

## **The “Plus One” Clinic: Tapping into the Disorienting Possibilities in Representing Landlords Alongside Tenants**

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### **ABSTRACT**

This article proposes a novel clinical methodology for teaching “political values,” which it defines as values that are not encompassed by the Rules of Professional Conduct, but extend beyond simply personal morality, and includes the values that guide lawyers in making client selection decisions. Under this “plus one” approach, a clinic with an existing docket of eviction defense representation would add to that docket at least one case representing a landlord seeking to evict a tenant, and a clinic representing workers in wage or employment discrimination claims would add at least one case representing an employer defending one of those types of claims. This article relies upon the premise that clinics are a potent venue for teaching “professional values,” which it defines as the ethical rules that all lawyers at least purport to be bound by, and argues that clinics also have a unique ability to teach “political value” lessons, regarding issues about which there is much disagreement within the profession and society. Law students are already taught the parameters of what they should and should not do once they have a client, but they are not always comparably taught how they should decide which individuals or entities to represent, and to what ends. Students in a “plus one” clinic would be given the tools to make these types of decisions in the context of their eventual practice areas and individual ideologies.

*Growing up means throwing off dependence upon external authority... It means questioning – not hastily, angrily, rebelliously, but calmly and dispassionately – our bequests from the past, our social heritage.*

Jerome Frank.<sup>1</sup>

## I. Introduction: Better Practices for Teaching Political Value Lessons

“What’s the biggest number?,” my (then) kindergarten-age son asked me once as we were driving to school. I distractedly replied that the biggest number I could think of was a number called a Googolplex.<sup>2</sup> After a few seconds of silence on both ends, I added, “But I can think of a bigger one now. A Googolplex plus one.”<sup>3</sup>

Early childhood educators probably understand that my son was speaking from the perspective young children bring to mathematical concepts; that of numbers having primarily ordinal, or superlative, qualities. I responded in kind, but upon further consideration, answered with the adult perspective on math; that it primarily relies upon the measurement of abstract intervals, without any set limits.<sup>4</sup> So often, in our formal debates over the direction(s) in which legal education must go to remain relevant and useful, we resort to formulations of “child’s math,” seeking the “best”<sup>5</sup> ways to achieve a set of institutional goals.

In contrast, in our everyday practices, legal educators operate in the world of “adult math,” making cumulative, incremental improvements to our teaching that build upon their predecessors and (theoretically) have no finite limit in effectiveness. The following proposal is offered in that spirit; as an example not of “best practices,” but simply a potential “better practice” than what is done today. Properly implemented, it would not change the course of continents, but it could markedly improve the impact of a clinical program that is interested in teaching political value lessons to its students.

By “political” values, I mean to exclude the class of behaviors that is encompassed by the Rules of Professional Conduct. Law students already receive much instruction in this area, although there is much debate about the effectiveness of these efforts.<sup>6</sup> The term “political

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<sup>1</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 207 (Transaction Publishers, 2009) (1930).

<sup>2</sup> Ten to the power of Googol (1 followed by one hundred zeros). See Wikipedia, Googolplex, <http://en.wikipedia.org/wiki/Googolplex> (last visited March 3, 2010).

<sup>3</sup> I am not making any claims about the originality of this statement. I was almost certainly thinking of something similar I had once read regarding the concept of infinity. Cf. YOKO OGAWA, *THE HOUSEKEEPER AND THE PROFESSOR* 2 (Stephen Snyder, trans., Picador 2009) (2003) (“He taught us about...the largest number of all, which was used in mathematical proofs...and about the idea of something beyond infinity.”).

<sup>4</sup> See, e.g., DAVID COHEN, *PIAGET: CRITIQUE AND REASSESSMENT* 39-40 (St. Martin’s Press, 1983) (“Even if the child can count and can tell *bigger* from *littler*, he will not grasp that  $3 \times 2$  has to equal  $2 \times 3$ ...Piaget’s point is that the child will not see the logical point or the logical necessity. The child remains rooted in, and routed by, pre-logic.”) (emphasis in original).

<sup>5</sup> See, e.g., ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (Clinical Legal Education Association, 2007).

<sup>6</sup> See Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 *CLINICAL L. REV.* 43, 46 (2009) (describing required professional responsibility courses as “hav[ing] had mixed results. Clearly both the coverage and credibility of legal ethics have increased substantially over the last several decades... Yet only a minority of students felt that these efforts had significantly helped them develop a ‘personal code of values and ethics.’”).

values” is meant to include personal morality,<sup>7</sup> but also matters about which lawyers may differ based on ideological or other preferences, and for which disagreements they would not necessarily be labeled immoral by an outside observer.<sup>8</sup>

In brief, what I suggest is that a clinic with an existing docket of eviction defense representation add to that docket at least one case representing a landlord seeking to evict a tenant. A clinic representing workers in wage or employment discrimination claims would add at least one case representing an employer defending one of those types of claims. An environmental clinic would represent at least one business in the regulatory processes required for compliance with environmental laws, and so forth. Of course, normal conflict-of-interest and confidentiality obligations would prevent client representation on both sides of the same case, or against previous clients of the clinic.<sup>9</sup> And this “plus one” approach would not be self-executing – as described in greater detail below, it would require significant planning and thought on the part of the clinician about the supervisory and reflective structures that would best capitalize on the educational opportunities that the inclusion of such cases would provide.<sup>10</sup>

But the educational potential in bringing such cases into the mix is correspondingly significant. The scholars of Legal Realism played a foundational role in the development of clinical legal education in the early twentieth century.<sup>11</sup> They would likely agree with most modern clinical legal educators that clinical legal education has an unparalleled ability to teach values. Calling upon law students to synthesize their skills training with the non-legal aspects of the practice that inevitably arise in live-client representation is a uniquely powerful means of teaching value lessons.<sup>12</sup>

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<sup>7</sup> See, e.g., Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUIY 1, 5 (2009) (“Whether there is a duty under tort law to rescue a drowning man does not answer whether I want to be hired so that I can defend someone’s right to watch a man die.”).

<sup>8</sup> See Hatfield, *supra* note 7, at 11 (“Each of us must choose what kind of person to be. That choice ought to determine our professional choices. If we choose to implement a client’s objective, it ought to be because doing so reflects what we personally value, not because we have been assured that what we help our clients do does not reflect our ‘nonprofessional’ personal morality.”).

<sup>9</sup> See, e.g., Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1, 7 (1997) (“To avoid conflicts of interest, services are provided in different Michigan counties.”). Admittedly, these necessary requirements may effectively bar a clinic from doing such work in smaller-population locations that have very few lawyers in the clinic’s practice area.

<sup>10</sup> See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 54 (1995) [hereinafter Fran Quigley] (“the significance of the disorienting experience itself can be lost if the clinical courses do not also provide opportunities for reflection, the second state of learning from such experiences.”).

<sup>11</sup> See Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1933 (2002) [hereinafter Wizner (2002)] (“The intellectual roots of clinical legal education date back to the legal realist movement that began in the 1930s.”). See also Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 944 (“Jerome Frank noted that ‘something important and of immense worth was given up when the legal apprentice system was abandoned as the basis of teaching in the leading American law schools.’”).

<sup>12</sup> See Linda F. Smith, *Benefits of an Integrated (Prosecution & Defense) Criminal Law Clinic*, 74 MISS. L.J. 1239, 1253 (2005) (“Involving the student in actual clinical work invites emotional reactions. It is incumbent upon us to offer our students a framework and a forum to process their reactions. This invitation to explore personal values, lawyering roles and professional responsibility is the most important component of the criminal clinic.”).

David Chavkin once asked, “[w]hat value does the clinical curriculum and the clinic faculty add to the work?” Put another way, “[d]oes the expensive clinic infrastructure add something special to the project” of legal education?<sup>13</sup> There is little debate that clinics provide a potent vehicle by which to teach those professional values and ethical rules that all lawyers at least purport to be bound by. As many clinicians have recognized over the years, though, there is also “something special” about clinical legal education’s ability to teach *political* value lessons, regarding issues about which there is much disagreement within the profession and society.<sup>14</sup>

The “political values” to which I refer in this article mainly track what Cass Sunstein has called, in a similar context, the “usual political stereotypes.”<sup>15</sup> Sunstein uses “simple, relatively uncontroversial tests” of what defines “‘liberal’ or ‘conservative,’” based on these stereotypes, in his studies of political polarization.<sup>16</sup> For example, he identifies the differing political views of study participants by variously asking for which party’s candidate, if any, Democratic or Republican, they would vote when they lacked any further information, asking that they “assign grades to various people,” such as former Vice President Dick Cheney, radio host Rush Limbaugh, former Senator Edward Kennedy, and the Reverend Jesse Jackson, “predicting how they would be as president,”<sup>17</sup> and, in studies of Court of Appeals judges, coding as “liberal” their votes “to uphold an affirmative action program, a campaign finance restriction, an environmental regulation challenged as too aggressive, or a decision of the National Labor Relations Board in favor of employees.”<sup>18</sup>

These are admittedly “pretty crude” measures of individual political values.<sup>19</sup> The common thread among them is that, unlike so-called “eureka problems, for which the answer, once revealed, is clear to all,”<sup>20</sup> such as the time of day or the number of home runs in Barry Bonds’ single-season record, they represent “low-feedback” topics of debate, in that they are “grand, sprawling subjects where information is difficult to come by, hard to make sense of, and given to competing explanations and interpretations.”<sup>21</sup> All of us experience these great debates of the day through a broad array of respective information sources and, as a result, we often hold

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<sup>13</sup> David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 263-264 (2003) (footnotes omitted).

<sup>14</sup> There is still quite a bit of daylight between “legal ethics” and “political values,” as I describe them, and therefore a great variety of potential approaches available to educators interested in, or tasked with, addressing these topics with students. See generally DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (5th ed. 2008).

<sup>15</sup> CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 10 (Oxford University Press, 2009).

<sup>16</sup> *Id.*

<sup>17</sup> See David Schadke, Cass R. Sunstein, and Reid Hastie, *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915, 919 n.12 (2007).

<sup>18</sup> Sunstein, *supra* note 15, at 10.

<sup>19</sup> Sunstein, *supra* note 15, at 10. See also Adam Liptak, *Court Under Roberts is Most Conservative in Decades*, N.Y. TIMES, Jul. 24, 2010 (“Scholars quarrel about some of the methodological choices made by political scientists who assign a conservative or liberal label to Supreme Court decisions and the votes of individual justices. But most of those arguments are at the margins, and the measures are generally accepted in the political science literature...Still, such coding is a blunt instrument.”).

<sup>20</sup> Sunstein, *supra* note 15, at 46.

<sup>21</sup> FARHAD MANJOO, TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY 177 (John Wiley & Sons, 2008).

