GO EAST, YOUNG LAWYERS: THE STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC

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INTRODUCTION

Seventy-five years after its first publication, Karl Llewellyn's *The Bramble Bush*[1] remains the best advice ever given to law students. In his series of lectures to incoming students at Columbia Law School given in 1929 and 1930, Llewellyn spent a fair amount of time describing how to read and think about "cases"—then, as now, largely appellate opinions. But ultimately he exhorted students to

> Pickle yourself in law—it is your only hope. And to do this you need more than your classes and your case-books and yourselves. You need your fellows. . . . In group work lies the deepening of thought. In group work lie ideas, cross-lights; dispute, and practice in dispute; cooperative thinking and practice in consultation; spur for the weary, pleasure for the strong.[2]

When Llewellyn was giving this counsel, the concept of clinical legal education as a critical aspect of a university law

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1. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publishers 1960).

2. *Id.* at 96.

school was in its infancy: Jerome Frank's seminal article,[3] for example, was not published until nearly four years after Llewellyn's lectures.[4] So Llewellyn advised students to pickle themselves in group work through moot court and law review.[5] But as Justice Tom C. Clark was later to observe in urging schools to emphasize clinical education,

> Instead of the dead-law of the case, the student deals with the living law of life. . . . He lives his case—it becomes part of him and he part and parcel of it. He welcomes its challenges and gives unsparingly of his time to its thorough preparation. What law review, what moot court can create such affinity, such devotion, such determination and, upon conclusion, such satisfaction![6]

From its beginning, clinical legal education has frequently been cast as an antidote to arid library work and Talmudic disputation over appellate opinions. That dichotomy often results in students seeing a sharp divide between the Supreme Court opinions they read in classes like Civil Procedure, Criminal Investigation, Constitutional Law, and Administrative Law on the one hand, and the work they do in direct-services, live-client clinics on the other. Much clinical legal education rightly focuses on the provision of legal services to individual indigent clients. In the best clinical programs, students not only gain mastery over a variety of skills such as interviewing, counseling, negotiating, drafting pleadings and motions, conducting discovery, and presenting witnesses and oral arguments, but they also "learn how to learn from their

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3. Jerome N. Frank, *Why Not a Clinical-Lawyer School?* 81 U. Pa. L. Rev. 907 (1933).

4. Learning law through an apprenticeship model, of course, was not a new idea at all: From the time of the Inns of Court in medieval England until the early part of the twentieth century, attorneys usually learned their profession through apprenticeship of some sort. *See* William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 Akron L. Rev. 463, 465-68 (1995) (discussing the historical background). What was new about the ideas proposed by Frank and John Bradway, *see* John S. Bradway, *Legal Aid Clinics in Less Thickly Populated Communities*, 30 Mich. L. Rev. 905 (1932); John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. Chi. L. Rev. 469 (1933), was the way they sought to locate the apprenticeship within law schools, rather than with full-time practicing attorneys, and to integrate the clinical and theoretical components of the students' educations.

5. *See* Llewellyn, *supra* n. 1, at 97 (moot court); *id.* at 135-36 (law review).

6. Tom C. Clark, *Student Advocates in the Courts*, 1 Seton Hall L. Rev. 1, 4 (1970).

experiences"[7] and gain a critical perspective on the legal system itself.

With a few notable exceptions,[8] however, law schools have not committed themselves to a similarly rich model for teaching appellate lawyering. Instead, as a report by an ABA-sponsored Committee on Appellate Skills Training observed, appellate advocacy training tends to "treat appellate litigation as involving only two aspects—writing a brief and making an oral argument," ignoring "all of the other important ingredients of appellate litigation," such as understanding appellate procedure, shaping the questions on which review is sought, working within the constraints of a record that is often simultaneously complex and incomplete, and accounting for the vicissitudes that characterize the particular appellate court that will be hearing the case.[9] In short, most clinical education focuses on the early stages of litigation while most classroom education focuses on the end product of the process: the opinion itself. There's not much attention paid to connecting the two.

Believing, to paraphrase Justice Holmes, that a student can learn greatly in appellate practice as elsewhere, we decided to offer a clinic that would expressly connect the doctrinal analysis of Supreme Court cases taught in traditional classrooms with the blend of skills and perspectives that infuse clinical courses. Supreme Court litigation presents a particularly rich opportunity to make this connection. While Supreme Court litigation shares many characteristics with other appellate litigation, it also involves a distinctive type of *lawyering*. One aspect of Supreme

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7. Quigley, *supra* n. 4, at 474-75 ("Clinical education is but one step in learning how to learn from experience. A person who learns how to learn from their experience is building, shaping, changing, and modifying their advocacy with each experience. The difference between persons who learn how to learn from their experiences and those who do not is the difference between a person who after five years as a lawyer has progressed and developed into a different kind of lawyer versus the person who has essentially been repeating their initial year in practice five times.").

8. For example, Gonzaga Law School runs a well-respected Ninth Circuit clinic. *See* Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 Gonzaga L. Rev. 1 (1997) (describing the program). Many schools that offer capital-punishment-related clinics spend considerable time on appellate and post-conviction work as well.

9. ABA App. J. Conf., Jud. Administration Div., *Report and Recommendations of the Committee on Appellate Skills Training*, 54 U. Cin. L. Rev. 129, 142 (1985) [hereinafter *ABA Appellate Skills Report*].

