

# A CLINIC'S PLACE IN THE SUPREME COURT BAR

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*The past several years have witnessed the emergence of a new phenomenon: clinics in law schools that litigate cases in the Supreme Court. Although some commentators have written about the pedagogical goals and benefits of such clinics, no one yet has written about their public interest mission. This Article takes up that task. It begins by empirically testing, for the first time in modern literature, the clinics' foundational assumption: that litigants in the Court who are represented by local counsel instead of Supreme Court specialists are generally at a distinct disadvantage. Finding that assumption to be accurate, the Article identifies and discusses opportunities that Supreme Court clinics have to serve the public interest. Most importantly, such clinics can level the representational playing field to the benefit of traditionally underserved litigants and bring balance to certain areas of the law that otherwise tend to be skewed by inequalities in lawyering. At the same time, operating a Supreme Court clinic presents special challenges and responsibilities. Unlike most other kinds of clinical work, Supreme Court cases generate reverberations far beyond the specific parties involved—indeed, sometimes beyond the courts themselves. Consequently, insofar as clinics have control over which cases they bring to the Court and can cause the Court to hear cases that it might not otherwise have heard, the clinics' work can implicate sometimes-latent tensions between client-centered representation and cause-based advocacy. The Article is forthright that when it comes to selecting (and, to lesser extent, handling) cases in the Court, there are not always easy ways to navigate these competing approaches to public interest lawyering. But it explores the ethical, practical, and normative issues that operating a Supreme Court pro bono practice raises.*

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INTRODUCTION.....	138
I. TESTING THE VALUE OF SUPREME COURT SPECIALIZATION.....	146
A. <i>Methodology</i> .....	147
B. <i>Relative Success Rates</i> .....	151
C. <i>Isolating Causes for the Differential</i> .....	157
1. <i>Selection bias</i> .....	157
2. <i>Amicus support from the United States</i> .....	160
II. CLINICAL OPPORTUNITIES.....	162
A. <i>Educational Considerations</i> .....	163
1. <i>Pedagogical considerations</i> .....	163
2. <i>Public service considerations</i> .....	164
B. <i>Operational Considerations</i> .....	167
1. <i>Expertise concerning the Court</i> .....	167
a. <i>Seeking certiorari</i> .....	167
b. <i>Opposing certiorari</i> .....	170
c. <i>Litigating on the merits</i> .....	171
2. <i>Resources</i> .....	171
a. <i>Certiorari stage</i> .....	172
b. <i>Merits stage</i> .....	173
3. <i>Substantive expertise</i> .....	174
III. CLINICAL CHALLENGES AND RESPONSIBILITIES.....	176
A. <i>Case Selection</i> .....	176
1. <i>Alternative avenues for relief</i> .....	179
2. <i>Coordination of similar cases</i> .....	184
3. <i>Screening cases to avoid making “bad law”</i> .....	187
a. <i>Putting the issue in context</i> .....	188
b. <i>Can clinics screen?</i> .....	190
c. <i>Should clinics screen?</i> .....	191
B. <i>Case Handling</i> .....	198
C. <i>Postdecision Work</i> .....	200
CONCLUSION.....	201

## INTRODUCTION

Early in the October Term 2009, the Supreme Court was hearing argument in a case, *Perdue v. Kenny A.*,<sup>1</sup> raising the question whether attorneys who prevail in a civil rights case may receive a fee enhancement above their typical lodestar rate for having done an exceptionally good job on a case. Chief Justice Roberts interrupted the plaintiffs’ lawyer. “I don’t understand the concept of extraordinary success or results obtained,” the Chief Justice suggested.<sup>2</sup>

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1. 130 S. Ct. 1662 (2010).

2. Transcript of Oral Argument at 30, *Kenny A.*, 130 S. Ct. 1662 (No. 08-970), 2009 WL 3293870.

The results that are obtained are presumably the results that are dictated or command[ed] or required under the law. And it's not like, well, you had a really good attorney, so I'm going to say the law means this, which gives you a lot more, but if you had a bad attorney I would say the law [means something else]. The results obtained . . . should be what the law requires, and not different results because you have different lawyers.<sup>3</sup>

Chief Justice Roberts' comments were a bit tongue-in-cheek.<sup>4</sup> For one thing, the Chief Justice himself was an exceptional advocate before he was appointed to the bench. He was known for being able to secure victories in particularly challenging cases. For another, the Chief Justice was speaking to Paul Clement, a former U.S. Solicitor General whom the plaintiffs had hired in the case presumably because they thought his extraordinary skills might make a difference. Finally, and most important, it is common wisdom that the quality of advocacy often *does* matter.<sup>5</sup> Better lawyers often get better results for their clients.<sup>6</sup> (Better lawyering, of course, might be the result of superior skill, superior experience, superior resources, or some combination of all three.)<sup>7</sup> At least that has long been the collective wisdom—reinforced by the market—when it comes to settlements, trials, and initial appeals.

But when it comes to Supreme Court litigation, one might think that the Chief Justice is right. Certainly, one might *want* to think that the Chief Justice

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3. *Id.* at 30-31.

4. The press reported it that way. *See, e.g.*, Robert Barnes, *Justices Weigh \$4.5 Million Bonus Awarded Lawyers in Ga. Litigation*, WASH. POST (Oct. 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/14/AR2009101403768.html>; Adam Liptak, *Justices Put Curbs on Payment for Lawyers*, N.Y. TIMES (Apr. 21, 2010), <http://www.nytimes.com/2010/04/22/us/22scotus.html>; Dahlia Lithwick, *The \$5 Million Man*, SLATE (Oct. 14, 2009, 7:49 PM ET), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2009/10/the\\_5\\_million\\_man.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2009/10/the_5_million_man.html); Tony Mauro, *High Court Justices Doubt Lawyers Should Be Paid Extra for Winning*, NAT'L L.J. (Oct. 15, 2009), <http://www.law.com/jsp/article.jsp?id=1202434599147>.

5. *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 335-36 & tbl.10, 343-44 (2011) (reporting results of survey of trial and intermediate appellate judges).

6. *See, e.g.*, David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1173 (2007) (finding that criminal defendants who are assigned public defenders in the ninetieth percentile of ability have an incarceration rate fourteen percentage points lower than those assigned public defenders in the tenth percentile of ability); Posner & Yoon, *supra* note 5, at 346 (finding that the judicial survey reinforced “evidence that the quality of legal representation has a strong effect on case outcomes” (footnote omitted)).

7. *See* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1077 (1984) (“Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory.”); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 101-04 (1974) (describing how attorneys with greater resources and expertise typically generate better outcomes for their clients).

is right. Supreme Court cases typically deal primarily with pure questions of law. And it seems strange to say that the requirements of the Constitution—or, for that matter, any federal statute—can depend on who happens to represent the parties in a case. Shouldn't the meaning of statutes and constitutional provisions be fixed, free from the arbitrariness of which lawyers might be involved in a given case?

On the other hand, it stands to reason that if the quality and experience of lawyers matter everywhere else, they ought to matter in the Supreme Court as well. The Justices are people like any other judges. Some Justices are more expert in some fields than others; they have different life experiences and bodies of knowledge; and they face resource and time constraints on their acquisition of new information. They therefore ought to respond, at least in marginal cases, to exceptional advocacy.

That is the calculation that the plaintiffs made in selecting Paul Clement as their attorney in *Kenny A*. It is also the calculation that the United States government made years ago when it established the Solicitor General's office. Many states have followed suit in recent years, establishing or enhancing existing solicitors general's offices.<sup>8</sup> And as Richard Lazarus has recently elaborated, the business community has also increasingly turned to a select group of Supreme Court "specialist" lawyers, hoping to boost its influence and to improve its outcomes in the Court.<sup>9</sup> As a result of these trends, we live in the first era since the one shortly following the country's founding in which a genuine "Supreme Court Bar" exists and handles a substantial portion of the cases the Court hears.<sup>10</sup>

What is more, in statistical analyses concerning cases the Supreme Court decided between 1977 and 1982, Kevin McGuire concluded that having more experienced counsel did matter. Leaving aside cases in which the Solicitor General's office was involved, and holding all else equal (including the identity of the parties and ideology of the position espoused), a petitioner's odds of winning during that period rose between 7% and 10% when represented by an attorney with more experience in handling Supreme Court cases.<sup>11</sup> Petitioners

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8. Symposium, *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545, 637-42 (2010) (describing the "explosion" of state solicitor general offices since 2001); John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 77 (2005).

9. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490-91 (2008).

10. See *id.* at 1489, 1497-501.

11. See KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 192 (1993) [hereinafter MCGUIRE, *LEGAL ELITES*] (finding a 10% difference in outcomes); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 193-94 (1995) [hereinafter McGuire, *Repeat Players*] (adjusting analysis and finding a 7% difference). For various reasons, these studies were somewhat imperfect. See Lazarus, *supra* note 9, at 1545 n.236.

won only 65% to 66% of the cases decided during that period but won between 73% and 75% of cases in which they were represented by attorneys with more experience than the respondents.<sup>12</sup> In an even more striking finding, McGuire concluded that experience was so important that when the Solicitor General's office faced off against equally experienced counsel, the office's oft-noted litigation advantage<sup>13</sup>—deriving primarily from its lawyers' depth of experience and the special client they represent—"disappear[ed] completely."<sup>14</sup> He "conclude[d] that, at least insofar as decisions on the merits are concerned, the federal government is not, as some have suggested, the 'tenth justice.' Instead, the solicitor general is merely one of many successful lawyers who appear before the Court."<sup>15</sup>

These statistics are obviously somewhat outdated, arising from a different Court and a different time. In the late 1970s and early 1980s, there were hardly any lawyers outside of the Solicitor General's office with significant Supreme Court experience who appeared in the Court.<sup>16</sup> Whatever local lawyer happened to have a case that went up to the Court tended to keep it. Thus, differences in "experience" were often quite marginal (for instance, one prior argument versus two), and the Solicitor General rarely faced off against equally experienced counsel. For these reasons and others, McGuire's analyses are somewhat imperfect.<sup>17</sup> Indeed, Lazarus recently offered that his "intuition based on involvement in literally hundreds of cases before the Court is that McGuire's analysis significantly overstates the extent to which litigation experience eliminates the distinct impact that the Solicitor General's Office has on

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12. MCGUIRE, *LEGAL ELITES*, *supra* note 11, at 192; McGuire, *Repeat Players*, *supra* note 11, at 193-94.

13. *See, e.g.*, John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 734 (1983) (noting that the Government wins "two of every three cases the solicitor general briefs or argues"); Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politization in the Solicitor General's Office*, 71 J. POL. 224, 225 (2009) (noting that scholars have "demonstrated that the justices overwhelmingly support the [Solicitor General]'s legal positions on the merits compared to all other participants" in Supreme Court litigation).

14. Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 515 (1998).

15. *Id.* at 506 (citation omitted).

16. Lazarus, *supra* note 9, at 1497. In October Term 1980, for example, less than 6% of the successful petitions for certiorari filed by lawyers outside of the Solicitor General's office were filed by lawyers who had presented more than five previous arguments before the Court. *Id.* at 1516. By October Term 2006, that percentage had risen to 44%. *Id.* Indeed, shortly after his appointment in 1986, Chief Justice Rehnquist remarked that "there is no such Supreme Court bar at the present time." *Id.* at 1497. The modern Supreme Court bar, in fact, was just beginning to form at that time. *See id.* at 1497-99.

17. For other reasons that McGuire's conclusions may be imprecise, see *id.* at 1545 n.236.

the Court's decision[s]."<sup>18</sup> Even so, Lazarus agreed that "the emergence of a private Supreme Court Bar capable of matching and sometimes even bettering" the Solicitor General's Office in terms of experience has "reduc[ed] the Solicitor General's disproportionate influence on substantive outcome."<sup>19</sup> And if that supposition is correct, one would also predict as a general matter that that expertise in advocacy, as well as depth of resources, would still make at least some difference in the Supreme Court—whether one's opponent be the government, a business, or any other litigant.

This is no small matter. As Richard Posner and Albert Yoon recently explained (with trial and intermediate appellate courts principally in mind):

To the extent that law is purely a private good—as in many civil cases it is—disparities, even vast ones, [in quality of representation] may be tolerable. But the legal process is also an important public good. Especially in a case-based legal system such as that of the United States . . . , litigation not only protects private and public rights but also is the vehicle for the development and refinement of the law itself. That function can be distorted by large disparities in the quality of legal representation . . . .<sup>20</sup>

As serious of a concern as this is with respect to garden-variety litigation, it is enormously important when it comes to Supreme Court cases. Such cases establish precedent that defines the law across the country, and for generations. In that sense, no Supreme Court case involves just the named parties. The lawyers represent not just the actual litigants involved but also, in a very real sense, untold numbers of other current and future individuals who find themselves in similar or related circumstances. A "wrong" turn in the law—that is, a turn that is affected by an imbalance in representation instead of the strength of legal arguments—can have profound consequences. And an ongoing representational disadvantage for identifiable classes of litigants can systematically skew the law against them.

It was with these assumptions partly in mind that Stanford Law School, in 2004, created the nation's first Supreme Court Litigation Clinic.<sup>21</sup> The school's primary hope, of course, was that by providing pro bono legal assistance to litigants in the Court, the Clinic would provide an excellent educational experience for students. But the school also hoped that the Clinic, in line with the

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18. *Id.* at 1545 n.237; see also JEFF YATES, POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT 95-103 (2002) (positing that institutional deference to the executive branch accounts for a significant part of Solicitor General's success in the Court).

19. Lazarus, *supra* note 9, at 1545-46.

20. Posner & Yoon, *supra* note 5, at 349.

21. Adam Liptak, *Specialists' Help at the Supreme Court Can Come with a Catch*, N.Y. TIMES, Oct. 10, 2010, at A1, available at <http://www.nytimes.com/2010/10/10/us/10lawyers.html>.

general design of law school clinics,<sup>22</sup> would perform a public service: providing expert counsel and a pool of resources to litigants—most often, criminal defendants and individual civil plaintiffs—who would not otherwise be able to pay for such assistance.

The Stanford Clinic's three original instructors—Pam Karlan, Tom Goldstein, and Amy Howe—have published an article describing the Clinic's educational attributes and pedagogical approaches.<sup>23</sup> When they wrote their piece, however, it seemed too soon to assess the Clinic's public service mission. The Clinic's docket was still developing, and the Court was just starting to pass judgment on its cases. And no other law school had yet entered the field.

The Stanford Clinic has now been up and running for nine years, and it has settled into some regular patterns and practices. In addition, in the years since Stanford's Clinic has matured, several other law schools have launched similar clinics. Some clinics, like Stanford's, are run primarily by law school faculty, with the assistance of outside attorneys. Others, such as Yale's Clinic, are run primarily by an outside law firm (in Yale's case, Mayer Brown), with law school faculty and staff playing a supporting role. Either way, the upshot is that litigants in the Court are now receiving expert representation from a new source: law school faculty and lawyers funded by the law schools, as well as eager and energetic students.

It thus seems an appropriate time to take stock of whether Supreme Court clinics serve a beneficial role in the Supreme Court bar. The clinics, collectively, have argued more than forty cases on the merits and now represent a party in more than one in ten cases on the Court's plenary docket. The cases involve everything from criminal procedure to bankruptcy law to voting rights. And the clinics have represented both petitioners and respondents in significant numbers at the certiorari stage.

What about the results? Thus far, they have been encouraging. I am not privy to other clinics' certiorari-stage statistics, but the Stanford Clinic—which is likely to be at least roughly representative of the others—has enjoyed considerable success in persuading the Court to hear its clients' cases. As of the end of the October 2010 Term, the Stanford Clinic had succeeded in getting certiorari granted in more than 39% of the petitions (20 of 51) it has filed—“almost certainly” a higher percentage “than any practice in the nation except for the

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22. See Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23, 23-25 (2006); Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 566-67 (2011).

23. See Pamela S. Karlan, Thomas C. Goldstein & Amy Howe, *Go East, Young Lawyers: The Stanford Law School Supreme Court Litigation Clinic*, 7 J. APP. PRAC. & PROCESS 207 (2005).

solicitor general's office."<sup>24</sup> The clinics also have helped parties defeat certiorari in numerous cases that were serious candidates for review. And against the backdrop of a Court that tends to favor the clinics' most frequent adversaries (businesses in civil cases and the government in criminal and civil rights cases),<sup>25</sup> the clinics have succeeded in winning a majority of their cases that the Court has decided on the merits.<sup>26</sup>

At the same time, the clinics' success (and, to some extent, their mere existence) has given rise to some theoretically and ethically challenging issues. Exactly how should a Supreme Court clinic's "public service" mission be defined? By the identity of clients? By the identity of counsel that would handle the case if the clinic were not involved? By the substantive issues involved in its cases? Of equal importance, once the mission is defined, how exactly should the clinic pursue that mission? Should the clinic, as a recent article suggests, decline assistance in cases it believes might make "bad law"?<sup>27</sup> Should the clinic assist clients in cases even when the cases are pedagogically defective for some reason? To what degree should the clinic consult with, and abide by the wishes of, relevant interest groups?

This Article explores these policy questions and others. The questions do not admit of easy answers. Indeed, this Article sometimes declines to offer definitive answers at all. The point, instead, is to confirm that Supreme Court clinics have become a significant presence in the Supreme Court bar and to begin to grapple with the many opportunities, responsibilities, and ethical dilemmas that follow from this reality. My hope is that this Article will provide a basis for informed thought and debate. The notion of a Supreme Court clinic is still a relatively new one. But the notion has now taken hold at various (mostly elite) law schools. These schools, the students who enroll in these clinics, and outside groups who interact with them ought to have a basis for discussion concerning what these enterprises should be trying to accomplish.

This Article proceeds in three Parts. Part I tests one of the clinics' foundational assumptions—not assessed empirically in any scholarship postdating the emergence of the modern Supreme Court bar—that expertise and resources matter in Supreme Court litigation. Through an empirical analysis of the

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24. Liptak, *supra* note 21. At the time that Liptak made this characterization, Stanford's grant rate was 42%. In all likelihood, however, his comment still holds true. The Court grants the Solicitor General's petitions about 70% of the time. Lazarus, *supra* note 9, at 1493.

25. See Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1, available at <https://www.nytimes.com/2010/07/25/us/25roberts.html>.

26. See *infra* Parts I.B-C.

27. See Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 168-71 (2011).

Court's decisions from October Term 2004 through October Term 2010, this Part confirms that litigants, in the aggregate, have considerably higher odds of success when they have Supreme Court specialists as their counsel. And this difference cannot simply be ascribed to selection bias—that is, the possibility that specialists handle only cases that are inherently easier to win. Even holding all else constant, specialists' clients prevail at significantly higher rates than nonspecialists' clients. Presumably, this comparative advantage is even stronger at the certiorari stage, where expertise comes more directly into play.

Part II discusses the opportunities that these statistical realities create for Supreme Court clinics. Specifically, this Part assesses how clinics can best deploy their resources to serve the public interest. It turns out that there are identifiable categories of traditionally underserved litigants, often represented by inexperienced or resource-strapped counsel, who can benefit from the services of a Supreme Court clinic. This assistance can be important both at the certiorari stage (in terms of identifying cases meriting review that might otherwise never be taken to the Court, and in terms of making arguments for or against granting certiorari) and at the merits stage.

