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WHY HARD CASES MAKE GOOD (CLINICAL) LAW

PAUL D. REINGOLD*

INTRODUCTION

In 1992, when the University of California’s Hastings College of Law decided to offer a live-client clinic for the first time, its newly hired director had to make several decisions about what form the program should take. The first question for the director was whether the clinic should be a single-issue specialty clinic or a general clinic that would represent clients across several areas of the law. The second question, and the one that will be the focus of this essay, was whether the program should restrict its caseload to “easy” routine cases or also accept non-routine, less controllable litigation.

Before addressing the second of these questions, I want to take a moment to consider the first. The choice of specialty clinic versus general clinic is an important one because a clinic’s structure cannot help but determine what values and skills it will teach. For specialists, the limited range of their work offers multiple benefits: Students get to handle routine cases in a way that lets them build on what they have done before, and students are better positioned to see the broader policy issues within the specialty, as well as to engage in law reform. Generalists, on the other hand, argue that students develop a more

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1 I heard about these curricular issues from the director, Mark Aaronson, when he and I participated in the same small group session at the 1992 AALS Conference on Clinical Legal Education in Albuquerque, New Mexico. Mark used the small group effectively as a sounding board to frame his questions and to explore his options. Subsequently, in 1994, I happened to be assigned to the same small group as Mark again, which gave me the chance to hear about the results of the choices he and his staff had made, after some 18 months of the new clinic’s operation.

2 Those who champion specialty clinics argue that students learn better when they see the same kind of case over and over again. By virtue of the repetition (so the argument goes), students can both hone their skills and chart their progress as they travel the same road several times. Moreover, by concentrating on a single area of the law and learning it in depth — that is, by becoming specialists themselves — students are able to pay less attention to the law and more attention to the lawyering that lies at the heart of the clinical enterprise.

3 Specialists claim that their students can address policy issues in a way that generalists’ students cannot. Over time a specialty clinic can become a resource in and of itself. It can locate and litigate issues that are ripe for challenge, and it can even work to change the legal framework of the specialty, for example by promoting new legislation or rules.

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open-minded approach to law when every intake is a mystery trip and students cannot operate from preconceived ideas or patterned expectations. Generalists also point out that students and teachers prefer, and benefit from, variety.

Fortunately for law students, most schools are not faced with the Hastings choice of offering exclusively a specialty clinic or a general clinic. Law schools typically offer both kinds of programs, allowing students to choose the clinic that suits them best. At some schools the clinical faculty can choose, too. They can move back and forth from one program to another, or they can create an entirely new clinic. They might build up a specialty clinic for a time, and then abandon it for some other project, in effect changing specialties every few years to keep themselves fresh.

As law schools have put more resources into clinical legal education, the debate over specialty versus general clinics has waned, but the second, related question has not gone away, in part because it affects specialists and generalists equally. Clinical teachers of both stripes face the dilemma that the director at Hastings had to answer: Should a program limit its intake to “easy” cases (that practicing lawyers and non-clinical faculty often assume are most appropriate for law students), or should a program also accept “hard” cases — the non-routine, atypical litigation that is certain to darken the door (or brighten the horizon, depending on your point of view) of specialty clinics and general clinics alike?

A working definition of these terms is essential here. My benchmark of the “hardness” of a case is the extent to which it (1) poses the risk of taxing the program’s resources; (2) may be controversial either in the public eye or to some constituent group of the law school; (3) is likely to outlive (figuratively if not literally) the students assigned to

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4 Students in a general clinic must question in the most probing way in order to discover an unknown array of potential legal problems (even if the “primary” problem has been disclosed to them before the first interview). Generalists place a higher value on their students’ ability to fit facts to legal categories and remedies. For them, the more creative lawyering takes the form of reconceiving a client’s expressed problem to discover an appropriate solution.

5 Students don’t want to be pigeonholed early into a specialty that they might not enjoy or that they fear could “label” them on their transcripts or résumés and make them less marketable to some future employer. The teachers, too, like other lawyers who complain about the repetitiveness of their work, can chafe at the prospect of doing the same thing year in and year out, especially in an introductory level course. The general clinic keeps them challenged. They practice in very different forums, against a wide range of opposing counsel, while constantly learning new law. Generalists may admit to being dilettantes, but they claim to be lively and happy ones.

6 Indeed, just having a choice can motivate students to do better work (although in my experience students are amply motivated even when they don’t get into the clinic that is their first choice).
it; and (4) presents legal issues of a scope, scale, character, or complexity not ordinarily handled by the program.\(^7\)

Probably the best example of a "hard" case — maybe the quintessential example — is the DeBoer custody battle (also known as the Baby Jessica case), which was litigated by Michigan’s Child Advocacy Law Clinic (CALC) in 1992-93. Prior to accepting the DeBoer case, CALC students had practiced almost exclusively in the probate courts, handling abuse and neglect cases at the trial level only. Although CALC students had occasionally written an amicus brief on appeal, or drafted proposed legislation, their bread-and-butter work was to serve as prosecutors, defense counsel, or guardians ad litem in termination of parental rights hearings.

At the start students and faculty debated about whether or not the Child Advocacy Law Clinic should accept the DeBoer case. They foresaw that it might monopolize their time and consume their limited resources. They disagreed about the merits of the case and the policy issues underneath it — the rights of natural parents versus the rights of adoptive parents versus the interests of children. In the end the issues tipped the balance. The clinical teachers, who were forging their careers around child welfare law and reform, could not say no to a case that might re-define that law. The CALC students, in turn, could not help but be intrigued by a case that went to the heart of the policy issues they were studying.

\(^7\) I admit that this is a loose definition, and that cases are relative. Clinical faculty who are teaching in an employment discrimination clinic may have a very different view of a "hard" case from their colleagues who are teaching in a landlord-tenant clinic. But for most clinical programs — with the possible exception of a program like a constitutional rights clinic that is devoted to "hard" cases — this definition ought to suffice. Within the community of clinicians, it may be enough to say that most of the time we know a "hard" case when we see one.

Of course, we occasionally get blind-sided. For example, in the mid-1980's my program handled the defense of a $300 medical bill. Actually, there was no defense because the hospital provided good care and our client broke her promise to pay for it. But the semester was young and the students were eager. They thought that they could at least negotiate with the hospital’s attorney over the payment terms, or seek what Michigan calls an “installment judgment” at a rate that our poor debtor could afford.

In the interval between saying yes to the client and appearing in court, the students discovered that the county had opted out of a state-mandated paupers’ hospitalization program. The $300 debt soon evolved into a class action. By the time the case settled four years later, the county had agreed to fund a hospitalization program to the tune of $500,000 a year, with the area hospitals pitching in another $1 million a year in uncompensated care and writing off $8 million in bad debt. In addition, the 40 named plaintiffs had their credit-worthiness restored, the state amended its welfare laws to authorize a county hospitalization pilot project, and preliminary steps were taken to design an out-patient managed health care program for the indigent. The clinic and our co-counsel (Legal Services of Southeastern Michigan) also recovered attorneys’ fees. See Jindo et al. v. Board of Commissioners, No. 85-30716 (Washtenaw Co. Cir. Court, consent judgment entered March 15, 1990).
Predictably, the case generated a firestorm of publicity. *People* and *Time* magazines put it on their covers. *The New Yorker* described it in a feature article. Court-TV broadcast live the eight-day "best interests" evidentiary hearing in circuit court. And within six months of the end of the case a television movie had fictionalized the story. Regardless of where one came down on the issues, the case itself was a galvanizing event. It focussed national attention on public policy questions that had escaped scrutiny in the past. It reminded us how statutes affect people in their everyday lives; how our culture is defined by the values reflected in the text of those statutes; how our state court systems operate independently but subject to the unifying force of the federal constitution; how law blends with other fields like sociology and psychology; and how lawyers play a role in their clients' lives, and their clients' children's lives.