“divergent perceptions about what’s actually happening in the world,”<sup>22</sup> that we are unable to reconcile with those held by individuals with differing political values than our own.<sup>23</sup>

It is important to note that agreement about these political values is not a necessary predicate to effective instruction about them. Nor is the goal of such instruction to drive students toward a particular “liberal” or “conservative” position on the issues at hand. Rather, my goal is to make those students’ clinical experiences part of what Sunstein calls the “architecture of serendipity” that can flourish in free societies.<sup>24</sup> He describes such an architecture, wherein a society’s inhabitants experience “a number of serendipitous encounters with topics and points of view,” as the alternative to an “architecture of control,” wherein “people may well restrict themselves to topics and views that they find congenial.”<sup>25</sup> In Sunstein’s view, there is great civic value to allowing individuals to “occasionally see elsewhere” on controversial issues, in instances when they otherwise might not. “What they see may change their minds, even their lives.”<sup>26</sup>

The “plus one” approach argued for in this article would challenge students to truly understand the practice area of the clinic through the prism of clients on both sides of the cases, an opportunity that the clinical setting is uniquely able to provide but the practice of law generally is not.<sup>27</sup> Such exposure could reduce in those students “the common human tendency to explain people’s behaviors as being a consequence of their essential disposition, rather than as something arising out of the specific situation they’re in,” what is called “fundamental attribution error.”<sup>28</sup> Familiarity with at least one client on the opposite side of the litigation from the rest of the clinic’s client base would give students the opportunity to empathize with both types of parties, and thereby inform those students’ views on how these disputes should be resolved.<sup>29</sup> More ambitiously, the “plus one” experience might lead students closer towards the balanced perspective that many longtime practitioners acquire only after years of exposure to their clients and opponents, and which I would argue is an essential ingredient in the professionalism of the bar as a whole.<sup>30</sup>

Such a perspective can in turn greatly inform those students’ practice choices as graduation approaches. The values that guide lawyers’ client intake and selection decisions for the most part lie outside the jurisdiction of the Rules of Professional Conduct and most clinics’

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<sup>22</sup> Manjoo, *supra* note 21, at 224.

<sup>23</sup> See generally Manjoo, *supra* note 21, at 19-21 (describing Swift Boat Veterans for Truth campaign against Sen. John Kerry during the 2004 presidential election as “a fight over two competing *versions of reality*,” where “the ads were asking us to look at history...and to decide which reality *actually occurred*.”) (emphasis in original).

<sup>24</sup> Sunstein, *supra* note 15, at 157.

<sup>25</sup> Sunstein, *supra* note 15, at 80.

<sup>26</sup> Sunstein, *supra* note 15, at 157.

<sup>27</sup> Cf. JOHN DEWEY, DEMOCRACY AND EDUCATION 368 (MacMillan, 1925) (“The ordinary worker in the factory is of course under too immediate economic pressure to have a chance to produce a knowledge like that of the worker in the laboratory. But in schools, association with machines and industrial processes may be had under conditions where the chief conscious concern of the students is insight.”).

<sup>28</sup> Manjoo, *supra* note 21, at 151 n.\*.

<sup>29</sup> See, e.g., Hatfield, *supra* note 7, at 10 (arguing that, among governmental lawyers on the question of torture, it was the existence of “empathetic identification that differentiated those who dissented from those who did not.”).

<sup>30</sup> See Manjoo, *supra* note 21, at 222-223 (arguing that “trust plays a large – a surprisingly large – role in the well-being of a culture,” in particular “what sociologists call ‘generalized trust,’ which describes, broadly, how likely it is that two strangers from a given community will be willing to trust each other.”).

curriculum, but such values can define a lawyer’s career.<sup>31</sup> William Hodes once described the following questions as the important ones that he believed lawyers too often failed to ask themselves:

Do I really believe in my client’s cause, heart and soul, so that I am a hired gun for the side I would have volunteered for? Or is it merely the luck of the draw that the other side failed to hire me first?<sup>32</sup>

Adrienne Jennings Lockie, a clinician at American University, has incorporated law students into her clinic’s case selection process because, in her view, the “client selection process...provides unparalleled opportunities to engage students in meaningful reflection about the attorney-client relationship and essential lawyering choices and roles.”<sup>33</sup> One of Lockie’s goals in making the pedagogical choice to “focus[ ] on client selection is to promote life-long reflection on whom we, as lawyers, choose to represent.”<sup>34</sup>

Client selection inevitably involves a normative judgment. A lawyer’s choice of whom to represent signals that lawyer’s values regarding which clients or issues are important or merit legal representation; choice of client is both a moral and a professional decision.<sup>35</sup>

Like many other aspects of the profession that clinics already address in meaningful ways, the more students are able to understand, through experience before graduation, this component of their future roles as attorneys, the better prepared they will be to practice law.<sup>36</sup> The goal of the “plus one” approach that I argue for in this article is “to encourage future lawyers to think more deeply about the lives they want to lead, and about how to match their personal values with their career priorities,”<sup>37</sup> and to thereby improve the quality of those future lawyers’ representation of their clients.<sup>38</sup> Achieving this goal would represent a significant enhancement

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<sup>31</sup> See, e.g., Stephen Wizner and Robert Solomon, *Law as Politics: A Response to Adam Babich*, 11 CLINICAL L. REV. 473, 477 (2005) (“We believe that the choices about which clients a clinic will represent, and what types of cases the clinic will handle on behalf of those clients, are political decisions.”).

<sup>32</sup> W. William Hodes, *Accepting and Rejecting Clients – The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 979 (2000).

<sup>33</sup> Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357, 358 (2010).

<sup>34</sup> Lockie, *supra* note 33, at 359.

<sup>35</sup> Lockie, *supra* note 33, at 359.

<sup>36</sup> See Hodes, *supra* note 32, at 978 (“...the excruciating difficulty of law practice is the *pervasiveness* of ethical challenges. You must earn your stripes day-by-day, subtlety-by-subtlety, as part of a *constant* process of self-examination.”) (emphasis in original).

<sup>37</sup> Rhode, *supra* note 6, at 51.

<sup>38</sup> See, e.g., Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. COLLOQUY 33, 45 (2009) (“Professionalizing moral engagement is not aimed at producing lawyers who are skilled at persuading clients to conform to the lawyer’s own moral worldview; the objective is to produce lawyers who are capable of raising the moral considerations embedded in a representation in a way that can actually enhance client autonomy.”).

of a clinic’s existing educational output and, accordingly, its overall role in the education of legal professionals.<sup>39</sup>

In his famous pamphlet, *Legal Education and the Reproduction of Heirarchy*, Duncan Kennedy criticized legal education in this country for

structur[ing] the pool of prospective lawyers so that their hierarchical organization seems inevitable and train[ing] them in detail to look and think and act just like all the other lawyers in the system.<sup>40</sup>

The factual accuracy of Kennedy’s observation seems indisputable; what is open to debate is whether or not this is a bad thing, and if so, the degree to which it is. A certain amount of standardization is central to the purpose of professional education. Our society expects architects, doctors, and nurses to all apply certain methodologies and standards of behavior in any number of novel situations. The reason why most law students incur upwards of forty thousand dollars of unsecured personal debt per academic year is to learn from us how to be (and, therefore, how to make a living by being) one certain type of professional, a lawyer.<sup>41</sup> This does not, of course, mean that political value lessons could not, or should not, be taught to them.

The importance of such lessons becomes apparent when considering, in particular, those law students who are headed towards ostensibly non-political, commercial careers that in fact will allow them to wield vast powers in our society. Kennedy decried the teaching of a “moderate, disintegrated liberalism” in law school as the alternative to the “pedagogical conservatism” that is also taught.<sup>42</sup> In his view, the liberal emphasis on individual “rights discourse is a trap,” because although within it “one can produce good pieces of argument about the occasional case on the periphery..., one is without guidance in deciding what to do about fundamental questions.”<sup>43</sup>

It seems to me, however, that being able to “produce good pieces of argument about the occasional case on the periphery” is precisely the type of skill that laypeople are seeking when they retain a lawyer in this country. It is this ability, rather than the ability to opine about “fundamental questions,” that is the essence of the value that lawyers add to a given situation. Teaching through such an intellectual posture, even in the area of political value lessons, is unapologetically part of the “plus one” approach that is argued for in this article.<sup>44</sup>

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<sup>39</sup>See, e.g., Dewey, *supra* note 27, at 360 (“An occupation is the only thing which balances the distinctive capacity of an individual with his social service. To find out what one is fitted to do and to secure an opportunity to do it is the key to happiness.”).

<sup>40</sup>Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591, 607 (1982).

<sup>41</sup>See, e.g., Dewey, *supra* note 27, at 139 (“Persons cannot live without means of subsistence...If an individual is not able to earn his own living and that of the children dependent upon him, he is a drag or parasite upon the activities of others...If he is not trained in the right use of the products of industry, there is grave danger that he may deprave himself and injure others in his possession of wealth...No scheme of education can afford to neglect such basic considerations.”).

<sup>42</sup>Kennedy, *supra* note 40, at 594.

<sup>43</sup>Kennedy, *supra* note 40, at 598.

<sup>44</sup>See, e.g., Dewey, *supra* note 27, at 417 (“There is an old saying to the effect that it is not enough for a man to be good; he must be good for something. The something for which a man must be good is capacity to live as a social member so that what he gets from living with others balances with what he contributes.”).

## II. The Social Justice Heritage of Clinical Legal Education

The teaching of political values has been a popular goal of clinicians from the beginning. A large proportion of the first generation of clinical legal educators came from a legal services background.<sup>45</sup> These pioneering individuals “brought a passionate commitment to social reconstruction to their work.”<sup>46</sup> They thought that it was “not enough for clinical teachers to instruct students in legal skills that are essential to competent representation of clients.”<sup>47</sup> Instead, they sought to teach what a committee of these now-eminent clinicians described at the end of the twentieth century as “excellence in lawyering, including devotion to justice and sensitivity to ethical and social issues.”<sup>48</sup> As one commentator described it,

[t]he cultural goal was to expose students to the “class” of legal aid clients; the practical goal was to “supplement orthodox instruction” by applying substantive knowledge to a real problem of a real client.<sup>49</sup>

It was hoped that such exposure would “inculcate in [law students] a sense of their own ability and responsibility for using law to challenge injustice by assisting the poor and the powerless.”<sup>50</sup>

The appropriateness of such avowedly political goals has been a topic of heated debate since the creation of these pioneering clinical programs,<sup>51</sup> and the debate has widened in recent years, as “clinical involvement in high-profile cases or mass litigation efforts has led to charges by some critics that clinics are breeding grounds for training liberals and advancing liberal agendas.”<sup>52</sup>

The most recent example of this phenomenon occurred in Maryland, where state legislators introduced a bill in 2010 demanding a list of clients and expenditures from the University of Maryland’s environmental law clinic, and threatening to hold up hundreds of thousands of dollars of funding if the university did not comply with the request.<sup>53</sup> The bill was expressly in response to the clinic’s pending litigation against Perdue Farms and “two Maryland chicken farmers who contract with Perdue” over pollution of the Pocomoke River and the Chesapeake Bay.<sup>54</sup> In response to criticism from law school deans, the American Bar

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<sup>45</sup> See Blaze, *supra* note 11, at 944. (“The legal aid ‘movement’ was the third significant influence leading to the earliest clinical efforts.”).

<sup>46</sup> Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 366 (2008).

<sup>47</sup> Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 331 (2001) [hereinafter Wizner (2001)].

<sup>48</sup> Ian S. Weinstein et al., *Report of the Working Group on Representation Within Law School Settings*, 67 FORDHAM L. REV. 1861, 1863 (1999).

<sup>49</sup> Blaze, *supra* note 11, at 946.

<sup>50</sup> Wizner (2001), *supra* note 47, at 331.

<sup>51</sup> See Blaze, *supra* note 11, at 942 (“many of the issues being discussed today – the mission of clinical education, skills training, teaching professionalism, and service provision – have been considered since the earliest days of clinical education.”) (footnotes omitted).

<sup>52</sup> Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 531 (2003).

<sup>53</sup> Annie Linskey and Timothy B. Wheeler, *Lawmakers threaten to stall UM funding over poultry-farm lawsuit*, BALTIMORE SUN, Mar. 27, 2010.

<sup>54</sup> Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES, Apr. 3, 2010.

