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## Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China

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# Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China

Michael William Dowdle

## **Abstract**

This Essay uses the experiences of international efforts to promote clinical legal aid in China to explore one such unexpected consequence of globalization: international assistance's understandable focus on more familiar kinds of legal aid institutions and activities can unintentionally impede the development of indigenous legal aid practices and institutions that might ultimately be better suited for the particular domestic environment. Part I of this essay will discuss international efforts to promote clinical legal aid in China, Part II will discuss reductive strategies for promoting legal development and the problems they present, Part III will discuss pragmatic strategies for promoting legal development and Part IV will provide an example from China to demonstrate the superior catalyzing potential inherent in pragmatic developmental strategies. The essay concludes that international development projects need to shift their focus from one of simply replicating successful foreign models (what we will call a reductive strategy) to one of promoting discovery of the indigenous developmental implications and possibilities inherent in the domestic environment (what we will call a pragmatic strategy).

# PRESERVING INDIGENOUS PARADIGMS IN AN AGE OF GLOBALIZATION: PRAGMATIC STRATEGIES FOR THE DEVELOPMENT OF CLINICAL LEGAL AID IN CHINA

*Michael William Dowdle\**

## INTRODUCTION

Globalization<sup>1</sup> affects access to justice in many ways. Many of these ways are positive. For example, globalization facilitates the formation of transnational communities that can promote access to justice more effectively than can national communities. Globalization also makes it easier for domestic actors seeking to promote domestic access to justice to learn about successful experiences abroad that might be useful to their cause.<sup>2</sup>

But globalization can also inhibit access to justice and can do so in unexpected ways. This Essay uses the experiences of international efforts to promote clinical legal aid in China to explore one such unexpected consequence of globalization: international assistance's understandable focus on more familiar kinds of legal aid institutions and activities can unintentionally impede the development of indigenous legal aid practices and institutions that might ultimately be better suited for the particular domestic environment. In order to avoid this dynamic, international development projects need to shift their focus from one of simply replicating successful foreign models (what we will call a reductive strategy) to one of promoting discovery of the indigenous developmental implications and possibilities inherent in

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1. "Globalization" refers to the trend in which various aspects of social life that have traditionally been bounded by sovereign borders are increasingly subject to transnational influences, due to the increasingly robust development of transnational economic and intellectual networks. In contrast to the influences of "internationalization," which describes the trend wherein issues that have been traditionally regulated domestically are increasingly delegated to regulation through public international law, the influences of globalization are not formally regulated, and we are just beginning to chart their effect on the development and efficacy of domestic legal systems.

2. Symposium: *Effect of Globalization*, 24 FORDHAM INT'L L.J. S277 (2000) [hereinafter CONFERENCE].

the domestic environment (what we will call a pragmatic strategy).

### I. INTERNATIONAL EFFORTS TO PROMOTE CLINICAL LEGAL AID IN CHINA

The inadvertent, suppressive effects of international development programs are readily evident in international efforts to promote the development of clinical legal aid programs in China. To date, these efforts have focused overwhelmingly on two institutions. One is the Wuhan University Center for the Protection of the Rights of Disadvantaged Citizens ("Wuhan Center"), the first institution in China to employ the basic structure and practices used by civil-liberties-focused clinical programs in American law schools (indeed, the Wuhan Center was designed from American clinical models). The other is the Center for Women's Law Studies and Legal Services of Peking University (the "Beida Center"), another American-style center that attracted much American interest in the months leading up to President Clinton's historic visit to China in the summer of 1998.<sup>3</sup> By common measures, both these centers enjoy considerable success.<sup>4</sup> The Wuhan Center wins some 60% of the administrative litigation suits (*i.e.*, suits brought by common citizens against governmental actors for violation of legally protected

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3. See Aubrey McCutcheon, *Contributing to Legal Reform in China*, in THE FORD FOUNDATION, MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 159, 183-85 (Mary McClymont & Stephen Golub eds., 2000) [hereinafter FORD FOUNDATION]. It should be noted that the Ford Foundation has underwritten many diverse projects related to legal aid and access to justice in China, many if not most of which are not vulnerable to the particular criticisms articulated in this Essay. See generally *id.* But insofar as clinical (school-based) legal aid is concerned, these two centers have received the lion's share of international resources and attention. See, e.g., Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L. J. 211 (1999); Qizhi LUO, *Legal Aid Practices in the PRC in the 1990s — Dynamics, Content and Implications*, 1997 OCCASIONAL PAPERS / REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES 1; Elisabeth Rosenthal, *First Lady Visits Center For Women and the Law*, N.Y. TIMES, June 29, 1998, at A8. No other clinical legal aid project in China has received significant attention from the academic community or popular press. See, e.g., Patrick Randolph, *Letter from Beijing /3: Legal Aid Clinic In Shanghai*, (visited June 16, 1999) <<http://www.helpcom.net/commentary/china3.htm>> (on file with the author) (suggesting that "aside from the Ford funded Women's Law Center here at Beida, the answer was that there was no formal legal aid in China.").

4. See also Liebman, *supra* note 3, at 234, 236.

civil rights) it supports—30% above the national average.<sup>5</sup> The Beida Center wins a similarly-striking number of its cases.<sup>6</sup>

But while these clinics have been successful in winning cases, they have not been particularly successful in promoting clinical legal education in China. Neither the Wuhan Center nor the Beida Center has inspired indigenous domestic imitators.<sup>7</sup> In fact, both these centers seem to be much more embedded in the international legal education communities than in China's domestic legal education communities.<sup>8</sup> Interviews with numerous observers of, and participants in, these two centers suggest that these centers and their donor-supporters have focused their energies primarily on developing institutional linkages with experts and institutions in the American legal environment.<sup>9</sup> This is probably because it is this environment that provides both the developmental paradigm used by these centers and the large funding necessary to support this paradigm in China.

Indeed, some evidence suggests that these two centers may be actually discouraging rather than catalyzing the development of rights-focused law clinics in Chinese universities. In China, these centers are known not only for their litigious success, but also for their extraordinary access to international developmen-

5. Interview with Wan Xiang, Founder and Director of the Wuhan Center, in Wuhan (May 1997).

6. Interview with Wang Jianmei, Director of the Beida Center, in Beijing (May 1997).

7. A center modeled after the Wuhan University Center for the Protection of the Rights of Disadvantaged Children ("Wuhan Center") was established in Jiangxi province. But this center was established with strong assistance from the Wuhan Center, and was intended to help the Wuhan Center handle the many requests for assistance it gets from Jiangxi. See Liebman, *supra* note 3, at 236 n. 226. Thus, it is more along the lines of a branch office of the Wuhan Center than a true case of inter-organizational diffusion of innovation. Huadong University in Shanghai has recently sought to set up a similar, Western-style clinical program, but with significant aid and encouragement from the Ford Foundation. See Randolph, *supra* note 3.

8. Failure to be embedded in domestic networks severely limits an institution's capacity to affect environmental change. See Matthew S. Kraatz, *Learning by Association? Interorganizational Networks and Adaption to Environmental Change*, 6 ACAD. OF MGMT. J. 621 (1998); L. J. O'Toole, Jr., *Implementing Public Innovation in Network Settings*, 29 ADMIN. & SOC'Y 115 (1997).

