# RELIGIOUS LIBERTY, CLINICAL EDUCATION, AND THE ART OF BUILDING BRIDGES

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*Three years ago, we founded at Stanford Law School the nation's only full-time academic program dedicated to teaching future lawyers through religious liberty litigation. Now established, this Article revisits the many questions raised at our founding and describes how our project is proving valuable to both legal education and religious liberty, and for obvious and perhaps surprising reasons. In so doing, it explores the following: (1) why the potentially controversial subject of religious liberty (including its proper limits) suits a teaching clinic; (2) the challenges and opportunities in developing a new clinic in an area of law that is at once foundational and disputed; (3) the benefits of clinical legal education a program like ours can deliver to a diverse group of student lawyers, their clients, and the profession they will soon join; and (4) the nuanced, yet important and uniting "cause" to which our program is oriented. In sum, this Article offers a vision for bridging core clinical methods and goals with a deeply human area of law that demands thoughtful, justice-oriented practitioners. In framing this vision on a docket that prefers helping the marginalized to engaging in "culture wars," it also urges broad consensus on the abiding value of religious liberty with the understanding such liberty is neither unlimited nor the exclusive domain of ideologues. This unique blend of pedagogy and principle, we hope, will be our enduring legacy.*

In 2012, I became the founding director of Stanford Law School's Religious Liberty Clinic—the nation's only full-time program dedicated to teaching law students through first-chair litigation in that field. Since then, the clinic has enjoyed much success; it has attracted a talented and diverse group of students, won a series of high-profile cases, and earned the praise of academics, lawyers, civil rights advocates, and faith leaders across the political and religious spectrum. Not

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a week passes by, however, without my being asked a version of this same question: is the clinic simply an alternative way to teach students through the "real practice of law," or is it a groundbreaking venture that serves the cause of religious freedom beyond the four walls of the classroom? The short answer is "Yes." The longer, more nuanced one is the discussion that follows.

At bottom, our young project exemplifies the challenge and promise of bridging core clinical pedagogies with important yet untapped practice areas that might otherwise be left to committed ideologues but through which any future lawyer can learn, serve, and thrive. We provide a professional experience where students navigate the shaky divides between principle and practice, cause and client, and perception and reality that mark an area of law which is at once foundational and disputed, timeless and timely. This benefits the students, their clients, and the profession they will join. In the process, however, we hope our approach will also help build consensus for the abiding value of religious liberty—particularly for those of misunderstood and marginalized faiths—while paving the way for other meaningful clinic programs that might at first appear "too hot" to try.

## I. OVERVIEW

As one of eleven clinics at Stanford and hundreds of others across the country, the Religious Liberty Clinic was developed within an established and hard-earned tradition of clinical legal education at American law schools.[1] The clinic therefore shares with its partners and predecessors a pedagogical understanding that the education of lawyers is maximized through the development of professional skills and judgment in a dynamic, reflective, and supervised lawyering expe-

[1] *See* Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 5-32 (2000) (tracing history of clinical legal education). The growth of modern clinical legal education can reasonably be divided into three periods: (1) the Depression-era work of Jerome Frank and John Bradway (*see*, *e.g.*, John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933)); (2) the parallel developments in the 1960s to 80s of clinic-teaching methodology and social-justice lawyering by Gary Bellow, Arthur Kinoy, and others (*see*, *e.g.*, GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); Arthur Kinoy, *The Present Crisis in American Legal Education*, 24 RUTGERS L. REV. 1 (1969)); and (3) the curriculum-reform era, illustrated in the 2007 Carnegie Report (*see*, *e.g.*, WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007)). *See* Barry et al., at 5-18 (describing first two "waves" of clinical education); Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 11-20 (2013) (describing contemporary trends).

rience.[2] Using a combination of seminars, simulations, rounds, and non-directive fieldwork, we teach future practitioners not only to think like lawyers but to act like them, too—through informed, client-centered legal service, and in real and indeterminate situations.[3] (At Stanford, we also have the benefit of having students full time—i.e., the clinic is the only class they take in an academic term. We can therefore immerse them all the more in the profession through supervised practice.)

In addition to a shared methodology, the Religious Liberty Clinic joins its partners in seeking to address particular challenges facing today's law schools. Among these is growing pressure—whether from clients, the bench and bar, accrediting and licensing authorities, or the legal academy itself—for students to graduate with the tools necessary to more readily succeed as lawyers, and the crucial role clinics play to that end, through focused and real-world integration of lawyerly skills and judgment.[4] Moreover, it is no secret that the reputation of lawyers and their image as ethical and detached servants of justice is suffering, among both the public and lawyers themselves.[5] Clinics, religious liberty or otherwise, help on this front by introducing students at the dawn of their legal careers to reflective client service under the care of

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[2] *See* SULLIVAN ET AL., *supra* note 1, at 120 (finding that the "most striking feature" of clinical legal education is perhaps its power "to engage and expand students' expertise and professional identity through supervised responsibility for clients"); *see also id*. at 122 (observing of clinics that "[i]f one were to search for a single term to describe the ability they hone best, it is probably *legal judgment*[;] . . . [i]n a wide sense, of course, this is the end of all legal education").

[3] *See* SUSAN BRYANT, ELLIOTT S. MILSTEIN, & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 4-5 (2014) (providing overview of core "methodologies" and "frameworks" of clinical legal education); *see also* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 10-14 (2002) (describing typical "instructional settings" for in-house law school clinics).

[4] *See* Tokarz et al., *supra* note 1, at 11-15 (describing contemporary pressures on legal education, and the role of experiential learning, particularly clinics, in better preparing students to become professionals); *see also* Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11 (describing market-based pressures on law school curricula); Tony Mauro, *ABA Delegates Approve Law School Reforms*, NAT'L L.J., Aug. 11, 2014 (describing the American Bar Association's adoption of a new accreditation standard for law schools that requires students to take at least six credit hours of "experiential" learning); Ruth Anne Robbins, *Law School Grads Should Be "Client Ready"*, NAT'L L.J., Feb. 18, 2013, at 31 (arguing that graduating law students should not only be "practice ready" but also "client ready," and that "[c]lients are certainly at the heart of clinical courses").

[5] *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 3-4 (2000) (describing wide public perception of lawyers as greedy, unethical, arrogant, uncivil, and uncaring to clients); *see also* MARY ANN GLENDON, A NATION UNDER LAWYERS 108 (1994) (lamenting the "current devaluation" of ordinary lawyerly tasks in service to clients, including by lawyers themselves).

experienced faculty dedicated to the task.[6] Finally, the Religious Liberty Clinic provides invaluable pro bono representation to the marginalized and misunderstood, which has long been a central goal of clinical legal programs and the law schools that sponsor them.[7]

Beyond these pedagogical and professional benefits common to all law school clinics, a clinic focused on religious liberty offers particularized value. Rooted in a storied legal and cultural tradition, students in this context can regularly engage and apply that tradition in new and fascinating ways. Our students, for example, have studied the 17th-century Quaker experience to help a Jewish synagogue in a land-use dispute, used James Madison's *Memorial and Remonstrance* to resist the closure of a homeless ministry, and cited Dostoyevsky to win worship protections for Muslim inmates.[8] And in each matter, they were not simply lost in the intellectual clouds but were helping real people with real problems, and in a wide variety of religious, racial, and economic circumstances.[9] Further, although religious liberty is the uniting theme of our work, the range of modalities we can pursue in that field—from land-use hearings at city councils, to federal litigation in workplace disputes, to amicus briefing at the Supreme Court—provides myriad opportunities for learning transferrable professional skills.[10]

A correlated benefit to this unique work, of course, is to help attract more students to clinical legal education. Clinics are increasingly popular among students, but most law schools still report partici-

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[6] *See* SULLIVAN ET AL., *supra* note 1, at 160 (observing that law school "clinics can be key settings in which students learn to integrate not only knowledge and skill but the cognitive, practical, and ethical-social facts of lawyering as well").

[7] *See* Jon. C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1475-77 (1998) (describing social-justice mission of clinical education, by increasing access to justice, exposing students to an "ethos of public service," and exploring the implications of justice and power).

[8] *See* FYODOR DOSTOYEVSKY, THE HOUSE OF THE DEAD (C. Garnett trans., 1975) (1862) (observing, "[t]he degree of civilization in a society can be judged by entering its prisons"); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* MADISON: WRITINGS 29, 30 (Jack N. Rakove ed., 1999) (quoting (and relying on) the Virginia Declaration of Rights' definition of religion as "'the duty which we owe to our Creator and the manner of discharging it'"); Edward Hart, *Remonstrance of the Inhabitants of the Town of Flushing to Governor Stuyvesant*, Dec. 27, 1657, Flushing Meeting of the Religious Society of Friends, http://nyym.org/flushing/remons.html (last visited Sep. 9, 2015) (defending Quaker religious freedom in Dutch-controlled New Netherland (present-day New York City)).

[9] *See generally* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001) (studying, along with Jean Koh Peters, the techniques and benefits—both pedagogical and professional—of training law students in cross-cultural circumstances).

[10] *See* SULLIVAN ET AL., *supra* note 1, at 160 ("The primary aim of law clinics is to help students develop the wide range of skills they will need as practicing attorneys, including interviewing, negotiating, case planning, conducting trial advocacy, and legal drafting.").

pation rates of well under half of their total student bodies.[11] The reasons for the disparity are many; most notably, a lack of resources.[12] Assuming clinics are a priority to justify the expense, however, students will respond. If you build it, they will come.[13] On that score, our participation data so far—which admittedly spans only three years—suggests more than one-third of our students might not have taken a clinic in our absence.[14] As for why they chose our clinic in particular, some naturally cite the defense of religious liberty. Interestingly, however, most credit the range and variety of litigation experiences or the human drama our cases invariably present.

In addition to these dynamic, yet fairly uncontroversial, aspects of our work, there is indeed the eponymous theme that animates our docket: we protect the right of clients to act according to their deeply held religious beliefs, even where it is unpopular for them to do so. Along the way, we seek to develop in our students and the wider community a respect for religious liberty as a right common to all people by virtue of their dignity as human persons. Like other aspects of life central to one's identity (e.g., race, gender, sexuality), determinations about the spiritual life are integral to the human experience and our relationships with others. As Robert Cochran puts it, "[i]f there is a God, finding and obeying him (or her) is probably the most important thing that people do on this earth."[15] Absent compelling circumstances, therefore, no government or employer should force someone to abandon their faith, or lack thereof. And that is not just the clinic's position. It is a well-established principle of domestic and international law.[16]

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[11] *See* DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, 2013-14 SURVEY OF APPLIED LEGAL EDUCATION 9-11 (2015), *available at* www.csale.org/files/Report_on_2013-14_CSALE-Survey.pdf (summarizing survey responses from 174 schools indicating an increase in student demand at 54% of those schools in the past three years and a median enrollment rate between 41% and 45%; the respective numbers for the previous five years were 80% and 31%-35%).

[12] *See id*. at 14 (providing survey data from law school administrators citing money and staffing as primary obstacles to the provision of live-client clinical opportunities to law students).

[13] *See* Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLIN. L. REV. 57, 78 (2009) (observing that "the overall trajectory is one of increasing participation in clinical training by law students").

[14] At Stanford, students must apply for a clinical spot and are encouraged to apply to more than one clinic, ranking them in order of preference. Of the 42 students who have taken the Religious Liberty Clinic so far, 13 applied only to that clinic. Anecdotally, at least four students have described our clinic as the reason they chose Stanford and several others have actively recruited new students to the law school through the clinic.

[15] This quote is taken from a blurb of support Pepperdine law professor Robert Cochran sent to include in the program for our clinic's formal launch event in January 2013. The program is on file with the author.

[16] *See* TIMOTHY SHAH, RELIGIOUS FREEDOM: WHY NOW? 44-50 (2012) (outlining vari-

Contrary to the uninformed assumption of some before we started, ours is not a partisan project.[17] In fact, we consciously strive to lower the temperature in the religious liberty field, which is all-too-often pitched as a "culture war" fight over the merits of a particular religion or religious practice, rather than a principled examination of human freedom and its limits.[18] And although this crucial distinction has been part of bipartisan legal thinking for centuries—from the ratification of the First Amendment to more recent unanimous passage of the statutes under which we do most of our litigation (i.e., the Religious Land Use and Institutionalized Persons Act, and the workplace accommodation provision of Title VII)—it bears repeating.[19] To illustrate this understanding, we look for cases that not only have high pedagogical value but also provide an opportunity for consensus. Our docket has thus emphasized sympathetic matters particular to our clients' identities over hot-button social issues or abstract establishment controversies. On a related note, we also stress in our work that religious liberty is not unlimited; most of our opponents have legitimate concerns, and it is also not uncommon for our students to even disagree with their clients. This, of course, brings us full circle to our particular mission of teaching those students how to be professionals in the messy world in which lawyers operate.

In explaining the value of our project and its methods, this Article proceeds in six parts: (I) this overview; (II) a brief discussion on the substantive importance of religious liberty; (III) a description of

ous legal protections, noting that "[r]eligious freedom in both its negative and positive dimensions enjoys an honored place in the law of the United States, of numerous countries around the world, and of the international community").

17 *See*, *e.g.*, Ethan Bronner, *At Stanford Law School, a Unique Clinic Offers Training in Religious-Liberty Cases*, N.Y. TIMES, Jan. 22, 2013, at A16 (framing our clinic as a politically conservative enterprise).

18 *See* Kevin Lee, *Clinic Aims to Cool Church-State Feud*, L.A. DAILY J., Jan. 16, 2013 (describing our detached, non-political approach that seeks to "'turn the temperature down'").

19 The statute under which we do most of our work as a clinic, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), passed both houses of Congress with unanimous consent (*see* 146 Cong Rec. H7192 (daily ed. July 27, 2000); 146 Cong. Rec. S7779 (daily ed. July 27, 2000)), and with the support of diverse private organizations, including the Christian Legal Society and the ACLU (*see* 146 Cong. Rec. S6688 (daily ed. July 13, 2000); 146 Cong. Rec. S7776 (daily ed. July 27, 2000)). In signing RLUIPA, President Clinton observed: "Religious Liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society." Presidential Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 Weekly Comp. Pres. Doc. 2168, 2168 (Sept. 22, 2000). The 1972 religious accommodation amendment to Title VII, 42 U.S.C. § 2000e(j), similarly passed with unanimous support. *See* Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972).

our docket and approach; (IV) an exploration of how a religious liberty clinic serves some of the more significant learning goals of clinical legal education; (V) a summary of the broader purpose to which our clinic is directed; and (VI) a short conclusion. Given the range of substantive and pedagogical topics implicated by our clinic, this paper takes the form of a survey. Nevertheless, it aims to provide a deeper understanding of our story that, I hope, will demonstrate the value of projects like ours to the legal academy and profession, and the society they both serve.

## II. WHY RELIGIOUS LIBERTY?

Before proceeding to the particular character and benefits of the Stanford clinic, it seems appropriate to first explore why religious liberty is an area worthy of clinical study and work in the first place. To some, the subject might seem anachronistic; to others, unwieldy; and to still others, too controversial. But the question of legal protection for religious practice in a diverse and pluralistic society has been with us from the founding of our country, and long before that.[20] Indeed, it is arguably *because* of these various and recurring objections that contemporary law students should study the nature and contours of religious freedom—including its limits. That well-intentioned people can disagree is a significant point to the exercise, and a prime opportunity for bridging. No matter the side one takes in a particular dispute between or among religious, secular, or other interests, the matter warrants thoughtful consideration . . . and good lawyers.