But just because the *DeBoer* case raised interesting issues does not mean that a clinic necessarily ought to litigate it. Without denigrating the educational value of repetition and expertise (the forte of specialists), and without criticizing the wonders of the unknown (the forte of generalists), I want to make the case for the "hard" case, in both settings. But the case for the "hard" case is not an easy or self-evident proposition, and the arguments against it are formidable. Let me start with them, despite the risk that I will appear to be setting up straw targets only to knock them down.

I. Why "Easy" Cases Appear to Be an Easy Choice

A. Completeness, Safety, Responsibility, and Service

The original choice that the new director made for Hastings typifies the attitude that many faculty once had toward clinics, namely that skills training is the paramount reason for the clinic's existence. It reflects a prudent (if cautious) approach to the clinical experience: the underlying tenets are (1) that students ought to handle cases that

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8 I will continue to put quotation marks around the words "easy" and "hard" because I am troubled by any terminology that implies that one set of files is more worthy of a lawyer's attention than another. I teach that every client requires the lawyer's full attention and deserves the same high quality of work.

I also don't mean to suggest that every student in a clinic should always be assigned to work on a "hard" case. Regardless of whether the program is a specialty clinic or general clinic, the caseload — and I mean both the number of cases and their complexity — should be tailored to the students' needs. Therefore, advocating for "hard" cases for a program is not the same thing as advocating for "hard" cases for every student in the program.

9 Hastings ultimately decided to set up a clinic that specialized in social security disability, unemployment compensation, and landlord-tenant cases. The program was thus a hybrid: it had the look of a general clinic, but it served clients in just three substantive areas (or sub-specialties). The program was designed to generate a caseload of "easy" cases.
can be completed, if possible, within the time that the students will be enrolled in the clinic, and (2) that the cases should not involve unduly complex issues or sophisticated practice.

Most members of the bar and most educators would probably agree with the proposition that law students are likely to learn the most if they can handle a case from start to finish, so that they get to see every phase of the process, from intake interview to disposition. If the case happens to be litigated in a forum where the rules of evidence are relaxed, or where lay advocates predominate, so much the better. The students will not have to worry about the niceties of evidence or the procedural formalities of a full-fledged court — practical skills, one could argue, that can only be learned from experience anyway. If the cases are repetitious and elementary then students can make all of the important decisions. When students serve as real first chairs and lead the litigation team, they then get a strong dose of what clinics may teach best, namely the development of a sense of personal and professional responsibility.

This model of student practice is also safer. Easier cases in less formal settings pose a lower risk of serious error or malpractice. When the stakes are just a few thousand dollars of unemployment insurance or disability benefits, or a few hundred dollars of rent, the anxiety level is also lower, even if we know that in every case the stakes can be high for the client: food on the table, a respite from worry, a roof overhead. "Easy" cases can also be supervised in less time and in greater numbers, thus promoting both the expertise that will reduce the risk of mistake and the repetition so valued by specialists.

Finally, handling a higher number of "easy" cases provides a more direct and more measurable service to the community. With Congressional support for publicly funded legal services in jeopardy, and with new restrictions on public benefits, poor people need legal services more than at any time in the last 25 years. Students can learn straight away that pro bono practice starts with one lawyer representing one client who otherwise would go unrepresented, and that the lawyer can make a real difference in the client's life (at least as far as that legal problem is concerned). A law school clinic that handles a higher volume of cases (because they are "easy") is also a political asset. The dean can show state and local officials that the law school is more than an ivory tower that uses scarce resources and pays no taxes. It returns free legal services to the low income community and instills public values in its students. If the cases are rarely controversial, and if the clinic does not compete with the private bar, then there is no political downside from the dean's perspective.
B. Serendipity

In my experience, as a rule the very best teaching material emerges from the cases unpredictably, its roots traced not to the substantive law, and not to the degree of complexity of the case, but to happenstance. This chanciness is one of the joys of working in a real-client clinic, where the hit-or-miss of practice provides the vehicle for teaching. We never know what issues will arise from day to day, and at almost every point we are willing to chuck the "lesson plan" and go with what is presented by the cases. We tend to teach from the material; we take what it gives, and we run with it as far as we can.

Ethical issues are one example of the haphazardness of practice. No one can predict when opposing counsel will do or say something that raises serious ethical concerns (that in turn will generate hours of class discussion and consume vast amounts of supervisory time). The misconduct can occur just as easily in a simple landlord-tenant case prosecuted by a sole practitioner as in a class action defended by the Justice Department. The odds may be higher that an overworked and underpaid soloist will more often cross the ethical line than a better educated or better resourced government lawyer or partner in a big firm, but we've all seen too many exceptions to make a claim for such a rule. But either way, the "easy" or "hard" character of the case rarely determines whether or not an ethical lesson will arise at all. Of course, the more cases that a clinic processes in a term, the greater the chances that some of them will present interesting and useful ethical issues. A higher volume of cases — at least up to a point — thus becomes a goal worth pursuing, just to generate material.

Chance plays a role in negotiation, too. The most instructive negotiation is as likely to occur in a shabby conference room at housing court as in a fancy board room with a dozen bureaucrats and their lawyers. In the simpler case the dynamics of the negotiation may be easier for students to understand. And if the students cannot first-chair a "hard" negotiation (say, on behalf of a class), then the immediacy of the experience — the hands-on learning that the clinic claims as uniquely and powerfully its own — is also lost or diluted.

10 I prefer the term "real-client" clinic to the more common "live-client" clinic because the implicit antonym of "live-client" suggests the mortician's trade; I am reminded of a lease which included the provision, "No live pets."

11 I don't mean to imply that a student, or a judge, or for that matter a teacher, could not equally say or do something unethical, that would justify taking time from the planned curriculum to examine what happened, and what should be done about it.

12 It may be that when the well-resourced lawyer crosses the line, the lesson for students is more dramatic, because the misconduct cannot so easily be attributed to ignorance or carelessness or overwork.
C. The Academic Calendar

Another very good reason to stick with "easy" cases is the academic calendar. Many clinicians on 11 or 12-month contracts have little or no student help over the summer. Those of us who must write in order to meet tenure requirements (or to gain the relative security of a long-term contract) rely on the summer. It is the only time when we don't have competing demands on our attention, and when we can work without interruption. If in May and early June we can attack the "easy" cases with a vengeance, and dispose of them quickly, then we have eight or ten weeks free for an academic project. Some clinics go further and hand off the cases wholesale to outside paid attorneys who monitor the files independently until the fall semester. "Hard" cases cannot be easily transferred, let alone be transferred twice.

II. Uneasiness with the "Easy" Case: One Clinic's Transformation

If "easy" cases provide more complete educational opportunities in a safer context, why choose another path? If a great lesson is just as likely to come out of a thin and insignificant file as it is to come from a thick case of first impression, why take on the extra burden? If the "easy" practice puts a feather in the dean's cap(ital), why ruffle it? If "easy" cases allow us the freedom to write in the summer, why risk losing that freedom? Why do I believe that some clinics can and should do more than they are doing now? Why do I do what I do?