Association, and clinical educators, the legislature subsequently dropped these financial penalties from the bill.<sup>55</sup>

Another well-known example of pushback against law clinics as a result of their involvement in “high-profile” controversies is the fierce reaction to the Tulane Environmental Law Clinic’s successful efforts in 1998 to prevent the construction of a polyvinyl chemical plant in an area of Louisiana known as “Cancer Alley.” The Governor of Louisiana threatened to “yank the school’s tax breaks,” and the Louisiana Supreme Court eventually “amend[ed] the state’s student practice rule, [to] mak[e] it the most restrictive in the country.”<sup>56</sup> In the wake of this controversy, the Tulane clinic’s new director led the clinic to adopt “a self-consciously apolitical philosophy,” the “essence” of which “is that each and every clinic decision, procedure, and activity is derived from politically neutral principles.”<sup>57</sup>

Some clinicians have questioned whether the “apolitical law school clinic” model is actually a departure from the traditional social-justice orientation of clinical legal education, due to the fact that the Tulane clinic still continues to primarily represent an indigent client base that would not otherwise be able to hire counsel.<sup>58</sup> Others reject any avowedly “apolitical” approach, instead advocating for an activist clinical model that “would both support the project of organizing the unorganized and *condition* the provision of services to communities on the establishment of collectives.”<sup>59</sup> In an environment where “the vast majority of law school graduates continue to enter private practice,”<sup>60</sup> many clinicians see “[t]hose who practice social justice law” as “essentially swimming upstream while others are on their way down.”<sup>61</sup> What obligations, if any, do clinicians bear to the others swimming downstream?

### III. Teaching Political Value Lessons to Adult Learners

Recent research has provided support for the widely-held, anecdotal view of clinical legal educators that clinics largely succeed in motivating and energizing students who are already inclined towards a public-interest career.<sup>62</sup> Constructivist educational theory<sup>63</sup> offers insight into why this is so. The enhanced learning possibilities available to students who agree with the political viewpoints of the faculty running social-justice clinics are a result of such students

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<sup>55</sup> *Maryland Legislature Blunts Threat to Law Clinic Funding*, ABA Division for Media Relations & Communication Services, April 7, 2010, available at <http://www.abanow.org/2010/04/maryland-legislature-blunts-threat-to-law-clinic-funding> (relating that the “threats of rescinding amounts ranging from \$250,000 to \$500,000 unless the clinic filed more detailed reports” were dropped from the final reconciled bill).

<sup>56</sup> Carey, *supra* note 52, at 537-538.

<sup>57</sup> Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 449 (2005).

<sup>58</sup> See Wizner & Solomon, *supra* note 31, at 477 (“The decision to represent only low income clients who cannot afford the cost of sophisticated environmental lawyers in affirmative cases seeking to block governmental and industrial projects that threaten the environment is a political decision.”).

<sup>59</sup> Ashar, *supra* note 46, at 356 (emphasis added).

<sup>60</sup> James G. Leipold, *After the Bar Exam: Legal Employment Trends for Law School Graduates*, THE BAR EXAMINER, May 2005, 28.

<sup>61</sup> William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 10 (2007).

<sup>62</sup> See Rebecca L. Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 99 (2009) (“Only among new lawyers who report that they entered law to improve society or help individuals do we see evidence consistent with a ‘clinic effect.’ These lawyers are more likely to be in public service employment overall, and those who found clinic helpful are more than twice as likely to be working in public service employment than those who did not. This finding suggests the possibility of an accelerant effect, though it is not clear what is accelerating what.”).

<sup>63</sup> See generally Cohen, *supra* note 4 (discussion of works of educational theorist Jean Piaget).

falling within the “zone of proximal development” for the lessons those clinical faculty seek to impart.<sup>64</sup> In other words, they are primed to absorb such lessons. Sunstein observed a similar phenomenon in his study of political polarization in three-judge Court of Appeals panel decisions. “The existence of unanimous confirmation, from two others, will strengthen confidence – and hence strengthen extremity.”<sup>65</sup>

The argument has been made that clinicians who pursue expressly political agendas should properly not be protected by academic freedom,<sup>66</sup> but the bodies that govern clinical legal education thankfully do not agree.<sup>67</sup> My concerns with the way social-justice goals have been interwoven with clinical legal education have nothing to do with issues of academic freedom. I am not seeking ideological diversity in clinical academia for its own sake; nor am I proposing, in lieu of an “apolitical law school clinic,” that a “fair and balanced” one be established.<sup>68</sup>

Instead, my suggestion is that the way in which many clinicians seek to provide “options to encourage students to engage in public interest or public defense work” does not fully take into account another longstanding principle of clinical legal education, the “need to meet students where they are,”<sup>69</sup> particularly that “vast majority” of law students who will enter for-profit private practice,<sup>70</sup> whether they originally intended to or not. More fully engaging such students in a clinical setting on political issues has the potential to increase tension, either among students or between supervisors and particular students.<sup>71</sup> And the adoption of a “plus one” approach may diminish the energizing effect of the clinical experience on students with pre-existing social justice interests.<sup>72</sup> However, my belief is that the potential benefits of the “plus one” approach outweigh these potential pitfalls.

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<sup>64</sup> See, e.g., ELENA BODROVA & DEBORAH J. LEONG, *TOOLS OF THE MIND: A CASE STUDY OF IMPLEMENTING THE VYGOTSKIAN APPROACH IN AMERICAN EARLY CHILDHOOD AND PRIMARY CLASSROOMS* 11 (Int'l J. of Educ. 2001).

<sup>65</sup> Sunstein, *supra* note 15, at 24.

<sup>66</sup> See David M. Rabban, *Does Professional Education Constrain Academic Freedom?*, 43 J. LEGAL EDUC. 358, 361 (1993) (“At some point, however, institutional neutrality should constrain the ideological preferences of clinical teachers.”).

<sup>67</sup> See, e.g., *Report of the Committee on the Future of the In-House Clinic, Report of the Subcommittee on the Clinical Teacher*, 42 J. LEGAL EDUC. 551, 554 (1992) (“Once a clinic has articulated pedagogical goals, and made decisions about the types of cases that the clinic will accept based on those goals, the clinical faculty’s choices about educational objectives, case selection, and case handling should be protected as part of the clinical faculty’s academic freedom.”).

<sup>68</sup> For example, Arizona State University College of Law operates a “Crime Victims’ Legal Assistance Project,” in conjunction with a local nonprofit organization, that provides representation to victims of crimes, who are accorded unique rights in the criminal justice process under the Arizona state constitution. See Arizona Voice for Crime Victims, <http://www.voiceforvictims.org/> (last visited March 3, 2010).

<sup>69</sup> Mary A. Lynch, *Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices*, 74 MISS. L.J. 1177, 1194 (2005).

<sup>70</sup> Leipold, *supra* note 60, at 28.

<sup>71</sup> See, e.g., Lockie, *supra* note 33, at 369 (“Many clinical teachers become clinical teachers because of their commitment to social justice or to particular issues. But not all students share these interests, and so a tension between supervisor interest and student interest can surface in the client selection process.”).

<sup>72</sup> See, e.g., Sunstein, *supra* note 15, at 151 (“If people hear the other side and give serious consideration to competing arguments, they may well be more respectful and tolerant – but they are also more likely to be passive and perhaps even indifferent.”).

It is not my argument that the adoption of a “plus one” approach will result in more or different students enrolling in the clinic. Irrespective of whether that occurs or not, my proposal is that the learning experience for the students in a “plus one” clinic will be enhanced, and the depth of their potential insights will increase, beyond what it otherwise would have been. This is because such an approach draws on the principles of “andragogy,” a term that has been coined to describe the theory and practice of adult education specifically.<sup>73</sup>

One of the seminal early works applying andragogical theory to legal education postulated four important “methodological point[s]” in any such application: 1) “[l]earning should be through mutual inquiry by teacher and student”; 2) “emphasis should be on active, experiential learning”; 3) “learning should relate to concurrent changes in the students’ social roles”; and 4) “learning should be presented in the context of problems that students are likely to face.”<sup>74</sup> The principles of andragogy have been invoked in support of the social-justice educational goals of clinical legal education,<sup>75</sup> but they would seem to caution against some of the ways in which these goals have been pursued.

The “individual case-centered model of clinical legal education” is the “predominant one in the United States.”<sup>76</sup> The “plus one” clinical approach argued for in this article is a variant on this model that moves closer towards adult-learning principles, most concretely by involving students in the initial “plus one” case selection decision, and exposing them to broader issues unique to the practice area as representation is ongoing.<sup>77</sup> Fran Quigley has famously advocated for teaching political or social-justice values in the predominant clinical model by “disorienting” students from comfortable middle- or upper-class upbringings,<sup>78</sup> as well as those with avowedly conservative political views,<sup>79</sup> through their interactions with and advocacy for the impoverished and marginalized individuals who, in the main, comprise the client base for pro bono legal service organizations. There are a number of reasons to be skeptical that this is the most andragogically effective way of reaching this goal. For one thing,

[r]esearch on persuasion shows that presentations acknowledging both sides of an issue are in fact more effective tools of persuasion to an educated audience, who innately mistrusts presentations that ignore the existence of alternative perspectives.<sup>80</sup>

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<sup>73</sup> Fran Quigley, *supra* note 10, at 46-47 (“Adult learning theory is sometimes referred to as ‘andragogy,’ literally the practice of helping adults learn, to distinguish it from ‘pedagogy,’ which refers to helping children learn.”).

<sup>74</sup> Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 333-334 (1982).

<sup>75</sup> See generally Fran Quigley, *supra* note 10.

<sup>76</sup> Ashar, *supra* note 46, at 368.

<sup>77</sup> See Sections V(b) and V(c), *infra*.

<sup>78</sup> See Fran Quigley, *supra* note 10, at 45 (“Given law students’ disproportionately high level of economically-privileged or at least non-poor backgrounds, it is simply impossible to expect student lawyers to achieve a true understanding of a poor client’s situation, to ‘cross the gap,’ without significant exposure to the realities of social injustice faced by this country’s poor.”).

<sup>79</sup> See Fran Quigley, *supra* note 10, at 53-54 (relating anecdote where “a middle-aged accountant and part-time law student whose politics were revealed by his active involvement in campaigns of right-wing Republican political candidates” was unable to relate to a client).

<sup>80</sup> Fran Quigley, *supra* note 10, at 65. *But see* Manjoo, *supra* note 20, at 43 (suggesting that individuals, “if given a choice, might actually prefer to listen to [weak dissonant] messages over...*weak consonant* [ones] – messages that seem to jibe with our views but that we consider factually unsteady,” due to the relative ease with which “the other

Many legal educators argue that this alternative perspective comes to law students from the rest of their legal education, as well as their lives, and that an express social-justice orientation in a clinic is a corrective to these forces.<sup>81</sup> Certainly there is a great deal of truth to this view of law school. Kennedy aptly described the first-year learning environment as one “with older lawyers controlling the content and pace of depoliticized craft training in a setting of intense competition and no feedback.”<sup>82</sup> However, positioning social-justice clinics as a corrective to broader, malign forces like the first-year lecture classes, ignores the self-selection that must result when students consider whether to commit such a large portion of their semester’s or year’s education (and their tuition dollars) to the social-justice work of such a clinic. Put differently, these clinics by their nature attract the subset of law students least likely to be “disoriented” by the experiences they provide.