Court practice stems from the nature of the Court's docket. With only a few exceptions, the Court's docket is entirely discretionary. Petitions for certiorari (and to a lesser extent, briefs in opposition) thus involve a style of argument that centers not primarily on the correctness of the decision below, but on whether the case raises important legal questions and provides an appropriate vehicle for resolving them. As a descriptive matter, the former question usually involves the presence, depth and breadth, and intractability of a circuit split. So students in a Supreme Court Clinic gain a special kind of experience in how to shape legal issues. Second, at the merits stage, Supreme Court cases are seldom squarely controlled by precedent. So students must learn not only to litigate cases in which there are strong legal positions on both sides but must also learn to interweave textual, structural, policy, and prudential arguments. Moreover, because most Supreme Court cases have implications for a broad category of litigants, Supreme Court practice often involves amicus briefs as well as briefs for the parties. Students can learn both from representing *amici* and from representing parties about a variety of issues: how to work collaboratively with lawyers representing a different perspective, how to resolve conflicts among perspectives, and special roles amici can play in providing the Court, or individual Justices, with alternative reasons for ruling one's way.

In short, there is real lawyering, and not merely doctrinal analysis, behind the Supreme Court's decisions. From identifying cert-worthy cases to filing petitions for certiorari to writing merits briefs to dealing with amici and sometimes the government, Supreme Court litigation provides students with a series of opportunities to think about tactical and strategic issues. Moreover, because cases generally have short lives—from the beginning of the certiorari stage to a final disposition on the merits, they usually last between a semester and an academic year—students can see a case through a number of stages, seeing how a lawyer's job shifts over time.

The Stanford Law School Supreme Court Litigation Clinic, the first of its kind, operates as a small law firm offering pro bono representation to a wide variety of individuals and groups before the United States Supreme Court. With two notable

exceptions—signing the briefs[10] and presenting oral argument—the students perform the entire range of tasks involved in litigating cases before the Court. In the remainder of this essay, we describe our experience with the Clinic so far.

For a Supreme Court litigation clinic to provide students with an accurate exposure to the entire range of Supreme Court practice, the clinic needs essentially three things: instructors and students capable of performing the work and work to perform. We've been amazingly fortunate with respect to all three.

THE INSTRUCTORS

One of the distinctive features of clinical education, as opposed to externships and other opportunities for hands-on training, is its general reliance on full-time faculty whose primary goal is teaching students rather than running a law practice. To be sure, clinical faculty have the same ethical obligations as all other lawyers with respect to their clients. But pedagogical considerations will play a major role in deciding both the nature and the size of a clinical instructor's caseload: some kinds of cases are better teaching vehicles than others, and it *always* takes longer to supervise students correctly than to simply do the work oneself.

For a Supreme Court clinic, however, it's not entirely clear that the standard model of running a clinic entirely in-house with full-time faculty can work. This is in part a function of the availability of clinical faculty, and in part a function of the nature of the practice itself.

First, as with any other clinic, instructors for a Supreme Court clinic need to have the kind of expertise they are hoping to convey: Thus, they must themselves be experienced Supreme Court litigators. In recent years, Supreme Court practice has become an increasingly specialized field. Of course, the Solicitor General's office has served for more than a century as the hub of Supreme Court practice: The federal government appears, either as a party or as an amicus curiae, in a majority of the Court's merits cases, and the lawyers there have built up a

10. *See* R. S. Ct. U.S. 34.1(f) (stating that "[n]ames of persons other than attorneys admitted to a state bar may not be listed" on a brief) (available at http://www.supremecourt us.gov/ctrules/rulesofthecourt.pdf).

well-deserved reputation for excellence over the years.[11] There are also a number of nonprofit public-interest law firms that maintain a relatively active practice before the Supreme Court—for example, Public Citizen; the NAACP Legal Defense and Educational Fund; and the Institute for Justice. But in the past decade or so, as the size of the Court's merits docket has shrunk dramatically,[12] an increasing share of the arguments presented by private parties has also gone to a relative handful of lawyers—most, but not all of them, alumni of the Solicitor General's office and virtually all of them located, not surprisingly, in Washington, D.C.[13] And even the ones who don't themselves practice in Washington are nearly all affiliated with firms that have Washington offices to provide a variety of support.[14] So the pool of experienced Supreme Court litigators is relatively small.

The bifurcation of faculty between the traditional academic track and the clinical track further reduces the pool of available instructors.[15] Although the academy is marbled with professors who spent time in the Solicitor General's office or practiced with public-interest or private law firms that maintained a Supreme Court practice, most faculty members, even those with Court-related backgrounds, entered the professoriat largely because they wished to devote themselves to traditional teaching and scholarship. Teaching a Supreme Court clinic is far more time-intensive than teaching a traditional course. Each semester brings entirely new cases, so a professor cannot rely on last

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11. *See e.g.* Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Knopf 1987).

12. For example, in its October 1999 Term, there were seventy-six cases on the Court's merits docket. By contrast, the merits docket for the October 1972 Term was over twice as large, with 158 cases. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 Wash. & Lee L. Rev. 737, 740 (2001).

13. For discussion of this phenomenon, see Tony Mauro, *Fewer Firms Are Arguing More and More of the Court's Shrinking Docket*, Leg. Times 10 (July 14, 2003).

14. At the same time, because so much of the work is done in writing, it is much more feasible to run a Supreme Court practice from a variety of locations than would be true for a direct-services clinic where students must interact face-to-face with their clients.

