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Law Schools' Supreme Court Clinics Make Their Mark

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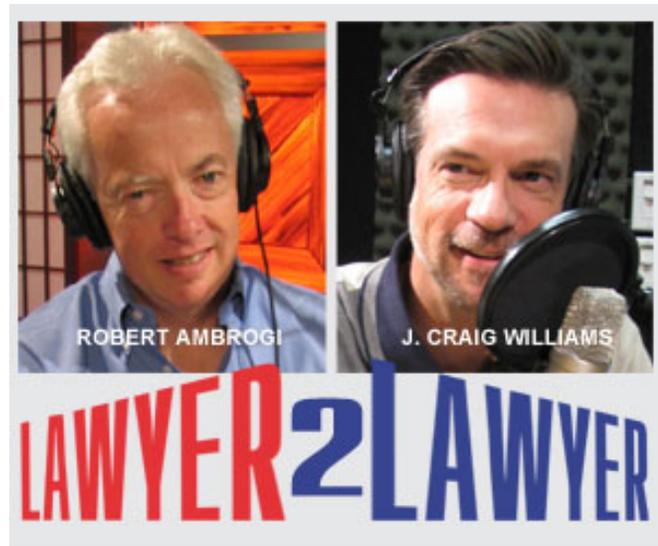
Just three years ago the Stanford Law School Supreme Court Litigation Clinic, the first of its kind, filed its inaugural petition with the Supreme Court.

Since then the Supreme Court clinic idea has spread like wildfire -- six top law schools have them now, by last count. In each, top students work with faculty and seasoned Supreme Court litigators to write briefs in a clinic setting for Supreme Court cases.

And last week, it seemed that clinics were everywhere on the Court's docket:

- On Feb. 26, the Court granted review in *Watson v. United States*, a criminal case involving the definition of firearm use. The brief came through the University of Virginia's brand-new Supreme Court clinic and was signed by Mark Stancil of Robbins, Russell, Englert, Orseck & Untereiner, who teaches clinic students along with UVA professors.
- The next day, a petition was filed in *Hamdan v. Gates and Khadr v. Bush*, the next round of the constitutional battle over access to the courts for Guantanamo Bay detainees. Among those working on the petition were Harvard Law School professor Laurence Tribe and students from Harvard's Supreme Court clinic.
- On Feb. 28, Mayer, Brown, Rowe & Maw partner Andrew Pincus argued in *Hein v. Freedom From Religion Foundation*, a case briefed by Pincus and Yale Law School's new clinic. To everyone else, the case was about church-state issues, but the headline on the *Yale Daily News* Web site was: "Court hears YLS case."

"It's been a net plus for all the schools, and it provides yet another source of great Supreme Court advocacy," says Richard Lazarus, founder of the Supreme Court Institute at Georgetown University Law Center, which puts on moot courts



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for lawyers practicing for Supreme Court arguments. So far Georgetown itself has bucked the Supreme Court clinic trend, says Lazarus, preferring to stick with its existing appellate clinic which allows students to actually argue before appeals courts -- something that could not happen at the Supreme Court.

But many other schools have followed in the footsteps of Stanford. Virginia, Yale and Harvard -- Harvard has two -- as well as Northwestern and the University of Texas have launched Supreme Court clinics.

It has gotten to the point where Thomas Goldstein of Akin Gump Strauss Hauer & Feld, the undisputed godfather of the Supreme Court clinic idea in general -- and the Stanford and Harvard clinics in particular -- wonders if the trend is too much of a good thing. "Does it keep going, or is there a super-saturation point? It will be interesting to see," he says.

Already, the Stanford clinic has had to fight harder for cert-worthy cases to handle, Goldstein says. At the beginning -- only three years ago -- Stanford's clinic could choose to take cases only on behalf of a direct party, and only those that Goldstein or Stanford professors would argue themselves. "We're doing more amicus briefs now," Goldstein says, and more cases in which the original attorney still argues the case. Goldstein said his clinic pursued Michael Watson, the petitioner in the firearms case the Court granted Feb. 26, only to find out that the Virginia clinic had gotten there first. [*Editor's Note: Goldstein is a contributor to Legal Times.*]

But Goldstein is unambiguously happy with the trend, which he thinks over time will have a "genuine effect" on the work of the Court and bring criminal and other cases to the justices that otherwise might get forgotten.

And while none of the justices of the high court have commented publicly on the role of the clinics, they have already paid them the highest possible compliment. "Five of my clinic students from Stanford and Harvard will be clerking for justices next term," Goldstein says.

"The clinics are already performing a vital role," says David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel. The benefit to the Court, as Frederick sees it, is in the category of "in the ball park" cases that might appeal to the Court -- but are passed over because they are not properly framed or briefed.

Could the clinics, then, be the cure for the Court's shrinking docket by polishing diamonds in the rough? So far, Frederick and others involved in clinics doubt it, since most of the cases clinics have handled probably would have gotten to the Court anyway.

Frederick, a veteran of the solicitor general's office and author of a book on Supreme Court advocacy, has a case in point. The clinic he guides at the University of Texas School of Law, his alma mater, filed its first petition last November in the maritime law case *Altadis USA v. Sea Star Link*, and it was granted review in January. "We're batting a thousand," he says. But he adds, "the Court probably would have granted it anyway," without the clinic's help. "It was ripe to be decided."

That said, the presentation of the case was improved through the clinic, by the students and by Texas professor Michael Sturley, a top expert in maritime law. (Last month, the case was settled by the parties and dropped from the docket.)

Robbins Russell's Stancil also doubts that the clinics, as good as they are, will convince the Court to take a case that does not deserve review. "We won't be able to flip anything by them."

But Stancil, too, sees a category of cases that might gain more prominence because the clinics are helping: disputes with a middle-level monetary value.

"The billion-dollar cases will go up no matter what," says Stancil, a onetime Rehnquist clerk. "And the religion-clause cases and other significant issues with broad impact will also go up." But because of the high cost of hiring a lawyer to take a case to the Supreme Court, an \$80,000 dispute might never be appealed unless by a clinic or other operation operating pro bono.

The criminal defense docket might also seem like a sector that could use the help of clinics, and that has already occurred. But Jonathan Hacker, a partner at O'Melveny & Myers who often writes briefs for the National Association of Criminal Defense Lawyers, says it will still depend on "whether the existing lawyer wants assistance." Solo criminal defense lawyers are sometimes reluctant to seek help or turn over an argument to an outsider, Hacker says, and that will still be the case even if

it is a clinic offering the helping hand.

Hacker, along with O'Melveny partners Walter Dellinger III and Pamela Harris, will be teaching at the yearlong Harvard clinic which launches in the fall. The existing clinic at Harvard, which operates in the winter term, is taught by Tribe and Goldstein, along with Goldstein's wife Amy Howe and Kevin Russell, her partner in the law firm Howe & Russell.

One benefit of the clinics seems beyond dispute: the value to students in exposing them to the thrill of working on a Supreme Court case, along with the more practical lessons of meeting deadlines and writing clear, persuasive, and authoritative prose for a tough audience of nine.

"They also learn that the Court is not, contrary to popular portrayals, a hotbed of politically charged or ideologically based decision-making," says Sidley Austin Washington, D.C., partner Jeffrey Green, who is teaching the Northwestern clinic along with managing partner Carter Phillips.

"With second- and third-year students, sometimes it's hard to get them psyched, it's hard to give them that passion," says Georgetown's Lazarus. When students get to see their handiwork having an impact on a Supreme Court or appeals court case, Lazarus says, "they get very psyched, very interested."