Part III is, in a sense, the flip side of Part II. It considers challenges and potential responsibilities that Supreme Court clinics must confront. All lawyers and law clinics must always put their clients' interests above their own, and Supreme Court clinics are no different. But the forum of the Supreme Court—the allure of handling cases on the merits before that judicial body—can magnify the tension that sometimes resides in that ethical obligation.<sup>28</sup> The power and influence of the Court also raise the stakes of case selection. In particular, a clinic engaged primarily in client-based advocacy (in which the clinics represent individual clients as an end in itself) might accept cases that a clinic following a model of issue-based advocacy (in which each individual case is viewed as a means to the end of pursuing particular policy goals) might shun for fear of making “bad law.” Although I think that a Supreme Court clinic might reasonably decide to follow either approach, the Stanford Clinic, for example, has chosen to pursue a client-based model, in which the clinic views itself more as a legal services office than a cause-lawyering enterprise. Accordingly, using the Stanford Clinic (the Supreme Court clinic, of course, with which I am most familiar) as a case study, I close by offering a defense of that model.

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28. *See id.*; Liptak, *supra* note 21 (quoting Barry A. Schwartz, a criminal defense lawyer in Denver, as supposing that “[t]here’s one and only one reason” many Supreme Court specialists are interested in handling cases. “It’s not because they love your client or believe in the legal principle your case presents. They want to get the case into the Supreme Court.”).

## I. TESTING THE VALUE OF SUPREME COURT SPECIALIZATION

This Part assesses the extent to which Supreme Court specialization affects outcomes on the merits in Supreme Court cases. This issue is central to the public interest mission of a Supreme Court clinic; unlike the clients of many other law school clinics, most clients of Supreme Court clinics will not go unrepresented without a clinic's assistance. Rather, a Supreme Court clinic's claim to be serving the public interest hinges largely on its purported ability to provide markedly *superior* representation to litigants—enhancing their odds of success by supplying expertise and resources to which the litigants would not otherwise have access.

The empirical assessment that follows focuses on litigation at the “merits stage” of cases rather than the certiorari (or jurisdictional) stage. I restrict the focus in this respect because there are far fewer variables to account for at the merits stage. Most importantly, it would be wildly unrealistic to assume, as a starting presumption, that all certiorari petitions have an equal chance of success and then to measure the success rates of specialists against those of nonspecialists. Especially in the clinical realm, specialists will tend to choose cases in part based on their perceived certworthiness, whereas nonspecialist counsel rarely have that luxury. And even within the realm of superficially similar certiorari petitions (say, the class of cases involving acknowledged conflicts among the federal courts of appeals), the chances that the Supreme Court will grant the petition vary dramatically according to several intangible and discretionary factors.

Within the realm of merits cases, by contrast, it seems reasonable to start from a presumption that, in aggregate, all similarly situated litigants (that is, all criminal defendants and all individual civil plaintiffs) share equal chances of prevailing on the merits. I readily acknowledge the possibility that specialists may screen cases for chance of such success more aggressively than nonspecialists. But for reasons I will elaborate, this possibility does not strike me as so powerful and pervasive as to preclude meaningful empirical analysis.

One final word before proceeding to statistics: it should go without saying that neither the value nor the success of a law school Supreme Court clinic should be measured solely (or even primarily) on the basis of its winning percentage. A clinic is as fundamentally an educational institution as it is a law office. But even with respect to its existence as a law office, that component cannot be measured solely according to substantive outcomes. It is one of the oldest and proudest adages of the bar that there is great nobility in providing counsel to any client—and perhaps especially to clients whose legal arguments may be weak. So even if all of a Supreme Court clinic's certiorari petitions were denied and its clients did no better on the merits than anyone else's clients, there would still be reason to think the clinic was performing a public service. But as it turns out, a comprehensive study of the Court's October 2004

through October 2010 Terms (dating back to the first Term in which the Stanford Clinic handled merits cases before the Court) suggests that the kind of Supreme Court specialization that a clinic can offer does indeed produce better outcomes than average and that expertise is what makes the difference.

### A. *Methodology*

In order to determine whether Supreme Court specialization boosts litigants' odds of success on the merits, it is necessary to ask two basic questions. First, how often do litigants represented by specialists prevail compared to other similarly situated litigants? Second, to the extent that litigants represented by specialists prevail more often, are those better outcomes more likely due to Supreme Court expertise (and resources to follow through on that expertise), some other attribute, or merely chance?

In order to explain how I have gone about trying to answer these questions, four preliminary points regarding methodology are in order.

First, in order to make comparisons as accurate as possible, this study focuses only on criminal cases and civil cases that a clinic might reasonably handle consistent with its pro bono mission. Indeed, nearly all of the cases that the Supreme Court clinics have handled on the merits have fallen into one of two categories: criminal cases (including habeas corpus cases)<sup>29</sup> in which clinics have represented the defendant, and civil cases in which clinics have represented the plaintiff. I therefore include all criminal cases in the study, except for white-collar crime and tax cases, where the defendants typically are businesses or individuals with the ability to hire Supreme Court specialists.<sup>30</sup> On the civil side, I have excluded cases in which the plaintiffs were businesses, governmental entities, labor unions, or other organizations—again, because these types of entities typically can pay for top-flight counsel. That leaves a batch of civil cases for comparison in which individual plaintiffs alleged violations of employment discrimination statutes, other employment laws, constitutional and statutory civil rights provisions, consumer protection laws, tort law, maritime law, or human rights statutes or treaties, as well as cases in which plaintiffs sought various kinds of federal benefits, bankruptcy protection, or employee benefits. Finally, I include immigration cases, which, like criminal cases, involve individuals (almost always of limited means) against the federal government.

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29. Habeas cases are technically civil cases. But they involve criminal law insofar as the issue is whether a person convicted of a crime should be released from custody on the ground that his constitutional rights were violated at trial.

30. For example, in the Court's recent trilogy of cases concerning honest services fraud, the defendants were each represented by Supreme Court specialists: Sri Srinivasan in *Skilling v. United States*, 130 S. Ct. 2896 (2010); Miguel Estrada in *Black v. United States*, 130 S. Ct. 2963 (2010); and Donald Ayer in *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010).

Second, in order to judge success at the merits, one needs to focus on cases that involved a full-blown merits stage. That leaves out cases where the Court summarily reversed a decision, for such cases lack any merits briefing or oral argument from lawyers. It includes, however, cases in which the Court dismissed the petition as improvidently granted after merits briefing and argument. As I explain in more detail below,<sup>31</sup> such an outcome (commonly known as a “DIG”) is unambiguously a win for the respondent, insofar as its effect is to leave intact the decision of the court below, where the respondent prevailed. While a DIG does not create precedent, it is otherwise no different from an affirmance as far as the respondent is concerned.

Third, conforming to conventional measures of success, any decision that upsets the judgment below in any way is considered a victory for the petitioner. If the Court leaves the judgment below entirely in place, it is a victory for the respondent.<sup>32</sup> To be sure, this binary approach is to some degree overly wooden. Even setting broader interests aside and focusing just on clients, some victories are different from others, and some losses are different from others. A victory in the Supreme Court that establishes a legal test that the litigant will have difficulty satisfying on a remand applying it to the facts of the case is not much of a win. As Lazarus explains:

Sometimes . . . the mark of distinction for a Supreme Court advocate is being able to recognize that a case is going to be lost before the High Court: a favorable lower court judgment is going to be reversed or an unfavorable one affirmed. . . . The [lawyer]’s task in such circumstances, which is not all infrequent, is candidly to explain the situation to the client, and to develop a legal strategy for optimizing the possibility of what is often dubbed a “soft landing.”<sup>33</sup>

A soft landing generally leaves open alternative paths to prevailing on remand or in future litigation. Yet it would clearly be difficult, if not impossible, to measure and quantify this kind of success. And it seems safe to assume that lawyers who are able to prevail more often are also more likely to be able to achieve this more subtle kind of success. Accordingly, this empirical analysis measures only technical victories.

Fourth, I have taken the cases in the sample and coded them according to whether the defendant (in criminal cases) or the plaintiff (in civil cases) or the immigrant (1) was the petitioner or the respondent; and (2) was represented by a Supreme Court specialist or not. The second part of this coding obviously gives rise to two more definitional issues: who, exactly, counts as a party’s attorney, and who counts as a Supreme Court specialist?

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31. See *infra* text accompanying notes 76-80.

32. The Supreme Court apportion costs in this manner, too. See SUP. CT. R. 43.

33. Lazarus, *supra* note 9, at 1541.

I treat the person who presents oral argument—and only that person—as a party’s attorney. The main reason for doing this is that it is impossible to know how involved various other lawyers listed on the cover of a brief might have been in a brief’s production. (Indeed, sometimes lawyers not even listed on a brief had more to do with it than those who were listed.) So the only consistent way to code attorney expertise is to focus on counsel who argued the case.<sup>34</sup>

A second reason for focusing on arguing counsel is that he or she is the person most likely to have had control over the case’s briefing and strategic decisionmaking. I understand that this is not always the case. Sometimes solo practitioners and other lawyers who argue cases affiliate with Supreme Court specialists for purposes of briefing, allowing the specialists significant (if not total) control over the case’s briefing. But in my experience, the attorney who will argue the case usually retains at least veto power in that circumstance—and often the attorney has considerably more to say about how the brief is written. At any rate, there can be no doubt that the attorney who argues a case has the last word with respect to the party’s argument. That attorney can reshape the party’s argument or even concede points at oral argument.<sup>35</sup>

For purposes of simplicity and consistency, I define a Supreme Court specialist by starting with the bright-line definition for expertise coined by Lazarus: An expert in Supreme Court advocacy, he asserted, is an attorney who, at the time of the argument, “has either him- or herself presented at least five oral arguments before the Court or works with a law firm or other organization with attorneys who in the aggregate have presented a total of at least ten arguments before the Court.”<sup>36</sup>

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34. I also ignore whether Supreme Court specialists, including a clinic, represented amici on any given side of a case. The consequence of amicus support is too tangential and difficult to assess to warrant inclusion in the empirical analysis.

35. It is worth noting that to the extent that keying classifications to arguing counsel is an imprecise measurement of a litigant’s having expert representation, that imprecision likely narrows the statistical gap between expert and nonexpert performance. That is, the potential classification issues are likely to underestimate the extent to which experts outperform nonexperts in the statistical analysis that follows. It is much more common for a specialist to write a brief in a case that a nonspecialist argues than vice versa. Thus, there are more cases in the “nonspecialist” pile that actually had significant specialist input than there are cases in the “specialist” pile that were primarily handled by nonspecialists.

36. Lazarus, *supra* note 9, at 1490 n.17. One categorical decision I made in implementing this definition is worth noting. I do not know how Lazarus classified law professors with fewer than five oral arguments, but in the five cases in which such individuals represented the relevant client, I classified the professors as experts on the ground that others at their academic institutions had given a combined ten arguments or more. Those cases are *Davis v. United States*, 131 S. Ct. 2419 (2011) (Orin S. Kerr of George Washington University Law School); *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (per curiam) (Richard D. Friedman of University of Michigan Law School); *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (Judith Resnik of Yale Law School); *Hammon v. Indiana*, 547 U.S. 813 (2006) (Richard D. Friedman of University of Michigan Law School); and *Gonzales v. Raich*, 545 U.S. 1 (2005) (Randy E. Barnett, then of Boston University School of Law). To

Obviously, specialization is not a perfect proxy for skill or effectiveness. Not all lawyers with five or more Supreme Court arguments are outstanding lawyers. On the other hand, many lawyers with fewer than five arguments can do an outstanding job before the Court. For example, a federal public defender who specializes in appellate advocacy might be just as skilled as a Supreme Court specialist at brief writing and oral argument. Similarly, an exceptional lawyer in a particular field, such as patent law, might do a better job than a Supreme Court specialist in such a case. (Exactly when it is better to proceed with nonspecialist counsel as opposed to other highly skilled counsel is a hotly debated subject, and I do not intend to tackle it here. Instead, the empirical assessment that follows is more designed to test Chief Justice Roberts's question at the beginning of this Article whether litigants generally do just as well in the Supreme Court with expert counsel as with a nonspecialist lawyer who happened to pick up the case at its outset.)

At the same time, specialization, as defined above, is the most objective measure one can imagine for quality of counsel. Many others have already written about the advantages such specialization lends.<sup>37</sup> Thus, suffice it to say here that specialization denotes at least three things. First, specialization reflects familiarity with the forum—both its members and its practices. If one took two equally talented lawyers and had one spend five years handling Supreme Court cases and the other, say, doing trials or administrative proceedings before the FCC, it seems obvious that the first lawyer would have an advantage in the Supreme Court—just as the other would have an advantage in the alternative forum. Second, the Court itself is familiar with specialists. Thus, provided that a specialist has a good reputation (and most do), the Court may be more apt (at least subconsciously) to value his or her assertions than those of a lawyer with whom it is not familiar. Third, once an attorney has presented five arguments in the Court, there are solid grounds for assuming that the lawyer is an exceptionally skilled advocate. There are basically only two ways to argue five or more cases in the Supreme Court: The first is to land a job with the Solicitor General's office. The second is to develop a reputation on one's own for exceptional skill. Neither of these avenues *guarantees* exceptional abilities, but they tend to be reliable indicators.

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the extent this classification is debatable, I know that each of the lawyers involved has significant expertise concerning the Court. At any rate, these cases involved three wins (two for petitioners and one for a respondent) and two losses (one for a petitioner and one for a respondent) in the entire empirical analysis, and so the difference in success rate between experts and nonexperts cannot be meaningfully attributed to this classification decision.

37. See, e.g., Lazarus, *supra* note 9; McGuire, *Repeat Players*, *supra* note 11; Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59 (2010).

### B. *Relative Success Rates*

All told, from the October Term 2004 through the October Term 2010, the Court decided a total of 356 cases on the merits that, under the criteria set forth above, are the kinds of cases that clinics typically handle—166 criminal cases, 178 civil cases, and 12 immigration cases.<sup>38</sup> Specialist counsel represented the criminal defendant or civil plaintiff in 43.8% of the cases (58 criminal cases, 91 civil cases, and 7 immigration cases). Within that group, Supreme Court clinics handled 13.2% (47) of the 356 overall cases,<sup>39</sup> while specialists at other kinds of law offices handled 30.6% (109). Nonspecialists represented the party in the remaining 56.2% of the cases. Specialists as a whole represented petitioners more often than respondents in both civil and criminal cases—handling 94 cases for petitioners (41 criminal cases, 47 civil cases, and 6 immigration cases), and 62 cases for respondents (17 criminal cases, 44 civil cases, and 1 immigration case).<sup>40</sup> By contrast, nonspecialists represented respondents more often than petitioners.<sup>41</sup>

In the 356 cases, the Court ruled in favor of the defendant in criminal cases, the plaintiff in civil cases, or the immigrant in immigration cases 39.9% of

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38. The Court sometimes writes a single opinion deciding more than one case. In such circumstances, and where the cases were consolidated for purposes of oral argument, I treat them as a single case. I also treat the Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), as a single case, even though it decided two cases that were not consolidated, because the issues in the case were identical. By contrast, I treat the Court's opinion in *Davis v. Washington*, 547 U.S. 813 (2006), as two cases, because the two cases decided there presented different legal issues and in fact came out differently.

39. The Stanford Clinic handled thirty-three cases; Yale handled eight cases; the University of Virginia handled four; and the University of Pennsylvania and the University of Texas each handled one. Consistent with the methodology described above, these figures account only for cases in which a clinic instructor argued the case. The Virginia Clinic also represented three civil defendants during this period, which fall outside of the sample. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011); *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011); *Fox v. Vice*, 131 S. Ct. 2205 (2011). The University of Pennsylvania's clinic represented one civil defendant as well. See *Abbott v. Abbott*, 130 S. Ct. 1983 (2010).

40. These differences in rates of representation could reflect the fact that it is more likely that a party will take their case to new counsel when their prior counsel lost below. When the party won below, by contrast, it is more likely that they will retain their original counsel because they may feel more confident and perhaps have a better relationship with that counsel. This could also reflect specialists' enhanced ability to get certiorari granted. See *infra* Part II.B.2.a.

41. This differential is driven primarily by civil cases, in which nonspecialists represented 25 petitioners and 62 respondents. In criminal cases, nonspecialists represented petitioners slightly more often than respondents (61 petitioners and 47 respondents), and in immigration cases nonspecialists represented 4 petitioners and 1 respondent. But both kinds of counsel represented both kinds of parties more than often enough to allow for statistical analysis.

the time.<sup>42</sup> When specialist counsel represented the criminal defendant, civil plaintiff, or immigrant, that party won 53.2% of the time. When nonspecialist counsel represented such a party, the party won 29.5% of the time.

But those winning percentages alone could be misleading, since the Court tends to rule in favor of petitioners so much more often than respondents, and, as noted below, specialists represent petitioners at comparatively higher rates than nonspecialists. Separating cases according to that variable yields more meaningful numbers: criminal defendants, civil plaintiffs, and immigrants prevailed in 106 (57.6%) of the 184 cases in which they were petitioners and 36 (20.9%) of the 172 cases in which they were respondents. These numbers are similar across all three types of cases: criminal defendants prevailed in 52.0% of the cases in which they were petitioners<sup>43</sup> and in 18.8% of the cases in which they were respondents;<sup>44</sup> civil plaintiffs prevailed in 63.9% of the cases in which they were petitioners<sup>45</sup> and in 22.6% of the cases in which they were respondents;<sup>46</sup> and immigrants prevailed in 70.0% of the cases in which they were petitioners<sup>47</sup> and in 0% (0 of 2) cases in which they were respondents.

Figures 1 and 2 show what happens when one reintroduces the variable of specialist counsel into these more refined categories.

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42. Although the dozen immigration cases constitute too small a sample for any meaningful analysis, the Court was remarkably consistent in deciding the 344 other criminal and civil cases—ruling for criminal defendants 39.1% of the time and civil plaintiffs 39.3% of the time.

43. 53 of 102 cases.

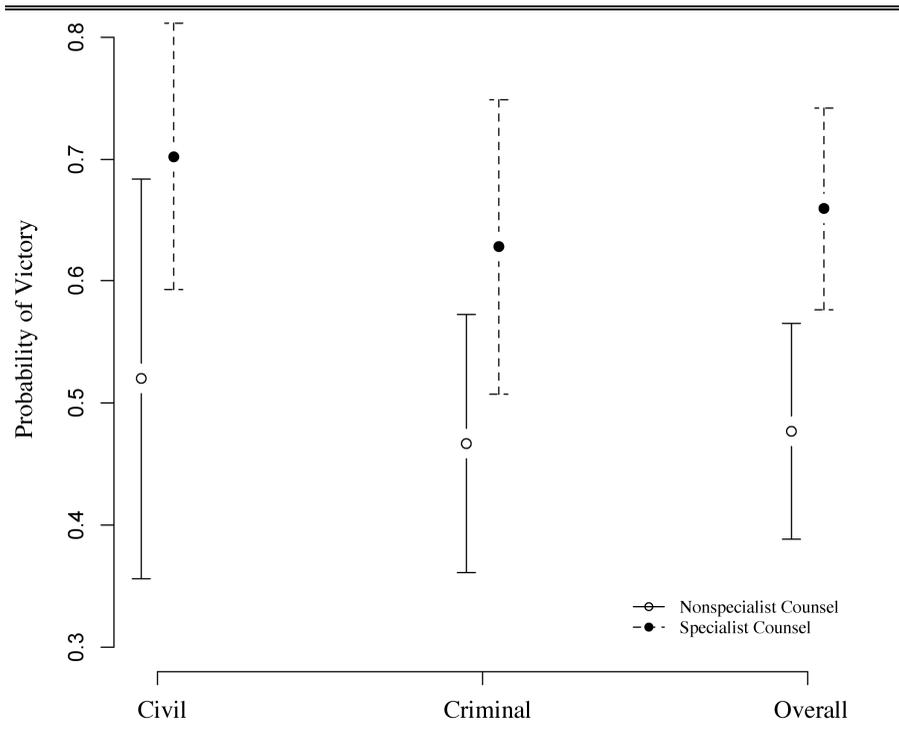
44. 12 of 64 cases.