For those clinical students who belong to the nearly two-thirds of the law student population heading into for-profit practice,<sup>83</sup> the andragogical principle that “students must be able to relate what they are learning from the clinic experience to their own projected future careers,”<sup>84</sup> gives way to the laudable goal of inculcating a new, or newly-reinforced, commitment to the provision of pro bono legal representation.<sup>85</sup> However, such an approach may simply serve to suppress the sharing of experiences and views by students who disagree with some or all of the values sought to be transmitted.<sup>86</sup> In contrast, “[a]dult learning theory suggests that students benefit from involvement in case selection,” in part because “shouldering [this] responsibility adds to their conceptual understanding,” and so “[i]nvolving students enhances their ownership in clinic, and presents opportunities to learn in role.”<sup>87</sup>

In the end, “a good teacher does not so much change students as make them into better versions of what they already are.”<sup>88</sup> Seeking to “teach students to challenge their assumptions” is a “core pedagogical goal for many clinical teachers.”<sup>89</sup> But no clinical experience, however

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side’s flimsy attacks on our side” can be rebutted as compared to the difficulty in incorporating the weak-consonant positions) (emphasis in original).

<sup>81</sup> See Wizner (2002), *supra* note 11, at 1935 (describing one of the “pedagogical objectives” of clinical legal education as “to ‘challenge tendencies in the students toward opportunism and social irresponsibility.’”); and John O. Calmore, “*Chasing the Wind*”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167, 1177 (2004) (“Law students and advocates committed to social justice lawyering often need to question, if not challenge, the dominant understandings that drive their professional socialization, a process that begins immediately upon entering law school.”).

<sup>82</sup> Kennedy, *supra* note 40, at 596.

<sup>83</sup> See Leipold, *supra* note 60, at 28.

<sup>84</sup> Bloch, *supra* note 74, at 352.

<sup>85</sup> See generally Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6 (2004) (describing how the “[i]nstitutionalization” of pro bono work has resulted in “a system of values and practices that have become deeply ingrained as part of the culture of legal professionalism, defining how lawyers understand their role in making legal services available to poor and underrepresented groups.”) (footnotes omitted).

<sup>86</sup> See, e.g., Sunstein, *supra* note 15, at 28 (describing “the important finding that low-status members of groups become ever more reluctant, over the course of discussion, to repeat privately held information, that is, information that they hold but that others do not. Those in the group who are inexperienced, or are thought to be low on the hierarchy, are particularly loath to emphasize their privately held information as discussion proceeds.”).

<sup>87</sup> Lockie, *supra* note 33, at 360.

<sup>88</sup> Christopher L. Eisgruber, *Can Law Schools Teach Values?*, 36 U.S.F.L. REV. 603, 607 (2001).

<sup>89</sup> Lockie, *supra* note 33, at 374.

fulfilling, is likely to shake adult law students out of the core principles or beliefs around which they have structured their lives to date.<sup>90</sup> Instead of doing so,

[i]f teachers can strengthen students, by giving them skills, opportunities, and resolve needed to act on the values they already have, then teachers can improve the behavior of their students without changing their values.<sup>91</sup>

These are the sorts of lessons that law students, as adult learners donning nascent professional identities, are well-poised to learn.<sup>92</sup>

#### **IV. Existing Approaches Along the Continuum of Social Justice Education in Law School Clinics**

My advocacy for the “plus one” approach is in no way meant to be an indictment of deficiencies in the approaches that different clinicians have taken to teaching political values. Instead, this variety of approaches illustrates the qualitative differences between the goals that different teachers of the law bring to their respective endeavors.

Lucie White has postulated what she calls “three ideal images of change-oriented lawyering, each of them addressing a different mechanism of domination,” drawn from Steven Lukes’ “three mechanisms through which political power is exercised and maintained in society.”<sup>93</sup> The three law clinics below are examples, in my view, of the ways that clinicians have sought to address each of these three dimensions of power. The “plus one” approach for which I argue will similarly only address one of these three dimensions (the first), but with a distinct set of goals from each of the clinics described below.

##### **a. Apolitical Clinical Education: The First Image of Lawyering**

White’s “first image of lawyering corresponds to the first dimension of power,”<sup>94</sup> in which “power is exercised as groups contest their interests through established channels of political disputing,”<sup>95</sup> and this image is embodied by that iconic figure in American law practice, the public interest litigator. In this image,

[i]t is not the lawyer’s role to question the structure of the law itself, asking whether it sometimes prevents the lawyer from translating his clients’ grievances

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<sup>90</sup> See, e.g., Sandefur & Selbin, *supra* note 62, at 100-101 (finding “no relationship between clinical experiences and *pro bono* service by private practice attorneys and internal counsel,” and “no consistent relationship between clinical training experiences and new lawyers’ active participation in community, charitable, bar-related and political advocacy groups.”).

<sup>91</sup> Eisgruber, *supra* note 88, at 610.

<sup>92</sup> See Bloch, *supra* note 74, at 329 (“Adult developmental tasks are keyed primarily to the various social roles that adults must fulfill. Thus, as adults’ social roles change, their developmental tasks change, and their readiness to learn any particular subject matter or skill changes with each change in appropriate developmental tasks.”).

<sup>93</sup> Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 747 (1988).

<sup>94</sup> White, *supra* note 93, at 755.

<sup>95</sup> White, *supra* note 93, at 747-748.

into good legal claims. Nor is it his role to question the judicial system, asking whether it sometimes prevents him from securing remedies that really work.<sup>96</sup>

Instead, “in litigating these unconventional cases, first-dimensional lawyers play an essentially traditional professional role,” and “[b]ecause the lawyer relies on the *court*, finally, to effect change, he must, first and foremost, be a good litigator.”<sup>97</sup>

Adam Babich, the Director of the Tulane Environmental Law Clinic, exemplifies this approach, which he calls “apolitical.” As Babich sees it, “the Clinic’s job is to train lawyers, not activists,” and “[i]t is professionalism – not activism – that goes to the heart of what it means to be a lawyer.”<sup>98</sup> Accordingly, Babich’s clinical model is marked by its emphasis on “professionalism – rather than [ ] a political viewpoint – as the motivating force behind each student attorney’s activities.”<sup>99</sup>

In this context, the apolitical clinic offers the pedagogical advantage of stressing and reinforcing professional values in their purest form – neither adulterated nor reinforced by a substantive agenda...<sup>100</sup>

The additional advantage of focusing on “those shared principles fundamental to all lawyers’ professional training” is the enhancement of the clinic’s ability to appeal to a “diverse constituency” that includes, in addition to its clients, the law school, its current and former students, non-alumni donors, and the local bench and bar.<sup>101</sup>

This approach, however, expressly disclaims any goals that relate to the teaching of values other than those that can appropriately be considered to be universally aspired-to among lawyers, while at the same time pursuing change in environmental practices and regulation for the better. Many clinicians believe that this type of express stance underestimates the extent to which law students are taught, both implicitly and explicitly, to hold their professional values above their personal ones,<sup>102</sup> and how that ill-serves both sets of values.<sup>103</sup> A “plus one” clinic, in contrast to Babich’s apolitical model, has the potential to provide valuable social justice lessons to law students without bearing the high risk of alienating many (but not all) of the constituencies from which a more expressly political clinic would naturally provoke a negative reaction. This comparative advantage should not be overstated, though. Even Babich’s

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<sup>96</sup> White, *supra* note 93, at 755.

<sup>97</sup> White, *supra* note 93, at 756 (emphasis in original).

<sup>98</sup> Babich, *supra* note 57, at 451-452.

<sup>99</sup> Babich, *supra* note 57, at 450.

<sup>100</sup> Babich, *supra* note 57, at 454.

<sup>101</sup> Babich, *supra* note 57, at 460.

<sup>102</sup> See Wizner (2001), *supra* note 47, at 340 (“Legal education – and especially clinical legal education – properly understood, should have a political and moral purpose that informs its intellectual and skills-training functions. It should not be limited to the acquisition of legal knowledge and the development of professional skills, although both of those are essential.”).

<sup>103</sup> See, e.g., John M. Conley, *Can You Talk Like a Lawyer and Still Think Like a Human Being?*, 34 LAW & SOC. INQUIRY 983, 999 (2009) (book review) (“Lawyers come to ‘feel themselves able to master any material with which they are presented by running it through a legal reading’ ...because of the law’s closed linguistic system, it ‘does not have a mechanism by which its own basic orientations and structure of authority can be opened to question.’”).

apolitical approach has not prevented subsequent, albeit unsuccessful, attempts to shut down the Tulane clinic by Louisiana chemical industry supporters.<sup>104</sup>

### b. The Middle Ground: The Second Image of Lawyering

In Lukes’ second dimension of power, as White describes it, the focus is on the “barriers...that keep certain interests and issues out of the political sphere altogether,” such as the “formal exclusion of certain groups or issues,” the existence of “institutional structures and cultural patterns which make it hard for the state to implement measures that benefit certain interests,” and “prevailing norms [that] do not identify a particular experience as a legitimate legal or political claim.”<sup>105</sup>

In the second image of lawyering, the lawyer acknowledges that litigation can sometimes work directly to change the allocation of social power. However, she sees these effects as secondary to law’s deeper function in stimulating progressive change...Under the second-dimensional approach...the measure of the case’s success is not who wins. Rather, success is measured by such factors as whether the case widens the public imagination about right and wrong, mobilizes political action behind new social arrangements, or pressures those in power to make concessions.<sup>106</sup>

Juliet Brodie, the Director of the Stanford Community Law Clinic, echoes this view when she describes community lawyering clinics, such as her own, as being “characterized by a self-conscious responsiveness to changing community conditions and priorities, which demands nimbleness and a willingness to shift gears and tread on new ground,” and “may include tactics that stretch beyond conventional notions of lawyering.”<sup>107</sup> In her clinical design, Brodie “resurrect[s] the profile of the legal services-type clinical practice in a neighborhood-based context” as a potent educational vehicle, and further

argue[s] that, if undertaken in a consolidated and strategic way and in a community lawyering pedagogical context, they also can play an important role in struggles for social justice in the low-income communities that surround many of the nation’s institutions of higher learning, and in enhancing the social justice education of our clinic students.<sup>108</sup>

Brodie fully embraces the andragogical notion that “individual representation cases are selected because they provide a scale of representation over which law students can be given primary responsibility.”<sup>109</sup> However, in the interest of adequately meeting the legal needs of the community in which such a clinic would reside, “neighborhood clinics strike the balance in the favor of volume, choosing to do a higher number of interviews and interactions” than would

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<sup>104</sup> See Bill Barrow, *Senator, Louisiana Chemical Association get no support for bill to limit student law clinics*, THE TIMES-PICAYUNE, May 19, 2010.

<sup>105</sup> White, *supra* note 93, at 748-750.

<sup>106</sup> White, *supra* note 93, at 758-759.

<sup>107</sup> Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 345 (2009).

<sup>108</sup> Brodie, *supra* note 107, at 337.