A. The Status Quo: Michigan's General Clinic in the Early 1980's

I shall try to answer these questions using time-tested clinical methods. By that I mean two things: first, I will work from concrete examples, using real cases to instruct where I can, and second, I will not pretend to be a neutral observer, but will advocate a position based on my own experience.13

When I took over the operation of Michigan's general clinic in the early 1980's, the program had a caseload of approximately 130 files. (At that time two or three teachers a term supervised 20-30 stu-

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13 A speaker at the AALS Newport Beach conference made a comment that has stayed with me. The speaker said something like, "What distinguishes clinical writing from academic writing is that it is experience-based." The comment was liberating for me because it meant that I did not have to make excuses for my insights and observations that came, not from an analysis of all of the literature on a subject, but from my work as a lawyer and teacher. Instead of being self-conscious about the merely anecdotal, I could celebrate what I know, regardless of the source of my knowledge (at least in a modest essay like this one). In teaching and in practice I've found that most of the time my experience informs and influences my thinking, and not the other way round.
There was not a single appeal pending, and more than half of the files were dormant (if not comatose). The caseload consisted of landlord-tenant matters, uncontested divorces, a sprinkling of unemployment compensation and social security benefits cases, drunk driving and shoplifting misdemeanors, and involuntary civil commitment hearings at the nearby state psychiatric hospital.\(^{14}\)

The Michigan Clinical Law Program was a classic general clinic that handled relatively "easy" cases across several substantive areas. The student-faculty ratio in the clinic had traditionally been high (sometimes as high as 15:1), with students carrying seven or eight files in teams of two. Because so many of the cases went to hearing quickly — the housing cases, the misdemeanors, and especially the civil commitment cases — the clinic, like many busy legal services offices, had the feel of a hospital emergency room. The energy could be intoxicating, but we never knew when it would blossom into full-blown hysteria, or when the dread that hung in the rafters of the student offices would become disabling.\(^{15}\)

B. The Need for Change Becomes Apparent

I discovered that I loved clinical teaching at about the same time that some law schools (including mine) began to accept the idea that a person could make a career of clinical teaching. For someone with a fairly deep ambivalence about his profession, I found the prospect (that I might be able to keep my job for the rest of my life) more than a little daunting. Did I want to? The notion of permanence made me ask myself what I got from my life as a clinical lawyer and teacher. What changes would make me happier, and how would those changes affect the program?

Once I had posed the questions it was easy for me to see that on both sides — the teaching and the lawyering — too often I was doing entry-level work. On the teaching side, students could take the clinic

\(^{14}\) Over time this mix changed considerably, quite apart from the steps we took to change it. New drunk driving laws and an expanded public defender's office cut back on our criminal practice, while revisions to the mental health code and the probate court rules shrunk the civil commitment docket. The unemployment cases disappeared when the student chapter of the National Lawyers Guild opened an unemployment benefits clinic.

\(^{15}\) The pace was often frantic. Some days two supervisors covered ten civil hearings in four courts on the same morning. Because we taught in the late afternoon and early evening (to avoid conflicts with other classes and with court dates), we often stayed at the office very late, putting the finishing touches on pleadings or briefs that were due in court the next morning. Monday was routinely an 11 or 12-hour day, because housing court convened Tuesday morning, and then Tuesday night was busy because two or three teams would invariably have civil commitment cases to try in probate court at the state hospital on Wednesday morning. By Wednesday afternoon it was time to get the pleadings ready for Friday's landlord-tenant docket. . . .
for only one semester, and for just five credits. The clinic was an introductory course without a strong substantive component. On the lawyering side, the caseload did not provide much of a challenge for me, despite the fact that it got students into court quickly and frequently. As I thought about what I wanted from a career in clinical teaching, a roadmap emerged: I would have to increase the credits; I would have to push for an upper-level component; I would have to teach more substantive law; and, most importantly, I would have to develop a clinical law practice that could engage me for a lifetime.

The first three items might meet institutional resistance or take time to implement, but I had complete control over the last item. If I was dissatisfied as a lawyer, the fault was all mine, because I was the captain of my caseload. When I looked at the case work that I had been doing over the past several years, I quickly saw that the “easy” cases, for all their virtues, had drawbacks both for the clinic and for me. I identified three serious problems.

1. **Routine**

When lawyers work in a specialty year after year, too often they view the routinized procedures of their practice as the only solutions to clients’ problems. In our practice I saw that most new ideas were coming from the students instead of from the faculty. Unlike us, the students had no preconceptions or rigid categories to cabin the clients’ problems, and therefore the students were more open-minded and creative about the range of legal responses. For the faculty, the routine of the cases had imperceptibly narrowed our vision and made us comfortable with our blinders. By the hundredth civil commitment hearing or landlord-tenant negotiation, we were running on autopilot. Although we were sure to arrive safely at the planned destination, we knew the route too well, and the flight was dull.¹⁶

2. **Weak Opposition**

The worst feature of the “easy”-case practice was weak opposition. Of course in social security disability (SSD) cases and other administrative forums there was often no opposition at all.¹⁷ Even in a

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¹⁶ The problem was not “burn-out” — a term once used by faculty committees and deans to justify the high turnover (and consequent low salaries) in clinics. Burn-out comes from working too hard for too little pay. It is easily cured by lowering student-faculty ratios, eliminating summer clinics, reducing the caseload, teaching in the daytime, and raising clinical salaries. My problem was not burn-out but boredom — the same problem that can afflict academic faculty who teach a first-year course every year, and who have lost interest in other professional pursuits.

¹⁷ I want to be clear: the lack of opposition in a given case is not necessarily a bad thing. Clinical teachers (at Harvard, for example) have constructed some wonderful teaching
housing law practice like ours — in which the landlords were usually represented — the landlords’ lawyers simply could not afford to litigate the cases aggressively. Most of the cases involved unpaid rent of less than two thousand dollars, so that a jury trial — no matter how good the result for the landlord — would be penny wise and pound foolish, especially with an uncollectible debtor-tenant. In a termination case (where the landlord sought the return of the property in summary proceedings), the cost of a jury trial all but foreclosed its prospect. Our housing law practice certainly taught a great deal about negotiation and about the economics of practice, but a real litigation practice it was not.

I don’t mean to say that bad lawyers invariably flock to “easy” cases. I learned very early on that this sort of categorical thinking is elitist error: there are very good and very bad lawyers (and clean and dirty ones) to be found at every income level and in every kind of practice. Nevertheless, some weak lawyers get low-value cases because they cannot get high-value ones, and even the strongest lawyers often cannot afford to do their best work in a low-value case. The problem of case valuation versus time may make for interesting class discussion about justice in a system of disparate resources, but it does nothing to improve the quality of the lawyering on the other side of the “easy” cases.

3. Student Responses

Too many times at the end of a semester I read journal entries, or papers, or questionnaire responses that said, “I enjoyed my work in the clinic this term, but I can’t imagine handling these little cases for poor people for the rest of my life.” Instead of turning students on to public interest work, we put them off with the steady diet of “easy” cases. Students feared that public interest law would be boring and professionally shallow (on top of the stigma of low pay and low status that accompanied those jobs).

C. The Transformation of the Clinic

Over time we were able to address some of the problems of teaching an introductory-level course: We raised the clinic’s credits from five to seven; we brought back a handful of the best students for an advanced clinic; we devised ways to teach more substantive law. But more importantly for this discussion — on the lawyering side — materials out of SSD cases, and in my clinic over the years we have found some SSD cases to be terrifically useful and educational. But when our practice was typified by cases with weak or no opposition, the range of material was limited, the teachers were rarely tested, and the students’ view of litigation was skewed.
we revamped the caseload.

