

From Empire to Empathy?
Clinical Collaboration Between the Global North and the Global South
– an essay in conversation with Daniel Bonilla –

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I am grateful, first of all, to Daniel Bonilla for his provocative and valuable paper, the rich conversations we had about it when he was visiting at Yale in the spring of 2011, and the great discussion of the paper that he led with the students of the Allard K. Lowenstein International Human Rights Clinic that semester. I am also grateful to my student Paul Linden-Retek for his insights and his patience in guiding me remedially through concepts about which I had only the most inchoate and elementary intuitions. He is officially my student but realistically, in these matters, my mentor. Finally, I want to thank my colleague Steve Wizner for his guidance about the social-justice mission of clinical legal education – when I started teaching thirteen years ago and when I set out to write this paper – and for his model of steadfastness in pursuing this mission.

“Take up the White Man’s burden—
And reap his old reward:
The blame of those ye better
The hate of those ye guard—
The cry of hosts ye humour”
(Ah slowly) to the light:
‘Why brought ye us from bondage,
Our loved Egyptian night?’”

Rudyard Kipling, “The White
Man’s Burden: The United States
& The Philippine Islands”

“‘Cursed is the man who withholds justice from
the alien, the fatherless or the widow.’ Then all
the people shall say, Amen!’”

Deuteronomy 27:19

“Learn to do right! Seek justice, encourage the
oppressed. Defend the cause of the fatherless,
plead the case of the widow.”

Isaiah 1:17

“ . . . send not to know
For whom the bell tolls,
It tolls for thee.”

John Donne, *Devotions Upon Emergent
Occasions, Meditation XVII*

“[The artist] speaks to . . . the subtle but
invincible, conviction of solidarity that knits
together the loneliness of innumerable hearts: to
the solidarity in dreams, in joy, in sorrow, in
aspirations, in illusions, in hope, in fear, which
binds men to each other, which binds together all
humanity – the dead to the living and the living to
the unborn.”

Joseph Conrad, Preface, *The Nigger of
the ‘Narcissus’*

“Show me a prison, show me a jail,
Show me a prisoner whose face has gone pale
And I’ll show you a young man with so many
reasons why
And there but for fortune, may go you or I.”

Phil Ochs, “There but for Fortune”

In his essay, “Legal Clinics in the Global North and South: Between Equality and Subordination,” Daniel Bonilla acknowledges the value of collaboration between law clinics of the Global South and the Global North, particularly the contributions these cooperative efforts can make to promoting more just societies and the skills they can foster in the participating students.¹ The essence of Daniel’s thesis, though, is that North-South clinical collaboration is dominated by a vertical relationship that both reflects and reinforces a relationship of systematic Northern domination that pervades legal academic exchange and the production, control and use of legal knowledge. These collaborative initiatives are examples, then, of a nearly inevitable global neo-colonialism that shapes interactions between the North and South. Daniel summarizes:

. . . [M]any of the exchanges are guided by norms, usually implicit, that do not promote equal relationships between clinics of the Global North and South. Rather, these rules create dynamics of domination and subordination that hinder the fulfillment of the purposes that both clinics are said to pursue.²

Daniel’s paper offers a careful and eloquent analysis of a phenomenon that he and others have directly experienced. His account and the principles it leads to constitute a valuable cautionary and a guide for anyone embarking on the kinds of collaboration he describes. I believe, however, that his analysis is incomplete in important ways and that a fuller account that considers not only structural, but also individualist, explanations of unequal clinic-to-clinic relationships is necessary for understanding and addressing the phenomenon comprehensively. Doing so calls upon us to explore and, ultimately, embrace concepts intertwined with one upon which Daniel’s three proposed normative principles rely but upon which Daniel’s analysis does not focus in the specific context of North-South clinical collaboration: the principle of

¹ Daniel Bonilla, *Legal Clinics in the Global North and South: Between Equality and Subordination – An Essay*, at 1-2.

² *Id.* at 2.

solidarity.³ Taking solidarity – and the fundamentally linked international human rights principle of universality – seriously provides a stronger and more essential base for Daniel’s proposed principles and may suggest additional principles.

