of its economic prowess, even as they condemn the human costs. To the chagrin of those agitating for an international neoliberal agenda, China did not follow the widely hailed “Washington Consensus,” (WC)\textsuperscript{91} which served as the “prevailing development orthodoxy,” and assumed an inseparable tripartite alliance between democracy, market capitalism and the rule of law as necessary precursors to development.\textsuperscript{92} Defying Western predictions of stagnant growth, China’s development trajectory was spurred by the “East Asian Model,”\textsuperscript{93} (EAM), which has been pejoratively characterized as “mercantile authoritarianism.”\textsuperscript{94} This model substitutes the primacy of nationalism for the principles of democracy favored under

\textsuperscript{87} The Chinese economy has grown at uneven rates, as development in coastal urban areas with infrastructure has exceeded the rate of growth in rural areas. \textit{See} CHINA HUMAN DEV. REPORT, supra note 84, at 8-10, 21-37.

\textsuperscript{88} Indicia of human development are more favorable in the coastal provinces and less auspicious in the west and autonomous regions. \textit{Id.} at 10-11. Coastal regions fare better for a range of reasons related to their closer proximity to urban areas, including a more developed infrastructure, the ability to attract both domestic and foreign investments, and more convenient access to international markets. \textit{HOW MUCH INEQUALITY}, supra note 86, at 5.

\textsuperscript{89} Preferences for men cross all spheres of life, and in particular with respect to hiring, earning and education. \textit{Id.} at 3.

\textsuperscript{90} UNDUE INFLUENCE, supra note 11, at 31.

\textsuperscript{91} Shift to “Washington Consensus,” adopted by World Bank. \textit{See} WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001 – ATTACKING POVERTY 61-62 (2000), available at http://go.worldbank.org/KL4JA4FXP0 (“the increasing disenchantment with inward-looking, state-led development led national governments to implement reforms that replaces state intervention in markets with private incentives, public ownership with private ownership, and protection of domestic industries with competition from foreign producers and investors. Where such market-friendly reforms have been successfully implemented, on average economic stagnation has ended and growth has resumed.”).


\textsuperscript{93} In general terms, the East Asian Model is characterized by six main themes: 1) a focus on economic development prior to the recognition of civil and political rights, 2) a selective approach to adopting elements of the WC and rejecting others, 3) incipient investment in social capital and institutions necessary to being a gradual transition to the “rule of law” 4) elections are delayed until a high degree of economic success is attained, 5) the beginnings of government support for Constitutionalism, civil society and its supporting institutions, and 6) increasing acceptance of civil and political rights. Randall Peerenboom, \textit{The Fire-Breathing Dragon and the Cute Cuddly Panda: The Implication of China’s Rise for Developing Countries, Human Rights, and Geopolitical Stability}, 7 CHI. J. INT’L L. 17, 20-21 (2006) [hereinafter \textit{Fire-Breathing Dragon and the Cute Cuddly Panda}].

\textsuperscript{94} Klein, supra note 92, at 91.
the WC, and premises the legitimacy of government power on increased living standards rather than democracy.\textsuperscript{95} Under the EAM, China has made measurable gains decreasing poverty, increasing literacy,\textsuperscript{96} and prolonging life expectancy.\textsuperscript{97} While some observers applaud the EAM for its successes in poverty alleviation, others decry China’s autocratic policies and its failure to comply with Western expectations of democracy, transparency, and accountability.\textsuperscript{98}

Critics of China’s economic development argue that its competitive advantage exacts a considerable toll on its workers. Labor abuses in China are prevalent, and one observer of China’s economic development trajectory suggests that labor conditions may deteriorate further.\textsuperscript{99} One analyst posits that China’s meteoric development relied on the presence of five factors: an abundant, exploitiable labor force, the transformation to a socialist market economy, widespread violations of intellectual property rights, lax environmental protections, and the ready availability of state funded investments. A variety of circumstances have altered the economic and political landscape and forced China to rely on its “cheap and disempowered labor force as the country’s only unchanged manufacturing competitive advantage.”\textsuperscript{100} In fostering economic growth under this model, “[e]veryone benefits from cheap labor – except the workers themselves, of course.”\textsuperscript{101}

Recent events have focused the international spotlight on the abysmal conditions for laborers in China. The public outcry at the events at the Shanxi brickyard slavery scandal galvanized international attention and may signal the increased willingness of international

\textsuperscript{95} Id. at 90. (noting that China’s example may signify that democracy is the most dispensable element of the WC development model, at east in the short term.) Id. at 91.
\textsuperscript{97} \textit{Fire-Breathing Dragon and the Cute Cuddly Panda}, supra note 54, at 17.
\textsuperscript{98} Id. at 17-18.
\textsuperscript{99} Eva Pils, \textit{Land Disputes, Rights Assertion, and Social Unrest in China: A Case From Sichuan}, 19 COLUM. J. ASIAN L. 235 (2005) (“With social unrest intensifying in China, there is a growing sense that the legal reforms of the past two decades have failed to provide adequate channels for resolving conflicts of interest and viewpoint between government and citizens – especially those who have been disadvantaged by economic development, and who believe that their rights have been violated by this process.”). While some economists believe China will be the largest economy in seventy five years, others argue that China’s continued development will not lead inexorably to a permanent position of global prominence. Irrespective of its future trajectory, most observers agree that the unparalleled scope of Chinese industrial development affects more people than in any comparable period in history. \textit{JUSTICE FOR ALL: CHINA, supra} note 10, at 8.
\textsuperscript{100} Jehangir S. Pocha \textit{The Last Competitive Advantage}, \textit{THE NATION}, June 4, 2007.
\textsuperscript{101} Id. (quoting Han Dongfang, who works for China Labor Bulletin).
actors to pressure China to enforce labor standards.\textsuperscript{102} Grave concerns about the safety of toys manufactured in China have also permeated the news, spurring apprehension about the international ramifications of inadequate regulatory oversight, the lack of legal transparency and lax law enforcement.\textsuperscript{103} Interestingly, there has been little international attention to the perils that Chinese workers face in manufacturing these items.\textsuperscript{104} However, powerful forces within China are making resistance a difficult and dangerous enterprise. The government has demonstrated an increasing intolerance of social unrest and internal dissent,\textsuperscript{105} which has provoked government crackdowns on protests and even tighter control over the dissemination of information, particularly through the internet.\textsuperscript{106} In these instances, the law is often used for instrumentalist purposes,\textsuperscript{107} and unpredictable law enforcement keeps activists in check and regular citizens in check.\textsuperscript{108} For those citizens not challenging the status quo, laws are infrequently enforced, but for those railing against the hegemony of the CCP, legal measures can be harsh.\textsuperscript{109} These conditions are exacerbated by rampant charges of corruption that further undermine the functioning and credibility of the state.\textsuperscript{110}

China has resisted international efforts to improve human rights conditions on the grounds of national sovereignty and the sanctity of their cultural values.\textsuperscript{111} In the first three decades of the post-Mao era, China was single-minded in its pursuit of economic development. Social unrest in response to growing income disparities has forced China to focus its attention on

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\item \textsuperscript{103} CONG.-EXECUTIVE COMM’N ON CHINA, 110 CONG., ANNUAL REPORT 2007, at 4 (1st Sess. 2007) [hereinafter CONG.-EXECUTIVE COMM’N ON CHINA], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:38026.pdf.
\item \textsuperscript{104} Andrew Ross, The China Syndrome, THE NATION, Oct. 29, 2007.
\item \textsuperscript{106} WORLD REPORT 2006, supra note 86, at 244.
\item \textsuperscript{107} CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 2.
\item \textsuperscript{108} But see Jianfu Chen, The Transformation of Chinese Law -- From Formal to Substantial, H. K. L.J. 689, 736 (2007) (noting that the instrumentalism may be starting to work to the benefit of citizens, as “[e]ven if law may still be seen as an instrument, it is increasingly seen as such for justice, fairness and equality, not just for creating and maintaining social stability conducive to economic development.”).
\item \textsuperscript{109} CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 3.
\item \textsuperscript{111} CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 4.
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deteriorating social and environmental conditions. Although achieving political pluralism in China is unlikely anytime soon, China’s continued interest in full integration into the global world has provided some window for hope of incremental progress toward increased transparency, accountability, and the development of a civil society. Since ascending to the party leadership five years ago, Hu Jintao has articulated his focus on building a “harmonious society.” Under this platform, Hu Jintao has articulated a government commitment to narrow the rural-urban development divide, curtail environmental degradation, and address the growing income gap. As some critics note, the government’s pursuit of these goals has been accompanied by significant efforts to reassert and reinforce social control. Nevertheless, the government’s willingness to publicly acknowledge the growing inequalities can foster expectations that those inequities should be redressed, which can in turn ratchet up pressure on the government.

B. China’s Legal Culture

Prior to the Cultural Revolution, China’s legal system was premised on the “rule of man.” At the inception of People’s Republic of China in 1949, Mao Zedong and his colleagues dismantled the preexisting legal system and formed a new one more suitable to the Marxist economy, much of it borrowed from the Soviet system. After Mao’s death in 1976, shifting political winds enabled China to begin its transition into the global economy by launching its efforts to develop a China-style “socialist market economy.” While Western countries often base theories of democracy on a separation of powers, China has centralized power under a “unity of powers” construct. Despite the structural differences, China developed a burgeoning

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113 How Much Inequality, supra note 86, at 35; see also Traci Daffer, “I Am Fighting For the Right To Eat, and I Will Keep Fighting: The Truth is on Our Side”: Class Action Litigation as a Means of Enacting Social Change in China 75 UMKC L. REV. 227 (2006)
115 Skeptics have argued that the underlying intent of these proclamations is to justify repression and mollify the masses rather than portend any real reform.
116 China’s antipathy to the codification of laws during this period was based on the belief that abstract laws were essentially a tool to maintain the power of the bourgeoisie. See Ignazio Castellucci, Rule of Law with Chinese Characteristics, 13 AM. SURVEY OF INT. AND COMP. LAW 35, 35 (2007).
118 Benedict Sheehy, Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes, 26 NW J. INT’L L. & BUS. 225, 234 (2006). After the disintegration of China’s Cultural Revolution and subsequent divergence from Marxist orthodoxy, the Chinese government split into three branches – executive, legislative (the National People’s Congress, NPC), and judiciary (the Supreme People’s Court, SPC),
interest in departing from “the rule of man” to a system based on “the rule of law.”119 This evolution was motivated in part to attract and reassure foreign direct investors about the legal regime’s willingness and ability to protect ongoing investment that was necessary to fuel continued economic growth.120 Some critics have argued that China’s transformation represents an “instrumentalist and pragmatic choice”121 aimed at facilitating economic growth and integration into the global economy rather than a philosophical commitment to real legal reform.

Because the modern Chinese legal system was essentially created in the last quarter century,122 China had an extremely condensed period of time in which to develop the foundational concepts and supporting infrastructure for a new legal system capable of supporting massive economic reform.123 The recent incarnation of the legal system precipitated a host of problems that one would expect to attend such a period of upheaval. These include a shortage of trained professionals, an inchoate legal infrastructure, a lack of cultural understanding about the mechanics of the new system and unrealistic expectations about the immense amount of work necessary to develop a viable and credible legal and regulatory apparatus, and distinctly different cultures among regions with varying amenability to adhere to this scheme. China’s rush to legislate an entire legal system resulted in broad, vague and politically palatable statutes, creating

although they function with few parallels to our tripartite system, most notably that the judiciary is subsumed into the bureaucratic of the branch. U.S. Dep’t of State, Background Note: China, http://www.state.gov/r/pa/ei/bgn/18902.htm (last visited Jan. 2, 2008); see also Castellucci, supra note 116, at 45 (noting that the Chinese government does not have a system of checks and balances).

119 “A common misperception about Chinese legal culture is that, prior to modern times, China did not have ‘law’ as it is understood in the West, or if it did, ‘law’ was viewed in purely negative terms as an instrument of repression.” ROGER BLANPAIN ET AL., THE GLOBAL WORKPLACE, INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW, CASES AND MATERIALS 2007, at 62. Other observers have noted that the distinction between “rule of man” and “rule of law” is of limited utility, because the dichotomy relies on normative distinctions. Teemu Ruskola, Law Without Law, or is “Chinese Law” an Oxymoron?, 11 WM. & MARY BILL RTS. J. 655, 668 (2003).


121 CONTAGIOUS CAPITALISM, supra note 120, at 102.

122 Stanley Lubman, Looking for Law in China, 20 COLUM. J. ASIAN L. 1, 5 (2006). But cf. Chen, supra note 108 (noting that idea that the current Chinese legal system was essentially conjured out of nothing “is neither entirely accurate nor possible. Indeed, it has been argued extensively elsewhere . . . [that] the present legal development is a continuing process of modernisation that was started at the turn of the twentieth century.”).

123 Lubman, supra note 122, at 7. Some analysts note that the enforcement and consistency of laws has not kept pace with the impressive legislative productivity, making it difficult to distinguish between real change and propaganda. CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 3.
some tolerance for local and regional experimentation absent overt conflict with national law.\textsuperscript{124} Experimentation has spawned both positive and negative outcomes, as localities enjoyed some latitude to inadvertently misinterpret or intentionally thwart the intent of the laws.\textsuperscript{125} Despite some measurable gains, widespread skepticism persists about continued progress toward transparency and consistency of the Chinese legal system.\textsuperscript{126}

During the prior two years, China’s legislature has passed a number of laws and regulations with interwoven goals; reviving and highlighting the importance of national sovereignty, addressing significant legislative deficiencies, and emphasizing the continued primacy of an idealized “harmonious society.” Some observers fear that these recent legal developments are in part a veiled effort to reconsolidate and recentralize power in the face of perceived threats to the stability of the CCP, under the pretext of addressing the social inequality.\textsuperscript{127} Others believe that China is genuinely invested in ameliorating conditions for its poorest citizens. Despite the apparent conflict, the two goals are not mutually exclusive, as China feels compelled to address the social ills and legal inadequacies that underlie growing dissatisfaction, while also legitimizing the tools necessary to repress growing unrest.