45. 46 of 72 cases.

46. 24 of 106 cases.

47. 7 of 10 cases.

FIGURE 1  
Differential Success Rates Representing Petitioners<sup>48</sup>



In overall terms, criminal defendants, civil plaintiffs, and immigrants represented by Supreme Court specialists prevailed in 67.0% of the cases in which they were petitioners<sup>49</sup>—61.0% in criminal cases;<sup>50</sup> 70.2% in civil cases;<sup>51</sup> and 83.3% in immigration cases.<sup>52</sup> By contrast, such parties prevailed as petitioners in 47.8% of the cases when represented by nonspecialist counsel<sup>53</sup>—45.9% in criminal cases;<sup>54</sup> 52.0% in civil cases;<sup>55</sup> and 50.0% in immigration cases.<sup>56</sup>

48. Error bars in this and the following charts represent 90% confidence intervals. The values and intervals in Figures 1 and 2 are derived from simulating outcomes in a logistic regression, simulating the probability of winning for each variety of case and counsel, holding other variables at their means.

49. 63 of 94 cases.

50. 25 of 41 cases.

51. 33 of 47 cases.

52. 5 of 6 cases.

53. 43 of 90 cases.

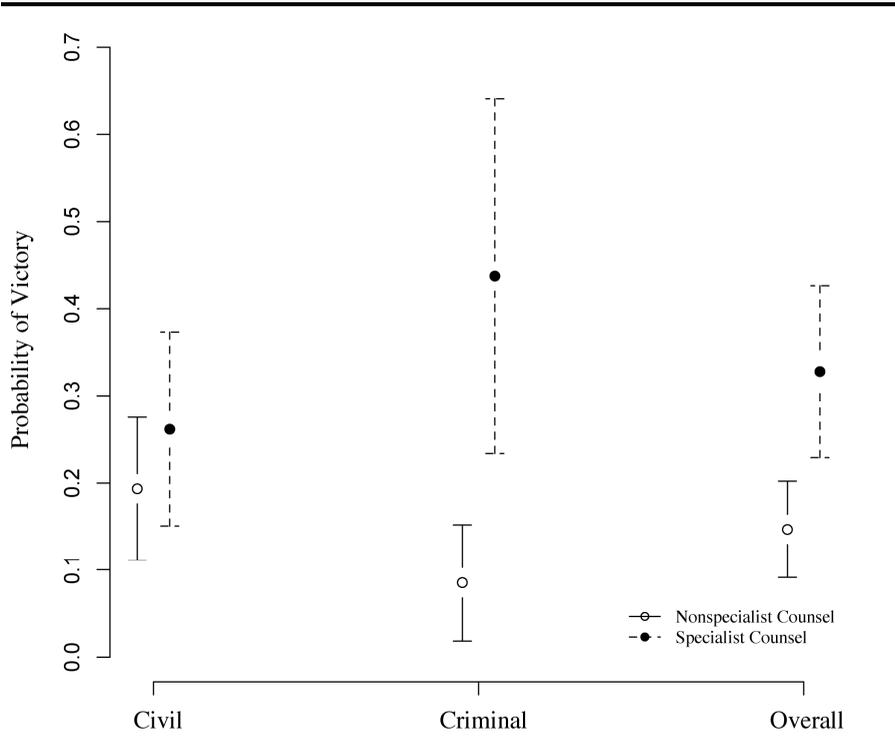
54. 28 of 61 cases.

55. 13 of 25 cases.

56. 2 of 4 cases.

The story with respect to respondents is much the same.

FIGURE 2  
Differential Success Rates Representing Respondents



Criminal defendants, individual civil plaintiffs, and immigrants prevailed in 32.3% of cases as respondents when represented by specialist counsel<sup>57</sup>—47.1% in criminal cases,<sup>58</sup> 27.3% in civil cases,<sup>59</sup> and 0% (0 of 1) in immigration cases. By contrast, such parties prevailed as respondents in just 14.5% of cases when represented by nonspecialist counsel<sup>60</sup>—8.5% in criminal cases,<sup>61</sup> 19.4% in civil cases,<sup>62</sup> and 0% (0 of 1) in immigration cases. That translates to an overall 19.2 percentage point difference for petitioners, and a 17.8 percentage point difference for respondents. In terms of relative odds of success, these

57. 20 of 62 cases.

58. 8 of 17 cases.

59. 12 of 44 cases.

60. 16 of 110 cases.

61. 4 of 47 cases.

62. 12 of 62 cases.

figures mean that petitioners represented by specialists are roughly 1.4 times more likely to win their cases, and respondents represented by specialists are slightly more than twice as likely to prevail.

Yet these differentials—significant as they are—may understate the impact of specialist counsel, for the statistics look at only one side of the equation. That is, these numbers do not differentiate cases in which opposing parties are represented by specialists from those in which they are represented by nonspecialists. Taking that next step yields even more dramatic figures. If one looks at the 98 cases in the sample in which the opposing party was represented by the Solicitor General’s office (an office of specialists at the top of the profession), one sees that specialists won 65.2% of their cases as petitioners,<sup>63</sup> whereas nonspecialists won 43.5% of such cases.<sup>64</sup> Specialists won 57.1% of their cases as respondents,<sup>65</sup> whereas nonspecialists won just 9.1% of such cases.<sup>66</sup> These results, which are relatively consistent across criminal and civil cases,<sup>67</sup> are illustrated in Figure 3.

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63. 15 of 23 cases.

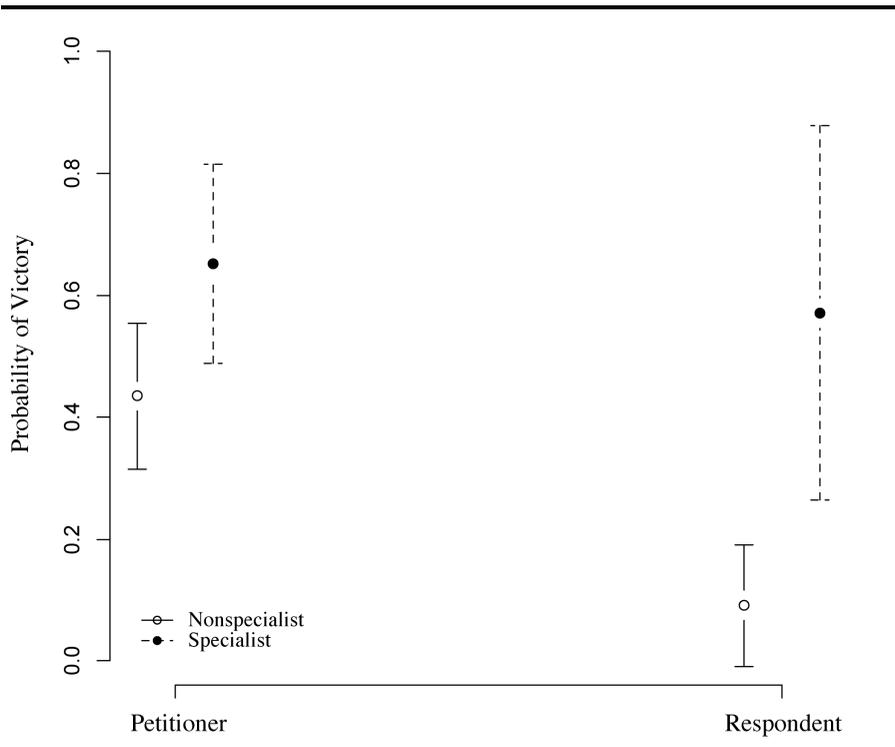
64. 20 of 46 cases.

65. 4 of 7 cases.

66. 2 of 22 cases.

67. In criminal cases, specialists won 62.5% (10 of 16) of their cases as petitioners, whereas nonspecialists won 39.4% of these cases (13 of 33). Specialists won 80.0% (4 of 5) of such cases as respondents, whereas nonspecialists won 22.2% (2 of 9) of these cases.

FIGURE 3  
 Percentage Rates of Success (Based on Party Lawyer Represents) Against the  
 Solicitor General



All of these statistics regarding the effects of specialists hold true with respect to the subset of specialists working with Supreme Court clinics. The clinics have prevailed in 21 of the 30 cases (70.0%) in which they have represented petitioners. They have prevailed in 6 of the 17 cases (35.3%) in which they have represented respondents. These success rates are slightly higher than those of nonclinical specialists with respect to both petitioners and respondents, but within the margin of error in light of the modest sample size—and well ahead of the percentages for nonspecialists. The clinics also have litigated against the Solicitor General's office in only 17 cases, but the early returns suggest that their success rates in such cases are in line with other specialist counsel—and, again, are substantially better than nonspecialists.<sup>68</sup>

68. The clinics have prevailed in 54.5% of their cases (6 of 11) as petitioners against the Solicitor General, and in 66.7% (4 of 6) of their cases as respondents. The former figure is lower than other specialists, but the latter figure—albeit based on a very small sample size—is higher than even the general the success rate for other specialists.

### C. *Isolating Causes for the Differential*

No variable besides specialization in the Court seems to explain these differential rates of success. For starters, as noted above, the types of cases and clients are similar across the board. There is no legal, factual, or procedural characteristic that tends to distinguish cases that specialists handle from those that they do not. But there are two possible explanations for at least some of the success differential between specialists and nonspecialists. First, there might be a problem of selection bias. That is, specialists might be simply choosing to take on, or succeeding in convincing the Court to review, more winnable cases than nonspecialists. Second, and somewhat relatedly, the United States, through the Solicitor General's office, might be supporting the clients of specialists as an amicus more often than those of nonspecialists.<sup>69</sup> Each of these possibilities deserves close consideration.

#### 1. *Selection bias*

It certainly strikes me as possible that selection bias might explain *some* of the differential in success that petitioners enjoy. One factor in the Court's certiorari calculus is whether it believes the decision below is erroneous.<sup>70</sup> Thus, Supreme Court specialists seeking out possible certiorari petitions might favor cases they think present strong claims on the merits.<sup>71</sup> Even more important,

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69. A third possible explanation is that the differential rates of success between specialists and nonspecialists is mostly, if not exclusively, attributable to a subgroup of particularly ineffective nonspecialists—perhaps those particularly lacking in appellate litigation skills, resources, or both. The difficulty, however, is that there is no real way to test that hypothesis, for it would require one to conduct a dauntingly subjective task—that is, to rate individuals lawyers qualitatively instead of on some empirical basis. So I will proceed on two general assumptions: (1) that more skillful nonspecialists generally perform better than less skillful nonspecialists; and (2) even so, that simply reinforces the central thesis of this Article—namely, that lawyering does matter a great deal in the Supreme Court.

70. See SUP. CT. R. 10(a), (c) (indicating that certiorari is more likely when a lower court has “departed from the accepted and usual course of judicial proceedings” or when the lower court has “decided an important federal question in a way that conflicts with relevant decisions of this Court”).

71. The Stanford Clinic, for example, does not screen its cases for “winnability,” except insofar as a strong argument on the merits can enhance a case's certworthiness. Cases can take many twists and turns during briefing and oral argument, often making it very difficult to predict at the outset of a case whether the case is likely a winner or a loser on the merits. Of course, it is not always hard to predict whether the Court will decide a certain case a certain way. When it comes to high-profile, hot-button social issues, the Justices sometimes have telegraphed their views in prior opinions in ways that make a case's eventual outcome all but certain. But I believe that such cases are the exception rather than the rule. When dealing, for example, with a statutory issue that has divided lower courts and that will not grab national news headlines (which is to say, a typical case for a clinic), the Court can be rather unpredictable. See, e.g., Theodore W. Ruger et al., Essay, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court*

the specialists might be better than nonspecialists at dressing up cases that are winners on the merits in the garb otherwise necessary to get them in the door of the Court—demonstrating splits of authority in the lower courts and nationwide importance of legal issues.<sup>72</sup> (Of course, this latter possibility would still mean that specialists make a difference, just in a somewhat different way.) Nonspecialists, by contrast, might have a harder time getting the Court’s attention in such cases and thus end up litigating a higher percentage of cases for petitioners in which the Court granted certiorari for reasons wholly (or mostly) independent of the merits. It stands to reason that lawyers would have a harder time winning those cases.

At the same time, it is hard to see much, if any, evidence of experts undertaking more winnable cases on behalf of respondents than nonspecialists handle.<sup>73</sup> Even if specialists are more adept at getting certiorari denied for respondents when their clients have weak merits arguments, I don’t know of any specialists who turn down (or decide not to offer to help in) cases the Court had decided to hear simply because the specialists think the respondent has a weak argument on the merits. One solo practitioner told me recently that he received eighteen calls offering help within forty-eight hours of the Court granting certiorari in a case that he had won below—a case in which one’s initial impression from the certiorari papers would have been that the Court took the case because it was inclined to reverse.<sup>74</sup>

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*Decisionmaking*, 104 COLUM. L. REV. 1150, 1171 (2004) (finding that a panel of legal specialists correctly predicted the outcome of only 59.1% of cases during the 2002 Term).

72. For instance, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), Miller-El’s specialist counsel Seth Waxman framed Miller-El’s petition for a writ of certiorari in terms of the Court’s Rule 10(a) exercise of “supervisory powers” and apparently persuaded the Court that certiorari was necessary to preserve its rule against racially discriminatory peremptory strikes. See Petition for Writ of Certiorari at i, *Miller-El*, 545 U.S. 231 (No. 03-9659), 2004 WL 3250799. Viewed from another perspective, however, the petition sought error correction, which is rarely the basis for the Court’s review. See SUP. CT. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

73. The best I can do here is to rely on my own experience and knowledge of how the Supreme Court bar operates. Ideally, one would be able to empirically test a selection-bias hypothesis by comparing cases in which specialists handled the certiorari stage with cases in which specialists became involved for the first time at the merits stage. But unfortunately, this does not work. Specialists often work on cases at the certiorari stage on behalf of respondents yet leave their names off of the briefs for fear of signaling to the Court that the case is a serious candidate for certiorari. And while specialists typically do put their names on certiorari petitions, there were not enough cases during the seven-year span studied here in which nonspecialists succeeded in getting certiorari granted and then turned the case over to specialists to handle the merits stage to generate any meaningful statistics.

74. This was a fairly narrow and fact-bound case in which a federal court of appeals had granted habeas relief based on a purported constitutional error in jury selection. No split of authority was alleged. The Supreme Court did indeed reverse, with the unanimous Court holding that the state prisoner was not entitled to habeas relief under the high bar set in habeas law. See *Berghuis v. Smith*, 130 S. Ct. 1382 (2010).

The only area in which it might possibly be true that specialists avoid cases with poor chances of success would be habeas cases in which states obtain certiorari. In this area more than any other, the current Court is willing to grant certiorari to engage in “error correction”—that is, granting certiorari simply to reverse the decision below in a way that will not create any important new precedent or settle any conflict in law. It is possible that specialists see these merits cases as so difficult to win or otherwise substantively undesirable that they do not put the same effort into becoming involved in them as they do in other cases.<sup>75</sup>

Indeed, when one looks at the statistics from the October 2004 Term through the end of October 2010 Term, one sees that nonspecialists handled 23 habeas cases on behalf of respondents. They lost all 23. Expert counsel handled 5 such cases. They lost 4 and won 1. If we were to adjust the success rates for respondents by taking out these habeas cases, we would end up with specialist counsel winning 33.3% of their cases (19 of 57) on behalf of respondents and nonspecialists winning 18.4% (16 of 87).

At any rate, but before jumping to any conclusion that such an adjustment is appropriate, even the one win that specialist counsel achieved for a respondent in a habeas case suggests that specialization makes a difference. The case that the specialist won was *Roper v. Weaver*,<sup>76</sup> in which the Court dismissed the case as improvidently granted after oral argument. At first blush, a DIG might seem like a fluke. But in reality, it can take great skill and familiarity with the Court’s practices and discretionary preferences to obtain a DIG. After all, once the Court reviews the merits briefs and hears oral argument, it has sunk a tremendous amount of its limited resources into the case. All of the Court’s momentum is moving toward issuing an opinion in the case. Only by persuading the Court that there is strong cause to abandon all of those efforts can counsel obtain a DIG.

That is what Weaver’s counsel<sup>77</sup> achieved in *Roper v. Weaver*. The Court granted the State of Missouri’s petition for certiorari to consider “whether the Court of Appeals’ application of the more stringent standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was consistent with our interpretation of that statute.”<sup>78</sup> In merits briefing and oral argument, however, Weaver’s counsel pointed out for the first time that a procedural glitch in the district court proceedings rendered it questionable whether

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75. While this is possible, I don’t think it is very likely for the reasons discussed in the preceding paragraph.

76. 550 U.S. 598 (2007) (per curiam).

77. Weaver’s counsel was John Blume, a professor and death penalty expert at Cornell Law School who has argued seven cases in the Court.

78. *Weaver*, 550 U.S. at 599 (citation omitted).

AEDPA even applied in the case.<sup>79</sup> (Weaver had nonspecialist counsel when he filed his brief in opposition, and those lawyers did not point out this issue.) Weaver's merits counsel also emphasized that Weaver's two codefendants had obtained relief on the constitutional claim he had advanced. Neither of these two things compelled relief in Weaver's favor. But by artfully pressing them both, his counsel was able to persuade the Court, by a 6-3 vote, to "exercise [its] discretion" to dismiss the case and thereby "to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner."<sup>80</sup>

Contrast this outcome with the Court's treatment of *Oregon v. Guzek*,<sup>81</sup> another death penalty case (although not a habeas case). The Court granted the State's petition for certiorari in that case to consider whether a defendant has a right under the Eighth Amendment to present evidence at sentencing designed to seek mercy on the basis of a "residual doubt" as to the defendant's guilt.<sup>82</sup> During merits briefing, it became apparent that Oregon state law independently allowed Guzek to introduce much, if not all, of the evidence at issue, thereby seemingly rendering the federal issue irrelevant. At oral argument, several of the Court's more liberal members pressed Guzek's counsel as to whether he would simply invoke that state law on remand if he lost in the Court. Apparently not realizing, however, that these were friendly questions designed to create grounds for a DIG (likely the only way Guzek could have avoided a reversal), Guzek's counsel fought the questions, and insisted that he wanted to preserve the right to go further than state law clearly allowed.<sup>83</sup> The Court went on to reach the merits and to unanimously reverse, citing those concessions in oral argument as its basis for declining to dismiss the case.<sup>84</sup>

## 2. *Amicus support from the United States*

Support from the United States, a factor well known to affect a party's odds of success,<sup>85</sup> does not seem to explain much, if any, of the differentials in success rates between specialists and nonspecialists. But the reasons why this is so are a bit more complicated.

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79. *See id.* at 600-01.

80. *Id.* at 601.

81. 546 U.S. 517 (2006).

82. *See* Petition for Writ of Certiorari at i, *Guzek*, 546 U.S. 517 (No. 04-928), 2005 WL 40870.

83. *See* Transcript of Oral Argument at 37-39, 41, 55-56, *Guzek*, 546 U.S. 517 (No. 04-928), 2005 WL 3387695.

84. *Guzek*, 546 U.S. at 522-23.

85. *See* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 145-50 (1992); *see also* sources cited *supra* note 13.

The Solicitor General's office has filed amicus briefs *supporting* parties represented by specialists more often than those represented by nonspecialists, and it filed amicus briefs *opposing* parties represented by nonspecialists more often than those represented by specialists. Specifically, in the sample analyzed here, the Solicitor General's office supported petitioners represented by specialists 46.3% of the time, whereas it supported petitioners represented by nonspecialists only 22.2% of the time. The Solicitor General's office supported respondents represented by specialists 28.6% of the time, whereas it supported respondents represented by nonspecialists 22.6% of the time. On the other hand, the Solicitor General's office *opposed* petitioners represented by specialists just 24.4% of the time, while it opposed petitioners represented by nonspecialists more frequently—38.9% of the time. The Solicitor General's office was also less likely to oppose respondents represented by specialists (45.2%) than respondents represented by nonspecialists (50.9%).