I view the approach that I take in this essay as a complement to Daniel’s essay, rather than a critique of it. I want our essays to be in conversation with each other. Therefore, I do not seek to offer a catalogue or scorecard of points in Daniel’s essay that are valid and valuable or those that are susceptible of criticism. My starting point is admiration for the courage and insight that my good friend has brought to the challenges of North-South clinical collaboration. Where I point to elements of his analysis that I find troublesome, it is to suggest limitations to its generalizability and to lay a foundation for alternative explanations or for explanations that might complement Daniel’s. While Daniel’s essay describes three types of clinical cooperation to illustrate his argument – fact-finding missions, consultations to develop law clinics in the Global South, and the joint organization of conferences⁴ – my discussion is based exclusively on collaborative clinical advocacy projects, including fact-finding missions. I believe it is in these projects that the phenomena Daniel describes manifest themselves most powerfully and problematically, and it is where Daniel largely develops his thesis (it is also where my experience has been).

I am a clinical teacher and a human rights advocate. I cannot suppress my advocates’ instincts, so this essay will undoubtedly be more sermon than description and analysis. South-North clinical project collaboration is, to a large extent, an activity of Northern international human rights clinics working with Southern clinics that are addressing human rights violations

³ See *Id.* at 3 and 27.

⁴ See *Id.* at 16-24.

and potential violations that are, for them, domestic.⁵ The very term “international human rights clinic” denotes the joining of two sets of values and traditions: those of human rights and those of clinical legal education. I will argue that these two streams of ideology flow together to insist upon an imperative of empathy that must guide South-North clinical collaboration in human rights advocacy efforts. Deviations from this imperative unavoidably entail, in the complex gestalt of their causes, the classic neo-colonial structures of subordination that Daniel identifies – I take it as a given that persistent elements of empire, colony, slavery, racism and exploitation inhabit each of our individual psyches and North-South relationships of all kinds – but these deviations are, at their core, individual failures of empathy.

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The great contributions of Daniel’s paper are its description of a phenomenon within the diverse constellation of South-North legal academic cooperation, its taxonomy of the three specific forms of domination and subordination that infect such cooperative projects, and the three guiding principles it proposes to counteract patterns of domination and subordination in cooperative ventures. The paper offers a rich explanatory theory of a problem that Daniel and others have experienced first hand. But the problem does not capture the entire reality of North-South clinical cooperation, and Daniel’s explanatory account is neither a full account of the problem nor the only explanation that fits his description of the problem. Daniel acknowledges this.

⁵ Daniel’s paper, particularly in addressing the two other forms of cooperation, Northern consultation with Southern law schools on the development of clinics and the organization of transnational conferences, notes that North-South clinical cooperation often involves Northern clinical faculty who are engaged in more traditional local legal services and advocacy. The differences between the orientation and experiences of faculty whose starting point is international human rights and the orientation and experiences of faculty whose starting point is local legal services in U.S. communities very likely result in different dynamics of cooperation. My paper addresses only project-based collaboration involving North-based international human rights clinics, and my analysis relies on the centrality of the human rights principle of universality to the goals and methods of human rights clinical advocacy and pedagogy.

I am not claiming that these theses describe all Global North – Global South clinical projects. I am not saying that there are no projects where the clinics in the North and the South work as equal partners. These ideas attempt to make explicit the theoretical and practical tensions that I have seen in many Global North – Global South clinical projects. They also aim to contribute to an open discussion of the problems that I have seen talked about informally by clinical professors both in the North and the South. . . . There are, of course, other interpretations of these dynamics.⁶

I want to take up Daniel’s implicit invitation to offer alternative interpretations of the dynamics he describes. But what I propose is not simply an alternative interpretation of those dynamics. It is also an attempt to do what Daniel’s paper does not do: come to serious grips with the experiences that do not fit his account and consider how those “projects where the clinics in the North and the South work as equal partners” may, in fact, shed light on our understanding of those projects that do manifest Northern domination and Southern subordination.

As I said, Daniel provides a persuasive explanatory account of a phenomenon that he and others have experienced – and experienced with the sting of Northern condescension. However, the experiences that generate his analysis constitute a limited sample of the universe of North-South clinical cooperation. This sometimes results in general observations that lack the evidence necessary to sustain them. For example, the paper exaggerates the extent to which South-North cooperative initiatives are susceptible of a tendency to lump, without regard for critical variations among and within them, all law schools of the North, on one hand, and all law schools of the South, on the other.⁷ Daniel’s claims are theoretical, not empirical, and, as he says, “the plausibility of [his] narrative, thus, depends on how much it resonates with other members of the practice.”⁸ How much it resonates with others will, in turn, depend on where in the complex

⁶ Bonilla at 4.

⁷ *Id.* at 10-12.