<sup>109</sup> Brodie, *supra* note 107, at 357.

otherwise be permitted by traditional clinical education principles.<sup>110</sup> Brodie describes this as a middle ground between the pure impact litigation and legal services models, “delivered in a strategic way and in response to a particular community’s articulated priorities.”<sup>111</sup>

This middle ground offers a unique learning environment for any law student as she begins to internalize the profession’s values, and provides lessons of particular value to a social justice minded student who aspires to identify and occupy her own place on the spectrum of progressive lawyering.<sup>112</sup>

In this way, Brodie seeks to teach the same types of broad “professionalism” values as Babich, while also trying to reach a subset of politically-minded students to impart a broader set of lessons. As described in greater detail in Section V below, a “plus one” clinic would similarly not neglect these broader, professional lessons, but would also seek to teach expressly political lessons to *all* of its students, through their collective struggle with the political implications of certain of the clinic’s clients.<sup>113</sup>

### c. Collective Mobilization: Third-Dimensional Lawyering

White explains that Lukes’ “third dimension” of power “incorporates the insights of the first and second dimensions,” in that it examines “the subtle mechanisms of power that place individuals and communities in circumstances where they are constrained from clearly asserting their own interests.”<sup>114</sup> The “most basic” of these mechanisms is “the socialization of subordinated groups into the norms and practices of the dominant culture,” where “[t]hey are taught to perceive, remember, imagine the world as though things cannot – and should not – change.”<sup>115</sup>

Thus, third-dimensional lawyering involves helping a group learn how to interpret moments of domination as opportunities for resistance. The lawyer cannot simply dictate to the group what actions they must take...The role of the lawyer is to help the group learn a *method* of deliberation that will lead to effective and responsible strategic action.<sup>116</sup>

Sameer Ashar, the Director of the Immigrant and Refugee Rights Clinic at the CUNY School of Law, is arguably the most prominent example of a clinician embracing this third-dimensional approach. Ashar rejects the “predomin[ant] rhetoric of clinicians” that proclaims “skills transfer [as] the highest priority of clinical programs.”<sup>117</sup> Instead, he advocates for an “alternative model of clinical legal education animated by collective mobilization,” in which

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<sup>110</sup> Brodie, *supra* note 107, at 353.

<sup>111</sup> Brodie, *supra* note 107, at 378.

<sup>112</sup> Brodie, *supra* note 107, at 378.

<sup>113</sup> See Brodie, *supra* note 107, at 383 (“Representing one poor person gives a young lawyer a chance to test those stereotypes against the reality of his client’s life. However, when students are exposed to only one client, the risk is always present that they will conclude that their client’s story is unique. A clinical experience that involves a critical mass of low-income people provides a richer data set on which to draw.” (footnotes omitted)).

<sup>114</sup> White, *supra* note 93, at 751-752.

<sup>115</sup> White, *supra* note 93, at 751-752.

<sup>116</sup> White, *supra* note 93, at 763-764 (emphasis in original).

<sup>117</sup> Ashar, *supra* note 46, at 373.

“political and social vision shape intake and pedagogy, rather than be[ ] shaped by them.”<sup>118</sup> Central to this alternative model is the use of outcome-based criteria to determine whether the clinic will take on a particular client matter; specifically, whether or not the project would “support the mobilization efforts of groups working to change the social order.”<sup>119</sup>

Such a case-selection standard would seem to contravene the andragogical principle that cases be “selected for law students [to] maximize the educational value of their clinical experience.”<sup>120</sup> Ashar, however, disagrees that his alternative model requires “any sort of abandonment of pedagogy,” only that “it simply requires that clinics be taught differently than in the canonical models and that they cover a different set of topics.”<sup>121</sup> In this way, Ashar stakes out territory along what he describes as the continuum of “differing points of compromise between social justice commitments and pedagogical goals” that are reached by different clinicians.<sup>122</sup> The “plus one” clinic I argue for in this article presents an alternative vehicle by which those clinicians, whose teaching goals lean toward the types of political lessons that Ashar aspires to teach, may introduce what is an admittedly different range of values into their curriculum.<sup>123</sup>

As White herself admits, “[t]his third-dimensional image of lawyering may seem very remote from our conceptions of lawyering, even lawyering specifically directed toward social change.”<sup>124</sup> After all, “[i]t certainly can be done without an attorney’s license and, indeed, without any legal training at all.”<sup>125</sup> I would go farther, and submit that individuals seeking to engage in such laudable activities should, in almost every instance, quite rationally decline to leverage themselves for more than an eighth of a million dollars to receive a Juris Doctor. Teaching “rebellion” (as Kennedy described it)<sup>126</sup> has never been a particularly well-done function of professional education, and for good reason.<sup>127</sup> The “plus one” approach for which I argue only seeks to educate law students in the first-dimensional image of lawyering set out by Lucie White, because it is in this image of lawyering that the vast majority of clinical students will find their careers cast. I accordingly feel it incumbent upon me to direct my political value lessons towards the topics from which I believe my students will potentially draw the maximum amount of utility in the years after they leave my clinic.

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<sup>118</sup> Ashar, *supra* note 46, at 389.

<sup>119</sup> Ashar, *supra* note 46, at 390 (“clinics should ask three questions of any proposed case or project: (1) whether it fits into a broader campaign for reform with other similarly situated clients; (2) whether the representation will help create or sustain some form of collective resistance; and (3) who will stand for (or work with) the population and its cause when students graduate and clinics move on to new cases and causes.”).

<sup>120</sup> Bloch, *supra* note 74, at 350.

<sup>121</sup> Ashar, *supra* note 46, at 410.

<sup>122</sup> Ashar, *supra* note 46, at 410.

<sup>123</sup> See Ashar, *supra* note 46, at 357 (“Lawyers would graduate from this clinic with a set of beliefs about and experiences with the relationship between law, politics, and justice.”).

<sup>124</sup> White, *supra* note 93, at 765.

<sup>125</sup> White, *supra* note 93, at 765.

<sup>126</sup> Kennedy, *supra* note 40, at 611.

<sup>127</sup> See, e.g., Dewey, *supra* note 27, at 115 (arguing that a genuinely democratic “society must have a type of education which gives individuals a personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder.”).

#### d. A First-Dimensional Approach with a Different Set of Predominant Goals

It is not my position that any of the above three clinicians deliberately or inadvertently neglect their teaching of the technical abilities and skills that their students will require for the practice of law after graduation. I do not doubt that each of these clinical directors consistently produces a class of highly-trained lawyers year after year. Brodie, for example, notes that her clinical model “challenges...certain clinical pedagogical orthodoxies,” but argues that “any compromise of these orthodoxies is matched by other teaching value,” including “expos[ing] students to fundamental and fungible lawyering skills, but within the frame of participating in local community justice struggles.”<sup>128</sup> I understand this to mean that, in striking the balance that *all* clinicians must strike – between the two goals of maximizing their students’ educational experience and the positive effects their students’ representation can have for their clients (and the broader community)<sup>129</sup> – each of these individuals has staked out a distinctive corner of the space within which all in-house, live-client clinics dwell.

In Figure 1 below, I have divided this space into four quadrants, separated by two axes representing two qualitatively different sets of clinical teaching goals.<sup>130</sup> The vertical axis runs from where “educational impact goals predominate” the teaching goals of the clinic, to where “social justice impact goals predominate.” The horizontal axis extends from where “political value-lesson goals predominate” the teaching goals, to where “professionalism value-lesson goals predominate.”

The three different sets of goals expressed by Adam Babich, Juliet Brodie, and Sameer Ashar occupy respective areas within three of these quadrants. Babich’s “apolitical” clinic lies in the quadrant where “professionalism value lessons” and “educational impact” are his predominant teaching goals. Brodie’s “little cases on the middle ground” model, in contrast, sits where “professionalism value lessons” and “social justice impact” are the predominant teaching goals. Finally, Ashar’s “collective mobilization” clinical model lies in the quadrant where “political value lessons” and “social justice impact” are the predominant goals of his teaching. The “plus one” clinic proposed in this article would take up residence in the fourth (and, I would submit, mostly-unoccupied) quadrant, where “political value lessons” and “educational impact” are the predominant goals, as well as the values by which case-selection decisions are made.

By “predominant,” I emphatically do not mean that such goals control *to the exclusion of* the goals placed in opposition to them; only that they affect particular decisions that have to be made in different ways. This can be illustrated by the following example: The existence of at least one “plus one” case on a clinical docket that is otherwise devoted to Section 8 housing eviction defense ordinarily would mean that one or more tenants facing eviction, whom the clinic would otherwise represent during that time period, will go without those services. Clinicians whose teaching goals predominantly fall in the bottom half of Figure 1, as I would argue Ashar

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<sup>128</sup> Ashar, *supra* note 46, at 338-339.

<sup>129</sup> *But see* Duquette, *supra* note 9, at 9 (“While clinics can often serve both interests of education and public service, educational goals must prevail if the two are not in harmony.”).

<sup>130</sup> Admittedly, these different goals do not exist in a zero-sum relationship with each other, and are only differences of kind. At least one of the individuals referred to in Figure 1 has expressed concerns about the accuracy of the characterizations that I make with this graphical layout. There are likely better models for describing the ways in which these different goals interact. However, the two-dimensional Figure 1 offered in this article represents the limits of my mathematical abilities in this respect.

and Brodie do, might choose to take those additional eviction defense matters instead of a “plus one” landlord case.

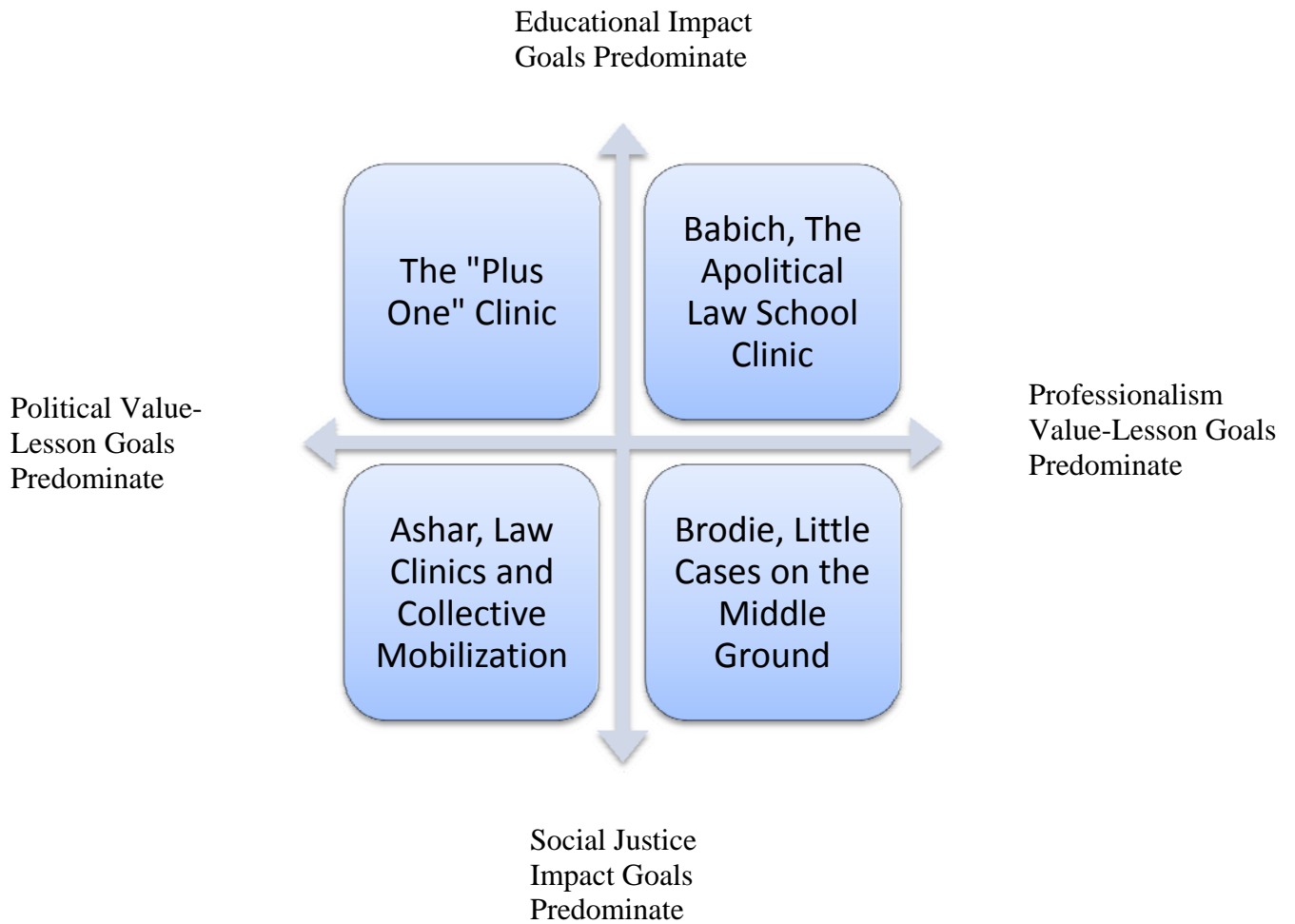
Clinicians in the upper right quadrant, where I argue Babich falls, would only take such a “plus one” landlord case to the extent that it did not conflict with those predominant educational and professionalism goals.<sup>131</sup> One of the central goals of the “plus one” approach for which I argue would be to seek out those cases, for the potential *political* value lessons they might provide, even if they otherwise present the same types of skills training opportunities as a case brought against such parties.<sup>132</sup> In light of these different goals of my proposed approach, a different set of teaching methodologies is called for, as described in detail in the next section.

