

Stanford Law School

**A Supreme Court Clinic's Place
in the Supreme Court Bar**

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A Supreme Court Clinic's Place in the Supreme Court Bar

Jeffrey L. Fisher¹

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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² 130 S. Ct. 1662 (2010).

³ Transcript of Oral Argument at 30, *Perdue*, 130 S. Ct. 1662 (No. 08-970).

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INTRODUCTION

Early last Term, the Supreme Court was hearing argument in a case, *Perdue v. Kenny A.*,² 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.³ “The results that are obtained are presumably the results that are dictated or command 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

² 130 S. Ct. 1662 (2010).

³ Transcript of Oral Argument at 30, *Perdue*, 130 S. Ct. 1662 (No. 08-970).

the law [means something else]. The results obtained . . . should be what the law requires, and not different results because you have different lawyers.’⁴

Chief Justice Roberts’ comments were a bit tongue-in-cheek.⁵ For one thing, the Chief Justice himself was an exceptional advocate before going on 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 Solicitor General whom the plaintiffs had hired in the case presumably because they thought his extraordinary skills might make a difference in the case. Finally, and most important, it is common wisdom that advocacy *does* matter.⁶ Better lawyers often get better results for their clients.⁷ (Better lawyering, of course, might be the result of superior skill, superior experience, superior resources, or some combination of all three.⁸) 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 is right. Supreme Court cases typically deal primarily with pure questions of law.

⁴ *Id.* at 30-31.

⁵ 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?hpid=moreheadlines&sid=ST2009101500087>; Adam Liptak, *Justices Put Curbs on Payment for Lawyers*, N.Y. TIMES, Apr. 21, 2010, at A16; Dahlia Lithwick, *The \$5 Million Man*, SLATE, Oct. 14, 2009, <http://www.slate.com/id/2232431>; Tony Mauro, *High Court Justices Doubt Lawyers Should Be Paid Extra for Winning*, NAT. L.J., Oct. 15, 2009, <http://www.law.com/jsp/article.jsp?id=1202434599147>.

⁶ *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 343-44 (2010) (reporting results of survey of trial and intermediate appellate judges).

⁷ *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 with public defenders in the tenth percentile of ability); Posner & Yoon, *supra* note 6, at 346 (finding that judicial survey reinforced “evidence that the quality of legal representation has a strong effect on case outcomes”).

⁸ *See* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1077 (1984) (“Resources affect the quality of presentation, which in turn has an important bearing on who wins and the terms of the victory.”); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 103 (1974) (describing how attorneys with greater resources and expertise typically generate better outcomes for their clients).

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 what 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 in terms of acquiring 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 also is 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 solicitor generals' offices.⁹ And as Professor Richard Lazarus recently has elaborated, the business community also has increasingly turned to a select group of Supreme Court "specialist" lawyers, hoping to boost its influence and to improve its outcomes in the Court.¹⁰ 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.¹¹

What is more, in statistical analyses concerning cases the Supreme Court decided between 1977 and 1982, Professor 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 seven and ten percent when represented by an

⁹ *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*, J. SUP. CT. HIST. at 77.

¹⁰ See Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

¹¹ See *id.*

attorney with more experience in handling Supreme Court cases.¹² Petitioners won 65-66% of the cases decided during that period but between 73 and 75% of cases in which they were represented by attorneys with more experience than the respondents.¹³ In an even more striking finding, Professor 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 advantage¹⁴—deriving primarily from its lawyers' depth of experience and the special client they represent—"disappear[ed] completely."¹⁵ He "conclude[d] that, at least insofar as decisions on the merits are concerned, the federal government is not, as some has suggested, the 'tenth justice.' Instead, the solicitor general is merely one of many successful lawyers who appear before the Court."¹⁶

These statistical assertions are obviously somewhat outdated, harkening back to a different Court and a different time. In the late 1970's and early 1980's, there were hardly any lawyers outside of the Solicitor General's office with significant Supreme Court experience who appeared in the Court.¹⁷ 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 (e.g., one prior argument versus two), and the Solicitor General rarely faced off against equally

¹² See Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* 192 (1993) (finding 10% difference); Kevin T. McGuire, *Repeat Players in the Supreme Court Bar: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 193-94 (1995) (adjusting analysis and finding a 7% difference). For various reasons, these studies were somewhat imperfect. See Lazarus, *supra* note 10, at 1545 n. 236.

¹³ McGuire, *Repeat Players*, *supra* note 12, at 193-94.

¹⁴ 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 Polarization in the Solicitor General's Office*, 71 J. POL. 224, 225 (2009) (noting that scholars have "demonstrated that the justices overwhelmingly support the S.G.'s positions on the merits compared to all other participants" in Supreme Court litigation).

¹⁵ Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 515 (1998).

¹⁶ *Id.* at 506 (internal citation omitted).

¹⁷ Lazarus, *supra* note 10, at 1497. In 1980, for example, only six percent 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 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." Tony Mauro, *Appealing Practice*, *Legal Times* (Oct. 9, 2000). The modern Supreme Court bar, fact, was just beginning to form at that time. See Lazarus, *supra* note 10, at 1497-99.

experienced counsel. For these reasons and others, Professor McGuire’s analyses are somewhat imperfect.¹⁸ Indeed, Professor 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 the Court’s decision[s].”¹⁹ Even so, Professor 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.”²⁰ 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 private good—as in many civil cases it is—disparities, even vast ones, between [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 and the other nations that derive their legal system ultimately from England, 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 representation²¹

As serious of a concern 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

¹⁸ For other reasons, *see* Lazarus, *supra* note 10, at 1545 n. 236.

¹⁹ Lazarus, *supra* note 10, at 1545 n. 237; *see also* JEFF YATES, POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT (2002) (positing that institutional deference to the executive branch accounts for a significant part of Solicitor General’s success in the Court)

²⁰ *Id.* at 1545-46.

²¹ Posner & Yoon, *supra* note 6, at 349.

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—a turn, that is, 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. The Clinic is now headed by two faculty members (one of whom is me) and two outside instructors who collectively have argued over fifty cases in the Court and been involved in scores of others. 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 the students. But the school also hoped that the Clinic—as law school clinics are generally designed to do²²—would perform a public service; providing expert counsel and a pool of resources in Supreme Court cases 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 that clinic’s educational attributes and pedagogical approaches.²³ But when they wrote their piece, 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 seven and one-half 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

²² See Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 566-67 (2011); 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. & SOCIAL JUSTICE 23, 23-25 (2006).

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).

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 over forty cases on the merits 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. The clinics have enjoyed considerable success in persuading the Court to hear their clients' cases. (I am not privy to other clinics' cert-stage statistics, but the Stanford Clinic, as of the end of the 2010 Term, had succeeded in getting certiorari granted in 39% of the petitions (20 of 51) it has filed—"almost certainly" a higher percentage "than any practice in the nation except for the solicitor general's office."²⁴) 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),²⁵ the clinics have succeeded in winning a majority of their merits cases.²⁶

At the same time, the clinics' success (and, to some extent, their mere existence) has given rise not just to exciting opportunities but also to some theoretically and ethically challenging issues. Exactly how should a Supreme

²⁴ Adam Liptak, *Specialists' Help at the Supreme Court Can Come With a Catch*, N.Y. TIMES, Oct. 10, 2010, at A1; *see also infra* at n. 109 for more detail regarding this statistic. 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 10, at 1493.

²⁵ *See* Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

²⁶ *See infra* text accompanying notes 59-60.

Court clinic's "public service" mission be defined? By identity of clients? By identity of counsel that would handle the case if the clinic were not involved? By substantive issues? Equally important, once defined, how exactly should the clinic pursue its public service mission? Should the clinic, as a recent article suggests,²⁷ decline assistance in cases it believes might make "bad law"? 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 to easy answers. Indeed, this article sometimes declines to offer any answers at all. The point, instead, is to confirm that a Supreme Court clinic 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 piece will provide a basis for thought and debate. The notion of a Supreme Court clinic is still a relatively new one. But the notion has now taken hold at Stanford, and it seems likely to continue at least some other law schools. These schools, and the students who enroll in these clinics, ought to have a basis for discussion concerning what these enterprises should be trying to accomplish.

This article proceeds in three parts. Part One 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. But through an empirical analysis of the Court's decisions over the past seven Supreme Court terms, the section 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, to specialists handling 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.

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, 168-171 (2011).

Part Two 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 certworthy cases that sometimes would otherwise never be taken to the Court, and in terms of making arguments for or against granting review) and at the merits stage.

Part Three is, in a sense, the flip side the Part Two. 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. The power and influence of the Court also raise the stakes with respect to case selection. In particular, a clinic engaged primarily in client-based advocacy (in which they represent individual clients as its own end) might accept cases that a clinic following a model of issue-based advocacy (in which each individual cases are viewed as a means to the end of a 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-centered 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 against recent suggestions that it is problematic.²⁸

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

²⁸ See Morawetz, *supra* note 27; Adam Liptak, *Specialists' Help*, *supra* note 24, at A1 (quoting Barry A. Schwartz, a criminal defense lawyer in Denver, as saying that “there’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 represents. They want to get the case in the Supreme Court.”)

the public interest mission of a Supreme Court clinic because, unlike many other law school clinics, most Supreme Court clinic clients will not go otherwise unrepresented. 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 that the litigants would not otherwise receive.

The empirical assessment that follows focuses on litigation at the “merits stage” of cases rather than the certiorari (or jurisdictional) stage. The reason for doing this is that 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 cert petitions have an equal chance of success and then measure specialists' success rates against nonspecialists'. Especially in the clinical realm, specialists will tend to choose cases in part based on their perceived certworthiness, whereas nonspecialist counsel rarely has that luxury. And even within the realm of superficially similar cert petitions (say, the class of cases involving acknowledged circuit conflicts), 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 success. I readily acknowledge the possibility below that specialists may screen cases for winnability on the merits 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 clinic should be measured solely (or even primarily) on the basis of its winning percentage. A clinic is more fundamentally an educational institution than 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—sometimes especially to clients whose legal arguments turn out to be weak. So even if all of a Supreme Court clinic's cert 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 last seven Terms (dating back to the inception of the Stanford clinic) suggests that the kind of Supreme Court specialization that a clinic can offer does indeed achieve 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 as accurate comparisons 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 (I include habeas corpus cases in this category²⁹) in which clinics have represented the defendant, and civil cases in which clinics 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.³⁰ 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

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 honest services trilogy, the defendants were represented by Supreme Court specialists Sri Srinivasan (*Skilling v. United States*, 130 S. Ct. 2896 (2010)), Miguel Estrada (*Black v. United States*, 130 S. Ct. 2963 (2010)); and Donald Ayer (*Weyhrauch v. United States*, 130 S. Ct. 2971 (2010)).

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 (herein of ERISA). Finally, I include immigration cases, which, like criminal cases, involve individuals (almost always of limited means) against the federal government.

Second, in order to judge success at the merits, one needs to focus, well, on cases that included a merits stage. That leaves out cases where the Court summarily reversed a decision for such cases lack any merits briefing or oral argument. 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,³¹ such an outcome (commonly known as a DIG) is unambiguously a win for the respondent, insofar as its effect is to leave the decision below intact. While a DIG does not create precedent, it is no different than an affirmance as far as the respondent is concerned.

Third, conforming to conventional measures of success, any decision that upsets the decision below is considered a victory for the petitioner. If the Court leaves the decision below in place, it is a victory for the respondent.³² 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 than others, and some losses are different than others. A victory 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. By contrast, as Professor 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

³¹ See *infra* at 19.

