Large-Scale Litigation in Law School Clinics

Friday, April 30, 11:00 a.m.

Dana Montalto, Lindsay Nash, Michael Wishnie

Attached is an optional reading that may be useful for attendees to read before this session or to refer to afterwards. While this reading is focused on crisis lawyering—i.e., lawyering to address urgent problems under significant time pressure—in a clinical setting, many of the benefits and some of the challenges that it discusses are also common to large-scale litigation in law school clinics. While we plan to address some of these benefits and challenges to frame the discussion in this session, this reading explores a number of these issues in greater depth and may help audience members generate ideas and questions for the facilitated discussion that will comprise the majority of this session.

As we hope that attendees will contribute their experiences, challenges, and successes in engaging in this type of pedagogy, we invite you to reflect on the following questions in advance of the session.

- If you take on large-scale or complex cases in your clinic, what are your reasons for doing so?
- If you do not take on this kind of work, what are some reasons that you have refrained from doing so?
- If you do engage or have engaged in this type of work in your clinic, what are some of the steps you've taken or internal rules/processes you've put in place to make it work for the unique context of a law school clinic?

Crisis Lawyering

Effective Legal Advocacy in Emergency Situations

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Call Air Traffic Control!

Confronting Crisis as Lawyers and Teachers

MUNEER I. AHMAD AND MICHAEL J. WISHNIE

Shortly after 10 P.M. on Friday, January 27, 2017, one week after the inauguration of US president Donald Trump, two former students called one of us to report that their client was being detained at John F. Kennedy International Airport in New York and that they were thinking about filing an emergency lawsuit. That man, Hameed Khalid Darweesh, was an Iraqi interpreter and engineer who, for approximately a decade, performed valuable work for the US government, including as an interpreter for the 101st Airborne Division in Baghdad and Mosul and as a project engineer for both the US government and US contractors. On the basis of this work, he received an Iraqi Special Immigrant Visa, designed especially for people like Mr. Darweesh who, by virtue of their work for the US government, are at grave and special risk for violence. We later learned that a second client, Haider Sameer Abdulkhaleq Alshawi, was also being detained at the same airport, despite having been granted a visa to join his wife and children; they had received refugee status due to their family's association with the US military.

The detention of Mr. Darweesh and Mr. Alshawi by US Customs and Border Protection (CBP) officials at JFK was based solely on an executive order issued by the president late that Friday afternoon—what would later come to be known as the Trump administration's first Muslim Ban. The order created chaos across the country and around the world—separating families, keeping students from returning to school, and placing people like Mr. Darweesh and Mr. Alshawi in danger not only of deportation but also of return to their deaths. That night, students and faculty in the clinic we teach at Yale Law School worked alongside lawyers from the International Refugee Assistance Project, the National Immigration Law Center, and the ACLU Immigrants' Rights Project to draft and file an emergency lawsuit. Just after 5:30 A.M. the next day—approximately seven hours after we received that Friday night call—we filed a nationwide class action challenging the government's action. By 8 P.M. that evening, we had obtained the first nationwide injunction against the Muslim Ban.

While the Muslim Ban presented uniquely exigent circumstances in a tumultuous political moment, immigration lawyers long have been familiar with crisis. Particularly for those defending clients against deportation, exigency is a recurring, if episodic, feature of practice. For people seeking asylum, refugee status, or other legal forms of protection against persecution, the stakes often literally are life or death. Likewise, for immigrants facing imminent "removal"—an anodyne legal phrase that frequently denotes permanent separation from one's children, spouse, community, or livelihood—the consequences often are devastating. This was true under the Barack Obama administration, as well as administrations of both political parties before it. But the election of Donald Trump—who has made the dehumanization of immigrants a centerpiece of his presidency—rendered immigration newly and relentlessly rife with crisis. Since Trump's inauguration, the administration has rolled out countless new enforcement policies and practices, forcibly separated parents from their children, terminated legal protections for millions of people, mounted a full-scale assault on refugees and asylum-seekers, and created *in terrorem* effects for immigrants and communities of color through persistent racialization and demonization of refugees and immigrants. As a result, the imperative for time-sensitive, high-stakes lawyering in the immigration space has never been greater.

While the full expression of Trump's attack on immigrants is manifest in scores of actions and policies, in this chapter we turn back the clock to the first days, weeks, and months of the administration and examine the lawyering in which we and our students engaged in two crises: the overnight challenge to the original Muslim Ban, and the first few days of the intensive representation of a woman who sought sanctuary from deportation in a New Haven, Connecticut, church—the first person to do so in our state. We highlight these two cases in order to demonstrate the different forms that crisis lawyering in the same practice area can take—from a class-action lawsuit challenging national policy, to the multipronged defense of a local resident—and the commonalities that exist across them. In so doing, we aspire to give further definition to what constitutes "crisis lawyering" and to reflect on lessons that may be useful not only for lawyers or clinical teachers but for other fields as well.