15. Stanford has been distinctive in this respect. Three of the current clinics—the Supreme Court Litigation Clinic, the Criminal Prosecution Clinic, and the Death Penalty Clinic—are currently taught by faculty members who hold traditional rather than clinical appointments, and who continue to teach conventional classroom courses as well as to publish scholarship not dependent on their clinical work.

year's notes as a jumping-off place for this year's teaching. The nature of the cases makes it impossible to create a bank of briefs that can be adapted readily to the factual circumstances of later cases. Not only can logistical exigencies eat into time that could otherwise be spent on scholarship, but shifting gears between advocacy and scholarship poses its own set of difficulties. In sum, the experienced Supreme Court litigators who want to keep practicing tend to stay in Washington, while those who leave Washington tend to stop practicing.

In some ways, Stanford is both a natural and an odd candidate to operate a Supreme Court clinic. On the one hand, it had a faculty member—Pam Karlan[16]—who was both an experienced Supreme Court litigator[17] and interested in offering a clinic. She had found that her litigation, scholarship, and teaching had reinforced one another, particularly when it came to voting-rights issues, and was eager to see whether the same would be true for the broader array of cases within the clinic, particularly when it came to constitutional issues and litigation under section 1983, two of the topics on which she was currently writing and teaching traditional courses.

Stanford also has a number of other faculty with extensive experience before the Supreme Court, such as Alan Morrison (for many years the director of Public Citizen's Supreme Court practice); Larry Marshall (who also is the overall director of clinical education); and Kathleen Sullivan (the school's Dean at the time the Clinic was started). They too were enthusiastic about the possibilities for a clinic and were available for help in thinking strategically about the Clinic's cases and helping to prepare advocates for oral argument. And a large number of

16. In the text of this essay, we refer to ourselves where appropriate for the sake of clarity in the third person; in conversation, none of us would be caught dead doing this. *Cf.* Steve Rushin, *There Is No "I" in Steve*, 103 Sports Illustrated 25 (July 11/18, 2005) (bemoaning "the cult of third-personality").

17. The merits cases in which she had represented parties include *Branch v. Smith*, 538 U.S. 254 (2003); *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *Presley v. Etowah County Commn.*, 502 U.S. 491 (1992); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *Lytle v. Household Manuf., Inc.*, 494 U.S. 545 (1990). She had also been counsel for *amici curiae* in cases such as *Lawrence v. Tex.*, 539 U.S. 558 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Clinton v. Jones*, 520 U.S. 681 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). She had also worked on a number of petitions for certiorari or jurisdictional statements.

other faculty with extensive subject-matter and Court-related expertise have also contributed greatly to the Clinic's work, both in talking to student team members about discrete legal issues and in helping with moot courts.

At the same time, Stanford is . . . well . . . in California. No one operates a Supreme Court practice entirely from a three-thousand mile remove. While there are occasions on which the time difference might prove fortunate—there are an additional three hours a day that *someone* is likely to be awake and available to work—they are few and far between.

And although Karlan had participated in more than twenty Supreme Court cases, she had concentrated almost entirely on a few areas of law, particularly voting rights, reproductive rights, and anti-discrimination statutes. While it would have been possible to build a clinic entirely around the preparation of amicus briefs in these areas, it would not have been feasible to set up a clinic actually representing parties. For one thing, the Court takes relatively few cases in these areas. And the parties are usually already represented by public-interest law firms with long experience both in the area and before the Court. Especially given the Court's shrinking docket, there would be little incentive for the clients to pick clinic representation instead. Moreover, while doing amicus briefs is pedagogically valuable, both because it expands the range of cases available to clinic students and because it gives students insights into the role of amici and amicus briefs that they might otherwise not get, running a clinic that does only amicus briefs would offer students an incomplete experience.

Most important, precisely because one of the key goals of the clinic was to expose students to the joys and frustrations of group work, it was critical to have the course taught collaboratively by instructors with different experiences and outlooks.

Tom Goldstein and Amy Howe were the ideal outside instructors for a clinical venture. Goldstein and Howe had built a successful Supreme Court practice based on an innovative approach to the Court's docket. Supreme Court Rule 10 sets out "the character of the reasons the Court considers" as providing a "compelling" basis for granting certiorari. First on the list is the following: "a United States court of appeals has entered a

decision in conflict with the decision of another United States court of appeals on the same important matter."[18] Several years earlier, Goldstein had observed that a significant share of the Supreme Court's docket each Term consisted of cases resolving conflicts among the circuits, and computer research soon revealed that there were literally hundreds of circuit conflicts that might be presented to the Court. Goldstein and Howe built their practice by reaching out to lawyers who had litigated cases that either created or deepened conflicts in the courts of appeals and offering to assist them in handling their cases before the Supreme Court. Within four years of founding the firm, Goldstein had argued eight cases before the Court[19] and had served as co-counsel in a number of other high-profile cases, including *United States v. United Foods, Inc.*[20] and *Bush v. Gore*.[21]

Thus, in addition to being experienced Supreme Court litigators, Goldstein and Howe had a skill equally critical to building a clinical practice: expertise in finding cases that the Court would find attractive and in reaching out to the lawyers who had represented the parties in the lower courts. A Supreme Court clinic can't rely on clients (or at least not clients with cert-worthy cases) simply walking through the door. The "catchment" area for traditional legal services clinics can consist entirely of the region where the school is located: At Stanford, for example, the Criminal Prosecution Clinic works with the Santa Clara County District Attorney's office, and the Youth and Education Law Clinic represents low-income clients in the Bay Area. By contrast, a Supreme Court clinic must look for potential cases nationwide.