In thinking about what an ideal caseload would look like, I realized that it paralleled the clinical models I described at the outset of this essay. To be happy as a lawyer I was either going to have to find a specialty of sufficient depth and complexity to sustain me, or I was going to have to be a generalist whose primary professional stimulation would come from learning new fields. Or (the light dawned), I could do both: my program might be called the general clinic, but surely we could develop special projects (and thus special areas of expertise) within the larger program.

The U.S. Department of Education’s program of grants for law school clinics provided the perfect excuse. We drafted proposals and got funding for two projects in the general clinic, one doing prisoners’ civil rights cases, and the other doing employment discrimination cases. At the same time I realized that we already had considerable expertise in the fields that had provided our bread-and-butter cases—housing law and mental health law. There was no reason why we had to limit our practice in these areas to “easy” cases. At the least we ought to identify issues that needed clarification from higher courts, and start appealing those issues.

Following the national trend, we also upgraded the calibre of the clinical faculty (in terms of legal experience). When we hired new people we looked for experience, and we offered longer-term contracts—we wanted to know that the lawyers who started a piece of litigation would be around to see it through. New hires included a recent past president of the state trial lawyers association, with scores of trials under his belt, and a lateral hire from another law school who

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19 The clinic had been structured along traditional lines: a tenure-track director worked on a nine-month contract, while one or two (depending on soft money) short-term staff attorneys taught year round. The staff attorneys were hired on one-year contracts, normally for two years. They tended to be relatively inexperienced lawyers—five to seven years out of school—and because (like me) they often had Legal Services backgrounds, they came with little trial experience and only low-budget discovery experience.

The young staff attorneys spent most of their first year learning how to teach clinical courses and how to supervise law students, and they spent most of their second year looking for a job. They worked six consecutive terms without a break. In the summer they taught the full course on a condensed schedule, packing 14 weeks of material into 11 weeks of classes.

I soon figured out that this model of clinic predominated not because it was pedagogically sound, but because it was cheap (and because only a single clinician had to be admitted to the regular faculty). In retrospect the structure did far more than we realized at the time: it dictated what the clinic’s caseload would look like; it determined in large part how the course would be taught; it governed who would teach students, and what they would teach; and it relegated the clinic to a second-class place within the institution.
had 15 years of criminal and civil litigation experience.\textsuperscript{20} With more staff — with a higher level of knowledge, ability, and experience — we could take on some “hard” cases without diminishing the rest of the program, and without feeling like we were getting in over our heads.\textsuperscript{21}

The clinical practice has been transformed. Although we still want students to get into court early and often on “easy” cases, we have also accepted a number of cases that we simply would not have considered before. In recent years our students have litigated cases against senior partners from big firms and lawyers from the state Attorney General’s Office, the U.S. Attorneys’ Office, and the Justice Department. Our students have done extended jury trials in federal court, and they have appealed cases to all levels of the state and federal systems. Students have worked on high-profile issues like civil forfeiture, the reproductive rights of workers and the mentally ill, the rights of adoptive parents, pregnancy discrimination, managed health care, death penalty appeals, and prisoners’ civil rights.

The “hard” cases breathed new life into the program. First, they helped us attract the new faculty (who might not otherwise have considered a career change at all, let alone made a commitment to clinical teaching). When experienced outsiders looked at our caseload, they could imagine themselves enjoying the clinic’s practice for its own sake. Like me, they saw the clinic as a place where they could grow professionally and intellectually, but where the burden of full-time practice — whether it was the high volume of a public-law caseload or the billable hours and high pressure of a private practice — would be

\textsuperscript{20} I don’t want to sound dogmatic. In some programs — for example, a specialty clinic in a narrow field, with several experienced lawyers on staff — the two-year appointment of a relatively junior lawyer (with experience in the field) might work fine. And some schools use graduate fellows quite effectively as clinical instructors, under the close supervision of seasoned faculty. Short-termers can also bring a steady infusion of new ideas and enthusiasm to a clinic. What they often cannot do well is teach strategic thinking, negotiation, or other core lawyering skills and values that are rooted in experience. Nor can they comfortably supervise complex cases.

\textsuperscript{21} Even on the academic side there is debate about what is lost and what is gained when non-lawyers (or unpracticed lawyers) proliferate on the faculty. See e.g., Harry T. Edwards, \textit{The Growing Disjunction Between Legal Education and the Legal Profession}, 91 Mich. L. Rev. 34 (1992), and \textit{Symposium, Legal Education}, 91 Mich. L. Rev. 1921 (1993). Whatever the merits of these arguments, we can understand how a person with a penchant for analysis and scholarship can move comfortably from the role of law student to the role of academic law teacher, in much the same way that students routinely move from Ph.D. programs to university faculties in other fields. But a real-client clinic is not just another course. The medical model is instructive: we may allow a senior resident to supervise the work of a junior resident, but the person who teaches surgery has performed hundreds of operations, not five. In the 1980’s, at many law schools the old default model — of a tenure-track director and fungible short-term staff attorneys — changed radically, and today it seems as obsolete and arcane as carbon paper.
gone.

Second, the work stimulated us, and the students caught our enthusiasm. When other students heard about the interesting work going on in the clinic, enrollments went up. Students who had no interest in poverty law thought twice about passing up the clinic when they saw their classmates litigating against the firms they wanted to work for. We were doing some of the kinds of litigation they saw themselves doing after law school, so that suddenly we had something to offer that they had not noticed before.

Third, the clinicians were now doing work that actually interested many of the academic faculty, who could not pretend that they could do it themselves. The experienced lawyers whom we hired brought their own useful reputations, but the work they did in the clinic — and talked about with the faculty as colleagues and peers — sped the process of integration.

III. Two Case Studies in the Virtues of “Hard” Cases

A. Johnson Controls

1. The Story of the Case

In the late 1980’s we opened an employment discrimination project in the general clinic. The Michigan Department of Civil Rights (MDCR) sent us agency files for our review, but we had no obligation to accept them. In these cases the MDCR staff wanted to issue a formal charge, but the Michigan Attorney General’s Office (which usually prosecuted the cases at the administrative level) either disagreed with the staff about the merits of the cases, or balked passively by dragging its feet.22

One of the first cases referred to us piqued our interest. The Johnson Controls company had adopted a policy that barred all fertile women (defined as unsterilized women up to age 60) from certain jobs in its battery plants because of environmental hazards. The company claimed that the policy protected developing fetuses from lead. Lead was known to be highly toxic to human beings, and especially so in utero.23

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22 The MDCR can file a charge once probable cause has been established through investigation and no settlement has been reached following a conciliation hearing. The case is tried to an MDCR referee (an appointed lawyer whose practice includes employment discrimination cases), who makes findings of fact and conclusions of law in the form of a recommendation to the 7-member Civil Rights Commission. The Commission reviews the record, reads the briefs and hears the arguments of counsel, and then issues a decision. Decisions of the Commission can be appealed of right to the state circuit courts, where they are reviewed de novo, but based on the record developed by the referee.

23 The company justified its policy on the grounds that women might be exposed to
Three women who had worked at a battery plant in Michigan claimed that they were not rehired after a layoff because of the company's "fetal protection" policy. Not atypically, their MDCR complaint, though filed in 1983, had languished in the agency for years in the investigation phase, and then had lain dormant again awaiting a decision by the Attorney General. In the interim they had been unable to find private lawyers to prosecute their cases.