⁸ *Id.* at 4. The paper further states: “No doubt, we must conduct further empirical research on the dynamics governing clinical projects of North/South cooperation. However, this study does not attempt a quantitative review

landscape of South-North clinical collaboration those others' practices lie and the extent to which their experience falls within the category of project-based relationships Daniel describes or among those others that he recognizes may not fit the pattern.

My point of departure – the fork in the road where Daniel and I start along different paths – is precisely the importance of taking seriously the counter-examples that Daniel does not explore. Those “projects where the clinics in the North and the South work as equal partners” do not refute Daniel’s theory of subordination and domination, but they suggest, at least, that something more is going on and that the structural realities that Daniel observes do not lead inescapably to vertical collaborative relationships. They point to a need to understand what the counter-examples mean and what distinguishes those projects that reflect the classic North-South verticality from those that proceed on a basis of equality. They suggest that Daniel’s three arguments, which he names the arguments of “the well of production,” “protected designation of origin” and “the effective operator,”⁹ may function more as factors in a complex web of factors than as nearly omnipotent structural determinants of North-South clinical relationships.

Daniel asserts that fact-finding reports are, although useful “in the abstract,” deeply and inherently flawed and, practically, of limited effectiveness.¹⁰ He writes that these reports only synthesize local knowledge; they can generate no new knowledge of local circumstances affecting human rights. Taken one way, this seems indisputable: If, by local knowledge, we mean local people’s knowledge of their own experience, then gathering testimony about that experience necessarily involves collecting local knowledge. But Daniel is talking about a more specific meaning of local knowledge, “local academic knowledge”: the collection, analysis and

of the object of study. As an individual immersed in a practice, I construct an interpretation of the dynamics that characterize it and offer the causes that I think explain them.”

⁹ *Id.* at 7-10.

¹⁰ *Id.* at 16-19.

understanding of experience by local legal elites.¹¹ This raises a number of concerns. It suggests that the publication of human rights reports simply takes pre-existing knowledge and publishes it for a foreign or transnational audience. However, even if it were true that such reports only synthesize local knowledge, this is not itself a compelling criticism. This is what the classic human rights fact-finding report does: It brings together knowledge from diverse relevant sources and makes it into a compelling and reliable story, analyzed by the standards of human rights, to use for advocacy by bringing the facts and the issues to the attention of various audiences with potential to influence policies and practices affecting peoples' ability to exercise their human rights. Local knowledge may be fragmented, diffuse, diverse, and not systematically assembled locally to represent a particular issue. Furthermore, there may be obstacles to local researchers investigating and documenting local issues.

If, however, we take the second meaning, the local knowledge amassed by local scholars, then we must be concerned about where we draw the boundaries between North and South. The Northern and Southern collaborators undoubtedly have more in common with each other – socioeconomically, educationally, ideologically – than the legal academics of the Global South have in common with the vulnerable populations in their countries whose human rights concerns are at stake in the collaborative clinical enterprise. There are, to be sure, disparities between Southern and Northern academics and their approaches and expertise, but they manifest themselves to a greater or lesser extent depending on the issues, contexts and areas of law at stake. A well-designed project of cooperation would comprehend differences and take advantage of the understandably varied strengths of the cooperating parties. Failures to

¹¹ *Id.* at 17-18.

cooperate on a basis of equality, then, as Daniel himself suggests in passing, are not structural¹² but a failure of design in the particular, the individual instance.

Daniel recognizes aspects of North-South clinical collaboration on advocacy reports that can contribute to social justice. In particular, bringing the resources of Northern law schools, including financial resources, student and faculty time and effort, and access to influential political elites in Northern countries, can increase the effective attention devoted to a human rights issue. To some extent, using resources to gain greater leverage for achieving progressive social change provides a benign explanation of some of the dynamic Daniel describes. But Daniel argues that often these resources could be put to uses that would make more significant contributions to social justice. Without empirical evidence – or any clear potential for developing it – this argument is purely speculative and is not about clinical collaboration as much as it is about the central human rights advocacy model generally. Furthermore, money is not always truly fungible. Clinics exist in law schools and receive budgets to educate the law schools' students, not to solve the world's problems based on some objectively determined priorities. This complicates the relationship between the social-justice and pedagogical goals of clinical education generally and clinical collaboration specifically.