9. This observation stems from the author's work with the Center for Women's Law Studies and Legal Services of Peking University ("Beida Center") during the Fall of 1996 and Spring of 1997, as well as from the author's visit to the Wuhan Center in May of 1997. A similar observation has been articulated by persons in the Legal Aid Research Center of the Ministry of Justice ("MOJ").

tal assistance—access that the vast majority of other Chinese law faculties simply cannot hope to have. A number of instances have been reported in which law professors and faculties might have been open to developing clinical programs except for the fact that they lacked what they perceived as the necessary relationship with the international donor community.<sup>10</sup>

## II. REDUCTIVE STRATEGIES FOR PROMOTING LEGAL DEVELOPMENT AND THE PROBLEMS THAT THEY PRESENT

The international efforts to develop clinical legal education in China discussed above pursue what we might call a “reductive” strategy of development, meaning a developmental strategy in which we know at the commencement of the developmental process what the institution being “developed” should look like after that development is completed.<sup>11</sup> Both the Wuhan Center and the Beida Center, at the outset, were conceived as traditional, American-style clinical legal aid centers<sup>12</sup> whose success was defined primarily by their success in litigating cases.<sup>13</sup> This conception by and large determined what kinds of developmen-

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10. Interviews with Chinese law professors of People's University, in Beijing (Sep. 1998), Qinghua University, in Beijing (Feb. 1997), and Chinese Academy of Social Sciences Institute of Law, in Beijing (March 1996).

11. See also Michael W. Dowdle, *Rule of Law and Civil Society: Implications of a Pragmatic Development*, in THE WOODROW WILSON CENTER SPECIAL REPORT: DEVELOPING CIVIL SOCIETY IN CHINA: FROM THE RULE BY LAW TOWARD THE RULE OF LAW? at 13 (Gang Lin ed., 2000).

12. Interview with an international donor, in Beijing (discussing impetus for Beida Center); Interview with Wan Exiang, Wuhan (May 1997) (discussing impetus for Wuhan Center). This is not to accuse the international developmental community with intentional imperialism. The Wuhan Center, for example, was designed and founded by a Chinese law professor who had been exposed to clinical legal education and legal aid programs while studying in the United States on a Fulbright scholarship. *Id.*

13. Compare Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 HOW. L. J. 135, 135-38 (1994), and Harold A. McDougall, *Lawyer-ing And The Public Interest in The 1990s*, 60 FORDHAM L. REV. 1, 9-10 (1991) (both complaining of litigious focus of American clinical education), with Aubrey McCutcheon, *University Legal Aid Clinics: A Growing International Presence with Manifold Benefits*, in FORD FOUNDATION, *supra* note 3, at 267, 272-79 (evinced strong litigious focus of the Ford Foundation's clinical legal aid programs both in China and in general). It should be acknowledged, however, that since the 1980s, American clinical legal education has grown much more varied in its approach to social issues. See Barry, *supra* note 13, at 138. See, e.g., Susan Bryant & Maria Arias, *Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992).

tal assistance these centers would receive. Foreign advisors and consultants to these centers, for example, were drawn overwhelmingly from the American clinical legal education and larger legal communities, and their consultation focused primarily on the preparation and management of cases for litigation.<sup>14</sup>

But there is real question whether the American-style clinical legal aid program is as effective in China's present legal environment as it is in the American legal environment. First, the line between legal aid and other forms of social assistance is much more blurred in China than it is in the United States. Law is a relatively new phenomenon in Chinese society, and as a result, China's embryonic civil society,<sup>15</sup> civil institutions, and regulatory apparatus have a less clearly defined understanding of what the "law" really does within society.<sup>16</sup> At the same time, China has only just begun to rationalize its division of social services into distinct, institutional competencies.<sup>17</sup> Until very recently, most, if not all, of these services were offered by a single provider: the state-run employer.<sup>18</sup> Rationalization results in a potentially more efficient but also significantly more complex social service system.<sup>19</sup> This complexity has obscured traditional

14. Observations drawn from author's experiences. *Cf. id.* (evinced strong litigious focus of Ford's clinical legal aid programs both in China); Liebman, *supra* note 3, at 233-35. (focusing on litigative activities of the Wuhan Center).

15. See Michael William Dowdle, *Constructing Citizenship: The NPC as Catalyst for New Norms of Public Political Participation in China*, in *CHANGING NATURE OF CITIZENSHIP IN CHINA* (Merle Goldman & Elizabeth Perry eds., forthcoming 2001); B. Michael Frolic, *State-led Civil Society*, in *CIVIL SOCIETY IN CHINA* 46 (Timothy Brook & B. Michael Frolic eds., 1997); GORDON WHITE ET AL., *IN SEARCH OF CIVIL SOCIETY: MARKET REFORM AND SOCIAL CHANGE IN CONTEMPORARY CHINA* (1996).

16. For example, participants in a student-run legal aid society operating at Beijing University report that a strong majority of the 400 public inquires they receive each month involve issues and disputes that do not really lie within the particular ambit of "law" as that concept is defined in developed Western legal systems. Interviews, with law students, Beijing University, in Beijing (Apr. 1996). See also Edward Rubin, *Administrative Law and the Complexity of Culture*, in *LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA* 88 (Ann Seidman & Robert Seidman eds., 1997) (noting different, albeit still quite rational, conceptions of role of law evinced by actors in administrative organs in China). Symposium, *An Overview of Civil Legal Services Delivery Models*, [24] *FORDHAM INT'L L.* [S225] (2000) [hereinafter *Overview*].

17. See, e.g. Sun Shangwu, *Pensions, Health Care Reforms Advancing*, *CHINA DAILY*, Feb. 5, 1998 (discussing China's efforts to establish pension system).

18. See generally Xiaobo Lu & Elizabeth J. Perry eds., *DANWEI: THE CHANGING CHINESE WORKPLACE IN HISTORICAL AND COMPARATIVE PERSPECTIVE* (1997).

19. See Peter M. Blau, *The Comparative Study of Organizations*, 18 *INDUS. & LAB. REL. REV.* 323 (1965).

channels of access to these kinds of services, leaving many ordinary Chinese people unsure as to where and how to secure particular social services formerly supplied by their respective employers.<sup>20</sup>

In such an environment, "access to justice" involves much more than the mere access to litigation-related adjudication that is the traditional focus of the American paradigm for clinical law programs.<sup>21</sup> If the law seeks to ensure that citizens have necessary access to health care, for example, but yet citizens fail to receive such care primarily because they do not know where or how to exercise their entitlement or perhaps even that they have such an entitlement, the law has failed just as much as in a system in which the availability of such care is denied primarily by governmental malfeasance. Failures of this former type cannot be addressed simply by offering assistance in bringing litigation.<sup>22</sup> Thus, in an environment in which legal failure is not infrequently due to 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.<sup>23</sup>

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20. See J.B. Ruhl and Harold J. Ruhl, Jr., *The Arrow of the Law In Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405 (1997); see also HERBERT EDELHERTZ, *THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME* 8 (1970) (noting that "[t]he increasing complexity of our society heightens vulnerability because it increases the difficulty of obtaining redress for losses suffered."). For an interesting example of how this relationship between complexity and vulnerability plays itself out in China, see Jacob Fisch, *Awaiting the Freudian Revolution: Chinese Society in Transition*, in vol. 1 no. 3 PERSPECTIVES (Dec. 31, 1999) (online journal available at <http://www.oycf.org/perspectives.htm>). See also Lucie White, *Panel: The Effect of Globalization on Domestic Legal Services* in CONFERENCE, *supra* note 3 (discussing of "new modes of vulnerability and invisibility").