C. Inadequate Professional Standards for Lawyers and Judges

Weaknesses in both the bar and the bench in China exacerbate the structural challenges to implementing the “rule of law.” China has very few lawyers to interpret, evaluate, and enforce its laws. The vast majority of lawyers serve urban populations rather than the rural locales where poverty is prevalent.\textsuperscript{128} Even more disturbing from an access to justice perspective, there are 206 counties in China without a single licensed practitioner.\textsuperscript{129} Inadequate training and poor qualifications fuel perceptions of lawyer incompetence. China has only recently implemented measures to redress these lapses, although lawyers can still practice law in the absence of

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\item \textsuperscript{124} Lubman, \textit{supra} note 122, at 34.
\item \textsuperscript{125} \textit{Id.} at 36.
\item \textsuperscript{126} These concerns include the hegemonic power of the CCP within the government, and the impact of this entanglement on notions of a check on bureaucratic power; the contradictions and overlap in regulatory authority between various agencies, the competing jurisdictional interests of municipal, provincial and national legislatures in which national legislation is often vague; and the limitations on judicial independence. \textit{See Note, Adopting and Adapting: Clinical Legal Education and Access to Justice in China, 120 HARV. L. REV. 2134, 2140-43 (2007)} [hereinafter \textit{Adopting and Adapting}]. 2140-43.
\item \textsuperscript{127} Some of these measures include restricting the media and a high profile anti-corruption campaign.
\item \textsuperscript{128} China has approximately 125,000 lawyers in the population of over 1.3 billion, so for each 10,000 people, there is less than one lawyer. In comparison, the US has over one million lawyers in a population of over 300 million, accounting for one lawyer per every 300 people. \textit{See Adopting and Adapting, supra} note 126, at 2145. Many of the Chinese lawyers do not practice law in the traditional sense. \textit{Id.} at 2144.
\item \textsuperscript{129} \textit{Id.} at 2146.
\end{itemize}
specialized legal education, and without passing any national licensing test.\textsuperscript{130}

Compounding the dearth of lawyers is a judiciary widely assumed to lack both skills and autonomy. Similar to the bar, most judges possess a low level of education, and are guided by unclear professional standards. Judicial independence is not valued, and many judges hailing from former roles in the military or police have demonstrated a disinclination to challenge the prevailing power structure.\textsuperscript{131} Charges of corruption and favoritism are rampant.\textsuperscript{132} Judges are appointed and compensated locally, which creates seemingly insurmountable problems of ‘local protectionism.’\textsuperscript{133} Observers also express dismay at the inconsistency among courts, which is often contingent on location, ranging from fairly sophisticated urban courts to barely functioning courts in poorer, more isolated rural areas.\textsuperscript{134} The system suffers from a lack of vertical and horizontal integration, as the Judiciary has not been empowered to reconcile conflicts between national, provincial and local laws, nor conflicts between the law and the Constitution.\textsuperscript{135} The Standing Committee of the NPC retains sole authority to interpret the Constitution.\textsuperscript{136} In part because China’s system is constructed as a civil law rather than common law society, legal decisions do not create precedent.\textsuperscript{137} The conclusory judicial opinions are mostly unpublished, further inhibiting consistency and predictability in the underlying rationale and outcome of cases.\textsuperscript{138}

Recent efforts to modernize the Chinese legal system have focused on professionalizing the bench and bar. The 1996 Law on Lawyers codified efforts to shift the conception of lawyers from “state legal workers” to professionals with an attendant obligation to provide legal services. This law signaled China’s intent to increase professionalism by obligating members of the bar to

\textsuperscript{130} Phan, supra note 82, at 128.
\textsuperscript{131} Inadequate training and qualifications for judges appears to be improving, with statistics showing that by 1997, 80% of judges possessed at least the equivalent of an associates degree, although this is not necessarily focused on the law. Lubman, supra note 122, at 29.
\textsuperscript{132} Id. at 29.
\textsuperscript{133} Id. at 30.
\textsuperscript{134} Id. at 29.
\textsuperscript{135} The Chinese Constitution does not grant plenary power to the Supreme People’s Court, authorizing the courts to interpret laws in the context of specific cases but not the power to establish or apply Constitutional norms. Thomas E. Kellogg, “Courageous Explorers”?: Education Litigation and Judicial Innovation in China, 40 HARV. HUM. RTS. L.J. 141, 184 (2007).
\textsuperscript{136} XIAN FA art. 67, § 1 (1982) (P.R.C.).
contribute to society though the imposition of mandatory pro bono requirements. Other initiatives include both domestic and international efforts to conduct trainings for the judiciary, and the passage of a law in 2001 instituting increased educational qualifications, and authorization and support for the creation of new law firms. Despite incremental progress, the combined challenges facing the bench and bar do not instill confidence in the legal system.

D. Developments in Legal Aid, Access to Justice and Public Interest Litigation

Recognizing that access to justice for citizens is critical for a society that wants to command any respect for its commitment to advancing the rule of law, China has begun to develop a system of legal aid. In addition to modernizing the legal system, access to justice initiatives signal the beginnings of an effort, although woefully inadequate, to address poverty and income disparities that reflects “socialism with Chinese characteristics.” The legal aid centers fall into one of five structures: those administered by the government and staffed by full time legal aid lawyers; programs that assign work to independent lawyers; programs that rely on lawyers from law firms to staff legal aid centers; non-government and university based programs; and those programs directed by government actors other than Ministry of Justice or local justice bureaus. Although demand for legal assistance far exceeds supply, attention to legal aid has increased representation for both civil and criminal litigants.

As noted above, to supplement the services provided by the legal aid centers, the Lawyers Law imposes mandatory pro bono requirements and institutes some private incentives for lawyers to undertake public interest work. Those reviewing the impact of pro bono requirements have issued decidedly mixed evaluations, in part due to resistance from some segments of the bar. Other observers lament “the lack of morale and diligence among lawyers who take on legal aid cases merely to satisfy the mandatory pro bono requirements under the

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141 As William Alford points out, the development of non-state law firms may be misleading, as some firms that are ostensibly independent from the state may be financially and politically intertwined with the state. William P. Alford Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 285 (William P. Alford ed., 2007).
143 Id. at 223
144 Id. at 224.
145 Id.
Law on Lawyers.” 147 Despite these efforts, many impediments inhibit the realization of anything remotely approaching full access to justice. Funding for the legal aid centers is minimal. 148 Even if the government fully funded legal aid programs, there are simply too few attorneys to take on the work. Finally, legal services are virtually non-existent for the masses of rural poor who constitute almost two thirds of China’s population. 149

A number of other structural obstacles impede the creation of a vibrant Public Interest Law (PIL) movement in China. These barriers include that; the laws of civil procedure articulate strict standards of standing that many plaintiffs cannot satisfy; the limited authority of Chinese courts prohibits them from adjudicating whether a law is justifiable or in compliance with the Constitution, which restricts judges to ruling on the implementation of laws, thus making the idea of meaningful law reform through the courts unlikely; the Chinese constitution does not provide a basis for PIL in the way it does in western democracies; PIL diverges from the traditional model of litigation between private parties, and courts unfamiliar with PIL are often reluctant to hear cases; and PIL does not appeal to many attorneys given its failure to offer financial incentives, and the fear of government reprisals. 150

E. Legal Education and Clinics

Chinese critics of legal education note that the foundational underpinnings of legal education were inadequate to train competent professionals. In its current iteration, law students in China have little interaction with their professors, many of whom conceive of their teaching duties as imparting massive amounts of information to students for memorization, without critical analysis. 151 Universities have historically placed little emphasis on skills training 152 and problem-solving. 153 Based on the values conveyed through the instructional methodologies, Chinese students understandably labor under the misconception that good lawyering is premised

147 Phan, supra note 82, at 145.
148 Adopting and Adapting, supra note 128, at 2147.
149 The unavailability of legal assistance in rural areas is partly attributable to geographical isolation and partly related to the reasons that impede to access to justice more generally. Li Zhiping, Protection of Peasant’s Environmental Rights During Social Transition: Rural Relations in Guangdong Province, 8 VT. J. ENVTL. L. 337 (2007).
151 Lubman, supra note 122, at 32.
152 Law students are required to complete a two to three month legal internship, but the program lacks consistency and focus, and students often do not take it seriously, making the educational value dubious. Phan, supra note 82, at 127.
on the “mastery of black letter law.”

Widespread dissatisfaction with the narrow nature of legal education precipitated a perceptible shift in legal education, broadening the focus of the legal academy. The clinical education movement began to gain a foothold in China, starting most prominently with grants from the Ford Foundation in 2000. Because China has in some ways mirrored the trajectory of clinical education in the US, where skills training was initially considered pedestrian, clinical education has not yet garnered significant institutional support, inhibiting resource allocation to clinics. In response to these challenges, advocates of clinical education coalesced into the Committee of Chinese Clinical Legal Educators (CCCLE) to advance the legitimacy of clinics, to consolidate the initial gains, and to collaborate and share insights about emerging clinical pedagogy.

Although many Chinese educators recognize the value of clinical instruction, the academy’s failure to embrace clinical education has relegated much of the support and funding to foreign sources. These models funded by foreign financial assistance tend to favor the prevailing clinical constructs derived the funding source’s own experiences and priorities, and are often infused consciously and unconsciously with embedded cultural biases. Money from the US Department of State, private foundations, and initiatives from academia tends to favor US style clinics that are very resource intensive, a model that is not readily adaptable to China’s legal education system. The limited prospects for obtaining foreign funding may deter proposals for

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154 Phan, supra note 82, at 127.
155 Mao Ling summarizes the three main points of Chinese legal education: “teacher-centered rather than student-centered; knowledge-oriented rather than skills-oriented; lectures on content and logical reasoning rather than problem-solving and creative-thinking.” Ling, supra note 153, at 426-29.
156 Phan, supra note 82, at 128. Clinics now exist at 64 law schools, and cover a range of substantive areas.
157 Ling, supra note 153, at 429.
158 Id. at 421. The recent move to coordinate programs under the aegis of the CCCLE may have the unfortunate side effect of bringing some unwanted government intrusion, attention and oversight. Adopting and Adapting, supra note 128, at 2148.
159 As Peggy Maisel notes with respect to South Africa, in countries where clinical education is not firmly established, a clinic’s ability to scramble for resources within the university may be thwarted by doctrinal faculty who see the allocation of resources to clinical programming as a “zero sum game.” Peggy Maisel, Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa, 30 FORDHAM INT’L L.J. 374, 399 (2007).
161 In response to the charge that exporting clinical pedagogy to emerging democracies amounts to “legal imperialism” Richard Wilson emphatically reject[s] that characterization of this work in virtually all respects. The
new clinics, based on the assumption that clinics need substantial external funds. Clinic funding that relies on short term grants inhibits stability in terms of faculty prestige, faculty turnover, and the clinic’s substantive focus, all of which in turn influence how fully clinical education is embraced and legitimized within Chinese law schools.

Like their US counterparts, clinical educators in China are not monolithic, and they articulate multiple goals to which they ascribe varying levels of priority. Goals include engendering critical thinking, fostering aptitude in both traditional lawyering skills and problem-solving, and advancing social justice. Equally importantly, many clinicians strive to educate Chinese lawyers about the history and development of law in China, and the centrality of law and legal institutions in implementing the “rule of law” in a heterogeneous democracy. Despite the range of goals, a growing number of Chinese clinicians have come to see the importance of integrating concepts of social justice into clinical pedagogy. Similar to the mission of many US clinics, a number of Chinese clinicians believe that skills building must be accompanied by a commitment to advancing justice and inculcating a public service ethos. While there are undoubtedly skeptics that question the ability of law school clinics to wield any transformative power, “China’s early clinicians instead look to the clinical model as the vehicle for establishing new modes of dialogue within their society.” This is particularly important, since the burden for providing legal assistance to China’s marginalized population has increasingly been delegated to law school clinics, where legal aid work serves as the bedrock for almost all programs.

vast array of international funding programs, many of which are not uniquely American in their conception or operation, makes obvious the argument that the globalization of clinical legal education is not a uniquely American business.” Training for Justice, supra note 160, at 428-29.

See Maisel, supra note 159, at 402

Id.


Phan, supra note 82, at 129-30.

Despite the struggle for legitimacy within the academy, and the range of clinical goals, the credibility and stature of legal academics enhances the ability of clinics to function with relatively less oversight and intrusion than might be the case in a free standing legal clinic. Because the clinics are associated with universities, some use that privilege to function as semi-autonomous NGOs, even though they are nominally related to the government. On the ground, law students working with legal aid programs affiliated with universities are given more latitude in providing representation than non-lawyers working outside of universities.

Adopting and Adapting, supra note 128; see also Phan, supra note 82, at 129.

Phan, supra note 82, at 135.

Id. at 125-26; see also Zhen, supra note 164.

Phan, supra note 82, at 136.
educational and service goals of clinics. However, the pressure on clinics to provide service is often heightened when the government relies so heavily on them, sometimes as the exclusive source of service provision in certain areas and within certain populations.

F. The Implications of Labor Conditions in China Radiate Far Beyond Its Borders

1. The Current Climate for Workers’ Rights in China

Many of China’s workers labor in harrowing conditions. The ramifications of these labor violations are disturbing and far-reaching, as “China’s workers are oppressed and exploited in ways that depress conditions throughout the world.” As Lance Compa argues, “[i]n the interests of workers everywhere, China’s millions of workers must win respect for their rights.” Professor Compa concluded that in the absence of evidence to the contrary, one can presume labor violations in every Chinese factory. Although Chinese labor laws embody some protections for workers, they are infrequently vindicated. Other significant structural impediments to the enforcement of workers’ rights are the CCP’s demonstrated reluctance to adopt a regulatory system that undermines its power, and the potentially insurmountable challenges to implementing and enforcing laws among the scattered, varied and sometimes “independent-minded regions.”

China’s transition from a centrally planned, rural peasant economy to an urban industrialized that responds to market forces paralleled a major reorganization of the power structure, and “[t]hese profound changes have unleashed powerful new forces that increasingly collide with existing institutional structures.” This evolution has fundamentally altered the preexisting labor paradigm. Under the old system, the state provided workers with some degree of security. As private employers entered the economy, displaced workers were denied benefits.

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171 See Carasik, supra note 17, at 28-33.
172 See Training for Justice, supra note 160.
173 These include dangerous environments, long hours, etc. See generally JUSTICE FOR ALL: CHINA, supra note 10.
174 Id. at 93.
175 Id.
176 Id. at 78.
177 CONTAGIOUS CAPITALISM, supra note 120, at 101.
178 JUSTICE FOR ALL: CHINA, supra note 10, at 78.
179 Id. at 93. In order to control the flow of migrants, China developed several mechanisms: the hukou system of household registration; a system of government selected job assignments that were unrelated to a worker’s personal preference or training (tong’yi zhidu); and the dossier system, (dang’an zhidu), a voluminous file which contained records of every aspect of an employee’s work history. See Kam Wing Chan & Li Zhang, The Hukou System and Rural-Urban Migration in China: Processes and Changes, 160 CHINA Q. 818 (1999). These government controls created a generation of employees who expected no autonomy with respect to employment choices.
that previously accompanied employment within state owned enterprises.\textsuperscript{180} The vast migration to urban areas has created a virtually limitless supply of desperate rural migrants who are rarely informed of their rights and even less likely to vindicate them.\textsuperscript{181} However, frustration with the evisceration of historical benefits and security on which the workers had come to rely has fomented an ever-growing body of restive workers.\textsuperscript{182}

Legal protections for workers originate from both the international community and within China. On the international level, protections are divided into two spheres: public international workplace rights and private workplace rights. The public arena includes those labor rights falling under the general penumbra of human rights contained in multilateral conventions and declarations, as well as those rights integrated into international trade instruments. Private workplace rights are increasingly emanating from MNCs. International pressure for fair labor practices can originate from various sources, including UN declarations, multilateral financial institutions, NGOs, and labor and human rights organizations, although these actors function with very different foci, goals and methods. Finally, the behavior of MNCs serves as a locus for the battle over workers’ rights.