### *A. The Founding Experience*

It is well known that the principle of religious liberty was a pressing concern to those who crafted the Constitution and Bill of Rights.[21] Formed in the crucible of persecution in Europe and the failed promise of broader liberty in some of the colonies—particularly for religious minorities like Baptists or Quakers—the founders understood freedom in matters of religious belief and practice as something fun-

[20] *See* E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 495 (2009) ("Our constitutional commitment to religious freedom is the culmination of centuries of theological and political controversy about the proper relation between religion and government.")

[21] *See generally* John Witte, *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996) (outlining founding-era thought on religious freedom). According to Thomas Jefferson, "[i]n our early struggles for liberty, religious freedom could not fail to become a primary object." LETTER OF THOMAS JEFFERSON TO BALTIMORE BAPTIST ASSOCIATION (1808), *reprinted in* 1 WRITINGS OF THOMAS JEFFERSON 317 (Andrew Adgate Lipscomb et al. eds., 1903).

damental to the American experiment.[22] As Madison observed in warning against restrictions on religious exercise, "torrents of blood ha[d] been spilt in the old world" in the name of religion.[23] And even in the colonies, religious persecution—though not as extreme—was "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence."[24]

Beyond their personal experience, the founders also shared an appreciation for religious liberty as a governing norm.[25] Among their chief intellectual influences was the English philosopher John Locke, who urged broad toleration of religious dissent, and that church and state should occupy distinct and limited spheres in addressing their respective worldly and spiritual concerns.[26] The founders likewise understood faith as a matter of deeply personal significance; according to Madison, religion must "be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[27] To the founders, "free exercise according to conscience was hardly a radical idea."[28]

The early American view of religious liberty might seem a bit cramped by contemporary standards, as it was commonly associated with a theological, and decidedly Protestant, worldview.[29] As Alexis

[22] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-30 (1990) (framing the proposal and ratification of the Free Exercise Clause in the context of religious conflict in England and a patchwork of approaches in the colonies).

[23] MADISON, *supra* note 8, at 30.

[24] Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 11 (1947).

[25] *See*, *e.g.*, THE FEDERALIST NO. 51, at 270-71 (James Madison) (George W. Carey & James McLellan eds., 2001) (1788) (arguing for religious liberty based on pacifying effect of diversity of sects and beliefs); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1982) (1782) (framing religious liberty in jurisdictional terms: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god.").

[26] *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION 25-27 (James H. Tully ed., 1983) (1689) (observing that "[t]oleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind, as not to perceive the necessity of it, in so clear a light"; and that government should concern itself with "civil concernments," while religion should concern itself with "care of souls"). Jefferson captured these ideas in his Virginia Statute for Religious Freedom (the First Amendment's leading precursor), which provides "no man shall be compelled to frequent or support any religious worship, . . . nor shall [he] suffer on account of his religious opinions or belief." Virginia Statute for Religious Freedom, Section II, *in* THE SACRED RIGHTS OF CONSCIENCE 251 (Daniel L. Dreisbach & Mark David Hall eds., 2009) (1786).

[27] MADISON, *supra* note 8, at 29 (internal quotation marks omitted).

[28] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 GEO. WASH. L. REV. 915, 933 (1992).

[29] *See* STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 7 (2014) (observing that the founding view of religious liberty was based on "distinctively Christian notions"). The founders were deeply influenced by prominent preachers like Eli-

de Tocqueville then observed, "[f]or the Americans, the ideas of Christianity and liberty are so completely intermingled that it is almost impossible to get them to conceive of the one without the other."[30] Moreover, the founders disagreed on specific aspects to what they agreed generally. On a theoretical level, some saw religious freedom as something the state tolerates, while others took the natural-law view that it precedes government authority.[31] Practically, they also divided on whether religious freedom requires exceptions to otherwise applicable civil laws.[32] Finally, and regrettably, some founders even disputed whether the pertinent rights should extend to non-Christians.[33]

But in the First Amendment text the founders' conclusion was both universal (i.e., that religious freedom belongs to everyone) and framed in the general yet resounding twin commands of non-establishment and free exercise.[34] And although courts and scholars continue to struggle over the meaning and application of the text of the Religion Clauses, their sixteen words capture numerous abiding principles, including liberty of conscience, free exercise, pluralism, equality, separationism, and disestablishment.[35] Each of these concepts has sparked countless debates, articles, and books, and our present purpose does not include covering them as a substantive matter. Suffice it to say there is ample and promising ground for clinic students to grapple with and apply profound and enduring legal and cultural concepts

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sha Williams, Isaac Backus, and John Leland, who saw freedom of religion as a command of Christ. *See* Witte, *supra* note 21, at 381-83 (describing influences for religious freedom from the evangelical community); *see also* McConnell, *supra* note 22, at 1439 ("The greatest support for disestablishment and free exercise . . . came from evangelical Protestant denominations.").

[30] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (J.P. Mayer ed., 1969) (1835).

[31] *See* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 777-78 (2013) (contrasting George Mason's view of religious freedom as "toleration" with Madisonian "free exercise").

[32] *See* McConnell, *supra* note 22, at 1449-55 (contrasting Jefferson's more restrictive view of liberty for religious "actions" (as opposed to "opinions") with Madison's more liberal one based on primary "duty" to God); *see also id*. at 1459-60 (describing varied approaches in founding-era state constitutions).

[33] *See*, *e.g.*, MORTON BORDEN, JEWS, TURKS, AND INFIDELS 8-20 (1984) (describing conflicting views among founders on the religious liberty of non-Christians); DENISE A. SPELLBERG, THOMAS JEFFERSON'S QU'RAN: ISLAM AND THE FOUNDERS 3-11 (2013) (describing founders' conflicting views on Muslims); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1873) (observing that the "real of object" of the First Amendment "was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects").

[34] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .").

[35] Witte, *supra* note 21, at 388.

through the development, theory, and language of the First Amendment and the founding experience.

### *B. Developing the Principle*

The general principle of religious freedom in law is of course not limited to the First Amendment text. It has since developed in cases and statutes that have followed, as well as the corresponding relationship between government and the people.[36] Conceiving this freedom as a universal right no matter the faith chosen (or not), for example, is now a constitutional fixture.[37] As Justice Douglas famously declared, accommodating religious choices "follows the best of our traditions."[38] Moreover, the Supreme Court has repeatedly made clear that religious liberty indeed applies to both beliefs and actions; the latter may be the subject of greater regulation, but not in a discriminatory way.[39] And although the Court's establishment jurisprudence is more erratic—and controversial, at least historically—it at a minimum prohibits the government from supporting religion directly, coercing worship, favoring particular beliefs, and unduly meddling in religious affairs[40]—all in service to the global purpose of minimizing government influence on religious choices.[41]

Federal and state statutes have also expanded upon these constitutional principles. Among these are two laws under which we do most of our work in clinic: the Religious Land Use and Institutional-

[36] *See* Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1252 (2000) (observing that the religious liberty question "is not solely a matter of constitutional law, to be abandoned to framers and ratifiers and interpreters . . . [i]t is worked out daily in the halls of legislatures, school boards, bureaucratic offices, and civil associations").

[37] *See* Cty. of Allegheny v. ACLU, 492 U.S. 573, 590 (1989) ("Perhaps in the early days of the Republic [the Religion Clauses were] understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." (internal quotation marks omitted)); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or matter of opinion or force citizens to confess by word or action their faith therein.").

[38] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[39] *See* Employment Div. v. Smith, 494 U.S. 872, 876-80 (1990) (distinguishing between religious beliefs and actions for state regulation, permitting latter to be more broadly regulated by neutral laws of general applicability); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-34 (1993) (describing non-discriminatory approach to religious beliefs and actions under First Amendment).

[40] *See Allegheny Cty.*, 492 U.S. at 590-91 (outlining basics of Court's establishment jurisprudence).

[41] *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 373 (1992) (arguing Religious Clauses are not in tension, but "together are designed to minimize government influence on religious belief and practice," including non-belief and non-practice).

ized Persons Act of 2000 (RLUIPA),[42] and Title VII of the Civil Rights Act of 1964.[43] Like the First Amendment, each of these laws forbids discrimination (i.e., disparate treatment) on the basis of religion. Title VII does so in the workplace, under the general theory that, notwithstanding the arguable mutability of religious beliefs, religious identity is akin to other core categories of personhood such as gender, race, or national origin, and should therefore not be used to limit one's ability to earn a living.[44] Meanwhile, RLUIPA forbids religious discrimination in the regulation of land use, based on concern over the widespread abuse of local zoning authority to exclude religious groups—particularly those with unfamiliar or unpopular beliefs or practices—as well as an appreciation for the common importance of physical space to religious practice.[45]

Unlike the First Amendment, however, Title VII and RLUIPA also categorically require accommodation.[46] RLUIPA does so in both land use and the other area it covers: prison.[47] Where, for example, a land-use regulation or prison policy substantially burdens religious exercise, RLUIPA imposes strict scrutiny: the state must show its action was justified by a compelling interest and was the means least restrictive of religion.[48] In the land-use area, this accommodation rule stresses the abiding importance of religious association in light of the risks of unfettered local power, especially where that association implicates minority practices, NIMBY-ism, or tax-exempt use.[49] In

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[42] 42 U.S.C. § 2000cc (2012).

[43] 42 U.S.C. § 2000e (2012); 42 U.S.C. § 2000e(j) (accommodation amendment).

[44] *See* James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1034 (2004) (noting inclusion of religion among categories protected by Title VII despite lack of consensus on its mutability).

[45] *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 755-56 (1999) (observing that "[t]he right to assemble for worship is at the very core of religious liberty," as "[i]n every major religious tradition—Christian, Jewish, Muslim, Buddhist, Hindu, whatever—communities of believers assemble together, at least for shared rituals and usually for other activities as well"); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 984-85 (2001) (summarizing RLUIPA's legislative history showing religious discrimination in local zoning decisions).

[46] *See* 42 U.S.C. §§ 2000cc (a)(1) & 2000cc-1(a) (RLUIPA); 42 U.S.C. § 2000e(j) (Title VII). *See also* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) (describing RLUIPA as providing "expansive protection for religious liberty" for inmate religious practice through a broad accommodation scheme); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015) (emphasizing that Title VII gives religious practices "favored treatment" by affirmatively requiring employers to accommodate them).

[47] *See* 42 U.S.C. §§ 2000cc (a)(1) (RLUIPA's land-use protections) & 2000cc-1(a) (RLUIPA's prison provisions).

[48] 42 U.S.C. § 2000cc (a)(1).

[49] *See* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and*

prison, an accommodation regime honors religious exercise as a core part of one's humanity in that special context.[50] As Justice Ginsburg wrote in affirming RLUIPA's constitutionality, the law understandably protects religious liberty in the "severely disabling environment" of prison, where "government exerts a degree of control unparalleled in civilian society."[51] RLUIPA's peculiar mix of land-use and prison provisions is admittedly rooted in a unique political compromise; unlike broader proposals that failed to pass before it, Congress adopted RLUIPA by unanimous consent, and it was praised by groups as diverse as the American Civil Liberties Union and the Christian Legal Society.[52] But its passage exhibits the opportunity for principled consensus we likewise seek in our clinic.[53]

For its part, Title VII requires employers to reasonably accommodate employees' religious practices, such as ritual clothing, grooming, or Sabbath observance.[54] And although the burden Title VII imposes is lighter than RLUIPA's strict scrutiny—i.e., employers can refuse accommodations that impose more than a "*de minimis*" cost[55]—it extends to private actors.[56] Perhaps more importantly, and for our clinic, California and many other states have gone beyond Title VII to require employers to accommodate religious practices short of only those that would cause "significant difficulty or expense" (which is the standard test for the accommodation of disability).[57] At whatever

*Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1025-40 (2012) (describing grounds for RLUIPA need in land-use context).

[50] *Cf*. O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting) (opining that undue limits on religious exercise "may extinguish an inmate's last source of hope for dignity and redemption").

[51] Cutter v. Wilkinson, 544 U.S. 709, 720-21 (2005).

[52] *See supra* note 19; *see also* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME LIBERTY 178-84 (2005) (describing consensus on RLUIPA that failed to coalesce around a broader bill).

[53] In signing RLUIPA, President Clinton remarked that it demonstrates "people of all political bents and faiths can work together for a common purpose that benefits all Americans." Presidential Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 Weekly Comp. Pres. Doc. 2168, 2168-69 (Sept. 22, 2000).

[54] 42 U.S.C. § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the [employer]").

[55] Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

[56] 42 U.S.C. § 2000e(b) (defining "employer" under Title VII).

[57] *See*, *e.g.*, CAL. GOV'T CODE §§ 12926, subd. (u), 12940, subd. (*1*) (West 2014); *see also* 42 U.S.C. § 12112(10)(A) (2012) (Americans with Disabilities Act providing similarly). Bipartisan efforts have been made for over a decade to import the higher standard to Title VII, but no such amendment has passed. *See* Lauren E. Bohn, *Workplace Religious Freedom Bill Finds Revived Interest*, HUFFINGTON POST, (July 3, 2010, updated May 25, 2011, 4:20 PM), www.huffingtonpost.com/2010/05/03/workplace-religious-freed_n_561560.html (describing the broad and diverse coalition of civil rights groups and politicians sup-

level, however, compulsory accommodation in the workplace not only honors the principle that religious identity is something one should not lose by going to work, it also recognizes that meaningful religious freedom must include protection of overt activity.[58] As the chief sponsor of the Title VII provision stressed at its passage—which, like RLUIPA, was unanimous—the statute rightly protects "the freedom to believe, and also the freedom to act."[59]

### *C. Continuity, Context, and Controversy*

Religious freedom has thus developed in our domestic law for over two centuries, permeating many aspects of our lives. And its resonance is not limited to this country. As Douglas Laycock notes, "[r]eligious liberty is one of America's great contributions to the world."[60] The Universal Declaration of Human Rights, which urges broad freedom for religious belief and practice and was adopted by the U.N. on a 48-0 vote in 1948, is a prime example of this influence.[61] But no matter what the text of this or any other legal provision says, however, the reason religious liberty has endured likely has less to do with positive law than a prevailing appreciation of its importance and centrality to the human experience. As Laycock also observes, "constitutional clauses and judicial review are very thin reeds to rely on."[62] When inevitable (and often necessary) controversies arise in the area, first-rate lawyers—or better yet, clinically trained ones—should thus be there.

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porting broader accommodation).

[58] *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033-34 (2015) (emphasizing that Title VII does not limit the meaning of "religion" to "*belief*" (emphasis in original), but includes actions as well).

[59] 118 Cong. Rec. 705 (1972) (statement of Sen. Jennings Randolph).

[60] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 840.

[61] *See* Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1 (Michael Ignatieff ed., 2005) (describing leading role played by United States in the drafting of the Universal Declaration of Human Rights); *see also* SHAH, *supra* note 16, at 2 (describing unanimous international support among voting countries for the Universal Declaration at its passing after the Second World War). The Universal Declaration provides, "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948). Article 29 of the Declaration states further, "[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id*., art. 29.

[62] Laycock, *supra* note 41, at 375.

There are salient arguments supporting religious liberty, including those stressed by the founders and outlined above, which continue to resonate in contemporary culture. The principle that religion and government should play distinct and independent roles in the lives of a free people, for example, reflects a judgment rooted in contrary millennia of religious wars and persecution[63]—a reality that tragically continues in many places across the globe.[64] This experience is in turn captured in a political understanding that religious liberty is vital to a society's ability to enable those of different views on matters of deep personal significance to co-exist in community and harmony.[65] Accordingly, President Obama has called religious freedom "central to the ability of peoples to live together."[66]

And beyond history and public policy, there are abiding theoretical arguments for religious liberty. These include direct supports, like John Locke's concept of the distinct nature and roles of church and state[67] or John Henry Newman's rights-duty formula (i.e., "[c]onscience has rights because it has duties"),[68] as well as more abstract philosophical grounds, such as John Stuart Mill's "marketplace of ideas"[69] or John Rawls's "veil of ignorance" theory of justice for equal liberty of conscience.[70] Then, of course, there are the various

[63] *See* Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right*, 2002 B.Y.U. L. REV. 217, 224 (arguing that centuries of strife yielded the "widely accepted" principle that "one of human government's main roles is to protect peoples' religious choices"); *see also* Nathan A. Adams, *A Human Rights Perspective: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1, 23-32 (2000) (describing historic "linkages" between human rights and religious liberty in global context).