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

for optimizing the possibility of what is often dubbed a ‘soft landing.’³³

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 immigrant was (1) the petitioner or the respondent; and (2) was represented by a Supreme Court specialist. 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?

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.) So the only consistent way to code attorney expertise is to focus on arguing counsel.

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 decision making. 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 a great deal of 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

³³ Lazarus, *supra* note 10, at 1541.

respect to the party's argument. That attorney can reshape the party's argument or even concede points.³⁴

For purposes of simplicity and consistency, I define a Supreme Court specialist by starting with the bright-line definition for expertise coined by Professor 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 is affiliated with a law firm or comparable organization with attorneys who have argued at least ten times before the Court."³⁵

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 in the Court. For example, a federal public defender who specializes in appellate advocacy might be just as skilled as a Supreme Court specialist at briefwriting 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' question at the beginning of this

³⁴ I also ignore whether Supreme Court specialists, including a clinic, represented amici on any given side of a case. That is too tangential and difficult to assess.

³⁵ Lazarus, *supra* note 10, at 1502. Two categorical decisions I made in implementing this definition are worth noting. First, I am not sure how Professor Lazarus would classify attorneys from ACLU offices who have given fewer than five arguments, but I placed them in the nonspecialist category. ACLU offices, much like federal public defender offices, operate with a high degree of autonomy. Thus, it seems more accurate to avoid treating the ACLU like a single law firm. Second, in five cases in which law professors with fewer than five oral arguments represented the relevant client, I classified the attorneys 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 (2010) (Orin Kerr of George Washington Law School); *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (2009) (Judith Resnik of Yale Law School); *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (Richard Friedman of University of Michigan Law School); *Hammon v. Indiana*, 547 U.S. 813 (2006) (same); *Gonzales v. Raich*, 545 U.S. 1 (2005) (Randy Barnett of Boston University School of Law). To 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) and would not materially affect the empirical results that follow.

article whether a litigants do just as well in the Supreme Court with expert counsel as with a local 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.³⁶ Thus, suffice it to say here that 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 the Supreme Court cases and the other, say, doing trials or administrative proceedings before the F.C.C., 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 (most do), the Court may be more apt (at least subconsciously) to value his or her assertions than a lawyer's 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 are pretty reliable indicators.

B. Relative Success Rates

All told, over the past seven years, the Court decided a total of 352 cases on the merits that the criteria set forth above for the kinds of cases that clinics typically handle—164 criminal cases, 176 civil cases, and 11 immigration cases.³⁷ Specialist counsel represented the criminal defendant or civil plaintiff in 43.6% of

³⁶ See Lazarus, *supra* note 10; McGuire, *supra* note 15; Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59 (2010).

³⁷ The Court sometimes writes an opinion deciding more than one case. When this happened and 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.

the cases (57 criminal cases, 89 civil cases, and 7 immigration cases). Within that group, Supreme Court clinics 12.5% (44) of the 351 overall cases),³⁸ while specialists at other kinds of law offices handled 31.1% (109). Nonspecialists represented the party in the remaining 56.5% of the cases. Specialists as a whole represented petitioners more often than respondents—handling 94 cases (41 criminal cases, 47 civil cases, and 6 immigration cases) for petitioners, and 61 cases (16 criminal cases, 44 civil cases, and 1 immigration case) for respondents.³⁹ By contrast, nonspecialists represented respondents more often than petitioners. But both kinds of counsel represented both kinds of parties more than often enough to allow for statistical analyses.

In the 352 cases, the Court ruled in favor of the defendant in criminal cases, the plaintiff in civil cases, or the immigrant in immigration cases 40.0% of the time.⁴⁰ When specialist counsel represented the criminal defendant, civil plaintiff or immigrant, that party won 53.4% of the time. When nonspecialist counsel represented such a party, the party won 29.6% 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 107 (58.5%) of the 183 cases in which they were petitioners and 34 (20.1%) of the 169 cases in which they were respondents. These numbers are

³⁸ The Stanford clinic handled 30 cases; Yale handled 9 cases; the University of Virginia handled 4; and University of Pennsylvania and the University of Texas each handled 1. 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 *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011); *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011); *Fox v. Vice*, 131 S. Ct. 2205 (2011). Penn represented one civil defendant as well. *Abbott v. Abbott*, 130 S. Ct. 1983 (2010).

³⁹ 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 cert granted. See *infra* text accompanying notes 107-109.

⁴⁰ Although the dozen immigration cases is too small of a sample for any meaningful analysis, the Court has been remarkably consistent in the two types of 340 other cases—ruling for criminal defendants 39.6% of the time and civil plaintiffs 39.2% of the time.

similar across all three types of cases: criminal defendants prevailed in 53.5% of the cases in which they were petitioners⁴¹ and in 17.5% of the cases in which they were respondents⁴²; civil plaintiffs prevailed in 63.9% of the cases in which they were petitioners⁴³ and in 22.1% of the cases in which they were respondents⁴⁴; and immigrants prevailed in 70% of the cases in which they were petitioners⁴⁵ and in 0 of 2 cases in which they were respondents.

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

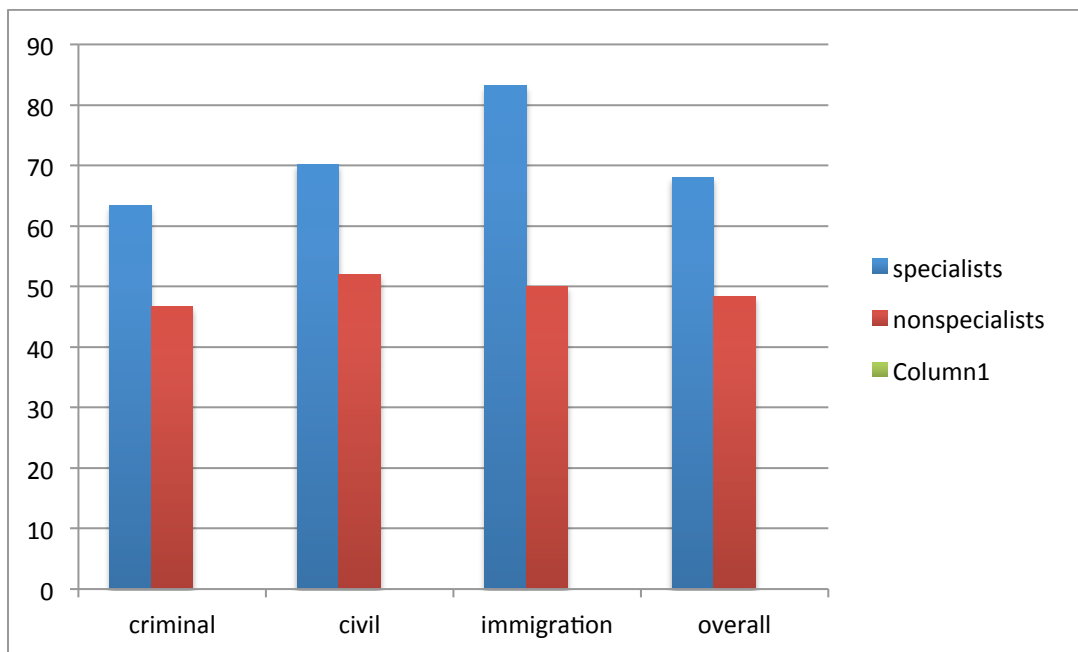


Figure 1: Percentage Rates of Success When Representing Petitioners

In overall terms, criminal defendants, civil plaintiffs and immigrants represented by Supreme Court specialists prevailed in 68.0% of the cases in which they were petitioners⁴⁶—63.4% in criminal cases⁴⁷; 70.2% in civil cases⁴⁸;

⁴¹ 54 of 101 cases.

⁴² 11 of 63 cases.

⁴³ 46 of 72 cases.

⁴⁴ 23 of 104 cases.

⁴⁵ 7 of 10 cases.

⁴⁶ 64 of 94 cases.

⁴⁷ 26 of 41 cases.

and 83.3% in immigration cases.⁴⁹ By contrast, such parties prevailed as petitioners in 48.3% of the cases when represented by nonspecialist counsel⁵⁰—46.7% in criminal cases⁵¹; 52.0% in civil cases⁵²; and 50% in immigration cases.⁵³

The story respecting respondents is much the same.

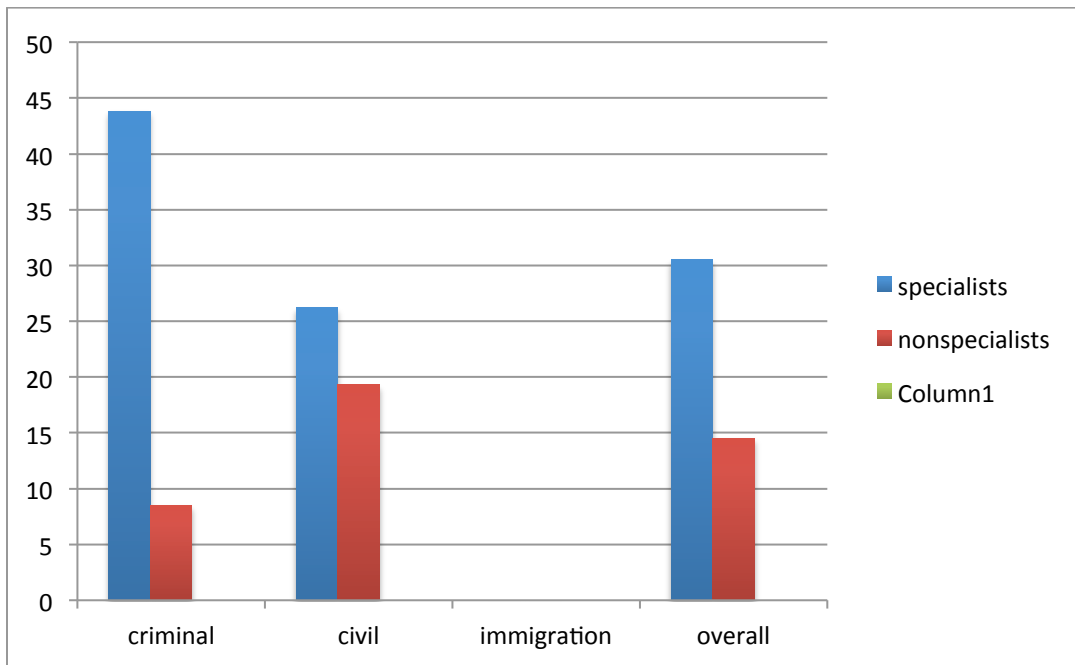


Figure 2: Percentage Rates of Success When Representing Respondents

Such parties prevailed in 30.5% of cases as respondents when represented by specialist counsel⁵⁴—43.8% in criminal cases⁵⁵; 26.2% in civil cases⁵⁶; and 0 of 1 in immigration cases. By contrast, such parties prevailed as respondents in just 14.5% of cases when represented by nonspecialist counsel⁵⁷—8.5% in criminal

⁴⁸ 33 of 47 cases.

⁴⁹ 5 of 6 cases.

⁵⁰ 43 of 89 cases.

⁵¹ 28 of 60 cases.

⁵² 13 of 25 cases.

⁵³ 2 of 4 cases.

⁵⁴ 18 of 59 cases.

⁵⁵ 7 of 16 cases.

⁵⁶ 11 of 42 cases.

⁵⁷ 16 of 110 cases.

cases⁵⁸; 19.3% in civil cases⁵⁹; and 0 of 1 in immigration cases. That translates to an overall 19.7 percentage point difference for petitioners, and a 16.0 percentage point difference for respondents. In terms of relative odds of success, these figures mean that petitioners represented by specialists are roughly 1.4 times more likely to win their cases, and respondents represented by specialists are over twice as likely to prevail.