21. See David McQuiod-Mason in *supra* text accompanying note 16. For example, Dr. Mohammed Yunus, pioneering founder of the Grameen Bank in Bangladesh and the microfinance movement in international development, has noted how access to credit "has powerful social and economic functions in determining the degree of participation of the individual members of the society in economic and social activities." George Anthan, *Fresh Approach to Helping Poor*, DES MOINES REG., Oct. 16, 1994, at 3 (quoting Dr. Yunus). For a description of the microcredit movement, see *Role of Microcredit in the Eradication of Poverty: Report of the Secretary General* at 6-7 (United Nations, 1998).

22. See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 202-6 (1997); see also Symposium, *Roundtable: Funding Strategies*, [24] FORDHAM INT'L J. [S254] (2000) [hereinafter *Funding*] (discussing activities of Droits d'Urgence).

23. See David McQuiod-Mason, in *Overview supra* note 16; see, e.g., CONFERENCE,



Second, insofar as issues of access to justice are concerned, paradigms that focus primarily on litigation are not as encompassing in China as they are in common law countries. As a civil law environment, China's legal system does not recognize an inherent, binding force in case law precedent.<sup>24</sup> This limits the larger social impact of litigation and, at the same time, gives greater relevance to other kinds of legal aid activities, such as lobbying and social education, that are outside the traditional focus of the American paradigm.<sup>25</sup>

A good example of the kind of priority conflict that can result when American models are injected into developing, civil-law environments can be seen in the conceptual gap that developed in the late 1990s between the Wuhan Center and one of its principal international donors regarding the proper scope of the center's activities. The donor, working off of the American paradigm, was somewhat discouraged by the relatively small size of the center's litigious caseload.<sup>26</sup> But the Wuhan Center itself had determined that, insofar as promoting the overall social efficacy of the legal system was concerned, legislative lobbying was more effective than litigation, and, thus, it had intentionally limited its litigious caseload in order to free up resources for its lobbying efforts.<sup>27</sup>

Finally, insofar as criminal matters are concerned, China's criminal proceedings, like that of Japan, place much greater fo-

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*supra* note 2 (discussing need to disseminate information to vulnerable members in culturally isolated communities); see McCutcheon, *supra* note 3, at 181-82 (citing example of legal aid development in China by describing activities of the Qianxi Women's Centre).

24. See Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1, 82 (1997). This is somewhat oversimplified, in that the Supreme People's Court, China's highest court, does publish model cases that are to serve as informal guides to lower courts when confronted with similar issues. See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1993). That court has also delegated authority, but not inherent authority, to promulgate abstract interpretations of selected laws. But these interpretations, which are similar in form to administrative regulations, do not issue through the process of adjudication. See Dowdle, *supra* note 24, at 87-88.

25. See Bedos, in *Funding*, *supra* note 22 (discussing France); Symposium, *Issues of Concern to Developing and Transitional Countries*, [24] FORDHAM INT'L J. [S317] (2000) (discussing Japan).

26. Interview with Program Officer for Principal International Donor of the Wuhan Center, in Beijing (May 1997).

27. Interview with Wan Xiang, Founder and Director of the Wuhan Center, in Beijing (May 1997).

cus on the pre-indictment stage of the criminal justice process.<sup>28</sup> In such a system, the American focus on post-indictment proceedings would cause legal aid clinics focusing on criminal justice to overlook that particular stage of the criminal process in which one has her best chance of securing true justice for the client.<sup>29</sup>

### A. Reductive Strategies and Globalization

The fact that reductive developmental strategies are likely to be less "efficient" in the recipient environment than they are in more mature legal environments in which they originated is by itself no cause for alarm. After all, inefficient aid is still better than no aid at all. But inefficient developmental paradigms do become harmful when they begin to prevent the development of more efficient paradigms.

Here is where globalization becomes a factor. The forces of globalization have significantly augmented the international donor community's influence over domestic legal development. Different aspects of globalization—such as the international community's growing sensitivity to domestic constraints on international trade and the growing range of normative concerns that are becoming incorporated into human rights law—have caused the internationalization of an increasingly diverse number of problems in domestic legal development.<sup>30</sup> This in turn has increased both the scope of, and resources devoted to, international legal assistance activities and, consequently, their capacity to influence the path of a developing country's legal development.<sup>31</sup>

Globalization has also increased developing countries' de-

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28. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 38* (1996). See also Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317 (1992) (discussing criminal justice process in Japan).

29. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 28, at 38. Cf. Toyama, *supra* note 26.

30. See, e.g., Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, 30 LAW & POL'Y INT'L BUS. 27 (1999); Peter S. Watson, *The Framework for the New Trade Agenda*, 25 LAW & POL'Y INT'L BUS. 1237 (1994); Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 612 (1984).

31. See, e.g., Funding, *supra* note 22 (discussing expansion of World Bank's developmental agenda); FORD FOUNDATION, LAW: FORD FOUNDATION GRANTEES AND THE PURSUIT OF JUSTICE (2000) (discussing widening role of Ford's international programs).

pendence upon the international donor community. One aspect of globalization is the international community's encouragement of export-promotion and foreign investment as the primary strategies for economic development.<sup>32</sup> This has made underdeveloped countries significantly more dependent, both economically and politically, upon economically developed countries.<sup>33</sup> At the same time, as issues of domestic legal development have become more internationalized, developed countries are increasingly conditioning, both expressly and implicitly, their cooperation and developmental assistance upon the willingness of the country receiving such aid to "reform" its legal system in order to address these new concerns.<sup>34</sup> Cooperating in legal developmental efforts endorsed by the international legal development community is one of the principal ways in which a developing country can demonstrate such willingness.<sup>35</sup>

Of course, I think it is safe to say that the vast majority of persons working in international legal development institutions are aware of the imperialist possibilities inherent in their work and conscientiously avoid programs that hint of such dangers.<sup>36</sup> But such imperialism can operate outside the control—indeed,

32. *See, e.g.*, EXPORT-ORIENTED DEVELOPMENT STRATEGIES: THE SUCCESS OF FIVE NEWLY INDUSTRIALIZING COUNTRIES (Vittorio Corbo et al. eds., 1985).

33. *See, e.g.*, WILLIAM GRIEDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 259-84 (1998) (discussing growing dependence upon economically developed countries in context of Mexico). *Cf. Rio Declaration on Environment and Development*, Principle 3, U.N. Doc. A/CONF.151/5/Rev. 1 (1992) *reprinted in* 31 I.L.M. 874 (1992), 877; Charter of Economic Rights and Duties of States Art. 30, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251, 260 (1975); Convention of Biological Diversity (Art. 20(4)), *reprinted in* 31 I.L.M. 818, 830-31 (1992) (noting that effectiveness of commitments of developing countries under Convention are dependent upon effective implementation of Convention standards by developed countries due to relatedness of financial resources and transferability of technology).

34. *See* Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993).

35. *Cf. Reformable?: The Profits of War in Liberia*, ECONOMIST, Jan. 08, 2000, at 44. The article, in part, stated

During a recent visit by aid donors, including the IMF and the World Bank, the [Liberian] government made a show of its commitment to the rule of law by prosecuting a junior minister accused of beating up a magistrate. That impressed some donors enough to consider giving aid directly to the government. At present aid is only channeled through non-governmental agencies (which received US\$200,000,000 last year). *Id.*

36. This was, of course, the great lesson we supposedly learned from the first "law and development" movement of the late 1960s and early 1970s. Whether or not we have actually learned this is an open question. *See, e.g.*, Jacques DeLisle, *Lex Americana?*

outside the awareness—of the individual donors participating in these efforts.