The tension between the goal of social justice and pedagogical goals is inherent in clinical human rights work. A third goal that Daniel identifies, self-interest, is also in tension with the goal of social justice, but this tension is not similarly inherent in the enterprise of clinical collaboration. Daniel asserts that in actual South-North collaborative projects, the goal of social justice is subordinated to pedagogical goals and the career-advancement goals of Northern faculty.¹³ Placing individual professional advancement on the same plane as pedagogy

¹² *Id.* at 19, n.91

¹³ *Id.* at 24-25, 26.

in shaping clinical collaboration is, however, problematic. We can easily justify the place of pedagogical concerns in clinical-project design. While we can accept professional advancement as a secondary benefit of project work, it would be impossible to construct an argument for making it a legitimate primary goal that could trump or even appreciably counterbalance either social-justice or pedagogical goals. It is a matter of raw self-interest, and self-interest knows no geographical boundaries. It can assert itself in projects of South-South or North-North collaboration as easily as it can in projects of North-South collaboration.¹⁴ Self-interest operates powerfully whether we seek to understand it in psychological or philosophical terms, and geography is an insignificant factor in nurturing or constraining it. To understand more fully failures of cooperation, we must explore not only the factor of an enduring structural North-South dynamic, but also the factor of individual outlook, individual differences in one's perspective on the relationship between the self and the world or "the other."

From this perspective, then, the focal issue is that Daniel's paper suggests, at least, that the North-South structural explanation of failures of equality in North-South clinical collaboration is adequate and complete while the factor of self-interest that Daniel observes tells us that a full understanding of such failures requires us to look at the individual dimension. How we understand unbalanced cooperative relationships affects how we respond to them. Ensuring equality in South-North collaboration requires us to think about how individual deviation from norms that, I want to argue, are inherent in international human rights clinical education may account for failures of cooperation. In the relationship that constitutes any single North-South clinical collaboration, it may be difficult to ascertain the broad theoretical construct of North-

¹⁴ This is a good point at which to reiterate the inevitable but varying role of a historical North-South hierarchy in forming the attitudes of individual actors from the North and the South. I do not want to suggest that any of us, whether from the North or from the South, is free of predispositions that likely affect the ways in which we seek to realize our interests, our tendencies to use some relationships to advance them more readily than we use others.

South institutional dynamics at play. Rather, we will see a complex web of factors specific to the particular relationship. It may include memories or vestiges or reverberations of North-South domination and subordination, but that verticality is now a matter of the individual psyche and, like the racism and sexism within us all, mediated in every individual by her own complex constellation of attitudes, insecurities, commitments and interests. The historical North-South structural relationship is part of who we are and operates more as a matter of individual psychology than as a set of governing social rules, and we need to address it on those terms. That may mean that it is not significantly at play in some South-North relationships, where circumstances, including the personalities, experiences and ambitions of the clinical faculty involved, erase or even reverse the direction of subordination.

To have a more complete understanding of the dynamics of South-North clinical cooperation, we need to understand what happens both when collaborative projects fail and when they work. Our understanding of projects that succeed in operating on a basis of equality and mutuality emerges from understanding how principles of human rights and of clinical education converge. When Daniel acknowledges that cooperative work between clinics of the North and South is desirable because they reflect and support the principle of solidarity,¹⁵ he is gesturing toward this essential conjunction. But he does not explore the internal logic and the demands that the principle of solidarity creates for clinical cooperation to advance human rights. This conjunction produces the imperative of empathy that the rest of this essay will discuss.

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The enduring commitment of clinical legal education to advancing social justice – and to teaching and work that instills in students a commitment to social justice – comes together in human rights clinical education with the universalism of human rights to create an imperative of

¹⁵ Bonilla at 3.

empathy. This is an imperative not only for the advocacy approach in which we indoctrinate our students but also for the entire enterprise of international human rights clinical education, including cooperation among clinics.

Daniel shortchanges the nature and value of clinical projects when he states that cooperative projects can, in addition to contributing to more just societies, “allow students to develop the clinical skills that are essential to performing effectively in professional practice, such as drafting legal documents and interviewing witnesses.”¹⁶ Although an emphasis on skills training has accompanied the institutionalization of clinical education at law schools of the North,¹⁷ an inspirational purpose has remained at the center of the clinical legal education mission. The literature on clinical education has discussed at great length and since the early days of the “clinical education movement” the centrality of the principle that “the public interest requires law students to learn they have a social and professional responsibility to challenge injustice and to pursue social justice in society.”¹⁸ There is no need to rehearse that rich discourse here. A few samples, though, will suggest the essence of this commitment and provide a base from which to think about its meaning and evolution.