Goldstein and Howe's approach to their practice had several other features that made them particularly good partners for a clinical venture. Because their eponymous law firm has

18. R. S. Ct. U.S. 10(a) (available at http://www.supremecourtus.gov/ctrules/rulesofthe court.pdf).

19. *See Lamie v. U.S. Trustee*, 540 U.S. 526 (2004); *U.S. v. Bean*, 537 U.S. 71 (2002); *Clay v. U.S.*, 537 U.S. 808 (2002); *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *L.A. Police Dept. v. United Reporting Publg. Corp.*, 528 U.S. 32 (1999); *Cunningham v. Hamilton County*, 527 U.S. 198 (1999).

20. 533 U.S. 405 (2001).

21. 531 U.S. 98 (2000).

remained tiny—with just three full-time attorneys and an office manager—they have far lower overhead than virtually all their peers, making it possible for them to devote nearly half their time to pro bono cases of the sort that a clinic might represent. Because Goldstein and Howe were also married to one another, they could travel to California for week-long orientation periods without being separated. At the same time, because they were based in Washington, they could host students who traveled east for oral arguments and their office could handle the last-minute logistics of filing briefs.

The three instructors had known each other for nearly a decade when the possibility of putting together a clinic arose. For all three, the Clinic offered an opportunity to combine a passion for Supreme Court litigation with a desire to work more intensively with students than either classroom instruction or the traditional internship model would allow. Plus, we knew we would enjoy working together.

Perhaps because Stanford is a small, relatively informal institution that had only recently begun building an in-house clinical program, the administration was enthusiastic about our experimental venture. Within a day of our raising the plan with Dean Kathleen Sullivan, she had approved the appointment of Tom Goldstein (and later that of Amy Howe) as Lecturers and had agreed to use funds connected with Karlan's endowed chair to help underwrite the Clinic's expenses. Her successor, Larry Kramer, has been equally supportive in sustaining the Clinic's growth. The school's newly appointed director of clinical education, Larry Marshall, not only brought his own Court-related expertise to the Clinic, but also offered valuable insights into pedagogical issues. And our colleagues around the law school have been extraordinarily generous with their time over the past two years: participating in moot courts, reading and commenting on drafts, and explaining to students the intricacies of areas of law in which they specialize.

THE STUDENTS

The Clinic has been remarkably fortunate in the caliber of students it has attracted. We have been struck by how the Clinic's membership, like the Clinic's caseload, has bridged the

gap between the scholarly and the practical. Some of the members have been Supreme Court junkies, students who studied the Court in college and who larded their schedules with advanced constitutional law courses. A significant proportion of the students had law-review experience, including two of the past three presidents of the *Stanford Law Review*. At the same time, a significant number of the students had other clinical experience, particularly in the Stanford Community Law Clinic, where they had done direct-services representation. And while a number of the students have aspired to do Supreme Court practice after they graduate, some emphasized in their applications their plans to be trial lawyers.[22] One striking thing about our applications is that a number of students apply only to the Supreme Court Litigation Clinic; they do not apply for the school's other clinics. This suggests to us that there is a pool of students who are underserved by clinical programs that don't offer some type of appellate experience.[23]

Although the Clinic's students have participated in a stunning array of outside activities during their time with the Clinic, ranging from tutoring youngsters in an after-school program, to law review and moot court, to serving as research assistants, to becoming first-time parents, the Clinic has placed substantial demands on their time, with the workload being both heavy and uneven over the course of the semester. Upper-level Stanford students take between ten and seventeen units of credit each semester,[24] and the Clinic awards seven units of credit. The typical student takes one or two courses other than the Clinic, and we strongly recommend that students pick their other courses with their clinical responsibilities in mind—avoiding,

22. Of the eleven Clinic members who have graduated so far, all have done judicial clerkships. Six have clerked, or are now clerking, for federal court of appeals judges, with one now clerking at the Supreme Court. One has clerked on a state supreme court. Four are now clerking for federal district court judges, with two of those clerking for a court of appeals judge next year. Of the current Clinic students, seven will be clerking next year—five on the court of appeals and two on the district court—and two plan to clerk the year after.

23. A similar situation often exists with respect to students who are interested in non-litigation-oriented careers. Law schools are beginning to create transaction-oriented clinics to serve this group.

24. Students are required to complete eighty-six units for the J.D., and given a typical first-year schedule, upper-level students have to average thirteen or fourteen units per semester to graduate. The typical upper-level classroom course awards three units of credit.

for example, courses with other sets of writing deadlines during the semester.

During our first two semesters, the Clinic had seven members, but we have since expanded to nine per semester. We are skeptical about the possibility that students will have the analytic or writing skills to handle the Clinic very early in their law school careers.[25] Thus, for the fall semester, we give preference to applicants entering their last year of law school; for the spring semester, we give preference to second-year applicants then entering their fourth semester. Because several Clinic members have usually signed on for a second semester, we anticipate having five or six slots for new students each semester—a system that has the added benefit of ensuring a mix of veterans and newcomers.[26] Since its beginning, the Clinic has been oversubscribed, with somewhere between three and eight applicants for each spot. The application process is relatively simple: We ask students for a transcript, a writing sample, and a short statement of why they want to take the Clinic. In looking at the transcript, we look for two things: first, a breadth of doctrinal courses—while it is entirely possible for Stanford students to avoid taking courses after their first year in which they read judicial opinions, we are concerned that students who've chosen that path are unlikely to have acquired the case-reading skills that the Clinic requires—and second, a relatively strong performance in the doctrinal and clinical courses they've already taken. There is, however, no particular grade cut-off for admission.