As the authority, power, and resources commanded by international donor institutions increase, so to does the prestige they enjoy, not only in the international community, but also within the developing countries themselves. Association with this prestige can cause the particular paradigms used by legal, developmental institutions to develop ideological weight<sup>37</sup> within the domestic community. When this happens, these paradigms do not merely assist in legal development, but increasingly define *for the subject itself* what constitutes effective, legal development.<sup>38</sup>

Of course, few, if any, of the donors or actors working to develop China's legal system individually regard or advance those American paradigms that inform their reductive developmental strategies as the settled solution for China's unique legal system. But ideological weight can accrue to developmental paradigms outside the conscious effort of developmental facilitators. Constant reiteration, particularly by a diverse collection of prestigious actors, can cause hypotheses and assumptions to gain the status of facts even where no particular actor intends such effect.<sup>39</sup> In China, international, legal, developmental assistance is—for historical and economic reasons—dominated by the American legal environment.<sup>40</sup> The particular reductivist paradigms that inform individual legal development assistance

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*United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

37. By "ideological," I mean the intellectual practice of insulating certain kinds of truth claims from critical evaluation.

38. See Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 138 (Daniel Kahneman et al. eds., 1982); RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); see also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 811-12, 814-18 (1994).

39. See Elizabeth Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, in 3 CRIME AND JUSTICE AN ANNUAL REVIEW OF RESEARCH 121 (Michael Tonry & Norvel Morris eds., 1981), and Felice Levine & June Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1113-14 (1973) (stating power of suggestion will be particularly great when suggestion emanates from a "high status").

40. See DeLisle, *supra* note 36; Frank Upham, *Speculations on Legal Informality: On Winn's "Relational Practices and the Marginalization of Law"*, 28 L. & SOC'Y REV. 233

programs are thus inevitably drawn largely from the same limited well of American experience and understanding, thus increasing the frequency with which particular American paradigms are reiterated in developmental projects.<sup>41</sup> Developmental suggestions can mutate into developmental ideologies simply by operation of collective reiteration of developmental hypotheses, a reiteration that occurs by-and-large outside the awareness of any single institutional actor.

As the foreign paradigms employed by developmental facilitators gain ideological weight, they threaten to crowd out other paradigms, most notably local, indigenous paradigms.<sup>42</sup> There are two problems with this. First, local paradigms frequently offer important and unique insight into the particular problems faced by legal development in the host country. Every society is constituted by a unique constellation of social and "cultural" forces. Some of these forces are more-or-less opaque to those operating outside that society. This means that local societies have some unique degree of insight into their own conditions, an insight Clifford Geertz famously referred to as "local knowledge."<sup>43</sup>

Local knowledge is relevant to legal effectiveness. In order to be effective, law has to be an expression of the culture in which it operates,<sup>44</sup> and local knowledge can be crucial to articulating effective cultural expression.<sup>45</sup> Legal effectiveness can depend crucially on the law's correspondence with particular social structures and dynamics that exist prior to the law.<sup>46</sup> Local knowledge can be crucial to identifying which of these structures and dynamics are relevant to, and can be employed in, service of legal development.<sup>47</sup>

Being formed in and by indigenous society, indigenous par-

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(1994); *see, e.g.*, Stanley B. Lubman, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 318 (1999).

41. *See* DeLisle, *supra* note 36.

42. *Id.* at 288.

43. *See generally* Clifford Geertz, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983).

44. *See* Rubin, *supra* note 16, *see also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 944 (1995)

45. *See* Geertz, *supra* note 43.

46. *See* Lessig, *supra* note 44, at 968-72; David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1, 57-59 (1972).

47. *See* Clifford Geertz, *supra* note 43, at 167, 216-219.

adigms embody local knowledge that might be crucial to the overall effectiveness of legal development.<sup>48</sup> This is not to suggest that indigenous paradigms are always or even likely to be superior or more effective than foreign imports. Rather, it is to say that the local knowledge embodied in local paradigms, their structure and experiences, can offer important insight into how a particular developmental model fits into the particular environment in which it is being introduced.<sup>49</sup> For example, if it were the case that no indigenous paradigm for legal aid services provided litigation-related assistance, this would not mean that there is no real social need for such assistance, nor that the introduction of foreign paradigms focused on providing such assistance into that society would be unwise. Rather, this would suggest, at the very least, that unique and latent structural impediments to litigation-centered legal aid could very well exist within that environment, impediments that will need to be identified and worked around before the foreign paradigm is to become effective.

Second, and more global in importance, local paradigms can also provide important contributions to our own understanding of the diversity of sociological processes and potentialities that might contribute to "legal development." Every local paradigm represents a unique experiment in social engineering. Human societies are diverse, but there is real reason to suspect that the psychological and social forces that underlie these cultures are by-and-large the same.<sup>50</sup> Thus, the experiences and knowledge gained from any one experiment are likely to be relevant in some part to understanding the other societies facing similar problems.<sup>51</sup> They can even contribute useful insights to our own experiences, since the diversity of legal solutions to particular social problems is invariably far greater than can be dreamt of by our own legal ideologies and the paradigms they spawn.<sup>52</sup> For example, when British jurists first looked at the

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48. *See id.*

49. *See, e.g.,* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 321-23 (1998).

50. *See* Michael G. Barnhart, *Getting Beyond Cross-Talk: Why Persisting Disagreements are Philosophically Nonfatal*, in *NEGOTIATING CULTURE AND HUMAN RIGHTS* (Ilag Pelag et al. eds., forthcoming in 2000).

51. *See* Trubek, *supra* note 46, at 48-49.

52. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999).

then underdeveloped French administrative law system in the late 19th and early 20th century, they saw a system that was a pathological travesty to "natural justice" because it lacked adversarial proceedings and intermingled administrative and judicial functions.<sup>53</sup> But as British jurists grew to better understand the French system of administrative law, at least some began to argue that Britain's own emerging administrative law jurisprudence might actually have much to learn from the French model.<sup>54</sup>

The corrupting effect of the reductivist ignorance of local paradigms is evinced in the conceptual disconnect that has developed between the American legal community's standard analysis of China's social developmental and American economists' and sociologists' analyses of that same development. The American legal community's analyses, which tends to evaluate China's development by reductivist comparison with American legal paradigms,<sup>55</sup> are largely pessimistic.<sup>56</sup> Sociological (and to a lesser extent, economic) analyses, which tend to evaluate China's development by more pragmatic comparison with other society's experiences, are frequently much more optimistic.<sup>57</sup> Thus, for

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53. E. C. S. WADE and A. W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 605-07 (A. W. Bradley & K. D. Ewing eds., 11th ed. 1993). "Natural justice" is the British equivalent of the American notion of due process. *Id.*

54. L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 3-4 (4th ed. 1993). Arturo Escobar analogizes the value of preserving local knowledge to our growing realization of the benefits of biodiversity. With regards to biodiversity, he notes that:

[In] the rising discourse of biodiversity . . . nature becomes a source of value in itself. Species of flora and fauna are valuable not so much as resources but as reservoirs of value that research and knowledge, along with biotechnology, can release for capital and communities. . . .

ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 203 (1995). Later on, Escobar notes that similarly, "local forms of knowledge [can be] recodified by modern science in utilitarian ways." *Id.* at 204.

55. See, e.g., Lubman, *supra* note 40; Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 *CULTURAL DYNAMICS* 315 (1999); see also Lubman, *supra* note 40, at 34 (acknowledging that standards used by himself and Professor Peerenboom are derived from Western models).

56. See Lubman, *supra* note 40, at 317 (summarizing pessimistic conclusions); Randall Peerenboom, *supra* note 55, at 319 ("Judged by the selected rule-of-law standards, China's legal system . . . stands in need of considerable improvement.").