The statistics with respect to the subset of specialists in Supreme Court clinics are in line with these numbers. The clinics have prevailed in 21 of the 30 cases (70%) in which they have represented respondents. They have prevailed in 4 of the 14 cases (28.6%) in which they have represented petitioners. These percentages are slightly higher than nonclinical specialists with respect to petitioners and slightly lower with respect to respondents, but well within the margin of error in light of the modest sample size—and well ahead of the percentages for nonspecialists. They also yield roughly the same relative rates of success compared to nonspecialists.

C. Isolating Causes for the Differential

No variable besides specialization in the Court seems to explain these differential rates of success. As noted above, the types of cases and clients are similar across the board; there is no factual or procedural characteristic that tends to distinguish cases specialists handle from those that they do not. Nor did support from the Solicitor General—one factor known to affect a party's odds of success⁶⁰—vary appreciably in the sample depending on whether specialist counsel is involved. In criminal cases, the Solicitor General never represents the defendant. Indeed, the Solicitor General was opposing counsel in all federal criminal cases in the sample. The results of those cases, although based on a relatively small sample size, are again powerful: specialists won 62.5% of their cases as petitioners,⁶¹ whereas nonspecialists won just 39.3% of their cases⁶²; and

⁵⁸ 4 of 47 cases.

⁵⁹ 12 of 62 cases.

⁶⁰ REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 142-50 (1992); *see also supra* at note 14.

⁶¹ 10 of 16 cases.

⁶² 13 of 33 cases.

specialists won 75% of such cases as respondents,⁶³ whereas nonspecialists won 22% of their cases.⁶⁴

When one adds in civil cases and immigration cases in which the Solicitor General represented a party, the sample size grows somewhat but the divergence in success rates holds constant. As Figure 3 shows, specialists won 67.8% of their cases as petitioners,⁶⁵ whereas nonspecialists won 34.1% of such cases⁶⁶; and specialists won 33.3% of their cases as respondents,⁶⁷ whereas nonspecialists won just 10.5% of such cases.⁶⁸

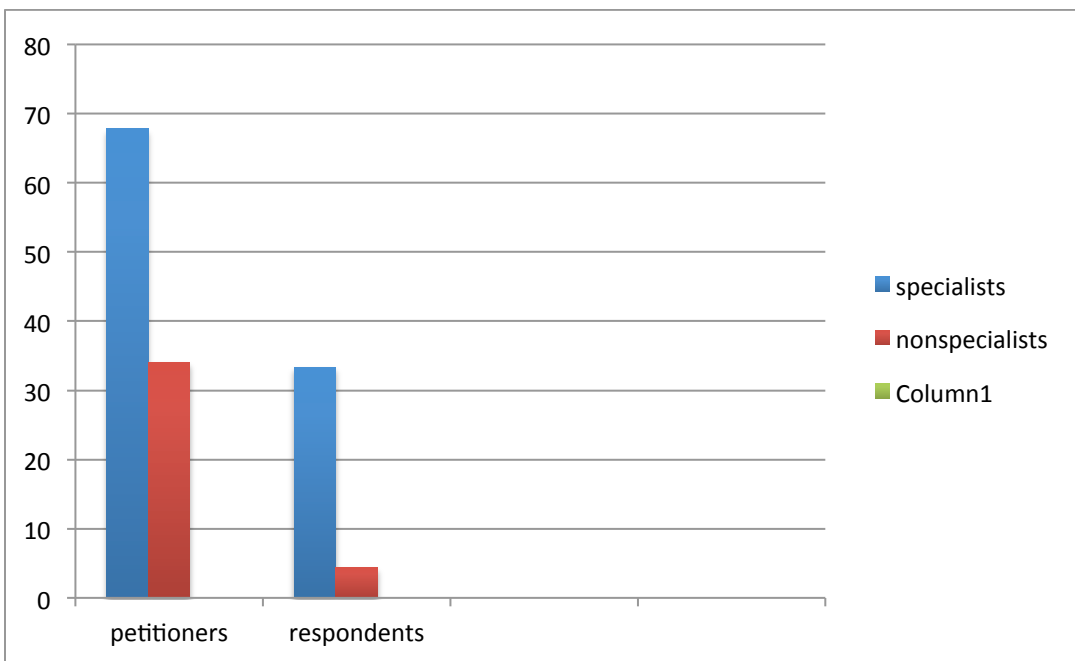


Figure 3: Percentage Rates of Success (Based On Party Lawyer Represents) Versus the Solicitor General

The story respecting civil cases in which the United States was not a party is a bit more complicated. But it is nonetheless consistent in showing an advantage for parties represented by specialists. The Solicitor General’s office

⁶³ 3 of 4 cases.

⁶⁴ 2 of 9 cases.

⁶⁵ 19 of 28 cases.

⁶⁶ 15 of 44 cases.

⁶⁷ 3 of 9 cases.

⁶⁸ 2 of 19 cases.

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, 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% off the time, whereas it supported respondents represented by nonspecialists only 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 interpretations 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, explains the greater success rates that specialist counsel enjoy. Or one might see the differential rates of involvement as still further evidence of the advantages that specialists confer upon their clients. For two reasons, the latter of these interpretations is much more plausible. First, as explained just above, specialists win a significantly higher percentage of federal criminal cases than nonspecialists, where the Solicitor General's participation is held perfectly constant.⁶⁹ The same is true in civil cases in which the Solicitor General either represents a party⁷⁰ or does not participate at all.⁷¹ And a statistical analysis of the civil cases in which the Solicitor General did intervene indicates that the Solicitor General's higher likelihood of a favorable intervention on behalf of specialist counsel than nonspecialist accounted for only 47.8% of specialists' higher rate of success as petitioners and only 30% of specialists' higher rate of success as respondents.⁷²

⁶⁹ See *supra* p. 22.

⁷⁰ See *supra* p. 22.

⁷¹ In civil cases in which the Solicitor General did not file a brief, specialists won 8 out of 10 cases (80%) when representing petitioners, whereas nonspecialists won 3 out of 5 (60%). Specialists won 2 out of 7 cases (28%) when representing respondents, whereas nonspecialists won 1 out of 10 (10%).

⁷² That is to say, even if one were to hold the Solicitor General's rates of intervention constant such that specialists were no longer able to persuade the Solicitor General's office to intervene

Second, it stands to reason that, all else being equal, Supreme Court specialists will be more likely than nonspecialist counsel to be able to persuade the Solicitor General to file in support of their client—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 are naturally going to have an advantage in making the necessary kinds of arguments to that office.

One might also wonder whether specialists are simply going after or getting more winnable cases in the door than nonspecialists (which could account not only for higher rates of positive Solicitor General intervention and for higher win rates overall). It strikes me as possible that this 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.⁷³ Thus, Supreme Court specialists seeking out possible cert petitions might favor cases they think present strong claims on the merits.⁷⁴ Even more important, the specialists might

favorably in more cases than nonspecialists, specialists would still retain a sizable chunk of their advantage over nonspecialists in their rates of success on the merits.

⁷³ See Sup. Ct. R. 10(a), (c) (indicating the 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 the relevant decisions from this Court”).

⁷⁴ 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, making it often 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 generally Theodore W. Ruger, et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting*

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 and nationwide importance of legal issues.⁷⁵ 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 took cert 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 getting more winnable cases on behalf of respondents. Even if specialists are more adept at getting cert denied for respondents when they have weak merits arguments, I don’t know of any specialists that 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 his case.⁷⁶

The only area in which this might possibly be true 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 cert 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 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.⁷⁷

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

⁷⁵ See, e.g., *Miller-El v. Dretke*, 545 U.S. 231 (2005). In that case, Mr. Miller-El’s specialist counsel Seth Waxman framed Mr. 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 preserve its rule against racially discriminatory peremptory strikes, when in reality the petition sought error correction. *Petition for Writ of Certiorari, Miller-El*, 545 U.S. 231 (No. 03-9659), 2004 WL 3250799.

⁷⁶ This was a fairly narrow and fact-bound case in which the Sixth Circuit had granted habeas relief based on a purported constitutional error in jury selection. *Berghuis v. Smith*, 130 S. Ct. 1382 (2010).

⁷⁷ Possible, but I don’t think very likely. See *supra* text accompanying note 76.

Indeed, when one looks at the statistics over the past seven years, one sees that nonspecialists handled 23 such 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 cases, we would end up with specialist counsel winning 31.5% of their cases (17 of 54) on behalf of respondents and nonspecialists winning 19.0% (16 of 84).

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*,⁷⁸ 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 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 some kind of 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 counsel⁷⁹ 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."⁸⁰ 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 AEDPA even applied in the case.⁸¹ (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]

⁷⁸ *Roper v. Weaver*, 550 U.S. 598 (2007).

⁷⁹ Weaver's counsel was John Blume, a professor and death penalty expert at Cornell Law School who has argued seven cases in the Court.

⁸⁰ 550 U.S. at 599 (citation omitted).

⁸¹ 550 U.S. at 601.

discretion” to dismiss the case and thereby “to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner.”⁸²

Contrast this outcome with the Court’s treatment of *Oregon v. Guzek*,⁸³ 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. 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 (the only way Guzek could avoid 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.⁸⁴ 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.⁸⁵

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 kind of advantage* from having such counsel. My findings that they do are statistically significant.⁸⁶ Furthermore, it seems that the difference—all else held constant—is somewhere between a 22.7% and a 16.0% (or, perhaps, if I am wrong in declining to exclude habeas cases in which states are petitioners, a 12.5%) chance of success on the merits. 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

⁸² *Id.* at 601.

⁸³ *Oregon v. Guzek*, 546 U.S. 517 (2006).

⁸⁴ Transcript of Oral Argument at 37-39, 41, 55-56, *Guzek*, 546 U.S. 517.

⁸⁵ *Guzek*, 546 U.S. at 522.

⁸⁶ Using a t-test, one can reject the hypothesis that petitioners represented by nonspecialists are just as likely to prevail as those represented by specialists at the required 95% confidence level (more specifically, at a 98.7% level). One can reject the same hypothesis with respect to respondents at the same level.

advantage at the cert stage, when familiarity with the Court and credibility of counsel is even more important.⁸⁷ But it is beyond my statistical capabilities, if it is even possible, to calculate how much bigger the cert 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 providing expertise and resources to litigants who lack it. Before reflecting 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 realize that Supreme Court clinics (even those run primarily by faculty members instead of law firms) share some attributes with private law firm practices that seek out and handle pro cases in the Court on a pro bono basis. But, as I elaborate in section A, the educational mission of a Supreme Court clinic should make it a fundamentally different enterprise than a law firm. So should a clinic's absence of a for-profit business looming as a superstructure. Thus, for example, while one commentator has surmised that a law firm "has an incentive to file many plausible petitions" in order to as to "maximize" its chances of getting cert grants,⁸⁸ a clinic's pedagogic mission should prevent it from doing this even if wanted to.⁸⁹ Instead, a clinic must strictly limit the number of cases it handles. A clinic must also ensure that all of the work it handles is proper for *pro bono* representation.

With those educational and pedagogical restrictions in place, section B considers whether a clinic should focus on any particular kind of clients or work. At its best, a clinic can help individual litigants of limited means get the Court's attention in cert petitions and fend off review when such litigants have won

⁸⁷ See Lazarus, *supra* note 10, at 1515-17. The Stanford Clinic, for example, has filed petitions for certiorari in 51 cases. The Court has granted 20 (39%) of those petitions through the October 2010 Term.