My colleague Steve Wizner has written often and eloquently about the law clinic’s duty to instill a commitment of justice in law students.

We need to profess a social, political and moral agenda in our teaching, an agenda that exposes students to the maldistribution of wealth, power and rights in society, and that seeks to inculcate in them a sense of their own ability and responsibility for using law to challenge injustice by assisting the poor and the powerless.¹⁹

¹⁶ *Id.* at 2.

¹⁷ See, e.g., Deena Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505, 524 (2002).

¹⁸ Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70- FORDHAM L. REV. 1929 (2002), <http://ir.lawnet.fordham.edu/flrl/vol70/iss5/29>.

¹⁹ Stephen Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 331 (2001). Wizner quotes Jane Aiken to sharpen the distinction between mere skills teaching and the values component of clinical education:

With my former colleague, Bob Solomon, Steve has emphasized the inherently moral and political nature of the clinical ethos, writing that “law school clinics should inculcate in students the professional value of representing the poor and powerless in asserting their rights against the rich and powerful.”²⁰ The omnipresence of words like “inculcate” and “instill” in the clinical literature leaves no doubt about the centrality of social-consciousness inspiration to the clinical mission.

In her important article on the place of international human rights clinics in the future of legal education, another former colleague Deena Hurwitz underscores this inspirational purpose that emerged with clinical education’s origins in direct legal representation. She wrote that “in international human rights we find an extraordinary vehicle for the original social justice mission of clinical legal education.”²¹ She goes on to explore the diverse practice of international human rights advocacy and to demonstrate how this practice ideally lends itself to accomplishing all of the purposes of clinical education, including the social-justice purpose, despite differences between human rights practice and traditional local lawyering for social justice.

When clinical legal educators invoke the social-justice mission of their work, they generally further invoke one or more of a cluster of words: compassion, sympathy and empathy. For example,

In order to increase the number of law school graduates who embrace a professional responsibility to assure access to justice for the poor, *clinicians must strive to inculcate in their students an understanding and compassionate concern*

If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.

Jane Harris Aiken, *Striving to Teach “Justice, Fairness and Morality,”* 4 CLIN. L. REV. 1, 6 n.10 (1997)

²⁰ Stephen Wizner and Robert Solomon, *Law as Politics: A Response to Adam Babich*, 11 CLIN. L. REV. 473, 476-77 (2005).

²¹ Hurwitz at 508. Hurwitz provides a useful survey of the history and evolution of the social-justice goal of clinical education. See *Id.* at 523-26.

for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice.²²

These terms appear to occur in the literature largely interchangeably and connote a constellation of emotions, attitudes, capacities and skills necessary to social-justice lawyering.²³ Deena acknowledges and elaborates on the need for this constellation to play a role in the international human rights lawyering that human rights clinics teach.

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

In the social justice context, the skill of *compassion* is the ability to appreciate that we operate with only a partial perspective and to recognize that many of us, law students and practicing attorneys, have privileges – most of them not earned through any personal effort on our part – which color our perceptions both of the client and the legal claim.

Empathic lawyering is fundamentally engaged and requires an ability to overcome one's own needs and limitations of perspective to experience the world as others do. More than intellectual curiosity, *empathetic* lawyering requires *sympathetic* identification and knowledge of others' experiences.²⁴

Again, terms of empathy, compassion and sympathy are used more or less interchangeably, and in the clinical context, they are presented as primarily a skill.

There is, ironically, a risk in invoking a capacity for compassion, empathy and sympathy. The requirement that students develop and learn how to use the skills of compassion or empathy

²² Stephen Wizner and Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997, 1011 (2004) (emphasis added).

²³ The work of Sue Bryant and Jean Koh Peters on the "Five Habits for Cross-Cultural Lawyering" urges lawyers to adopt a series of habits, "awareness, knowledge, and skills that enhance the lawyers' and clients' capacities to form meaningful relationships and to communicate accurately." Sue Bryant and Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in *RACE, CULTURE, PSYCHOLOGY, & LAW*, Kimberly Holt Barrett and William H. George, eds. 47 (2005). One might think of the habits as providing practical content – "awareness, knowledge, and skills" – to the concepts of compassion and empathy that the clinical literature more broadly calls on teachers to instill in their students.