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<sup>131</sup> See Babich, *supra* note 57, at 470 (“...in the past five years, the Clinic has accepted only one defense case, and that involved individuals, not an industrial polluter. But most members of the regulated community can afford representation by members of the private bar...these potential clients rarely approach the Clinic for help. If they did, many would probably be precluded by the Clinic’s case selection criteria, which emphasize the Clinic’s role as a law firm of last resort.”).

<sup>132</sup> But not if they present noticeably *lesser* educational potential than other cases that could be taken on. I would submit that this is a baseline to which the three clinicians discussed above, as well as *all* clinicians, subscribe.

Figure 1



## V. The Implementation of the “Plus One” Clinic

A “plus one” clinic would employ the full persuasive force of the clinical learning experience<sup>133</sup> to draw out the lessons to be learned by representing more than the usual set of participants in the courts that comprise that clinic’s practice area. For example, the presence of a “plus one” case of a landlord seeking to evict a tenant, among a number of eviction defense matters in a case rounds discussion, would allow all of the students participating in that rounds to grapple with complex issues tied to a real client and case. This is critical to their learning because

any single clinical student’s personal exposure to justice issues – though often powerful – is necessarily limited in scope to the observation of a handful of situations. The addition of other students’ experiences to the student’s knowledge is an important part of adding context to the student’s experience and allows for some consideration of the universal applicability of the knowledge gained.<sup>134</sup>

The recursive, contextualizing process described above would be enhanced by the presence of a landlord’s eviction case in a case rounds that might otherwise only consider landlords individually as opposing parties with whom to negotiate or do battle, and collectively as the class of individuals seeking to displace the students’ clients from their homes.<sup>135</sup> Such a discussion would have great transformative potential for a group of adult learners experiencing the practice of law for the first time, carrying with them a variety of beliefs and, potentially, factual misconceptions, about the world at large that pre-existed their identities as law students.<sup>136</sup>

The choice between “andragogy” and pedagogy is not a categorical imperative, but rather a methodological preference that shifts to suit different educational demands. As Malcolm Knowles, one of the pioneers of modern adult education, describes it,

andragogy is simply another model of assumptions about learners to be used alongside the pedagogical model of assumptions, thereby providing two alternative models for testing out the assumptions as to their “fit” with particular situations. Furthermore, the models are probably most useful when seen not as dichotomous but rather as two ends of a spectrum, with a realistic assumption in a given situation falling in between the two ends.<sup>137</sup>

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<sup>133</sup> See, e.g., Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 693 (2004) (“If we want students to consider with open minds the positive weight of the moral values of others that differ from their own, and to appreciate the implications to others, as well as the effectiveness for their clients, of various behaviors, only feedback, discussion, reflection, and follow-up, led by someone skilled at evaluating their work, and communicating about it with them non-judgmentally, are likely to produce that result.”).

<sup>134</sup> Fran Quigley, *supra* note 10, at 58.

<sup>135</sup> See, e.g., Duquette, *supra* note 9, at 16 (“In our experience, student attorneys become more skeptical of the clumsiness of the social services bureaucracies and less tolerant of the self-righteousness of the child’s advocates.”).

<sup>136</sup> See Fran Quigley, *supra* note 10, at 51 (“Psychologists and educators thus have some understanding about how adults learn from life experience. If an experience is unsettling or puzzling or somewhat incongruous with our present meaning structure, it captures our attention. If the gap is too great between how we understand the world and ourselves in it and the experience, we may choose to ignore it or reject it. If however we choose to grapple with it, learning results.”).

<sup>137</sup> MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION* 43 (Follett Publishing 1980).

That is, whether a teaching tool should properly rely more on andragogical or pedagogical assumptions will depend on the particular set of students being taught, and the substance of the lessons being transmitted. In the teaching of doctrinal law, the relatively blank slate presented by a first-year law student might rightfully justify the more pedagogical approaches of the core-curriculum classrooms. However, for the teaching of political values, the predicate facts about which even the youngest law students often have already acquired a great deal of information (erroneous or otherwise), if not strong opinions, a more andragogically-sound approach is called for.<sup>138</sup>

This is not to say that the “plus one” approach argued for in this article would have uniform effect, whatever the nature of the clinical program in which it was adopted. Clinicians should rightfully be skeptical of any proposal that claims to perform the same great way in all settings.<sup>139</sup> Instead, a clinician wishing to implement a “plus one” model would need to examine the following elements of the approach in light of his own particular client base, relevant constituencies, and his clinical students’ ideological diversity, all of which may change significantly year-to-year, or semester-to-semester. The proposed role of students in the “plus one” approach would aid in this ongoing evaluative process.<sup>140</sup> The process of ongoing evaluation would also present the clinician with the opportunity to model for students his own approach to learning within the “four-stage cycle” of experiential education, which moves from immediate experience to reflection, and then to the formulation and application of general principles and abstract concepts.<sup>141</sup>

#### **a. Extrapolating from Existing Models**

##### **i. Combined Prosecution and Criminal Defense Clinics**

One area in which clinicians have already broken this ground is in criminal law, through the integration of prosecution clinics – which “do not directly fit” the historical template of clinical legal education as “providing needed legal services to the poor”<sup>142</sup> – and traditional in-house criminal defense clinics. Due to the state’s monopoly on criminal prosecution,<sup>143</sup> these integrated clinics are oftentimes combinations of prosecutorial and criminal defense externship

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<sup>138</sup> See Sunstein, *supra* note 15, at 110 (“In short, people are motivated to accept accounts that fit with their preexisting convictions; acceptance of those accounts makes them feel better, and acceptance of competing accounts makes them feel worse.”).

<sup>139</sup> See, e.g., Fran Quigley, *supra* note 10, at 71 (“Indeed, facilitators who are critically alert and sensitive to altered contexts will be immediately skeptical of standardized concepts or models that purport to be replicable in all possible situations.”).

<sup>140</sup> See Lockie, *supra* note 33, at 371 (“Regularly involving students provides an ideal impetus to re-evaluate client selection and clinic design and presents opportunities for enhanced collaboration with students.”).

<sup>141</sup> See Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N. M. L. REV. 185, 194-195 (1989) (“The learner must first immerse herself in immediate, concrete experience. The experience then forms a basis for the learner’s reflection and self-observation. From this process emerges the formulation of abstract concepts, hypotheses, and generalizations. Finally, the learner tests the implications of the deduced theories in new experiential situations.”).

<sup>142</sup> Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955, 960 (2005).

<sup>143</sup> See Lynch, *supra* note 69, at 1204 (“Unlike other in-house projects, a prosecution project cannot simply announce itself open for business but must work with a local prosecutor and/or a district attorney’s office.”).

placements within one curricular setting.<sup>144</sup> A clinician does not have the same degree of interaction and supervision over students in an externship setting as he does in a live-client, in-house clinic.<sup>145</sup> Nevertheless, integrating these experiences into one course opens up students to a new range of “disorienting” teaching moments, such as when simulation exercises “require students who are externing with a prosecution agency to play the role of defense counsel...and vice versa.”<sup>146</sup>

There are examples of clinicians who have successfully combined an in-house prosecutorial and criminal defense practice into a single clinical program,<sup>147</sup> allowing them to utilize the “fertile ground” that in-house settings “provide...for integrating theory, law, reality, practice and disorienting moments.”<sup>148</sup> However, important differences between civil and criminal practice limit the value of comparisons between these existing integrated criminal clinics and a potential “plus one” civil clinic. The most salient of these differences is that both sides of the criminal representation bar are substantially made up of public employees.<sup>149</sup> Law students preparing for a career in criminal practice accordingly approach their clinical experiences with a different set of expectations than their larger civil-practice cohort. Stated differently, there is no shortage of avowed future prosecutors enrolled in criminal defense clinics.<sup>150</sup>

## ii. The University of Michigan’s Child Advocacy Law Clinic

A non-criminal law example of a “plus one” type of approach is the clinic in which I enrolled as a third-year law student, the Child Advocacy Law Clinic (CALC) at the University of Michigan Law School.<sup>151</sup> Students enrolled in the CALC “handle cases in three distinct legal roles – attorney for the child, for the parents, and for the agency.”<sup>152</sup> The express purpose behind giving students “a mix of child welfare cases representing each of the three major roles” is “so they get to see and understand the lawyer role from different vantage points and with different

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<sup>144</sup> See Jean Montoya, *The University of San Diego Criminal Clinic: It’s All in the Mix*, 74 MISS. L.J. 1021, 1024 (2005) (“In the externship component of the course, students engage in legal work at the local office of a criminal defense or prosecution agency.”).

<sup>145</sup> See Hans P. Sinha, *Prosecutorial Externship Programs: Past, Present and Future*, 74 MISS. L.J. 1297, 1311 (2005) (“In-house clinics can be distinguished from field placement programs by the virtue of law school faculty providing the supervision of the students and the cases, as opposed to field placement programs where attorneys outside of the law school provide this supervision.”).

<sup>146</sup> Montoya, *supra* note 144, at 1037.

<sup>147</sup> See generally Lynch, *supra* note 69.

<sup>148</sup> See Lynch, *supra* note 69, at 1182.

<sup>149</sup> For example, the National Association for Law Placement, which conducts an annual survey of law graduate employment, defines “public-service employment” to include “government jobs (including those in the military).” Leipold, *supra* note 60, at 29.

<sup>150</sup> See, e.g., Smith, *supra* note 12, at 1255-1256 (“Most of our third-year Criminal Clinic students are seeking or considering a career practicing criminal law...Perhaps because of this career orientation, most of our students arrive at the clinic with a definite and strong preference regarding which ‘side’ of the case they want to handle – most students prefer to serve as prosecutors. Because placements are limited, students are asked if they are willing to participate on either side, and most students are indeed willing to switch sides if they have no direct conflict of interest due to clerkship work.”).

<sup>151</sup> See Michigan Law, Child Advocacy Law Clinic (hereinafter, the “CALC website”), <http://www.law.umich.edu/centersandprograms/ccl/calc/Pages/default.aspx> (last visited March 3, 2010).