57. See, e.g., SUSAN SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA* 3-17 (1993); see also DOUGLAS GUTHRIE, *DRAGON IN A THREE-PIECE SUIT: THE EMERGENCE OF CAPITALISM IN CHINA* (1999); Gabriella Montinola, Yingyi Qian and Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 *WORLD POLITICS* 50 (1995).

example, while American scholars of Chinese law are generally bemoaning the sad state of China's development,<sup>58</sup> scholars of social and economic development are arguing that the Chinese experiences should be the principal paradigm for promoting economic and social development in other developing societies.<sup>59</sup>

B. *Problems of Reductive Strategies in China's Clinical Legal Aid Development*

The domestic response to the efforts of the international donor community to promote the development of clinical legal aid programs in China evinces quite clearly how reductivist strategies of development could well be suppressing the development of more promising indigenous paradigms. Since the late 1980s, Chinese universities and colleges have been experimenting on their own initiative with a number of indigenous models for clinical legal aid programs, administered out of state-corporatist institutions, mainly student unions<sup>60</sup> and University-affiliated law firms.<sup>61</sup> Given the strong corporatist emphasis of China's emergent civil society and attendant regulatory framework,<sup>62</sup> this would seem to facilitate social and political embeddedness far more readily than the wholly autonomous institutions that characterize the American model. This in turn allows these indigenous models to exploit more easily the network efficiencies existing in China's present political and societal struc-

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58. See *supra* note 56.

59. See, e.g., Louise Do Rosario, *Trouble Spots: The Outlook for the Chinese Economy*, BANKER, Oct. 1, 1999, at 91 (quoting Joseph Stiglitz, Chief Economist of the World Bank, as saying that "China has been by far the most successful of the low-income countries."); Spencer Lee, *How the West Lost Russia: Dr. Stiglitz Expresses Disappointment*, BOTTOM LINE ONLINE, Apr. 20, 2000; see also Roberto M. Unger & Zhiyuan Cui, *China in the Russian Mirror*, NEW LEFT REVIEW 78-88 (Nov./Dec. 1994); Lan Cao, *The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOK. J. OF INT'L L. 97 (1995); Shirk, *supra* note 57, at 3-17.

60. Student unions at Beijing University and Chinese University of Law and Politics had been organizing—with faculty support—legal aid activities since the late 1980s. Interview with Liu Renwen, Chinese Academy of Social Sciences, in Beijing (Dec. 1996). Professor Liu believed that such activities were commonly organized by law student unions throughout China. *Id.* Huadong University in Shanghai instituted similar activities as of the early 1990s. Interview with Law Students, Fudan University, in Shanghai (Jul. 1996).

61. This is the case with the legal aid program run by the South-Central University of Politics and Law.

62. See *infra* note 68.



ture.<sup>63</sup>

The superior network efficiencies of these indigenous models are clearly evident when comparing the operating budget of the Wuhan Center with that of a clinical legal aid program run by the South-Central University of Politics and Law ("South-Central University Center"), a corporatist legal aid clinic run out of that University state-owned law firm (Wuhan Municipality Law Firm No. 2).<sup>64</sup> Without receiving any assistance from international donors, the South-Central University Center actually litigates a significantly greater number of cases than the Wuhan Center.<sup>65</sup> And despite its statist pedigree, there is no evidence that it is any less effective in its efforts than the Wuhan Center.<sup>66</sup>

This indigenous, corporatist form of legal aid clinic evinces at least two distinct advantages over the American model. First, there is significant comparative evidence suggesting that such models could be particularly effective in catalyzing the development of a more modern civil society in China. Studies that in some emergent civil societies, state-corporatist institutions have provided important initial fora in which the citizenry can begin to express and promote its pluralist interests, creating a rudimentary state-society dialogue which can serve as a foundation for future social organization.<sup>67</sup> A similar transformative dynamic, albeit still rudimentary, has been observed in China.<sup>68</sup> The corporatist structure of these indigenous models can stimulate and take advantage of this dynamic.

63. See Frolic, *supra* note 15.

64. Interview with Personnel, Ministry of Justice, in Wuhan (May 1997). The South-Central University Center scrupulously avoids contact with foreigners and, perhaps for this reason, has been generally ignored by Western scholars. *Id.*

65. Interview with Official, Ministry of Justice, in Wuhan (May 1997). The Wuhan Center frequently refers people to the South-Central University Center when it does not want to handle the case itself. *Id.*

66. Interview with Official, Ministry of Justice, and Law Students, Beijing University, in Wuhan (May 1997) (discussing visit to Wuhan Center). Comparisons between these two organizations' quality of service are matters of impression only. In particular, the South-Central University Center does not show particular institutional preference for "hard cases" as does the Wuhan Center. *Id.*

67. See Baohei Zhang, *Corporatism, Totalitarianism, and Transitions to Democracy*, 27 COMP. POL. STUD. 108 (1994); Frolic, *supra* note 63; see, e.g., Stanley A. Gacek, *Revisiting the Corporate and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 79-85 (1994) (examining this dynamic in Brazil).

68. See, e.g., Frolic, *supra* note 63; Anita Chan, *Revolution or Corporatism? Workers and Trade Unions In Post-Mao China*, 29 AUSTRAL. J. OF CHINESE AFF. 31 (1993).

Second, because the corporatist structure of these indigenous models is more attuned to the corporatist structure of China's civil society and regulatory state, these models have had significantly greater influence over the larger development of China's clinical legal aid culture than that heretofore evinced by those providers modeled off of the American paradigm.<sup>69</sup> In contrast to the as yet un-imitated American-modeled centers, the corporatist model has been adapted by an increasing number of social institutions in China, including a number of law schools, as well as the All-China Women's Federation and China's national Union of the Handicapped, both of which have been aggressively exploring the possibility of using corporatist legal aid clinics as a means for mobilizing their constituent interests.<sup>70</sup>

The transformative effect of domestic *vis-à-vis* foreign paradigms with regards to legal aid in China is particularly well-demonstrated by contrasting the diffusion of foreign-funded American models<sup>71</sup> with that of one particular indigenous model, also foreign-funded. In 1995, the same year it founded the Beida Center and three years after the Wuhan Center was founded, the Ford Foundation helped the Qianxi County Women's Association, a local branch of the state-corporatist All-China Women's Federation, establish the Qianxi Women's Law Center ("Qianxi Center").<sup>72</sup> Like the foreign models, the Qianxi Center is dependent on foreign assistance.<sup>73</sup> But whereas to date there has been no significant diffusion of these foreign models within China, the Qianxi Center has inspired at least two other imitators.<sup>74</sup>

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69. Cf. Thomas W. Valente, *NETWORK MODELS OF THE DIFFUSION OF INNOVATIONS* (1995) (showing that socially embedded actors are much more effective at injecting new ideas and technologies into a particular environment than are non-embedded actors).

70. See *infra* Part IV (noting that "[o]n March 28, 1997, representatives of the MOJ Center, the Beida Society, and a number of China's corporatist social interest institutions, including the All-China Women's Federation and the All-China Union of the Handicapped, held a day long conference at Beida to explore how law student organizations like the Beida Society might be able to contribute to efforts by these corporatist, social interest institutions to establish their own legal aid programs for their constituents."); see also McCutcheon, *supra* note 3, at 181 (reporting on legal aid center (not clinic) established by local branch of All-China Women's Federation).