There are two conclusions one might draw from these numbers. One might deduce that the differing rates in the Solicitor General's involvement, not any difference in the party's counsel, explain the greater success rates that specialist counsel enjoy. Or one might see the differing rates of involvement as still further evidence of the advantages that specialists confer upon their clients. For three reasons, the latter of these interpretations is much more plausible. First, as explained above, specialists win a significantly higher percentage of cases than nonspecialists in cases in which the Solicitor General's participation is held perfectly constant—that is, in cases where the Solicitor General is opposing counsel.<sup>86</sup> The same is true in cases in which the Solicitor General does not participate at all.<sup>87</sup>

Second, a statistical analysis of the civil cases in which the Solicitor General did file amicus briefs indicates that the Solicitor General's higher likelihood of a favorable intervention on behalf of specialist counsel than nonspecialist counsel accounted for only 47.8% of the difference in success rate between specialists and nonspecialists as petitioners and only 30.0% of the difference as respondents.<sup>88</sup>

Third, even those boosts in success rates are likely attributable to differences in counsel. In particular, it stands to reason that, all else being equal, Supreme Court specialists will be more likely than nonspecialists to be able to

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86. *See supra* text accompanying notes 64-68 and Figure 3.

87. In civil cases in which the Solicitor General did not file a brief, specialists won 9 out of 12 cases (75.0%) when representing petitioners, whereas nonspecialists won 4 out of 7 (57.1%). Specialists won 3 out of 11 cases (27.3%) when representing respondents, whereas nonspecialists won 2 out of 14 (14.3%).

88. That is to say, even if one were to hold the Solicitor General's rates of intervention constant such that specialists' clients were not supported any more often by the Solicitor General's office than nonspecialists', specialists would still retain a sizable chunk of their advantage over nonspecialists in their rates of success on the merits.

persuade the Solicitor General to file in support of their clients—or at least to refrain from filing against them. The process of pitching one’s position to the Solicitor General’s office is much like an appellate proceeding: parties typically send the office a letter (or at least their earlier filings in the case) and have a meeting in which something loosely resembling an oral argument takes place. But the focus of the interaction is as much the government’s interests as the merits of the case. Given that Supreme Court specialists are generally alumni of the Solicitor General’s office or at least frequently interact with that office, these lawyers will naturally have an advantage in making the necessary kinds of arguments to that office.

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In the end, the purpose of this Article is not to pinpoint any statistical “bump” that a litigant receives from a Supreme Court specialist. The only relevant issue is whether litigants receive *some significant kind of advantage* from having such counsel. My findings that they do are statistically significant.<sup>89</sup> Furthermore, it seems that the difference against those represented by nonspecialists—all else held constant—is somewhere between a 19.2% and a 17.8% (or, perhaps, if these calculations should exclude habeas cases in which states are petitioners, a 14.9%<sup>90</sup>) greater chance of success on the merits. The difference when the opposing party is represented by specialists in the Solicitor General’s office is even more pronounced. And I think it is safe to say that whatever the precise statistical advantage on the merits is, Supreme Court specialists provide a greater comparative advantage at the certiorari stage,<sup>91</sup> when familiarity with the Court and credibility of counsel is even more important. But there is no readily apparent way to estimate how much bigger the certiorari stage advantage is than the merits stage advantage. There are simply too many variables in the cases and no real way to compare apples to apples.

## II. CLINICAL OPPORTUNITIES

The fact that Supreme Court specialists can, and do, affect the outcomes of cases confirms that a Supreme Court clinic can provide a public service by

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89. Using a one-sided t-test, one can reject at a 99% confidence level the hypothesis that petitioners represented by nonspecialists are just as likely to prevail as those represented by specialists in favor of the alternative hypothesis that those petitioners represented by specialists are more likely to prevail than those represented by nonspecialists. One can reject the same hypothesis with respect to respondents at the same level.

90. See *supra* text accompanying note 75.

91. See Lazarus, *supra* note 9, at 1515-17 & tbl.2. The Stanford Clinic, for example, has filed petitions for certiorari in 51 cases. The Court has granted 20 (39.2%) of those petitions through October Term 2010.

providing expertise and resources to litigants who otherwise have access to neither. Before elaborating on those opportunities, I want to make clear that, except where otherwise noted, I confine myself in this Part and the next to considering the proper role of a Supreme Court *clinic* in the Supreme Court bar. I recognize that Supreme Court clinics (even those run primarily by law school faculty members instead of lawyers at law firms) share some attributes with private law firm practices that handle cases in the Court on a pro bono basis. But, as I elaborate in Subpart A, the educational mission of a Supreme Court clinic should make it a fundamentally different enterprise than a law firm.

With those educational and pedagogical restrictions in place, Subpart B considers whether a clinic should focus on particular kinds of clients or work. At its best, a clinic can help individual litigants of limited means to get the Court's attention in certiorari petitions and to fend off review when they have won victories below. A clinic can also level the playing field on the merits between individual litigants of limited means and corporate and governmental litigants.

#### A. *Educational Considerations*

There are two kinds of educational considerations that inform a Supreme Court clinic's docket: (1) pedagogical considerations and (2) public service considerations.

##### 1. *Pedagogical considerations*

More than anything, a clinic's mission of teaching law students about the Court and the practice of law imposes significant resource constraints. For example, at full capacity, the Stanford Clinic operates with four instructors (two Stanford faculty members and two "lecturers" who practice law in Washington, D.C. and teach part-time in the clinic) and roughly a dozen students. Given the teaching and editing methods we need to implement with the students and co-counsel,<sup>92</sup> the Clinic has found that the most that it can handle at any given point is about six to ten active cases, while juggling their briefing schedules and, in some instances, awaiting word on whether the Court will hear cases on the merits.

Furthermore, some cases provide better educational opportunities than others. In substantive terms, some areas of law are particularly accessible to law students. All else being equal, students are likely to get more out of a case involving a subject matter they have encountered in law school—criminal procedure or Title VII, for instance—than an arcane area of federal statutory law that they have never come across and that requires specialized experience.

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92. See Karlan et al., *supra* note 23, at 219-23.

A clinic's educational mission also incentivizes it to have a mixture of cases at any given point across a variety of dimensions. A clinic might try to balance its docket in terms of civil versus criminal cases, as well as constitutional versus statutory cases. It might also try to balance its docket in terms of types of litigants it is representing, achieving a mixture of parties and amici, individuals and (sometimes more sophisticated) institutions, and plaintiffs and defendants. It might also balance its docket in terms of stages of Supreme Court litigation, having some petition-stage cases alongside merits-stage cases. (In fact, I think it is especially worthwhile for clinics to represent *respondents* at the certiorari stage, so they can teach the lesson to law students eager to appear before the Supreme Court that sometimes the best thing you can do for your clients is to keep their cases *out* of the Court.)

Finally, a clinic might try to balance its docket in terms of co-counsel arrangements. Sometimes clinics work with appointed counsel who are eager to turn cases over to them. Other times, clinics work with lawyers (such as public defenders in criminal cases<sup>93</sup> or voting rights experts in civil cases<sup>94</sup>) who are experts in the substantive fields at issue but not in Supreme Court litigation. The students benefit from interacting with different kinds of co-counsel. Indeed, working with solo practitioners or small firms often gives students a window into a style of practice to which they have not been directly exposed through on-campus interviews or programs, or their summer jobs.

## 2. *Public service considerations*

On the public service side of the ledger, a clinic's initial consideration will presumably be whether a potential client could afford to hire a Supreme Court specialist. The situation in which a litigant could not do so arises more often than someone unfamiliar with the Court might think. A substantial percentage (more than half) of the Court's cases involve an individual person or persons on at least one side of the case. And individuals typically lack the hundreds of thousands of dollars necessary to hire Supreme Court counsel. Indeed, many of the individuals whose cases go to the Supreme Court are indigent (especially criminal defendants) or people of very modest means (especially plaintiffs in employment cases and civil rights cases). Organizational litigants, such as non-profit institutions and municipalities, also often lack the means to hire specialized Supreme Court counsel.

Not only do individual litigants who wind up in the Supreme Court rarely have the means to hire Supreme Court specialists, but litigants who end up in

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93. *See, e.g.*, *United States v. Tinklenberg*, 131 S. Ct. 2007 (2011) (Stanford Clinic co-counseled with federal public defender).

94. *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406 (2008) (Stanford Clinic co-counseled with voting rights expert).

the Supreme Court hardly ever start their cases—or even prosecute their intermediate appeals—with appointed or contingency-fee counsel who have experience in Supreme Court litigation. Supreme Court litigation (especially on the merits) happens rarely enough that it is highly unlikely that a typical criminal defense attorney or plaintiff's lawyer has ever done it, much less accumulated the kind of experience that comes from handling several cases in a given forum. Furthermore, there is no real way of identifying likely Supreme Court cases at the trial or appellate level, in order to preassign them to lawyers with Supreme Court experience. This is because there is rarely any real way to predict in advance which of the thousands of plausible lower court cases each year will become viable Supreme Court cases. A typical case on the Court's merits docket is certworthy, by its very nature, precisely because it raises a frequently recurring issue of federal law in a run-of-the-mill factual setting.<sup>95</sup> Even with respect to cases that one can say at the trial level contain a certworthy legal issue, it generally is a crapshoot which ones will eventually present themselves suitably for Supreme Court review: Many cases settle. They get resolved on different or alternative grounds. They get bogged down in collateral litigation. Juries return surprise verdicts. The list of things that can happen is as long as the Rules of Civil Procedure.<sup>96</sup>

The lack of available specialist counsel is particularly acute in cases in which an individual sues a corporation. While law firms with Supreme Court practices are increasingly willing to handle cases on behalf of individuals against governmental entities on a pro bono basis, such law firms typically are unwilling to challenge the interests of corporations. That means that plaintiffs

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95. See EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 245 (9th ed. 2007).

96. Two cases that the Stanford Clinic has handled—one criminal, one civil—illustrate aspects of this reality. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court considered the question whether the prosecution in a criminal case violates the Sixth Amendment's Confrontation Clause if it introduces a forensic laboratory report against the defendant without calling the author of the report to the stand. This is an issue that arises literally on a daily basis in courts across the country. No one could have known in advance which case the Court would ultimately choose to resolve the issue. As it turned out, *Melendez-Diaz* was an utterly typical drug prosecution; the Massachusetts Appeals Court had affirmed the case in an unpublished opinion, *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (Mass. App. Ct. 2007), dispensing with the confrontation claim mainly in a footnote; and the Massachusetts Supreme Judicial Court had denied review, *Commonwealth v. Melendez-Diaz*, 874 N.E.2d 407 (Mass. 2007) (table decision).

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Court considered whether a worker may bring a Title VII claim for pay discrimination when she received disparate paychecks within the statutory limitations period but the disparity was due to discriminatory acts that occurred outside of the limitations period. At the time the plaintiff filed her lawsuit, every federal court of appeals to have considered the issue had held that such a claim could be brought. See *id.* at 623 (noting that the Second and D.C. Circuits had ruled in plaintiffs' favor on the issue). A conflict arose—and the case became certworthy—only after Ledbetter prevailed at trial and the defendant appealed, persuading the Eleventh Circuit to reject the previous consensus.

in employment and tort cases, in particular, often lack any access whatsoever to experienced Supreme Court counsel.<sup>97</sup>

In light of this reality, one might argue that a clinic should focus its resources exclusively upon these kinds of cases. I think a clinic might well decide to do so, not only for reasons related to access to counsel, but also—as I discuss more fully below—as one possible way of focusing on a particular subject matter in order to deliver targeted, substantive expertise to clients.<sup>98</sup>

At the same time, there are compelling reasons why a clinic might decide that its public service mission warrants handling other kinds of cases as well. First, while law firms are often willing to take on merits cases involving criminal law or civil rights, they are not necessarily so eager to take on such work at the certiorari stage, where the marketing and publicity benefits of such work are more speculative. Accordingly, a clinic can serve an important role by working on such cases at the certiorari stage—and in order to fill that role, it may often need to promise to handle the case at the merits stage as well. Even if such a promise is not necessary, it often will be best for the client if the same office represents her on the merits as handled the case at the certiorari stage. Second, clinics, unlike law firms, do not have to find ways to balance billable work with pro bono Supreme Court work. When paying clients demand the time of Supreme Court specialists and their associates, it may be tempting to put less time into a low-profile pro bono case at the Court. Finally, a clinic that regularly handles criminal defense and civil rights cases will probably develop substantial expertise (at the instructor level) in those areas, whereas most lawyers in law firms (even Supreme Court specialists) handle primarily business law cases.

There also is a strong educational argument for a clinic to work not only on cases against corporations but also criminal and civil rights cases against governmental entities. A Supreme Court clinic, unlike many other kinds of clinics, gives rise to the opportunity for deep study and reflection on a particular court—indeed, a particularly important court. And that study is bound to be richer insofar as it is grounded in a diverse array of cases. Among other things, the Court approaches statutory cases differently than constitutional cases, and it sometimes treats private litigants differently from public litigants. The only way for students to appreciate and understand these differences firsthand is for a clinic to handle some cases in each of these camps.

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97. There are a few offices with Supreme Court specialists that handle even these cases—most notably in the tort area, Public Citizen—but their numbers are thin.

98. See *infra* Part II.B.3.

## B. *Operational Considerations*

Broadly speaking, clinics have opportunities to deliver three kinds of assistance to pro bono clients in Supreme Court litigation: (1) expertise concerning litigating in the Court; (2) deep resources to commit to the case; and (3) expertise concerning the substantive law at issue in any given case. Some of the ways in which clinics can deliver these “goods” are fairly obvious and intuitive. But it is worth spelling out exactly how a clinic’s bundle of offerings can level the playing field between an individual litigant and a governmental or corporate entity represented by Supreme Court specialists. Only after that opportunity is set forth can one explore the more nuanced issues surrounding the existence of such clinics.

### 1. *Expertise concerning the Court*

A clinic’s expertise can help litigants in terms of (a) seeking certiorari; (b) defeating certiorari; and (c) winning on the merits.

#### a. *Seeking certiorari*

The certiorari process suffers from what Tom Goldstein has called a “market failure”<sup>99</sup>—or at least a “market inefficiency.” The Court, which might be thought of as the consumer of certiorari petitions, generally wants a certain kind of product: cases presenting important questions of federal law over which state or lower federal courts are confused or divided.<sup>100</sup> The Court selects such cases for review so that it can provide guidance to lower courts concerning what the law is and how it should work. Yet the Court’s desires do not typically correlate with the interests of litigants, the suppliers of certiorari petitions. Generally speaking, litigants—especially individual litigants who are not repeat players in the judicial system—simply want to win their cases. Criminal defendants want their convictions reversed. Civil plaintiffs want their jury verdicts reinstated, or they want summary judgments or dismissals reversed. And so on.

Sometimes parties wishing to take a case to the Court can accommodate these competing objectives. Such parties can hire lawyers who, after copious research beyond the four corners of the case, package the clients’ petitions for certiorari (as best as they can) in terms of the Court’s concerns and goals. Petitions carefully select one or two issues from the case; explain why the issues are important; describe confusion or conflict, or at least a misguided approach,

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99. Goldstein uses this phrase in a lecture on the certiorari process he has often given to students in the Stanford Clinic.

100. *See* SUP. CT. R. 10.

regarding the issues in the lower courts; and explain why the case is an excellent vehicle for bringing order to the law and giving guidance to lower courts.

But sometimes the cross-purposes of the Court and litigants generate a situation in which a certiorari petition is not filed in a case that the Court would nonetheless choose to hear. I'm not talking here about cases that litigants self-consciously decide not to pursue in the Court for fear of generating bad law. (I will address that general subject below.)<sup>101</sup> Rather, I am talking about two kinds of more basic market failures, which can happen separately or simultaneously.

First, a client (and his attorney) might not know that his case has characteristics that make it a strong candidate for certiorari. Many of the lower court opinions the Court decides to review do not say that their holdings implicate any split of authority, even though they in fact do.<sup>102</sup> Usually, particularly in state court practice, this is because the parties fail to advise the appellate court that other courts have addressed the legal question at issue, and the courts themselves never learn otherwise. Or an appellate court may already have binding precedent on the issue and simply cite that. Furthermore, even when a court issues an opinion that—based on briefing from the parties or not—acknowledges it implicates an important issue over which courts are confused, clients and their lawyers sometimes still do not know that their case is a potentially strong candidate for certiorari. All they may know, instead, is that the Court accepts only about one out of one hundred cases.<sup>103</sup> So they might just assume, totally understandably, that a run-of-the-mill case between an individual and a government or corporation would not meet the Court's criteria.

A Supreme Court clinic can mitigate this informational inefficiency. First, a clinic should have the expertise and resources to identify cases that are certworthy but in which local counsel has no plans to, or is unsure whether to, seek certiorari. A clinic can then reach out to local counsel and clients, advise them of the case's potential importance, and offer assistance in preparing and filing a certiorari petition. Indeed, in several cases in which the Stanford Clinic has obtained certiorari, the Clinic was able to file certiorari petitions on behalf of clients whose attorneys were not planning to seek review in the Supreme Court.<sup>104</sup>

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101. See *infra* Part III.A.3.

102. See the examples below in note 104.

103. See Lazarus, *supra* note 9, at 1515.

104. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), for instance, Melendez-Diaz was represented in the Massachusetts state courts by a solo practitioner who was appointed counsel. Melendez-Diaz's counsel ably argued in the Massachusetts Appeals Court that the prosecution had violated his rights under the Confrontation Clause by introducing a forensic lab report without putting the analyst who had prepared the report on the stand. The Appeals Court rejected the argument in a footnote, relying on a prior decision from the Massachusetts Supreme Judicial Court rejecting the same argument.

Equally important, a clinic's expertise and reputation should enable it to obtain certiorari in cases that nonspecialist attorneys, even though already committed to seeking certiorari, could not get through the door to the Supreme Court. Given the highly specialized nature of certiorari practice, a clinic can deploy its expertise in framing a case to simultaneously maximize the chances that the Court will decide to review it and the chances that the client will ultimately prevail. Indeed, to the extent that the Court knows that a clinic screens cases at least to some degree for their certworthiness, the clinic might be able to boost the litigant's chances of certiorari simply by appearing in the case. One reason the Solicitor General's office enjoys such a high rate of success in its certiorari practice is because the Court knows that it generally refuses to file a certiorari petition unless it genuinely believes that certiorari should be granted.<sup>105</sup> A clinic might decide to adopt a similar rule, at least to the extent that it is willing to file certiorari petitions only in cases in which a substantial case can be made for certiorari. If the Court begins to see a pattern in this respect, the clinic's success should beget further success.<sup>106</sup>

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Commonwealth v. Melendez-Diaz, 870 N.E.2d 676, 2007 WL 2189152, at \*4 n.3 (Mass. App. Ct. 2007) (unpublished opinion). Neither the Appeals Court's decision nor the earlier decision from the Supreme Judicial Court noted any conflict over the issue. Yet by the time the Appeals Court issued its decision, there was a deep conflict on the subject among various state high courts. The Stanford Clinic reached out to Melendez-Diaz's attorney and urged her to preserve the issue in a petition for review to the Massachusetts Supreme Judicial Court. When we spoke, she did not have plans to raise the issue in that court—believing, again totally understandably—that there was no use in doing so because the Massachusetts Supreme Judicial Court had already squarely decided the issue. By connecting with local counsel in a timely manner, we enabled Melendez-Diaz to preserve his rights. (The Supreme Court will not review a federal constitutional claim in a case arising from a state court system that was not presented to the highest court of that state. *See, e.g.,* Howell v. Mississippi, 543 U.S. 440, 442-43 (2005)). Our communication with local counsel ultimately paved the way for the client's winning a reversal of his conviction on remand from a favorable outcome in the Supreme Court. *See* Commonwealth v. Melendez-Diaz, 921 N.E.2d 108 (Mass. App. Ct. 2010).