Enter the clinic. Our advanced students (affectionately known as "retreads") researched the issues and quickly learned that a similar claim against the same company was progressing through the federal courts under Title VII. Lawyers for the United Auto Workers had filed a class action in Wisconsin in 1984, challenging the same fetal protection policy. After extensive hearings in the Milwaukee district court, the company's motion for summary judgment had been granted in 1988. By the time the MDCR file arrived at our office late in 1989, the UAW case had just been affirmed en banc by the Seventh Circuit. The UAW's petition for certiorari would be filed within 90 days.

The issue presented by the Johnson Controls case was one of first impression, and the company had invested a lot of resources in the case. Although our state-law-based claim would inevitably trail behind the federal lawsuit (and we would live or die with its result), we might be able to influence the federal case, and certainly our students could learn from it. Furthermore, if the UAW won, we would be perfectly positioned to make new state law, because the MDCR was certain to follow the U.S. Supreme Court's interpretation of Title VII. Finally, if the UAW won, damages could be substantial, given the years of interest that would be added to our clients' award. With lead at levels believed to be safe for adults but harmful to fetuses before the women even knew that they were pregnant. The company argued that infertility was thus a bona fide occupational qualification (BFOQ) and that the policy should be upheld under the "business necessity" defense.

24 I'm told that the term was coined by Tony Amsterdam when he taught advanced (repeating) students in a simulation course at Stanford Law School. At Michigan, our current crop of "retreads" — seeking more status — have taken to calling themselves "Michelin Fellows."


27 International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc). The court found 8-4 that the fetal protection policy did not violate Title VII. Interestingly, Judges Posner and Easterbrook were among the four members of the court who sided with the UAW.

28 The dean had authorized us to sign contingent retainer agreements with our clients in fee-generating cases, with the fees to be segregated for use in and by the clinics. Success in the MDCR case would bring an award of attorneys' fees against the respondent, plus the
some reservations, but with high excitement, we said yes.

The MDCR, with the clinic as counsel, filed a formal charge in the spring of 1990. (The UAW’s petition for certiorari was granted three days later.) The company responded with motions to dismiss based on, among other things, the doctrines of laches and collateral estoppel.\textsuperscript{29} Students defeated the motions and the case moved toward trial. Students worked with experts at Michigan’s School of Public Health to develop the case, and conducted discovery informally by reviewing the UAW’s files and interviewing witnesses, and formally by using the MDCR’s discovery procedures.

The U.S. Supreme Court heard the UAW case in early October, 1990. The students got to review drafts of the UAW’s briefs and developed their own positions about what strategy would be most effective in the appeal. That same month the students tried the case to the MDCR referee (who wanted to be ready to make a decision when the U.S. Supreme Court resolved the underlying legal issues the following spring).

In March, 1991, the U.S. Supreme Court decided the case.\textsuperscript{30} The Court held unanimously that the company’s fetal protection policy violated Title VII. The Court found that sterility was not a BFOQ, and that the fetal protection policy could not be justified under the “business necessity” defense.

Applying Johnson Controls, the MDCR referee soon found that the company had violated Michigan’s civil rights law as well, and she recommended a damage award of about half a million dollars (including interest and attorneys’ fees). Needless to say, the company appealed. Students briefed and argued the appeal, and lost: the Civil Rights Commission reversed. On the facts, it held that two of our clients were not affected by the company’s fetal protection policy because, based on their poor work records, they would not have been rehired in any event. On the law, the Commission held that our cli-

\textsuperscript{29} In 1984 these same women had joined a group of male employees who had sued the union and the company in federal court under the Labor-Management Relations Act (LMRA), 29 U.S.C. § 301, alleging that the company had breached its contract and that the union had breached its duty of fair representation in not enforcing the recall rights of these employees. In 1986 the employees lost the case, and the Sixth Circuit affirmed. See Ade v. Johnson Controls, 831 F.2d 293 (6th Cir. 1986) (table). The fetal protection issue was not raised in that action because (1) the three women had filed their complaint with the MDCR first; (2) most of the plaintiffs were men who had not been rehired for other reasons; (3) the union was a necessary party aligned with the defendant company; and (4) pregnancy discrimination in the form of a fetal protection policy was still problematic as a potential claim under Title VII.

ents' failure to join the fetal protection claim in their 1984 LMRA lawsuit barred the re-litigation of that claim now, even though the administrative complaint had been filed first.\(^{31}\)

We appealed the Commission's decision to state circuit court.\(^{32}\) In 1993, the circuit court affirmed as expected, and we prepared our application for leave to appeal to the Michigan Court of Appeals.

In the meantime, the UAW and the company were trying to settle the class members' damage claims.\(^{33}\) Since no named plaintiff was a former employee who had been denied rehire, we realized that our intervention into the federal case could be a formidable threat both to the company and to the union. Our appearance in the case could expand the size of the class and might scuttle the settlement negotiations (which were nearly complete).\(^{34}\) We arranged to be admitted to the federal court in Milwaukee and we found local counsel to assist us there if necessary. Then we drafted a proposed motion to intervene in the Milwaukee action as named plaintiffs, on behalf of the sub-class of workers who were not current UAW members, but who, like our clients, had been denied recall jobs on account of the fetal protection policy.

Facing our appeal to the Michigan Court of Appeals and our possible entry into the class action, the company finally made a settlement offer that our clients were willing to accept.\(^{35}\) By the end of 1993, both the federal class action and the Michigan civil rights case were resolved, putting an end to the Johnson Controls litigation.

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\(^{31}\) The collateral estoppel effect of a federal lawsuit on a state constitutional commission was also an issue of first impression, and one that might go either way depending upon whether state or federal doctrine applied.

\(^{32}\) The company removed the case to the rural county where its battery plant was located, and where we had almost no chance of success. Therefore, we viewed the circuit court appeal as a dry run for the appeal to the Court of Appeals. Most of our strategic decision-making revolved around how to get a decision from the circuit court that would best help us in the next appeal(s).

\(^{33}\) Both sides treated the case as if the class consisted of employees who were discriminated against by virtue of the fetal protection policy, and not former employees who were denied rehire by virtue of the policy. (This position made perfect sense, as the company wanted to limit its damages, and the UAW wanted to maximize recovery for its constituent UAW members.)

\(^{34}\) We were prepared to argue that the res judicata defense would be unavailing in federal court. Both the company and the union had suggested in earlier court documents that our clients might be within the (vague) definition of the class. If they were, then arguably our clients need not have included their fetal protection claim in their 1984 LMRA case, because (by virtue of the class action) that claim would have already been pending in another, first-filed federal court action.

\(^{35}\) The terms of the settlement cannot be disclosed because the defendants bargained for and got a non-disclosure provision.
2. Reflections on the Case

In many respects the Johnson Controls case was an ideal "hard" case for the clinic. It raised cutting-edge legal issues that the students were excited to litigate, but those issues were primarily the province of the UAW lawyers in federal court. Our more modest state-based claim was a coat-tail affair. Our proofs at hearing focussed on whether or not the women would have been rehired notwithstanding the company's fetal protection policy, and on their damages. To argue the case the students had to learn all of the UAW's arguments (and basic Title VII law), but each new team could be brought up to speed quickly by reading the most recent federal court decision and the parties' briefs. So the case hung in a frame that made it look flashy and important, but the actual work of the case was relatively straightforward. At trial the referee determined what had happened to the plaintiffs and what harm they had suffered, while the appeal decided a very interesting but fairly narrow and technical issue of procedural law, namely how collateral estoppel should apply in a state administrative proceeding.