Historically, labor law has been used to harness “the power of the state to offset serious imbalances between labor and capitol.”\textsuperscript{183} In light of the complexity of current conditions and its global context, there is no consensus about how to “make transnational labor regulation effective or how such a system might be brought into being,”\textsuperscript{184} nor does there seem to be agreement about how to remedy the international community’s apparent inability or unwillingness to provide meaningful, enforceable protections for labor rights.\textsuperscript{185} Critics of international labor standards argue that they are fundamentally protectionist policies disguised as efforts to protect workers in the developing world.\textsuperscript{186} Proponents respond that labor standards are meant to

\textsuperscript{181} Workers often work without contracts for long hours. See JUSTICE FOR ALL: CHINA, supra note 10, at 39.
\textsuperscript{184} Book Review, supra note 183 at 728.
\textsuperscript{185} Id. at 725.
\textsuperscript{186} Some observers discredit the notion such standards serve only to rob developing countries of their competitive advantage. See BOB HEPPE, LABOR LAWS AND GLOBAL TRADE (2005), (arguing that labor standards actually enhance development); see also KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARD IMPROVE UNDER GLOBALIZATION? 11 (2003) (arguing that global labor standards can be improved without depriving developing economies of their much needed competitive edge or unilaterally imposing Western values. In
empower workers to command fair working conditions that are consistent with the particular conditions in each country by setting a very low floor beneath which standards must not fall.  

2. China’s Compliance with International Labor Standards

The International Labor Organization (ILO) was created in 1919 to serve as the principal forum and world conscience for universal labor standards. In 1998, the ILO promulgated Fundamental Conventions, known as the core conventions, which cover four basic areas of labor practice and form the accepted standards for the treatment of workers: The Elimination of Child Labor, The Abolition of Forced Labor, Freedom of Association and Collective Bargaining and Equality/Discrimination. Because the core standards reflect the collective will of member states, they represent a brokered agreement and leave out protections in critical areas. Although the ILO was created by a multilateral agreement with the express goal of setting minimum standards and monitoring those benchmarks, it has no independent enforcement authority. Nevertheless, the ILO uses the bully pulpit to articulate standards, study and report on labor order to do so, analysts must discern the floor for standards and determine where flexibility is necessary to protect the appeal of investing in those developing economies.). Other detractors argue that “[b]ad [j]obs at [c]heap [w]ages [a]re [b]etter than [n]o [j]obs at [a]ll.” Paul Krugman, In Praise of Cheap Labor: Bad Jobs at Cheap Wages Are Better than No Jobs at All, SLATE, Mar. 27, 1997.


Under the human rights rubric, the core labor standards adopted by the ILO fall into the category of negative rights, those that essentially require governments and other actors to refrain from engaging in certain acts, rather than positive rights, that require affirmative action to actively promote those rights. See Philip Alston & James Heenan, Shrinking the International Labor Code: An Unintended Consequence of the ILO Declaration of Fundamental Principles and rights to Work?, 36 N.Y.U. J. INT’L L. & POL. 221, 253-54 (2004). Other criticisms of the ILO include questions as to whether it “possesses the legitimacy and responsiveness needed to address some of the adverse distributional consequences of flexible production and economic globalization.” Partick Macklem, Labor Law Beyond Borders, J. INT’L ECON. L. 605 (2002); see also Lance Compa, Promise and Peril: Core Labor Rights in Global Trade and Investment, in INTERNATIONAL HUMAN RIGHTS: A HALF CENTURY AFTER THE UNIVERSAL DECLARATION 8 (George Andreopolous ed., 2002) (questioning why the ILO core conventions do not incorporate health and safety concerns).
abuses, and focus the international spotlight on deplorable conditions. Numerous other general multilateral human rights instruments contain provisions that are applicable to labor rights. These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Universal Declaration of Human Rights. China’s compliance with the labor standards articulated in international conventions is varied.

Despite China’s ratification of the UN Convention on the Rights of the Child, and various ILO Conventions targeting child labor that supplement national laws, the exploitation of children in the workplace continues to be a grave concern. Some observers argue that child labor is commonplace, evincing China’s intent to sacrifice humane working conditions at the altar of economic growth. While child labor evokes a visceral revulsion, the issue is more complicated than it may seem at first blush, since a complex constellation of social, economic, and political factors often compel poor families to rely on the wages earned by children for survival. As such, the solution requires careful thought rather than a reflexively punitive approach. While law enforcement must be enhanced, punishment alone will be insufficient to curtail child labor.

194 Howard W. French, Fast Growing China Says Little of Child Slavery’s Role, N.Y. TIMES, June 21, 2007, available at http://www.nytimes.com/2007/06/21/world/asia/21china.html?pagewanted=print (“In order to achieve modernization, people will go to any ends to earn money, to advance their interests, leaving behind morality, humanity and even a little bit of compassion, let alone the law or regulations, which are poorly implemented . . . . Everything is about the economy now, just like everything was about politics in the Mao era, and forced labor or child labor is far from an isolated phenomenon. It is rooted deeply in today’s reality, a combination of capitalism, socialism, feudalism and slavery.” quoting Hu Jindou, a professor of economics at the University of Technology in Beijing). Allegations of child trafficking are also widespread. JUSTICE FOR ALL: CHINA, supra note 10, at 65-66.
196 Because China refuses to publish statistics on child labor, it is difficult to ascertain the extent of the problem, and whether China joins the world community in its recent success in reducing child labor. See INTERNATIONAL LABOUR ORGANIZATION, THE END OF CHILD LABOR: WITHIN REACH (2006), available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6176 (noting that child labor fell 11% globally in the last four years). However, child labor clearly remains a problem. Current impediments to enforcing the prohibitions on child labor include poorly articulated standards and vague classifications for child laborers, insufficient interest on the part of
Efforts to eliminate child labor must also incorporate strategies to eliminate the underlying economic conditions that compel families to send their children into the labor market, and include measures such as increased education funding to ensure that education is truly free and accessible to all children.\textsuperscript{197}

China has ratified certain instruments related to non-discrimination, but failed to endorse others. Although China has ratified the ILO Convention requiring equal pay for equal work irrespective of gender,\textsuperscript{198} the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)\textsuperscript{199} and the International Covenant on Economic, Social and Cultural Rights (ICESCR),\textsuperscript{200} the harsh reality for women has not lived up to these standards.\textsuperscript{201} Prior to the Cultural Revolution, Confucian ideology relegated women to secondary status, expecting subservience to fathers, husbands and sons.\textsuperscript{202} With the ascendance of the Communist Party, women were viewed as a vital economic force, and the CCP revived the old proverb that “women hold up half the sky.”\textsuperscript{203} Women are now integrated into the work force, although significant stratifications remain, and they face discrimination in hiring, terms and conditions of employment,\textsuperscript{204} wage disparities, and exclusion from certain industries. Moreover, certain legal provisions prioritize the retention of primary breadwinners during layoffs, which as applied targets women as the most disposable members of the workforce.\textsuperscript{205} Mirroring the development of gender discrimination law elsewhere which focuses on formal equality, the laws requiring local authorities to take any proactive steps to ferret out labor abuses, and a lack of leadership on local, provincial and national level to eradicate child labor. Remedial efforts could include attention to the aforementioned, as well as increased public discourse and participation by NGOs. SMALL HANDS, supra note 195, at 34.

\textsuperscript{197} China’s investment in education is woefully inadequate, ranking it near last in per capita expenditures. JUSTICE FOR ALL: CHINA, supra note 10, at 62.


\textsuperscript{200} International Covenant on Economic, Social and Cultural Rights art. 3, Dec. 16, 1966, available at http://www2.ohchr.org/english/law/cescr.htm (article 3 states that signatories support the equal right of men and women to avail themselves of the economic, social and cultural rights contained in the Covenant).

\textsuperscript{201} China has not ratified the International Covenant on Civil and Political Rights, (ICCPR) which contains provisions related to workplace rights, such as freedom of association.

\textsuperscript{202} LOUIE, supra note 117, at 21.


\textsuperscript{204} JUSTICE FOR ALL: CHINA, supra note 10, at 40 (noting unequal pay and occupational segregation based on gender).

\textsuperscript{205} Allowing employers to prioritize the retention of breadwinners allows employers to favor men, given the concentration of women in low wage positions, see JUSTICE FOR ALL: CHINA, supra note 10, at 38-41.
equal treatment have eclipsed the goal of true substantive equality, and do little to ameliorate the reality of unequal status and stature.\footnote{Charles J. Ogletree & Rangita de Silva-de Alwis, \textit{When Gender Differences Become a Trap: The Impact of China’s Labor Law on Women}, 14 \textit{YALE J. L. \\& FEMINISM} 69, 91 (2002). Moreover, laws focused on formal equality can have a backlash, since some women are not hired because of laws restricting work while pregnant, lactating or menstruating.\footnote{Moreover, “[a]s in other legal systems, laws which are protective of women as a class, such as paid maternity leave, may have the unintended effect of reinforcing discrimination against them. Additional legislation, equally difficult to implement, then becomes necessary to counter unintended consequences or loopholes in existing law.” \textit{BLANPAIN ET AL.}, supra note 119, at 471 (noting that 1992 Women’s Protection Law (\textit{FUNU QUANYI BAOZHANG FA}) and 1995 amendments together prohibit adverse action based on marriage, childbearing or lactation, but that efforts at prohibiting sexual harassment have apparently met with little success)).\footnote{Kerry Rittich, \textit{Transformed Pursuits: The Quest for Equality in Globalized Markets}, 13 \textit{HARV. HUM. RTS. J.} 231, 242 (2000).}} Subtle biases contained in the laws allow employers to discriminate with impunity.\footnote{PUN NGAI, \textit{MADE IN CHINA: WOMEN FACTORY WORKERS IN A GLOBAL MARKETPLACE} 2005. Pun Nai’s ethnographic study of women in an electronics sweatshop provides a devastating critique of the intersection of the enduring remnants of patriarchal society and the dissolution of centrally planned economic control that compels young migrant women to sacrifice four or five years of their lives to abysmal workplace conditions. \textit{Id.}} Moreover, women are still charged with the primary responsibility in the reproductive sphere, which is non-remunerative.\footnote{The UN Declaration on Universal Human Rights, the ICCPR and the ICESCR all contain provisions prohibiting discrimination based on origin. In addition to proscribing discrimination on the basis of gender, numerous international instruments contain a more general ban on discrimination based on characteristics such national extraction, race, color, religion, political thought, and social origin.\footnote{Convention concerning the Discrimination in Respect of Employment and Occupation, June 25, 1958, C111, available at http://www.ilo.org/iloex/cgi-lex/convde.pl?C111.} China historically codified this discrimination, despite the fact that it contravenes Article 13 of the Universal Declaration of Human Rights, which states that “Everyone has the right to freedom of movement and residence within the borders of each state.” \textit{Universal Declaration of Human Rights}, art. 13, Dec. 10, 1948, available at http://www.un.org/Overview/rights.html\footnote{International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 176 (“everyone lawfully within the territory of a State . . . the right to liberty of movement and freedom to choose his residence”).}} Conditions for women are exacerbated by their intersection with other areas of oppression. Mass migration to urban areas has had a particularly insidious impact on women, and created a class of urban poor migrants, classified as “dagingmei,” women.\footnote{}}

Institutionalized discrimination against internal migrants is pervasive in China, despite prohibitions in human rights conventions.\footnote{Convention concerning the Discrimination in Respect of Employment and Occupation, June 25, 1958, C111, available at http://www.ilo.org/iloex/cgi-lex/convde.pl?C111.} China has not ratified the ILO’s general ban on discrimination,\footnote{Convention concerning the Discrimination in Respect of Employment and Occupation, June 25, 1958, C111, available at http://www.ilo.org/iloex/cgi-lex/convde.pl?C111.} which proscribes discrimination on the basis of origin, among others, but both the Universal Declaration of Human Rights\footnote{China historically codified this discrimination, despite the fact that it contravenes Article 13 of the Universal Declaration of Human Rights, which states that “Everyone has the right to freedom of movement and residence within the borders of each state.” \textit{Universal Declaration of Human Rights}, art. 13, Dec. 10, 1948, available at http://www.un.org/Overview/rights.html\footnote{International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 176 (“everyone lawfully within the territory of a State . . . the right to liberty of movement and freedom to choose his residence”).}} and the ICCPR guarantees the right to freedom of movement within a state.\footnote{International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 176 (“everyone lawfully within the territory of a State . . . the right to liberty of movement and freedom to choose his residence”).} Approximately 150-200 million people from rural China have migrated to the urban centers in search of a means of subsistence, in what has been called “the
world’s largest ever peacetime migration.”

This trend is not expected to abate, with observers estimating that the migrant population may swell to over 300 million by 2015. In order to stem the flow of internal migrants during early periods of industrialization, the CCP instituted hukou, an urban registration system, to minimize migration to urban centers. Under the hukou system citizens must be registered with the local authority or police at birth, and are only permitted to work within restricted areas. Although there are provisions for temporary permits, many migrants are presumably working under the radar of local authorities. Their unregistered status renders migrants vulnerable to exploitation by employers, harassment by landlords and the police, and often forces them to live in abysmal conditions. China’s limitations on internal mobility violate basic human rights and in effect, create a second class of citizenry.

According to the ILO, China has indicated its intent to ratify the conventions related to forced labor, although it has not yet done so. China’s laogai system (reform through labor) evinces blatant disregard for the standards codified by the ILO, as well as those embodied in the

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217 China’s Challenge to the International Labor, supra note 4, at 61.
219 Some observers have noted that it is not just the government and the CCP policies that contribute to the poor treatment of rural migrants, arguing that many urban residents view rural migrants as inferior. HOW MUCH INEQUALITY, supra note 86, at 30.
220 Lawrence Cox, Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China’s Internal Migrant Workers, 8 ASIAN-PAC. L. & POL’Y J. 370, 429 (2007) (“Freedom of internal movement is a basic human right that all citizens should enjoy. Creating non-citizens out of China’s own nationals only leads to greater exploitation and cultural biases. Urbanization is a global phenomenon and the PRC population will continue to follow this trend. Unless migrant workers are provided with a full range of legal protections, the threat of social destabilization in China will continue.”).
221 Convention concerning Forced or Compulsory Labour, June 28, 1930, C029, available at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029; Convention concerning the Abolition of Forced Labour, June 25, 1957, C105, available at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105. Convention 105 bans using prison labor “as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a means of labour discipline, or as a punishment for having participated in strikes.” Id. art. 1.
Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international standards. Under laogai, prisoners who have been afforded virtually no procedural protections are forced to labor involuntarily in a variety of facilities, ranging from detention centers to prison. China is recalcitrant in its refusal to dismantle the Reeducation Through Labor (RAL) system. Many of these workers have not been convicted of any violation, and the imposition of administrative detention has escalated in recent years. The recent events in Shanxi and elsewhere underscore ongoing violations of forced labor throughout China.

China has not ratified key ILO provisions related to collective bargaining rights, which recognize “freedom of association and the effective recognition of the right to collective bargaining.” Although China is a signatory to the International Covenant on Economic, Social and Cultural Rights, (ICESR), which provides certain protections related to the right to form unions, the Chinese government opted out of the section guaranteeing the right to form independent trade unions, arguing that such a provision is inconsistent with Chinese law prohibiting those affiliations. To some observers, the rights of workers to unite against their more powerful employers is the sine qua non of real, sustained, and meaningful worker empowerment, and the only real strategy capable of tipping the balance of power. Without those rights, other protections are to some degree illusory, as marginal gains may be won but the underlying power imbalance remains.