Similarly, in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), Flores-Figueroa had been convicted of aggravated identity theft and had lost on appeal in an unpublished disposition. *See id.* at 649. An argument he raised in his case, however, implicated a circuit split over the reach of the aggravated identity theft statute. The Stanford Clinic reached out to local counsel four days before a certiorari petition was due and learned that the lawyer had no plans to seek certiorari. We sought certiorari and eventually got Flores-Figueroa's conviction overturned.

105. *See, e.g.,* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1328-30 (2010) (describing the "rigorous screening process" the Solicitor General employs in deciding whether to seek certiorari).

106. On the other hand, one could argue, at least in the world in which we live today, that a clinic should focus its resources on more marginal cases. Nowadays, whenever a federal court of appeals issues a decision involving an individual on one side and a governmental entity on the other that acknowledges it implicates a circuit split, the odds are high that a law firm—often a few—will call the individual litigant and offer to file a certiorari petition for free. Perhaps a clinic should stand down in such situations and limit its assistance to

b. *Opposing certiorari*

A clinic also can and should use its expertise to assist litigants and local counsel in defeating opponents' petitions for certiorari. As Lazarus recently explained,<sup>107</sup> a brief in opposition to certiorari is one of the oddest—sometimes utterly counterintuitive—documents a litigator can have to write. Having just won in the court below, the brief must, among other things, downplay the importance of the victory, minimize its impact, make the legal issues sound dull, emphasize quirks in the case, and even point out ways that the petitioner may still get what it wants. The best arguments in these respects usually have little or nothing to do with the merits. A clinic can help local counsel navigate this process and increase the odds that certiorari will be denied.

This work can be especially important because defeating a certiorari petition is sometimes an individual litigant's only real hope of preserving his or her victory—and it is almost always a litigant's best hope of doing so. Recall that from October Term 2004 through October Term 2010, individual plaintiffs in this sample won as respondents on the merits only 22.6% of the time.<sup>108</sup> Criminal defendants won as respondents on the merits only 18.8% of the time.<sup>109</sup> By helping more of these parties defeat review in the first place, a clinic can have a positive impact on its clients' cases. Beyond that, the clinic can also truly aid the Court by helping it screen out cases that appear on the surface to be worthy of plenary review but that actually are flawed in some way, or are less practically or jurisprudentially significant than meets the eye.

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those cases in which no one else calls, either because no real conflict exists or no one else recognizes the conflict. Presumably, the clinic would enjoy a lower rate of success in filing certiorari petitions. But maybe its impact on the Court's docket would still be greater.

I think that either approach is legitimate, and that the two are not mutually exclusive. The Stanford Clinic, in fact, has brought and occasionally gotten certiorari granted in cases that, at least at first blush, were fairly marginal. I think other clinics may have had similar experiences. In these scenarios, a clinic's impact is plainly apparent. On the other hand, even when a case appears from the decision below alone to be strong candidate for certiorari, a clinic likely increases the petitioner's chances of success in a few ways. First, in light of the way a clinic is likely to be run, with teams of students typically spending five or six weeks working on each petition, students will probably spend inordinate amounts of time doing background research. And when it comes to certiorari petitions, sheer dedication and effort—finding every last lower court opinion on the subject—can make a difference. Second, clinic instructors will be intimately involved in the strategy—not just the writing—of the petition, often in a much deeper way than a partner in a law firm is typically involved in a pro bono matter. Again, this can produce important marginal benefits. Finally, instructors in clinics are sometimes experts in the substantive area of law at issue, whereas lawyers in law firms who offer to help may not be.

107. Lazarus, *supra* note 9, at 1510-11.

108. *See supra* note 46 and accompanying text.

109. *See supra* note 44 and accompanying text.

c. *Litigating on the merits*

Finally, a clinic has an opportunity to deploy its expertise in order to help clients prevail (or at least to lose in the least harmful way<sup>110</sup>) on the merits. The statistics above show that from October Term 2004 through October Term 2010, individuals represented by Supreme Court specialists appear to prevail considerably more often than those represented by nonspecialists.<sup>111</sup>

These statistics even go so far as to support McGuire's assertion fourteen years ago that the Solicitor General is indeed "merely one of many successful lawyers who appear before the Court."<sup>112</sup> When facing the Solicitor General's office as counsel for the petitioner, Supreme Court specialists prevailed—as noted above—65.2% of the time among these cases, almost exactly the average rate of success of all petitioners in the Supreme Court overall (about 65%).<sup>113</sup> In other words, when an individual has specialist counsel, it truly levels the playing field on the merits.<sup>114</sup>

2. *Resources*

A Supreme Court clinic presumably will have deep resources—both in terms of human energy and in terms of financial support from a law school. Those resources can assist clients at both the certiorari and merits stages.

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110. *See supra* note 33 and accompanying text.

111. *See supra* Part I.

112. McGuire, *supra* note 14, at 506.

113. *See supra* note 63 and accompanying text; Lazarus, *supra* note 9, at 1540. There were not enough cases in which specialists represented respondents to warrant any significant conclusions.

114. It is worth noting that these statistics involve only cases in which an individual person usually lacking the financial ability to hire a Supreme Court specialist was involved as a litigant. Individuals, however, are not the only litigants who sometimes lack the financial ability to hire Supreme Court counsel. Small organizations such as municipalities, churches, nonprofit institutions, and Native American tribes sometimes also lack the ability to hire Supreme Court counsel. Thus, a clinic could decide to make its services available to such litigants as well. The Stanford Clinic, for instance, has represented municipalities and Native American tribes at the certiorari stage, *see, e.g.*, Petition for a Writ of Certiorari, Navajo Nation v. U.S. Forest Serv., 556 U.S. 1281 (2009) (No. 08-846), 2009 WL 46999, and would have been willing to continue those representations on the merits if the circumstances had called for it. The University of Virginia Clinic represented a municipality on the merits last year. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011). A clinic could even decide, as the Virginia Clinic has, that it is sometimes in the public interest to offer its services to a state government that lacks a Solicitor General's office. *See Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011).

a. *Certiorari stage*

Informational deficits are not the only kind of “market failure” that can impede the certiorari process. Financial deficits also cause a client not to seek certiorari in a certworthy case. Imagine a client who is suing for \$10,000. The costs alone of printing briefs to file in the Supreme Court can approach that amount; the costs of paying for a lawyer’s time would dwarf it. A prominent Supreme Court specialist at a Washington, D.C. firm, for example, recently charged a business client \$1.1 million for handling the certiorari and merits stages of a case.<sup>115</sup> Thus, even if a client were sure that the Court would take her case and that she would win, she nonetheless might reasonably decide not to file for certiorari.

Some individual litigants, of course, do not have to make such financial calculations. Many plaintiffs have contingency agreements with their attorneys or are protected by fee-shifting statutes<sup>116</sup> from paying legal fees. Criminal defendants often have appointed lawyers who are paid entirely by the government. But that does not mean that these litigants are immune from the pressures of cost-benefit analysis. It simply means that the litigants feel those pressures through their lawyers’ resource allocation decisions. That is, many lawyers—given their own financial imperatives—will avoid work that they predict is unlikely to produce dividends, either in a financial or professional sense.

Before jumping to the conclusion that such lawyers are shirking their duties to their clients, or to the public as members of the bar, consider the example of the first Supreme Court case that I handled, *Crawford v. Washington*.<sup>117</sup> In the Washington State appellate courts, Michael Crawford was represented by an appointed lawyer who, under the standard contract with the State for criminal appeals, earned \$2000 for each appeal he handled. This fee was intended to cover not only proceedings in the Washington Court of Appeals but also any that occurred in the Washington Supreme Court. The lawyer had no ability to recoup any extra funds by litigating the case in U.S. Supreme Court.

After Crawford lost 9-0 in the Washington Supreme Court,<sup>118</sup> I called his lawyer and asked whether he had any plans to seek certiorari. He did not, even though the Washington Supreme Court’s holding implicated a deep conflict concerning how to apply the Confrontation Clause’s then-prevailing “reliabil-

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115. Robert Schmidt & Greg Stohr, *The Price of Winning at the Supreme Court*, BLOOMBERG BUSINESSWEEK, Aug. 8, 2011, at 32, available at <http://www.businessweek.com/magazine/the-price-of-winning-at-the-supreme-court-08042011-gfx.html>.

116. *See, e.g.*, 42 U.S.C. § 1988(b)-(c) (2011).

117. 541 U.S. 36 (2004).

118. *See* State v. Crawford, 54 P.3d 656 (Wash. 2002) (en banc).

ity” framework,<sup>119</sup> and three sitting Supreme Court Justices had recently suggested that the Court’s reliability-based approach to the Confrontation Clause should itself be reconsidered.<sup>120</sup> The investment required to litigate these issues in a single case in the Supreme Court would have crowded out any hope of the lawyer’s taking enough appointments to sustain a living at \$2000 per case.

A clinic can solve cost-benefit impediments to certiorari. Because a clinic receives its funding from a law school, and because all of its work is done on a pro bono basis, it can seek certiorari in a civil case in which the cost of hiring counsel to litigate the matter would exceed any expected recovery. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,<sup>121</sup> for example, the Stanford Clinic represented a plaintiff in a case involving the Fair Debt Collection Practices Act who claimed that her damages totaled \$1000.<sup>122</sup> In *Sossamon v. Texas*, another Stanford Clinic client likewise sought modest damages for violations of the Religious Land Use and Institutionalized Persons Act.<sup>123</sup> Both cases involved frequently recurring issues that affected a substantial number of people across the country. But in both cases, it cost more than the individual plaintiffs were seeking in damages simply to pay the printing costs for the briefs in their cases.

#### b. *Merits stage*

Surely one reason that Supreme Court specialists tend to be more successful in the Court, wholly apart from the expertise they can deliver, is the depth of resources that specialists tend to have. Pamela Harris, the former Executive Director of the Georgetown Supreme Court Institute and a former attorney in a

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119. The split was over whether the fact that an accomplice’s custodial statement “interlocked” with the defendant’s allowed a court to conclude that the accomplice’s statement was sufficiently reliable to satisfy the Confrontation Clause’s then-prevailing reliability test. Compare *id.* at 663-64 (holding that interlock established reliability), and *Rankins v. Commonwealth*, 523 S.E.2d 524, 531 & n.8 (Va. Ct. App. 2000) (acknowledging that interlock may establish reliability), with *People v. Farrell*, 34 P.3d 401, 406 (Colo. 2001) (en banc) (holding interlock irrelevant), *Franqui v. State*, 699 So. 2d 1312, 1319 (Fla. 1997) (same), *Simmons v. State*, 636 A.2d 463, 469-70 (Md. 1994) (same), and *People v. Watkins*, 475 N.W.2d 727, 745-46 (Mich. 1991) (same).

120. See *Lilly v. Virginia*, 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring); *id.* at 143 (Scalia, J., concurring in part and concurring in the judgment); *id.* (Thomas, J., concurring in part and concurring in the judgment); see also *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., concurring in part and concurring in the judgment) (“I respectfully suggest that, in an appropriate case, we reconsider how the phrase ‘witness against’ in the Confrontation Clause pertains to the admission of hearsay.”).

121. 130 S. Ct. 1605 (2010).

122. *Id.* at 1609. The plaintiff also sought class certification, which would have entitled her to seek up to \$500,000 on behalf of the class. *Id.* But the district court had not ruled on that motion as of the time the case went up on appeal.

123. 131 S. Ct. 1651, 1655 (2011).

law firm's Supreme Court practice, told me once that she thought it took, on average, about one month of solid, full-time work to write an adequate merits brief. That sounds about right to me.

If anything, the estimate strikes me as low. Even if one has written the certiorari petition and litigated a case below, writing a merits brief for the Court is an enormously complicated task. One needs to master not only all of the law in the specific subject matter at issue, but also needs to mine the Court's jurisprudence in general for parallel situations and related issues. One may need to compile an exhaustive legislative history of a statute or research the Framers' intent regarding a constitutional provision. One needs to talk to experts across the country about how various laws or proposed rules work on the ground. One needs to draft, redraft, edit, and edit again. On top of all of that, one often needs to manage a significant amicus effort. Instead of taking all of one lawyer's time for a month, therefore, it may well require several people's full-time attention for several weeks in order to handle the briefing stage of a merits case. Properly preparing for oral argument takes the better part of several weeks as well, especially if counsel has not previously argued in the Court.

The reality is that no matter how skilled a solo practitioner or a member of a small firm or public interest office may be, such a lawyer may simply lack the time and resources to commit to the merits stage of a case. Over the several months during which a merits case is active, for example, such a lawyer may have to write several other briefs or even try several cases. And even if the lawyer (or an entire small firm) could put her entire practice virtually on hold for those several months, doing so might jeopardize the individual's (or firm's) solvency. A clinic serves the public interest by providing resources to litigants in such cases.

### 3. *Substantive expertise*

In addition to providing expertise concerning the Court and resources, a clinic can also offer substantive expertise to clients concerning the field of law at issue in their cases. It is certainly true, as noted above, that one reason that Supreme Court specialists are successful in the Court is because they tend, to some degree, to be substantive generalists—just like the members of the Court themselves.<sup>124</sup> At the same time, however, some specialists are successful in the Court in part because they are experts in particular areas of law. The Solicitor General's office generally classifies its deputies according to areas of

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124. See Lazarus, *supra* note 9, at 1497 (noting the advantage of being “completely familiar with the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases that would be largely invisible to those who focus on just one case at a time”).

substantive expertise. Experts exist on the private side of the ledger, too.<sup>125</sup> When such lawyers combine expertise concerning the Court with expertise in a certain field, they are able not only to craft legal arguments and strategies that appeal to the Court as generalists, but they are able to back them up with reputations for a deep understanding of how the law at issue works on the ground. The Court sometimes embraces such expertise and expressly draws it out at oral argument.<sup>126</sup>

A clinic can offer the same sort of substantive expertise to its clients. Given the fact that students have limited substantive legal experience, a clinic's substantive expertise is primarily a product of its instructors. And beyond a clinic's actual instructors, a clinic ought to be able to draw on the substantive expertise of its law school's full faculty as well. (This kind of collaboration can be great not only for clients but also for the clinic's students.)

A clinic could go even further in terms of substantive specialization and decide to focus exclusively on one particular substantive area. Such a decision would make a Supreme Court clinic, in a sense, more closely resemble a traditional law school clinic, insofar as most clinics tend to focus on a particular substantive area of law or client base. Furthermore, a Supreme Court clinic that focused on a particular subject matter might be more likely to build close ties with interest groups that care about the same subject, and to involve the students in long-term aspects of cause lawyering. Of course, such targeted specialization would have to be balanced against the educational cost of foregoing representing clients in a wider cross-section of cases. When students focus on cases only in one subject area, it is more difficult for them to gain the kinds of insights that come from comparing the Court's work across different fields.

It does not seem to me that either structural choice for a clinic is clearly superior to the other. The point is simply that a Supreme Court clinic has an opportunity to aid litigants by delivering expertise not only concerning the Court but also concerning substantive areas of law.<sup>127</sup>

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125. For instance, John Blume, a professor at Cornell Law School, is an expert in habeas law. Andrew Frey, a lawyer at Mayer Brown and an alumnus of the Solicitor General's office, is an expert in punitive damages.

126. *See, e.g.*, Transcript of Oral Argument at 18, *Hammon v. Indiana*, 547 U.S. 813 (2006) (No. 05-5705), 2006 WL 766741 (Justice Breyer asking counsel for guidance because "you're an expert in this").

127. One student commentator has argued that when a Supreme Court specialist offers to help in a case in which the litigant's current lawyer does not have significant experience before the Court, that lawyer has an ethical obligation to inform the client of the offer and to explain why it might be in the client's best interest to accept the help, but that the lawyer does not have an obligation to accept the help if the client does not want it. *See* Christine M. Macey, Note, *Referral is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 *GEO. J. LEGAL ETHICS* 979, 979-80 (2009). I will not pursue that issue further here except to note that this piece seems generally correct to me.

## III. CLINICAL CHALLENGES AND RESPONSIBILITIES

As is so often the case, along with opportunities come very real challenges and responsibilities. As fun and interesting as running a Supreme Court clinic may be, Supreme Court litigation is not sport. It is a means of serving the interests of litigants. What is more, Supreme Court litigation has legal as well as public policy repercussions that go far beyond what happens to individual clients. Supreme Court cases define and reshape legal doctrine for litigants across the country. They establish constitutional boundaries for governmental actors. They impact national politics. Two of the Stanford Clinic's recent cases, for example—*Ledbetter v. Goodyear Tire & Rubber Co.* and *Kennedy v. Louisiana*—were discussed by the presidential candidates on the 2008 campaign trail,<sup>128</sup> and *Ledbetter* also prompted swift postelection action from Congress.<sup>129</sup> Another case in which the Stanford Clinic was involved invalidated an act of Congress.<sup>130</sup> Still other clinic cases have invalidated state laws and—at least in the eyes of some—reshaped the way trials and plea negotiations across the country are conducted.<sup>131</sup> So anyone who runs a clinic needs to be utterly serious when setting its goals and defining its practices—not to mention committed to integrating an awareness of the clinic's impact into the classroom.

This Part considers these public interest challenges and responsibilities. The responsibilities attendant to operating a Supreme Court clinic can be broken into three realms: (A) case selection; (B) case handling; and (C) postdecision work.

## A. Case Selection

A Supreme Court clinic, by its nature, will have control over not only its general philosophy for serving the public interest, but also over which specific cases it takes on as a means of implementing that philosophy. That is, unlike a

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128. See Op-Ed., *Who's Afraid of Lilly Ledbetter?*, L.A. TIMES (Apr. 24, 2008, 5:19 PM), <http://opinion.latimes.com/opinionla/2008/04/whos-afraid-of.html> (discussing Barack Obama's and Hillary Clinton's calls for a congressional bill to overturn *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Kathryn Jean Lopez, *McCain "Disappointed,"* NAT'L REV. ONLINE (June 25, 2008, 1:51 PM), <http://www.nationalreview.com/blogs/print/164987> (quoting a 2008 press release by Senator John McCain describing *Kennedy v. Louisiana*, 554 U.S. 407 (2008), as "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime").

129. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.) (overturning *Ledbetter*, 550 U.S. 618).

130. See *United States v. Stevens*, 130 S. Ct. 1577 (2010) (invalidating 18 U.S.C. § 48).

131. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (holding that criminal defense attorneys must advise their noncitizen clients of potential immigration consequences of guilty pleas); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2554 (2009) (Kennedy, J., dissenting) ("[T]he Court's decision is . . . contrary to authority extending over at least 90 years . . .").

law firm or a public interest group, a clinic is unlikely to have any (or at least many) ongoing relationships with clients that require it to take on certain matters. A clinic, therefore, should be generally free to pick whichever particular cases it wishes.