²⁴ Hurwitz at 522-23 (internal citation omitted) (emphasis added).

to deal with, in the original language of clinical education, clients who are poor or, in broader terms, clients who are vulnerable or repressed or at the margins of society can come close to sounding like a kind of *noblesse oblige* for the legal profession, a duty of responsibility for those to be anointed part of the legal elite toward those less fortunate. Steve Wizner quotes William Pincus, the successful early crusader for clinical legal services for the poor in the late 60s; the language Pincus used to describe the impact clinical education can have on students hints at the way the call for law students' development of sensitivity to the concerns of the poor can be read as a form of *noblesse oblige*.

[Clinical education] can develop in the future lawyer a sensitivity to malfunctioning and injustice in the machinery of justice and the other arrangements of society . . . [and can enable students] to learn to recognize what is wrong with the society around [them] – particularly what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.²⁵

To the extent the invocation of compassion, sympathy, sensitivity to “what is wrong with the society around [future lawyers],” and a “special responsibility” for the workings of the legal system resonates with the ethical muddle of *noblesse oblige*, it tends to throw consideration of North-South legal cooperation directly into the troubling structure of Northern domination and Southern subordination.

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The antidote to the instinct toward the lawyer's *noblesse oblige* lies in a notion of solidarity. In this paper, I use “solidarity,” a term that is put to many different uses, to refer to a sense that a core of feelings, needs and interests common to all people entails a sense of shared

²⁵ William Pincus, *Educational Values in Clinical Experience for Law Students*, COUNCIL LEGAL EDUC. FOR PROF. RESP. NEWSL., Sept. 1969, at 31-2, *reprinted in* COUNCIL FOR LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY NEWSLETTERS 1969-72, at 31-2, *quoted in* Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, *supra* note 17, at 1934, n.24 (brackets in original).

and linked destiny and, thus, a duty of reciprocity to all people. Steve Wizner pushes the usual demand of compassion toward a requirement of solidarity when he writes:

Assuming the role of advocate, under proper supervision by a clinical teacher, can change a student's perspective about her client and the world in which her client lives. It can even transform the student's view of the world and lead her to identify with her client and with others like her client. Serving as an advocate on behalf of a low-income client under good supervision can deepen the student's understanding and compassion, and cause her to affirm the common humanity she shares with her client and with others in her client's position.²⁶

One can debate the boundaries of our common humanity, but the radical fact that binds each of us to every other is our mortality and, more important, our human knowledge that the end of material life is our common fate.

Václav Havel's writings, an introduction to which has been a great gift to me from my student Paul Linden-Retek, offer insight into why non-self-interested regard for others is part of human reality. Havel wrote, "[We] all share a common isolation, the isolation of humanity thrown into the world, [an isolation that] injures us in the same way, regardless of who, concretely, appears to be injured in a given instant."²⁷ Our solidarity lies in our common isolation and injury. It impels us toward identification with the Other.

The vulnerability of another person, therefore, touches us not only because in it we recognize our own vulnerability This cry from the depths of another's fate arouses and excites us, mobilizes our longing to transcend our own subjectivity . . . – we suddenly find ourselves compelled to identify with Being, and we fall into our own responsibility.²⁸

If in others' vulnerability, we not only see our own, but "identify with Being," and thus "fall into our own responsibility," we are not moved finally to solidarity by recognition, we do not find solidarity prescribed by recognition; rather, it is innate in us. Havel wrote, "Responsibility for others is something primal and vitally important . . . by virtue of which we transcend ourselves

²⁶ Wizner, *Beyond Skills Training*, *supra* note 19, at 328.

²⁷ Václav Havel, *LETTERS TO OLGA* (1988) at 323,

²⁸ *Id.* at 324.

from the beginning.”²⁹ Similarly, Joseph Conrad’s evocation of solidarity captures its descriptive, rather than normative, significance. He wrote of “the subtle but invincible, conviction of solidarity that knits together the loneliness of innumerable hearts: to the solidarity in dreams, in joy, in sorrow, in aspirations, in illusions, in hope, in fear, which binds men to each other, which binds together all humanity – the dead to the living and the living to the unborn.”³⁰ This “conviction of solidarity” connects us to the category of the “human” and thus to the essential principle of international human rights, universality.