71. See *supra* notes 7-29 and accompanying text.

72. See Liebman, *supra* note 3, at 231-32; McCutcheon, *supra* note 3 at 181-82.

73. See Liebman, *supra* note 3, at 232.

74. *Id.*

Nevertheless, as the American-style models have grown to dominate international and domestic attention, these indigenous clinical models and their potential contributions to China's political and social development have been increasingly ignored.<sup>75</sup> As noted above, at least two law faculties in China have decided not to pursue development of clinical legal aid programs in any form once they determined that they did not have access to the international resources necessary to replicate the American-style models.<sup>76</sup> But in so deciding, these law faculties seem to have failed to consider the possibility of pursuing the less-expensive, indigenous, corporatist paradigm. This oversight cannot be due to any demonstrated inadequacies in these indigenous programs—indeed, general impressions suggest that these programs have been as effective at what they do as the American-modeled programs.<sup>77</sup> Rather, it is more likely to reflect a growing ideological conception of what clinical legal aid is *supposed* to look like, an ideological conception that is inspired by the foreign funded, American-style programs and all the attention, resources, and prestige they are able to enjoy.<sup>78</sup>

Again, this is not to argue that China's indigenous, corporatist paradigms invariably offer better solutions to problems of clinical legal aid development in China than the paradigms offered by American legal culture. It is not to suggest that we must renounce foreign or American models in favor of indigenous models whenever and wherever indigenous models exist. Rather, it suggests that local paradigms can shed unique and important insight into these problems. At the very least, these paradigms need to be explored and understood before being displaced by foreign models. However, to do so requires modifying

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75. See, e.g., *id.* at 269-72 (dividing legal aid services in China into two general types, "government-funded" and "non-governmental organizations," ("NGO") as defined by the Wuhan and Beida Center paradigm). Compare *id.* with Heath B. Chamberlain, *Review Article: Coming to Terms with Civil Society*, 31 *AUSTL. J. OF CHINESE AFF.* 113 (1994) and Alan Cawson, *Functional Representation and Democratic Politics: Towards a Corporatist Democracy*, in *DEMOCRATIC THEORY AND PRACTICE* 173 (Graeme Duncan ed., 1993) (suggesting that state-society distinction is not useful when looking at corporatist forms of social organization). See also Chamberlin, *supra* note 75, at 115-17 (suggesting that we may need to re-conceptualize what an NGO is in China).

76. See *supra* notes 7-10 and accompanying text.

77. See *supra* note 66 and accompanying text.

78. Compare Liebman, *supra* note 3, at 234 nn. 208, 236 & 270 (noting strong press coverage enjoyed by Wuhan Center and Beida Center) with *id.* at 231-232 (giving no indication of press coverage for corporatist Qianxi Women's Law Center).

the reductive developmental strategies that inform most legal development projects.

### III. ALTERNATIVES TO REDUCTIVELY-CONCEIVED DEVELOPMENT: PRAGMATIC STRATEGIES FOR PROMOTING LEGAL DEVELOPMENT

Reductive development strategies are ultimately founded on the assumption that where the right rules, institutions, and practices have already been discovered somewhere there is no need for the developmental beneficiary to have to go through the arduous process of discovering them anew. But legal development is not simply a process of "getting the rules right." As noted above, it is a process whereby society and its various institutions come to learn, or discover, what particular legal rules and practices "mean" in the larger context of that society's unique, local understandings and concerns.<sup>79</sup> Reductivist developmental strategies suppress this learning dynamic by positing the structural goals of development at the outside of the developmental process itself. Instead, they unintentionally encourage recipient systems to become *intellectually* dependent on the legal culture that created the reductivist developmental strategies.<sup>80</sup> Such dependence ultimately impedes legal maturation in a way similar to the way that the political and economic dependencies frequently induced by colonial imperialism impede political maturation.<sup>81</sup>

In order to avoid the inadvertent imperialisms latent in globalized international development, we need to employ developmental strategies that make the discovery of developmental paradigms the goal of the project, rather than a prior (and hence ideological) condition for the project. We need, in other words, a more "pragmatic" developmental strategy:

[Pragmatism] suggest[s] that we abandon the sterility of abstract categories and the lock-step of linear deductive reasoning for the more contextual and concrete reasoning of situated practitioners. Rather than drawing on a single, powerful

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79. See *supra* notes 43-48 and accompanying text.

80. See *supra* notes 39-42 and accompanying text.

81. See Obiora Chinedu Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT'L L.J. 503, 510-14 (2000); Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 L. & Soc'y REV. 723, 753-54 (1980).

referent (Theory with a capital T) as the source of meaning and justification, pragmatism . . . draws on a multifaceted web of contextual meaning and a historically-based, consensual way of life.<sup>82</sup>

Pragmatism is particularly conducive to learning.<sup>83</sup> True learning frequently entails the destruction of old truths, a process Michael Polanyi called “destructive analysis.”<sup>84</sup> By removing particular truth-claims that inform the project’s developmental paradigm, from threat such destructive analysis, reductive strategies prevent the institution from possibly discovering newer, more effective understandings that might dispute or contradict these paradigms.<sup>85</sup> Pragmatism, by contrast, exposes all truth-claims to potential critical inquiry, thus catalyzing a project’s ability to overcome the limitations latent in initial conceptions.

Reductive developmental strategies tend to focus primarily on training. Pragmatic strategies, by contrast, need to focus much more on discourse.<sup>86</sup> Institutional knowledge is something more than the simple aggregate of the knowledge of its members. When we say that an institution, as contrasted with an individual, learns or discovers a new truth, what we are really saying is that within that institution, a new consensus has formed around some new truth-claim.<sup>87</sup> Such consensus is not simply a matter of everyone believing the same thing. It is a matter of

82. Brook K. Baker, *Beyond MacCrate: the Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 349 (1994).

83. See generally *id.*

84. MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 50-52 (1962); see also Joseph Schumpeter, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 81-86 (3d ed. 1950) (discussing “creative destruction”).

85. See also Polanyi, *supra* note 84, at 195-202.

86. For a good demonstration of this difference, and how it provoked a certain cognitive dissonance in one American legal advisor participating in an administrative law reform project in china, see Rubin, *supra* note 16.

87. Here, I am only talking about the sociology of truth formation in institutions. and not making a claim about the epistemology of truth *per se*. Whereas the epistemology of truth is concerned with that condition that makes a proposition objectively true, the sociology of truth is concerned with the conditions that make a society act upon a particular proposition as if it were true. See HANS GEORG GADAMER, *TRUTH AND METHOD* 385 (Joel Weinsheimer ed. and Donald G. Marshall trans., 1996) Regardless of the whatever epistemology a particular society uses to determine truth, the sociological quality of truth will depend on the extent to which that there is broad social consensus in that society that that proposition is indeed true. See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 17 (2d ed. 1980).

everyone knowing that they believe the same thing. It is possible for a vast majority in a particular institution to share a common understanding, but yet not have that understanding manifest in the truth structure that informs that institution's behavior, because persons are not sufficiently aware that others share this particular aspect of their individual beliefs.<sup>88</sup> An institution's ability to form new consensus around a particular matter, to learn in the sociological sense of the term, depends crucially on the ability of its members to communicate their new understandings of that matter to one another.<sup>89</sup> Thus, while training can inject new knowledge into particular individuals, only discourse can allow this knowledge to inform the institution as a whole.<sup>90</sup>

Of course, training involves discourse as well. What distinguishes the discourse of pragmatic development from that of reductive development is that the discourse of the former is decentralized. In training, only a limited and somewhat rarified selection of institutional participants contribute knowledge, information, and skill to the institutional environment, whereas pragmatic discourse allows every institutional participant to contribute her knowledge and experiences to the environment. The important result, particularly in environments in which different persons play different roles, is that the unique experiences of each different kind of role is able to contribute unique insight into the nature of the environment and how it interacts with particular institutional goals to the project. This unique,

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88. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 213-16 (1994); Michael MacKuan, *Speaking of Politics: Individual Conversational Choice, Public Opinion, and the Prospects for Deliberative Democracy*, in *INFORMATION AND DEMOCRATIC PROCESSES* 59 (John A. Ferejohn & James H. Kuklinski eds., 1990).