⁸⁸ Morawetz, *supra* note 27, at 146. I suspect that at least some firms do not have such a maximization policy, preferring instead to concentrate their pro bono resources on especially promising cases. But as I said, I leave this topic to others.

⁸⁹ See *supra* Part I.A.1.

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. My observations here are derived in part based on my experience with the Stanford clinic, but I assume that the same basic considerations shape any Supreme Court clinic that is overseen by law-school faculty and run as an operation (in the traditional clinical spirit) in which students have primary responsibility for preparing briefs.

1. Pedagogical issues

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,⁹⁰ the clinic has found that the most that it can handle at any given point is four ongoing briefs. And the clinic's capacity can drop off below that level during the summer and other academic terms in which it is not up and running at full steam. All of this adds up to an ability to have about six to ten active cases on the clinic's docket at any given time, while juggling their briefing schedules and, in cases at the cert stage, awaiting word on whether the Court will hear the case on the merits. So clinics will sometimes have to pass on opportunities to work on cases for the simple reason that it does not have space to take them on, or because the case's timing does not fit into the academic calendar in ways that will promote student ownership and robust student engagement in projects.

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

⁹⁰ See Karlan et al., *supra* note 23, at 219-23.

procedure or Title VII, for instance—than some arcane area of federal statutory law that they have never come across and that requires specialized experience. Similarly, when it comes to representing a respondent at the certiorari stage, students get much more out of participating in a case that is a serious candidate for certiorari. It is too easy—not to mention a waste of resources—to file briefs in opposition to petitions that are destined to be denied anyway.

A clinic ought to have sufficient control over the briefing in a case such that the students can feel true ownership over it. The students, in other words, must play the role of responsible attorneys on the case, not mere research assistants. Thus, for instance, while the Stanford clinic prefers cases in which counsel from the lower courts stays involved (this aids us in terms of continuity, knowledge of the record, rapport with the client(s), and sometimes expertise regarding the case's legal issues), it typically declines to work on cases where such counsel wants to be the primary draftsman of the brief(s).⁹¹

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.) Relatedly, a clinic might try to balance its docket in terms of representing petitioners and respondents.

Finally, a clinic might try to balance our docket in terms of co-counsel arrangements. Sometimes clinics work with appointed counsel who are eager to turn case over to them. On the other hand, sometimes clinics work with lawyers

⁹¹ This is not to say that the clinic refuses to offer *any* assistance when an attorney whom we contact decides to keep a case in his primary control. Instructors in the clinic often discuss strategy and offer comments and edits on briefs in such cases on their own time. But when a local lawyer keeps control over the case, the case does not become a *clinic* case because the students do not get involved.

(such as federal public defender in criminal cases⁹² or voting rights experts in civil cases⁹³) 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 restrictions

On the public interest side of the ledger, a clinic's predominant consideration will presumably be whether a potential client could afford to hire a Supreme Court specialist. This situation arises more often than someone unfamiliar with the Court might think. A substantial percentage (over one-half) of the Court's cases involve an individual person or people on at least one side of the case. And individuals generally 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 (think here especially criminal defendants) or people of very modest means (think here especially plaintiffs in employment cases and civil rights cases). Organizational litigants, such as nonprofit institutions and municipalities, also often lack the means to hire 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 the Supreme Court hardly ever start their cases—or even prosecute their 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

⁹² See, e.g., *United States v. Tinklenberg*, 131 S. Ct. 2007 (2011) (Stanford clinic co-counseled with federal public defender).

⁹³ See, e.g., *Riley v. Kennedy*, 553 U.S. 406 (2008) (Stanford clinic co-counseled with voting rights expert).

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.⁹⁴ If either of those things were not the case, the Court would likely not have taken the case to begin with. Even with respect to cases one can say at the trial level raise a certworthy legal issue, it generally is a crap shoot to guess which ones will eventually suitably present themselves for Supreme Court review. Cases settle. They get resolved on different or alternative grounds. They get bogged down in collateral litigation. Juries return surprise verdicts. And so on.

Two cases that the Stanford clinic has handled – one criminal, one civil – illustrate aspects of this reality. In *Melendez-Diaz v. Massachusetts*,⁹⁵ 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 on literally 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 Appeals Court of Massachusetts had affirmed the case in an unpublished opinion,⁹⁶ dispensing with the confrontation claim mainly in a footnote; and the Massachusetts Supreme Judicial Court had denied review.⁹⁷

In *Ledbetter v. Goodyear Tire & Rubber Co.*,⁹⁸ 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.⁹⁹ A conflict arose—and the case became certworthy—only after she prevailed at trial

⁹⁴ See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 245 (9th ed. 2007).

⁹⁵ 129 S. Ct. 2527 (2009).

⁹⁶ Commonwealth v. Melendez-Diaz, 870 N.E.2d 676 (Mass. App. Ct. 2007).

⁹⁷ Commonwealth v. Melendez-Diaz, 874 N.E.2d 407 (Mass. 2007).

⁹⁸ 550 U.S. 618 (2007).

⁹⁹ See *id.* at 623 (noting that the Second and D.C. Circuits had ruled in plaintiffs' favor on the issue).

and the defendant appealed, persuading the Eleventh Circuit to reject the previous consensus.¹⁰⁰

The mention of *Ledbetter* raises one other issue. While law firms with Supreme Court practices are increasingly willing to handle cases against governmental entities on a pro bono basis, such law firms typically are unwilling to challenge the interests of corporations. That means that plaintiffs in employment cases and tort cases, in particular, often lack access to Supreme Court counsel. (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.) Perhaps a clinic interested in leveling the playing field should focus its resources specifically upon these kinds of cases. I think a clinic might well decide to focus on employment and tort cases on the merits 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.¹⁰¹

At the same time, I do not think this is the only possible legitimate choice a clinic can make. Although 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 serve that role, it may often need to promise to handle the case at the merits stage as well. Even if

¹⁰⁰ Based on these examples and other cases clinics have handled, one might think that Supreme Court clinics necessarily have liberal agendas. Insofar as representing “the little guy” is more often associated with advocating a “liberal” result, a Supreme Court clinic is indeed likely to find itself more often on that side of the ideological spectrum. But that is a function of providing expertise and resources to litigants who are unable to pay for it, not any political agenda. Indeed, one need only look at Supreme Court cases over the past few years to see employment cases, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); civil rights cases, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and property rights cases, *Kelo v. City of New London*, 545 U.S. 469 (2005); *Wilkie v. Robbins*, 551 U.S. 537 (2007), in which individuals of modest means advanced arguments that were viewed as distinctly conservative in nature. Still more cases lack any easily identifiable ideological bent, either because they involve political crosscurrents, *United States v. Comstock*, 130 S. Ct. 1949 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010); or because they lack any discernable political import, *Rousey v. Jacoway*, 544 U.S. 320 (2005) (whether debtors may exempt IRAs from their estates in filing a petition for bankruptcy). Some of these cases (*Wilkie*, *Stevens*, and *Rousey*) were handled by clinics, and others legitimately could have been.

¹⁰¹ See *infra* text accompanying notes 131-132.

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 cert stage. Furthermore, 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 working not only on cases against corporations but also criminal and civil rights case 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 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 than public litigants. The only way for students to appreciate and understand these differences first-hand is for a clinic to handle some cases in both camps.

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. Spelling them out might also sound a bit like an infomercial. But it is essential to explain, in some detail, exactly how a clinic’s bundle of offerings can do something very important: 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 cert process suffers from what Tom Goldstein has called a “market failure”¹⁰²—or at least a “market inefficiency.” The Court, which might be thought of as the consumer of cert 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.¹⁰³ The Court seeks out such cases 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 cert 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 conviction reversed. Civil plaintiffs want their jury verdict reinstated, or they want summary judgments or dismissals reversed.

Often 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 cert (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, in the lower courts over the issues; and explain why the case is an excellent vehicle to 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 cert 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

¹⁰² Tom uses this phrase in a lecture he gives to students in the Stanford clinic each quarter on the cert process.

¹⁰³ *See* SUP. CT. R. 10.

will address that general subject below.¹⁰⁴) 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.¹⁰⁵ Usually, particularly in state-court practice, this is because the parties fail to advise the appellate court that other courts have issued opinions concerning 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 cert. All they know, instead, is that the Court accepts only one out of one hundred cases.¹⁰⁶ So they 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 cert. Indeed, a clinic should be able to identify certworthy cases even when the decision from which the petitioner would seek cert does not identify a circuit split or have another telltale sign of certworthiness. A clinic might identify certworthy cases through reading slip opinions or by secondary sources reporting on new decisions in the federal circuits or state supreme courts. 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 cert petition. Indeed, in several cases in which the Stanford clinic has obtained certiorari, we were able to

¹⁰⁴ See *infra* text accompanying notes 185-220.

¹⁰⁵ See examples *infra* note 107.

¹⁰⁶ Lazarus, *supra* note 10, at 1515.

file cert petitions on behalf of clients whose attorneys were not planning on filing for certiorari.¹⁰⁷

Equally important to situations in which a cert petition would never have been filed but for a clinic, a clinic's expertise and reputation should enable it to obtain certiorari in cases that nonspecialist attorneys, even though already committed to seeking cert, could not get through the door. Such cases might involve a clinic reaching out and offering help, or they might involve local counsel or a client approaching a clinic. Either way, given the highly specialized nature of cert practice, a clinic can deploy its expertise in knowing how to frame a case to maximize the chances that the Court will decide to review it.

Furthermore, 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 cert simply by appearing in the case. One reason the

¹⁰⁷ In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2532 (2009), for instance, Mr. Melendez-Diaz was represented in the Massachusetts state courts by a solo practitioner who was appointed counsel. His counsel ably argued in the Massachusetts Court of Appeal that the prosecution had violated his rights under the Confrontation Clause by introducing a forensic lab report without putting the analyst who prepared the report on the stand. The Court of Appeal rejected the argument in a footnote, relying on a prior decision from the Supreme Judicial Court of Massachusetts rejecting the same argument. Neither the Court of Appeal's decision nor the earlier decision from the Supreme Judicial Court noted any conflict over the issue. Yet by the time the Court of Appeal issued its decision, there was a deep conflict on the subject among various state high courts. The Stanford clinic reached out to Mr. Melendez-Diaz's attorney and urged her to preserve the issue in a petition for review to the Supreme Judicial Court of Massachusetts. 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, 443 (2005)), and ultimately paved the way for his winning a reversal of his conviction in the Supreme Court.

Similarly, in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), Mr. Flores-Figueroa had been convicted of aggravated identity theft and had lost on appeal in an unpublished disposition. An argument he raised in his case, however, implicated a circuit split over the reach of the aggravated identity theft statute. The Stanford reached out to local counsel four days before a cert petition was due and learned that the lawyer had no plans to seek cert. We sought certiorari and eventually got his conviction overturned.

Solicitor General’s office enjoys such a high rate of success in its cert practice is because the Court knows that it generally refuses to file a cert petition unless it genuinely believes that cert should be granted.¹⁰⁸ A clinic might decide to adopt a similar rule, at least (as we have) to the extent that it is willing to file cert petitions only in cases in which a substantial case can be made for cert. Once the Court begins to see a pattern in this respect, the clinic’s success should beget success. Indeed, if a clinic instituted a particularly strong screening process, the clinic’s “brand” could become a signaling device to the Justices—a means of allowing individual litigants (just like the Solicitor General and some state attorneys general or solicitors general can do on behalf of governmental entities) implicitly to tell the Justices to take a close look because this case *really is* certworthy.¹⁰⁹

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 cert petition for free. Perhaps a clinic should stand down in such situations and limit its assistance to those cases in which no-one else calls, either because real conflict exists or no-one else recognizes the conflict. Presumably, the clinic would enjoy a lower rate of success in filing cert 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 cert

¹⁰⁸ 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) (discussing the “rigorous screening process” the Solicitor General employs in deciding whether to seek certiorari).