<sup>152</sup> Duquette, *supra* note 9, at 7. See generally *id.* at 10-16 (describing three types of cases assigned to students each semester).

concerns and interests.”<sup>153</sup> In particular, the benefit of having the students in the CALC defend “parents accused of child abuse or neglect” is that it “provides an essential perspective on the child welfare system.”<sup>154</sup> As the Director of the CALC, Don Duquette, explains,

It is easy to demonize a person accused of child abuse and neglect. This up-close and personal look makes students recognize the common humanity they share with these clients, who are most often the poor, powerless, and invisible in our society.<sup>155</sup>

I still remember the child for whom my clinic partner and I were *guardians ad litem*, the mother we defended against abuse and neglect charges, and the mother whose parental rights we successfully terminated. My concurrent representation of each informed my impressions of the other parties in my cases, and prevented me from drawing any easy conclusions from that clinical experience. I could not approach my termination of a mother’s parental rights without reflecting upon the stark divide between the devastated Flint neighborhood where she lived and the suburban cul-de-sac in which her child had been placed, or my own simultaneous efforts to keep the children of another client, in another county, from being taken from her in like fashion. Neither could I ignore the merits of the decision to terminate when, as a *guardian ad litem*, I had previously sought to remove my minor clients from similarly deprived circumstances in another city. However, normal confidentiality obligations<sup>156</sup> prevent me from describing these experiences here in sufficient detail to discuss any further the specific lessons that I learned. This illustrates the centrality of extensive case rounds discussions, in which students would be free to discuss their case matters within the confidentiality “bubble” of their clinical colleagues and supervisors, to any “plus one” approach.

### **iii. Practice Areas Potentially Well-Suited to the “Plus One” Approach, and Those That Are Not**

Many traditional clinical programs operate in at least one of the following three areas: housing eviction defense, with a focus on recipients of public housing benefits; misdemeanor criminal defense; and employment litigation on behalf of workers, such as wage and hour or workers’ compensation claims. Other common areas of practice include civil protection orders for domestic violence victims, juvenile justice, and child abuse and neglect proceedings. In these practice areas, a “plus one” clinical model would not precisely track the integrated criminal law models already in place in schools across the country, for a variety of reasons. However, they are each in their own way amenable to the inclusion of a “plus one” case structure, as the CALC has successfully demonstrated since 1976.<sup>157</sup> This may be because the two (or more) “sides” of these cases do not represent stark ideological divides, so much as they represent what Paul Tremblay has called a “disagreement as stemming from differences in predictions about future harm,” rather than “a difference in values.”<sup>158</sup>

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<sup>153</sup> CALC website, *supra* note 126.

<sup>154</sup> Duquette, *supra* note 9, at 15.

<sup>155</sup> Duquette, *supra* note 9, at 15.

<sup>156</sup> See MODEL RULES OF PROF’L CONDUCT 1.6 (2007) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...”).

<sup>157</sup> Duquette, *supra* note 9, at 7.

<sup>158</sup> Paul R. Tremblay, *Coherence and Incoherence in Values-Talk*, 5 CLINICAL L. REV. 325, 331 (1998).

Sunstein describes this distinction as one of degree rather than kind. In his view, “[d]ifferent people have different ‘thresholds’ for moving as a result of new information or social pressure,” such that “some people will readily shift their views on hearing a different position, whereas others will shift with more difficulty, and still others will shift only when presented with truly overwhelming reasons to do so.”<sup>159</sup> These individual thresholds are, in his view, one of two sets of factors that will predict whether group deliberation will result in a more extreme decision than what would be reached by any of the individuals in that group.

Two things matter: the direction of people’s original convictions and their thresholds for changing them. Recall that among federal judges, there is no polarization on the issues of abortion, national security, and capital punishment, apparently because the threshold for changing views is exceedingly high. When group members begin with firm convictions, they require a great deal of information or social pressure (or both) to change their views. If social influences are strong enough, such people will likely move, but the extent of their movement is limited because of relatively high thresholds for accepting certain beliefs or engaging in certain behavior.<sup>160</sup>

Two examples of areas where such a vast difference in values might be more likely to result in the “plus one” approach falling flat are also areas of practice not commonly found in clinical legal education, specifically labor law and reproductive rights. Individuals seeking to challenge unionization drives, allege a breach of their union’s duty of fair representation, or restrict the operations of a Planned Parenthood facility, would oftentimes easily meet the baseline requirement that the clinic only represent individuals who could not otherwise afford representation,<sup>161</sup> although that requirement would likely bar the representation of management in almost every instance. In labor law, individual-employee claims usually have very little monetary value and are most rigorously pursued today by ideologically-driven nonprofits such as the National Right to Work Legal Defense Foundation, which was established in 1968 “to handle legal work tied to [ ] opposition to compulsory unionism.”<sup>162</sup>

From the beginning, clinical programs have strenuously avoided competition for clients with the private bar, so as to ensure their continued existence.<sup>163</sup> This is a consideration that *any* “plus one” approach should address as a threshold question. The primary reason why a “plus one” clinic would not work in either labor law or reproductive rights is that, even where such a clinic is not in economic competition with the private bar, it will still generate opposition by

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<sup>159</sup> Sunstein, *supra* note 15, at 58-59.

<sup>160</sup> Sunstein, *supra* note 15, at 59.

<sup>161</sup> See Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 259, 260 (2004) [Hereinafter Wizner (2004)] (“Many of the lawyers who started building and teaching in clinics were lawyers who had worked in legal aid and public defender offices, and for civil rights and other public interest organizations. It is not surprising, therefore, that clinics began at many law schools primarily as programs to enable law students to provide free legal services to the poor.”); and Blaze, *supra* note 11, at 951 (“It is also important to recognize that an altruistic desire to provide legal services to the poor was not the only reason that the early clinics served exclusively indigent clients.”).

<sup>162</sup> Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1241 (2005).

<sup>163</sup> See Blaze, *supra* note 11, at 951 (“avoiding competition with the bar was the most important external limitation on the client base of early clinical programs. Both the Duke and Tennessee programs experienced stiff resistance from the bar until the issue of potential financial cooperation was resolved.”).

nature of the deep institutional and ideological loyalties on either side of these practice areas, and the relatively small sizes of the bar for each. Plainly stated, each set of clients would hold the other against it, and no one would be able to stay out of anyone else’s way.

Both practice areas embody what Tremblay might admit is not a difference “in our understanding of facts,”<sup>164</sup> but rather a disagreement about what are properly considered the material facts of the situations in question. Partisans on one side of each debate hotly contest the validity of even asking when the soul attaches, or whether unionization helps or harms our macroeconomic well-being, and do not for the most part engage in dialogue aimed at finding a satisfactory answer to those questions. The andragogical effectiveness of a “plus one” clinic in such circumstances would likely be limited and would in any event have to be carefully managed by the clinical legal educator.<sup>165</sup>

### **b. The Importance of Student Choice in Case Selection and Intake**

Knowles argues that a “basic element in the technology of andragogy is the involvement of the learners in the process of planning their own learning[.]”<sup>166</sup> The notion of involving students in client or case selection is admittedly a “quite scary” one for many clinicians,<sup>167</sup> and brings with it a number of logistical hurdles.<sup>168</sup> Fran Quigley suggests a few different ways to deal with these hurdles, including asking prospective students to “indicate prior to the start of the semester the types of experiences they desire,” so that clinicians may plan accordingly.<sup>169</sup> Quigley nevertheless believes that such student involvement is crucial, as it can “lead to better understanding of the concepts presented by these experiences.”<sup>170</sup> This is consistent with the broader andragogical mission of professional education, which is to produce individuals who are able to continue learning the relevant competencies in their field for the duration of their careers.<sup>171</sup>

Student involvement in a “plus one” approach would ideally begin with the decision at the outset whether to even take on a “plus one” case during the semester or year in which they are enrolled in the clinic, as well as in choosing the particular case or cases to take in this category.<sup>172</sup> The students will likely not feel prepared to make such a collective decision at the beginning of the semester, and for that reason, a “plus one” clinical curriculum should begin with

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<sup>164</sup> Tremblay, *supra* note 158, at 330.

<sup>165</sup> See Tremblay, *supra* note 158, at 329 (“Only if we can find some manner by which to discuss good and bad with a shared evaluative language can values-talk make sense.”).

<sup>166</sup> Knowles, *supra* note 137, at 48.

<sup>167</sup> Fran Quigley, *supra* note 10, at 66.

<sup>168</sup> See Lockie, *supra* note 33, at 371 (“Most notably, some students (1) place undue emphasis on their own needs, (2) have too much faith in the ability of the legal system to solve problems, (3) jump to conclusions about their prospective client’s legal problem, and (4) rely on biases or stereotypes in their decision-making.”).

<sup>169</sup> Fran Quigley, *supra* note 10, at 66.

<sup>170</sup> Fran Quigley, *supra* note 10, at 66.

<sup>171</sup> See Knowles, *supra* note 137, at 28 (“one of the tests of everything the adult educator does...is the extent to which the participants leave a given experience with heightened curiosity and with increased ability to carry on their own learning.”).

<sup>172</sup> This does not mean there will be no input from the clinician in this decision. See Lockie, *supra* note 33, at 372 (“...because many issues take longer than one semester to resolve, the students responsible for selecting the client are unlikely to see the long-term consequences of the client’s engagement with the legal system.”).

an explicit discussion of the approach and the goals of the clinician in utilizing it.<sup>173</sup> After a short span of time, during which additional clinic-wide and small-group discussions may be conducted on particular aspects of how the “plus one” case or cases would be integrated into the existing docket, the students would be directed to reach by consensus a decision as to whether to take on such a case or cases.<sup>174</sup>

For such a program structure to function without potential negative implications for the “plus one” clients (prospective or current), the clinician must commit to seeking out such clients in advance of the students’ enrollment, performing intake interviews, and maintaining their case matters during the pendency of the students’ decision-making process, all of which would comprise a not-insignificant increase in the clinician’s duties.<sup>175</sup> Additionally, to minimize any appearance of impropriety, and to maximize the educational potential of such cases,<sup>176</sup> the clinician will have to carefully consider factors in addition to the merits of the prospective clients’ positions, such as their socioeconomic background, and whether they would accrue collateral benefits, such as effectively barring all of their tenants (in the case of landlords) from future pro bono representation by the clinic, by virtue of simply being a prospective “plus one” client.<sup>177</sup> In the event the student consensus is that none of the “plus one” case choices presented to them should be taken on, the clinician will then be obligated to either continue representation himself, or have an adequate means of prompt referral of the matter to outside counsel that does not materially prejudice the client.<sup>178</sup>

### c. Rounds, Rounds, and More Rounds

Fran Quigley warns that the “significance of the disorienting experience itself can be lost if the clinical courses do not also provide opportunities for reflection, the second stage of learning from such experiences.”<sup>179</sup> This is one of the reasons why well-structured case rounds

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<sup>173</sup> See also Lockie, *supra* note 33, at 360 (“...because practicing lawyers and clinic supervisors often use unspoken selection criteria, another pedagogical goal is to teach students to unmask and evaluate the implicit criteria in client selection.”).

<sup>174</sup> It would be up to the clinician whether to be bound by this decision, although the circumstances under which he would *not* be should be adequately defined, and explained to the students well in advance of their reaching a decision. See Lockie, *supra* note 33, at 376 (“Supervisors must have principled reasons for exercising their veto power that are consistent with their pedagogical goals.”).