We pay as much attention to the students' writing samples as to their transcripts. While much of the Clinic revolves around intensive editing and revision of their written work, we look for students who already are at least solid writers, since the dual goals of running the Clinic and providing high-quality representation to our clients precludes us from taking as Clinic members those who require intensive work on elementary rules of grammar or syntax.

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25. *Cf. ABA Appellate Skills Report*, *supra* n. 9, at 143 (stating that a "key element" of a sound program in appellate skills is that it not begin during the first year because students need to learn a fair amount of background law first).

26. We discuss the advantages of this model in the next section.

Finally, we look for students who will work well together. In this, we're aided by the fact that Karlan teaches large numbers of students in foundational doctrinal courses, so she has at least a passing acquaintance with a substantial proportion of the student body. We also speak to a wide range of other faculty members about their experiences with Clinic applicants. And we place special weight on the views of faculty members who have taught students in analogous situations such as other clinics, simulation courses, or moot court.

THE WORK

The Stanford Clinic operates like a tiny public-interest law firm. We begin with a week of intensive orientation. Some of the orientation focuses on the distinctive nature of Supreme Court practice, giving the students a sense of the relationship between doctrine, jurisprudential approaches, and pragmatic considerations.[27] Some of it focuses on the Supreme Court bar. Some of it focuses on aspects of the Supreme Court Rules that may be unfamiliar to students. Some of it focuses on the certiorari stage—in particular, the ways in which briefs written at that stage differ from conventional appellate briefs. But almost immediately we hit the ground running. Part of the reason for this is the traditional pedagogical approach of clinics everywhere: Students will learn best by doing and reflecting simultaneously. But part of our getting underway immediately also stems from the fact that the academic and Supreme Court calendars do not run even remotely in synch, and we have to conform our calendar to that of the Court. So, for example, our first petition for certiorari, in *Smith v. City of Jackson*,[28] was due on February 11, 2004, less than a month after the semester began.[29] And we have had to turn down several otherwise

27. We remind them that it's perhaps just as important for a litigator as for a Justice to be able to "count to five," that is, to figure out what arguments will appeal to various Justices who together can constitute a majority. *See* Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 29, 32 (1997) ("Justice Brennan used to joke that a critical talent for a Supreme Court Justice was the ability to count to five.").

28. 125 S. Ct. 1536 (2005).

29. At the other end of the calendar, students of course leave for permanent or summer jobs or vacations at the end of each semester, while the cases keep going. We have had to draft several merits briefs over the summer while the clinic members have been away,

attractive opportunities to do amicus briefs because the briefing schedule meant the work would have had to be done entirely outside of term time.

The Clinic is committed to representing a diverse group of clients, so we have no ideological litmus case about the kinds of cases the Clinic takes. In the Fall 2005 semester, for example, we represented the City of Columbus, Ohio, in a petition seeking review of the court of appeals' holding that the city's policy of terminating water service to rental properties based on a landlord's failure to pay outstanding utility bills violates the equal-protection rights of a current tenant who did not incur the arrearage. We thought the case raised an interesting and tractable constitutional issue: Students spend a fair amount of time discussing rationality review in their constitutional law courses, and this would give them an opportunity to see how it operates in practice. Moreover, the case offered the opportunity to see how representing a government entity differs from representing other sorts of clients.

We try to involve students as much as possible in the decision whether to undertake representation. In Spring 2005, for example, after we had identified several potentially attractive circuit splits, we presented the various candidates to the students, had them review the decisions below, discussed with them the relative benefits and drawbacks of each case both substantively and pedagogically, and then voted as a group on which cases to pursue and the order in which to pursue them. Not only did the process result in our representing one of the clients the students had chosen, but it also allowed us to introduce them to the delicate processes of working with outside lawyers and persuading them to allow our participation.

Once a case comes into the Clinic, we assign a team of three students to work together in drafting the relevant documents under the primary supervision of one of the three instructors.[30] In assigning students to teams, we take into

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using one summer student at Stanford and summer associates at Goldstein & Howe. Thus, unlike many other clinics, where the length of a client representation may dovetail nicely with the length of a student's time in the clinic, our cases tend to run for more than one semester.

30. Our experience during the first semester suggested to us that larger teams became unruly and that smaller teams often felt overwhelmed.

account four factors. First, we try to accommodate the Clinic members' preferences.[31] Second, we try to ensure that each team has at least one "veteran" Clinic member. We have found that the learning curve is terribly steep, and the extra semester under a student's belt often enables him or her to teach the newer students in ways that complement ours. Moreover, there are ministerial aspects of our practice, like generating tables of authorities, that students can easily teach one another without our direct involvement. Third, we try to rotate students among teams and instructors so that over the course of the semester, everyone works intensively with as many people as possible. Finally, and most importantly, we try to ensure that each student sees a variety of work, ideally working on at least one case at the certiorari stage and one case at the merits stage where we represent a party, and—time permitting—a third project like an amicus brief. In addition to giving each student extensive writing experience, we try to make sure every student gets to participate in some work related to oral advocacy, mooting either an instructor or an outside attorney who will be appearing before the Court.