If human rights are not universal, if they do not belong to all people solely because they are humans, they cannot function as rights, available to all to invoke as a demand for justice. I do not want to wade into the murky marsh of debate about the sources of human rights and the extent to which claims of universality are justified. As an advocate, I take the universality of human rights as a necessity for the efficacy of human rights as a tool for achieving social justice. Without the principle of universality, human rights cannot be a legitimate source of legal demands or of people’s or movements’ political demands for justice. The extent to which there is global consensus that any particular right is universal is an issue that calls for further discourse. Nevertheless, the principle of universality derives directly from the fact of solidarity. And just as the full extent of what all humans have in common is indeterminate, the full extent of rights to which we can ascribe universality remains unsettled. In understanding the content of universality as a dynamic and troubled matter, Makau Mutua has cogently defined the problem and laid out the course for a project of true universalization of human rights:

The universalization of human rights cannot succeed unless the corpus [of human rights] is moored in all the cultures of the world. Ideas do not become universal

²⁹ *Id.* at 322.

³⁰ Joseph Conrad, *Preface*, THE NIGGER OF THE ‘NARCISSUS’ (1897), <http://www.gutenberg.org/files/17731/17731-h/17731-h.htm>. I am grateful to Stephen Ackley-Ortiz for pointing me to Conrad’s Preface.

merely because powerful interests declare them to be so. Inclusion not exclusion is the key to legitimacy.³¹

While criticizing the Western presumption of universality claims for the current corpus of human rights, Mutua does not reject the value of universality as a principle underlying human rights as a set of norms and political arrangements aimed at “the reduction, if not the elimination, of conditions that perpetuate human indignity, violence, poverty, and powerlessness.”³² He puts the notion of universality in a more complex context than the one that tends to be comfortably accepted by actors brought up within the human rights tradition.

Just over half a century after the Universal Declaration of Human Rights laid the foundation for the human rights movement, diverse peoples have embraced those ideas across the earth. That fact is undeniable. But it is only part of the story. Those same people who have embraced that corpus also seek to contribute to it, at times by radically reformulating it, at others by tinkering at the margins.³³

Mutua’s critique of human rights universality claims is consistent with Daniel’s analysis of a pervasive Northern domination of clinical human rights collaboration. Both have at their core a Northern arrogance, what Makau refers to in this chapter and elsewhere as “the pathology of the savior mentality.”³⁴ Whether one accepts claims of the established universality of human rights or, with Mutua, views universality as a goal to be achieved through an inclusive global discourse, universality is an essential principle of human rights that not only provides the grounds for demands for justice, but also must guide the work of advocates.

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³¹ Makau Mutua, *The Complexity of Universalism in Human Rights*, in András Sajó (ed.) *HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* (2004) 51, 63. Mutua argues for an inclusive process of global conversation to achieve universalization of a “new corpus [that] must discard the false premises of the current corpus and reject its excesses, while building on those of its notions which have the potential for genuine universality.” *Id.* at 64.

³² *Id.* at 57.

³³ *Id.* at 54.

³⁴ *See, e.g., Id.* at 58.

Solidarity is a fact, the reality of human life and its inevitable boundary. Universality is the legal embodiment of the fact of solidarity, necessary to make rights susceptible of justice claims and consistent protection across arbitrary divisions. In the conduct of human rights clinics, with solidarity the fact that generates clinical education's commitment to social justice and universality the principle that makes rights rights, empathy is the inevitable offspring, the required governing attitude for all interaction with others. At the confluence of solidarity and universality is the imperative of empathy. Is empathy any more of an imperative in the human rights clinic than in the more traditional legal services clinic? The centrality to human rights of the principle of universality adds a dimension to the clinical commitment to social justice: It necessarily entails knowledge of solidarity and the mutuality of regard it demands.³⁵

Empathy requires something of us. It involves *seeking* to identify with other peoples' conditions, to understand those conditions from the others' perspectives. The expression of this responsibility toward the other as an imperative of empathy has ancient roots. The Old Testament contains many references to the duty to protect, defend or support the widow, the orphan, the poor, and the stranger. These references are in the language of duty and even of law:

“When thou gatherest the grapes of thy vineyard, thou shalt not glean it afterward: it shall be for the stranger, for the fatherless, and for the widow.”³⁶

“Cursed is the man who withholds justice from the alien, the fatherless or the widow.”³⁷

³⁵ This may suggest that we should subject North-South clinical human rights collaboration to higher expectations of equality than the expectations we might have for other forms of clinical collaboration. Although Daniel separates various forms of cooperation and has a special focus on collaborative human rights fact-finding missions, his analysis lumps together cooperative efforts that involve human rights clinicians of the North and efforts that involve Northern clinicians whose work addresses local problems. The imperative of empathy, especially when combined with human rights clinical teachers' interest in and experience with international matters and working across cultures, would lead to a greater expectation of equality in North-South cooperative human rights clinical relationships.

³⁶ DEUTERONOMY 24:21.