<sup>175</sup> See Kotkin, *supra* note 141, at 201 (“A potential disadvantage of both the shifting role and the co-counsel concepts is the time investment that they require on the part of the supervisor. Clinicians are already consumed with the everyday demands of individual supervision, and now increasingly add to their commitments classroom teaching and scholarship. An expectation of practice in addition would be viewed by many as simply too much.”).

<sup>176</sup> See, e.g., Duquette, *supra* note 9, at 10 (“By associating with a group like a prosecutor’s office, child advocacy group, or a public defender’s office, a clinic can select the most interesting cases at their educationally most valuable stage and then return them to the office when they no longer suit educational purposes.”).

<sup>177</sup> See MODEL RULES OF PROF’L CONDUCT 1.18 (2007) (“a lawyer who has had discussions with a prospective client” shall not thereafter “represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter,” except under certain conditions). See also Lockie, *supra* note 33, at 417 (“Because of the conflict-of-interest rules, the decision to take on a new client limits the lawyer’s subsequent choices about which clients to accept, which can in turn affect the future work of the clinic.”).

<sup>178</sup> See, e.g., Duquette, *supra* note 9, at 10 (“...a clinic should never transfer a case to another lawyer or office if the transfer and lack of continuity will adversely affect the client. For such reasons, many clinical teachers stay with cases for years with or without student assistance, well after the educational value of a case has become minimal.”).

<sup>179</sup> Fran Quigley, *supra* note 10, at 54.

are crucially important to the educational goals of a “plus one” approach.<sup>180</sup> Born out of the ways in which lawyers and doctors share case information with their colleagues and elicit advice and feedback on those cases, rounds in clinic are “facilitated classroom conversations in which [students] discuss with each other their cases or projects,”<sup>181</sup> and they normally occur on a periodic basis throughout the clinical semester or year.

Sue Bryant and Elliott Milstein memorably labeled rounds the “signature pedagogy” of clinical legal education.<sup>182</sup> In their view, clinicians “typically engage in three pedagogies: supervision, seminar, and rounds.”<sup>183</sup> The unique properties of rounds, as compared to these other two teaching methods, are “distinctive” to clinical legal education, and they serve as a “‘window’ into ‘what counts most significantly as the essence’” of what clinicians do.<sup>184</sup> The benefits of rounds as a teaching method also dovetail well with the potential added value of a “plus one” approach.

Rounds conversations build upon learning that occurs in clinical seminars and the rest of law school...Students’ experiences as lawyers also create rounds conversations that explore the norms of the profession and both the fit and the tension between the student and the norms. Finally, and importantly, rounds can be used to explore broader social justice issues that arise in the cases.<sup>185</sup>

This is because a well-managed rounds discussion can provide a safe environment for the airing of individual viewpoints in the context of the cases being discussed.

When students tell their case stories, they explain themselves to their colleagues, and also to themselves...As they justify their beliefs and test them against those of others, students who are engaged in a supportive and challenging collaborative environment can learn how their perspectives shape their judgments.<sup>186</sup>

Once these perspectives are identified, students can be invited to engage in “Parallel Universe” thinking, in which they envision “alternative explanations for behavior, especially when they feel judgmental or negative about client behavior[.]”<sup>187</sup>

Although rounds discussions are student-driven, they do not naturally result in the production of such insights without facilitation. “Teachers help the students see connections that might not otherwise be apparent between their experiences and those of others, often including those of the teacher.”<sup>188</sup> This requires the clinician to take on different roles at different points in the rounds discussion, with the choices as to what role to play being “shaped by essential goals

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<sup>180</sup> See also Sunstein, *supra* note 15, at 142 (“...we need to specify the idea of deliberation, rather than to celebrate it as such.”).

<sup>181</sup> Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLINICAL L. REV. 195, 196 (2007).

<sup>182</sup> See generally Bryant & Milstein, *supra* note 181.

<sup>183</sup> Bryant & Milstein, *supra* note 181, at 197.

<sup>184</sup> Bryant & Milstein, *supra* note 181, at 250.

<sup>185</sup> Bryant & Milstein, *supra* note 181, at 202.

<sup>186</sup> Bryant & Milstein, *supra* note 181, at 210.

<sup>187</sup> Bryant & Milstein, *supra* note 181, at 223-224.

<sup>188</sup> Bryant & Milstein, *supra* note 181, at 216.

of students seeing both that they can learn from and teach each other, and that attention to the process of doing that enriches their understanding of professional practice.”<sup>189</sup>

In my view, the effective deployment of a “plus one” approach would require an initial decision-making set of rounds, perhaps two to three sessions over the first two weeks of the semester, or longer for a year-long clinic. During the first rounds discussion, *all* of the current or prospective cases on the clinic docket (or representative examples of recent past cases) would be discussed, with particular focus on the skills and professionalism value lessons potentially available in each.

After this, either in the same rounds or a second session, the clinician would present the philosophy behind a “plus one” approach, the learning goals specific to the clinic’s practice area that are sought for the students, and the specific “plus one” case or cases to be added to the docket. The clinician would emphasize not only the skills and professionalism value lessons, but also the *political* value lessons potentially available from taking on such a case or cases. There should then be a second (or third) rounds at a later date, with the students assigned during the intervening period of time to reflect on the prior rounds session(s), meet in small groups, and brainstorm the costs and benefits of taking on a “plus one” case or cases. At this final rounds session, the students would be directed to decide by consensus whether or not to take on these cases. During this initial decision-making period, the clinician would act in the capacities that Bryant and Milstein define as “expert” and “co-participant/collaborator,” providing, for example, “the missing bit of knowledge,” “connect[ing] a particular event or insight of a student to larger recurring themes,” and “reveal[ing] his or her own doubts.”<sup>190</sup>

After the student decision has been made, “special-topic” rounds should be scheduled to occur on a regular basis after that, with planned discussions and designated student facilitators on substantive topics, such as the broader historical, political or policy implications of the law in the clinic’s practice area, and thematic topics, such as assigning each team to argue their opposing side’s best case. The clinician in these special rounds discussions would again act as an expert on the substantive and procedural issues, but also as a “coach,” helping “identify choices and encourag[ing] students to select from them” or “show[ing] a student how to do something and then step[ping] aside.”<sup>191</sup> In this way, the clinician can “build motivation for participation.”<sup>192</sup>

Finally, regular case rounds should commence immediately upon the assignment of case matters to student teams, and they should run concurrently to the other two rounds types on at least a weekly basis. During these more free-form rounds discussions, the clinician would limit himself to a “facilitator,” what Bryant and Milstein call the “most basic job of the rounds teacher...keeping student participation balanced, ensuring that multiple voices are heard and intervening lightly to help the group.”<sup>193</sup>

There is reason for concern that the political value lessons that stand to be taught by a “plus one” approach would reinforce some of the negative traits of mind that are taught to students by the rest of their law school experience. In her superb book *The Language of Law*

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<sup>189</sup> Bryant & Milstein, *supra* note 181, at 239.

<sup>190</sup> Bryant & Milstein, *supra* note 181, at 241-242.

<sup>191</sup> Bryant & Milstein, *supra* note 181, at 240.

<sup>192</sup> Bryant & Milstein, *supra* note 181,

<sup>193</sup> Bryant & Milstein, *supra* note 181, at 239.

*School*, Elizabeth Mertz describes, through an extensive linguistic analysis of the Socratic back-and-forth in eight first-year contracts classes, how “legal training demands a bracketing of emotion and morality (as it is commonly understood) in dealing with human conflict and the people who appear in legal conflict stories.”<sup>194</sup> Mertz notes that the “formative discourse in law school classrooms” favors those who are able to “learn to take a somewhat agnostic position concerning matters about which many people in society care passionately,” and warns that it “might well differentially disadvantage students who have difficulty doing so.”<sup>195</sup> She further argues that

this step out of social context and emotion provides the law with a cloak of apparent neutrality, which can conceal the ways that law participates in and supports unjust aspects of capitalist societies. This approach also gives the appearance of dealing with concrete and specific aspects of each conflict, thereby hiding the ways that legal approaches exclude from systematic consideration the very details and contexts that many would deem important for making just moral assessments.<sup>196</sup>

A clinician implementing a “plus one” approach would need to structure the order of the “special-topic” rounds to provide sufficient context for the larger issues he seeks to bring out over the course of the semester or year, and be mindful in *all* case rounds discussions of the tendencies that Mertz has isolated, so that he may intervene (or not intervene in a particular manner) where appropriate. The fact that the individuals being discussed would be real-life clients would go a great distance towards humanizing their roles in the cases at hand. In addition, the explicit purpose of the “special-topic” rounds would be to contextualize these individuals, rather than just discuss the substantive aspects of their legal claims. That latter type of discussion would also occur, but in a different set of rounds sessions on a parallel schedule.

### VI. Conclusion: To Be Continued

In formulating the ideas set forth in this article, it did not escape my attention that the three clinical directors whose disparate approaches I discuss, as well as the rest of the clinicians whose work is cited herein, made their contributions to the scholarship of clinical pedagogy from the perspective of having first attempted the approaches they describe. Indeed, it is very much the norm for clinicians to relate what they *have* done, rather than what they *propose* to do.<sup>197</sup> My hesitation to appear presumptuous is outweighed by my interest in the potential contained in the “plus one” approach for which I advocate. It would admittedly require a great deal of preparation and ongoing effort on the part of the clinician, and I look forward to reporting in the future on the successes and shortfalls of my implementation of this approach. My own experience as a law student in the Child Advocacy Law Clinic encourages me to believe that,

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<sup>194</sup> ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 121 (Oxford University Press 2007).

<sup>195</sup> Mertz, *supra* note 194, at 128.

<sup>196</sup> Mertz, *supra* note 194, at 134.

<sup>197</sup> See, e.g., Nathalie Martin, *Poverty, Culture and the Bankruptcy Code: Narratives From the Money Law Clinic*, 12 CLINICAL L. REV. 203, 207 (2005) (relating “experiences” from author’s operation of bankruptcy and transactional clinic that “have implications for training both students and teachers, and also raise issues about how we as educators can help adapt legal systems to serve diverse populations.”).

through this approach, I might deliver some compelling educational lessons to my future students.

The students who enroll in our clinical programs are already taught in their legal education the parameters of what they should and should not do once they *have* a client,<sup>198</sup> or are communicating with someone who may become one.<sup>199</sup> They are not comparably taught how they should decide *which* individuals or entities to represent and to what ends,<sup>200</sup> and whether or how to weigh considerations about the results that are sought for those clients against the larger class of people and entities that would be affected if those results were achieved.<sup>201</sup> Understandably, many lawyers do not hang out their own shingles or move fluidly between different employers and practice areas, and so they spend much or all of their careers in positions where they are not given a choice about which clients they will serve. It is my belief that graduates of a “plus one” clinic may still, in those situations, at least have more tools with which to consider their daily work within its larger context, and to thereby derive a greater understanding or meaning from that work.

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<sup>198</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT 1.2 (2007)

<sup>199</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT 1.18 (2007).

<sup>200</sup> See, e.g., Hodes, *supra* note 32, at 981 (“It is wrong to be willing to take a client’s money but unwilling to do the sometimes unlovely work that has to be done on the client’s behalf. In other words, it is the very epitome of honorable and professional service to put a known killer back on the golf course, *if you happen to be the killer’s lawyer.*”) (emphasis in original).

<sup>201</sup> See, e.g., Vischer, *supra* note 38, at 39 (“...pursuing the client’s objectives may have consequences beyond the attainment of that objective. Those consequences – the collateral effects on the client’s public standing or moral integrity, harms to the opposing party or third parties, damage to the reputations of the lawyer or her colleagues – may not be readily apparent to the client.”).