¹⁰⁹ Over the past seven years, for example, the Stanford Clinic has filed 51 cert petitions. The Court has granted 20, or 39%, of them. (These numbers leave aside two cases: (1) *Allshouse v. Pennsylvania*, 131 S. Ct. 1597 (2011) (mem.), in which the Court granted, vacated, and remanded the case in light of another recent decision; and (2) *Golan v. Holder*, 131 S. Ct. 1600 (2011) (mem.), in which the Court granted cert in a case in which the Stanford clinic advised the school’s Fair Use Project, which was lead counsel in the case.) This “grant rate” is almost certainly the second-highest in the Nation, after the Solicitor General’s office. Adam Liptak, *Specialists’ Help at the Supreme Court Can Come With a Catch*, N.Y. Times, Oct. 10, 2010, at A1; see also Lazarus, *supra* note 10, at 1515 (“A Supreme Court advocate who manages to get 30% of her cert petitions granted would be beyond outstanding.”).

granted in cases that, at least at first blush, were fairly marginal. I think other clinics might have had similar experiences. In these scenarios, a clinic's impact is plainly apparent. On the other hand, even when a case appears even from the decision below itself to be certworthy, 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 cert petitions, sheer dedication and effort—finding every last lower court opinion on the subject—can make a difference. Second, clinic instructors will be deeply involved in the strategy—not just the writing—of the petition, often in a much deeper way than a partner in a law firm typically is in a pro bono matter. Finally, instructors in clinics are often experts in the substantive area of law at issue, whereas lawyers in law firms who offer to help may not be.¹¹⁰

(b) Opposing certiorari

A clinic also can and should use its expertise to assist litigants in defeating opponents' petitions for certiorari. Just as a clinic can use its resources to identify federal and state appellate decisions that are certworthy, it can track cert petitions as they are filed to identify serious candidates for plenary review. Generally speaking, when the Solicitor General or a state attorney general files a cert petition, it has at least a significant chance of being granted. The same goes for petitions that corporations file through Supreme Court specialists. A clinic can work with local counsel representing respondents in cases in which counsel might not have experience litigating in the Court in general, or opposing cert in particular.

As Professor Lazarus recently explained,¹¹¹ a brief in opposition to certiorari is one of the oddest—and sometimes utterly counter-intuitive—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 to nothing to do with the merits. A

¹¹⁰ See *infra* text accompanying notes 129-132.

¹¹¹ Lazarus, *supra* note 10, at 1510-11.

clinic can help local counsel navigate this process and increase the odds that cert will be denied.

This work can be especially important because defeating a cert 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 over the past seven years, individual plaintiffs eligible for clinical representation won as respondents on the merits only 20.1% of the time. Criminal defendants won as respondents on the merits only 17.5% of the time. 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 less practically or jurisprudentially significant than meets the eye.

(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 way¹¹²) on the merits. The statistics above show that over the past seven years, individuals represented by Supreme Court specialists appear to prevail somewhere between 19.7 and 16.0 (or 12.5) percentage points more often than those represented by nonspecialists.¹¹³ These are significant variances. They mean that petitioners were roughly 1.5 times as likely to prevail, and respondents were roughly twice as likely to prevail, when represented by Supreme Court specialists.

Another striking thing about the numbers concerning litigants represented by specialists is that the numbers average out to an average individual litigant's having almost exactly a 50% chance of success (68% as a petitioner and 30.5% as a respondent). Given that an individual litigant's opponent is usually a governmental entity or corporation, and that such an opponent is usually represented by Supreme Court specialists, the statistics from the last seven years suggest that an individual's having specialist counsel truly levels the playing field on the merits. (These statistics even go so far as to support Professor McGuire's assertion twelve years ago that the Solicitor General is indeed "merely one of

¹¹² See *supra* note 33 and accompanying text.

¹¹³ See *supra* notes 38-74 and accompanying text.

many successful lawyers who appear before the Court.”¹¹⁴ When facing the Solicitor General’s office as counsel for the opposing party, Supreme Court specialists enjoyed basically the same 50/50 success rate as against other attorneys, winning 67.8% of the time representing petitioners and 33.3% of the time representing respondents.¹¹⁵ At the same time, parties lacking specialist counsel seem, as a general matter, to be at a serious disadvantage in cases on the merits. Such parties prevailed in only 29.6% of their cases over the last seven years—48.3% of cases when representing petitioners and 14.5% of cases when representing respondents.¹¹⁶

It is worth emphasizing that these statistics involve only cases in which an individual person 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 Indian 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 Indian tribes at the cert stage,¹¹⁷ 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.¹¹⁸) A clinic could even decide that it was in the public interest to offer its services to a state government that lacked a Solicitor General’s office.¹¹⁹

¹¹⁴ McGuire, *supra* note 15, at 506.

¹¹⁵ See *supra* notes 65-66 and accompanying text.

¹¹⁶ See *supra* notes 40-59 and accompanying text

¹¹⁷ The Stanford clinic has represented the Navajo Nation, *see* Petition for a Writ of Certiorari, *Navajo Nation v. U.S. Forest Service*, 129 S. Ct. 2763 (2009) (No. 08-846), 2009 WL 46999; the City of Columbus, *see* Petition for a Writ of Certiorari, *City of Columbus v. Golden*, 546 U.S. 1032 (2005) (No. 05-354), 2005 WL 2276033; and the City of Valdez, *see* Brief in Opposition, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009) (No. 08-310), 2008 WL 4893773.

¹¹⁸ *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).

¹¹⁹ For example, the University of Virginia clinic represented the Nevada Commission on Ethics last Term. *See Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2434 (2011).

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 cert and merits stages.

(a) Certiorari stage

Informational deficits are not the only kind of a “market failure” that can impede the cert process. Financial deficits also cause a client not to seek cert 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 can dwarf it. A prominent Supreme Court specialist at a Washington, D.C. firm, for example, charged a business client \$1.1 million for handling the certiorari and merits stage of a case.¹²⁰ Thus, even if a client is sure that the Court would take her case and that she would win, she may reasonably decide not to file for cert.

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 statutes¹²¹ 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, whose appointments often expire at the end of state-court proceedings.¹²² 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 my first Supreme Court case, *Crawford v. Washington*.¹²³ In the Washington State appellate courts, Michael Crawford was represented by an

¹²⁰ Robert Schmidt & Greg Stohr, *The Price of Winning at the Supreme Court*, Business Week, August 13, 2011, at xx.

¹²¹ See, e.g., 42 U.S.C. § 1988 (2006).

¹²² See, e.g., PA. R. CRIM. PRO. 904 cmt. (appointing counsel through “all avenues of appeal through the Supreme Court of Pennsylvania”).

¹²³ 541 U.S. 36 (2004).

appointed lawyer who, under the standard contract with the State for criminal appeals, earned \$2000 for each appeal he handled. (This fee covered not only proceedings in the Washington Court of Appeals but also 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, in an opinion that did not mention any conflict or confusion regarding the Confrontation Clause jurisprudence at issue,¹²⁴ I called the lawyer and asked whether he had any plans to seek cert. The lawyer responded that he did not see any reason to do so, since the Washington Supreme Court's decision was consistent with its own prior law. What the lawyer did not know—and what I discovered only after hours of Westlaw research—was that the Washington Supreme Court's holding actually implicated a deep conflict concerning how to apply the Confrontation Clause's then-prevailing “reliability” framework.¹²⁵ What is more, three sitting Supreme Court Justices had recently suggested that the Court's reliability-based approach to the Confrontation Clause in general should be reconsidered.¹²⁶ Even after I told him those things, however, it was still not feasible for the lawyer to file a cert petition; he realized that the investment required to litigate the case would crowd out any hope of taking enough appointments to sustain a living at \$2000 per case.

A clinic can solve cost/benefit impediments to cert. 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 cert in a civil case in which the cost of hiring counsel to litigate the matter would exceed any expected recovery. In *Jerman v. Carlisle*,

¹²⁴ See *State v. Crawford*, 54 P.3d 656 (Wash. 2002).

¹²⁵ 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 *State v. Crawford*, 54 P.3d 656, 663-64 (Wash. 2002) (holding that interlock established reliability); *Rankins v. Commonwealth*, 523 S.E.2d 524, 531 & n.8 (Va. App. 2004) (same), with *People v. Farrell*, 34 P.3d 401, 406 (Colo. 2001) (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); *People v. Watkins*, 475 N.W.2d 727, 746 (Mich. 1991) (same).

¹²⁶ See *Lilly v. Virginia*, 527 U.S. 116, 140 (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); *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.”).

*McNellie, Rini, Kramer & Ulrich LPA*¹²⁷ for example, a clinic represented a plaintiff in a case involving the Fair Debt Collection Practices Act who claimed that her damages totaled \$1000.¹²⁸ In *Sossamon v. Texas*,¹²⁹ a clinic client likewise sought modest damages for violations of the Religious Land Use and Institutionalized Persons Act. 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.

A clinic can cure economic disincentives even in cases that implicate fee-shifting statutes, such as civil rights, employment discrimination, or Fair Labor Standards Act actions. If local counsel in such cases were to seek cert and ultimately prevail (not just in the Supreme Court but also on the merits), they would recover their full attorneys' fees. But because the odds of obtaining cert and ultimately winning are so slim, local counsel may have a strong interest to "invest" their time in other cases that are more likely to bear fruit. A clinic does not have to make such financial assessments.

(b) Merits stage

Surely one reason that Supreme Court specialists tend to be more successful in the Court, wholly apart from the expertise it 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 law firm's Supreme Court practice, told me once that she thought it took, on average, about one month of solid work to write an adequate merits brief. That sounds in the right ballpark to me.

If anything, the estimate strikes me as low. Even if one has written the cert 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 one also needs to mine the Court's jurisprudence in general for parallel situations and related issues. One may need

¹²⁷ 130 S. Ct. 1605 (2010).

¹²⁸ She also sought class certification, which would have entitled her to seek up to \$500,000 on behalf of the class. 130 S. Ct. at 1609. But the district court had not ruled on that motion as of the time the case went up on appeal.

¹²⁹ 130 S. Ct. 3319 (2010).

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 person'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 as well, especially when 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. It would likely be difficult or impossible for the lawyer to shift that work onto someone else. Instead, the lawyer (or an entire small firm) would have to put their entire practice on hold for months those several months, perhaps jeopardizing the individual's (or firm's) solvency. A clinic serves the public interest by providing resources to litigants in such cases. Just as with expertise, such resources typically level the playing field between the parties.

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 laws 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.¹³⁰ 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 sorts its deputies according to areas of substantive expertise. On the private wide of the ledger, John Blume, for example, a

¹³⁰ See Lazarus, *supra* note 10, 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”).

professor at Cornell Law School, is an expert on the death penalty. Andrew Frey, a lawyer at Mayer Brown and an alumnus of the Solicitor General's office, is an expert in punitive damages. 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.¹³¹

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. In the Stanford clinic, for example, my colleague Pam Karlan is an expert in constitutional and civil rights law, with a particular focus on voting rights and election law. Kevin Russell is similarly expert in employment law. 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. A clinic might decide to focus exclusively on one particular substantive area, as the University of Texas's clinic has done with respect to capital punishment.¹³² Such a move makes 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 tougher for them to gain the kinds of insights that come from comparing the Court's work across different fields.