89. See Berger & Luckman, *supra* note 87, at 61-62 (discussing discursive foundation of social knowledge).

90. A good example of this phenomenon was relayed to me by a cousin who was recently in China to inspect a Chinese drug manufacturer. As he observed each individual step of the manufacturing operation, he was quite impressed by the care that the manufacturer took to insure the purity of its product. But after manufacture, the company, located in the middle of Shanghai, stored these drugs by placing them into open containers placed in a storage room with open windows. Maintaining purity during post-production storage is much easier than maintaining purity during production, and yet this company's storage procedures completely negated the purity the company had put so much effort to maintain in its production process. Thus, despite the fact that the individual components of the manufacturing process possessed adequate awareness of, and training in, the need for maintaining drug purity, this knowledge had not filtered up into the collective, institutional knowledge and understanding of the company as a whole.

lower-level knowledge, sometimes called tacit knowledge<sup>91</sup> or personal knowledge,<sup>92</sup> often contains information that is useful to an institution's efforts to learn about and adapt to its environment.<sup>93</sup>

Decentralization of discourse also allows actors to avoid centralized, bureaucratic communicative structures—structures that serve primarily to support and protect the established truth framework of the institution<sup>94</sup>—discourage the kind of destructive analysis that promotes institutional learning and discovery.<sup>95</sup> Pragmatic discourse begins when institutional actors identify new, shared understandings in the process of solving some common local problem or comprehending some common local experience. Once identified, these new, local understandings can offer pragmatic “benchmarks” that others in the environment can refer to when confronting similar problems or experiences that seem to deny more conventional understandings.<sup>96</sup> If these benchmarked understandings prove useful in comprehending an increasing range of institutional situations, they displace older, contrary institutional understanding that prove less adept at giving coherent meaning to the institution's evolving collection of experiences.<sup>97</sup> In this way, initially unorthodox understanding can eventually become accepted—and hence “learned”—as new institutional truths.<sup>98</sup>

A useful analogy for this particular kind of discourse is Robert Putnam's notion of “civil society.”<sup>99</sup> Putnam's civil society de-

91. DONALD A. SCHON, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARDS A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 25-33 (1987).

92. See Polanyi, *supra* note 84.

93. See David Middleton and Derek Edwards, *Conversational Remembering: A Social Psychological Approach*, in COLLECTIVE REMEMBERING 28-31 (David Middleton & Derek Edwards eds., 1990).

94. See John W. Meyer and Brian Rowen, *Institutional Organization: Formal Structure as Myth and Ceremony*, 83 AM. J. OF SOC. 340 (1991).

95. See *supra* note 84 and accompanying text.

96. See Charles F. Sabel, *Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions*, 23 POL. & SOC'Y 5 (1995).

97. *Id.*

98. See Berger & Luckman, *supra* note 84, at 61-67.

99. See Robert D. Putnam, MAKING DEMOCRACY WORK 86-91 (1993). Perhaps a more common definition of civil society contemplates civil society as something that exists completely independently of the State. See also Jurgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 421, 435-54 (Craig Calhoun ed., 1992). But the successes of many neo-corporatist democracies calls into serious question the universal relevance of that particular conceptualization. See Cawson,

scribes a social condition in which individual social interests are basically free to define and pursue their own goals and interests by interacting among themselves in a generally cooperative and interdependent environment. Comparative studies show that such civil societal articulations generally precede legal effectiveness.<sup>100</sup> This suggests that the defining paradigm for legal development programs should not be the rules and practices of already established legal cultures, but the civil-society-like dynamics that have allowed these cultures to discover these successful rules and practices in the first place.<sup>101</sup>

Pragmatic strategies can be seen as seeking to replicate civil-society-like fora and institutional structures, fora and structures that can catalyze the interdependent and pragmatically-driven cooperation between and among the state and non-state actors that characterizes civil society. Such strategies would differ from reductive strategies in that the principal focus of such fora would be on internal discovery of possibly unforeseen developmental implications inherent in China's own unique experiences, as opposed to the external study and importation of successful foreign experiences. Such fora would emphasize interaction and contact among a wide range of domestic actors, rather than contact between domestic actors and foreign advisors and consultants.<sup>102</sup> The focus would be to study the dynamics and particulars of the relevant domestic regulatory environment, searching for promising indigenous paradigms that are more embedded in the environment, and thus could be much more effective at catalyzing environmental-wide changes than the foreign models that inform reductive developmental efforts.

In a pragmatically informed developmental strategy, infor-

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*supra* note 75, at 180-81 (showing that absolute state-society separation, which characterize some notions of civil society, are inconsistent with corporatist forms of democracy); Chamberlain, *supra* note 75, at 115-17 (noting that conceptual demands that civil society be independent of the state are analytically untenable even with regards to non-corporatist polities).

100. See POTTER & DOWDLE, *supra* note 11, at 4, 1. See generally KATHARINA PISTOR & PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT (1999); see also Putnam, *supra* note 99, at 83-120. Cf. Mick Moore, *How Difficult is it to Construct Market Relations? A Commentary on Platteau*, 30 J. OF DEV. STUD. 818-19 (1994) (noting that "it is widely agreed that, even in societies where the rule of law is respected, law plays only a limited role in regulating commercial transactions.").

101. See also Dowdle, *supra* note 11.

102. *Id.* at 16-18 (comparing pragmatic and reductive development strategies in context of development of China's capital markets).



mation about foreign legal systems and experiences would still be important, but it would serve a different function than it does in reductive development strategies. Rather than suggesting a solution to particular domestic problems, foreign experiences would be used to inform the participants' understanding of the domestic system. Comparative focus would be not simply on foreign solutions themselves, but on the particular problems and limitations inherent in these solutions, and on how the larger legal and social environments compensate for these problems and limitations. The different function that foreign experience plays in legal development also means that such fora and their developmental facilitators should conscientiously seek to explore a range of diverse foreign experiences, not simply the experiences of one or two successful systems.

A more "pragmatic" developmental strategy for the development of clinical legal aid in China, would not simply focus on American-style clinics, but would also devote equal effort to exploring experiences which appear in many ways to be more relevant to China's transitional, civil law legal environment than American models, for example those of South Africa, France, and Japan experiences.<sup>103</sup> More importantly, it would explore these models, not with a view toward copying them or their particular parts, but with a view toward identifying how these experiences might suggest new understandings of China's own, unique clinical experiences—understandings from which might emerge currently unforeseen solutions to China's present problems.

#### IV. AN EXAMPLE FROM CHINA<sup>104</sup>

The superior catalyzing potential inherent in pragmatic developmental strategies was evinced by one foreign-funded program focusing on the development of clinical legal aid that did adopt a more pragmatic developmental strategy. Since the late 1980s, the Law Students Union at Beijing University ("Beida"), the entity that "represented" Beijing University Law Students in China's corporatist organizational structure, has been providing

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103. See generally CONFERENCE, *supra* note 2.