Chinese workers also face a number of other deplorable labor conditions that are not directly covered by the ILO’s core labor standards but nonetheless run afoul of generally

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222 JUSTICE FOR ALL: CHINA, supra note 10, at 71.
226 Trade Union Law (promulgated by the Standing Comm. People’s Cong., Apr. 3, 1992, amended Oct. 27, 2001) LAINFOCHINA (last visited Jan. 4, 2008) (article 10 establishes the All China Federation of Trade Unions as the “unified national trade union federation” and Article 11 grants the ACFTU the right to sanction or withhold approval over lower level unions and the ability to block the formation of other federations).
accepted tenets of workers’ rights. For example, employers often pay little attention to ensuring that workers labor in safe conditions. Machinery and working conditions are often treacherous, resulting in an unacceptably high rate of worker injuries. Floating populations of rural workers are particularly vulnerable to increasingly perilous working conditions. Both the materials employees handle and the ambient environment are often toxic, and the ramifications of these perilous conditions spread far beyond the workers and the end users of their products to the entire global community.

3. Protections for Workers in China
   a. Laws

   To some extent, Chinese law as written supports the core labor standards, with the notable exception of the conventions related to freedom of association and the right to collective bargaining. Reality on the ground is starkly different. In industrialized countries, “labor markets are regulated by a complex mix of laws, customary practices, local conditions, technologies, and the action of workers and their employers.” Internally, China’s recent transition from a centrally planned economy to budding market economy has left it without a clearly articulated body of law and history of relations governing its labor force. China is in the process of developing these regulatory structures. With respect to the core labor standards, China has passed some labor and anti-discrimination laws, but maintains its recalcitrant refusal to allow collective action through anything but the state controlled union. Although China has passed a number of new laws related to employment, many observers are concerned that these laws will

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228 CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 68. For documentation of toxic conditions for workers, see also CHINA LABOR WATCH, INVESTIGATIONS ON TO SUPPLIERS IN CHINA; WORKERS ARE STILL SUFFERING (2007), available at http://www.chinalaborwatch.org/EightToy%20820071%20Final%20edit1.pdf. 229 These conditions are also present in certain industries in the US, despite the existence of legal protections. See, e.g., LANCE COMPA, HUMAN RIGHTS WATCH, BLOOD, SWEAT AND FEAR: WORKERS’ RIGHTS IN US MEAT AND POULTRY PLANTS (2005), available at http://www.hrw.org/reports/2005/usa0105/ (documenting widespread and serious health and safety violations in the US meatpacking industry). 230 WORLD REPORT 2006, supra note 86, at 247. Despite widespread concern about the government’s lack of transparency on many issues, even official reports acknowledge the death of 4,228 people in coal mining accidents in the first months of 2005. Id. at 247. 231 Environmental degradation threatens to imperil the health of the entire planet. The high stakes extend beyond our children at risk from Chinese imports, and the workers themselves toiling in unsafe conditions, to the health of the planet as whole. See Andres Ross, The China Syndrome, THE NATION, Oct. 29, 2007 (noting that companies must realize that the best way to ensure safe products is to protect the conditions for workers at the site of manufacturing). See generally Zhiping, supra note 149(noting that the rural environment is China is degrading with alarming speed). 232 UNDUE INFLUENCE, supra note 11, at 37.
have little effect in the face of anemic efforts to enforce them, making it hard to distinguish between China’s genuine interest in reform and propaganda. If China truly intends to support nascent efforts to provide protection for workers, the historically lax attention to the enforcement of existing labor rights must be reversed. In order to effectively advance these new workers’ rights, it is critical to understand and address the complex web of legal, sociopolitical, historical and economic factors that will influence the rigor and consistency with which the law is enforced.

Relatively new labor law protections in China hold out some hope for change. Labor protections in China emanate from the 1994 Labor Law (“Labor Law”). The Labor Law, which was promulgated after a lengthy and contentious process, was the first law to provide rights in the typical areas of “wages, healthcare, insurance, and working hours.” Recent changes in the law’s dispute resolution provisions have shifted its historical focus on mediation conducted within enterprises toward arbitration and litigation. Appeal rates have increased dramatically, a sign of Chinese workers’ increasing willingness to avail themselves of legal processes that were previously considered contrary to the primacy of “collective welfare.” However, legislation is pending that may reverse the shift toward more formal dispute resolution processes, redirecting labor conflicts back to internal workplace mechanisms that defuse conflict and deflect attention from the central government.

233 CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 3.
234 “Currently in China there are few labor laws, fewer still that are enforced, and no social safety net.” UNDUE INFLUENCE, supra note 11, at 8.
235 “Enforcement of existing labor law remains a serious problem in China. Chinese labor administration has recently been granted new legal powers for compliance, but enforcement at the local level will surely remain haphazard and generally favor employers.” Id. at 38.
236 Monnin, supra note 53.
237 Monnin, supra note 53 at 753.
238 Arbitration is not binding, and an appeal is permitted in court.
239 Mary E. Gallagher, Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness, 40 LAW & SOC’Y REV. 783, 789 (2006) [hereinafter Mobilizing the Law in China] (“China’s process of dispute resolution for labor conflict has evolved over the reform period from an almost total reliance on mediation and administrative measures to an increasing legalization and formalization of the dispute process.”); see also Monnin, supra note 53 at 754.
240 In large urban areas, appeal rates have exceeded 50 – 70% of arbitration decisions. Mobilizing the Law in China, supra note 239, at 790.
The most recent effort to promulgate worker protections came in 2007, when China passed the new Contract Labor Law, to be effective in January, 2008. Passage of the new Labor Contract Law was seen by some as evidence of measurable progress for a country that has provided little real protection for workers.242 This law codifies new labor protections in response to growing concerns about sweatshop conditions, and counteracts some of the shortcomings of prior legislation.243 Historically, jurisdic- tional fragmentation has caused workers to rely on often inconsistent local and provincial regulatory schemes that provide varied and at times conflicting substantive protections. These uncertainties and contradictions continue to erect a difficult hurdle for those trying to standardize rights and enforcement schemes.244 Some analysts believe that passage of this new law heralds China’s increasing commitment to protecting workers’ rights.245 Others have been less sanguine about the law, in part because it was brokered between competing interests, with heavy lobbying from the international business community to eviscerate worker protections.246 Some observers are concerned that passage of the law represents a bureaucratic mirage intended to quiet restive workers with the promise of a renewed commitment to workers’ rights. Instead, they argue that inadequate enforcement mechanisms will undermine protections,247 belie the law’s stated intent, and provide an unfair competitive
advantage to those who violate laws with impunity.\textsuperscript{248} An unintended benefit of the lobbying effort has been the response of independent unions and international labor federations that have become more unified in opposing the “global sweatshop lobby.”\textsuperscript{249} Also noteworthy is the unprecedented participation by Chinese workers in providing commentary on the law during the period preceding its passage.\textsuperscript{250}

Notably absent from the law is any protection for collective bargaining or independent trade unions, despite their designation as core labor rights by the ILO.\textsuperscript{251} This is hardly surprising given China’s longstanding and deeply ingrained antipathy toward independent unions.\textsuperscript{252} The Labor Contract Law does contain provisions for “collective contracts,”\textsuperscript{253} but many argue that this protection, far more circumscribed than true collective bargaining, is meaningless.\textsuperscript{254} China does have a union federation, the All China Federation of Trade Unions (ACFTU), that operates as a monopolistic labor organization controlled by the state. The ACFTU nominally represents the workers, but given its real function as an arm of the state, it cannot be accurately classified as an independent body capable of interested in leveraging the collective power of workers to equalize bargaining positions between labor and business.\textsuperscript{255} Empirical studies have reinforced this perception by demonstrating that considerable overlap exists between union leadership and

\textsuperscript{248} JUSTICE FOR ALL: CHINA, supra note 10, at 88.
\textsuperscript{249} During the period of debate surrounding this law, numerous multinational corporations and business alliances weighed in with objections about the law, resisting efforts to impose regulate the source of cheap and plentiful labor. Some corporations even made veiled threats about taking their business elsewhere. In a vindication of the strategy of pressuring corporations to adhere to strict standards of ethical conduct, Nike and some other companies split with their peers who were lobbying to undermine the protections conferred in the law. See UNDUE INFLUENCE, supra note 11, at 7. But “[t]he exposure of corporate opposition to expanded labor rights for Chinese workers has generated outrage among labor organizations and their allies around the world.” Id. at 7.
\textsuperscript{250} “The solicitation of input from workers and other throughout China . . . increases the likelihood of popular support and mobilization for its enforcement.” Id. at 9 n.10, 12( noting that 191,849 comments were received on a website).
\textsuperscript{251} It is interesting to note that while the US provides protections for collective bargaining, the mere existence of protections does not alone ensure compliance with fair labor practices. See, e.g., UNFAIR ADVANTAGE, supra note 227, at 12 (noting that while US workers do not face the same egregious, violent repression faced by union activists in some countries, unions are under siege in the US).
\textsuperscript{252} China’s Challenge to the International Labor, supra note 4, at 63.
\textsuperscript{254} CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 61.
\textsuperscript{255} China’s Challenge to the International Labor, supra note 4, at 70; see also Louie, supra note 117, at 27 (“Peoples’ organizations affiliated with the Chinese Communist Party, such as the All China Federation of Trade Unions . . . have devolved into toothless social groups at best and instruments of coercion at worst.”).
party apparatchiks. Recently, isolated advocates from ACFTU have moved to carve out a more independent role for the union, and some regions have experimented with more autonomous strategies, but these departures from the ACFTU’s adherence to party interests have been few and far between. A few recent instances have purported to represent true collective bargaining, but “most researchers have found that these negotiations and contracts are usually staged events, orchestrated by the local government and Communist Party, that have little impact on labor relations in practice.”

Despite those mildly favorable developments, it does not appear that the CPP will cede control over the ACFTU in any significant respect. Although the right to bargain collectively is critically important, advocates advancing that agenda risk running afoul of the government. The risk extends beyond the individuals, because if the state is inflamed by activists pushing for a radical reform agenda, those engaging in other strategies deemed less controversial may be repressed as well. The US labor movement has been of divided about whether and how to engage with the ACFTU, in part due to concerns about providing some “creeping legitimization” of the union. Past US union practice has been to ignore the Chinese federation, but certain segments of US labor have more recently evinced some amenability to cautiously approaching and engaging with the ACFTU. Theoretically, enhancing transnational union solidarity should benefit all workers. However, building transnational labor alliances within China is challenging, given government control of mass communication and the harsh penalties for labor activists organizing independent unions.

The period surrounding the implementation of the new Labor Contract law presents a unique window of opportunity to consolidate the law’s benefits. If China mirrors the trajectory of labor rights followed by other developing countries during periods of industrialization, this

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256 CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 58. As a result of these competing loyalties, the ACTFU protects workers so long as it can advocate for protections that are not dissonant with the interests of the CCP.

257 JUSTICE FOR ALL: CHINA, supra note 10, at 80.

258 Mobilizing the Law in China, supra note 239, at 791 n.10.

259 JUSTICE FOR ALL: CHINA, supra note 10, at 81.

260 As we have seen, most disturbingly in Tiananmen Square but also more recently, the government can act with brutal force when threatened. For examples of lawyering that has elicited a repressive response from the government. See infra note 375.

261 China’s Challenge to the International Labor, supra note 4, at 69.

262 Katie Quan, Strategies for Garment Worker Empowerment in the Global Economy, 10 U.C. DAVIS J. INT’L POL’Y 39 (2003) (arguing that the mobility of capital requires garment workers to develop strategies that extend beyond the traditional organizing and bargaining techniques for a more global focus).

263 See CONG.-EXECUTIVE COMM’N ON CHINA, supra note 103, at 58 (for examples).
law may serve as a springboard for enhanced protections for vulnerable workers. As such, it deserves careful attention from transnational advocates seeking to enhance protections for all workers.

b. Obstacles to Law Enforcement

Historically, the primary mechanism for enforcing violations of labor rights in China has been through public bureaucratic processes, a system rife with structural flaws that impede the ability of Chinese workers to vindicate critical labor protections. Because of inherent limitations of state enforcement through the “command and control” approach, regulatory experimentation holds out some hope for progress. Improving the enforcement capacity of workers through the increased availability of private enforcement is critical to support restructuring enforcement regime. However, the proposed new law on mediation and arbitration might serve to circumscribe the ability of workers to pursue their rights in the court system. The widespread unavailability of legal services also poses a serious impediment to eradicating employment violations. Moreover, there is little financial incentive for the private bar to undertake these types of cases. Attorneys’ fees are low, and even if they were higher, the victims are often unable to pay. The complicated nature of the cases serves as a deterrent to lawyers. The lack of finality in proceedings has also been problematic, since an employer has right to appeal for a de novo trial after arbitration.

Difficulties in ensuring fair treatment of workers are exacerbated by deeply entrenched discriminatory attitudes. Historically, anti-discrimination laws and procedures have been inadequate. Law enforcement is often inconsistent, and the general nature of national laws

264 In other countries that experienced rapid industrialization, labor markets were plagued by numerous and overlapping destabilizing factors: “migrant labor, highly casual and contingent work relations, high turnover, harsh working conditions, low pay, few benefits, weak labor laws, lax enforcement, court battles, rampant strikes, and labor protests.” UNDUE INFLUENCE, supra note 11, at 9. These conditions were ameliorated in part by forces of social unrest. Id.

265 Cooney, supra note 85, at 1051 (“[T]he Chinese regulatory framework pertaining to work relationships is impeded by a failure to clarify key norms, a bureaucratic “command and control” approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance.”).

266 Id. at 1052.


268 Brown, supra note 55, at 421.


270 Id. at 993 (noting that the Labor Law art. 12 (translated in 6 P.R.C. Laws art. 57) only prohibited discrimination against ethnic groups, race, sex or religious belief).
delegates responsibility to provincial and local governments to pass interstitial laws, which is problematic for a variety of reasons. In response, the NCP enacted the Employment Promotion Law\(^{271}\) prohibiting discrimination against a wide range of groups, including rural workers,\(^{272}\) people with disabilities,\(^{273}\) women and minorities,\(^{274}\) and others. Whether legal changes alone can instigate a change is societal attitudes is certainly questionable.\(^{275}\) The general consensus seems to be that laws must be supplemented by other measures such as educational campaigns and the manifestation of CCP’s political will, since “China’s employment discrimination comes from historical and cultural mores which are exacerbated by the country’s present economic transition to a market economy.”\(^{276}\)

Whatever one believes about the ideal balance between development and democratization, there is room to work within Chinese society on the tenets on which there is general accord—themes of basic human dignity that should remain above the contested fray, such as enforcing the laws on the books, eliminating discrimination, ending child labor, and ensuring that workers are paid their wages.

4. Other International Actors

Although there are other strategies to that are currently pivotal to anti-sweatshop advocacy efforts, a detailed analysis is beyond the scope of this article. An enormous body of conflicting scholarship and opinions on each of these issues reflects the contested nature of the discourse, just as the role of the international regime on labor standards has been hotly contested. In order to briefly identify the panoply of mechanisms available to labor rights activists, the following list is by no means exhaustive: corporate social responsibility, linkage between trade and labor rights, linkage between international financial assistance and labor rights, grassroots and labor federation activism, and human rights litigation. The general consensus seems to be


\(^{272}\) Id. art. 31.

\(^{273}\) Id. art. 29.

\(^{274}\) Id. arts. 27, 28.

\(^{275}\) In the US, much has been written regarding the relationship between social change and legal change, and whether one precipitates the other. As Susan Sturm has noted with respect to discrimination jurisprudence in the US, even strong laws are inadequate to eradicate discrimination, since attitudes are often deeply internalized, and “[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality. . . . The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts...to articulate and enforce specific, across-the-board rules.” Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 460-61 (2001).