On each case, the team meets intensively with the primary instructor to develop a work plan, including internal deadlines for circulating documents both within the Clinic and with outside counsel and other interested parties. The team then works on a preliminary outline and, after the outline has been thoroughly discussed, both by the team and the instructor, and often by the entire Clinic at our weekly all-hands meeting,[32] the team members divide up the preliminary drafting among themselves. Once the team has produced a first draft, the team members are expected to edit one another's work before submitting it to the primary instructor.

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31. This sometimes has humorously ironic consequences. One Clinic member who was particularly interested in disabilities law pressed to be included on the team for *Spector v. Norwegian Cruise Lines Ltd.*, 125 S. Ct. 2169 (2005), a case involving the application of the Americans With Disabilities Act to foreign-flag cruise ships, only to find that most of his work on the case focused on the salience of international maritime treaties.

32. The entire Clinic meets at least once a week, with Tom Goldstein and Amy Howe often participating by conference call from Washington. The Clinic meets in a seminar room that is equipped both with an excellent conference phone and with an audiovisual system that enables Goldstein or Howe to put documents they want to discuss up on a large wall screen so that everyone in the room can see the documents and observe the editing process.

When the team is ready to circulate a draft, it posts the draft to the Clinic's internal coursework website, so that the instructors and other students can download the draft. We like to have the students work in a template that shows them precisely what the finished product will look like; this has both the practical purpose of giving them a sense of the space constraints they face and the psychological effect, perhaps, of driving home to them that they're the lawyers. Most of the time, the first draft will have significant organizational issues, and it is therefore likely to precipitate a discussion both with the instructor and in the all-hands meeting about recasting some of the arguments.

By the second circulating draft, we begin an intensive line-editing process. The process is designed, of course, to improve the ultimate product, but we try to do it in a fashion that throws back to the students the responsibility for actually doing revisions. Sometimes, for example, we will intensively line edit a subsection of the brief and then return the remainder to the team for another round. In the average case, the team will produce around a dozen drafts before it and the instructors are satisfied. Toward the end of the process, the other instructors will also become involved in doing extensive line edits and comments. And at the end of the process, the students will handle final production work, cite checking and proofreading the draft and handling table generation before the document is sent to Wilson-Epes Printing Company in Washington, D.C., to handle the printing and filing.

On merits cases, students also participate actively in argument preparation. We moot each Clinic case publicly at the Law School before a bench consisting of Clinic members, instructors, and other faculty with particular expertise. One innovation we adopted recently is to have one of the team members also do a dry run of the oral argument. This gives the student a sense of what oral argument feels like; it also allows us during the post-mortem to ask the student to reflect on the choices he or she made in the heat of the moment. When the student and the attorney have responded differently to similar questions, we have the opportunity to discuss a host of tactical issues. The moot always raises new questions, and the team will often work on finding answers to those questions. This gives students a feel for the way in which oral argument preparation

extends far beyond simply rereading the briefs, a point that moot court programs rarely teach. We also give each student a school-subsidized opportunity to travel to Washington to see oral argument, preferably in a case on which he or she worked. This also gives students a chance to observe and participate in the last-minute argument preparation. And while they're in Washington, we arrange for them to meet with members of the Supreme Court press corps, lawyers from the Solicitor General's office, or other people who can give them insight into the Court.

In addition to mooting our own cases, the Clinic each semester offers to moot lawyers in other cases before the Court. So far, we've done about a half-dozen of these moots, many for lawyers who also participated in the superb program run by Professor Richard Lazarus at Georgetown University Law Center,[33] but occasionally for lawyers who are unable to travel to Washington ahead of time or whom Professor Lazarus is unable to accommodate. We assign two students to sit with the faculty panels that conduct those moots.

So far, the Clinic has succeeded beyond our expectations. A list of the Clinic's cases appears as an appendix to this essay. The Court granted certiorari in the first four cases in which the Clinic filed petitions—a record we knew we couldn't maintain forever, but we hope to continue to find a significant number of cases that the Court finds cert-worthy. We have also introduced the Clinic members to the art of writing Briefs in Opposition. Given the tiny proportion of cases the Court takes, this might seem like shooting fish in a barrel, but we try to find cases in which the cert. petition is filed by skilled lawyers who assert an important circuit split, so that the students will get to grapple with both interesting doctrinal issues and vehicle questions.

In the five Clinic merits cases that have been decided so far, we won three outright—*Spector*, which involved the application of the public-accommodations provisions of the Americans with Disabilities Act to foreign-flag cruise ships, *Rousey v. Jacoway*,[34] which involved the treatment of Individual

33. That program is described elsewhere in this issue. *See* Gregory J. Langlois, *Dress Rehearsal: The Moot Court Program at Georgetown Law School's Supreme Court Institute*, 7 J. App. Prac. & Process 231 (2005).

34. 125 S. Ct. 1561 (2005).