104. The example is drawn from the personal experience of the author, who served a faculty advisor to the Beida Center from Spring of 1996 through Spring of 1997, and designed and participated in many of the projects described herein.

free walk-in legal advice to local residents. Such advice generally consisted of providing clients with what one might call "legal triage" and referrals to relevant public, social, or legal institutions. In 1994, that Beida institutionalized these activities by forming the Beijing University Law Students Union's Legal Aid Society ("Beida Society"). In the summer of 1994, the Beida Society expanded its services by setting up a local "hotline" with which residents in Beijing and neighboring Hebei Province could call the Beida Society for legal advice. In the summer of 1995, working with a micro-grant of US\$1500 from a private donor, the Beida Society further expanded its services by setting up hot-lines in several of China's more impoverished provinces, including Gansu, Ningxia, and Sha'anxi, which allowed residents in these provinces to call the Beida Society free for legal advice and referrals (these hotlines were set up with the help of the local Justice Bureaus).<sup>105</sup> As of the spring of 1996, the Beida Society, operating on a yearly budget of less than US\$200, was receiving and responding to an average of 400 calls a month.

In the summer of 1996, a program was established with the Ministry of Justice ("MOJ") which allowed students from the Beida Society to receive academic credit by working as research externs for the MOJ's Legal Aid Research Center ("MOJ Center"), which had been charged with developing a national legal aid system for China.<sup>106</sup> Student externs researched and reported on various foreign legal aid systems for the MOJ Center, which lacked internal researchers with sufficient foreign language capability to research foreign systems. Through this association, the MOJ learned about the scope and quality of the Beida Society's activities, and began to consider how similar, state-corporatist student entities might be able to contribute to a

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105. See *Xichu Yangguan Duo Zhiji: Beida Xuezi Shuqi Pufa Jixing* [Many Friends West of Yangguan (i.e., 'in places far away'): A Journal of Beijing University Students Giving Legal Advice during the Summer Holiday], FAZHI RIBAO [LEGAL DAILY], Sept. 30, 1996, at 7 (reporting on this trip).

106. See Liebman, *supra* note 3, at 222-23; Luo, *supra* note 3, at 3; McCutcheon, *supra* note 3, at 180-81.

There seems to be some confusion about the founding of the MOJ Center. Benjamin Liebman reports that the MOJ Center was formally established in December of 1996. See Liebman, *supra* note 3, at 2. Luo Qizhi reports that the Center was formally established on May 26, 1997. See Luo, *supra* note 3, at 3. In any event, even if not formally established, the center was institutionally delineated and operational as of the end of summer of 1996, as the author worked personally with that institution in setting up this externship program.

national legal aid framework.<sup>107</sup> On March 28, 1997, representatives of the MOJ Center, the Beida Society, and a number of China's corporatist social interest institutions, including the All-China Women's Federation and the All-China Union of the Handicapped, held a day long conference at Beida to explore how law student organizations like the Beida Society might be able to contribute to efforts by these corporatist, social interest institutions to establish their own legal aid programs for their constituents.

In the summer of 1996, law students at Fudan University learned about the Beida Society's activities and, after consulting with members of that society, set up their own version of the Beida Society called the Fudan University Legal Aid Center (the "Fudan Center") under the auspices of Fudan's Law Students Union, which, like Beida, is a state-corporatist student entity.<sup>108</sup> The Fudan Center began its operations by doing research projects for the Shanghai Municipal Bureau of Justice, similar to that done for the MOJ by the Beida Society. In fall of that year, the Fudan Society was officially incorporated within the local legal aid system.<sup>109</sup>

In May of 1997, the Ford Foundation provided a grant allowing representatives from the MOJ Center, the Beida Society, Fudan Society, and the Beida Center for Women's Law Studies and Legal Services to travel to Wuhan for five days to observe the workings of the Wuhan Center. The hope was that observing the Wuhan Center would help these various organizations improve their ability to provide legal aid services or, in the case of the MOJ Center, to institutionalize more effective legal aid practices in its eventual national framework.

But in fact, the Chinese participants quickly concluded that the Wuhan Center's practices and experiences were just too dependent on international funding to be of much relevance to their efforts. But exploring their own common experiences,

107. Interview with Gu Jing, Student Liaison to the MOJ, Beijing (Oct. 1996); interview with Official, MOJ, Beijing (March 1997).

108. Interview with Students, Fudan Center, Shanghai (July 1996); interview with Students, Beida Society, in Beijing (Dec. 1996).

109. See, *Fudan Xuesheng Yi Faxue Zhishi Baohu Shehui* [*Fudan Students Use Their Legal Training to Help Society*], WEN BAO, September 9, 1996.]. See also STUDENTS' LEGAL AID CENTER PREPARATION GROUP OF FUDAN UNIVERSITY, BRIEF ON THE PROCESS OF THE PREPARATION OF THE STUDENTS' LEGAL AID CENTER FUDAN UNIVERSITY (1996) (on file with author).

problems, and concerns led participants to suspect that the activities of another legal aid provider in Wuhan, the corporatist South Central University Center,<sup>110</sup> might be more relevant to their own situations. Not only did the South Central University Center require far less resources to operate than did the Wuhan Center,<sup>111</sup> but its operating structure was more consistent with that of the visitors. An impromptu visit to that center was thus arranged by an alumni of South-Central University who worked at the MOJ Center. The participant ended up spending two days observing and working in that center, and it was there, rather than at the Wuhan Center, that they claimed they gained their greatest insight into how to improve their own services.

Five months later, the MOJ Center held a national conference to discuss ways of incorporating law students into a national legal aid framework, a conference which introduced the experiences of the MOJ and their work with the Beida Society into China's national legal environment.

The above narrative provides a good demonstration of how pragmatic development efforts can catalyze environmental change where reductive developmental efforts could not. As noted above, the experiences of, and technologies developed by, China's reductively-inspired American-style clinical legal aid institutions appear generally to have failed to diffuse throughout China's legal and educational environments.<sup>112</sup> In contrast, the experiences and technologies of the Beida Society have diffused—to Fudan, to the MOJ, to the All-China Women's Federation, and other corporatist interest groups and into the larger environment through the MOJ's national conference in 1997. The motor for this diffusion was a collection of developmental projects whose collective effect was to create a small civil-society-like structure linking diverse but related actors from China's domestic regulatory, academic, and legal communities in the pragmatic study of their own problems and experiences. Participating in this structure embedded the Beida Society more robustly into China's larger legal and social environment, and at the same time allowed others in those environments to discover for

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110. See generally *supra* notes 64-66 and accompanying text.

111. See *supra* note 65 and accompanying text.

112. See *supra* note 7 and accompanying text.

themselves how the experiences and technologies of the Beida Society might be relevant to their own concerns.

But perhaps the truest testimony to the value of pragmatic approaches to legal development lies in the fact that *none of the projects discussed above intended or even foresaw the diffusion they fostered*. The externship program with the MOJ was intended to introduce Beida students to public interest work; the study tour to Wuhan was intended to introduce the participants to the efficiencies of the Wuhan Center.

It is well accepted in the study of economic development that neither governments nor international advisors are able to predict in advance where and how economic success will occur. The unforeseen and unplanned diffusions of the Beida Society's experiences gives us strong reason to believe that the same common wisdom should inform our approach to legal development as well.

### CONCLUSION

Again, none of this is to suggest that domestic paradigms are inherently superior to foreign paradigms. Such a position would merely substitute one form of reductivism—what we might call provincialism—for another. Indeed, analyses of China's present practices suggest that the relationship between indigenous and foreign paradigms is ultimately complementary, rather than competitive.<sup>113</sup> But the shape of that complementary relationship cannot be designed *a priori*. It must be discovered. And the crucial need for such discovery argues strongly for more pragmatic developmental strategies.

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113. See Liebman, *supra* note 3, at 271-72.