\(^{276}\) Brown, supra note 55, at 419.
that only an integrated and comprehensive approach to labor standards will succeed on the ground. Strategies can range from “invoking the authority of supranational institutions to bring pressure to bear on states from above, so to speak, [to] . . . mobilizing grass roots movements to pressure states from below.” Labor activists, facing a complex array of interconnected variables, should at least be acquainted with the spectrum of venues and tactics, legal and non-legal, to which they can avail themselves.

The corporate accountability movement has emerged as one strategy to promote workers’ rights. The unfettered movement of capital in the global economy and the increasing existence within national borders of Foreign Invested Enterprise (FIEs) has made MNCs largely impervious to regulatory efforts. In response to the failure of national and international organizations to regulate global economic interactions, there is an increasing trend to reify private lawmaking that at times supplants the existing public legal structures. As a result, the standards set by MNCs contribute to the development of a global common law that signals a challenge to the monopoly of supranational and international organizations regulation of economic activity. These conditions foster an unprecedented degree of corporate self-regulation. The impact of MNC autonomy cannot be underestimated, as 51 of the largest 100 economies in the world are corporations rather than nations. A wide range of tools may be available to hold multinational corporations accountable for labor conditions throughout their supply chain, irrespective of the existence of a formal contractual relationship between the corporation and the exploited laborers. Promoting corporate social responsibility (CSR) through voluntary compliance schemes for MNCs has emerged as an effective weapon in the arsenal

280 Id. at 1783.
281 Id. at 1747.
283 The increasingly widespread use of Voluntary Codes of Conduct (COCs) as a means of spurring corporate social responsibility has received mixed reviews. Proponents argue that they are good for business because they appeal to socially conscious consumers and provide brand name appeal. Many MNCs with COCs have an applicable provision that address the rights of workers to organize and bargain collectively. Those companies that take their
against labor abuses, and corporations currently spend $31 billion dollars a year on CSR measures. Other efforts aim to hold corporations accountable for supply chain abuses including monitoring mechanisms, inducing MNCs to engage in norm changing and standard setting, augmenting consumer demand through social labeling of products, use of shareholder resolutions to pressures corporations from within, suits under the Alien Tort Claims Act (ATCA), civil liability, and exerting political pressure and shaming pressure on MNCs.

Observers evaluating the efficacy of these measures have provided decidedly mixed reviews, and
while some are more promising than others, clearly none can work in isolation from other efforts. 290

Another venue for improving labor conditions lies within International Finance Institutions (IFIs), specifically the World Bank, 291 and International Monetary Fund, 292 which together form the “Bretton Woods Institutions” (BWIs). Formed in 1944 to stabilize the international monetary system, the role of the BWIs has since evolved from their initial focus on short terms crisis intervention to the broadened role as the ultimate arbiters of macroeconomic policymaking for those countries in the developing world that are in need of financial assistance. 293 Through their control of the purse strings, they wield considerable power in determining development policy. Historically, the BWIs have been the main propagators of the ideological orthodoxy advanced by the Washington consensus, but critics of BWI come from both the left and the right. 294 The BWIs have been criticized for imposing harsh conditions on desperate countries, including “structural adjustment programs.” In these programs, poor countries were pressured by “conditionality” to adopt fiscal austerity measures as a short term sacrifice that would usher in long term prosperity. Critics have accused the BWIs of perpetrating policies that undermine worker conditions, cause environmental degradation and ultimately bleed money from the developing countries to the more affluent nations. 295 Because these institutions are so powerful, advocates have lobbied for a central role for social clauses mandating the enforcement of legal standards through linking them with the financial assistance

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290 For a comprehensive review of “Strategies for Promoting Corporate Social Responsibility,” see JUSTICE FOR ALL: GLOBAL ECONOMY, supra note 191, at ch. 7.
292 The IMF was initially created to oversee exchange rates between countries, but evolved to an institution that provides loans to countries.
293 JUSTICE FOR ALL: GLOBAL ECONOMY
294 ISHAY, supra note 30, at 257; see also Balakrishnan Rajagopal, From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions, 41 Harv. Int’l L.J. 529 (2000). From the left, criticism emanates from “radical neo-Marxist and dependency theories. According to this critique, capitalism is a reactionary force in the Third World and therefore the cause poverty, not a cure for it.” Id. at 540. A more moderate liberal critique holds while these institutions have not realized their goals of promotion development and eradicating poverty, they are nonetheless a worthwhile enterprise in need of reform rather than elimination. Id..
295 BRECHER ET AL., supra note 3, at 4.
offered by the BWIs. The IFIs were initially resistant to the growing pressure to integrate labor issues into their mission. Despite some movement to consider labor issues, critics note that when the IFIs do address worker protections, it is often couched in terms of “labor market flexibility,” which typically indicates deregulating pro-labor policies that decrease wages and undermine worker protections. Some analysts are pessimistic about the prospects of linkage, arguing that the BWIs are unlikely to stray far, if at all, from the free market ideology that has driven their economic policies.

Global trade comprises another area in which advocates have campaigned to link agreements emanating from international, multilateral regulatory bodies to labor protections. The World Trade Organization, (WTO) the preeminent multilateral trade organization, was created in 1995 to establish a global framework for trade. In addition to the WTO, numerous unilateral, bilateral and multilateral trade instruments can incorporate social clauses. Some assert that given its central role, the WTO should serve as an important venue for the protection of labor rights, and that linking trade and labor rights is both eminently reasonable and necessary. Proponents of linkage contend that the WTO should incorporate social standards into free trade agreements, conditioning trade on attention to human rights generally and minimum labor standards specifically. The linkage argument is premised on four general principles: (1) unfettered free trade encourages the race to the bottom, and without externally imposed labor standards, domestic labor regulation will be weak; (2) conditioning the apparatus of trade on coordinated labor standards will increase productivity and economic growth; (3) an international imprimatur for the precept that discriminating between products generated in countries with enforced labor standards and those produced under abysmal labor conditions is normatively and legally justifiable; and (4) the concept that development should be writ large and promote

296 Don Wells, “Best Practice” in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, 27 COMP. LAB. L. & POL’Y J. 357 (2006) (arguing that in Cambodia, despite its unique circumstances, the “carrot” of positive trade incentives and ILO . . . monitoring programs . . . suggests that this model could be useful to improve labor standards in other low labor standards regimes.”).
297 JUSTICE FOR ALL: GLOBAL ECONOMY, supra note 191, at 193.
300 For a list and analysis of various trade agreements, see JUSTICE FOR ALL: GLOBAL ECONOMY, supra note 191, at chs. 3-5.
tangibly improved living standards far beyond general indicia of economic growth.\textsuperscript{301} Opponents resist the idea of linkages, maintaining that policies that inhibit free market principles will ultimately restrict growth and retard poverty alleviation methods as a result.

A broad and energetic network of national and international NGOs also work tirelessly to champion workers’ rights. Far reaching and diversely constituted grassroots mobilizations such as the World Social Forum have been visible, vocal, and resistant to containment.\textsuperscript{302} Smaller scale NGO efforts such as the United Students Against Sweatshops have been very effective in generating publicity and stoking public outrage.\textsuperscript{303} Grassroots labor has been an increasingly prominent actor in international discourse and activism.\textsuperscript{304} Other possible pressure points include unilateral pressure from the US government that may induce China to pay some attention to labor violations,\textsuperscript{305} using national and supranational litigation to enforce rights,\textsuperscript{306} advancing a coordinated strategy that relies on a combination of hard and soft law,\textsuperscript{307} and a comprehensive approach of “integrative linkage.”\textsuperscript{308}

\textsuperscript{302} World Social Forum, International Labor Federations and other diverse coalitions  
\textsuperscript{303} Progenitors of the “Sweat-Free Campus Campaign.”  
\textsuperscript{304} For example, the International Trade Union Federation, a NGO committed to advancing workers’ rights “through international cooperation between trade unions, global campaigning and advocacy with major global institutions.” International Trade Union Confederation, General Information, http://www.ituc-csi.org/spip.php?rubrique57 (last visited Jan. 4 2008). The ITUF proposes a multifaceted, global approach to combating violations of core labor rights, including: “Trade, investment and labour standards; Health and safety at work and sustainable environmental practices; Global governance; The social responsibilities of business including global social dialogue; Social protection and sound legal employment relationships; Trade union organizing; Fighting HIV and AIDS; and Combating child labour and forced labour.” International Trade Union Confederation, Economic and Social Policy, http://www.ituc-csi.org/spip.php?rubrique4 (last visited Jan. 4 2008)  
\textsuperscript{305} There may be some political will to leverage on the US scene as well, as the issues raised may come to dominate partisan politics in the upcoming presidential and congressional election. China is “the country that’s most likely to shape U.S. politics in 2008 . . . China, in other words, is inevitably going to move back to the center of U.S. politics because it crystallized the challenges faced by U.S. workers in the 21st Century. Thomas Friedman, \textit{China: Scapegoat or Sputnik?}, N.Y. TIMES, Nov. 10, 2006, available at http://select.nytimes.com/2006/11/10/opinion/10friedman.html?_r=1&n=Top%2fOpinion%2fEditorials%20and%20Op%2dEd%2fOp&oref=slogin.  
\textsuperscript{307} See David M. Trubek & Lance Compa, \textit{Trade Law, Labor, and Global Inequality}, in LAW AND CLASS IN AMERICA 217 (Paul D. Carrington & Trina Jones eds., 2006).  
\textsuperscript{308} See, e.g., Kolben, supra note 301. (arguing that traditional linkage approaches aimed at enforcing labor standards have failed, particularly with respect to developing countries that have dysfunctional labor regimes, and advocating for a combination of public and private regulatory schemes).
III. The Praxis: Designing Clinics that Advance Workers’ Rights

The foregoing discussion has illuminated the coherence of supplementing US clinical anti-poverty efforts with strategies to advance workers’ rights in China. The final section of this article explores political, cultural and pragmatic factors that influence the specifics of clinic design focused on transnational labor issues in the global sweatshop economy. All clinics face choices about the advocacy strategies they embrace, and their efficacy at realizing their goals will rely in part on their ability to reflect the political and legal reality in which they will operate.

A. The Chinese Component

i. Initial Steps

In order to explore the possibility of an US-China collaboration, I set out to partner with a NGO with an international presence, experience working abroad with constituents on the ground, familiarity with the complexity of issues, and possessing significant expertise and wisdom gained from grappling questions about how to effectively advance workers’ rights. To facilitate a multidisciplinary perspective, I wanted to work with an organization that approached advocacy from a perspective that is not purely or even centrally legal. For a variety of reasons, I elected to work with Verite, an internationally recognized and widely respected non-governmental organization (NGO) that promotes the universal adoption of workplace standards that ensure fair and safe working conditions around the world, with a focus on emerging markets. Verite’s efforts are at the forefront of an innovative approach to improving labor standards in the integrated global economy through a variety of mechanisms, including private, independent monitoring of transnational Corporate Codes of Conduct, training and education programs, and the enforcement of local, regional and international labor laws.  

In developing a joint workers’ rights project, I assumed my best entree was in the nascent clinical legal education movement in China. To deviate from the widely assailed top-down
approach, and to combat legitimate concerns about US cultural imperialism, however well-intentioned, I hope to construct a model that integrates Chinese stakeholders and advocates, using the connections, credibility and gravitas Verite has developed through its efforts to aid Chinese and other workers toiling in the supply chain throughout the developing world. From that collaboration, I hope to generate ideas for a US clinical partnership that coincides with the needs of Chinese workers and advocates, as well as a diverse coalition of advocacy groups in the US. With some cultural knowledge and local input, we can extract culturally transferable and appropriate insights from our own evolving notions of social justice lawyering. Inevitably, various interests may at times collide, but it is critical to struggle to transcend the divisions in order to support a global consciousness that demands fundamental economic justice. In addition to bringing committed and sincere interest, US clinicians can offer several concrete services to Chinese collaborators: a willingness to seek out the funding necessary to finance this enterprise, experience in exploring the intersection of clinic design and pedagogy with social justice goals, access to academic and other research resources, and technical support.

ii. Cultural Sensitivity

a. Caveats from “Law and Development” and the “Rule of Law”

The “Law and Development” movement began in the 1950s and 1960s as an effort to help democratize developing countries in Latin America through US consultation and technical support aimed at establishing a legal system premised on Western ideals of transparency.

Lancaster and Ding Xiangshuin, Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School, 30 FORDHAM INT’L L.J. 356 (2007). Well endowed institutions enjoy access to significant resources, prestige, and credibility, to bolster their efforts, but they can only sustain a limited number of partnerships. Although it would be easy to conclude that a single clinician at a school with considerably fewer resources (read none) has little to offer, we may be able to fertilize grassroots movements, fly under the radar, and articulate an explicit social justice mission that targets workers’ rights rather than general support for the rule of law.

311 Addressing labor conditions in China requires tact, local collaborators and a seasoned ability to read the political winds. In order to continue its work in China without running afoul of the government, Verite makes careful strategic choices about how to work, none of which compromise its integrity and independence or dilute its mission. These tactical considerations are wise, and not unlike those that confront advocates irrespective of their practice area.

312 Sweatshop conditions are not limited to China. See, e.g. Scott Cummings & Ingrid V. Eagly, After Public Interest Law, 100 NW. U. L. REV. 1251, 1261 (2006)[hereinafter After Public Interest] (noting that in Long Island, “the low-wage workers who occupy the lowest rungs of the service sector, toiling in the shadows of the underground economy, where they are subject to systemic labor and safety violations – nonpayment of wages, failure to pay minimum wage and overtime, and exposure to unsafe working conditions – emblematic of the modern-day sweatshop”).
 Despite its stated philanthropic intent, “Law and Development” has been disparaged by many critics as an essentially failed orthodoxy aimed at modernizing the developing world through the imposition of US legal and cultural values. As the movement progressed, it became painfully apparent that “transplanting Western Legal constructs to different parts of the world proved more difficult than the founders of the movement anticipated, however, and a decade later it came to a virtual halt . . . after a crisis of disillusionment not only with specific projects but the whole vision of legal development which sustained them.” Innumerable critics, legal and otherwise, have excoriated the failures of the “Law and Development” movement on both ideological and instrumentalist grounds. One of the most resonant and poignant criticisms is that “[t]he international field of law and development focuses too much on law, lawyers and state institutions, and too little on development, the poor, and civil society.”

The 1990s witnessed a resurgence of interest in “exporting” US values, aimed at assisting the developing world, ostensibly as an extension of US human rights policy. The term of art attached to chastened US efforts to provide international legal assistance has been “rule of law” initiatives, intentionally jettisoning the baggage associated with the widely disparaged “law and development” movement. As advocates have learned, law must reflect the culture in which it operates, and “[f]or law reform to be of assistance to the developing world, the international accountability and democracy.

Jeremy J. Kingsley, Legal Transplantation: Is This What the Doctor Ordered and Are the Blood Types Compatible? The Application of Interdisciplinary Research to Law Reform in the Developing World – A Case Study of Corporate Governance in Indonesia, 21 ARIZ. J. INT’L & COMP. L. 493, 521 (2004) (“The Law and Development movement was problematic in that it was viewed by many people in the developing and developed worlds as an almost imperialistic venture –Americans traveling around the world from place-to-place voluntarily promoting (read imposing) laws that mirrored legal structures without focusing on, or learning about, the different institutional structures and behaviors in the places being affected.”).