Nancy Morawetz argues, in the context of selecting cases in which to seek certiorari, that this freedom (combined with a need to fill a clinic's docket) creates "distorted incentives" for clinics to take some cases to the Court that ought not be taken there, or at least that should not be taken to the Court as a lead case on an issue.<sup>132</sup> In particular, Morawetz claims that the "new Supreme Court Pro Bono Bar" (a term into which she lumps Supreme Court clinics together with law firm practices<sup>133</sup>) "can be expected to engage in truncated case analysis, avoid coordination with lawyers handling similar cases, and otherwise make decisions that are influenced by each firm's interest"—unconnected to any substantive agenda or interest groups—"in being in a position to handle cases on the merits before the Supreme Court."<sup>134</sup>

This is a serious charge that deserves serious reflection. As an initial matter, however, two preliminary observations seem appropriate. First, although Morawetz treats clinics and law firm Supreme Court practices as interchangeable in her article, it is not clear that their incentives are the same in the certiorari process. Clinics (at least those that are run from within law schools), as opposed to law firms, cannot truly try to "maximize" the number of merits cases they handle. Such an objective would simply be in too much tension with the clinics' educational missions, academic scheduling constraints, and resource constraints. Nor do clinics face economic pressures that law firms may face to demonstrate to potential paying clients that they regularly represent parties in merits cases.

Second, while Morawetz is certainly correct that Supreme Court clinics need to handle a certain number of cases and want at least *some* of those cases to be at the merits stage, the basic argument that this desire produces "distorted incentives" does not rest on anything unique to Supreme Court litigation. Trial lawyers—whether they run a law school clinic or some other kind of office—want to handle trials. Transactional lawyers want to handle deals. Yet once a lawyer agrees to represent a client, the lawyer has a professional obligation to pursue the client's interests at all times, even when doing so comes at the expense of the lawyer's professional or financial desires. This is the essence of zealous representation.<sup>135</sup> Thus, a trial lawyer considering taking on a new

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132. Morawetz, *supra* note 27, at 131.

133. *See id.* at 137.

134. *Id.* at 131.

135. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter [or enter a guilty plea].").

matter must be prepared to pursue settlement strategies and to give balanced advice regarding plea offers and the like. A transactional lawyer taking on a new client must be alert to possibilities besides complicated contracts or financial instruments for securing the client's objective. So the difference in the challenge for a Supreme Court specialist screening potential cases is mainly one of degree, not one of kind. In other words, the challenge is to discharge ordinary ethical duties in the particular context of potential work in the Supreme Court.

To be sure, there is something special about the Supreme Court. The grandeur and mystique of the Court makes many lawyers want to handle (and, especially, to argue) a case there in a way that litigators across the country probably do not pine for the chance to handle a case before the FCC or the Missouri Court of Appeals.<sup>136</sup> Still, to the extent that the Court's allure threatens to compromise lawyers' professional obligation to put a potential client's interests above their own, it is questionable whether the specialists leading Supreme Court clinics, who have generally argued several cases at the Court (and presumably will have opportunities in the future to argue several more) are more likely to succumb to personal interest than a lawyer who has never argued a case.

One story from my personal experience illustrates the point. Some years ago, a divided state supreme court decided a criminal procedure case in favor of a criminal defendant in a way that framed an important conflict among the lower courts.<sup>137</sup> In part because the Stanford Clinic had previously litigated the issue at the certiorari stage in a different case, I called the defendant's lawyer to offer help on a brief in opposition in the event the state sought certiorari (as it eventually did). Before I could make the offer, the lawyer exclaimed, "Looks like we're going to Washington!" I acknowledged that that seemed like a possibility, but then noted that, of course, the best thing for his client at that point was *not* to go to Washington. I added that it was a shame for the defendant that the state supreme court had not decided the case on state constitutional grounds, especially since the dissenters had noted that if the defendant had pressed an alternative state constitutional argument, they would have agreed with the majority on the outcome. The lawyer then explained: "Oh, no, I purposely refrained from raising the state constitution so that if I won in the state supreme court, I could get a U.S. Supreme Court argument."

This is no doubt a rather extreme example of grossly unethical behavior. But I have had several conversations over the years with lawyers who have told

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136. See, e.g., Timothy Coates, *I Couldn't Wait to Argue*, 5 J. APP. PRAC. & PROCESS 81 (2003).

137. Because my point in telling this story is to illustrate a phenomenon, not to seek some sort of action in the case, I have decided not to disclose the name of the lawyer or the name of the case.

me how much they wanted to argue a case—just one case in their career—in the Court. And that’s perfectly understandable. The key, however, is to make sure—whether one is eyeing one’s first and potentially only chance ever to do so, or whether one is running a Supreme Court clinic and has argued several cases—not to let that desire compromise one’s professional duties and judgment. The client’s best interests must always come first.

In particular, there are two ways in which an office seeking out Supreme Court cases unquestionably needs to be careful to keep its would-be clients’ interests at the forefront of its decisionmaking: (1) whether there is a venue other than the Supreme Court in which the client might obtain relief; and (2) whether there is another case headed to the Court that might trigger a more favorable outcome for the client if the Court accepted that case for plenary review instead of the client’s. Morawetz additionally suggests that there is a third issue that clinics deciding whether to take up a case ought to consider: (3) whether the client’s case has the potential to generate unfavorable law for other similarly situated individuals.<sup>138</sup> The degree to which a clinic ought to consider this third issue—in contrast to the first two, to which any good lawyer obviously should attend—is debatable, inasmuch as it does not involve lawyer-client conflicts but rather potential conflicts between lawyers, clients, and interest groups. I explore each of these three issues in turn.

### 1. *Alternative avenues for relief*

It is a fundamental rule of ethics that a lawyer is obligated to pursue a client’s interest through any legitimate means.<sup>139</sup> This rule applies no less with respect to Supreme Court litigation than anywhere else. If a client would be best served by seeking relief in an alternate forum—another court, an administrative body, settlement negotiations—a Supreme Court clinic or any other counsel must pursue that avenue. Thus, if a clinic offers to help a client with her case and the client accepts, I wholeheartedly agree with Morawetz that the clinic takes on a duty to assist the client in pursuing her ends via whatever avenues are best for the client.

One might say that this obligation does not fit the mission of a Supreme Court clinic, which is, after all, to work on Supreme Court litigation. Moreover, a Supreme Court clinic may not have the means or expertise to assist a client in an alternative forum such as an administrative body. True as these observations

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138. See Morawetz, *supra* note 27, at 166-71.

139. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1980) (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . .” (footnotes omitted)); *id.* EC 7-9 (“In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client.” (footnotes omitted)).

may be, they do not absolve a Supreme Court clinic of its ethical obligations. On the contrary, in terms of case selection, they heighten a clinic's duty carefully to screen cases at the outset for whether Supreme Court litigation is truly what is best for the client. And they compel a clinic to advise potential and existing clients of any alternate means of obtaining relief.

That said, scenarios (in cases that have reached the stage where Supreme Court review is possible) in which alternative avenues of relief are genuinely viable are rare, and when they do arise, a clinic's self-interest is generally aligned with what is best for the client. Let me turn first to the infrequency of viable alternative avenues of relief. It is important to understand at the outset that a significant percentage of a clinic's cases (for example, more than half of the Stanford Clinic's) do not begin as certiorari petitions. Instead, they begin as briefs in opposition to certiorari or merits briefs in cases the Court already has accepted for review. In such cases, the possibility that an alternative avenue for relief exists is exceedingly slim. Settlement, of course, is almost always a theoretical possibility all the way through a case, at least in civil cases. But once governments or corporations (clinics' most common adversaries) have litigated all the way to the Supreme Court, they are unlikely to have any interest in settling a case. Roughly one case per year settles (or is dismissed based on actions of the parties) after the Court has granted certiorari.

One might think, however, that a litigant who has lost in a federal court of appeals or a state supreme court has more control over his situation—at least in the sense that such a litigant unilaterally gets to decide what, if anything, to do next. But it is quite unusual for the litigant to have any viable option besides asking the Supreme Court to take his case.

Certainly a litigant who has lost in a federal court of appeals has the option of filing a petition for rehearing en banc, and a litigant who has lost in a state high court can file a petition for rehearing. Often it will make sense for a litigant to file such a petition, on the theory that he may as well take another bite of the apple. (It is not *always* in a litigant's interest to seek rehearing. In a case in which the litigant believes that the court is set on ruling against him, he may be better off not filing a petition for rehearing that sets forth all of the weaknesses of the opinion, because all the petition will do is give the court the chance to amend its opinion to make it stronger and more "certiorari proof.") But such petitions, even in certworthy cases, are almost always denied. So the question whether someone who has lost in a court below has viable alternative options usually reappears even after seeking rehearing.

Because the odds of getting certiorari granted (further discounted by the odds of success on the merits) are so low, there is rarely any reason for a government or corporation that has prevailed in a court below to consider offering any kind of settlement. Nor is a litigant likely to have any other forum to which he can turn. Standard *res judicata* principles preclude litigants from bringing new cases seeking the same relief they previously sought and failed to

obtain.<sup>140</sup> Thus, for example, when one of the Stanford Clinic's clients, Lilly Ledbetter, had her \$360,000 verdict for sex discrimination overturned by the Eleventh Circuit, the only way she could hope to reinstate it (or to get anything at all from the defendant) was by obtaining Supreme Court review.

Morawetz suggests that criminal defendants (a small, but nonetheless significant, percentage of clinic clients) sometimes have a viable alternative to Supreme Court review: filing a petition for a writ of habeas corpus or seeking other collateral review.<sup>141</sup> Habeas litigation is unique in that it is not subject to traditional *res judicata* principles.<sup>142</sup> Accordingly, Morawetz suggests that such litigants will sometimes be better off foregoing the ability to seek certiorari and instead proceeding directly to federal habeas review.<sup>143</sup>

At the outset, it is important to understand that federal habeas is actually *not* an option even for all people who have been convicted of crimes. A person can seek habeas relief only if he is still "in custody" for the offense of conviction.<sup>144</sup> That means that if the person was sentenced to less than a few years (the minimum time it usually takes to exhaust one's remedies on direct review), he will not be able to seek federal habeas relief as a way of overturning his conviction.<sup>145</sup> Furthermore, federal habeas relief is not available for certain kinds of federal claims. The Supreme Court has held, for example, that Fourth Amendment violations are not cognizable on habeas review.<sup>146</sup> Nor are any other federal constitutional violations that did not have a "substantial and injurious effect" on the verdict.<sup>147</sup>

Yet even for a state prisoner whose claim would be legitimate grounds for seeking habeas relief, foregoing an opportunity to seek immediate Supreme

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140. See generally 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4420 (2d ed. 2002).

141. See Morawetz, *supra* note 27, at 147.

142. See *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (explaining that only a "modified *res judicata*" exists in federal habeas, which "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings").

143. See Morawetz, *supra* note 27, at 147. Morawetz also suggests that seeking clemency might be a viable alternative option for criminal defendants (both state and federal). See *id.* at 147 n.60. This is simply wishful thinking. Clemency is almost never awarded, and when it is, it is almost always awarded after all appeals, including a petition for review by the Supreme Court, have been exhausted. Cf. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." (footnote omitted)).

144. 28 U.S.C. § 2254(a) (2011) (governing state habeas corpus claims); *accord id.* § 2255(a) (governing federal postconviction relief).

145. See, for example, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), in which the defendant had been sentenced to two years in prison, and had completed that term by the time the case was in the Supreme Court on direct review.

146. See *Stone v. Powell*, 428 U.S. 465, 494-95 (1976).

147. See *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993).

Court review would almost always be foolhardy. The standard of review in federal habeas proceedings is much more unfavorable than the standard on direct review. The Supreme Court will reverse a state court judgment on direct review whenever it concludes that a defendant's constitutional rights were violated. By contrast, a federal court cannot grant habeas relief on a claim that a state court previously adjudicated on the merits unless the state court decision was "contrary to, or involved an unreasonable application of, *clearly established Federal law*, as determined by the Supreme Court."<sup>148</sup> Federal courts adjudicating a habeas petition, in other words, must defer to state court decisions that are within the ballpark of reasonableness, regardless of whether the decisions were actually correct.<sup>149</sup>

Consider, for example, the cases the Supreme Court considered about one decade ago involving whether the State of California's "Three Strikes Law"—which imposed sentences of twenty-five years to life even for minor offenses that were defendant's "third strikes"—violated the Eighth Amendment's ban on cruel and unusual punishment. The first case in which the Court published anything on the topic was a case on direct review, *Riggs v. California*,<sup>150</sup> in which the defendant had been given a three-strikes sentence for a third offense of petty theft, a misdemeanor under California law absent any prior criminal record. Four Justices wrote separately to express their interest in the issue,<sup>151</sup> but the Court ultimately denied certiorari to allow the issue to percolate. A few years later, the Court granted certiorari in two California three-strikes cases: *Lockyer v. Andrade*,<sup>152</sup> presenting the same legal issue as *Riggs* but in the context of a habeas petition, and *Ewing v. California*,<sup>153</sup> presenting the issue (on direct review) whether a three-strikes sentence for a low-level crime that could be treated as a *felony* even absent prior convictions violated the Eighth Amendment. Andrade and Ewing both lost 5-4 in the Court,<sup>154</sup> but the majority in *Andrade* conspicuously refused to decide whether the sentence—based on a misdemeanor, not a felony—actually violated the Eighth Amendment. Instead, the majority held merely that the state court's decision had been sufficiently reasonable to

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148. 28 U.S.C. § 2254(d)(1) (emphasis added). The federal habeas court can also grant relief if the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented" in state court. *Id.* § 2254(d)(2).

149. *See, e.g.*, *Harrington v. Richter*, 131 S. Ct. 770, 785-86 (2011) ("For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . If this standard is difficult to meet, that is because it was meant to be." (internal quotation marks omitted)).

150. 525 U.S. 1114 (1999) (denying certiorari).

151. *See id.* at 1114-15 (Stevens, J., respecting the denial of certiorari) (writing for himself and Justices Souter and Ginsburg); *id.* at 1116 (Breyer, J., dissenting from denial of certiorari).

152. 538 U.S. 63 (2003).

153. 538 U.S. 11 (2003).

154. *Andrade*, 538 U.S. at 65; *Ewing*, 538 U.S. at 13.

warrant AEDPA deference.<sup>155</sup> Given the fact that the Court often has decided habeas cases on the ground that the Constitution was not violated at all,<sup>156</sup> and that it would have had every reason to do so here if it thought its rejection of *Ewing's* Eighth Amendment claim was controlling, there is reason to believe that the standard of review in *Andrade* may have been decisive.

Even though the vast majority of criminal defendants and civil plaintiffs will not have alternative avenues of relief, there is no doubt that litigants occasionally will. Sometimes, for instance, a litigant who lost in the court below has other viable claims in her lawsuit that she can and should instead pursue on remand. Sometimes the primary claim itself is in an interlocutory posture, and even the loss at the appellate level leaves open the possibility of future success. Morawetz also asserts that in immigration cases, litigants have genuine opportunities to seek administrative relief;<sup>157</sup> I assume, given her expertise in that substantive field, that this is so.

But I believe that Morawetz is simply incorrect when she argues that the “[c]ompetition for cases that may be heard by the Supreme Court on the merits creates a disincentive to the new Supreme Court bar to engage in full case analysis prior to accepting a case for representation.”<sup>158</sup> Quite the contrary. To the extent that the goal of a clinic (or any Supreme Court lawyer) offering to help a litigant file a certiorari petition is in part to generate merits work for itself down the line, that goal is generally aligned with the client’s interest in fully reviewing a case for potential alternative avenues of relief. It is a basic tenet of certiorari practice that the Court is less inclined to grant review in a case when it believes that the petitioner might be able to obtain relief some other way—whether on remand from the decision below or in a nonjudicial forum.<sup>159</sup> For instance, the Court virtually never grants certiorari in criminal cases on interlocutory review.<sup>160</sup> What is more, the Court will sometimes dismiss a case even after granting certiorari if it learns belatedly that the petitioner can obtain the relief he seeks another way.<sup>161</sup> Accordingly, even if a petitioner’s attorney were inclined for some reason to ignore potential alternate grounds for review, a well-represented respondent (which a clinic’s adversary almost always will be)

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155. *Andrade*, 538 U.S. at 77.

156. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

157. *See* Morawetz, *supra* note 27, at 154-55.

158. *Id.* at 145.

159. *See* GRESSMAN ET AL., *supra* note 95, at 248-49.

160. *See id.* at 280-81 & n.63.

161. *See, e.g.*, *Medellin v. Dretke*, 544 U.S. 660, 662 (2005) (per curiam) (“dismiss[ing] the writ as improvidently granted” because, among other things, a “state-court proceeding may provide [petitioner] with the very reconsideration of his . . . claim that he now seeks in the present proceeding”); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (noting, while dismissing the writ of certiorari as improvidently granted, that “[i]t appears that in any event the respondent will be able to try its claim in the District Court”).

will always raise them in its brief in opposition. It follows that even if a clinic's paramount goal in choosing cases in which to file certiorari petitions were to generate merits work, the clinic would still have a strong incentive to figure out at the outset whether would-be petitioners might have an alternative avenue for obtaining relief and to shun those cases in which the litigants did. Alternative avenues for relief are an enemy of successful certiorari petitions.

Only in the rare case when an alternate avenue for relief exists of which neither the opposing party nor the Court is aware does a lawyer considering filing a certiorari petition really face any kind of ethical issue. And, as I noted at the outset of this Subpart, the proper resolution of that issue is clear: the client's interests must control.

## 2. *Coordination of similar cases*

Another responsibility of any lawyer representing a litigant in the Supreme Court is to monitor any other cases on the Court's docket or cases that might soon become ripe for a certiorari petition. When a conflict or confusion among lower courts develops over an important issue of federal law, the Supreme Court will usually take only one case as a "vehicle" to resolve the conflict. If other certiorari petitions presenting the issue come to the Court's attention either at the same time the Court decides to review a different case or while a merits case on the same issue is pending, the Court will simply "hold" the petitions not selected for full briefing and oral argument and dispose of them in summary orders after it decides the lead case.<sup>162</sup> If the Court's legal analysis in the lead case calls into question the result in any of the cases it held pending that decision, the Court will grant, vacate, and remand (GVR) those cases for reconsideration in the lower courts.<sup>163</sup> On the other hand, if the Court's legal analysis in a lead case does not call into question the result in a held case, the Court will deny certiorari in the held case.

It thus becomes important to litigants, if there are multiple cases in the certiorari pipeline that present a common legal issue, that the case the Court chooses to decide the issue puts the litigants' best foot forward. I should emphasize at the outset, however, that this is a big "if." Even though almost every legal issue that the Court agrees to decide arises in multiple cases over time, it

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162. See GRESSMAN ET AL., *supra* note 95, at 346.

163. As the Court stated in *Lawrence v. Chater*:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

516 U.S. 163, 167 (1996) (per curiam); see also GRESSMAN ET AL., *supra* note 95, at 345-49 (describing Supreme Court GVR practice).

is relatively rare for two or more cases to cleanly present the issue after appellate review in a federal court of appeals or state high court within the narrow window of time—roughly a few months—necessary to allow for coordination. Hence, assuming that a litigant should not have to forego Supreme Court review altogether when another case that will not be ready for the Court for several months or even years may be a better vehicle, the ability to coordinate is usually more theoretical than real.

But when coordination is a possibility, a Supreme Court lawyer has to take that possibility very seriously. Most legal issues can arise in a variety of factual and procedural settings, and some settings unquestionably shed more favorable light on a position than others. It is impossible to say with any real precision how much the choice of vehicle matters to the Court's ultimate resolution of any given legal issue. I doubt it is determinative of the outcome very often, especially when parties and amicus briefs make the Court aware of the spectrum of settings in which an issue arises. But vehicle choice just as surely does sometimes matter.