[64] In its 2014 report, the U.S. Commission on International Religious Freedom designated at least 33 countries where religious persecution continues to take place on a consistent basis. *See* ANNUAL REPORT OF U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (2014), http://www.uscirf.gov/sites/defaultfiles/USCIRF%202014%20Annual%20Report%20PDF.pdf

[65] *See* McConnell, *supra* note 36, at 1258 (arguing that "[t]he First Amendment Religion Clauses, in particular, were designed to enable people of many diverse views to live together in a political community").

[66] President Barack Obama, Remarks by the President on a New Beginning, Speech at Cairo Univ. (June 4, 2009), (transcript available at www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09).

[67] *See supra* note 26 and accompanying text.

[68] *See* JOHN HENRY NEWMAN, *A Letter Addressed to His Grace the Duke of Norfolk on Occasion of Mr. Gladstone's Recent Expostulation*, *in* CERTAIN DIFFICULTIES FELT BY ANGLICANS IN CATHOLIC TEACHING, § 250 (1875), *available at* www.newmanreader.org/works/anglicans/volume2/gladstone/section5.html (outlining a duty-based understanding of freedom of conscience).

[69] *See* J.S. MILL, ON LIBERTY 50, 53 (Elizabeth Rapaport ed., 1978) (1859) (justifying free expression of ideas as an exercise in the search of truth, subject to limitation where resulting action would harm another).

[70] *See* JOHN RAWLS, A THEORY OF JUSTICE 118, 180-90 (1999) (arguing "[m]oral and religious freedom follows from the principle of equal liberty" developed through a "veil of ignorance" thought experiment, where rights would be chosen without prior knowledge of

arguments arising from the world's great religions, including Buddhist,[71] Christian,[72] Hindu,[73] Jewish,[74] and Muslim[75] sources—all of which, to varying degrees, may be understood as proposing the freely chosen faith as a divine or natural command.[76]

Perhaps most relevant to our present purpose, however, is the practical reality of religious diversity and commitment reflected in the faces and stories of our clients. Put simply, the ability to practice one's faith matters deeply to real people with real lives and in real circumstances.[77] We have represented Sikh truck drivers fired for refusing to cut their hair lest they apostatize;[78] Jewish inmates facing starvation after their requests for Kosher meals were denied;[79] and a homeless ministry outlawed for following Christ's command to care for the "least of these."[80] Regardless what philosophers, theologians, or academics might say about religious liberty in the abstract, our clients risk their jobs, their property, and even their personal safety to follow the

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one's social position).

[71] *See* Masao Abe, *Religious Tolerance and Human Rights: A Buddhist Perspective*, *in* RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND RELIGIONS 193, 198 (Leonard Swidler ed., 1986) ("In Buddhism, deep faith and true tolerance do not exclude one another but go together.").

[72] *See*, *e.g.*, SECOND VATICAN COUNCIL, *Dignitatis Humanae*, *in* VATICAN COUNCIL II: THE BASIC SIXTEEN DOCUMENTS 551, 554 (A. Flannery ed., 1996) (1965) ("[T]he practice of religion of its very nature consists primarily of those voluntary and free internal acts by which human beings direct themselves to God.").

[73] *See* James E. Wood, Jr., *An Apologia for Religious Human Rights*, *in* 1 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 458 (John Witte ed., 1996) ("In the ancient teachings of Hinduism, . . . intolerance and the very denigration of the religious rights of other faiths are expressly condemned.").

[74] *See* DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 79-80 (2009) ("[T]he covenant between God and individual Jews [requires] an individual Jew [to] want[ ] to be in the covenant under no external duress.").

[75] *See* Abdullah Saeed, *The Islamic Case for Religious Liberty*, FIRST THINGS, Nov. 2011, at 33 ("[R]eligious liberty [ ] is embedded in [our] history and . . . stands at the center of [our] most sacred texts.").

[76] *See* Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1763-67 (2011) (summarizing religious views on religious liberty as "grounded in powerful claims of ultimate reality—claims concerning the will of God or the call to spiritual fulfillment; claims concerning the dignity and individuality of each and every human being; and claims affirming religious liberty as an intrinsic (God-given or natural) human right").

[77] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 4 (1993) (emphasizing that "religion matters to people, and matters a lot").

[78] 2 THE ENCYCLOPAEDIA OF SIKHISM 466 (Harbans Singh ed., 2d ed. 2001) ("Trimming or shaving is forbidden [for] Sikhs and constitutes for them the direst apostasy.").

[79] 5 ENCYCLOPAEDIA JUDAICA 650-57 (Michael Berenbaum & Fred Skolnik eds., 2007) (detailing the sacred Jewish practice of *kashrut*, and the suffering Jews have historically endured for following it).

[80] *Matthew* 25:40; *see also Matthew* 25:31-46 (the remainder of the "parable of the sheep and the goats," where Jesus pledges eternal rewards (or punishment) to those who care (or not) for those in need).

teachings of their faith. As Michael McConnell put it recently, such commitment surely "counts for something."[81] It at least merits thoughtful and dedicated legal advocacy.

And the struggles our clients face will likely grow in the coming years, continuing the personal relevance of religious liberty. As Martha Nussbaum observes, America now "contains a religious diversity unparalleled in its history."[82] Based on past experience, it is therefore not unreasonable to expect tension over new and different faith practices.[83] At the same time, and for better or worse, the increasing role of government in aspects of life previously left to the private or non-profit sector heightens the opportunity for conflicts between private and public conceptions of the good.[84] And then there is collateral damage from the so-called "culture wars," where the concept of religious liberty has become increasingly joined to contested debates over marriage, contraception, and abortion.[85] Most religious liberty cases have nothing to do with these controversies.[86] But the stigma is there, either directly or because the issues are linked on a continuum for many of those involved.[87]

Of course none of the arguments for religious liberty is without counterpoint. As in any honestly waged lawsuit, there are almost always valid countervailing interests in our cases; e.g., prison security, neighbor property rights, employer prerogatives. Indeed, the very laws under which we litigate recognize in their balancing tests that

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[81] McConnell, *supra* note 31, at 791 ("[M]any hundreds of thousands of real people have regarded their religious beliefs as so important that they sacrificed their lives, fortunes, social standing, opportunities for career advancement, and bodily comfort in order to worship in accordance with their convictions.").

[82] MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 358 (2008).

[83] *See* John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, *in* SHARI'A IN THE WEST 279, 288 (Rex Adhar & Nicholas Aroney eds., 2010) ("The current accommodations made to the religious legal systems of Christians, Jews, First Peoples, and others in the West were not born overnight. They came only after decades, even centuries of sometimes hard and cruel experience.").

[84] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 181 (1992) (lamenting lack of religious exemptions to general laws, where the state "has penetrated so much more deeply into both private life and the operations of the nonprofit sector").

[85] *See* Laycock, *supra* note 60, at 846 (opining that "the biggest problem for religious liberty in our time is deep disagreements over sexual morality").

[86] *See id*. at 877 ("Most religious liberty issues actually have nothing to do with sex, or abortion, or nonbelievers."). As detailed below, our docket choices reflect much of Professor Laycock's concern over the undue association in contemporary culture between religious liberty and the "culture wars."

[87] Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 185 (2014) (describing controversy surrounding the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) as "both a product of and a contributor to the larger culture war").

religious liberty has limits—a point we stress in our work.[88] Beyond this legal reality, some prominent scholars have also questioned the validity of religious exemptions to general laws or the universality of religious freedom in the first place. Christopher Eisgruber and Lawrence Sager argue this freedom should largely be limited to equality;[89] Brian Leiter objects to exemptions as enabling irrationality;[90] and Marci Hamilton challenges whether religion is a social good worthy of unique protection at all.[91] And in the culture-war context, challenges to religious liberty as mere window dressing to underlying political agendas are not uncommon.[92]

As discussed below, we shape our docket to account for many of these objections. In any event, however, we believe their presence urges the study of religious liberty all the more—particularly where, as in a clinic, we strive to teach transferrable lawyering skills through reflective service to the misunderstood.[93] As Stephen Carter encourages in the broader political context, "[a] state that loves liberty and cherishes its diversity . . . should revel in these conflicts, welcoming them as a sign of political and spiritual health."[94] In our view, our clients and the principle they represent deserve no less.

## III. Our Clinic: Nuts, Bolts, and Wrenches

Notwithstanding the rich tradition of religious liberty in America, our clinic is the only full-time program in the nation dedicated to training lawyers through student-owned litigation in the field.[95] On a

[88] *See*, *e.g.*, 42 U.S.C. §§ 2000cc (a)(1) (RLUIPA's test for the application of land-use rules: where such rules impose a "substantial burden" on religious land use they must be justified by a "compelling governmental interest" and constitute the means "least restrictive" to such use); and 2000cc-1(a) (analogous RLUIPA test for prison-based claims); 42 U.S.C. 2000e(j) (Title VII accommodation test, which requires employers to "reasonably accommodate" employee religious practice absent "undue hardship").

[89] *See* Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 52-53 (2007) (summarizing "alternative understanding" of religious freedom as "equal liberty").

[90] *See* Brian Leiter, Why Tolerate Religion? 63-64 (2013) (arguing there is no moral case for "special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning").

[91] *See generally* Hamilton, *supra* note 52 (disputing assumption of religion as an unmitigated good).

[92] *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L. Rev. 373, 373 (1992) (lamenting the troublesome use of each Religion Clause as "one side's club to beat the other side with").

[93] *Cf*. Marci A. Hamilton, *A Response to Professor Laycock*, 105 Mich. L. Rev. 1189, 1190 (2007) (urging academic debate and conversation about religious liberty questions on which reasonable minds differ).

[94] Carter, *supra* note 77, at 274.

[95] Led by law and religion expert Thomas Berg, the University of St. Thomas recently

day-to-day basis, our teaching methods are surely and appropriately conventional: we employ the seminar-fieldwork-supervision-rounds combination that has long been the hallmark of clinical pedagogy in most law schools.[96] The unique twist, which is at once a challenge and a bridging opportunity, is of course the area of practice. In short, we seek to unite the correspondingly proud traditions of clinical teaching and religious liberty in a pedagogically sound and salutary way.

### *A. Foundations*

Our clinic's website promises "a full-time, first-chair experience representing a diverse group of clients in legal disputes arising from a wide range of beliefs, practices, and circumstances."[97] We also aim to develop in students an appreciation for the view that religious liberty is "a universal human right shared by everyone regardless of your religious belief."[98] It is for these unique and admittedly ambitious objectives that many leading academics thought our founding was a particularly momentous occasion in legal education.[99] And although I am grateful for (and a bit intimidated by) the kudos, at least the way we seek to do these things is relatively familiar ground as follows.

Like many law school clinics, we hold frequent (at least semi-weekly) seminars dedicated to teaching professional skills and habits through lawyering and practice-area readings, presentations, simulations, discussions, and case rounds—all of which are geared to developing a global lawyering experience through the parallel work students do in the field.[100] Lawyering topics include client interview-

launched a part-time appellate clinic focused on amicus briefs. *See* Religious Liberty Appellate Clinic, UNIV. OF ST. THOMAS, www.stthomas.edu/ipc/legal/religiouslibertyappellate clinic (last visited Aug. 31, 2015). Gary Simson also directed a religious liberty clinic for a time at Cornell in the mid-1990's. *See* Gary J. Simson, *Reflections on Free Exercise: Revisiting* Rourke v. Department of Correctional Services, 70 ALBANY L. REV. 1425, 1425-26 (2007) (describing clinic case).

96 *See* BRYANT ET AL., *supra* note 3, at 4-5 (describing basic elements of traditional clinical pedagogy to include seminar, rounds, supervision, and fieldwork).

97 Our website can be found at https://law.stanford.edu/religious-liberty-clinic (last visited Aug. 31, 2015).

98 Sam Scott, *New Law Clinic Handles Religious Liberty Cases*, STANFORD MAG., May/June 2013, at 25.

99 At its founding, our clinic was called "pioneering," "unique," "corner turning," and perhaps "the most important work going on in legal education anywhere." These quotes are taken from friendly endorsements provided by Joseph Weiler, Jeffrey Selbin, Thomas Farr, and Robert Cochran. They can be found on our website at https://www.law.stanford.edu/religious-liberty-clinic/endorsements (last visited Aug. 31, 2015).

100 *See* Susan Bryant & Elliott Milstein, *The Clinic Seminar: Choosing the Content and Methods for Teaching in the Seminar*, *in* BRYANT ET AL., *supra* note 3, at 35-39 (arguing that grounding the clinic seminar in the students' field work is supported by theories of adult learning as well as a "core" interest of clinicians in the "lawyering process" (a phrase coined by Gary Bellow and Bea Moulton in their pioneering book of the same name, *see*

ing and counseling, case theory and storytelling, pleadings, discovery, negotiation, and writing (business and legal), and are based almost exclusively on standard clinical sources.[101] For their part, the practice-area topics involve both the framing of each lawyering topic in the context of religious liberty disputes as well as the specialized legal, policy, and cultural materials necessary to their successful litigation.[102] These typically include a practical exploration of the statutes, cases, history, and theory described in the previous section (including past and present controversies), as well as student updates on the latest developments in law and religion,[103] interfaith presentations,[104] and visits from leading practitioners in the field.[105]

Also like the typical law school clinic, we dedicate a significant number of class sessions to case rounds. Hailed by Susan Bryant and Elliott Milstein as "signature pedagogy" for clinical education, we seek in these facilitated peer discussions to explore and reflect upon the lawyering skills, ethical dilemmas, and social-justice issues that arise in the students' fieldwork.[106] Along the way, students get valuable feedback for their own projects, but also collaborate in the work of their colleagues and therefore broaden their understanding of the

BELLOW & MOULTON, *supra* note 1), where students are afforded the opportunity in clinic to understand lawyering as an organic whole, from first meetings to solutions).

101 Our lawyering sources include DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS (2d ed. 2004); DAVID CHAVKIN, CLINICAL LEGAL EDUCATION (2012); DEBORAH EPSTEIN ET AL., THE CLINIC SEMINAR (2014); ROGER S. HAYDOCK & PETER B. KNAPP, LAWYERING (3d ed. 2011); and articles from leading clinicians like Susan Bryant, Robert Dinerstein, Elliott Milstein, and Binny Miller. For writing, we use both clinical and practice resources, including BRYAN A. GARNER, THE WINNING BRIEF (3d ed. 2014)).

102 Our practice-area sources include statutes and cases; articles from scholars like Douglas Laycock, Brian Leiter, Michael McConnell, Martha Nussbaum, and John Witte; and area practice guides.

103 Students are assigned on a rotating weekly basis to give a brief update on developments in the religious liberty field from the prior week. We find this exercise enhances the immediacy of what students are doing in their cases and teaches them the practice skill of staying fresh in your area. Students often use Howard Friedman's acclaimed *Religion Clause* (http://religionclause.blogspot.com) for material.

104 In the middle of the term, each student must make a 20-minute presentation on the beliefs, practices, and religious liberty challenges of a faith of their choice. We find these presentations develop in students both the ability to tell and learn the story of the faiths in question as well as a sense of the overlapping nature of many religious beliefs and practices, and their attendant legal issues. Presentation topics from past quarters have included Buddhism, Catholicism, Islam, Jainism, Judaism, Mormonism, Native American Spirituality, Protestant Christianity, Quakerism, Scientology, Secular Humanism, Sikhism, Wicca, and Zoroastrianism.