Arwen Joyce & Trayce Winfrey, Taming the Red Dragon: A Realistic Assessment of the ABA’s Legal Reform Effort in China, 17 GEO. J. LEGAL ETHICS 887-88 (2004). It is beyond the scope of this article to delve deeply into the debate about development, but it is important to look at global advocacy in context, to search for pathways that benefit local and global workers, incrementally, without having to radically reorganize the world order. There are a number of possible pressure points.


Rule of law is itself a contested concept, subject to debate as to its terms and implications. At a minimum level, “rule of law” implies substantive principles and procedural safeguards that ensure a government’s minimal adherence to articulated rules and norms.
community needs to localize its approach.” Proponents believe that “a well-developed and widely acceptable normative framework for the rule of law is more than just academic: It has tangible consequences for human development and human rights as well.”

As a prominent proponent of spreading the “rule of law,” the ABA has launched a new set of initiatives in China, with the express intent to extend the reforms beyond their initial targets to “reverberate through the Chinese legal system, promoting transparency, civic participation, accountability, and democratization in other areas.”

Using a constitutionalist reform approach can be a double edged sword however, as the law can be used both as a rhetorical tool for reform and an instrument of repression.

Despite the best efforts of proponents to incorporate the lessons of failed policies, “rule of law” initiatives are also vulnerable to blistering criticism for their cultural arrogance. Expectations are that “rule of law” will incubate and encourage the growth of a civil society capable of replicating the representative democratic principles favored by its adherents. Critics note that transplanting western ideas may have unintended and unpredictable consequences.

Those who subscribe to “Asian Values” as the best mechanism for economic development reject the primacy of values dictated by western liberal democracies, and the defense of “Asian Values” has come to embody the resistance to western economic and political hegemony.

Those defending “Asian Values” fairly observe that western conceptions of democracy have

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319 Kingsley, supra note 313, at 495; see also Chen, supra note 108, at 737-38 (arguing that China has often adopted Western legal ideas without adequate attention to their suitability to local conditions, and that more care should be taken to critically adapt rater than adopt those ideas in order to form a uniquely Chinese legal system that both respects local culture and conforms to international standards). Efforts to adopt culturally sensitive practices must be conceptualized and implemented with great care, with a further caution that even well-intentioned cultural circumspection can seep over into orientalism.


321 Joyce & Winfrey, supra note 315, at 898.

322 Carol Rose notes the significant challenges of providing cross-border legal assistance and the lingering question of whether countries can selectively export/import certain aspects of a legal framework, such as statutes and regulations, and disregard the broader legal and political philosophy on which the system relies. Carol V. Rose, The New Law and Development Movement in the Post-Cold-War Era: A Vietnam Case Study, 32 LAW & SOC’Y REV. 93, 94 (1998) [hereinafter Vietnam Case Study].

323 Asian countries are by no means monolithic, but “Asian values” are generally meant as shorthand to refer to a combination of Confucianism, a collectivist approach that elevates communal values over individual freedoms, and values consensus and harmony with strong political leadership. These values are often espoused by authoritarian governments.
failed to ameliorate growing economic stratification,\textsuperscript{324} while critics argue that regimes dissemble their autocratic tendencies behind more lofty goals of Confucianism.\textsuperscript{325} Other criticisms emanate from those concerned that “rule of law” initiatives are driven more as lubrication for market penetration than loftier concerns about human rights and democratic ideals, and even “[t]heoretical attention and sensitivity to the meaning of the rule of law is unlikely to prevent the impression (in some cases, perhaps quite justifiable) that law reform initiatives are imperialistic.”\textsuperscript{326} Moreover, the lack of consensus as to the definition of the “rule of law” “has, in some cases, facilitated the cynical “capture” of rule of law rhetoric by authoritarian and corrupt governments,”\textsuperscript{327} and ignoring the social, political and economic context of “rule of law” initiatives may just serve to legitimate authoritarian states.\textsuperscript{328} The US can be legitimately upbraided for its own hypocrisy, for example related to its own disregard of international labor standards.\textsuperscript{329} Finally, critics of rule of law initiatives note that these programs tend to impose law from above and outside, not based on the expressed desires of those citizens it purports to benefit, in contravention to the precepts of empowering and generating change from below, driven by those most impacted by the policies. But despite the criticism, and irrespective of the intent, empirical evidence suggests that “rule-of-law reforms also create new venues for political participation and social activism.”\textsuperscript{330}

Well-meaning analysts hailing from every political hue and espousing legitimately contrasting theories will never achieve consensus about the best method for achieving development, nor will they agree on the acceptable balance between economic development, legal development, and democratization. Irrespective of one’s preference for capitalism or communism, individualism or collectivism, or other polarizing characterizations, there is more

\begin{itemize}
\item \textsuperscript{324} \textit{Fire-Breathing Dragon and the Cute Cuddly Panda}, supra note 54, at 30. (arguing for “a viable normative alternative to the formal democracy and liberalism that have failed to resolve the very pressing issues of social inequality and human well-being for so many people in rich and poor countries alike.”).
\item \textsuperscript{325} Ruskola, supra note 119, at 668.
\item \textsuperscript{326} Ringer, supra note 320, at 185 (“the citizens of nations experiencing foreign-funded rule of law reforms may become resistant and perhaps even hostile to development initiatives if they feel the rule of law is being used to smuggle in foreign moral, political, and cultural values under the guise of neutrality.”)
\item \textsuperscript{327} Id. at 188.
\item \textsuperscript{328} Stephenson, supra note 45.
\item \textsuperscript{329} \textit{Hoffman Plastic Compounds, Inc. v. NLRB}, 535 U.S. 137 (2002) (holding that undocumented workers terminated for union organizing were not entitled to the back pay and wages earned while working illegally); see also Sarah Cleveland et al., Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers’ Migrant Status, 1 Seattle J. Soc. Just. 795 (2003).
\item \textsuperscript{330} \textit{Mobilizing the Law in China}, supra note 239, at 788.
\end{itemize}
than enough collective wealth to engage in at least a modest redistribution that ensures each human being’s entitlement to basic dignity and survival.

b. Applying Lessons Learned

The challenge lies in determining which aspects of our clinical pedagogy can be extracted and transferred to China. Collaborations between academics and the local stakeholders they propose to serve will inform this endeavor, but partnerships between the US clinic movement and their Chinese counterparts must be undertaken with cultural acuity. Michael Dowdle underscores the importance of taking great care to ensure that ‘indigenous paradigms” are not extinguished or overrun by well-meaning but counterproductive foreign clinicians eager to implement their models without adequate reflection about its applicability and appropriateness for China. Relying on these concerns, he observes that “local paradigms frequently offer important and unique insight into the particular problems faced by legal development in the host country,” taking advantage of “local knowledge,” that cannot be readily discerned from the outside.

As Maximo Langer suggests, we should reframe the historical paradigm of exporting aspects of our legal system from “legal transplantation,” which reeks of US cultural arrogance, to a model of “legal translation,” suggesting a carefully individualized transfer of information from one system to the other rather than a “cut and paste” approach. The importance of avoiding the thoughtless exportation of American style clinics without due regard and careful consideration cannot be overstated. In developing these new clinical models, Chinese clinicians need to exercise caution and critically assess the contributions and advice of foreign clinicians, and develop their clinical constructs, pedagogy, and mission with considerations of the economic, political, social, and legal culture in China. In fact, certain aspects Chinese legal culture makes it hard to replicate the US paradigm. Delegating primary professional responsibility for clinical work to students is thwarted in China by the absence of a student

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332 Id. at 66.
334 Dowdle supra note 331, at 78.
335 Adopting and Adapting, supra note 128, at 2146.
practice rule authorizing them to act in the role of attorneys, at least with respect to appearance in
court and administrative processes.336 This caution applies equally to US clinicians offering
assistance and collaboration with issues of clinic design. US clinicians must be sensitive to the
specifics of the Chinese legal system, and the implications for the focus of skills teaching. For
example, judges in China are active participants in the fact-finding process, and there is no
formal, court supervised mechanism to facilitate discovery.337 Relevant training therefore would
place greater emphasis on imparting the skills necessary to function in the evolving system.
However, as China moves toward a more litigious, adversarial system, the educational focus may
gravitate to more litigation based skills.338

iii. Fanning the Winds of Change

In designing a clinic to address global poverty by supporting Chinese workers, it is
critical to remain mindful of social change theory and progressive lawyering, and strive for a
construct that advances social justice imperatives.339 Admittedly, there is no consensus as to the
most effective strategies to achieve social justice in the US, so one could argue there is little
utility in trying to apply these theories to a different culture and legal system. However, the little
empirical work undertaken to date suggests that at least some parallels exist with respect to the
importance of cultivating grassroots networks to push for social change.340 Although it is
important to exercise caution and restraint about imposing one’s own values, as Leah Wortham
believes, “[c]linical education should not be a value-free, technocratic endeavor.”341

Accordingly, clinic design should try to incorporate a number of goals that converge at the
intersection of clinical pedagogy, human rights, globalization, and social change theory. As Dina
Hurwitz eloquently argues, “[t]he transnationalization of institutions, the human rights problems
associated with globalization, the relevance of a global ethic of responsibility, and the need to
educate lawyers about the process on international cooperation all point to a growing role for

336 See Zhen, supra note 164, at page 23.
337 Phan, supra note 82, at 140.
338 Lancaster & Xiangshun, supra note 310.
339 See, e.g., Clinical Design, supra note 70, at 1485 (“social justice is furthered through the provision of services
and pursuit of legal and social reform on behalf of clients and community groups lacking meaningful access to
society’s institutions of justice and power.”).
340 Eva Pils, Asking the Tiger for His Skin: Rights Activism in China, 12 FORDHAM INT’L L.J. 1209, 1254 (2007)
[hereinafter Asking the Tiger for His Skin] (noting that rights activism should not be limited to lawyers but should
extend to “ordinary people, including peasants”).
341 Wortham, supra note 13, at 677 (“resistance to professional skills as a raison d’être resonates with the LDM
critique that enhanced professional skills in the most powerful interests in a society [that] can be a further detriment
to the position of poor people in that society.”).

To achieve those goals, lawyers must rely on a diverse toolkit of advocacy strategies. While lawyers can rely on traditional legal strategies, “much human rights work is also non-legal, such as community education, media outreach, fact-finding and reporting.”

As discussed supra, advocates in the US have long cogitated over the most effective methods of instigating social change, and engaged in self-flagellation over the abysmal failure of past efforts to achieve a more equitable and peaceful society.

One recurring area of examination is the relative merits of pursuing social change through a rights based approach, and some critics of social justice lawyering in this country decry its lawyer dominated, rights-driven agenda.

In her critically reflective assessment of her work organizing undocumented workers in Long Island, Jennifer Gordon outlined the dangers of protecting workers through individual case representation. The story Gordon recounts reinforces her belief that framing grievances in terms of legal rights in fact lends legitimacy to rather than mounting an attack on the status quo, and pursuing the vindication of individual rights inhibits the spread and ossification of broader discontent and solidarity necessary to build large scale social movements.

In recognizing the limited impact of resolving individual legal complaints in isolation, Gordon’s clinic functioned with the express intent to mobilize workers and serve as a catalyst to the

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342 Hurwitz, supra note 7, at 509.
343 Id. at 513.
344 Gerald Torres and Lani Guinier have developed the concept of “demosprudence,” which is “the study of the lawmaking and democracy enhancing effects of social movements as they influence and are disciplined by democratic practice.” Gerald Torres, Legal Change, 55 CLEV. ST. L. REV. 135, 135-36 (2007) (defining demosprudence as “a philosophy, a methodology and a practice that systematically views lawmaking from the perspective of popular mobilizations, such as social movements and other sustained forms of collective action that serve to make formal institutions, including those that regulate legal culture, more representative and thus more democratic. It highlights the democratic wisdom and lawmakers power of social movements.”). Torres distinguishes between cause lawyering and social movement lawyering, noting that while the former may ultimately achieve social change, it is typically the cause lawyers themselves who designate the rules to be challenged and the methods by which they are contested, while they remain unembedded in the movement. Id. at 142. In contrast, social movement lawyering reconceives of the goals and strategies of representation, recognizing that ultimately, effective lawyering “is not about “service” to clients or causes. It is about constantly asking: what do we need to do to bring more people into the exercise of democratic power.”) Id.
347 Internationalization of Public Interest, supra note 24.
collective vindication of grievances. But it is important not to underestimate or disregard the power of law to generate change, and “while skepticism about [lawyers’] expertise may lead to a healthy dose of self-awareness among progressive lawyers as they interact with marginalized groups, it also may breed a devaluation of legal skills in a way that risks ceding the field of legal struggle to adversaries.”

Contemporary attitudes about litigation as a dispute resolution mechanism in China are influenced by traditional cultural thinking that idealizes the “collective good,” valuing harmony over discord and preferring concession to institutionalized conflict. Some observers argue that the state has set up the current dispute resolution system as an instrumentalist exploitation of those communitarian values by encouraging the individual pursuit of complaints in a manner that does not constitute a threat to the regime. More recently, however, some citizens have evinced a greater willingness to channel disputes through the legal system. For example, against tough odds, some lawyers have experimented with new strategies to collectivize grievances, such as class action suits. While litigation is not viable as an exclusive strategy for a number of reasons, including most practically the widespread unavailability of attorneys, neither should it be categorically rejected. Even unsuccessful attempts at litigation can generate positive effects, with perhaps less danger of cooptation presented by those strategies in the US, since they may serve to heighten expectations about legal accountability. One activist has posited that although seeking redress of labor disputes though the courts has been an uphill battle, slow progress is evident, and “[t]hrough these legal battles we also provide the idea that workers should get together.” Citizens who develop this consciousness and solidarity can unite in pursuit of “the fundamental transformation of the social, economic and/or political conditions

348 After Public Interest, supra note 312, at 1259.
349 Id. at 1278.
350 Sheehy, supra note 118, at 243.
351 JUSTICE FOR ALL: CHINA, supra note 10, at 85 (noting that in addition to being inefficient, the individual pursuit of grievances can defuse demands for the creation of independent trade unions).
352 See Daffer, supra note 113 (noting that rural peasants have begun to use class action lawsuits as a means to vindicate rights, although certain reforms are necessary to remove the impediments to collective justice); see also China Labor Bulletin, Tieshu Textile Workers: Historic First Hearing of Workers Collective Lawsuit Against the Suizhou Social Insurance Bureau, http://www.china-labour.org.hk/public/contents/article?revision%5fid=3557&item%5fid=3556 (last visited Jan. 4, 2008).
353 Liebman, supra note 142, at 218.
which permit and perpetuate that oppression.”

Recently, China has seen a “growing tendency to frame demands and grievances in rights-claiming, legalistic language,” and the state has played a role in creating these expectations of legal rights as part of efforts at legitimation. The organized dissemination of legal information has aided the ripening of a distinct legal consciousness. This ‘critical consciousness’ “is [further] developed through education, training, and community organizing, as well as strategic lawyering.” This incipient legal consciousness can in turn spark grassroots attention to both furthering the rule of law abstractly and more concretely, transforming “a vague sense of rights to a detailed list of grievances.” This awareness can ultimately encourage citizens to “begin to express and promote [their] pluralist interests, creating a rudimentary state-society dialogue which can serve as a foundation for future social organization” In assessing impact of this trend, it is important to avoid the urge to interpret legal awareness narrowly, based on concrete numbers documenting court usage or the results of self-reported surveys. This reductive analysis ignores the intangible but critical reality that “[t]hrough the process of legal mobilization, self-professed “common people” (lobaixing) evolve into critical citizens, taking the state to task for failures or problems with the legal system.” Although the autocratic nature of the CCP is widely known, increasingly “legal and constitutional development in China is a dynamic process shaped not only by top-down decisionmaking, but also by interactions between the government and ordinary citizens.”