The students were thus fully able to first-chair almost every major aspect of the case. The hands-on work — trying the case before the referee, drafting findings of fact and conclusions of law and trial motions and briefs, and then writing the appellate briefs and arguing before the Commission and the circuit court — were all well within the students' abilities. Equally important, the major tasks were well spaced in time and were largely within our control. We were able to set the hearing dates to coincide with our calendar. Opposing counsel were flexible about motion and discovery cut-off dates to suit our schedule, and they were cooperative about extending briefing deadlines to fit the students' time lines. We were also lucky: the major case events took place at opportune times or on relatively long deadlines. Even when some events occurred over the summer, the students who had handled the case in the spring were willing and able to get released (or even sponsored) by their summer employers to return to Ann Arbor to complete the work.

The interdisciplinary component of the case was typical of complex litigation. Some student teams did Medline searches and became versed in the literature and pathology of lead poisoning. Others got help from scientists and epidemiologists in public health. Students learned about battery making, about OSHA standards, and about plant management and safety. In a larger social context they learned about company town politics, environmental politics, and the realities
of working-class life.\textsuperscript{36}

The students also learned about disappointment (their clients' and their own) when the case fell apart and the big verdict was lost on appeal. They learned crucial lessons about making a record in the only way that those lessons can be fully learned — by having to write and argue appeals from the record that they and their colleagues (or forebears) made. They learned about the consequences of decisions, including a decision made in another case years before — not to include a potential claim, but to let a parallel administrative complaint proceed instead. They learned about negotiations, devising an imaginative strategy at the end (over the objections of our UAW allies) that snatched a partial victory from the jaws of defeat. And they learned about the dynamics of representing three plaintiffs who start out in solidarity and end up feuding over who will get how big a piece of a small pie.\textsuperscript{37}

Although the case was absorbing the whole time it was in the office, it rarely overwhelmed us. For the better part of two years it provided first-rate material for the retreads, teaching them case development. Week after week the two-hour advanced seminar was devoted to strategic planning and decision-making in \textit{Johnson Controls}, with a never-ending array of possibilities and choices and directions to take. Opposing counsel, from big firms in Detroit and Milwaukee, took the case seriously and defended it with determination and persistence to the end. When we look back over the caseload of the last five years, the \textit{Johnson Controls} case stands out as one of the clinic's most successful long-term teaching vehicles, even though the result was less favorable than we had hoped for (after the referee's generous recommendation). Did the case provide balance to the many short-term routine cases that passed through the office over the same period of time? It did. Did the case give the clinical teachers an opportunity to stretch their professional skills and to learn from each other and from the students? It did. Did we make the right choice in taking the case? Absolutely, we did.

\textsuperscript{36} Some young women were prepared to choose sterilization in order to keep their jobs and feed their families. For our three clients, by the end of the case their poverty and job insecurity had worn them down, so that the prospect of a certain but modest sum of money today was worth far more to them than the chance of a major windfall down the road, if they won a reversal in the final appeal.

\textsuperscript{37} Where two of our three clients had lost on the facts, and the third (with the strong facts) had lost only on the law, the students had to grapple with distribution conflicts: one client had a much better chance of prevailing on appeal than the other two, but the company would only settle the case as a packaged deal, raising yet another ethical dilemma for the students in the clinic.
B. The Parole Case

1. The Story of the Case

In 1992 Michigan quietly amended its penal laws to reduce the frequency of parole review for prisoners serving sentences of ten years to life. By 1994 several inmates had filed pro se lawsuits challenging the amendments, and the cases came to our attention. Our preliminary research showed that in recent years several states had enacted similar laws to reduce the frequency of parole review for long-term inmates. The legal challenges to these statutes had been quite successful: Most courts had ruled that when such amendments are applied retroactively, they violate the ex post facto clause of the U.S. Constitution.

Most of our prisoners' rights cases are demanding simply because (1) they are filed in federal district court with a jury demand, and (2) students have a hard time mastering the substantive and procedural law of 42 U.S.C. § 1983. But the parole case presented problems of an unusual scope, scale, character and complexity compared even to those cases.

A prison class action would have higher costs than a single case, and it would be sure to tax our resources. (The last such case had generated about 1,600 letters in inmate correspondence alone.) With 8-10 cases already filed and more probably in the pipeline, the management of the parole case would not be easy. The core issue preserving the chance for early parole for the state's worst felons would be politically unpopular. Finally, the case would almost certainly outlast teams of our students.

Should the clinic take the case? We gave that question a long look, weighing the costs and benefits. We felt a powerful sense of obligation to take it. In Michigan, as elsewhere, only a handful of private lawyers do prisoners' rights work, and none of them had expressed any interest in the case. Thus, if we turned down the case, no other lawyers would step forward. Moreover, we might lose. Despite

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38 New anti-crime bills and tougher sentencing laws have boosted prison populations so much that in some states (like Michigan) the annual corrections budget now exceeds the social services budget. Bills that reduce the frequency of parole review are another form of law-and-order measure, seeking to extend sentences at the back end instead of up front. The legislation also conveniently kills two birds with one stone: at no cost it lightens the workload of over-worked parole authorities (who could not possibly keep up with the burgeoning prison population), while demonstrating yet again the legislators' commitment to "get tough on crime."

strong reported decisions from several circuits and from three state
supreme courts, every U.S. magistrate or federal judge *in Michigan* to
have decided one of these cases had ruled against the prisoners. The
law was uncertain. The previous year the U.S. Supreme Court had
granted *certiorari* in a similar case out of South Carolina, but after full
briefing and argument, had dismissed the writ as improvidently
granted.\textsuperscript{40} There was the resource question. We suspected that more
cases had been filed than we knew about, and we could not prevent
additional cases from being filed in the future. Each new case would
spread us thinner.

After discussing the question several times in class, we said yes,
with trepidation. Student teams threw themselves into the substantive
research, reading about the history of the *ex post facto* clause and
tracking down all reported cases. They got permission to appear in
every case we knew about, and they sent out discovery to locate the
stragglers. By the time we appeared in many of the cases the defend-
dants had already moved for summary judgment. The plaintiffs' re-
sponses either had been filed *pro se* or were overdue. The students
drafted responses to the pending motions as well as drafting objec-
tions to several magistrates' reports and recommendations. They also
researched and wrote early drafts of a motion for consolidation or
class certification.

Our reservations about the case proved to be justified when the
defendants opposed consolidation or class certification. The judges
were also uncooperative, refusing to stay the separate cases, hoping
for a quick decision from the Sixth Circuit that would clear their dock-
ets.\textsuperscript{41} Consequently, we had to appear and file briefs in some 15 dif-
f erent district court cases, often on an emergency basis. No two briefs
were identical because the law to be applied in each case depended
upon the law in effect when the plaintiffs committed their crimes. The
filings seemed endless and sometimes pointless. For example, as each
*pro se* plaintiff (or we) lost and appealed each case, we had to file
motions to override district court orders holding that the appeals were
frivolous and therefore could not be taken *in forma pauperis*.