³⁷ DEUTERONOMY 27:19.

“Learn to do right! Seek justice, encourage the oppressed. Defend the cause of the fatherless, plead the case of the widow.”³⁸

Moses’ command to the Israelites as he redelivered the ten commandments, “Remember that *you* were slaves in Egypt, so be careful to obey these decrees,”³⁹ is a radical statement of solidarity and the imperative of empathy.

Empathy requires effort, but it also requires the knowledge that the effort always fails. The identification with the other that is empathy’s object is, at best, partially achievable, because we can never fully know and experience the other within her complex intersecting layers of circumstance. Empathy, as an inevitably failed effort at identification with the other, carries with it a component of humility, a recognition that we are ultimately incapable of totally occupying the place of the other. But empathy relies on the effort to do so, not on the ultimate success of that effort. The real-world work of a human rights clinic forces the abstract universal of principle, of all human beings, of Being, to merge with the particular of a specific individual or group in a way that demands the effort to put oneself in the place of the other and the humility to know that identification will, at best, be partial. But we can move asymptotically toward identification. As Samuel Beckett wrote, “Ever tried. Ever failed. No matter. Try Again. Fail again. Fail better.”⁴⁰ That is the imperative of empathy. To act without making the effort is dangerous. To act without humility is more dangerous.⁴¹

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Daniel’s three principles, “mutual recognition, consensus in establishing, interpreting and transforming the rules that guide the project, and prioritizing the social justice objective over

³⁸ ISAIAH 1:17.

³⁹ DEUTERONOMY 16:12 (emphasis added).

⁴⁰ Samuel Beckett, *Worstward Ho* (1983) at 7.

⁴¹ The requirement of humility resonates with Makau Mutua’s critique of universality and, in particular, his rejection of the “savior mentality.” His call for realizing universality through inclusive, respectful discourse is, in fact, consistent with a notion of universality based on solidarity.

purposes of professional development and educational growth,”⁴² find a stronger foundation in the understanding of solidarity and the imperative of empathy that derive from the universality principle of human rights and the social-justice commitment of clinical education. Also, empathy, in its effort to identify with the other and in its humility, can help elaborate Daniel’s principles and suggest others. Northern clinical teachers collaborating with Southern counterparts in advocacy projects addressing Southern local human rights issues should listen to and take their lead from the needs of local actors. So should Southern clinical teachers, who have a North-South relationship with the people on whose behalf they seek to advocate; this relationship, too, should be guided by empathy. Fact-finding projects should focus on narrow issues for which necessarily brief collaborative investigative missions can obtain useful information and avoid Northern appropriation of Southern knowledge. The three motives Daniel identifies for clinical cooperation, advancing social justice, educating students and clinical teachers’ professional advancement, must be assigned appropriate priorities. Where selecting projects requires choosing among many possibilities, all of which have potential to similarly advance social justice, the selection should respect the teacher’s duty to educate students and, thus, consider pedagogical criteria. Once a project is chosen, implementation should be guided primarily by constant assessment of what will achieve the best possible social-justice result. The professional advancement of teachers should be a by-product of principled decisions about pedagogy and increasing social justice and should never enter into those decisions. Following the imperative of empathy will ensure at least one result: Judgments about advancing social justice and teaching and inspiring students to advance social justice will vanquish pure self-interest.

⁴² Bonilla at 28.

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Daniel accounts for a reality or part of a reality, not *the* reality. It invites further reflection to help us understand why some instances of South-North clinical collaboration appear to overcome the dynamic of domination and subordination that Daniel has observed. Daniel acknowledges that some collaborative projects involve clinics of the South and North working as equal partners, and he uses words like “often” and “many” and “much” when he describes the domination-subordination dynamic. But the structural nature of his analysis suggests a story of “usually” and “most” – an inexorable process along a path to inequality. To take the exceptions to the dynamic of Northern domination and Southern subordination seriously requires us to understand what enables them. Joining the human rights principle of universality with the commitment of clinical education to inspire students to use law to pursue social justice pushes the fact of solidarity to the heart of the international human rights clinical enterprise and imposes on its practitioners an imperative of empathy. When we fail to act according to the imperative of empathy, we ultimately fail as individuals, affected by our complex individual constellations of attitudes, ego, interests, beliefs, strengths and weaknesses, including, yes, our place in the North-South dynamic. Without considering the role of the imperative of empathy and the human capacity to embrace it, we risk giving into a powerful tyranny of geographic and historical determinism.