Retirement Accounts in bankruptcy, and *Tum v. Barber Food*,[35] which involved the application of the Fair Labor Standards Act and the Portal-to-Portal Act to workers at a poultry-processing plant. We lost a fourth case, *Whitfield v. United States*,[36] which involved the federal money-laundering conspiracy statute. The outcome in the fifth case, *Smith v. City of Jackson*,[37] which involved the availability of disparate-impact claims under the Age Discrimination in Employment Act, was bittersweet: We succeeded in persuading a majority of the Court that such claims were cognizable—the question presented by our petition—but all nine Justices agreed that our clients, police department employees in Jackson, Mississippi, had not established such a claim. The case also provided an invaluable teaching moment, as the students were able to see a "counting to five" strategy in action. There was no opinion for the Court. Instead, Justice Stevens's opinion for himself and Justices Souter, Ginsburg, and Breyer took the position that the ADEA recognizes disparate-impact claims as a matter of straightforward statutory construction, while our fifth vote for ADEA coverage, Justice Scalia, adopted that view only because of *Chevron* deference.[38] During the course of the semester, as we crafted the *Chevron* argument, the students got to see some realpolitik in action: Although we were arguing for deference to the interpretation of the ADEA taken by the Equal Employment Opportunity Commission, the United States did not participate in the case, raising the possibly tantalizing question of how much deference should be given to an agency's interpretation when the agency does not appear before the Court to press its view.

This Term, we once again have a significant number of cases, raising a broad range of issues before the Court.[39] We're running at capacity, and we have actually had to turn away several attractive requests for assistance.

Stepping back and thinking about the more purely pedagogical achievements of the Clinic, we note that the Clinic managed to impart a striking number of the lawyering skills

35. 126 S. Ct. 514 (2005).

36. 543 U.S. 209 (2005).

37. 125 S. Ct. 1536 (2005).

38. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

39. Those cases are also listed in the Appendix.

identified as central to responsible practice in the 1992 MacCrate Report on legal education.[40] Some of these—such as legal analysis and reasoning, legal research, written communication, knowledge of litigation procedures, and knowledge about the organization and management of legal work—are not surprising. Any appellate clinic is bound to teach legal reasoning, research, and writing. But we were also struck by how naturally the Clinic members were called upon to use skills that aren't on their face quite so intimately tied to appellate litigation. For example, despite all the stress on the fact that appellate lawyers are tied in significant ways to an already created record, Clinic members did a surprising amount of factual investigation involving issues connected to our cases.

In *Spector*, for example, the Clinic represented disabled cruise ship passengers and their able-bodied companions in a suit under the public accommodation provisions of the Americans with Disabilities Act; students researched various cruise lines' policies regarding a host of practices to show, among other things, that cruise lines frequently invoked the protections of U.S. law and that cruise lines other than the respondent made various accommodations for disabled passengers. In *City of Evanston v. Franklin*,[41] the Clinic successfully opposed a petition for certiorari seeking review of a Seventh Circuit rule requiring a government employer to provide a sort of reverse-*Miranda* warning to employees facing disciplinary hearings: because their answers would be considered compelled by the threat of losing their jobs and thus inadmissible in any future criminal proceeding, they could be fired for refusing to answer questions. The Seventh Circuit itself had described the rule as "unique," stating that it "ha[d] been rejected in two circuits, . . . ha[d] been expressly left open in two others, . . . [and had] been followed in none,"[42] and the City argued that the rule was unworkable. After its legal research determined that the Federal Circuit had actually adopted a

40. ABA Sec. of Leg. Educ. & Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 138-207 (ABA 1992).

41. 125 S. Ct. 1696 (2005).

42. *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) (internal citations omitted).

similar rule,[43] the team looked at the personnel policies of federal agencies ranging from the Bureau of Prisons to the Federal Communications Commission and the Nuclear Regulatory Commission to show that they gave similar warnings, suggesting that there was nothing unworkable about the Seventh Circuit's rule. And students frequently observed and engaged in negotiation, both within the Clinic and in dealing with other lawyers and our clients. For many, this was their first opportunity to work collaboratively with their classmates. Finally, on a number of occasions, students were confronted with complex ethical issues they needed to resolve. Not only did the students attain new levels of expertise, but they also gained confidence in their emerging professional identities. Certainly, they moved dramatically closer to serving the four values that the MacCrate Report suggested as the moral foundation of legal practice: providing competent representation to their clients; promoting justice and fairness within society; maintaining and improving the legal profession; and developing professionally.

CONCLUSION

The Stanford Supreme Court Litigation Clinic is still very much a work in progress. Each semester so far, we've noticed things that need changing or modifications that could improve the students' experience, our overall performance as lawyers, or both. Certainly, all three of us have become better clinical teachers and better lawyers as well. And we hope that the Clinic is well on the way to developing what the Court once called "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise" in cases before it.[44] Already, Stanford alumni have figured in several of our cases.[45] We look forward to the day when we work with or oppose Stanford Clinic alumni as well.

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43. *See Weston v. U.S. Dept. of Hous. & Urban Dev.*, 724 F.2d 943 (Fed. Cir. 1983).

44. That phrase, from *NAACP v. Button*, 371 U.S. 415, 422 (1963), refers to the NAACP Legal Defense and Educational Fund, where Professor Karlan received her training as a Supreme Court litigator.

45. In our first case before the Court, *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), we represented petitioners, and respondents were represented by Glen Nager, J.D. '82. In *Ill. v. Bartels*, 126 S. Ct. ___ (No. 04-1066 Oct. 3, 2005) (vacating judgment and remanding), we represented respondent and petitioner was represented by Illinois Solicitor

APPENDIX

STANFORD SUPREME COURT LITIGATION CLINIC CASES

Merits Cases

1. *United States v. Gonzalez-Lopez*, 127 S. Ct. ___ (counsel for respondent, who was erroneously denied the right to representation by his retained counsel of choice at a criminal trial) (No. 05-352) (cert. granted Jan. 6, 2006).