Despite the growing legal consciousness, given the idiosyncrasies of the Chinese system, relying on legal strategies alone can backfire. Other obstacles endemic to the legal system itself compound the state’s resistance to challenges to its authority. Perhaps most prominently,

356 Mobilizing the Law in China, supra note 239, at 785 (presenting an ethnographic perspective on the development of rights consciousness in China).
357 Id. at 792.
358 Id. at 794.
359 Hurwitz, supra note 7, at 517
360 Mobilizing the Law in China, supra note 239, at 813.
361 Dowdle, supra note 331, at 70.
362 Mobilizing the Law in China, supra note 239, at 786.
363 Id. at 788.
365 “Exclusive reliance on legal strategies can actually retard genuine trade union development and entrench the government run union system.” JUSTICE FOR ALL: CHINA, supra note 10, at 85.
litigation provides limited power to advance social justice goals because in the Chinese civil law system, the principle of stare decisis is inapplicable. The lack of precedent setting “limits the larger social impact of litigation and, at the same time, gives greater relevant to other kinds of legal aid activities, such as lobbying and social education . . . .”366 The risk of myopic loyalty to old, familiar litigation strategies is great, and “in an environment in which legal failure is not infrequently due to a lack of social understanding, a clinical legal aid provider needs to develop other kinds of competencies if it wishes to provide effective access to justice to the citizenry at large.”367

A workers’ rights clinical model that employs tactics beyond individual case representation provides an opportunity for workers to collectivize their grievances, engendering much needed solidarity based on shared experiences.368 Given the particular challenges to the efficacy of models premised on litigation alone in the US, and the amplification of these conditions in China, community lawyering techniques may have unique resonance in China. Clinics, often less fettered in their ability to maneuver than their government run legal aid counterparts, can “practice a form of “street law” that is aimed towards social education and the provision of legal aid more broadly.”369 Acting in this role, clinics can contribute to grassroots movement building,370 which unites citizens, and serves “to sensitize workers to the commonality of their exploitation, to make them understand that theirs were not isolated instances of individualized abuse, but part of a larger structure with deep historical and political roots.”371 Admittedly, overcoming restrictions driven by the state’s desire for social control and stability is challenging and perilous, and underscores the difficulty of instigating social change in China. However, recent events point to the beginnings of a broader willingness to speak out, as evidenced by “widespread – though sporadic- worker revolts, the emergence of grassroots labor

366 Dowdle, supra note 331, at 62.
367 Id. at 61.
368 Phan, supra note 82, at 149-50. (“because the clinical model takes place in an academic setting . . . lawyering that occurs there more successfully incorporates and inculcates skills necessary by meaningful and productive dialogue with social movement actors, including the ability to listen, share power, to open oneself up to critical examination so that meaningful dialogue can take place, and to develop an imagination. In this way, working one case at a time nonetheless has tremendous impact.”) (footnotes omitted).
369 Id. at 146. Some of these efforts are focused on employment issues and are comprised of trainings, consultations and educational campaigns. See JUSTICE FOR ALL: CHINA, supra note 10, at 84.
370 Phan, supra note 82, at 149.
371 After Public Interest, supra note 312, at 1258.
NGOs, and stirrings of reform within official union structure.” Contributions to consciousness-raising by legal clinics and other NGOs can engender solidarity with other participants in the global labor rights movement.

Although progress toward political and legal accountability and transparency in China has been uneven and at times even retrogressive, some observers believe that in letting the proverbial horse out of the barn, the state has unleashed an inexorable, if not linear, march toward democratization. While this vision may be debatable, some analysts believe that China has already “inadvertently created the preconditions for a “rule of law” theory that will help redistribute some power back to the people and reform society as a whole.” Chinese activists espouse dissonant views about the tactics most likely to erode absolute state power. Some Chinese analysts make the compelling argument that radical change imperils the activists and may be counterproductive, arguing for a more moderate, incremental approach that generates dialogue between the people and the government. Particularly in an authoritarian state that has historically tolerated little dissent, it is critical to pay careful attention to the development of social movements, and the considerable risks faced by its protagonists. This is not to suggest that activists committed to helping Chinese citizens in the struggle for improved conditions should act paternalistically, simply that those engaged in the endeavor are mindful of the

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372 UNDUE INFLUENCE, supra note 11, at 37; see also Ngai, supra note 209, at 6 (observing that migrant workers engaged in “short-lived, spontaneous strikes and collective actions that were generally unrecorded.”). Ngai believes that young migrant workers are beginning to form the resistance to the tripartite oppression inflicted by globalization, the social control of the party-state and the vestiges of patriarchy. Id.

373 Phan, supra note 82, at 133 (“The democratization has in general reduced the role of the state in aspects of economic, social and political life, paving the way for new relationships to emerge in all spheres.”). But cf. Miron Mushkat & Roda Mushkat, Economic Growth, Democracy, the Rule of Law, and China’s Future, 29 FORDHAM INT’L L.J. 229 (2005) (arguing for tempered optimism about progress toward the rule of law in China).

374 Phan, supra note 82, at 151.

375 As one might expect, there is not consensus among Chinese lawyers as to the most effective or moral way to push for reforms, although the personal stakes for activists are undeniably higher. Some lawyers embrace a confrontational approach in certain cases, relying on increasing civil impatience with the pace of reforms to serve as a buffer from government repression. Others emphasize a more moderate approach. See Hand, supra note 364, at 180-81 (noting that despite recent actions by Chinese leaders quell reform efforts and crack down on dissidents deemed dangerous to the existing status quo, activists have found ways to agitate for incremental reform); see also Asking the Tiger for His Skin, supra note 340 (recounting the cautionary tale of a radical Chinese lawyer and juxtaposing two competing visions of rights activism in China: the pragmatist and consequentialist approach aimed at instrumentalist reform through gradual progress toward change, and the more radical approach that aims to expose injustice irrespective of the outcome of that strategic choice on institutional reform). Given the political reality in China, and the PRC’s tight control over the dissemination of information, visions of advancing social change from abroad must be tempered. Foreign advocates are removed from the immediate personal risks and the broader potential repercussions of activism. The safest path may be to promote long term progress rather than risk instigating radical changes that are unlikely to be tolerated by the government, resulting in a pyrrhic victory. While incremental changes are already underway, their path is uncertain.
potentially dire consequences for the activist lawyers, the people on behalf of whom they advocate, and for social change more broadly.

iv. Access to Justice and Public Interest Lawyering

Enhancing access to justice is a pivotal goal for clinical education in China. 376  While determining the subject matter of a clinic is always contingent on a number of variables, the dearth of clinics and lawyers elevates the importance of selecting an area that is calculated to maximize the impact of student work. Despite a recent exponential increase in the number of attorneys in China, the critical shortage continues to hamper the vast majority of poor people from accessing the legal system. Students representing clients through clinics can make a measurable difference, 377  both in terms of the actual number of clients benefiting from legal representation and the ripple effect to others who begin to see the legal system as a viable mechanism to vindicate rights. 378

A clinic designed to maximize its effectiveness in advancing social justice goals must tailor its structure to the climate on the ground. In China, “[g]iven the strong corporatist emphasis of China’s emergent civil society and attendant regulatory framework, [footnote omitted] this would seem to facilitate social and political embeddedness far more readily than the wholly autonomous institutions that characterize the American model.” 379  When they mirror China’s corporatist structure more generally, the corporatist clinical models have been more influential in promoting a culture of public interest lawyering than those models premised on the dominant US paradigm. 380  Associating with an exiting NGO is also a wise strategic consideration, given their relative ability to function independently. 381

376 Even if law clinic initiatives succeed, “inadequate government funding will prevent legal aid from reaching the majority of those in need.” Joyce & Winfrey, supra note 315, at 897.
378 Robert Rubinson, A Theory of Access to Justice, 29 J. LEGAL PROF. 89, 90 (2005) (“[T]he ideal of equal justice is incompatible with the social realities of unequal wealth, power, and opportunity, which no amount of legal formalism can disguise. In an unequal society, the Haves usually are better served by legal formalism than the Have-Notss, a disparity that creates a persistent legitimacy crisis.”).
379 Dowdle, supra note 331, at 69.
380 Id. at 71.
381 Partnering with a NGO is less likely to generate resistance, and those clinics associated with universities may have a unique ability to function differently than other NGOs, although the latter have recently enjoyed increased acceptance in China. Carillo, supra note 6. NGOs in China that function with the most autonomy are those who do not evince a purpose hostile to or challenging the legitimacy of the government itself. CHINA DEV., NGO ADVOCACY IN CHINA 124 (2006), available at http://www.chinadevelopmentbrief.com/node/749. Instead, many
Because clinics should strive to respond to local need, a focus on providing services to China’s underserved rural areas is a worthy goal. The practical impediments to realizing this goal are considerable, as inconsistent infrastructure development and differing dialects erect substantial barriers to reaching rural communities. Developing local partnerships is critical to overcoming these barriers. Creative measures are warranted, such as organizing and supporting outposts staffed by lay advocates. Since actual representation may present insurmountable barriers, the students could disseminate information to prospective migrants about their legal rights, in the hope of providing them with ammunition and the will to resist labor violations prior to arriving in urban areas. Because the rural poor in China have generally not been privy or the beneficiaries of the developing rights consciousness, it is essential to nurture awareness about and demands for rights, to make some effort to level the playing field.

China lacks a rich history of public interest lawyering, so a clinic’s ability to influence the ethos of students is critical. Exposing students to service opportunities that arouse and sustain a commitment to public interest work is invaluable. Students who use the law to make a measurable difference in the lives of individual clients can begin to develop a compelling vision of social justice that combats the tendency toward “legal nihilism.” Experience in the United States strongly suggests that working with marginalized clients can have a transformative effect on students, thereby enhancing their competency in and commitment to public interest work.

NGOs eschew confrontational tactics in favor of constructive engagement, most likely attributable to two things: a pragmatic assessment of how to remain viable as an organization in the face of government intolerance of dissent, and a cultural preference, rooted in Confucianism, that values a “harmonious society” over overt conflict. Id. at 11; see also Phan, supra note 82, at n.96.

See, e.g., Antoinette Sedillo Lopez, Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training, 7 CLINICAL L. REV. 307, 317 (2001) (“In a clinical setting, providing access to justice means designing a program to address needs for legal service in our communities.”).

383 Liebman, supra note 142, at 231-32.

See Carasik, supra note 17, at 40; see also Phan, supra note 82, at 151 (“by focusing on tomorrow’s generation of lawyers while they are still early in their careers, the clinical model has great potential to help set a higher standard for the legal profession and instill trust in the legal system among those farthest from its reaches.”); Wortham, supra note 13, at 672 (“Clinical education works with law students as their professional identities are being formed. Their interaction with clients also may help to shape what their clients see as the potential for finding help in the legal system and seeking social change more generally.”). But cf. Adopting and Adapting, supra note 128, at 2146-47 (noting that although the US clinical model has demonstrated some success in instilling a public service ethos, several factors mitigate effect in China: the lack of a class of professionals publicly identified as engaging in public interest work, the lack of public interest job opportunities, and little support for pro bono work in law firms beyond that required by the state).

385 See Wortham, supra note 13, at 664; see also Minna J. Kotkin, The Law School Clinic: A Training Ground for Public Interest Lawyers in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION 129, 139 (noting that clinics can serve “to empower students: to encourage them and give them a sense of optimism and confidence as they contemplate careers in public interest law”).
Because of the comparatively small number of lawyers in China relative to the total population, and the virtually insignificant number engaging in human rights work, augmenting the number and capacity of lawyers committed to supporting nascent rights is imperative.\textsuperscript{386}

In contemplating the appropriate set of priorities and tactics, consulting with the stakeholders is imperative.\textsuperscript{387} Advocates and scholars are acknowledging “the validity of a bottom-up approach to human rights, in which human rights theory trickles up through interaction with real people, who have real problems, as opposed to “top-down thinking,” in which scholars hand down “mantras.”\textsuperscript{388} As a countervailing empowerment strategy, Haynes suggests that “[w]hen working to eradicate a practice or abuse occurring elsewhere, coordinate with a local counterpart, and consider including “capacity building” as a component of the clinic’s work.”\textsuperscript{389} Honoring the contributions, opinions and doubts of the intended beneficiaries helps achieve this goal. Admittedly, since the target group of stakeholders is enormous and varied, it would be impracticable to solicit and incorporate the preferences and priorities of all Chinese low wage workers. Perhaps more importantly, the practical barriers are compounded by the understandable reluctance of many workers to publicly challenge the government, given the considerable risks of speaking out. Still, incorporating worker representatives into the planning efforts is a critical component of a truly community oriented effort to advance workers’ rights.

\textbf{v. Pragmatic Considerations - Tempering Idealism}

Without compromising the integrity of the enterprise, given the conditions on the ground, it would be useful to minimize the chances of antagonizing the government in order to avoid a political backlash. Because the state has demonstrated a relative tolerance for some clinic activism and the selective and judicious use of the press for those clinics in its good graces, treading carefully may enhance the chances that the clinic can operate with relative autonomy and freedom from interference. To be sure, there will be areas in which the clinic’s interests and those of the government will likely collide. However, it would be wise to highlight the areas where the clinic can articulate goals that coincide with those of the CCP. Few citizens and

\textsuperscript{386} As an important step in ensuring the continued vitality of the this commitment to public interest work, a law school clinic could also be structured to provide a continuum of technical and moral support to its alumni, other attorneys and non-governmental organizations committed to vindicating labor rights.

\textsuperscript{387} In critiquing law and development initiatives in Vietnam, Carol Rose noted the danger of relying on the elites who stood to gain from certain aspects of economic integration and investment and might be therefore insensitive to preserving indigenous priorities. \textit{Vietnam Case Study}, supra note 323, at 132.

\textsuperscript{388} Haynes, supra note 41, at 410-11.