¹³¹ See, e.g., Transcript of Oral Argument, *Hammon v. Indiana*, 547 U.S. 813 (2007) (No. 05-5224), 2006 WL 766741 (Justice Breyer asking counsel for guidance because "you're an expert in this").

¹³² See *Supreme Court Clinic*, SCH. L.: UNIV. TEX. AT AUSTIN, www.utexas.edu/law/clinics/supremecourt (last visited Jan. 26, 2011).

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.¹³³

III. CLINICAL CHALLENGES AND RESPONSIBILITIES

As is so often the case, along with opportunities come very real challenges and responsibilities. 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,¹³⁴ one of which also prompted swift post-election action from Congress.¹³⁵ Another case in which a clinic was involved invalidated acts of Congress.¹³⁶ Still other clinic cases have invalidated state laws and reshaped the way trials and plea negotiations

¹³³ 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 in 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 does not have an obligation to accept the help if the client does not want it. See Christine M. Macey, *Referral is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 GEO. J. LEGAL ETHICS 979 (2008-09). I will not pursue that issue further here except to note that this piece seems generally correct to me.

¹³⁴ See *Who's Afraid of Lilly Ledbetter?*, L.A. TIMES, Apr. 24, 2008, <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), <http://www.nationalreview.com/corner/164987/mccain-disappointed/kathryn-jean-lopez> (quoting 2008 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").

¹³⁵ See *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (overturning *Ledbetter*, 550 U.S. 618).

¹³⁶ See *United States v. Stevens*, 130 S. Ct. 1577 (2009) (invalidating 18 U.S.C. § 48 (2006)).

across the country are conducted.¹³⁷ So anyone who runs a clinic needs to be deadly 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) post-decision work.

A. Case Selection

A Supreme Court clinic, by its nature, presumably 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. Unlike a 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.

Professor Nancy Morawetz argued recently, in the context of selecting cases in which to seek cert, 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.¹³⁸ In particular, Professor Morawetz the “new Supreme Court pro bono bar” (a term into which she lumps Supreme Court clinics together with law firm practices)¹³⁹ “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

¹³⁷ See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Melendez-Diaz*, 129 S. Ct. 2527, 2554 (2009) (Kennedy, J., dissenting) (“[T]he Court’s decision is . . . contrary to authority extending over at least 90 years . . .”).

¹³⁸ Morawetz, *supra* note 27, at 131.

¹³⁹ *Id.* at 137. As I noted above, clinics (as opposed to law firms) do not try to “maximize” the number of merits cases they handle. Such an objective would simply be in too much tension with a clinic’s educational mission. But there is no doubt that clinics want to work on *some* merits cases each Supreme Court Term, in order to give the students and the instructors regular opportunities to engage in merits briefing and oral argument. So presumably Professor Morawetz’s concern applies to clinics as well as law firms.

substantive agenda or interest groups—“in being in a position to handle cases before the Supreme Court on the merits.”¹⁴⁰

This is a serious charge (particularly insofar as it is advanced as a global matter) that deserves serious reflection. First, however, a preliminary observation seems appropriate: While Professor Morawetz is certainly correct that Supreme Court clinics want to handle cases on the merits, 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. Deal lawyers want to handle deals. Yet all lawyers have a professional obligation to pursue their clients’ interests at all times, even when doing so comes at the expense of lawyers’ professional or financial desires. This is the essence of client-centered representation.¹⁴¹ Thus, a trial lawyer must be prepared to pursue settlement strategies and to give balanced advice regarding plea offers and the like. A deal lawyer interviewing a potential client must be alert to possibilities besides complicated contracts or financial instruments for securing the client’s objective. So 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 way that litigators across the country probably do not pine for the chance to handle a case before the Federal Communications Commission or the Missouri Court of Appeals.¹⁴² 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 someone who has argued several cases at the Court (and presumably will have

¹⁴⁰ *Id.* at 131.

¹⁴¹ See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2004) (“[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 wishes whether to settle a matter [or enter a guilty plea.]”).

¹⁴² See, e.g., Timothy Coates, *I Couldn’t Wait To Argue*, 5 J. APP. PRAC. & PROCESS 81 (2003).

opportunities in the future to argue several more) is 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. A few years ago, a divided state supreme court decided a criminal procedure in favor of a criminal defendant in a way that framed an important conflict among the lower courts.¹⁴³ In part because our clinic had previously litigated the issue at the cert 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 cert (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, that 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 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 you are running a Supreme Court clinic and have argued several cases—not to let that desire compromise your professional duties and judgment. The client's best interests must always come first.

In particular, there are two issues involving case selection 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: (a) whether there is a venue other than the Supreme Court in which the client might obtain relief; and (b) 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. Professor Morawetz suggests that there is a

¹⁴³ 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.

third issue that clinics and other offices deciding whether to take up a case ought to consider: (c) whether the client’s case has the potential to make “bad law” for other similarly situated individuals.¹⁴⁴ The degree to which a clinic ought to consider this 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.¹⁴⁵ 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 some 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 Professor Morawetz that the clinic takes on a duty 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 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 which alternative avenues of relief are genuinely viable are rare, and when they do arise, a clinic’s self-interest is generally aligned

¹⁴⁴ See Morawetz, *supra* note 27, at 166-171.

¹⁴⁵ See MODEL CODE OF PROF’L RESPONSIBILITY Canon 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)).

with what is best for the client. Let me turn first to the rarity 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, over one-half of the Stanford clinic's) do not begin as cert petitions. Instead, they begin as briefs in opposition to cert 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 or plea bargaining, of course, is almost always a theoretical possibility all the way through a case. But once governments or corporations (clinics' most common adversaries) have litigated all the way to the Supreme Court, they are highly 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, do so 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 dead 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 "cert 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 need to win 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 to turn. Standard *res judicata* principles preclude litigants from bringing new cases

seeking the same relief they previously sought and failed to obtain.¹⁴⁶ Thus, for example, when one of the Stanford clinic's clients, Lilly Ledbetter, had her \$2 million jury verdict for sex discrimination taken away 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.

Professor Morawetz suggests that criminal defendants who have lost in state court (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 in a federal district court.¹⁴⁷ Habeas litigation is unique in that it is not subject to traditional *res judicata* principles.¹⁴⁸ Accordingly, Professor Morawetz contends that such litigants will sometimes be better off foregoing the ability to seek cert and instead proceeding directly to federal habeas review.¹⁴⁹

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 in state court. A person can seek habeas relief only if he is still "in custody" for the offense of conviction.¹⁵⁰ That means that if the person was sentenced to less than about five years (the time it usually takes to exhaust ones remedies in state court), he will not be able to seek federal habeas relief as a way of overturning his conviction.¹⁵¹ Furthermore, federal habeas relief is not available for certain kinds of federal claims. The Supreme Court has held that Fourth Amendment violations

¹⁴⁶ See generally 18 CHARLES ALAN MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 4420 (2d ed. 2002).

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

¹⁴⁸ See *Harrington v. Richter*, 131 S. Ct. 770, 785-86 (2011) (explaining that only a "modified form of *res judicata*" exists in federal habeas, in which stops "short of imposing a complete bar to federal court relitigation of claims already rejected in state court proceedings").

¹⁴⁹ See *id.* Professor Morawetz also suggests that seeking clemency might be a viable alternative option for criminal defendants (both state and federal). See *id.* at 147-148, n. 60. This is simply wishful thinking. Clemency is almost never awarded, and when it is, it is almost always awarded after all appeals have been exhausted.

¹⁵⁰ 28 U.S.C. § 2254(a) (2006).

¹⁵¹ 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.

are not cognizable on habeas.¹⁵² Nor are any other federal constitutional violations that did not have a substantial and injurious effect on the verdict.¹⁵³

Yet even for a state prisoner whose claim would be legitimate grounds for seeking habeas relief, foregoing an opportunity to seek immediate Supreme Court review would almost always be a foolhardy choice. The standard of review in federal habeas proceedings is much more unfavorable than in seeking cert from a loss on direct review. The Supreme Court will reverse a state court judgment whenever it concludes that a defendant's constitutional rights were violated. By contrast, a federal court may not 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."¹⁵⁴ Federal courts adjudicating a habeas petitions, in other words, must defer to state court decisions that are within the ballpark of reasonableness, regardless of whether the decisions were actually correct.¹⁵⁵

Consider, for example, the cases the Supreme Court considered about one decade ago involving whether the State of California's imposing 25-years-to-life sentences 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*,¹⁵⁶ in which the defendant had been given a three-strikes sentence for petty theft, ordinarily a misdemeanor under California law. Four Justices wrote separately to express their interest in the issue,¹⁵⁷ but the Court ultimately denied cert to allow the issue to percolate. A few years later, the Court granted cert in two California three-strikes cases: *Lockyer v. Andrade*,¹⁵⁸ presenting the same legal issue as *Riggs* but in the context of a habeas petition, and *Ewing v. California*, presenting the issue (in the context of direct review) whether a three-strikes sentence for a low-level *felony* violated the Eighth

¹⁵² See *Stone v. Powell*, 428 U.S. 465 (1976).

¹⁵³ See *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

¹⁵⁴ 28 U.S.C. § 2254(d) (2006) (emphasis added).

¹⁵⁵ See, e.g., *Harrington v. Richter*, 131 S. Ct. 770 (2011).

¹⁵⁶ 525 U.S. 1114 (1999) (mem.).

¹⁵⁷ *Id.* (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).

¹⁵⁸ 538 U.S. 63 (2003).

Amendment. Andrade and Ewing both lost 5-4, 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 warrant AEDPA deference. Given the fact that the Court often has decided habeas cases on the ground that the Constitution was not violated at all,¹⁵⁹ and that it would have had every reason to do so here if it thought *Ewing* was controlling, there is reason to believe that the standard of review in *Andrade* may have been decisive.

Consider also the case in which Professor Morawetz suggests that a state prisoners might have been better off going straight to federal habeas: *Montejo v. Louisiana*.¹⁶⁰ *Montejo* had been sentenced to death for capital murder and had a strong claim that his Sixth Amendment right to counsel had been violated. And when one is facing execution, one can reasonably be expected to want to pursue every potential avenue of relief. Still, Professor Morawetz suggests that *Montejo* might have had a better chance of success by going straight into federal habeas proceedings because the foundation for his Sixth Amendment claim was a somewhat dated Supreme Court decision, *Michigan v. Jackson*,¹⁶¹ that the modern Court had suggested it might wish to overturn.¹⁶²

Even assuming that Professor Morawetz is correct that *Montejo*’s attorneys would have realized that there was a chance the Court would overturn *Jackson* if necessary to deny him relief, I think she overestimates the benefits that going straight into habeas proceedings would have offered. To be sure, a federal district court (and the Fifth Circuit on appeal) would have had to accept *Jackson* as good law. But one can be fairly certain that if *Montejo* had obtained habeas relief on those grounds and the Fifth Circuit had affirmed, then the State of Louisiana would have petitioned for certiorari. And at that point, *Montejo* would

¹⁵⁹ See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 1098 (2010).

¹⁶⁰ 129 S. Ct. 2079 (2009), cited in Morawetz, *supra* note 27, at 148-153. This is a strange case for her to highlight in an article arguing that Supreme Court specialists create problems when they “troll[] for cases. Morawetz, *supra* note 27, at 148, n. 61. *Montejo* was not a case that a Supreme Court specialist went after. *Montejo*’s state-court lawyers, the Capital Appeals Project in Louisiana, reached out to a lawyer at a law firm who specialized in Supreme Court work and asked him to take the case.