105 Clinic guests have included lawyers from area civil rights organizations that do related work—including Muslim Advocates, Prison Law Office, and Sikh Coalition—as well as partners from private law firms—including Munger Tolles & Olson and Horvitz & Levy.

106 Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLIN. L. REV. 195, 200-15 (2007) (describing the nature of clinical case rounds).

skills, norms, and challenges of a practicing lawyer.[107] We find rounds to be particularly valuable in the context of religious liberty work, based on the range of modalities across the docket—e.g., from inmate interviews to appellate briefs—as well as the diverse cross-cultural and interpersonal aspects of each matter—e.g., from a Seventh-day Adventist who lost her job for refusing to work the Sabbath, to a group of Buddhist monks barred from printing holy texts for their community's use in Tibet.[108]

Turning to the field, and for reasons explored below, we tend to focus on cases involving ad hoc obstacles to our clients' faith, and in the prison, employment, and land-use contexts.[109] Under a loose theme of "religious liberty for all," we have so far represented Buddhists, Hindus, Messianic Jews, Missionary Christians, Muslims, Native Americans, Orthodox Christians, Orthodox Jews, Quakers, Reform Jews, Seventh-day Adventists, and Sikhs, as well as secular civil rights groups in support of others, including female prisoners of all faiths.[110] The diversity of clients is mirrored by the diversity of lawyering tasks, which has included client and witness interviewing; client counseling; contract, letter, complaint, motion, and brief writing; discovery and depositions; presentation of oral argument; and mediation to settlement. And our forums have included agency, trial, and appellate venues (including amicus briefs to the Supreme Court).[111] We have yet to have a trial, but anticipate at least one in the coming year.

Once we accept representation, we take a primarily client-centered approach, recognizing there are both legal and non-legal aspects to the type of problems our clients present that make them more properly resolved through a collaborative and empowering process.[112]

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107 *See id*. at 200-01 (describing the broadening effects of case rounds discussions).

108 *See* Helen H. Kang, *Use of Role Play and Interview Modes in Law Clinic Case Rounds to Teach Essential Legal Skills and to Maximize Meaningful Participation*, 19 CLIN. L. REV. 207, 222, 245 n.116 (2012) (describing particular benefit of rounds to clinics involving many forums and diverse clients).

109 Our case list is here: https://law.stanford.edu/organizations/pages/rlc-cases (last visited Aug. 28, 2015).

110 *See id*.

111 We filed briefs with the United States Supreme Court at the merits and petition stages in cases involving grooming practices in prison, and at the petition stage in a case involving the rights of faith communities to exemptions from laws that are seemingly neutral on their face but may nonetheless target and impact their religious way of life disparately. *See* Brief of Amicus Curiae Women's Prison Ass'n in Support of Petitioner, Holt v. Hobbs, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2506632; Brief of Amicus Curiae The Sikh Coalition in Support of Petitioners, Knight v. Thompson, 135 S. Ct. 1173 (2015) (No. 13-955); Brief of Amicus Curiae American Islamic Congress in Support of Petitioners, Big Sky Colony, Inc. v. Montana Dep't of Labor & Indus., 134 S. Ct. 59 (2013) (No. 12-1191).

112 *See* BINDER ET AL., *supra* note 101, at 2-13 (describing theory and method of client-centered lawyering). On occasion, we might take a more direct advisory role where the risk of undue influence is small; for example, with our organizational clients. But that is the

This approach aims to respect the dignity and autonomy of our clients, which is particularly important for the imprisoned or those of marginalized faiths.[113] It also impresses upon the student lawyers the importance of client relationships and, in religious and other profoundly human contexts, the centrality of client stories.[114] Furthermore, the client-centered posture reminds students of the key distinction between the principle of religious liberty as a universal norm and the merits of a particular religious belief or practice.[115] To foster and encourage professional identity, students tend to meet and work with their clients without an instructor present.[116] But only after supervised planning and with prompt unpacking.

Regarding supervision, having students full time affords us ample opportunities to engage in anticipatory and diagnostic feedback as well as "in time" oversight to frame the planning, execution, and reflective understanding of case work and associated learning.[117] We explore the lawyering challenges in the case at hand, but also bridge those challenges to the student's other cases and the clinic experience generally—a three-step process that Ann Shalleck and Jane Aiken call "the matter, the macro, and the meeting."[118] We hold impromptu, on-the-spot team gatherings and email exchanges as well as scheduled "mini-rounds" planning and reflection discussions. I also regularly meet with each student on an individual basis; these are structured, self-reflective sessions that some students have fondly dubbed their

exception.

113 *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 584-88 (1990) (summarizing client and lawyer benefits of client-centered counseling, particularly in situations where dehumanization and misunderstandings are likely).

114 *See* Ruth Anne Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 J. LEGAL WRITING INST. 3, 3 (2008) ("Storytelling is the backbone of the all-important theory of the case, which is the essence of all client-centered lawyering.").

115 *See* KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG 145-46 (2d ed. 2012) ("[E]ven when we can't agree on who God is, we can and should agree on who we are.")

116 *See* SULLIVAN ET AL., *supra* note 1, at 121 ("Responsibility for clients and accountability for one's own actions are at the center of the clinical experience."); *see also* STUCKEY ET AL., *supra* note 1, at 195 (noting, "[t]he goal of most clinical teachers is to allow students to carry complete responsibility for their cases").

117 *See* Bryant & Milstein, *supra* note 106, at 207 (and notes) (describing value of "just-in-time" learning in clinic context); *see also* Kele Stewart, *How Much Clinic for How Many Students?: Examining the Decision to Offer Clinics for One Semester or an Academic Year*, 5 J. MARSHALL L. J. 1, 35-36 (2011) (describing single-mindedness of students in a full-credit-load clinic model); Philip G. Schrag, *Constructing a Clinic*, 3 CLIN. L. REV. 175, 199 (1996) (describing the full-time lawyering model of full-credit-load clinic).

118 Ann C. Shalleck & Jane H. Aiken, *Supervision: A Conceptual Framework*, *in* BRYANT ET AL., *supra* note 3, at 175-97 (describing the three-part framing of supervision through direct, collateral, and global case work, to the benefit of both client representation and student learning).

"confessions."[119] (They intend the pun.) Throughout supervision in the context of religious liberty, students confront the professional-judgment challenges common to any clinical experience but also, as Jeffrey Selbin predicted at our founding, struggle with "the often uneasy intersections of church and state, freedom and equality, and faith and reason" presented by our client's problems and the various environments in which they take place.[120]

### *B. Practical Challenges (and Opportunities)*

Practically speaking, we have faced three overarching hurdles in developing the clinic; two of which any new thematically and case-based clinic might face, and another presented by our potentially controversial subject. We have made progress on each front, although it will always be a work in progress. As it should.[121]

First, a substantive approach no doubt provides a reliable and accessible theme around which clinical students can struggle, grow, and develop.[122] As Philip Schrag observes, "specialization promotes clinic cohesion and educational sharing by enabling students to comment with some degree of expertise on each other's cases, and by making each student's case work potentially useful to every other student."[123] But a subject-focused approach is also potentially so open-ended that it can be tricky to craft a docket to teach transferrable skills and experiences in a consistent and meaningful way.[124] As David Binder and Paul Bergman cautioned about "case-centered" clinics generally, they can risk devoting "too little time to too many lawyering tasks."[125] Opportunities and temptations to overreach abound.

To address this concern, we decided to focus up front on prison,

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119 *See* Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Self-Awareness in Performance*, 13 CLIN. L. REV. 143, 154-59 (2006) (detailing student-initiated feedback model).

120 Prof. Selbin's comments can be found on our clinic's website, https://law.stanford.edu/religious-liberty-clinic/endorsements (last visited Aug. 31, 2015).

121 *See* Schrag, *supra* note 117, at 178 (observing that "planning a clinic cannot be static," but rather "must respond to experience and to changed circumstances").

122 *See* Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLIN. L. REV. 333, 352 (2009) (observing that subject-area clinics provide a "stability . . . that leads to depth and experience").

123 Schrag, *supra* note 117, at 191.

124 *See* Susan Bryant & Conrad Johnson, *Fieldwork: The Experience that Sparks the Learning*, *in* BRYANT ET AL., *supra* note 3, at 271 ("As with most choices, subject matter concentration comes at a cost. By specializing in one substantive area, students may have difficulty transferring the knowledge gained from their clinic experiences to other contexts.").

125 David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLIN. L. REV. 191, 203 (2003).

employment, and land-use disputes, and then, after an intense inaugural year, narrowed the docket even further to emphasize cases in those areas that tend to present fairly clear-cut discrimination or non-accommodation issues. We may adjust again in the coming years but our approach has so far produced a fairly predictable, manageable, and overlapping menu of factual predicates and legal doctrines,[126] where students can practice a relatively stable series of skills across their matters while still benefiting from the indeterminacies of real-life scenarios.[127] Students also have the opportunity to learn in a consistent and deep way the profound personal consequences of unjust limitations on the ability of their clients to fulfill a central part of their humanity.[128] As for supervision, the more tailored docket also suits my particular professional and academic background in the field.[129]

In addition to case selection, we have sought to ensure better transfer by adjusting our class sessions to include more and regular case rounds (now held almost weekly), and by developing a simulation series linked to the lawyering tasks most common to the area of practice—e.g., cross-cultural interviewing, counseling, and storytelling; advocacy before agencies; pleading and brief writing.[130] We have also introduced an intensive peer-review process for major written products or oral presentations, where students present or moot drafts to those outside their case team. This has raised the quality of work product and also bridged learning and experience gaps among the students.[131] Lastly, although we almost always insist our students take the lead, we have fostered rich co-counsel relationships, either in matters that could stretch us too thin or where it would be helpful for students

126 *See supra* Section II.B (describing legal tests and factual predicates for prisoner and land-use cases under RLUIPA and employment cases under Title VII or its state-law equivalent).

127 *See* Schrag, *supra* note 117, at 191 (observing that subject specialization can "enable students to learn one or two areas of law or practice very well").

128 *See* Bryant & Johnson, *supra* note 124, at 271 (observing that clinics which focus on discrimination cases develop in students an understanding of the broad social injustices reflected in such matters, and an appreciation for the profound emotion and practical life consequences of such unjust treatment on clients).

129 *See* Juliet M. Brodie, *Reflections from the Middle Ground: Clinic Design in Context*, *in* BRYANT ET AL., *supra* note 3, at 296 ("The best clinic design is the one that rises from the passion of the lawyer/teachers who lead it."); *see also* Schrag, *supra* note 117, at 191 ("Specialization also enables most teachers to offer better supervision, because they themselves don't have to spread their knowledge over several fields.").

130 *See* Bryan & Milstein, *supra* note 106, at 208 ("In rounds, students explicitly build on one another's knowledge."); Binder & Bergman, *supra* note 125, at 213-16 (suggesting ways to improve transferability apart from rounds, including the narrowing of skills taught and the increased use of simulations).

131 *See* Beryl Blaustone, *Reflection on Supervision in Feedback Interactions; Reinforcement of Some Fundamental Themes*, *in* BRYANT ET AL., *supra* note 3, at 230-31 (describing benefits of peer feedback).

to see and benefit from additional perspectives—for example, in cases involving problems outside our expertise, like environmental issues in land use, or in cases with language or cultural challenges requiring particular guidance or credibility.[132]

The second challenge we have faced is misunderstanding raised by our potentially divisive topic. In the practical sense, I am not talking about the cultural discord to which our broader "cause" is attuned; for that, see Section V. Rather, I mean distraction from our immediate and primary goal of teaching students. Many associate religious liberty in contemporary America with high-profile fights over volatile social issues or controversial governmental entanglements with religion.[133] And although those matters are important, they are only a small subset of cases involving an otherwise broadly accepted right to practice one's faith without undue interference; their overemphasis can risk to political noise the pedagogical benefits we offer.[134] Granted, we expect some heat. After all, we often and intentionally challenge powerful interests on behalf of those with unpopular views.[135] But personalized, in-context representation of individual clients whom students can readily support on principle is one thing; deliberate political clashes where even they are sorely divided is quite another.[136] For transferrable learning, we prefer the former.[137]

Indeed, our docket is the chief answer to the practical challenge of our potentially unwieldy subject. Controversy in case selection is common to many clinics.[138] In crafting a diverse and client-centered

132 *See* Binder & Bergman, *supra* note 125, at 213-14 (describing benefits of partnering with outside firms).

133 *See* Horwitz, *supra* note 87, at 185 (describing Supreme Court ruling regarding the ability of employers to refuse employees state-mandated contraceptives as taking place in the "eye of a hurricane"); Editorial, *Commandments in Context,* WASH. POST, Mar. 3, 2005, at A24 (calling Supreme Court cases involving Ten Commandments displays "a focal point in the culture war").

134 *See* Laycock, *supra* note 60, at 839, 877 (arguing the "culture-war" dimension of prominent religious liberty disputes involving sexual morality has caused a distorted understanding of religious liberty).

135 *See* Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLIN. L. REV. 545, 546-47 (1996) (arguing for the pedagogical benefit of taking controversial cases generally).

136 *See* Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLIN. L. REV. 357, 369 (2010) (noting the "tension" that can result from the lack of internal consensus on the priorities of a clinic's case selection process).

137 *See* Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331, 338 (2012) ("Every law student should feel welcome in a clinic regardless of ideology, backgrounds, or interest.").

138 *See* Adam Babich, *The Apolitical Law School Clinic*, 11 CLIN. L. REV. 447, 447 (2005) ("[C]linic directors often find themselves trying to defuse, avoid, embrace, or otherwise manage controversy.").

docket, however—e.g., accommodation cases for inmates, discrimination cases for laborers, land-use cases for ministries to the homeless—we have favored relatively noncontroversial matters around which students can rally with minimal distraction, and thus learn through collaborative consensus to be thoughtful practitioners in direct service to those in need.[139] Correspondingly, due to their potential to swamp our teaching with political baggage, we have, for example, declined to take cases involving same-sex marriage issues or prayer in government.[140] To be sure, our caseload includes plenty of conflict. But rarely do those who oppose our clients do so on principled grounds of non-accommodation or inequality; rather, they typically dispute only the application of shared accommodation and anti-discrimination norms to our client's facts.

Perhaps if we were an at-large public interest firm or academic center, we might welcome the thorniest issues in the field. Many of the hot-button disputes, for example, raise compelling and fascinating questions in the context of other cherished rights—and not always to their mutual exclusion.[141] But we are a teaching clinic first and, for better or worse, there are ample "in-the-margins" injustices to which we can offer dynamic legal training and serve the public without getting caught in the political crosswinds.[142] Our cases still allow students to grapple with fundamental tensions—e.g., liberty and equality, toleration and accommodation, church and state—but in a more measured and client-focused way. To the extent broader controversies affect our matters, our students study and address them. Yet they do so chiefly as client-centered lawyers, not ideologues.[143]

The third practical challenge we have faced is attracting students

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[139] *See id*. at 454-55 (describing the pedagogical benefits of an "apolitical" clinical docket). *But see* Stephen Wizner & Robert Solomon, *Law as Politics: A Response to Adam Babich,* 11 CLIN. L. REV. 473 (2005).

[140] *See* Laycock, *supra* note 60, at 839, 869-70 (describing deep "hostility" arising from cases touching on "sexual morality"); Joan Biskupic, *At U.S. High Court Hearing, Passions Over Religion and Its Rules*, CHI. TRIB., (Nov. 7, 2013), http://articles.chicagotribune.com/2013-11-07/news/sns-rt-usa-courtprayer—analysis-20131106_1_three-jewish-justices-joan-biskupic-washington-religion (describing Supreme Court's recent deliberation of case involving prayer at a city council meeting—where the Court ultimately split 5-4, *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014)—as an instance where "all hell br[oke] loose").