\textsuperscript{389} \textit{Id.} at 414.
organizations can muster the political will to challenge the CCP outright, and the state’s inconsistent response to both radical activism and more gradual reform approaches must be carefully monitored.\textsuperscript{390} The risks for Chinese lawyers engaging in the indigenous version of “rebellious lawyering” should not be understated, and the government’s tolerance for radical rights activism appears to be quite limited. Many activists promote a strategy that recognizes that “[u]nrealistic reform demands, politicized appeals, unauthorized organization and collective action and demonstrations all hold significant risks for legal reformers and…may actually set the reform process back.”\textsuperscript{391} For labor activists and lawyers in China, confronting the state can be a perilous enterprise, both to their own well-being and to the causes they hold so dear. Those choices are theirs alone.\textsuperscript{392}

China has evinced a historical aversion to “human rights” for reasons noted above. However, this proposal is designed to advance economic justice, which the Chinese government itself has recently embraced, at least rhetorically. Theoretically, international actors advocating for workers’ rights should be less likely to inflame the Chinese government’s antipathy than when China perceives that outside agitators are imposing culturally relative western ideals. This focus could render China less resistant to external efforts to monitor and enforce workers’ rights than they would be to cultural values that implicate issues of sovereignty, although this does not seem likely on the ground. If China conforms to international human rights standards, perhaps there will be some international pressure for US and other developed countries to adhere to international standards of economic, cultural, and social rights.\textsuperscript{393}

Aside from the lofty pedagogical and justice goals, the nuts and bolts issues of clinic design require careful and systematic thought. Compiling a comprehensive planning list reduces the risk of oversight.\textsuperscript{394} Previous international collaborations have clearly demonstrated that the

\begin{footnotesize}
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\item[390] Given the restrictions on the press and freedom of information more generally, outside sources may enjoy a more advantageous perspective from which to monitor reports about activism that manage to evade the watchful eyes of the government.
\item[391] Hand, \textit{supra} note 364, at 185-86.
\item[392] Labor activists, including He Chaohui, Yao Fuxin, Wang Sen and Hu Shigen are currently imprisoned for terms ranging from 7 to almost 20 years for attempting to organize unions outside the permitted ACFTU. \textsc{Cong.-Executive Comm’n on China, supra} note 103, at 2.
\item[393] Cathy Albisa & Sharda Sekaran, Forward, \textit{Realizing Domestic Social Justice Through International Human Rights}, 30 \textsc{N.Y.U. Rev. L. & Soc. Change} 351 (2006) (“One of the greatest values of the international human rights legal framework is its recognition that civil, political, economic, social, and cultural rights are interdependent and must be respected and ensured as a unified whole. The role of economic and social rights is of particular importance in the United States, where these rights, at least at the national level, are virtually unrecognized.”).
\item[394] Wortham, \textit{supra} note 13, at 672.
\end{enumerate}
\end{footnotesize}
most successful clinics are carefully planned with the full participation of partners in the host country, and pay close attention to details.\textsuperscript{395} Any partnership proposal should be prepared to make a sustained commitment to ongoing involvement with a clinic to bolster its chances of success.\textsuperscript{396}

vi. An Existing Model that Fuses Many Social Justice Goals

The substantial impediments to social change advocacy heighten the importance of realistically assessing the viability of any particular clinical construct. One existing Chinese clinic possesses many positive and promising attributes that are consonant with the goals outlined above, and serves as an encouraging model of what is possible. Students enrolled in Peking University’s Qianxi clinic engage in a broad panoply of advocacy activities that are structured in a pedagogically sound, logical progression. In embracing idealistic goals, the clinic “is a highly ambitious project, not just for its scale, [citation omitted] but for its attempt to use Qianxi County as an experimental site to explore models of rule of law and self-governance at the grassroots of Chinese society.”\textsuperscript{397} Many parallels are evident between the lawyering philosophy espoused by this clinic and recent scholarship and activism related to the evolving conceptions of social change lawyering in the US. Students participate in the clinic much as clinic students would in a US litigation based model, by first using concrete lawyering skills to interact with and represent clients, and then engaging in consciousness raising and community mobilization efforts.\textsuperscript{398} Using those experiences to reflect on what they have learned about law and legal institutions, the students apply these insights to consciousness raising and mobilization efforts on the ground, utilizing “macro-oriented activities including drafting community legislation and suggesting grass-roots legal reforms.”\textsuperscript{399} One legal commentator opined that this model is particularly well-adapted to Chinese legal and political culture.\textsuperscript{400}

vii. The Spirit of Collaboration

Building on the above-noted concepts and cautions, I am in the initial step of seeking out a partner in China. I assume that this proposal will evolve, perhaps radically, in the context of a

\textsuperscript{395} Schnasi, \textit{supra} note 78, at 150.
\textsuperscript{396} Wortham, \textit{supra} note 13 (arguing that foreign clinicians are often buoyed by the support and camaraderie of US clinicians that cultivate and sustain a relationship with them).
\textsuperscript{397} \textit{Adopting and Adapting}, \textit{supra} note 128, at 2153.
\textsuperscript{398} Both in the US and abroad, street law trainings can be incorporated into clinical models. See Wortham, \textit{supra} note 13, at 661.
\textsuperscript{399} \textit{Adopting and Adapting}, \textit{supra} note 128, at 2154.
\textit{Id.}
truly open, cross-cultural collaboration. Although massive differences exist between the US and China, there are also some fundamental similarities that undergird concepts of universal humanity. Activists in both nations share a commitment to lift people out of poverty by “raising all the boats.” That said, in seeking an appropriate partner, it is important to at least start with a clear articulation of goals, flexibility, commitment, and humility.

The legitimacy and utility of exporting US legal culture generally and clinical education specifically are fair questions that should be frequently revisited. While it is critically important to maintain vigilance to curb the blind imposition of our own priorities, clinicians should not shrink from the challenges of counteracting the suffering that the US has played a role in perpetrating. This proposal strives to be culturally sensitive, and mindful of charges of US economic, political and legal imperialism that have plagued past efforts at trying to graft our legal system and values, irrespective of the suitability of that model for the partner culture.\(^\text{401}\) I am operating under the assumption that members of the world’s most affluent and powerful nation have some overarching responsibility to leverage that privilege to fight injustice and inequality for those less fortunate, both at home and abroad.\(^\text{402}\) Given conditions for workers in China, and the considerable impediments to their self-empowerment, international pressure is an integral component of a comprehensive approach. Any international effort is open to charges of unwelcome, ethnocentric interloping and cultural imperialism. But I believe that many poor Chinese workers share the goals of enhanced legal protections and distributive justice, just as domestic legal services advocacy for poor and marginalized communities presume shared goals with their constituents.\(^\text{403}\) As a privileged actor, although the path is fraught with peril, I feel compelled to try to construct a clinical model with global reach. Despite my best efforts at thinking critically and reflectively about what to do, I may well be as misguided as my predecessors in the law and development movement. I hope not.

\(^{\text{401}}\) In addition to sensitivity to the political conditions, it is important to attend to interpersonal skills necessary to maintain productive cross-cultural collaborations. See generally Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 8 CLINICAL L. REV. 33 (2001)

\(^{\text{402}}\) It is fair to criticize the notion of US benevolence on the grounds that this country could not even manage to make the commitment to aid and advocate for our own people, such as the residents of New Orleans in the aftermath of Katrina. See Paul Krugman, Katrina all the Time, N.Y. TIMES, Aug. 31, 2007.

\(^{\text{403}}\) To borrow from Isabelle Gunning, we should endeavor to be “world travelers,” striving to understand the distinction between the “other” and ourselves before undertaking advocacy as outsiders. Isabelle R. Gunning, Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189 (1992).
B. Forming an International Clinical Advocacy Partnership

Once the Chinese clinic is functioning, we can turn to considerations of setting up its US partner. Ideally, this US component could add a third semester to the Legal Services Clinic I currently direct. This supplemental semester could provide the continuity of vision and commitment to global solutions to local poverty. Developing a wholly separate clinic is also a possibility, but I am limited in terms of clinical resources, and it would lose the importance of highlighting the linkage between local and global poverty. Alternatively, the focus could be a center or institute dedicated to advancing international labor standards. Complicating this picture is the need to balance these ambitious aspirations with the practical considerations of clinical pedagogy and law school priorities.

The efforts, successes and challenges of the Chinese clinic would inform the structure and focus on clinical efforts in the US. Much of this structure is speculative for a number of reasons, some ideological and some pragmatic. On the global level, the structure will depend on what emanates from China, and acknowledge the difficulties of achieving consensus as to the most effective, inclusive and collaborative efforts. While the importance and legitimacy of a labor rights focus is clear, many aspects of the US component are contingent on specific conditions in China.

404 More practically, the nuts and bolts will have to wait as well, and include issues such as how to get the clinic through the curriculum committee and secure faculty approval. The current Legal Services construct is set up already as a two semester experience – the first focusing on skills training and the second serving as the semester in practice. It remains to be seen whether students would be willing to take a third semester of clinic, and would requires a recalibration of the trade offs between skills training and social justice goals. However, packaging the new focus in practical and political terms may enhance its appeal. For instance, since students are exposed to traditional lawyering skills in the practical component of the Legal Services Clinic, the subsequent add-on could be more policy based and as such, implicate the mastery of a different set of skills; perhaps not those envisioned by a narrow conception of lawyering and clinical pedagogy, but certainly contained within the expansive definition of public interest lawyering and the social justice mission of law school clinics. Such a construct would lack many of the benefits of a clinic. However, because it would be less resource intensive and less demanding, it may be able to incorporate more students. Also, visibility outside the skills curriculum serve a number of other goals, including contributing to the overall intellectual climate, and providing an appealing focal point for fundraising. See Stephanie M. Wildman, Democracy and Social Justice: Founding Centers for Social Justice in Law Schools, 55 J. Legal Educ. 252 (2005)

405 Such a construct would lack many of the benefits of a clinic. However, because it would be less resource intensive and less demanding, it may be able to incorporate more students. Also, visibility outside the skills curriculum serve a number of other goals, including contributing to the overall intellectual climate, and providing an appealing focal point for fundraising. See Stephanie M. Wildman, Democracy and Social Justice: Founding Centers for Social Justice in Law Schools, 55 J. Legal Educ. 252 (2005)

406 Carasik, supra note 17, at 26 n.9 (“Clinicians may need to temper their idealism in articulating dramatic social justice objectives with more pragmatic considerations. These include ensuring opportunities to provide training in a reasonable range of lawyering skills, as well as other contingencies, such as the constraints imposed by limitations on institutional resources, loyalty to existing clinical programs, the clinician's own area of expertise, student interest, the opportunities and demand present in the local community, and the challenges and uncertainty of determining the clinic structure most likely to achieve social justice goals.”). Carasik, supra note 17, at 26 n.9 (“Clinicians may need to temper their idealism in articulating dramatic social justice objectives with more pragmatic considerations. These include ensuring opportunities to provide training in a reasonable range of lawyering skills, as well as other contingencies, such as the constraints imposed by limitations on institutional resources, loyalty to existing clinical programs, the clinician's own area of expertise, student interest, the opportunities and demand present in the local community, and the challenges and uncertainty of determining the clinic structure most likely to achieve social justice goals.”).
A broad range of creative advocacy activities are possible for the clinical component at home. The clinic could focus on research and policy based on any combination of issues related to the previously outlined labor rights; engage in lobbying efforts, coalition building between poor constituents and grassroots organizing that exerts pressure on China to bring its worker protection regime into compliance with international standards, both in the law and on the ground; examine the interplay and overlap between and efficacy of voluntary compliance schemes; partner with NGOs to provide litigation, lobbying support, policy analysis, or engage in factfinding and/or monitoring of labor conditions; and search for other ways to support the work of our Chinese colleagues.

The collaborative enterprise would be a two way street, so that while it is possible to speculate about areas in which US clinical advocacy might be helpful, the domestic component would be crystallized only after multiparty dialogue and careful strategic thought. The benefit of integrating US students into this effort is multifaceted. Aside from the concentrated advocacy effort provided by the clinic, US law students will “a new generation of public interest lawyers with a sense of global justice will be trained in international human rights clinics.”

Many factors will influence the focus and efficacy of these efforts. There will undoubtedly be difficulties, frustrations, diverging goals and disappointments. However, advocates must forge alliances that transcend these differences by rejecting old, false dichotomies such as those cleaving divisive lines between the categories of welfare/labor, national/international, and universalist/relativist. There may also be some unanticipated benefits, such as helping to combat the US’s eroded credibility and moral authority based on our own human rights violations. I do not mean to imply that the clinic alone could engender radical changes, but by modeling the transnational possibilities for other clinics and advocates fighting for the protection of workers, it could make a measurable difference.

407 Admittedly, convincing Americans generally, and members of marginalized groups more specifically, to invest any emotional or social capital in campaigns such as the anti-sweatshop movement is a daunting task. See Ruben J. Garcia, Transnationalism as a Social Movement Strategy: Institutions, Actors and International Labor Standards, 10 U.C. DAVIS J. INT’L L. & SOC’L POL’Y 1 (2003).
408 While some of these ideas may be cost prohibitive in the absence of external funding, others are viable even in the absence of additional resources.
409 Alternatively, the US component could advocate for migrant workers in the US…
410 Hurwitz, supra note 7, at 508.
411 Although this proposal envisions modest success, there are examples of clinics undertaking and succeeding in enormously important cases. See, e.g., BRANDT GOLSTEIN, STORMING THE COURT (2005)(recounting the heroic efforts of Yale law students in advocating for Haitian detainees at Guantanamo).
While this clinic proposal and the goals of economic justice it envisions may seem a hopelessly naïve utopianism, the strategic importance of China argues in favor trying rather than conceding defeat. Without doubt, resistance by the Chinese government may present unacceptable risks or erect insurmountable barriers to implementing a social justice clinical collaboration. If that is the case, this proposal provides a template for clinical initiatives in other countries that may be more amenable, or at least less antagonistic, to this type of partnership, and the model of transnational social justice collaborations can be applied elsewhere.

CONCLUSION

In the era of globalization, local politics are now unavoidably, inseparably and irreversibly global, and effective lawyering for marginalized people must include transnational strategies. This proposal strives to integrate the best practices of anti-poverty lawyering and clinical teaching, with a sense that local anti-poverty lawyers are players in a global world. The idea is based on my abiding belief in distributive justice, and that affluence and income disparities in the world should not be held up on the backs of the invisible workers who toil away in obscurity, without equitable compensation or legal protection. While this explicit goal may be controversial for a clinical educator, it is not fundamentally different from other proposals whose embedded normative values are less transparent.

My hope is that the proposal creates a synergy between social justice goals of clinics in China and the US that results in enhanced worker protection. Ideally, the collaboration will makes a measurable impact in the lives of those it touches directly, while contributing to the development of a legal consciousness that galvanizes grassroots mobilizations here and abroad. Lessons learned from this collaboration can be extrapolated and applied to other clinical models seeking to advance international justice. Transnational lawyering strategies to advance workers’ rights can also be enhanced by these efforts.

I do concede a nagging discomfort about this enterprise, characterized by “ambivalent activism, multiple discourses and lingering dilemmas.” In the process of developing a proposal such as this, it is critical to continually reflect on the unsettling questions of what a US clinician can bring to this enterprise, and whether we can shed our own cultural blinders and arrogance. Those engaging in cross-border collaborations should remain “committed to the

412 Peter Rosenblum, Teaching Human Rights: Ambivalent Activism, Multiple Discourses and Lingering Dilemmas, 15 HARV. HUM. RTS. J. 301 (2002) (noting that international human rights advocacy is replete with contradictions that require probing thought)
process but always critically reflective of its context and consequences, but cannot fail to act in the face of injustice, inequality and suffering. Ultimately, I subscribe to a theory of “minimal universalisms,” and despite the doubts, believe that it is important to move forward, trying to juggle the competing and conflicting issues and not to be daunted by the enormous complexities. We cannot afford to delay action until the timing is auspicious and the proposal has been perfected, because conditions are deteriorating for millions of people while we wait. In the end, if we are to be architects for peace and justice, we must start by drafting the blueprints.

413 Hurwitz, supra note 7, at 538.
414 Although justice and income equality are difficult terms to define, it is easier to identify injustice and inequality. Surely it is hard to argue that the current status quo is anything other than manifest injustice.
415 Hurwitz, supra note 7, at 520.
416 Ralph Nader, Corporate Law Firms and the Perversion of Justice: What Public Interest Lawyers Can Do About It, 1 WASH. U. J. L. & POL’Y 53, 60 (1999) (“Lawyers are the architects of justice in our society.”).