¹⁶¹ 475 U.S. 625 (1986).

¹⁶² *Texas v. Cobb*, 532 U.S. 162, 174-77 (Kennedy, J., concurring).

have been in a worse position than he was upon having lost in the Louisiana Supreme Court. The U.S. Supreme Court still would have had every right to overrule *Jackson*, and even if it chose not to do so, it would have been reviewing Montejo's *Jackson* claim through the deferential lens of habeas review.

It is possible, of course, that the Court would not have granted cert in such a scenario. But as I noted above,¹⁶³ several Justices on the current Court seem to see it as their duty to grant cert in cases—especially capital cases—when a federal court of appeals has allowed habeas relief but the Justices think the prisoner does not actually deserve such relief. It is irrelevant to these Justices whether the decision implicates a circuit conflict of any kind. Thus, in all but the most extraordinary case, a state prisoner may as well—indeed, it is strongly in his interest to—seek cert on direct review from the state court system, even if he has the right to seek habeas relief at some point.

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 claims still alive in her lawsuit that she can and should instead pursue on remand. Sometimes the primary claim itself is in some kind of interlocutory posture and even the loss at the appellate level leaves open the possibility of future success. Professor Morawetz also asserts that in immigration cases, litigants have genuine opportunities to seek administrative relief,¹⁶⁴ and I assume, given her expertise in that substantive field, that this is so.

But with all due respect, I believe Professor Morawetz is simply incorrect when she argues that the “competition 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.”¹⁶⁵ Quite the contrary. To the extent that the goal of a clinic (or any Supreme Court lawyer) offering to help a litigant file a cert petition is 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.

¹⁶³ See text accompanying *supra* note 77.

¹⁶⁴ See Morawetz, *supra* note 27, at 154-155.

¹⁶⁵ *Id.* at 145.

It is a basic tenet of cert 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.¹⁶⁶ For instance, the Court virtually never grants certiorari in criminal cases on interlocutory review.¹⁶⁷ What is more, the Court will sometimes dismiss a case even after granting cert if it learns belatedly that the petitioner can obtain the relief he seeks another way.¹⁶⁸ Accordingly, even if a petitioner’s attorney were inclined for some reason to try to ignore potential alternate grounds for review, a well-represented respondent 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 cert 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 some alternative avenue for obtaining relief and to shun those cases in which the litigants did. Alternative avenues for relief are anathema to successful cert petitions.

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

2. Coordination of similar cases

Another responsibility that any lawyer representing a litigant in the Supreme Court has is to monitor any other cases on the Court’s docket or that might soon become ripe for a cert 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 any other cert petitions presenting the issue come to the Court’s attention either at the same

¹⁶⁶ See GRESSMAN ET AL., *supra* note 94, at 248-49.

¹⁶⁷ See *id.* at 280-81 & n.63.

¹⁶⁸ See, e.g., *Medellin v. Dretke*, 544 U.S. 660, 662 (1995) (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”).

time the Court grants another case or while the other case is pending, the Court will simply “hold” those petitions and dispose of them in summary orders after it decides the lead case.¹⁶⁹ 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) the cases for reconsideration in the lower courts.¹⁷⁰ 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 cert in the case.

It thus becomes important to litigants, if there are multiple cases in the cert 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 most every legal issue that the Court agrees to decide arises in multiple cases over time, it 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 for the moment 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 is 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 vehicle choice matters to the Court’s ultimate resolution of any given legal issue. I doubt it is outcome determinative 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 matters sometimes.

¹⁶⁹ See GRESSMAN ET AL., *supra* note 94, at 346.

¹⁷⁰ “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.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); see also GRESSMAN ET AL., *supra* note 94, at 345-49 (describing Supreme Court GVR practice).

One example comes to mind. In the 1990's, federal courts of appeals divided over whether new limitations on attorney's fees (primarily hourly fee caps) that the Prison Litigation Reform Act (PLRA) imposed 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 over a decade previously.¹⁷¹ 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.¹⁷² 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 context of the two cases. In the first case, the attorneys had filed two lawsuits years ago and were simply monitoring consent decrees going forward when the PLRA intervened. In the second, the attorneys recently filed the lawsuit and were on the eve of trial when the PLRA intervened.

The Court granted the first case.¹⁷³ During the first minute of oral argument, Chief Justice Rehnquist interrupted the prisoners' lawyer to explain that he thought it "extraordinary" that lawyers monitoring consent decrees were entitled to attorney's fees at all.¹⁷⁴ Another member of the Court explained that this fact "colors my whole view of this case."¹⁷⁵ By the time Chief Justice Rehnquist interjected again to call the cases "cash cows" for the prisoners' lawyers,¹⁷⁶ the dye had been cast. The prisoners lost 7-2.¹⁷⁷ 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 the second case. But all of the prisoners involved in both cases

¹⁷¹ *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998).

¹⁷² *Blissett v. Casey*, 147 F.3d 218 (2d Cir. 1998).

¹⁷³ *See* 525 U.S. 1000 (1998) (mem.).

¹⁷⁴ Transcript of Oral Argument at 5, *Martin v. Hadix*, 527 U.S. 343 (1999) (No. 98-262), 1999 WL 200681.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 8.

¹⁷⁷ *See Martin*, 527 U.S. 343.

surely would have been better off if the Court had used the second case as the vehicle for deciding the issue.¹⁷⁸

At the same time, most situations involving multiple potential vehicles present much more subtle dynamics. A case that the Stanford clinic handled two Terms ago, *Dolan v. United States*,¹⁷⁹ illustrates the 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 90-day statutory time period for doing so. Professor Morawetz argues that another case in the cert pipeline at the time, *United States v. Balentine*,¹⁸⁰ 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 was longer.¹⁸¹ 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 Indian Health Center at which the victim had been treated. It thus seemed far less unfair to saddle the “victim” with the consequences of 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.¹⁸²

Faced with such arguably cross-cutting circumstances, it is difficult to say that there was any clear answer concerning which case would have been the 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 cert stage with lawyers involved in other

¹⁷⁸ I have no idea whether the prisoners’ lawyers in the case that the Court did take could have done anything to engineer such an outcome (they were 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 considered the other case first and it became the lead case.

¹⁷⁹ 130 S. Ct. 2533 (2010).

¹⁸⁰ 569 F.3d 801 (8th Cir. 2009).

¹⁸¹ Morawetz, *supra* note 27, at 161-162.

¹⁸² *See Dolan*, 130 S. Ct. at 2537; *Balentine*, 569 F.3d at 802.

cases. In *Flores-Figueroa v. United States*,¹⁸³ another case cases that Professor Morawetz suggests suffered from a “lack of coordination,”¹⁸⁴ a Supreme Court clinic learned about the case only four days before the cert petition was due, and it was too late to seek an extention.¹⁸⁵ Flores-Figueroa’s counsel had no idea the case was potentially certworthy and had abandoned him. The 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 cert 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.¹⁸⁶

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 cert 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 singular concern for the groups’ causes) will push cases to the Court that will create bad law from the groups’ point of view, and sometimes even frustrate years-long litigation campaigns. Thurgood Marshall, for example, sometimes tried to keep local lawyers from filing cert petitions in racial discrimination cases that he thought

¹⁸³ 129 S. Ct. 1886 (2009).

¹⁸⁴ Morawetz, *supra* note 27, at 163, n. 154.

¹⁸⁵ Petitioners generally cannot obtain extensions within ten days of a cert petition being due. *See* SUP. CT. R. 13.

¹⁸⁶ Professor Morawetz asserts that because the government acquiesced to cert 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.” Morawetz, *supra* note 27, at 163-164, n. 154. This is incorrect. Each petitioner had every opportunity to file a reply brief arguing for the Court to grant cert in his case. The other petitioner simply elected not to do so. If anything, therefore, the briefing in the two cases suggested that the Court would get better work from Flores-Figueroa’s attorneys.

could backfire in the Court.¹⁸⁷ 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 cert granted in cases that public interest communities would have prefer to let die on the vine.

This section—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 is must be taken seriously. Thus, having isolated the situations in which a public interest community might arguably and justifiably wish a Supreme Court clinic to shun cases for fear of making bad law, this section 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—and, I presume, that other clinics take on as well. The issue is nonexistent when the Supreme Court has already granted cert in the case at the time a clinic gets involved.¹⁸⁸ It also is a nonissue when a clinic represents a respondent at the cert stage, for the petitioner has already triggered the Court's jurisdiction.¹⁸⁹ I

¹⁸⁷ 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, 1627-31 (1997) (discussing Marshall's frustration when a local lawyer filed cert petition in *Shelley v. Kraemer*).

¹⁸⁸ In seven of the 18 merits cases in which the Stanford clinic has reached out to offer assistance over the past six years, the clinic became involved only after the Court had already granted certiorari.

¹⁸⁹ In four of the 18 cases mentioned immediately above, the Stanford clinic reached out in order to offer assistance in opposing certiorari.

also believe it is a nonissue when a would-be client approaches a clinic and asks the clinic to seek certiorari on his or her behalf.¹⁹⁰

Professor Morawetz seems to disagree on the latter point. Discussing the *Jerman* case, in which the plaintiff went to the Stanford clinic and asked it to file a cert petition for her, Professor Morawetz suggests that the clinic should have asked itself “whether this was in fact a case in which it made sense to offer free pro bono resources” because the “risk[]” that the Court would make bad law appeared to her “substantial.”¹⁹¹ Professor Morawetz also suggests—again, even though the client in the case approached the Stanford clinic, not vice versa—that the clinic should have considered turning down Lilly Ledbetter’s request for representation.¹⁹²

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. A well-advised litigant 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 cert, it would be a drastic step for a Supreme Court clinic to turn away the case on the ground that it might make bad law.¹⁹³ Presumably the conversation would go something like this: “Look, I’m sorry, I know that the Eleventh Circuit just took away your \$2 million verdict for sex discrimination; that you were depending on that money for your retirement; 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

¹⁹⁰ Over the past five years, roughly half of the merits work the Stanford clinic has done came to the clinic that way.

¹⁹¹ Morawetz, *supra* note 27, at 171. As it happened, *Jerman* prevailed 7-2 on the merits.

¹⁹² *Id.*

¹⁹³ See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Attorney-Client Relationship*, 85 YALE L.J. 1060 (1065-66 (1976) (defending the notion that a lawyer who zealously pursues a well informed client’s goals acts with high moral purpose).

other plaintiffs in other parts of the country. So we do not want to give you expert representation in the Court.”¹⁹⁴

To the extent that a Supreme Court clinic resembles a public defender’s office or a civil legal aid office, it would be improper to reject a case in this way. Those kinds of offices—somewhat like a Supreme Court clinic—have certain constituencies of clients whom they typically represent, and those clients, generally speaking, share some common interests. But if a person is eligible for, and needs, the services of one of those offices, the offices do not turn the person away for fear of making bad law for others in the outside world. A public defender’s office, for example, would not hesitate to oppose a client’s execution on the ground that it has taken too long for his appeals to run their course,¹⁹⁵ 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.

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 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.¹⁹⁶ But a Supreme Court clinic need not adopt a similar goal. A clinic may legitimately decide that it is more comfortable following the public defender / legal aid model. Under these circumstances, it does not seem appropriate for a clinic to refuse to represent litigants who come to it and ask it to take their cases solely because their cases are risky.

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

¹⁹⁴ I am indebted to Pam Karlan for this way of putting the point.