[141] *Cf.* Michael Paulson, *North Carolina's Gay-Marriage Ban Is Challenged by Church*, N.Y. TIMES, Apr. 29, 2014, at A13 (describing lawsuit challenging same-sex marriage ban on religious liberty grounds).

[142] *See* Kosuri, *supra* note 137, at 337 ("Clinics . . . should let their teaching goals drive client selection, rather than the reverse.")

[143] *See* Babich, *supra* note 138, at 451-52 (observing that "the Clinic's job is to train lawyers, not activists").

to our new and somewhat unique project.[144] Because students typically apply to clinics in the previous academic term, those choosing a clinic in its first year of operation likely have little on which to base their decision apart from a course description and the thrill (or fear) of trying something new. New clinicians, as in my case, have often not even arrived on campus by the time inaugural applications are made.[145] And although, as one of my colleagues put it to me recently, religious liberty has been a "scorching hot" topic the past few years, that can be a double-edged sword depending on pre-existing perceptions of what a new clinic in such a field might entail. Fortunately, we enjoyed a solid opening enrollment (ten full-time students), based on broad encouragement from my colleagues and corresponding interest from a diverse group of enterprising students.[146]

We have since enrolled 48 more students, and many have re-enrolled on a part-time basis excited to continue work on their cases. Applications have grown each year, and this spring will mark our third consecutive year at full enrollment. Students have included a mix of women and men, those of various religious traditions and those of no religious affiliation at all, liberals and conservatives, some already passionate about religious liberty and others entirely new to the area. Some cite the clinic as one of the reasons they chose Stanford, others call it their best experience in school, and many have recruited their peers. Prior student "buzz" has likely been our best recruiting tool.[147]

Of course, it has been only a few years and law students often cite clinic participation as a highlight of their law school training.[148] Nevertheless, the repeatedly positive response from a diverse group of students supports our addition as far as student demand is concerned.[149] Based on their applications and our discussions, there are many and

144 *See* Stephen R. Miller, *Field Notes from Starting a Law School Clinic*, 20 CLIN. L. REV. 137, 172 (2013) ("Maintaining student interest in a clinic is an important objective for a new clinician."); *see also* Schrag, *supra* note 117, at 210 ("Any clinic needs a plan for recruiting students.").

145 *See* Miller, *supra* note 144, at 172 ("If my experience is a guide, new clinicians will enter a classroom where students have been given some vague notion that a new clinic will be offered and, based upon a vague course description, some will jump at the chance.").

146 *See* Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to Be Rebellious Lawyers in the '90s*, 4 B.U. PUB. INT. L.J. 1, 6 (1994) (stressing the importance of "unlikely coalitions" in support of "expanding the clinical offerings [in] law school").

147 *See* Miller, *supra* note 144, at 172 (describing "word-of-mouth" support from previously-enrolled clinic students as "[o]ne of the most valuable recruiting tools" to a clinic).

148 *See* Sandefur & Selbin, *supra* note 13, at 58-59 (describing survey data showing "early-career lawyers value clinical experience more highly than any other aspect of the formal law school curriculum in preparing them to make the transition to the profession").

149 *See* STUCKEY ET AL., *supra* note 1, at 173 (stressing importance of offering a range of experiential education courses to meet the needs and interests of students).

varied things that seem to have attracted them, from a distinct interest in religious liberty or religion generally, to the range of litigation opportunities or client dynamics we offer. Whatever the reason in a particular situation, however, our unique blend of clinical education and the timeless-yet-timely issues presented by our cases has resonated.[150]

## IV. Our Pedagogy: Variations on a Theme

Having described our subject and general approach, and how we seek to bridge one to the other practically, I would now like to turn more directly to some particular benefits our one-of-a-kind clinic provides from the perspective of clinical pedagogy. To varying degrees, law school clinics are typically oriented toward two chief objectives: (1) the development of professional skills, knowledge, and judgment; and (2) a commitment to justice.[151] Of course, how or to what extent each of the hundreds of clinics across the country seeks to achieve these goals differs—whether in the types of matters it handles, the clients or causes it serves, the forums in which it works, or even where it is located.[152]

In reflecting upon the goals of clinical legal education and how our clinic's founding and development uniquely serves them, three areas stand out. First, a clinic dedicated to "religious liberty for all" necessarily and powerfully involves professional and justice-seeking challenges of cross-cultural lawyering.[153] Second, and on a somewhat related note, tasking students with representing clients with foreign or

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150 The appeal of our clinic to contemporary law students is perhaps reflected in their generation, which, as clinical scholars have observed, includes "a greater awareness of and comfort level with diversity of all kinds than previous generations," a preference for "'hands on, inquiry-based approaches to learning,'" and a collaborative work ethic. Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 Clin. L. Rev. 1, 8-13 (2013).

151 *See* Dubin, *supra* note 7, at 1478-79 (distilling the dozens of goals for clinical legal education proposed by the AALS and prominent legal educators to two: "(1) client and community service; [and] (2) professional competency instruction in the skills and values of the profession"); *see also* Carolyn Gross, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 Clin. L. Rev. 489, 494-97 (2013) (dividing lawyering pedagogy further into "learning for transfer" and "skills and lawyering process").

152 *See* Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 Clin. L. Rev. 779, 779, 806 (2007) (observing that "[t]he history of clinical legal education in this country is one of debates—over its goals, its methods, and its case or client selection," and eschewing a "one-size-fits all pedagogy"); *see also* Brodie, *supra* note 122, at 346-47 (describing the pedagogical benefits of locating a community lawyering clinic within the neighborhood it serves); Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools*, 75 Tenn. L. Rev. 343, 346, 354-56 (2008) (describing "dizzying array" of subjects covered by more than 500 domestic law school clinics).

153 *See* Bryant, *supra* note 9, at 49 (describing the central importance of cross-cultural study, understanding, and critical reflection to "good lawyering and learning").

unpopular beliefs demands that they learn effective case theory.[154] And third, given the communal nature of most religions, our cases often require students to grapple with the professional dynamics and dilemmas of working with groups, either as clients or interested third parties.[155] Each of these dynamics provides yet another series of bridges between and among students, their clients, the practice of law, and clinical legal education. They are surveyed in turn.

### *A. Cross-Cultural Lawyering*

A fundamental aspect of effective client-centered legal practice is the recognition, appreciation, and anticipation of cultural dynamics between and among clients and their lawyers, as well as in relationships with the justice system generally.[156] As a leading clinic text puts it, "[a] lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them."[157] And based on contemporary demographic trends, the ability of lawyers to understand and work with the culture of their clients while acknowledging their own biases is more important now than ever.[158] In many and varied ways, therefore, a clinic that serves clients with deeply held religious beliefs and practices, and for that reason, squarely presents this aspect of law practice for study, application, and development. Based on our experience so far, it may be our students' most enduring "wisdom of practice" lesson—which the Carnegie Report famously urged as a central goal of legal education.[159]

In their landmark work on cross-cultural lawyering, Susan Bryant and Jean Koh Peters poignantly describe "culture" for this purpose as

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154 *See* Binny Miller, *Give Them Back Their Lives*, 93 MICH L. REV. 485, 487 (1994) (defining case theory as "an explanatory statement linking the 'case' to the client's experience of the world").

155 *See* Jayashri Srikantiah & Janet Martinez, *Applying Negotiations Pedagogy to Clinical Teaching: Tools for Institutional Client Representation in Law School Clinics*, 21 CLIN. L. REV. 283, 292-99 (2014) (describing challenges and benefits of representing organizations in the clinical setting).

156 *See* BINDER ET AL., *supra* note 101, at 32-39 (describing the lawyer's anticipation of her client's cultural "motivations" as fundamental to client-centered interviewing and counseling); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS 59-68 (4th ed. 2011) (expanding cross-cultural lawyering beyond the interviewing and counseling context to include a range of lawyering modalities); *see also* Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 136-55 (2006) (describing prominent cross-cultural lawyering approaches in the clinical literature).

157 KRIEGER & NEUMANN, *supra* note 156, at 59.

158 Barry et al., *supra* note 1, at 62 (arguing that "clinical instruction focused on multicultural and cross-cultural settings will become increasingly important" based on demographic changes, observing that "[i]n the twenty-first century, the United States will become a majority 'minority' country").

159 SULLIVAN ET AL., *supra* note 1, at 115-16.

"the air we breathe—it is largely invisible and yet we are dependent on it for our very being[;] . . . [it] is the logic by which we give order to the world."[160] Culture informs our manners and values, our means of verbal and physical communication, our concepts of credibility and trust, and even our perceptions of reality itself.[161] It also concerns our view of, and approaches to, those who might seem similar to or different from us; indeed, cultural perspectives are often framed by one's community affiliations;[162] or, perhaps more informatively, ways in which one differs from a group to which he or she might otherwise be linked.[163] No two people are entirely alike.[164] For lawyers to best represent the "dignity, voice, and story" of their clients, therefore, they must explore and account for the respective cultural lenses through which they and their clients see the world.[165]

Cross-cultural lawyering requires both a full appreciation of client perspectives as well as a critical self-understanding of the lawyer's own background and biases, whether explicit or implicit.[166] Cross-cultural scholars have in fact argued that "self-awareness of the values and assumptions one brings to an interaction" is perhaps "more critical" to client-centered practice than the neutrality otherwise urged in the model.[167] This self-examination naturally involves study of cultural differences between lawyer and client.[168] Just as importantly, however, it also involves reflection on similarities, real or assumed; regarding the latter, assumptions of lawyer-client "sameness" are often less obvious, and thus can be even more insidious.[169] Finally, recognizing it

160 Bryant, *supra* note 9, at 40.

161 *See id*. at 38-48 (describing range of aspects of client situations that are informed by their culture).

162 *See* Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLIN. L. REV. 373, 380 (2002) (observing group dimension of cross-cultural lawyering, particularly as it concerns "non-dominant cultures" that "tend to share certain preferences, styles, patterns, and values").

163 *See* ROBERT F. COCHRAN, JR., ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 202-03 (3d ed. 2014) (warning against group-based stereotypes attributed to individual clients).

164 *See* Bryant, *supra* note 9, at 41 (observing that no matter one's shared cultural affiliations "no two people can have exactly the same experiences and thus no two people will interpret or predict in precisely the same ways").

165 Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, *in* BRYANT ET AL., *supra* note 3, at 350.

166 *See* Bryant, *supra* note 9, at 40 ("To become good cross-cultural lawyers, students must first become aware of the significance of culture on themselves.").

167 Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369, 426 (2006).

168 *See* KRIEGER & NEUMANN, *supra* note 156, at 60-63 (framing cultural differences to be explored).

169 *See* Alexis Anderson et al., *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLIN. L. REV. 339, 341 (2012) (observing in clinical context that "assumptions rooted in sameness are particularly seductive and bring unique

is the American legal system that brings them together, a lawyer must appreciate both in herself and her client their relative connections, or lack thereof, to that system and its norms.[170] This is of special concern for racial or other minorities, who might view that system as foreign or hostile.[171]

Clinicians invariably (and appropriately) include "religion" within the litanies of cultural dynamics to which lawyers should be attuned.[172] For although philosophers and theologians may dispute its precise meaning and contours,[173] religion continues to play a central role in the lives of millions in this country.[174] Unfortunately, however, it is a factor many lawyers often seem to undervalue or ignore.[175] This is especially troubling from a cross-cultural perspective, where the increasingly diverse nature of society in the coming decades will likely only compound the consequences of any such ignorance.[176] The time

challenges to our work"); *see also* Bryant, *supra* note 9, at 52 (recounting from clinical experience that students "who saw themselves as very similar to their clients often missed differences and made assumptions about client motivations and goals").

170 Using group dynamics, Professors Bryant and Koh Peters describe the systemic dimension to cross-cultural lawyering as an overlapping series of three dyads, or "rings" between or among the following: (1) lawyer and client; (2) client and legal system; and (3) lawyer and legal system. *See* Bryant, *supra* note 9, at 68-70.

171 *See* Michelle S. Jacobs, *People from the Footnotes: This Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 361-74 (1997) (exploring systemic cross-cultural problems in the racial context).

172 *See*, *e.g.*, Bryant, *supra* note 9, at 49 ("Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, *religion*, accent, skin color or a variety of other characteristics." (emphasis added)); *see also* Piomelli, *supra* note 156, at 133 ("In the heterogeneous and stratified society in which we live, race, class, gender, national origin, language, immigration status, sexual orientation, *religion*, and a host of other differences between us continue to have real significance." (emphasis added)).

173 *See* Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709, 721-22 (2004) (observing that "no generally accepted definition of religion exists and probably never will exist").

174 *See* CARTER, *supra* note 77, at 15 (arguing that religion should be taken seriously "as an aspect of the lives and personas of tens of millions of Americans who insist [it] is for them of first importance"); *see also* FRANK NEWPORT, GOD IS ALIVE AND WELL: THE FUTURE OF RELIGION IN AMERICA 11 (2012) (Gallup Editor-in-Chief citing survey data that "[a]bout six in 10 Americans consistently say that religion can answer life's problems").

175 *See* Evan Seamone, *Divine Intervention: The Ethics of Religion, Spirituality, and Clergy Collaboration in Legal Counseling*, 29 QUINNIPIAC L. REV. 289, 308, 313 (2011) (describing clinical insights on cross-cultural lawyering while lamenting that "[t]he legal profession largely avoids both religion and spirituality, making few distinctions in its categorical ignorance").

176 *See* Barry et al., *supra* note 1, at 62 (recommending that as a result of demographic changes over the next few decades, "instruction focused on multicultural and cross-cultural settings will become increasingly important"); *see also* PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5-8 (Feb. 8, 2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (describing its survey data showing

seems right for clinical efforts to sensitize the next generation of law students to this and similar demography-related issues. Fortunately, that generation seems game.[177]

Our clinic's clients, cases, and students (and, of course, faculty) are marked by a host of diverse and divergent cultural attributes: age, gender, race, ethnicity, marital and family status, sexual orientation, education, and economic position, to name a few. Given our topic, however, religion is the common, yet almost always divergent, denominator: it arises in all cases, but rarely do students, clients, or I share the same perspective, either between or among us. Using Bryant and Koh Peters's cross-cultural "habits" pedagogy, we thus explore and reflect upon the lawyer-client-legal system dyads of sameness and difference, parallel-universe thinking, and communication bridges and blunders, all of which they emphasize in developing transferrable cross-cultural awareness and skill.[178] Because our matters often involve clients who perceive their present predicament in religious, and therefore fairly categorical terms, our students also have the added opportunity of grappling with the indeterminacies common to any legal dispute but in light of the related pressure of such unique client certainty.[179]

In a Sikh employment case, for example, two Ivy-League educated students in their mid-twenties—one an agnostic single white mother and former stock analyst from New York; the other a single white man and former Mormon missionary from Utah[180]—represented four middle-aged truck drivers fired for refusing, in accord with their faith, to cut their beards or hair for drug testing.[181] (The clients

"religious affiliation in the U.S. is both very diverse and extremely fluid," including "internal diversity" within religious groups and immigration-related impacts); DIANA L. ECK, A NEW RELIGIOUS AMERICA 1-6 (2001) (describing trend of religious diversity in United States).

177 *See* Benfer & Shanahan, *supra* note 150, at 22 (describing the accessibility of cross-cultural learning to the Millennial Generation).

178 *See* Bryant, *supra* note 9, at 64-78 (describing "five habits" of cross-cultural lawyering: (1) degrees of separation and connection between or among the lawyer and client; (2) a further overlay of client-lawyer similarities and differences with the operative law; (3) alternative cultural explanations for client behavior, or "parallel universe" thinking; (4) communication across cultures; and (5) recognizing one's own biases and stereotyping).