One example comes to mind. In the 1990s, federal courts of appeals divided over whether new limitations on attorney's fees (primarily hourly fee caps) imposed by the Prison Litigation Reform Act (PLRA) applied to work performed after the Act's effective date on cases filed before the Act was enacted. Two cases emerged as candidates for Supreme Court review. The first case involved attorneys monitoring two consent decrees concerning prison conditions, to which a state had agreed more than a decade previously.<sup>164</sup> In the second case, a prisoner was seeking redress for a brutal and racially motivated assault at the hands of a prison guard; his attorneys had filed the lawsuit shortly before the PLRA was enacted but took it to trial afterwards.<sup>165</sup> It takes little reflection to see that one of the best arguments for declining to apply the PLRA to cases filed before its enactment—the notion that attorneys had relied on the fee structure at the time of filing—felt very different in the dissimilar contexts of the two cases. In the first case, the attorneys had filed two lawsuits many years beforehand and were simply monitoring ongoing consent decrees when the PLRA was enacted. In the second, the attorneys had recently filed the lawsuit and were on the eve of trial when the PLRA was enacted.

The Court granted certiorari in the first case.<sup>166</sup> During the first minute of oral argument, Justice Scalia interrupted the state's lawyer to explain that he thought it "extraordinary" that lawyers monitoring consent decrees were

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164. See *Hadix v. Johnson*, 143 F.3d 246, 247-48 (6th Cir. 1998), *aff'd in part, rev'd in part sub nom. Martin v. Hadix*, 527 U.S. 343 (1999).

165. *Blissett v. Casey*, 147 F.3d 218, 219 (2d Cir. 1998), *cert. denied*, 527 U.S. 1034 (1999).

166. *Martin*, 527 U.S. at 352.

entitled to attorney's fees at all.<sup>167</sup> Justice Scalia further explained that this fact "colors my whole view of this case."<sup>168</sup> By the time Chief Justice Rehnquist interjected to call the cases "cash cows" for the prisoners' lawyers,<sup>169</sup> the die had been cast. The prisoners lost 7-2.<sup>170</sup> There is, of course, no way to know for sure whether the Court would have decided that the PLRA did not apply to any work performed on cases filed before its enactment if the Court had granted certiorari in the second case. But all of the prisoners involved in both cases surely would have been better off if the Court had used the second case as the vehicle for deciding the issue.<sup>171</sup>

At the same time, most situations involving multiple potential vehicles present much more subtle dynamics. A case that the Stanford Clinic handled during the October Term 2009, *Dolan v. United States*,<sup>172</sup> illustrates this point. The case presented the issue whether a federal district court in a criminal case had the power to enter a victim restitution order beyond the ninety-day statutory time period for doing so.<sup>173</sup> Morawetz argues that another case in the certiorari pipeline at the time, *United States v. Balentine*,<sup>174</sup> was a more defendant-friendly vehicle than *Dolan* because it presented a "less horrific crime scene," the victim was a bank instead of a person, and the delay beyond the statutory window was longer.<sup>175</sup> On the other hand, the victim in *Dolan* was not out one penny; the Government sought restitution only to cover its own expenditures for medical treatment through the federal hospital at which the victim had been treated. It thus seemed far less unfair to saddle the victim with the consequences of the Government's failure to handle its request for restitution in a timely manner. The Government in *Dolan* also never asked for a timely restitution order, whereas the Government in *Balentine* had been more diligent and arguably had been thwarted by the district court's negligence.<sup>176</sup>

Faced with such arguably crosscutting circumstances, it is difficult to say that there was any clear answer concerning which case would have been the

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167. Transcript of Oral Argument, *Martin*, 527 U.S. 343 (No. 98-262), 1999 WL 200681, at \*5.

168. *Id.*

169. *Id.* at \*8.

170. *See Martin*, 527 U.S. at 346.

171. I don't know whether the prisoners' lawyers in *Martin*, the case that the Court did take, could have done anything to engineer such an outcome (they represented the respondents in the case, after all). But if so, it would not have taken much foresight to see that the best thing that could have been done for their clients was to try to manipulate the timing of their case so that the Court would consider the other case, *Blissett*, first so that it might become the lead case.

172. 130 S. Ct. 2533 (2010).

173. *Id.* at 2537.

174. 569 F.3d 801 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 3452 (2010).

175. Morawetz, *supra* note 27, at 161-62.

176. *See Dolan*, 130 S. Ct. at 2537; *Balentine*, 569 F.3d at 802.

most defendant-friendly vehicle. And both lawyers reasonably believed that their clients' interests would be best served by being in the lead (or at least by leaving it up to the Court to decide which case to take). So the petitions were filed within five days of each other. The Court eventually considered them at the same conference. It granted *Dolan* and held *Balentine*.

In still other circumstances, it is simply impossible for a Supreme Court lawyer even to try to coordinate at the certiorari stage with lawyers involved in other cases. In *Flores-Figueroa v. United States*,<sup>177</sup> another case that Morawetz suggests suffered from a "lack of coordination,"<sup>178</sup> the Stanford Supreme Court Clinic learned about the case only four days before the certiorari petition was due, and it was too late to seek an extension.<sup>179</sup> Flores-Figueroa's counsel apparently did not know that the case was potentially certworthy and had abandoned him. The Stanford Clinic wrote a petition in four days and filed it, shortly after another petition had been filed in another case (by a nonspecialist) presenting the same issue. The Solicitor General eventually recommended that the Court grant certiorari in the other case and hold *Flores-Figueroa*—a recommendation that could have been based on her assessment of which case the Government was more likely to be able to win.<sup>180</sup>

In short, no two situations will be the same. But a clinic considering taking on a case unquestionably has an ethical duty to figure out whether another case in the pipeline might present a better vehicle for the legal issue involved. If so, the client's interests obviously come first. But if not, then the only question is whether there are certain times that a clinic should refrain from offering to file a potentially meritorious certiorari petition because there is a chance that the would-be client's case could make "bad law" for other individuals out in the world who may not even have court cases yet. It is to that thorny question that I now turn.

### 3. *Screening cases to avoid making "bad law"*

There is nothing new about the phenomenon of public interest groups worrying that attorneys outside of their fold (that is, without a singular concern for the groups' causes) will push cases to the Court that will create bad law from

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177. 556 U.S. 646 (2009).

178. Morawetz, *supra* note 27, at 163 n.154.

179. Petitioners generally cannot obtain extensions within ten days of a certiorari petition's due date. See SUP. CT. R. 13.

180. See Morawetz, *supra* note 27, at 163 n.154. Morawetz asserts that because the government acquiesced to certiorari in one case and recommended a hold in *Flores-Figueroa* a few days later, "only Flores-Figueroa had the advantage in making [his] argument for why [it] was the better vehicle." *Id.* This is incorrect. Each petitioner had every opportunity to file a reply brief arguing for the Court to grant certiorari in his case. The other petitioner simply elected not to do so.

the groups' points of view, and sometimes even frustrate years-long litigation campaigns. Thurgood Marshall, for example, sometimes tried to keep local lawyers from filing certiorari petitions in racial discrimination cases that he thought could backfire in the Court.<sup>181</sup> But clinics (and other Supreme Court pro bono practices) might be thought to pose a greater danger to public interest communities' abilities to control litigation in their realms simply because the clinics are more likely than local lawyers unfamiliar with the Court to be able to get certiorari granted in cases that public interest communities would have preferred to let die on the vine.

This Subpart—relying in part on the experience of the Stanford Clinic as a case study—begins by assessing the extent to which clinics really do pose a challenge to public interest communities' abilities to control litigation. It turns out that unless one takes an extremely broad view of public interest communities' "right" to control litigants' access to the Court, clinics actually seem to pose a minimal concern in this respect. Still, insofar as virtually every Supreme Court case is important, the concern must be taken seriously. Thus, having isolated the situations in which a public interest community might arguably and justifiably want a Supreme Court clinic to shun cases for fear of making bad law, this Subpart assesses whether it is truly feasible to screen cases in this manner and whether clinics should do so.

a. *Putting the issue in context*

It is important to begin by putting the issue of shunning certworthy cases for fear of making bad law into context. For starters, the issue simply does not arise with respect to the vast majority of the cases that the Stanford Clinic takes on—nor, I presume, for most cases that other clinics take on as well. The issue is nonexistent when the Supreme Court has already granted certiorari in the case at the time a clinic gets involved.<sup>182</sup> It also is a nonissue when a clinic represents a respondent in order to oppose certiorari, because the petitioner has already triggered the Court's jurisdiction.<sup>183</sup> It also is generally a nonissue in cases in which a would-be client approaches a clinic, explains that it is seeking specialist representation of some sort, and asks the clinic to seek certiorari on

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181. See, e.g., William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1627-28 (1997) (discussing Marshall's frustration when a local lawyer petitioned for certiorari in *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

182. In seven of the eighteen merits cases in which the Stanford Clinic has reached out to offer assistance between October Term 2005 and October Term 2010, the Clinic became involved only after the Court had already granted certiorari.

183. In four of the eighteen cases mentioned immediately above, the Stanford Clinic reached out in order to offer assistance in opposing certiorari.

its behalf.<sup>184</sup> Unless the case pits an individual against a corporation (and sometimes even then), clinics can be nearly certain that even if all of them turned away the request, the client would find a specialist in a law firm to represent her.

This leaves a fairly small set of cases capable of raising the issue of whether a Supreme Court clinic ought to decline to offer assistance when there is a substantial risk of making bad law—namely, those cases in which a clinic reaches out and offers to file a certiorari petition on behalf of someone who has lost in a lower court.<sup>185</sup> And even some of those cases are not genuinely capable of raising the issue of making “bad law” that would not otherwise be made, for one must assume that at least some of the cases in which clinics file successful certiorari petitions—cases, for example, when federal courts of appeals judges themselves invite Supreme Court review—would have resulted in certiorari grants without expert assistance.<sup>186</sup> What is more, at least some such cases do not fit the criteria of “risky” cases, either because the petitioner’s argument on the merits was so strong or because there was little potential downside to losing for any identifiable public interest constituency. Accordingly, clinics are probably responsible for putting no more than one or two “risky” cases per Term on the Supreme Court’s docket.

One could take things even further and assert that even this estimation overcounts the number of cases in which this issue arises. More and more, when a Supreme Court clinic reaches out to offer assistance in writing a certiorari petition, at least one other clinic also calls and offers pro bono help. (Indeed, whenever a federal court of appeals issues an opinion that it acknowledges implicates a significant circuit split, the local lawyer is sure to receive several calls within days from clinics as well as law firms.) Thus, one might argue in these scenarios that certiorari petitions will be filed no matter what any given clinic does, so there is no ethical decision to make.

But I will resist taking that position. The goal of this Article is to consider what a clinic’s best practices should be. And what is a best practice for one clinic should be a best practice for another. Therefore, at least theoretically, if

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184. Between October Term 2006 and October Term 2010, roughly half of the merits cases the Stanford Clinic has handled came to the clinic that way.

185. For example, between October Term 2005 and October Term 2010, the Stanford Clinic (either as lead counsel on the merits or as co-counsel to another attorney who argued the case) has handled thirty-three cases on the merits, but only in seven did the clinic reach out to offer help to a petitioner at the certiorari stage: *Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Abbott v. Abbott*, 130 S. Ct. 1983 (2010); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *Herring v. United States*, 555 U.S. 135 (2009); and *Greenlaw v. United States*, 554 U.S. 237 (2008).

186. It is, of course, impossible to say with any precision how often this is the case. There are too many variables.

there are cases regarding which clinics should refuse to offer assistance, then no clinic should reach out for those cases.

b. *Can clinics screen?*

With the issue of risking making “bad” law placed in context, the first critical question is whether it is even possible to screen cases for those that would make bad law. Every year, the Supreme Court decides several criminal cases in favor of defendants and several civil cases in favor of plaintiffs bringing civil rights, employment, and the other types of cases noted above. Immigrants seeking various types of relief also win cases with regularity. So one cannot simply point to certain categories of cases and say that Supreme Court specialists should never take those types of cases to the Court.

To be sure, the current Court has tendencies—in some areas, strong tendencies. It rarely holds, for example, that plaintiffs bringing cases under 42 U.S.C. § 1983 can overcome assertions of qualified immunity, and it rarely sides with criminal defendants claiming that their *Miranda* rights have been violated. But even in such areas of law, lower courts sometimes go too far. Therefore, even the most ardent public interest lawyer would presumably acknowledge that it is important and proper, at least occasionally, to take such cases to the current Supreme Court for correction. The task thus becomes identifying those cases that raise a certain level of risk that (a) the Court might indeed grant certiorari and (b) the Court might affirm in a way that makes bad law.

This is usually an extremely difficult assignment. For starters, most cases that the Court hears in any given year are statutory cases that, at least on the surface, do not raise terribly divisive social or legal issues. This is especially the case when it comes to a Supreme Court clinic’s likely docket. As explained above, law clinics tend to work on run-of-the-mill cases that happen to implicate splits of authority. By contrast, most major challenges to the constitutionality of federal and state laws are coordinated by interest groups from the outset. Clinics never get involved. The upshot of this dichotomy is that the outcomes of law clinics’ likely cases are much harder to predict. Justices do not get as invested in them; the force of legal research and technical legal arguments are more likely to tip the balance.

In other words, assessing the riskiness of a typical clinic case before full merits briefing has taken place is a very tricky business. It is not impossible, but it is hardly an exact science. The best one can do is make a rough estimate based on the Court’s general proclivities and the persuasiveness of lower court opinions on the subject.

c. *Should clinics screen?*

In light of the limited ability—but not utter inability—to estimate how a given case might come out on the merits, should a clinic turn away cases that it thinks might be losers on the merits and would create new law that harms similarly situated individuals? There are a few ways to ask this question. Each way, I believe, is legitimate, and each yields a somewhat different response.<sup>187</sup>

i. As an initial matter, one could ask whether an individual with a potentially certworthy and meritorious claim has a right to top-flight counsel. Here, the intuitive answer is yes. I do not mean this in the sense that litigants seeking to file certiorari petitions have a constitutional right to counsel (much less specialist counsel); not even criminal defendants have a constitutional right to counsel at the certiorari stage.<sup>188</sup> Rather, litigants should have a right to counsel insofar as a bar that is otherwise willing and able to file a certiorari petition in a person's potentially meritorious case should not turn it away because the case might have negative consequences for others not involved in the case.

In this sense, a clinic could view itself like a law office making itself available for judicial appointments, seeking to discharge the directive in the ABA Model Rules of Professional Conduct that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”<sup>189</sup> The Model Rules allow lawyers to turn away appointments only (as is relevant here) when “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”<sup>190</sup> To be sure, a clinic considering reaching out on its own volition to offer its services has license to exercise discretion in selecting cases that a law office does not have in responding directly to a judicial tribunal’s request to take on a case. And, as commentators have emphasized, “While the Code of Professional Responsibility suggests attorneys should not lightly decline employment, the Code

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187. Consistent with the focus of the rest of the Article, I concentrate here on public interest considerations. It is worth noting, however, that the issue of screening itself presents an excellent teaching opportunity. And to the extent a clinic takes cases that look at the outset like difficult cases, allowing students to invest in those projects and see how some of them turn out in unexpected ways teaches extremely valuable lessons about the dangers of attorneys prejudging cases.

188. The Sixth Amendment’s right to counsel pertains only to “criminal” cases. U.S. CONST. amend. VI. And even there, criminal defendants do not have a Sixth Amendment right to counsel to file a certiorari petition. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *Nichols v. United States*, 563 F.3d 240, 249-50 (6th Cir. 2009) (en banc); *Pena v. United States*, 534 F.3d 92, 95-96 (2d Cir. 2008).

189. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2012).

190. *Id.* R. 6.2(c). The rules also allow a lawyer to refuse representation that would impose a financial hardship on her. *See id.* R. 6.2(b) & cmt. 2; *cf. Mallard v. U.S. Dist. Court*, 490 U.S. 296, 298-99 (1989) (federal statute did not authorize court to force lawyer unfamiliar with the complex legal questions presented to take case pro bono).

specifically protects the autonomy of an attorney to choose his own clients.”<sup>191</sup> But insofar as one of a clinic’s primary goals is to level the playing field by providing expert Supreme Court counsel for litigants who would not otherwise have access to it, a clinic ought to be hesitant to decide for itself that a litigant with a potentially meritorious case should be shut out of the Court because the litigant’s case could create bad law for others.<sup>192</sup>

Morawetz seems to disagree. Discussing the *Jerman* case (in which the plaintiff approached the Stanford Clinic and asked it to file a certiorari petition for her), Morawetz suggests that the Clinic should have asked itself “whether it made sense to offer free pro bono resources” because the risk that the Court would make bad law appeared (to her) to be “substantial.”<sup>193</sup> Morawetz also suggests that the Stanford Clinic should have considered turning down Lilly Ledbetter’s request for representation and that another Supreme Court specialist should have considered declining to file a certiorari petition a few years ago on behalf of a capital defendant who had lost in a state supreme court.<sup>194</sup>

These suggestions strike me as troubling. When a potential client approaches a lawyer and requests Supreme Court representation, the lawyer surely has a duty to advise the client regarding whether the Court is the best forum for obtaining the relief the client seeks. And the lawyer surely has an obligation to advise the client of any potential risks (not just to her own interests, but to those of people like her) of proceeding to the Court.<sup>195</sup> A duly advised litigant

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191. Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 322 (1982); see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1076-80 (1976) (emphasizing the importance of lawyer autonomy in this respect).

192. Cf. Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 2003-09 (2003) (arguing that, though selected clients are not the same as appointed clients, Model Rules 1.2 and 6.2 may prohibit a clinic from eschewing unpopular matters or clients).

193. Morawetz, *supra* note 27, at 171. As it happened, Jerman prevailed 7-2 on the merits. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (2010).

194. Morawetz, *supra* note 27, at 172-73; *id.* at 148-53.

195. See, e.g., Breger, *supra* note 191, at 352. One might also object that lawyers (and, thus, Supreme Court clinics) should have something to say about whether litigants with meritorious cases should be able to seek certiorari in the Supreme Court because Model Rule 1.2(a) generally give attorneys, not clients, authority to decide “the means” by which clients’ litigation objectives are to be pursued. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) & cmt. 2. This rule certainly gives the bar some decisionmaking authority when a litigant who has lost in a federal court of appeals or a state supreme court has potentially viable options besides seeking U.S. Supreme Court review for achieving his or her goal. See *supra* Part III.A.1. But when, as is often the case, obtaining a reversal in the Supreme Court is the litigant’s only hope of achieving his or her objective, the decision whether to file a certiorari petition is the client’s. See Rubenstein, *supra* note 181, at 1633 & n.54. And when a well-informed client in this situation would want to proceed with a certiorari petition, the Model Rules at least arguably impose upon the bar a duty to provide “competent” representation, see MODEL RULES OF PROF’L CONDUCT R. 1.1, perhaps even if the litigant is unable to pay

may well decide that she would prefer to accept a loss than to risk making law that forecloses the potential rights of others. But when a client reasonably decides he or she does want to seek certiorari, it strikes me as a serious matter for a Supreme Court clinic to turn away the case on the ground that it might make bad law.<sup>196</sup> Presumably the conversation with someone like Lilly Ledbetter would go something like this: “Look, I know that the Eleventh Circuit just took away your \$360,000 judgment for sex discrimination; that you were depending on that money for your retirement; that you have a potentially meritorious claim; and that you have no option besides the Court for getting the money back. But the fact is that the Court might affirm the Eleventh Circuit and make bad law for other plaintiffs in other parts of the country who are currently winning cases like this. So even though you understand and have considered those realities and want to go forward, we refuse to give you expert representation in the Court.”<sup>197</sup>

Make no mistake, I do not see a problem with a cause-lawyering office like the ACLU or the Center for Individual Rights—that is, an office that is itself dedicated to issue advocacy—turning away potential clients on the ground that the office perceives an undue risk of the case generating what in their views would be bad law. The very goal of such offices, and the cases they bring, is to move the law; client representation is a means to their end.<sup>198</sup> Many law school clinics follow this model, and I suppose that a Supreme Court clinic could as well.