2. *Hamdan v. Rumsfeld*, 126 S. Ct. ___ (counsel for amici curiae historians supporting the argument that the original understanding of the President's powers under the commander-in-chief clause of Article II is sharply circumscribed) (No. 05-185) (cert. granted Nov. 7, 2005).

3. *Whitman v. United States Department of Transportation*, 126 S. Ct. ___ (counsel for petitioner, an FAA employee challenging the agency's drug testing policy) (No. 04-1131) (cert. granted June 27, 2005) (argued on December 5, 2005).

4. *Georgia v. Randolph*, 126 S. Ct. ___ (counsel for respondent, whose home was searched, over his objection, after his estranged wife consented to the search) (No. 04-1067) (cert. granted April 18, 2005) (argued on November 9, 2005).

5. *Domino's Pizza v. McDonald*, 126 S. Ct. ___ (counsel for respondent, a black entrepreneur who claimed race discrimination by Domino's under 42 U.S.C. 1981) (No. 04-593) (cert. granted April 25, 2005) (argued on December 6, 2005).

General Gary Feinerman, J.D. '91. And in *Whitfield v. U.S.*, 534 U.S. 209 (2005), we worked with Sharon Samek, J.D. '87, who represented petitioners.

6. *Bank of China v. NBM, LLC*, 126 S. Ct. 675 (2005) (counsel for respondents, who were sued for violations of the civil RICO statute).

7. *Tum v. Barber Foods*, 126 S. Ct. 514 (2005) (counsel for petitioners, employees at a poultry processing plant who sought to be paid for the time they spending walking to and waiting at stations where they pick up required safety equipment).

8. *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005) (counsel for *amicus curiae* Abu Ali Abdur'Rahman, a death-row inmate, supporting the argument that Fed. R. Civ. P. 60(b) permits district courts to reopen their judgments in habeas cases).

9. *Spector v. Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169 (2005) (counsel for petitioners, a group of disabled passengers and their companions, who argued that the respondent cruise line failed to comply with the public accommodations and public transportation facilities provisions of the Americans with Disabilities Act).

10. *Rousey v. Jacoway*, 125 S. Ct. 1561 (2005) (counsel for petitioners, debtors who sought to keep the money in their Individual Retirement Accounts during their bankruptcy proceedings).

11. *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (counsel for petitioners, a group of police department employees challenging the City's pay policy under the Age Discrimination in Employment Act because it had a disparate impact on older workers).

12. *United States v. Booker*, 125 S. Ct. 728 (2005) (counsel for *amicus curiae* National Association of Criminal Defense Lawyers in a challenge to the federal sentencing guidelines).

13. *Whitfield v. United States*, 125 S. Ct. 687 (2005) (counsel for petitioners, who were convicted of conspiracy to commit money laundering).

14. *United States Department of Transportation v. Public Citizen*, 124 S. Ct. 2204 (2004) (counsel for *amici curiae* Defenders of Wildlife, Environmental Defense, and Sierra Club in a challenge to the Environmental Protection Agency's failure to do a full environmental impact review before allowing Mexican trucks to travel throughout the United States).

Certiorari-Stage Cases

1. *Cox v. United States*, 126 S. Ct. ___ (counsel for petitioner in a case challenging the power of a federal district court to order that subsequent sentences be served consecutively to the sentence it is imposing) (No. 05-454) (cert. pending)

2. *City of Columbus v. Golden*, 126 S. Ct. ___ (2005) (counsel for petitioner in a case concerning whether a policy of terminating water service to rental properties based on a landlord's failure to outstanding utility bills violates the equal protection rights of a current tenant who did not incur the arrearage) (cert. denied).

3. *Jones v. Bush*, 126 S. Ct. ___ (2005) (counsel for *amicus curiae* League of Women Voters of Florida in a case challenging Florida's lifetime disenfranchisement of ex-offenders) (cert. denied).

4. *Hadfield v. McDonough*, 126 S. Ct. ___ (2005) (counsel for petitioner, a sheriff's department employee fired from his job for supporting the previous incumbent, who challenged the department's failure to provide him with a pre-termination hearing) (cert. denied).

5. *Illinois v. Bartels*, 126 S. Ct. ___ (2005) (counsel for respondent, whose car was searched after a traffic stop) (granted, vacated, and remanded in light of *Illinois v. Ceballes*, 543 U.S. ___ (2005)).

6. *Bell v. Abdur'Rahman*, 125 S. Ct. 2991 (2005) (counsel for respondent, a death-row inmate seeking to reopen the judgment in his federal habeas proceeding) (granted, vacated, and remanded in light of *Gonzalez v. Crosby*, 545 U.S. ___ (2005)).

7. *City of Evanston v. Franklin*, 125 S. Ct. 1696 (2005) (counsel for respondent, who was fired from his job for refusing to answer questions regarding off-duty criminal behavior without being warned that his statements could not be used in any criminal proceeding) (cert. denied).

8. *Donaldson v. Lott*, 125 S. Ct. 876 (2005) (counsel for petitioners, who were searched and seized unconstitutionally but whose section 1983 case was dismissed because of qualified immunity) (cert. denied).