179 *See* Robert D. Dinerstein & Elliott S. Milstein, *Learning to Be a Lawyer: Embracing Indeterminacy and Uncertainty*, *in* BRYANT ET AL., *supra* note 3, at 327-45 (describing pedagogical benefits of indeterminacy generally); LEITER, *supra* note 90, at 36 (describing "categoricity" of religious belief as "the willingness of religiously motivated believers to act in accordance with religious precepts, notwithstanding the costs").

180 Out of respect, I have adjusted the cultural characteristics of students in some cases. One or more of our students, however, has possessed each of the characteristics used in this paper.

181 *See* 2 THE ENCYCLOPAEDIA OF SIKHISM 466 (Harbans Singh ed., 2d ed. 2001) ("Trimming or shaving is forbidden [for] Sikhs and constitutes for them the direst

had offered alternatives, like nail clippings, to show they were drug free.) Among the opportunities the students had—like working with Punjabi translators and partnering with a national civil rights group that had referred the clients[182]—was developing a deep understanding of the cultural indignities their clients had suffered, both in their personhood and as male breadwinners for their tradition-bound families. A particularly profound moment came when the students asked the clients what would have happened if they had cut their hair. As the students reported, "they looked at us like we had two heads." One even sobbed incredulously. The clients could not even conceive the possibility. Struggling and reconciling their own experiences and ideas of faith, ethnicity, free will, and family—to name a few—the students had to learn to tell their clients' stories in ways that would not only prove legally viable but also honor their clients' trust and esteem.[183] In the process, the students learned and applied at powerful and transferrable levels the habits of cross-cultural lawyering.

The Sikh case is just one example. Indeed, almost all of our cases provide similar, or at least analogous, opportunities (perhaps warranting fuller treatment in a later article). From Hare Krishnas seeking property-tax exemptions, to Orthodox Jews abstaining from work on Saturdays, to Native American prisoners insisting on the right to use tobacco, our cases press students to internalize and work with, and through, other cultures as well as their own. Most importantly, the fruit of each experience is not only a worthwhile lesson in itself but a skill that will serve the students well no matter what practice area they choose for their career. As Bryant and Koh Peters observe, "all lawyering is cross-cultural."[184] Or, as I have often put it to my students, "if you can handle our clients, you can handle anyone." And I mean that with the deepest affection and respect.

Finally, although religion is the common denominator, its often-concentric overlap with other aspects of human identity—particularly race or ethnicity—makes it an invaluable vehicle to explore a range of cultural dynamics. As Bryant and Koh Peters stress, an effective cross-cultural lawyer must avoid assuming her client is limited to one, perhaps even dominant, cultural characteristic ("anti-essentialism"); she

apostasy.").

182 *See* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1002-04 (2007) (describing the unique challenges to client-centered lawyering presented by interpreters); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355, 378-80 (2008) (describing the pedagogical benefits of working with clients with affiliated legal organizations).

183 See Dinerstein, *supra* note 113, at 574 ("To be successful, any model of lawyering must appeal to the primary constituency of lawyers' services: clients.").

184 Bryant, *supra* note 9, at 49.

must instead understand them as likely connected to many ("intersectionality").[185] In our prison accommodation cases, for instance, our students grapple with the obvious religious dimension of the claims; but they must often go farther to understand the racial overlays and dehumanization of prison life generally.[186] From this view, our students can better see why our African American Jewish-convert client might have been refused a kosher meal, or why our women's-rights organization client worries about refusals of seemingly modest religious dress and grooming requests.[187] Struggling with these and similar issues helps prepare students for cross-cultural lawyering far beyond the religious context.

### *B. Case Theory (and Storytelling)*

On a related note, our clinic also provides its students a unique yet transferrable opportunity to learn and practice critical lawyering skills in communicating their clients' causes—in particular, the development of case theory and related storytelling.[188] Binny Miller defines case theory as an "explanatory statement linking the case to the client's experience of the world," which can create a "perspective for the facts, relationships, and circumstances of the client and other parties that is grounded in the client's goals."[189] Or, to put it in more external terms—i.e., from a decision-maker's perspective—Peter Murray describes case theory as the "picture" that resonates with "human experience."[190] And in seeking such resonance, a lawyer must build and tell her client's story in a manner that not only establishes the necessary legal elements of their claim but also expresses the personal dimension of the problem and compels the solution the client desires.[191]

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185 Jean Koh Peters & Susan Bryant, *Talking About Race*, *in* BRYANT ET AL., *supra* note 3, at 388.

186 *See* Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 224-26 (2012) (stressing that, for effective professional and human practice, all lawyers should understand the prison system and its laws).

187 *See* Brief of Amicus Curiae Women's Prison Ass'n in Support of Petitioner, Holt v. Hobbs, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2506632 (our brief on grooming and dress in women's prisons). *See generally* Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. Rev. 859 (2012) (analyzing social-control dynamics of prison grooming and dress).

188 *See* PHILIP MEYER, STORYTELLING FOR LAWYERS 2 (2014) ("Make no mistake about it—lawyers are storytellers. It is how we make our livings.").

189 Miller, *supra* note 154, at 553.

190 PETER MURRAY, BASIC TRIAL ADVOCACY 53 (1995). *See also* KRIEGER & NEUMANN, *supra* note 156, at 172-74 (framing case theory with similar emphasis on attention and buy-in from the decision-maker).

191 *See* KRIEGER & NEUMANN, *supra* note 156, at 142-47 (describing successful lawyer storytelling as consisting of both "paradigmatic" stories that rationally fit facts to law, and "narrative" stories that connect and provide deeper meaning to the audience).

By presenting students with cases that typically involve fairly clear facts but are rife with interpersonal misunderstandings and subjective values, effective case theory in a clinic that is focused on religious liberty is an essential skill and pedagogical opportunity.

Because our facts tend to be relatively undisputed—in the accommodation cases that form the bulk of our docket, for example, our clients want something their opponents often refused for reasons unrelated to religion—students must construct theories that tell their clients' stories while anticipating the seemingly legitimate perspective of opponents.[192] In light of the heightened scrutiny imposed by the laws under which we work, they must also argue for what might first appear to be unpopular or counterintuitive results; often, the supposed "favored treatment" of religious believers.[193] It is therefore important for students to develop accessible storylines as in any other litigation type, by exploring facts helpful to clients and their credibility while rebutting harmful evidence and adverse contentions.[194] But given the risks of prejudice and accusations of unfairness, it is just as vital that they strike emotional resonance through narratives of particularized injustice.[195]

Take, for example, the first case our clinic ever handled, which was for a Florida inmate serving a life term for a violent kidnapping.[196] The client was a Cuban immigrant whose Jewish parents did not have him circumcised after his birth for fear of government persecution. Wanting to return to the faith and reform his life after several prison visits from a rabbi, he asked to be circumcised while incarcerated. Despite the fact the client had obtained the support of a Jewish group to perform the "Brit Milah" procedure free of charge, the

192 *See* Miller, *supra* note 154, at 492-98 (describing effective case theory as both affirmative and responsive).

193 *See* Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at 1 (describing tension over seemingly "special arrangements" of religious accommodation laws for faith-based groups).

194 *See* BINDER ET AL., *supra* note 101, at 152 (summarizing case theory development as a set of four lines of questioning: (a) pursuing helpful evidence; (b) bolstering client credibility; (c) rebutting the impact of harmful evidence; and (d) undermining adversaries' legal contentions).

195 *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 287 (2002) (emphasizing context in lawyer storytelling as "that ineradicable element in meaning-making"); KRIEGER & NEUMANN, *supra* note 156, at 175-76 (describing importance of case theory as resonating with sense of injustice).

196 The case received national attention. *See*, *e.g.*, Shelly Benveniste, *It's Never Too Late*, THE JEWISH PRESS, (Oct. 10, 2013), http://www.jewishpress.com/sections/community/south-florida/its-never-too-late-2/2013/10/24; Leslie A. Gordon, *Does a Prisoner Have a Right to a Mohel?*, ABA J., May 1, 2013, 12; David A. Schwartz, *Inmate Gets First Circumcision in a Florida Prison*, SUN SENTINEL, (Oct. 16, 2013), http://articles.sun-sentinel.com/2013-10-16/florida-jewish-journal/fl-jjps-circumcision-1016-20131016_1_circumcision-florida-prison-mohel.

prison denied the request. The group put the client in contact with our clinic.

So how do you tell the story of a once-violent Cuban Jewish immigrant—fondly called "The Jewban" by his friends—who wants to be circumcised by a New York mohel in a prison deep in the Florida panhandle? Our students—one was the co-president of the student women's association; the other co-president of the Federalist Society chapter—began by flying to Florida to visit their imprisoned client, both to build rapport and develop client-specific facts to help solve the seemingly intractable problem.[197] During their trip, the students learned their client's background, criminal history, religious "reversion," and goals; they also gained a more concrete sense of the prison's operations. Upon returning to campus, the students then took this "'local knowledge'" and set to the deliberate task of developing and telling the client's story.[198]

The students studied Jewish teaching and the centrality of male circumcision,[199] reflected on their client's past (good and bad), coordinated with the mohel and rabbi who had counseled the client's reversion, and built a story around a uniting and overarching theory: the redemption of a man.[200] The concept had many benefits, including framing the client's past as part of a stock narrative in his favor—i.e., that a once-troubled young man has now found a way to both atone for his wrongdoing and reorder and understand his life (and continued imprisonment) on a traditionally understood path of humility and righteousness.[201] It also blended both the policy of rehabilitated personal dignity underlying the operative law (RLUIPA)[202] and the sup-

197 *See* Laurie Shanks, *Whose Story is it Anyway? – Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLIN. L. REV. 509, 510-11 (2008) (emphasizing client relationships as central to effective lawyer storytelling, particularly where client and student life experiences differ).

198 SULLIVAN ET AL., *supra* note 1, at 102.

199 *See Genesis* 17:10–14 ("Every male among you shall be circumcised.").

200 *See* KRIEGER & NEUMANN, *supra* note 156, at 174-75 (emphasizing importance of the creative process of developing a "unifying theme" to "make your client's story convincing to the decision-maker").

201 *See* AMSTERDAM & BRUNER, *supra* note 195, at 42-48 and 127-29 (describing the persuasive power of relating to stock stories, such as "the narrative teleology of human striving" over self-inflicted obstacles).

202 *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 510-12 (2005) (summarizing the legislative history behind RLUIPA, which lamented undue restrictions on inmate religious practice and stressed the beneficial effects of religion in prison); Thomas P. O'Connor, *What Works, Religion as a Correctional Intervention: Part II*, 14 J. COMMUNITY CORRECTIONS 4, 24 (2004) (arguing that "religion in prison helps to humanize a dehumanizing situation by assisting prisoners to cope with being a social outcast in a prison situation that is fraught with loss, deprivation, and survival challenges").

posed rehabilitative goal of incarceration generally,[203] with a largely accessible and relevant theme of covenant between a human being and something greater than himself.[204] Most importantly, the story was the one the client wanted told.[205] To top it all off, the approach was successful as a practical matter; in response, the state settled and allowed the ritual to take place.

Along the way, this and similar storytelling experiences in our clinic have also provided students the arguably inverse lesson that they must avoid overly relying upon or oversimplifying the "super" stock story, whether from the perspective of effectiveness or client-centeredness. To understand our cases in strictly religious terms, for example, risks ignoring other key dynamics; our Florida client's story was not merely about religion, but included his Cuban past, his status as a lower-income immigrant, and his incarceration as a racial minority in the Deep South.[206] Similarly, our students cannot assume that their clients' religious claims—which are readily understood by our self-selected clinic class—will resonate. In the Florida case, the students had to account for the ignorance of others about the value or appropriateness of ritual circumcision, and even the possibility of anti-Semitism.[207] They also had to understand the risks and rewards of pushing the religion narrative too far, by framing an admittedly complex situation with overly simplistic or potentially loaded rhetoric.[208]

At bottom, in steeping themselves in consistently deep human stories while anticipating the benefits and limitations of stock narra-

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[203] *See* Francis T. Cullen et al., *Is Rehabilitation Dead? The Myth of the Punitive Public*, 16 J. CRIM. JUST. 303, 314 (1988) (observing that, regardless of its effectiveness or reflection in the law, the "rehabilitative ideal" of imprisonment "remains firmly anchored in the American value structure").

[204] *See* AMSTERDAM & BRUNER, *supra* note 195, at 235 (describing the persuasive power of "stock" stories that resonate with the prevailing culture).

[205] *See* Miller, *supra* note 154, at 553 (urging that case theory must be "grounded in the client's goals").

[206] See Koh Peters & Bryant, *supra* note 185, at 388-90 (stressing multi-dimensional approach to cross-cultural understanding and presentation of client stories); *see also* ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 301 (3d ed. 2006) (describing the profound importance of religious conformity and change for immigrants to the United States).

[207] David Brooks, Opinion, *How to Fight Anti-Semitism*, N.Y. TIMES, Mar. 24, 2015, at A23 (lamenting global trends in anti-Semitism and corresponding domestic ignorance of the problem); Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES, June 5, 2011, at A20 (describing recent successes of the anti-circumcision movement).

[208] *See* AMSTERDAM & BRUNER, *supra* note 195, at 138 (emphasizing the importance of sincerity in legal storytelling and the corresponding need to avoid "signs of a hard sell or over-heated rhetoric"). Our work for Muslim clients presents a particular host of narrative challenges. *See generally* Leti Volpp, *The Citizen and Terrorist*, 49 UCLA L. Rev. 1575 (2002) (describing interplay of racial, ethnic, and religious hostility in post-9/11 backlash against Muslim Americans).

tive, our students can move past "cardboard" understandings of their clients and see that working with and through real-life, messy situations is central to the practice of law.[209] They can also develop a sense of lawyers as empathetic problem solvers rather than detached technicians.[210] And because of the religious and other differences that mark our docket, students learn all of this in contexts that instill appreciation for lawyers as cross-cultural communicators.[211] We again expect each of these skills will pay professional and public dividends as our students join the bar, regardless the area of future practice or their clients' circumstances.

### *C. Organizational Advocacy*

As part of their clinical experience, our students have the further opportunity to work with groups in unique yet transferrable ways.[212] We have represented religious organizations directly—our clients have included an Orthodox Christian monastery, a Hare Krishna temple, and a Muslim community association—and also often interact with groups as a corollary to individual representations; in prisoner accommodation cases, for example, our students commonly work with religious non-profits that support inmates of their respective faith traditions. Furthermore, given the communal nature of most religious beliefs, practices, and identities, our students must also invariably contend with these broader dynamics, whether in group or individual-representation scenarios.[213] Indeed, in almost every case they handle, our students must anticipate the wider consequences of their work on others.

Among the most worthy struggles clinic students face in the group representation context is discerning the client's nature; to paraphrase William Simon's landmark work, "who is my client?"[214] Our

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209 Ann C. Shalleck, *Construction of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1732 (1993) (emphasizing the need for legal education to present clients as the "people whose lives and work, whose problems and desires, bring them into contact with the legal system").

210 *See* SULLIVAN ET AL., *supra* note 1, at 102 (noting the professionalism norm of a cooperative problem solver that accompanies case-theory development); *see also* BINDER ET AL., *supra* note 101, at 2, 5 (noting the lawyer's role as a problem solver attuned to the non-legal ramifications of matters she handles).

211 *See* Shanks, *supra* note 197, at 509-11 (stressing cross-cultural dynamics for transferrable storytelling).

212 *See* Srikantiah & Martinez, *supra* note 155, at 291-92 ("Clinic work solving problems for institutional clients prepares students for the realities of practice.").

213 *See* EISGRUBER & SAGER, *supra* note 89, at 125-26 (emphasizing group dimensions of religious belief and practice as fundamental to a proper understanding of religious liberty).