Ultimately, a class was certified, all of the pending district court
cases were consolidated, all of the Sixth Circuit cases were permitted
to proceed without payment of fees, and all of those appeals were

\textsuperscript{40} See Roller v. Cavanaugh, 984 F.2d 120 (4th Cir.), *cert. dismissed*, 114 S. Ct. 593
(1993) (mem.). In that case the state apparently changed its law again during the pendency
of the case, effectively mooting the appeal.

\textsuperscript{41} We did not want the Sixth Circuit to hear any case until a factual record had been
developed. There were important factual distinctions between the way Michigan had im-
plemented its law and the way other states had implemented their laws in the reported
cases, that we thought might be outcome determinative.
consolidated for briefing and/or submission. Just when we had begun to get the files under control, the U.S. Supreme Court granted certiorari in Morales v. California Department of Corrections, a similar case that a pro se prisoner had won in the Ninth Circuit. We got orders staying our class action and all of the appeals pending the U.S. Supreme Court’s decision in Morales.

The U.S. Supreme Court appointed counsel (from O’Melveny & Myers) to handle the case in Washington. Our students sent copies of their briefs to the lawyers, reviewed drafts of the U.S Supreme Court brief as it was being written, and were given the opportunity to write an amicus brief (although in the end they did not file one).

In the interim, the district court permitted discovery in our class action to go forward, despite the stay. The students worked on document discovery with the help of attorneys who were handling related state court actions, and scheduled depositions of parole board members and staff.

The Morales case was decided (against the inmate) in April, 1995. However, the opinion was narrow enough that it did not resolve the Michigan cases. The Sixth Circuit therefore remanded the pending appeals for reconsideration in light of Morales, and we got orders consolidating all of those files with the class action. Meanwhile in the class action itself the district court scheduled an evidentiary hearing, followed by briefs and argument on cross motions for summary judgment. In September, 1995, the district court held that much of the 1992 parole law was unconstitutional under the ex post facto clause. The case is now pending in the Sixth Circuit.

2. Reflections on the Case

By the standards I set forth above, the parole case certainly proved itself to be a “hard” case. As of the end of 1995 we had spent 400 billable hours of faculty supervisory time (and probably closer to 600 hours in real time), and many more hours of student time, on this one file. (The fee petition sought almost $80,000.) The case outlasted several teams of students over four semesters and two summers, with no end yet in sight. It caused controversy because the University of Michigan is a state school that gets funds from the legislature, and Michigan law students were asserting that a cost-saving measure of
the legislature was unconstitutional. Although the core legal issues in the case were not particularly complex, the management of the case presented problems of a different order of magnitude than the cases we customarily handle.

In fact the management and strategy issues lay at the heart of our decision to take the case. We saw at the start that the central lessons of the case would revolve around how lawyers get this sort of litigation under control, for the courts and for themselves, and how they narrow the case to make it winnable. (Defining the class and the subclasses in order to draft the class certification order, and thinking through the relief we wanted, were both exquisite exercises in case development.) In my view these managerial and strategic tasks — which only arise writ large in the framing of “hard” cases — are essential lawyering skills that are undertaught in the clinic’s conventional caseload.

But did we make the right decision in taking the case? In retrospect the parole case did not work very well as a clinical vehicle despite the many and wonderful opportunities for students to immerse themselves in it for a term or two. Oddly, the parole case disappointed us not by virtue of the nature of the case, but for the same frustrating reason that “easy” cases occasionally do not work out well — we could not control the calendar. The most difficult work occurred between May and September, both in 1994 and in 1995. The first summer we had to meet briefing deadlines in a string of separate files, while moving for consolidation or class certification, perfecting the appeals as needed, and seeking stays in both the district court and in the Sixth Circuit. When the U.S. Supreme Court issued its decision in April, 1995, we spent another summer completing discovery, conducting the evidentiary hearing, and then briefing and arguing the cross motions for summary judgment.

Although a few teams got a great benefit from the case, and one summer work/study student profited hugely from it, the bulk of the work had to be done by faculty, at the wrong time. For consecutive

45 Even the anticipated projects — motions to consolidate, the motion for class certification, early discovery and then discovery motions, an amended class complaint (if necessary), motions challenging denial of the pro se plaintiffs' in forma pauperis status, motions to consolidate and stay the appeals in the Sixth Circuit, etc. — were all relatively straightforward and fully within the law students’ ability to research, write, and argue if necessary.

46 We suspected that the Attorney General’s strategy — one we had seen before — would be to try to win several pro se cases quickly, creating a sort of (under)groundswell of unpublished precedent that would constrain each new magistrate or judge in turn, and which might eventually carry the day in the Sixth Circuit. Indeed, before the class was finally certified, some nine magistrates and eight federal district court judges had ruled against our position, including two published opinions in pro se cases (one by the same judge who later decided the class action, in effect reversing himself).
summers the parole case buried us. The clinic staff nearly mutinied as
the stream of emergency motions and briefs continued unabated
through June, July, and August of 1994. The work that we usually do
during our “down” time did not get done in 1994, which meant that as
an office we started the fall of 1994 tired and grumpy.47

The parole case highlighted some of the problems and dangers of
“hard” cases, but it had its virtues, too. For a clinic that wants to be
known for its prisoners’ rights work, we now have an established pres-
ence in every federal court in the state. We are more likely to get
good referrals from the judges and magistrates who learned about our
work, and we proved that we are sensitive to the burdens that prison-
ers’ rights cases present. Our efforts to get 25 cases handled as one
proved that we will not clutter up the courts’ dockets with unnecessary
litigation.

Within the community of prisoners’ rights lawyers, we showed
that we are willing to tackle a major lawsuit, which makes other law-
yers think of us as a resource. In turn we are more likely to be con-
sulted and included (or given referrals) when litigation is on the
drawing board in the future. In my view clinics should be a repository
of expertise and a clearinghouse of specialized information, but these
things are earned by hard work. Even with hard work the clinic’s ex-
pertise may remain invisible without the publicity or controversy of a
high-profile case. Although the parole case had serious programmatic
costs, it also had fairly high reputational benefits.

The case also served well the faculty’s need for significant law-
yering challenges. The state was represented by knowledgeable attor-
neys in the AG’s Office who would have gotten 25 bites at the apple if
no lawyers had come in to stop them. Even opposed by counsel, the
defendants’ lawyers were able to push the early cases to judgment
before the late cases could be consolidated. Stopping that train —
bringing everything to a halt in the district courts and in the Sixth
Circuit, while developing the record that had to be developed in order
for us to have a chance to win — took planning on a scale that the
“easy” cases never require. Not only did the clinical faculty get to
stretch themselves, but the students who served as co-counsel on the

47 At Michigan, some of the clinical teachers are technically on nine-month contracts,
although they are expected to maintain their cases over the summer. When a “hard” case
goes to trial at the wrong time, the clinician handling it can wind up spending time working
on the file, without compensation. In August, 1992, Mark Mitshkun had to try a prisoner’s
civil rights case because the federal court refused to adjourn the trial into September, when
students could handle it. Mark won the largest jury verdict (on behalf of a prisoner) in
Michigan history ($550,000, later remitted to $100,000), plus another $40,000+ in fees for
the clinic, but Mark was not compensated for the hundreds of summer hours that he spent
on the case.
case developed a longer-sighted vision of litigation and a more accurate picture of what it takes to do it well.

IV. Revisiting the Decision to Take “Hard” Cases: The Benefits and Drawbacks

Once the “hard” cases became an accepted part of our caseload, we could see more clearly the limitations of our prior practice. Suddenly the lawyers were engaged again. New ideas flowed from all directions, and not just from the students. The brainstorming and planning sessions with the retreads became the high point of the week, as together we plotted uncharted routes, with sweaty hands on the controls.