But not all public interest law offices that offer free legal services to clients are cause-lawyering enterprises. A public defender’s office might be thought of as residing on the other side of the spectrum. The mission of a public defender’s office is to represent one client at a time, providing the most vigorous defense that can be mustered. Such an office would not refuse a representation (or decline to make an argument in the midst of a representation) for fear of making “bad law” for other criminal defendants. For example, a public defender’s office would not hesitate to oppose a client’s execution on the ground that it has

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for it, *see id.* R. 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay.”); *see also* Kuehn & Joy, *supra* note 192, at 2041-49 (questioning whether attorney control of the means of representation allows clinics to impose limitations on their lawyers’ choice of means).

196. *See* Fried, *supra* note 191, at 1065-66 (defending the notion that a lawyer who zealously pursues a well-informed client’s goals acts with high moral purpose).

197. I am indebted to Pam Karlan for this way of putting the point.

198. *See, e.g.*, Rubenstein, *supra* note 181, at 1632 (“The significant unifying factor of the cases [brought by professional public interest litigators] is that they are brought with the intention of establishing a legal precedent that will improve a group’s social situation and thus they aim to have an effect on other pending cases or on future cases. They constitute ‘impact’ litigation or ‘test’ cases brought over time as part of larger litigation ‘campaigns.’”).

taken too long for his appeals to run their course,<sup>199</sup> even though such an Eighth Amendment holding from the Court might well harm numerous other death row inmates throughout the country by encouraging courts to resolve their cases more quickly. This would remain true even if a criminal defense organization called the office and said it would prefer that the case not go forward.

A Supreme Court clinic, of course, is not like a public defender's office, insofar as a clinic has complete control over whom it represents and on which cases it chooses to work. Public defenders are assigned to cases; clinics are not. Accordingly, perhaps the model of a civil legal aid office offers a closer analogy. The goal of a legal aid office, generally speaking, is to "promote equal access to the system of justice by providing high-quality legal assistance to those who would be otherwise unable to afford legal counsel."<sup>200</sup> This goal, like that of a public defender's office, expresses an ideal of procedural justice, relatively free from substantive value judgments about whether the outcome a client seeks is "good," "bad," or "risky."<sup>201</sup> At the same time, legal aid offices are typically unable to represent all of the people who qualify for and want their services, so such offices must make choices about how best to deploy limited resources.<sup>202</sup> In making those choices, legal aid offices take into account, among other things, the fact that they have certain constituencies of clients whom they typically represent, and that those clients, generally speaking, share

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199. See, e.g., *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari) ("Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment.").

200. See Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *GEO. J. LEGAL ETHICS* 369, 378-79 (2004) (internal quotation marks and alterations omitted) (quoting the official mission of the federal Legal Services Corporation).

201. See Breger, *supra* note 191, at 360-61 (advocating that legal aid offices follow "the client-oriented perspective" of lawyering instead of a "social utility" or cause-lawyering approach). As years have passed and legislation has restricted the ability of legal services offices to engage in structural litigation, this client-oriented model has become more and more predominant. See Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 *GEO. J. LEGAL ETHICS* 989, 1004-07 (2007).

202. See Rhode, *supra* note 200, at 380 (noting that most legal services offices "can handle only a small fraction of the cases that qualify for [their] assistance"); see also Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 *B.U. L. REV.* 337, 342 (1978) (noting that one of "[t]he most troubling ethical problems for public interest lawyers . . . relates to the enormous gap between what service is presently available and what would be necessary to provide full representation" and explaining that such lawyers must, therefore, "decide, according to some ethically justifiable criteria, who gets what sort of assistance and what obligations are owed to those who are turned away"); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *LOY. L.A. L. REV.* 869, 878-80 (2009).

some common interests.<sup>203</sup> So in an extreme case, a legal aid office might choose to shun a case on the ground that it might work to the detriment of a constituency it regularly represents.<sup>204</sup> But this would be an unusual occurrence, and the presumption when any potential client walks in the door of many legal aid offices is that if the client has a meritorious case and stands a sufficiently good chance of obtaining meaningful relief, the office is willing—indeed, it feels virtually duty-bound—to take the case.<sup>205</sup>

A Supreme Court clinic may legitimately decide to favor this basic model of individual representation instead of a cause-lawyering one. For starters, the individual representation model avoids the necessity of making sometimes-difficult value judgments concerning what potential outcomes would be “bad.” While certain outcomes may clearly favor or disfavor a client base, others can be much trickier to assess.<sup>206</sup> An individual representation model also mitigates the problem of having to predict the likelihood of losing a potential case (or otherwise generating a certain legal rule).<sup>207</sup> Finally, by sticking (absent exceptional circumstances) to a procedural goal of providing equal access to justice, an individual representation model avoids making thorny—and, at least to me, highly distasteful—judgments about who among a number of people in need most “deserves” expert representation. Indeed, if a clinic selected its cases based on such value judgments, whatever benefit it thought it was providing to the adversarial system might quickly begin to evaporate, or at least to skew towards certain favored constituencies. The clinic itself would start controlling the shape of the law, instead of leaving that power to the Court.

This seems especially so when the individual at issue did not even initiate the lawsuit, as in the case of a criminal defendant or an immigrant whom the government is seeking to deport. Take the clinic case of *Herring v. United*

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203. See Bellow & Kettleon, *supra* note 202, at 343; Breger, *supra* note 191, at 328-33; Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 *UCLA L. REV.* 1101, 1123-24, 1144 (1990) (conceptualizing legal aid lawyers as trustees of low-income communities who are bound to protect their interests as best as possible).

204. See Elder, *supra* note 201, at 1029 (arguing that sometimes “prospective individual clients” seeking legal aid representation “must be rejected in favor of the collectivized good”).

205. See Breger, *supra* note 191, at 326-28 (explaining how legal aid lawyers differ from public interest lawyers in this respect).

206. To provide one example from personal experience: In *Crawford v. Washington*, 541 U.S. 36 (2004), I argued on behalf of a criminal defendant that the Confrontation Clause should be narrower in scope but more categorical in application. Such a transformation of previous doctrine helped my client (because the statement he was challenging fell within the narrower scope), but it hurt future criminal defendants who wanted to challenge the introduction of hearsay statements that no longer fell within the ambit of the clause. See *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (“It is thus unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted [against defendants] in criminal trials.”).

207. See *supra* Part III.A.3.b.

*States*.<sup>208</sup> After discovering by means of an illegal search that Herring had a gun in his car, the Government charged and convicted him of being a felon in possession of a firearm. On appeal, he argued in the Eleventh Circuit that the gun should have been suppressed as the product of illegal police conduct. The court of appeals rejected the argument, holding that evidence need not be suppressed when it is the fruit of police negligence that is attenuated from the ultimately unlawful arrest.<sup>209</sup>

The Eleventh Circuit's opinion conflicted with several state supreme court opinions,<sup>210</sup> giving Herring a quite viable case for certiorari. At the same time, the case was a risky one from the perspective of criminal defendants and civil libertarians. Two years earlier, the Supreme Court's four most conservative Justices had joined a plurality opinion that many took as signaling that they were ready to dispense altogether with the Fourth Amendment's exclusionary rule.<sup>211</sup> Justice Kennedy had written separately to insist that the exclusionary rule was "not in doubt," but he, too, suggested that he might be inclined to cut back on its traditional application.<sup>212</sup>

Still, it seems almost impossible to say that the riskiness of Herring's case should have deprived him of Supreme Court counsel. Obtaining a reversal in the Supreme Court was Herring's only chance of voiding his conviction, since Fourth Amendment claims cannot supply a basis for habeas relief.<sup>213</sup> His local, appointed lawyer, however, had no familiarity with the Supreme Court and no intention of pursuing the case.

Herring's situation was not part of any "natural order," in which certain cases are meant to die on the vine before reaching the Supreme Court. Rather, it was simply a function of Herring's indigence and his bad luck in having been appointed counsel who was unable to handle a case in the Supreme Court and was apparently unaware that the case was a viable candidate for certiorari. Because a well-informed lawyer would have sought certiorari in Herring's case, it cannot be that the Stanford Clinic acted improperly in offering to perform that task with a high level of expertise. Indeed, the clinic discharged the bar's professional, public-service *obligation* to assist Herring.

*ii.* Viewed from a distinctly different perspective, one could ask whether public interest communities have a right to exercise control over whether individuals' cases go to the Supreme Court. Here, the answer is mixed. On the one

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208. 555 U.S. 135 (2009). The Stanford Clinic handled this case.

209. *United States v. Herring*, 492 F.3d 1212, 1214-15, 1218 (11th Cir. 2007), *aff'd*, 555 U.S. 135.

210. *See, e.g., Hoay v. State*, 71 S.W.3d 573, 576-77 (Ark. 2002); *People v. Willis*, 46 P.3d 898 (Cal. 2002); *Shadler v. State*, 761 So. 2d 279 (Fla. 2000).

211. *See Hudson v. Michigan*, 547 U.S. 586 (2006) (plurality opinion).

212. *Id.* at 603-04 (Kennedy, J., concurring in part and concurring in the judgment).

213. *See supra* note 146 and accompanying text.

hand, public interest communities are entitled to provide information to litigants (either directly or through other counsel). But they enjoy no more of a right than individual lawyers to dictate a litigant's access to quality counsel. Under the ABA's Model Rules, it is generally up to litigants, not their attorneys (much less other attorneys not involved in the case), to consider "third persons who might be adversely affected" by the case and whether this concern should cause a litigant to decide to shoulder a loss in a lower court for the greater good.<sup>214</sup> Thus, the most that a public interest advocacy organization concerned about a case's potential to make bad law should do is advise a litigant of its concern. It should not tell the litigant not to seek the advice or potential assistance of specialist counsel.

On the other hand, one of the ways that a public interest community can help its constituents is by managing litigation in order to maximize the chances of positive legal developments (or at least to avoid negative ones). And Supreme Court clinics are bound to share one or more common client bases with certain public interest communities. Hence, a clinic could reasonably conclude that it is in its best interest in the long term to cultivate relationships with these communities by seeking out and considering their advice during the case-selection phase. (After all, the Model Rules do not apply until a clinic has taken on a case.) Public interest groups often have years of experience with the issue a case presents and are likely to have insights and ideas that escape a more generalist clinic. They may also know of other pending cases that present the same issue as the case the clinic is considering and that may be better vehicles.

I am not saying that clinics should be bound to follow the advice of public interest groups. As noted above, when the government has initiated criminal proceedings against a person, that person has a right to able counsel, and that counsel has a duty to press viable claims whenever it is in the individual's best interest. The same surely holds true when civil litigants such as Lilly Ledbetter have been injured and their court cases provide their only chance of redress. But especially when an individual's reason for being involved in litigation is more abstract, forward-looking, and connected to a desire for social change, a public interest community interested in the issue might be able to provide advice as to why it would be better for the litigant to forego seeking Supreme Court review.<sup>215</sup> In this circumstance, the ABA Model Rules render it perfectly appropriate to offer advice not only about the law but also concerning "other considerations such as moral, economic, social and political factors, that may

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214. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2012); see Kuehn & Joy, *supra* note 192, at 2011-17 (arguing that clinics may limit client selection for pedagogical or priority reasons, but that the bar on third-party interference discourages clinics from avoiding representation due to the influence of third parties).

215. See Rubenstein, *supra* note 181, at 1666-67.

be relevant to the client's situation."<sup>216</sup> Everyone is better off if the clinic and the litigant benefit from the public interest community's expertise in deciding whether to go forward.

*iii.* Finally, one could ask—free of all of the potential tension between individual litigation and group activism—the simple question whether a legal clinic forced to dispense limited resources should offer to take cases to the Court that appear to have less chance of turning into winners on the merits than others. Here, it seems that the answer is generally no. As an initial matter, a case's odds of having certiorari granted are greater when the Court senses that the decision below is likely wrong than when the decision below seems correct.<sup>217</sup> Furthermore, while there is certainly some social good achieved whenever litigants are afforded excellent representation for the entire duration of their cases and whenever the Supreme Court resolves a conflict to create uniformity in the law, lawyers (or clinics) obviously deliver more to their clients when they are successful at the Supreme Court.

Given these realities, it comes as no surprise that Supreme Court specialists already favor cases that turn out to be winners over those that turn out to be losers. When specialists represented respondents in the data analyzed above (that is, when they had no control over whether the case was taken up to the Court), they prevailed 17.8% of the time more than nonspecialists.<sup>218</sup> But when specialists represented petitioners, they prevailed 19.2% more often.<sup>219</sup> Supreme Court clinics representing petitioners have prevailed 22.2% more often. In other words, while Morawetz suggests that Supreme Court specialists are a problem because they are more likely than nonspecialists to take cases to the Court that turn into losers, precisely the opposite seems to be true (at least in the aggregate): specialists are much more likely than nonspecialists, even accounting for their differential rates of success overall, to have their cases turn out to be winners. Specialists (again in the aggregate) are helping criminal defendants and civil plaintiffs to do better in the Court and thus to create more law that is beneficial to those groups than would be created otherwise. The same things are true—and perhaps more so—with respect to clinical specialists.

## B. *Case Handling*

Once a clinic has taken on a case, its responsibilities are considerably more straightforward and clear-cut. When a law office represents a client, the office's singular objective is to achieve the best possible result for the client. For a clinic, fulfilling this duty usually means doing one's best to win the client's

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216. MODEL RULES OF PROF'L CONDUCT R. 2.1.

217. *See supra* notes 70-72 and accompanying text.

218. *See supra* notes 57-62 and accompanying text.

219. *See supra* notes 49-56 and accompanying text.

litigation in the Supreme Court, either by getting certiorari denied (if the clinic represents the respondent) or by prevailing on the merits. But, as Morawetz correctly points out, this duty also involves staying alert to any alternative avenues of relief that materialize while the case is pending.<sup>220</sup> As described above, such opportunities rarely arise, but they are not unheard of.

Another way in which a clinic should maximize its chances of obtaining a favorable result for the client is to coordinate with outside individuals and organizations that have substantive expertise to offer. Such individuals and organizations can help in two major and sometimes overlapping ways. First, they can offer suggestions, strategic advice, and feedback regarding the clinic's work. A clinic, for example, should seek the assistance of the working Supreme Court group of federal defenders (the Defender Supreme Court Resource Assistance Project, or DSCRAP) when litigating cases that implicate their expertise.<sup>221</sup> Scores of similar organizations exist—both formal and informal—and a clinic must avail itself of all potentially helpful expertise.

Second, outside organizations can file helpful amicus briefs. Sometimes this possibility can run in tension with a clinic's pedagogical interests. In particular, a clinic might want to file a brief earlier rather than later to ensure that subsequent proceedings fall at particular times when the clinic will be operating with students. Yet one or more potentially helpful outside organizations might need more time than a certain filing date will allow them to prepare amicus briefs. Here, the client's interests must control. While a clinic might prefer a case to run on a certain schedule (and might even turn it down at the outset because its timing is problematic), the clinic has an obligation, once it takes on a case, to put its clients' interests above its own. Lawyers sometimes have to work on weekends and holidays, and clinicians sometimes have to do case work over the summer.

Lastly, after a clinic has taken on a case in order to file a certiorari petition, it should stay alert to the possibility that another case might arise that presents a more favorable vehicle for considering the legal question at issue. As explained above,<sup>222</sup> sometimes the best thing for a litigant is to position someone else's case with more favorable facts in the lead, so the litigant can benefit from someone else's victory on the merits.

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220. Morawetz, *supra* note 27, at 146-55.

221. I do not know why Morawetz suggests, *see id.* at 163-65 & n.154, that the Stanford Clinic did not leave enough time for collaboration with DSCRAP in the case of *Dolan v. United States*, 130 S. Ct. 2533 (2010). The clinic worked extensively with DSCRAP throughout the briefing process, and no one involved claimed that the process was too rushed.

222. *See supra* Part III.A.2.

### C. *Postdecision Work*

The final issue regarding a Supreme Court clinic's responsibilities is whether—and, if so, when—a clinic has a responsibility to keep working on a case after the Court remands it for further proceedings. The ABA Model Rules provide that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>223</sup> It thus is common for Supreme Court specialists—like other lawyers who specialize in particular forums or tasks—to limit their representation to litigation in the Supreme Court. In fact, the requirement of “competence”<sup>224</sup> may actually require a clinic to *give up* a case if it is remanded for something like a new trial, instead of merely continued appellate proceedings.

Still, when a case is remanded and a clinic is unable or, for whatever reason, unwilling to continue the representation, the clinic—like any other specialized law office—should try to help the client find able representation for future proceedings. Often, that will simply mean returning sole ownership of the case to local co-counsel. At other times, however, it may require the clinic to seek out new pro bono counsel of some kind.

When a remand contemplates further appellate-style proceedings involving substantive questions that a clinic has handled in the Supreme Court, a clinic might reasonably decide to continue working on the case on the remand. In *Magwood v. Patterson*,<sup>225</sup> for example, the Stanford Clinic persuaded the Supreme Court to overturn an Eleventh Circuit ruling that a habeas petition filed by a prisoner on Alabama's death row was procedurally improper. The Clinic then briefed the prisoner's substantive claims on remand and obtained relief for him.<sup>226</sup> This kind of work offers excellent opportunities to teach about the meaning and effect of Supreme Court decisions and, when done within a clinic's realm of expertise, helps its clients as well.<sup>227</sup>

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223. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2012).

224. *See id.* R. 1.1; *cf.* Kay Nord Hunt & Eric J. Magnuson, *Ethical Issues on Appeal*, 19 WM. MITCHELL L. REV. 659, 664 (1993) (“[A]n attorney cannot assume competence at the appellate level based merely upon competence in the trial court.”).

225. 130 S. Ct. 2788 (2010).

226. *See* *Magwood v. Warden*, 664 F.3d 1340, 1341, 1349-50 (11th Cir. 2011).

227. Morawetz further suggests that clinics might have some responsibility to assist, when necessary, in advocacy to achieve (or to stave off) legislative reactions to their clients' Supreme Court decisions. Morawetz, *supra* note 27, at 171-73. It is hard to see how a clinic has any obligation to participate in postdecision legislative advocacy that would not help the clinic's client. Certainly such scenarios, much like remands, might offer excellent learning opportunities. Clinics might therefore volunteer to participate in such efforts to the extent they have something to offer. But it cannot be that a clinic, unlike a legal aid or public defender's office, takes on a duty whenever taking a case to the Supreme Court to pursue a cause beyond a client's needs.

## CONCLUSION

A Supreme Court clinic has substantial opportunities to serve the public interest, as well as attendant responsibilities. An empirical analysis of Court decisions from the October 2004 through the October 2010 Terms demonstrates that providing specialist counsel (along with the deep resources a clinic can deliver) to noncorporate criminal defendants and individual civil plaintiffs significantly enhances those litigants' chances of success. Put another way, clinical representation in the Court levels the playing field between such litigants and their corporate or governmental adversaries.

At the same time, a Supreme Court clinic must remain mindful of the magnitude of Supreme Court litigation—its potential consequences for the law and, sometimes, for society at large. A clinic must always put its clients' interests and objectives above its own, and it should take care to coordinate its efforts with other lawyers, clients, and interest groups that might be affected by the clinic's cases or have expertise to offer. Through such zealous representation and thoughtful collaboration, a Supreme Court clinic can not only enhance the quality of representation afforded in the Court to traditionally underserved litigants, but can also serve the high purpose of helping to make our ever-evolving law fairer and more evenhanded.