214 *See* William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003); *see also* Stephen Ellmann,

group clients typically have a leader with whom the students work, such as a pastor, rabbi, or imam. But, they must constantly ask, does this person in fact represent the interests of the group (i.e., the client) in this situation?[215] The dilemma becomes acute where, as in the case of the many groups we serve, there are internal disagreements—whether about the group's vision or the pertinent legal controversy.[216] We often see, for example, generational divides among immigrant group clients; older members who came to America just to survive tend to be more cautious than the youth who grew up in the United States and seem more comfortable fighting for their civil rights.[217] Conversely, we see in groups of more domestically established traditions that those who began the ministries now facing legal difficulty tend to be more comfortable with risk (as challengers to the status quo) than those who might join later.[218] Finally, and perhaps unlike the organized-group dynamics considered by Paul Tremblay and others—where a lawyer might necessarily defer less to an agent to help ensure direct allegiance to the group as the client[219]—the context in which our cases operate often forces the client-centered lawyer to consider whether reduced leader deference might actually be appropriate given the commonly esteemed position that the leader holds in the particular community.[220]

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*Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1106-07 (1992) (describing challenges in representing groups in public interest setting); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 826-31 (1992) (describing the range of ethical and practical challenges posed by group representation).

215 *See* BINDER ET AL., *supra* note 101, at 504-05 (describing discernment of a client's preferences, values, and comfort with risk as particularly challenging with a group client, even where it has a designated agent); *see also* Srikantiah & Martinez, *supra* note 155, at 294 (stressing that when working with a group agent in organizational representation the lawyer must understand how that agent represents the goals of the group).

216 *See* Ellmann, *supra* note 214, at 1159-63 (describing lawyering challenges in the public interest context posed by disunity within the represented group).

217 *See* PORTES & RUMBAUT, *supra* note 206, at 315 (describing intergenerational differences among immigrant communities toward legal conflicts, noting that "refuge" is typically the chief goal of the first generation, while "respect and resources" more commonly mark the second generation's priorities).

218 *See* RODNEY STARK & WILLIAM SIMS BAINBRIDGE, THE FUTURE OF RELIGION 99-100 (1985) (describing H. Richard Niebuhr's famed observation about the sociological pattern common to the development of Christian sects, where they are often founded in rebellion but end up in conciliation).

219 *See* Paul R. Tremblay, *Counseling Community Groups*, 17 CLIN. L. REV. 389, 413-21 (2010) (urging the possibility that the client-centered lawyer might defer less to the agent of a well-structured group client than he or she would otherwise in the context of individual representation).

220 *See* MICHAEL A. SAND, HOW TO MANAGE AN EFFECTIVE RELIGIOUS ORGANIZATION 35 (2011) (observing that "[f]or many congregants [of a religious organization], their relationship with the minister is an extremely important part of their lives").

As for indirect clinic work with groups, many of our individual clients have been referred to us or are otherwise supported by non-profit organizations dedicated to helping their religious brethren or civil liberties more generally. These relationships often present fascinating ethical and professional challenges with which our students must contend—e.g., confidentiality, loyalty, or the degree of involvement to protect the client's interest vis-à-vis the "supportive" third party and any external cause(s) to which it is directed.[221] In collaborating with non-profit groups in particular, students not only learn the benefits of working as a larger team; they also gain an appreciation for the broader communities they impact through their work.[222] By working closely with groups like the Anti-Defamation League, Sikh Coalition, Prison Law Office, or Church State Council, for example, our students have developed a heightened sense of the public-interest dimension of their lawyering beyond their (otherwise rewarding) work in isolated cases for individual clients.[223]

Of our cases so far, one stands out in its pedagogical benefits of group advocacy: our work for a neighborhood church dedicated to serving (and "saving") the homeless.[224] The church retained our clinic to protect against city efforts to close the daytime ministry it had operated for years in accordance with its understanding of Jesus's command to care for "the least of these."[225] Not only did the students prepare and argue the case to the city council and in court, they wrestled with tensions between the church, its congregants, and its neighbors; made presentations to the church board while also balancing their continous relationship with the church's committed and fairly

221 *See* Tremblay, *supra* note 219, at 389-91 (on the challenges of working with "community groups").

222 *See* Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications for a Combined Advocacy Clinic*, 16 CLIN. L. REV. 451, 481-84 (2010) (describing the team-work and community-awareness benefits of working with "institutional players"); *see also* Sameer A. Ashar, *Fieldwork and the Political*, *in* BRYANT ET AL., *supra* note 3, at 289 (stressing the pedagogical benefit of working with "movement organizations").

223 *See* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING 529-32 (2013) (urging the benefits of interdisciplinary collaboration in public interest lawyering); *see also* Srikantiah & Martinez, *supra* note 155, at 284 (noting trend of law school clinic collaboration in social-justice advocacy).

224 This case has also received broad media attention. *See*, *e.g.*, Eric Berkowitz, *Defending the Faithful*, CALIFORNIA LAWYER, Sept. 2013, at 18; Madeleine Han, *Law School's Religious Liberty Clinic Fights for the Homeless*, STAN. DAILY, Jan. 31, 2014, at 4; Arlene Martinez, *Religious Freedom at Stake in Dispute Over Harbor Church, Proponents Say*, VENTURA CTY. STAR (Apr. 26, 2013), http://www.vcstar. com/lifestyle/religious-freedom-at-stake-in-dispute-over-in; Ruth Moon, *Feeding the Homeless Is a Religious Liberty Issue Too*, CHRISTIAN POST (Apr. 30, 2015), www.christianitytoday.com/gleanings/2015/april/homeless-meals-religious-liberty-rfra-joan-cheever.html.

225 *Matthew* 25:40.

hands-on pastor; and confronted on many levels the practical consequences of limited financial resources. The students also coordinated with a religious non-profit and a homeless rights organization, both of which supported their client but for distinctly religious and secular reasons, respectively. Each of these, in turn, has offered a host of transferrable learning opportunities.

The charismatic agent dilemma—which seems to have arisen in almost all of the organizational client cases we have handled so far—has proven to be a particularly valuable vehicle in developing the balance of "empathy and professional detachment" for which good clinical legal education is noted.[226] Through the successive student teams who have worked on the homeless church case, for example, a three-step progression has seemed to have repeatedly occurred: the first is deep awe at the sacrificial work the pastor and others have led in serving the poor; the next is disillusionment at the inevitable human tensions inherent to any group that must carry out such difficult work; the last is matured reconciliation to the need to frame the pastor's vision as central to the small church's vitality while always in service to its practical mission as an organization. Rounds with non-case students have been crucial in grounding and encouraging the case students on the path, and I have been increasingly mindful to withhold my views at the start of each term so to allow experienced self-discovery of these dynamics anew.[227] In the end, the students have developed vital and transferrable skills of group representation and management while also gaining confidence as professionals amid significant emotional and interpersonal drama and stress.[228]

Relatedly, the interest group dimension to our homeless (and other) cases has also offered transferrable learning in dealing with the issue of external collaboration, either in the public interest sector or otherwise.[229] Again in the homeless church case, at first blush it

[226] Susan Bryant et al., *Learning Goals for Clinical Programs*, *in* BRYANT ET AL., *supra* note 3, at 16.

[227] *See* Bryant & Milstein, *supra* note 106, at 208-213 (describing the benefits of case-rounds discussions in both exploring context and developing professional identity, whether for those on or outside the immediate case); Jane H. Aiken & Ann C. Shalleck, *The Practice of Supervision*, *in* BRYANT ET AL., *supra* note 3, at 215 ("An important part of supervisory interactions is retaining student responsibility for understanding the problem, not substituting the supervisor's understanding for that of the student.").

[228] Gaining confidence is a critical part of a clinical law student's experience. *See generally* Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLIN. L. REV. 167 (1995) (praising the opportunity to gain professional and personal confidence through clinic); Judith L. Ritter, *Growin' Up: An Assessment of Adult Self-Image in Clinical Law Students*, 44 AKRON L. REV. 137 (2011) (extolling the clinic experience as a way to address the much-needed maturation of the typical law student).

[229] *See* CHEN & CUMMINGS, *supra* note 223, at 146-51 (describing the value and challenges of collaboration and coalition building for public interest lawyers).

seemed obvious to the students—and, frankly, to me—that they should invest heavily in cultivating support from a broad array of faith and homeless-rights groups, to show the principled appeal of the client's ministry and claim. But in later dealing with the consequences of a loss at the city level—the case is presently in court on appeal—where those groups had added their voice at our client's hearing, we faced the possibility that this dramatic push on principle may have been an overreach with decision-makers who were perhaps more concerned about neighborhood politics than law. The students also saw that the supposed unified front they sought may have backfired over the somewhat dissonant approaches of those seeking to help the homeless for different reasons. In any event, by working in the tension between solving client problems and joining with others, the students gained valuable insights into the risks, rewards, and vagaries of creative professional collaboration.[230]

In the end, through their work for the homeless church and with other groups—whether directly or indirectly—our students have been able to tackle "harder" cases, to their benefit and that of the program generally.[231] Given the complexity of some of the group matters, it has not always been easy; in our stickier land-use disputes, for instance, I have at times had to take a more hands-on role and we have occasionally needed to enlist the help of outside law firms with development or environmental expertise. But even with these arguable drawbacks, the students have been energized and engaged by the many opportunities for group-based work our clinic provides.

## V. Our Salutary Purpose

A *New York Times* story about our clinic's launch proclaimed as its headline, "At Stanford Law School, a Unique Clinic Offers Training in Religious-Liberty Cases."[232] Despite the balanced title, however, the paper's reporter then framed the program in almost exclusively political terms, casting us in a pitched battle of supporters and skeptics of robust religious exercise—at least as it is all-too-often understood in today's political environment; namely, as a liberal versus conservative controversy. The reporter also quoted our then-associate dean of clinics responding in exasperation to a relentless series of

[230] *See* Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 Wash. U. J. L & Pol'y 359, 389-92 (2008) (describing educational value in the tensions, challenges, and opportunities of clinical work in collaborative community-lawyering context).

[231] *See* Reingold, *supra* note 135, at 556-57 (describing value of complex, high-profile cases in clinic).

[232] Bronner, *supra* note 17, at A16.

politically motivated questions with the following nugget: "the 47 percent of the people who voted for Mitt Romney deserve a curriculum as well."[233] Other media outlets, either in defense of or opposition to our new clinic (at least as they understood it), also covered its founding in similarly partisan terms.[234]

When asked about those early reports, I often found myself with a sore throat and sounding like a broken record, as did many of our students. As one of our first students said to the *Times* reporter when challenging the reporter's assumption in asking why the student chose to enroll in a "conservative" clinic: "we're a religious liberty clinic, not a religion clinic; by your logic, if it was the 1960's Civil Rights era you'd likely ask us why we chose to enroll in a 'liberal' clinic. The controversies might change, but the principle remains the same. By the way, I'm an active Democrat and I voted for President Obama." Similarly, albeit less eloquently, I would say, "Please wait until you see our work. Then you'll understand what we are, and what we're not. Do we support religious liberty? Yes. But our use and contribution to that field is in the context of providing students a first-rate program of clinical legal education. You'll see." Three years later, it seems appropriate to revisit the question of our purpose beyond the nuts and bolts of legal training.[235]

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233 *Id.*

234 *See*, *e.g.*, Clement Boyd, *Let Religious Freedom Ring*, CITIZEN MAG., May 2013, at 26 (defending clinic as "particularly heartening" to Christians); Brian Leiter, *Stanford Law School's New, and Somewhat Curious, "Religious Liberty" Clinic*, BRIAN LEITER'S LAW SCHOOL REPORTS (Nov. 6, 2013), leiterlaw school.typepad.com/leiter/2013/11/stanford-law-schools-new-and-somewhat-curious-religious-liberty-clinic.html (framing clinic as a politically conservative program); Eduardo Penalver, *The Political Valence of Religious Liberty*, DOTCOMMONWEAL (Jan. 22, 2013, 10:52 PM), www.commonwealmagazine.org blog/political-valence-religious-liberty (same). *See also* Berkowitz, *supra* note 224, at 18 (presenting a more balanced picture, and in a cover story); Karen Sloan, *Stanford to Start New Religious Liberty Law Clinic*, NAT'L L.J., Dec. 27, 2012 (also presenting a more balanced story, while quoting Liberty University's law school dean criticizing our clinic for representing Muslims).

235 In its political take, the *Times* also stressed that much of our seed funding was raised by the Becket Fund for Religious Liberty—a non-profit group probably best known today for its work on religious exemptions to the Obama administration's contraceptive-mandate rules, notably in *Hobby Lobby*. *See* Bronner, *supra* note 17, at A16. For what it is worth, however, the Becket Fund resists such partisan framing and prides itself on having fought both conservatives and liberals and on behalf of minority and established faiths. *See* Luke W. Goodrich, *How the Becket Fund Became the Leading Advocate for Religious Freedom for All*, BECKET FUND FOR RELIGIOUS LIBERTY (June 19, 2014), www.becketfund.org/bf-leading-religious-freedom-advocate. That is chiefly why I admire their work. Regardless, neither Becket nor any other of our many donors has ever sought to impose its supposed agenda on our curriculum or docket. A "soft money" approach no doubt presents the risk of conflicts to which clinicians should be well attuned. *See* Alecia E. Plerhoples & Amanda M. Spratley, *Engaging Outside Counsel in Transactional Law Clinics*, 20 CLIN. L. REV. 379, 413-16 (2014). But I am aware of nothing unique about us in that regard.

### *A. Social Justice*

Like most law school clinics, in addition to teaching technical lawyering skills we also have a justice mission—through both direct client service and in the development of future practitioners.[236] Most of our clients come from already marginalized communities, have limited economic means, and have suffered profoundly personal (and consequential) oppression—e.g., Sikh truck drivers left unemployed for honoring their faith, Muslim inmates fearing retaliation, small churches giving all they have to the homeless. Absent our pro bono help, their suffering and difficulties would only be compounded by underrepresentation or no legal representation at all. They would otherwise have little access to justice.[237]

By helping these clients protect beliefs and practices central to their identities from majority pressure and power, our students serve a social justice "imperative" of providing vulnerable minorities more meaningful access to justice—a central purpose of clinical legal education.[238] And it is not simply economic justice we try to secure for them; rather, it is a peace of mind that comes with increased assurance that they can live and work without fear of temporal or spiritual harm. In short, our students work to save those who are out of step from the mainstream from the emotionally and financially painful choice between fidelity to their religious faith and unnecessary requirements imposed by those in power, whether in the form of job rules, zoning codes, or prison conditions.[239] This should hardly be a partisan enterprise, particularly given the relatively unobjectionable and bipartisan passage of the statutes under which we bring most of our clients' claims.

In these circumstances, our students also develop in themselves core professional values in seeking and (hopefully) achieving jus-

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[236] *See* Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 CLIN. L. REV. 411, 412 n.8 (1994) (observing that "[m]ost live client clinics have a justice mission as well as a goal of teaching practice skills").

[237] *See* Barry et al., *supra* note 1, at 12 (emphasizing that "access to justice for traditionally unrepresented clients" has been a central dimension of clinical legal education from its earliest beginnings).

[238] *See* Dubin, *supra* note 7, at 1475 (describing assistance of those "lacking meaningful access to society's institutions of justice and power" as a chief way clinical education furthers "social justice imperatives").