¹⁹⁵ *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045 (1995).

¹⁹⁶ *See, e.g.*, Rubenstein, *supra* note 187, at 1632 (1997) (“The significant unifying factor of the case [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.’”).

a substantial risk of making bad law—namely, those cases in which a clinic reaches out and offers to file a cert petition on behalf of someone who has lost in a lower court.¹⁹⁷ 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 cert petitions would have been filed and granted without expert assistance.¹⁹⁸ 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.¹⁹⁹ 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 over-counts 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 cert petition, other clinics and law firms also call and offer pro bono help. (Nowadays, for example, whenever a federal court of appeals issues an opinion that it acknowledges implicates a circuit split, the local lawyer is sure to receive several calls within days from clinics and law firms.) Thus, one might argue in these scenarios that cert petitions are going to 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 ponder 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 there are cases regarding which clinics should refuse to offer assistance, then no clinic should reach out for those cases—and law firms might reasonably behave the same way.

¹⁹⁷ For example, the Stanford clinic over the past six years (either as lead counsel on the merits or as co-counsel to another attorney who argued the case) in 33 cases on the merits, but only in eight did the clinic reach out to offer help to a petitioner at the cert 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*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 555 U.S. 1 (2009); *Greenlaw v. United States*, 554 U.S. 237 (2008).

¹⁹⁸ It is, of course, impossible to say with any precision how often this is the case. There are too many variables.

¹⁹⁹ Recall that the clinics have prevailed in 70%—the vast majority—of the cases in which they have successfully sought certiorari. *See supra* text accompanying notes 59-60.

(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 other types of cases. 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 a class of cases that raise a certain level of risk that (a) the Court might indeed grant cert and (b) the Court might affirm in a way that makes bad law.

This is 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 very tricky business. 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 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.²⁰⁰

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 answer must be yes. I do not mean this in the sense that litigants seeking to file cert petitions have a Sixth Amendment right to counsel (much less specialist counsel),²⁰¹ but rather in the sense that a bar that is otherwise willing and able to file a cert petition in a person's potentially meritorious case should not turn it away because the case might have negative consequences for others.

In this sense, a clinic is like a law office making itself available for 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."²⁰² The Model Rules allow lawyers to turn away appointments only 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."²⁰³ To be sure, a clinic considering reaching out on

²⁰⁰ 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.

²⁰¹ The Sixth Amendment's right to counsel pertains only to "criminal" cases. U.S. Const. amend. VI. Even there, criminal defendants do not have a Sixth Amendment right to the counsel they would need to file a cert petition. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 614-15 (1974); *Nichols v. United States*, 563 F.3d 240, 250 (6th Cir. 2009); *Pena v. United States*, 534 F.3d 92, 95-96 (2d Cir. 2008).

²⁰² MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

²⁰³ MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (1983). The rules also allow a lawyer to refuse representation that would impose a financial hardship on her. *See* MODEL RULES OF PROF'L

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. But insofar as one of a clinic's primary goals is to level the playing field by providing access to expert Supreme Court counsel for litigants who do not otherwise have access to it, a clinic ought to be extremely 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. Whatever benefit clinics thought they were providing to the adversarial system would quickly begin to evaporate, or at least to be skewed towards certain favored constituencies.²⁰⁴

One might respond that lawyers (and, thus, Supreme Court clinics) should have something to say about whether litigants with meritorious cases should be able to seek cert 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.²⁰⁵ This Rule certainly gives the bar some decision making 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.²⁰⁶ 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 cert petition is the client's.²⁰⁷ And when a well-informed client in this situation would want to proceed with a cert petition, the Model Rules impose upon the bar a duty to provide "competent" representation, even if the litigant is unable to pay for it.²⁰⁸

CONDUCT R. 6.2 cmt c (1983); *cf.* *Mallard v. United States Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296 (1989) (federal statute did not authorize court to force lawyer to take case pro bono).

²⁰⁴ See Robert R. Kuehn and Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 2003-2009 (2003) (arguing that, though selected clients are not the same as appointed clients, Model Rule 6.2 prohibits a clinic from eschewing unpopular matters or clients).

²⁰⁵ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

²⁰⁶ See *supra* text accompanying notes 144-45.

²⁰⁷ See Rubenstein, *supra* note 187, at 1633 & n.53. Professor Rubenstein questions whether this is the best reading of the Model Rules in the case of civil rights impact litigation. I grant him that caveat below, see *infra* text accompanying notes 215-16. In typical litigation, however, where the Supreme Court provides the only possibility of relief, the client unquestionably has the right to authority that his or her attorney seek certiorari.

²⁰⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1; R. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay."). See Kuehn and Joy, *supra* note

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 that the government is seeking to deport. Take the clinic case of *Herring v. United States*.²⁰⁹ After discovering during through illegal search that Herring had a gun in his car, the government charged and convicted Herring 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 police illegality. 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 to the ultimately unlawful arrest.²¹⁰

The Eleventh Circuit's opinion conflicted with several state supreme court opinions,²¹¹ giving Herring a quite viable case for cert. 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.²¹² 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.²¹³

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.²¹⁴ 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 local cases are meant to die on the vine before reaching the Supreme Court.

205, at 2041-49 (questioning whether attorney control of the means of representation allows clinics to impose limitations on their lawyers' choice of means).

²⁰⁹ 555 U.S. 135 (2009). The Stanford clinic handled this case.

²¹⁰ *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007).

²¹¹ *Compare* *Hoay v. State*, 71 S.W.3d 573 (Ark. 2002); *Shadler v. State*, 761 So.2d 279 (Fla. 2000); *People v. Willis*, 46 P.3d 898 (Cal. 2002).

²¹² *Hudson v. Michigan*, 547 U.S. 586 (2006).

²¹³ *Id.* at 603-04.

²¹⁴ *See supra* text accompanying note 150.

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. Because a well-informed lawyer would have sought cert 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.

Viewed from a distinctly different perspective, one could ask whether public interest communities have a right to have a say in whether individuals' cases go to the Supreme Court. Here, the answer is mixed. On the one hand, public interest communities have a right 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 parties who might be adversely affected"²¹⁵ 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. Thus, even if a case might make bad law from a community's perspective, that community should not try to interfere with the litigant's chance of success on the merits by persuading a clinic not to offer to help on the case.

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 avoiding 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. 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 at which the clinic is looking and which may be better vehicles.

²¹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1. *See* Kuehn and Joy, *supra* note 205, at 2011-17 (arguing that clinics may limit client selection for pedagogical reasons, but that the bar on third-party interference prohibits clinics from avoiding representation due to the influence of third parties).

I am not saying that clinics should be bound to follow the advice of public interest groups. As noted just above, when the government has initiated 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 individuals 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 information why it would be better for the litigant to forego seeking Supreme Court review.²¹⁶ 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 be relevant to the client's situation."²¹⁷ Everyone is better off if the clinic and the litigant benefits from the public interest community's expertise in deciding whether to go forward.

Finally, one could ask—free of all of the potential tension between individual litigation and group activism—the simple question whether a law 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 cert granted are greater when the Court senses that the decision below is wrong than when the decision below seems correct.²¹⁸ Furthermore, while there is certainly some social good achieved whenever litigants are afforded excellent representation all of the way through 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 obtain a reversal 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 have represented respondents (that is, when they had no control over whether the case was taken up to the Court), they prevailed 16.0% of the time more than nonspecialists. But when specialists represented petitioners,

²¹⁶ See Rubenstein, *supra* note 187, at 1666-67.

²¹⁷ MODEL RULES OF PROF'L CONDUCT R. 2.1.

²¹⁸ See *supra* note 73 and accompanying text.

they have prevailed 19.7% more often.²¹⁹ Supreme Court clinics have prevailed 21.7% more often. In other words, while Professor 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 do better in the Court and thus to create more good law than they were previously getting, not causing them to do worse and creating more bad law. This appears to be all the 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. Fulfilling this duty usually means doing one's best to win the client's litigation in the Supreme Court, either by getting certiorari denied (if the clinic represents the respondent) or by prevailing on the merits. But, as Professor Morawetz correctly points out, this duty also involves staying alert to any alternative avenues of relief that materialize while the case is pending.²²⁰ 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, 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.²²¹

²¹⁹ See *supra* notes 41-68 and accompanying text.

²²⁰ Morawetz, *supra* note 27, at 146-155.

²²¹ I do not know why Professor Morawetz suggests, *see* Morawetz, *supra* note 27, at 163-165 and note 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. No one ever claimed that the process was too rushed.

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, so as 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 give 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 petition for certiorari, 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,²²² sometimes the best thing for a litigant is to have someone else’s case with more favorable facts be in the lead, so the litigant can benefit from someone else’s victory on the merits.²²³

C. Post-Decision 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 it is remanded. 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.”²²⁴ 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,

²²² See *supra* text accompanying notes 168-76.

²²³ On one recent occasion, for example, the Stanford clinic prepared a cert petition for a client and then delayed filing it for over two months in the hopes that a better vehicle would arise.

²²⁴ MODEL RULES OF PROF’L CONDUCT R. 1.2(c).

the requirement of “competence”²²⁵ 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 going forward. 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 *Whitman v. Department of Transportation*,²²⁶ for example, the Stanford clinic litigated post-remand cross-motions for summary judgment against the government in the U.S. District Court for the District of Alaska. This kind of work offers excellent opportunities to teach about the meaning and effect of Supreme Court opinions and, when done within a clinic’s realm of expertise, helps its clients as well.

Professor 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.²²⁷ It is hard to see how a clinic has any obligation to participate in post-decision legislative advocacy that would not help the clinic’s client. Certainly such scenarios, much like remands, might offer excellent learning opportunities, so clinics might voluntarily want to participate in such efforts to the extent it has something to offer.²²⁸ But it cannot be that a clinic, unlike a legal aid or public defender office, takes on a duty

²²⁵ MODEL RULES OF PROF’L CONDUCT R. 1.1; *cf.* Kay Nord Hunt and Eric J. Magnuson, *Ethical Issues on Appeal*, 19 WM. MITCHELL L. REV. 659, 664 (1993) (“an attorney cannot assume competence at the appellate level based merely upon competence in the trial court”).

²²⁶ 547 U.S. 512 (2006).

²²⁷ Morawetz, *supra* note 27, at 171-173.

²²⁸ One of the Stanford clinic’s instructors, Kevin Russell, did just that in the Lilly Ledbetter case, helping to obtain federal legislation overturning the Court’s holding that equal pay cases must be brought within 180 days of discriminatory pay-setting decisions, regardless of whether the disparate pay continues beyond that period. *See* The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 § 3(A), 123 Stat. 5, 5-6.

whenever taking a case to the Supreme Court to pursue a cause beyond a client's needs.

I do not mean to end on a defensive note. One of the great opportunities in a Supreme Court clinic is to ponder the unique role that Supreme Court decisions play in our legal and political society. Professor Morawetz's article helps remind clinics of that reality and offers serious grist for consideration in the classroom. In that sense, even when a clinic is unable to assist a client or a cause beyond a Supreme Court proceeding, it serves the public interest in a broader sense to encourage students to reflect on the consequences of Supreme Court litigation and the reform (or backlash) that such litigation can set in motion. After all, clinics do not just litigate cases; they prepare students for the future practice of law. Thus, even when a Supreme Court clinic is limited in how it can serve the public interest in terms of direct advocacy, the clinic still serves the greater good.

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 past seven years 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 the clinic's cases or have expertise to offer. Through such client-centered representation and thoughtful collaboration, a Supreme Court clinic can not only by 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 in general more fair and evenhanded.