Raising the stakes also made a difference in the quality of the opposition we faced. For example, a charge of discrimination is taken more personally than other kinds of legal claims, and it brings out a stronger response. The defense of a discrimination case — even for a big corporation that may see these claims in some numbers — tends to be strident, fueled by indignation (if not by guilt). For clinical teachers and students who have grown accustomed to “easy” cases, the first discrimination case may seem “hard” (even if it does not meet the criteria I set forth above), because the defense will be much more aggressive than in the normal clinical practice. Raise the stakes another notch — by challenging a company policy as discriminatory, or by representing a group of employees or a class, as we did in Johnson Controls and in the parole case — and you start seeing several lawyers’ names on the other side’s pleadings (or, in a small city like Ann Arbor, silk-stocking firms whose home offices are decidedly not local).

The “hard” cases also prove that public interest work can be as compelling and as intellectually challenging as anything that the private sector has to offer. Indeed, the clinic (the same as other public law offices) can take on whatever looks interesting, without regard to the major constraint that limits private law firms, namely profit. Nor are we likely to be out-resourced: In a pinch, we can put 30 students on one case if necessary, and we have clinics across the country to back us up.

Often “hard” cases involve “issue” litigation in which the clients are little more than shadow figures. This problem raises wonderful questions of client-centeredness and the role of the public interest lawyer.48 The “hard” cases allow us to bring some of the intellectual

debate among clinicians into the classroom. With a caseload of “easy” cases our students would never be asked these questions while they were still in school — nor would they have occasion to reflect on them afterward, if they leave the clinic convinced that public interest law is intellectually second rank.

When I think of the best clinical programs, I think of small groups of diverse, interesting, smart, dedicated lawyer-teachers, who inspire each other and their students. What gives students their enthusiasm is not just that they are going to court for the first time, but that they are working with lawyers who clearly love their jobs and who are dedicated to their practices and to their teaching. In these programs the synergy among the faculty and between the faculty and students is unmistakable. People work hard. Students and faculty question everything. They bring their work to the larger group and take the group’s feedback and return to the drawing board: they do a thing over and over again until they get it right.

In the “hard” cases students see faculty at their best and most instructive — not knowing the answers, but needing each other and their students to find the answers, and seeking excellence for its own sake and for the sake of an excellent (public interest) cause. Students and faculty develop an abiding knowledge of the facts and the law because everyone stays with the case for more than a few weeks; they all have a stake in it. The results of strategic decisions made early on in the case must be lived with even as they criticize those decisions with the wisdom of hindsight.

The “hard” cases do have significant drawbacks that I cannot dodge. At crunch time — on a key motion, at the endgame negotiation, in the deposition that has to be done right — the faculty supervisor is more apt to take over than in an “easy” case. I tend to measure my success as a supervisor by the infrequency of my intervention: the best trial is the one in which I do not say a word (and we win big). In the “hard” cases the faculty do more of the work, in court and out of court. No matter how much responsibility we push onto the students, the “hard” cases can take on the look of the dreaded “mentor” model. Students have less ownership of the case because they come into the middle of it and they are responsible for only a part of it. Their personal relationship with the clients may be more diffuse or less immediate than with their “easy” case clients. And students can realistically assess that their word carries less weight than the teachers’ in the weekly group meetings. No matter how much we downplay our own expertise and insist that the students work as full partners, their desire to make us mentors comes closer to fruition in the “hard” cases, our vigilance notwithstanding.
The “hard” cases also eat up faculty time that could otherwise be spent on supervision. This is exactly the trade-off that I think is worth making. In the heat of a “hard” case a supervisor may be unavailable for days or weeks at a time, preparing a case, trying it with students, or cranking out a big brief. We are forced to cover for each other on the “easy” cases more than we would have to otherwise, which can also result in poorer (or at least less organized) supervision. But when we limited our practice exclusively to “easy” cases, the quality slid because we grew bored and soured on the work. My colleague Mark Mitshkun describes the “hard” cases as an investment in the clinic’s future. We take time away from current students to ensure that tomorrow’s classes will be taught by better teachers — enriched by their practice, energized by the challenges they set for themselves, and improved as lawyers because they met those challenges.49

One last word of caution. Some public interest lawyers have a heavy emotional investment in seeing themselves as knights-errant riding to the rescue of the downtrodden. There can be a “hotdog” element in the work, and I don’t want to gloss over it. The hero myth is a useful motivator, but it isn’t very realistic. We are, after all, just lawyers,50 and even the biggest cases we handle are still just lawsuits: someone pays some money or does not, or some policy is altered incrementally or it is not. Even the biggest cases may not have anywhere near the effect we want to claim for them.51 The practice of law, in my view, by definition cannot be revolutionary, but it can offset the built-in, reactionary inertia that defines the present at any

49 As noted, in Michigan’s Child Advocacy Law Clinic students try abuse and neglect cases in the probate courts. Although the cases provide wonderful vehicles for a host of lawyering and counseling skills, the legal issues are rarely complex and the trials tend to be “easy” — weak opposition, relaxed rules of evidence, pre-ordained results. The nature of the caseload permits the clinical faculty to focus their attention on broader issues in other forums (academic or legislative), but the teachers’ litigation skills can atrophy. When Suellen Scarneccia took on the DeBoer case, the experience of working on a “hard” case was a milestone in her own professional development. She speaks of the case as having made her by far a better lawyer and teacher, even if during the case she was the primary litigator, and her students were remote second-chairs.

50 It may be that in order to spend a lifetime representing poor people and confronting those in power you need to be in a perpetual state of arrested development — at whatever appropriate stage, be it oedipal conflict, adolescent rebelliousness, or ongoing mid-life crisis. These are heady moments, and if you can harness the energy that accompanies them and direct it into litigation, you’re close to cold fusion. Such revolutionary zeal can be sustained for a surprisingly long time. See Margaret M. Russell, De Jure Revolution, 93 Mich. L. Rev. 1173 (1995) (reviewing Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994), and Richard Delgado & Jean Stefancic, Failed Revolutions: Social Reform and the Limits of Legal Imagination (1994)).

given cultural moment. The model here is not lawyer as mythic hero-savior, but lawyer as gadfly, ever critical, ever insistent that the current measure of justice is too small.

**Conclusion**

At bottom I am suggesting that planned doses of the exceptional are a tonic for the teachers, for the students, and for the program. If we are to make careers out of clinical teaching, then we need to build into our programs the same things that we would want in any other career (to make it fulfilling and satisfying over the 30 or 40 or 50 years of our working lives). We need to let ourselves grow, to make sure that we do not grow stale. For those of us who started out as lawyers and who think of ourselves primarily as lawyers (as opposed to scholars), we need to develop as lawyers. If our students are to believe that public interest work can be sustaining, they need to see us sustained by it — they need to be able to imagine themselves doing that work in their own careers. We need to look forward to coming to the office every day, knowing that we have created challenges for ourselves that will keep us sharp, that will test us, that will make us better lawyers, and that will help us to live up to our own ideals. If we lead by example, with luck our students will feel the same way that we do about our courses. They will begin to learn what they want from the practice of law, and how they can get it, and how they can serve the public at the same time. “Hard” cases knock us off our routine, interrupt our complacency, and force us to think. These are all useful things for academic lawyers, and why I say that “hard” cases make good (clinical) law.