[239] *See*, *e.g.*, Laycock & Goodrich, *supra* note 49, at 1025-32 (justifying RLUIPA land-use protections from the perspective of minority faiths); Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 826 (2012) (listing the "arbitrary treatment" of religious accommodation claims as a motivating factor for bipartisan passage of RLUIPA in 2000); Bilal Zaheer, *Accommodating Minority Religious Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 497-98 (framing employment accommodation as something of particular importance to minority and immigrant faith communities).

tice.[240] To adequately assume professional responsibility in such sensitive and personal settings, they must not only use practical skills but also develop and practice client-centered empathy, loyalty, and respect.[241] Because to many our clients may appear strange, misguided, or even flat-out wrong about matters of ultimate concern, our students must elevate them as fully equal rights bearers whose current or threatened suffering based on fundamental, cherished beliefs about who they are and where they are going is an injustice that must be redressed.[242] This personal resolve to fight injustice arises whether we are successful in the case or not; in fact, although we never want this to happen to our clients, it could rightly be said that the lesson is all the more impressed on our students when facing the disappointment of a loss.[243] It is hard to imagine a more human context in which to learn how to act like, and become, a professional.[244]

And by blending technically demanding lawyering experiences with this personal dimension of helping real people with real problems, we further inculcate in our students an emotional connection to pro bono service that they will hopefully continue when they become practicing lawyers.[245] The Carnegie Report observes, "[c]ompassion and concern about injustice become much more intense when students develop personal connections with those who have experienced hardship or injustice."[246] Or, as one of our former students said when asked what aspect of the clinic she found most rewarding, "[t]he chance to help people follow their consciences in times of difficulty."[247]

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240 *See* Bryant & Johnson, *supra* note 124, at 265 (arguing that a central goal of clinical legal education is instilling in students an understanding of "achieving justice" as a "core value" of the practice of law).

241 *See* STUCKEY ET AL., *supra* note 1, at 190 (observing that the in-house clinical experience of "providing services to under-represented segments of society helps develop positive professional characteristics").

242 *See* AMSTERDAM & BRUNER, *supra* note 195, at 141 (describing the power of narrative to link grand legal theories to concrete client circumstances).

243 *See* Reingold, *supra* note 135, at 563-64 (noting benefit of facing defeat in hard-fought cases in clinic).

244 *See* SULLIVAN ET AL., *supra* note 1, at 159 (stressing value of "a human face for the practice of law").

245 *See id*. at 138-39 ("[A] good pro bono experience can strongly influence a student's future involvement in public service."); *see also* Dubin, *supra* note 7, at 1476 (observing that the social justice "ideals" of clinical education "are served by exposing law students to an ethos of public service or pro bono responsibility in order to expand access to justice through law graduates' pursuit of [such activities in their] careers").

246 SULLIVAN ET AL., *supra* note 1, at 146.

247 This quote is taken from a blurb of support the student sent to include in an annual report of recent clinic activities we developed for supporters of our work. The report is on file with the author.

### *B. Unity in Diversity*

Beyond daily service to clients, our clinic also has broader objectives rooted in our combined interest in clinical legal education and religious liberty more generally. Regarding the former, we aim to enhance the clinical lawyering experience by conducting it through this lively, human, and cross-cultural area of the law—a point explored in Sections III.A and IV above. We also strive to expand the above-described educational and professional benefits of clinical legal education by reaching those who might not have been exposed to them.[248] Exploring novel variations on established pedagogical themes—like our program does—demonstrates to the current generation of law students that there are many different ways to "do clinic."[249] The value of more and diverse clinical opportunities will likely only increase in the coming years as external and internal pressures grow for law students to become better-prepared professionals.[250]

As for the global principle of religious liberty, we have three objectives. First, we hope to contribute to its continued protection as fundamental to a free and pluralistic people—a notion recognized at the founding of our country, in the laws since passed, and as an international norm.[251] The right is not unbounded; indeed, the nature and measure of its limitations commonly form the crux of matters we handle in clinic and are sometimes even aspects of our cases on which our students personally demur. Yet the basic ideal, and its abiding value—particularly to the vulnerable, marginalized, or disfavored—remain a hallmark of our civil liberties.[252] We honor them on a case-by-case

248 *See* STUCKEY ET AL., *supra* note 1, at 173 (describing as a "best practice" of legal education that the law school have "enough experiential education courses to meet the needs and interests of its students").

249 *See generally* Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 CLIN. L. REV. 205 (2010) (urging diversity in clinical approaches as a way to share the values and benefits of clinical legal education with Millenials); *see also* Dubin, *supra* note 7, at 1475 (observing that, as a practical matter, the social justice ideals of clinical legal education "can take a variety of forms").

250 *See* Tokarz et al., *supra* note 1, at 53-57 (urging experiential learning innovations to meet contemporary challenge to produce "competent, ethical practitioners who are ready to become professionals").

251 *See supra* Section II.

252 *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 1 (1985) (stressing that "religious liberty is the central value and animating purpose of the Religion Clauses" of the First Amendment); AMERICAN CIVIL LIBERTIES UNION, *Religious Freedom in a Pluralistic Society* (June 21, 2012), www.aclu.org/religion-belief/religious-freedom-pluralistic-society ("Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character."); *see also supra* notes 19, 60 (describing unanimous political support for the adoption of religious liberty protections, both domestically for RLUIPA and the Title VII accommodation provisions and internationally for the Universal Declaration of Human Rights).

basis but also in the simple, yet not insignificant, witness of our clinic's existence.[253]

Second, we hope to reinforce the crucial distinction between religious liberty and the merits of a particular religion or religious practice. Like other freedoms in the First Amendment—i.e., speech, assembly, press, petition—the freedom itself is primary, and not what is said or done with it.[254] (This is not to suggest that substance is irrelevant; only that it should be an exception to the rule.) This distinction is particularly important where, as in many of the matters we handle, the religion or practice is seen as strange or is the target of implicit or explicit bias.[255] Among the cases we handle, for example, those for Native Americans have tended to involve the most misunderstanding while our Muslim clients have faced the most open hostility.[256] As Stephen Carter laments, "[r]eligions that most need protection seem to receive it least."[257] By choosing to represent all faiths rather than the merits of particular religious practices, we address and introduce students to this important dimension.

Third, and notwithstanding our default "religious liberty for all" approach, we are well aware of contemporary associations with our topic generally. Noah Feldman points out that in today's culture, "no question divides Americans more fundamentally than that of the relation between religion and government."[258] And tensions have seemed to only increase with recent controversies surrounding contraceptive coverage requirements (and exceptions) under the Affordable Care Act,[259] the so-called "anti-sharia" challenge to the use of Islamic law

253 *See* Brodie, *supra* note 122, at 368 (urging the value of "little cases" to achieve social justice in both the near term (i.e., for clients) and long term (i.e., through the lessons and values students take into practice)).

254 *See* Steven Helle, *Prior Restraint by the Backdoor: Conditional Rights*, 39 VILL. L. REV. 817, 845 (1994) (noting the "paradox[es]" associated with the First Amendment, including the "right to be wrong"); *see also* CARTER, *supra* note 77, at 34 (stressing that "to be truly free," religions "must be able to engage in practices that the larger society condemns").

255 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasizing distinction between freedom and substance, observing "freedom to differ is not limited to things that do not matter much").

256 *See* Amber McDonald, *Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation*, 33 HOFSTRA L. REV. 751, 755 (2004) ("Because traditional Native American practices are fundamentally different from other American religions, they are often misunderstood."); Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMEND. L. REV. 330, 344-51 (2012) (describing anti-Muslim hostility, including in employment and land use).

257 CARTER, *supra* note 77, at 9.

258 NOAH FELDMAN, DIVIDED BY GOD 5 (2006).

259 *See generally* Horwitz, *supra* note 87 (analyzing contraceptive coverage controversy, particularly as it arose in the *Hobby Lobby* case).

by domestic courts,[260] and the Supreme Court's recognition of same-sex marriage.[261] Rather than seeing such controversies as an obstacle, however, we view them as an opportunity, both for our students and the clinic as a whole.

At a project level, we can capitalize on the attention paid to these high-profile fights but then propose as an escape-valve alternative the less divisive reality—at least as a global matter—from which most law and religion disputes arise.[262] By favoring individual client matters around which consensus can more readily develop, we defend the principle in circumstances where it often matters most: in the perennial struggle of marginalized people and communities to live in a pluralistic society while honoring their God(s).[263] In the process, we work to save the principle from partisan heat that might threaten to overtake it.[264] We also make room for consensus, dialogue, and mutual understanding that have prevailed in the past, and, as we believe to have shown in our own small way, can continue—whether in the matters we choose to handle or those we do not.[265]

Finally, our students benefit from experiencing and communicating the personal dimension of what they might understand differently from only indirect awareness of the more notorious disputes in the field. Among other things, those who assume before enrolling that

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260 *See generally* James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717 (2015) (analyzing "anti-sharia" controversy).

261 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (holding same-sex couples have a fundamental right to marry while noting that many of those who oppose same-sex marriage do so on religious or philosophical grounds); *see also* Emily Bazelon, *What Are the Limits of "Religious Liberty"?*, N.Y. TIMES MAG., July 12, 2015, MM13 (describing religious-liberty controversies in the wake of *Obergefell*).

262 *See* Lee, *supra* note 18 (news story about our clinic's vision for building consensus).

263 *See generally* Laycock, *supra* note 60, at 840-41 (stressing that "culture war" debates should not be allowed to overcome the general principle of religious liberty that "has enabled people with fundamentally different views on fundamental matters to live in peace and equality in the same society").

264 *See* Martha Minnow & Michael McConnell, Opinion, *Respectfully Resolving Tensions Between Religion, Law Is Possible*, BOSTON GLOBE (May 27, 2015), http://bit.ly/1OQUnMq (urging continuing tradition of civility and mutual respect on contemporary matters of religious accommodation and its limits); *see also* CARTER, *supra* note 77, at 3-11 (pointing to the civil rights progress of the 1960s as an example of faith-based action that would have been threatened by some of the discord over the protection of religious liberty that has occurred since).

265 *See supra* note 19 (describing consensus surrounding adoption of RLUIPA and Title VII religious accommodation provisions). As perhaps further cause for optimism, the Supreme Court has issued several unanimous or near-unanimous decisions in the religious accommodation arena in recent years. *See*, *e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) (8-1); Holt v. Hobbs, 135 S. Ct. 853 (2015) (unanimous); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (unanimous); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (unanimous); Cutter v. Wilkinson, 544 U.S. 709 (2005) (unanimous); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (unanimous).

they know what religious liberty is all about—including, but not limited to, our more religious-minded students—can gain significant insight into the profession when facing those assumptions in direct service to clients who are often less concerned about any cause and more worried about keeping their jobs or ensuring their personal safety.[266] At a minimum, we provide students an environment where these sensitive issues can be explored in a mature, thoughtful, and diverse way.[267]

### *C. Cause Lawyering*

I have often been asked whether ours is a "cause" clinic, a term coined by Austin Sarat and Stuart Scheingold to describe the use of law "to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic or, indeed, legal."[268] On one hand, it could be said our clinic does in fact involve cause lawyering; after all, we consistently take the side of individuals or groups challenging restrictions on religious exercise, and invariably advocate broad legal protection of that exercise.[269] On the other hand, we prefer a consensus approach, and focus more on teaching students how to resolve cases for individual clients under existing law than pushing for systemic change.[270] We also challenge in students the stereotypes of client difference or sameness, while stressing the need for professional detachment in what can be an activist-heavy field.[271] One might argue, as some did at our launch, that such activism is what sparked the founding of our clinic and the attention it has so far received—particularly if one buys the mistaken narrative of a conservative program amid the progressive elite.[272] But we have in fact consciously decided

266 *See* Anderson et al., *supra* note 169, at 341 (noting risks of over-identification in professional setting).

267 *See* RHODE, *supra* note 5, at 195 (urging the thoughtful exploration of potentially controversial topics "throughout the [legal] educational experience"); *see also* Kosuri, *supra* note 137, at 343 (opining "[c]linics that are intellectually and ideologically diverse further th[e] [law school] mission" of diversity generally).

268 STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN 3 (2004) (citation omitted).

269 *See id*. at 9-10 (characterizing cause lawyers as choosing one side in a "social conflict and identify[ing] themselves with the sides they take"); *see also id*. at 102-03 (describing lawyering for "'first-generation' rights"—e.g., those reflected in the Bill of Rights—as a form of "liberal democratic cause lawyering").

270 *See* GLENDON, *supra* note 5, at 100-08 (urging the value of straightforward "order-affirming" lawyering for clients and a lawyer's "feel for common ground," in contrast with the "adversarial advocate" model).

271 Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 470-71 (1996) (warning against the risk of a lawyer's over-identification with a client's cause).

272 Much of the political framing likely comes from our welcomed support by the Becket Fund, and the perception, correctly or not, that the latter has a conservative agenda. *See*

as a clinic not to be so limited in our methods and approach, so as to capture the many and profound educational and social-justice values outlined in this Article that are available beyond that space.

At bottom, therefore, I would suggest that to the extent our project involves cause lawyering it is more at the margins than some might first expect. We indeed take on cases to help ensure religious liberty for all, but we tend to seek matters in which students learn to serve the interests of individual clients under existing legal provisions and prevailing norms.[273] Maybe in the occasional amicus brief, we could be said to be seeking a broader vision; but even there, we have largely chosen a consensus approach—e.g., filing a brief for the Women's Prison Association in support of a Muslim inmate's refusal to cut his beard, or another one for a Muslim non-profit in support of a self-sustaining Hutterite community seeking relief from a compulsory workers compensation system that it viewed as inconsistent with their faith.[274] Overall, one might see some resemblance to my colleague Juliet Brodie's "middle ground" approach to community lawyering, as we "hover" between direct service and impact litigation . . . but emphasize the former.[275] To my mind, that is where we can presently make the most difference as a teaching clinic in the important yet nuanced field of social justice we have chosen.[276]

This variation of cause lawyering seems particularly appropriate given our goal for building understanding around common principles. Rather than imposing a vision of absolute rights—which, incidentally, most of our students likely would not support in any event—we propose and defend religious freedom as a central aspect of human dignity and existence through "communication, reason-giving, and mutual understanding."[277]

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ANN SOUTHWORTH, LAWYERS OF THE RIGHT 155 (2008) (including the Becket Fund on a list of "conservative and libertarian groups . . . that pursue law reform through strategic litigation"). *See also supra* note 235 (discussing Becket).

273 *See* AUSTIN SARAT & STUART SCHEINGOLD, EDS., CAUSE LAWYERING 7 (1998) (distinguishing "cause" lawyers at the margin with typical pro bono lawyering: "[a]t this end of the continuum, cause lawyers tend to be distinguished primarily by a willingness to undertake controversial and politically charged activities and/or by a sense of commitment to particular ideals"); *see also* SCHEINGOLD & SARAT, *supra* note 268, at 101-07 (contrasting cause lawyers for the protection of established rights with their more radical cousins, on both the political left and right, that seek to "supplement, transcend, or repudiate these rights").

274 *See supra* note 111 (listing our amicus briefs to the Supreme Court).

275 Brodie, *supra* note 122, at 377-78.

276 *See* Kosuri, *supra* note 137, at 337 (urging clinicians to "let their teaching goals drive client selection, rather than the reverse").

277 MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF LEGAL DISCOURSE 45 (1991).

## VI. CONCLUSION

In founding a twenty-first century law school clinic dedicated to religious liberty, we knew there would be challenges, both practical and political. But through a measured approach that employs established clinical pedagogies, focuses on student development and client service, and urges consensus principles on which our nation was founded and vulnerable populations continue to depend, we have shown it can and should be done. And if we can build a thriving clinic in a field as seemingly "hot" as ours, it would appear that clinics focused on developing lawyers through other potentially controversial yet fundamentally important areas can too.[278] The changing professional and demographic arenas in which today's law schools and lawyers operate just may require it.[279]

[278] *See* Reingold, *supra* note 135, at 546-47 (noting the pedagogical benefit of "controversial" clinic work).

[279] *See* Barry et al., *supra* note 1, at 71-75 (urging new approaches to legal education).