Many occupations demand the exercise of judgment, skill, and collaboration so as to address urgent problems under significant time pressure. For some lawyers, this is true on a regular basis. For many teachers—and certainly those teaching at a university level—these circumstances are probably less common. We are clinical professors of law, which means that we are both lawyers and teachers. We teach full-time at a law school, but in our classes we do not deliver lectures; instead, we lead seminars and supervise law students

representing real clients with real legal problems in courts, before legislatures and agencies, and in other settings in which lawyers practice. Like medical students whose training includes treating real patients in a teaching hospital, our students earn grades and course credit by representing clients, without pay, under our supervision. For years, we have cotaught a clinical course at Yale Law School in which students represent indigent immigrants facing deportation, among other matters.

We undertook our work on the first Muslim Ban and the sanctuary case while teaching this course. Because law clinics such as ours are committed to the dual goals of client service and student learning, crisis lawyering in a clinical context poses unique challenges and special opportunities. Ordinary precepts of clinical legal education, which seek to foreground the work of students over that of experienced attorneys, are placed under considerable stress. At the same time, crisis lawyering can illuminate a broader set of pedagogical commitments and cultivate students' abilities to engage in alternative lawyering modalities. We believe this to be important both because of the prevalence of crisis in the current moment and because crises of one form or another are endemic to nearly every form of social justice lawyering. Teaching the next generation of lawyers how to lawyer in crisis is, therefore, an essential element of the long-term struggles in which we are now engaged.

Although our reflections on these lawyering experiences center on the clinical context, we believe that many of them will be fruitful for crisis lawyering in all practice settings. For example, we identify ways in which the structure of our practice enabled us to work nimbly and effectively in crisis—but also how it constrained us. Crisis lawyering, then, can help to illuminate the architecture of one's practice, account for its strengths, and suggest directions for future development. We also discuss how lawyering in crisis can shed light on dominant, regressive, and often invisible practices that characterized our non–crisis lawyering as well. We therefore argue that crisis lawyering can serve as a stress test for one's lawyering generally, an opportunity to measure one's practices against one's values, and to take appropriate steps toward achieving a greater congruence between them.

Law clinics can have a laboratory quality, melding experimental practice with observation and learning. They require a deep commitment to critical reflection so as to capture insights about successful practice for future application. And they require a deep humility to both see and articulate the ways in which our practice falls short. It is in this spirit of action and learning that we enter this conversation on crisis lawyering.

We do so even as our engagement in and learning from crisis lawyering continues in the COVID-19 era. Starting in March 2020, our clinic began to

represent individuals in immigration detention in order to secure their release because of the mortal threat of COVID-19 in the congregate environment of jails and prisons. This has included litigating federal habeas corpus petitions for nearly a dozen individuals, as well as cocounseling class-action litigation on behalf of 150 persons held in immigration detention at the most notorious facility in New England in a suit that reduced the immigration population by two-thirds and became a model for similar suits around the country. In addition, our students helped a local union to establish and staff an unemployment insurance application and technical assistance hotline in Connecticut following the sudden layoff of thousands of its members. One of us has also worked with students to represent incarcerated veterans in habeas petitions seeking their release, develop FAQs on access to federal and state veterans' benefits during the COVID-19 crisis, and engage in emergency political advocacy for incarcerated veterans. As this crisis has unfolded, our learnings from the two cases discussed in this chapter deeply informed our current practice. Indeed, the current conditions, and the extraordinary hardship they have created for millions of people, have reinforced for us the imperative to prepare future generations of social justice lawyers for crisis as an essential component of their practice.

Crisis Lawyering in a Clinical Setting

Modern law clinics originated as a reform movement in legal education born out of the progressive student activism of the 1960s. As the civil rights movement sharpened demands for racial and economic justice, advocates for President Lyndon Johnson's War on Poverty succeeded in securing federal funding for legal services for the poor, based on an understanding that law reform, in addition to traditional legal aid, was a necessary component of the antipoverty agenda. In this environment, students agitated for law schools to make their curricula more responsive to the newly articulated needs of poor people, and a first generation of clinicians brought client service into the mainstream of legal education. What began as a small-scale effort by local practitioners evolved into the most significant transformation in legal education since the advent of the Langdellian case method in the late nineteenth century. Rather than utilize appellate cases as the principal basis for teaching law, clinical legal education elaborated a curriculum around the firsthand experience of students representing clients. This included the integration of legal doctrine, lawyering skills, professional responsibility, and critical analysis of legal systems and theories. From its earliest days, then, the pedagogical and social justice missions of clinical legal education were inextricable. Today, the American Bar Association, which accredits US law schools, mandates that law schools require

each student to earn at least six credits in "experiential" classes before graduation. Clinics are thus a feature of nearly every law school in the United States, although they vary significantly in scale, structure, and ambition.

As clinical legal education matured, its adherents developed an increasingly robust set of pedagogical practices and an associated body of scholarship. As is often the case with innovations, a set of experimental practices hardened into orthodoxies. Two hallmark features animate most every clinical program. The first is a commitment to placing students in professional role as lawyers representing real-life clients and endowing them with the primary decision-making responsibility that comes from occupying such a role. To the maximum extent possible, students are positioned as lawyers out in front, rather than as interns merely assisting faculty. From this axiom of clinical legal education flow a number of other pedagogical commitments. For example, the dominant model privileges the lawyer-client relationship as a principal focus of the lawyering experience. It also favors "small" cases, typically involving a single client with a discrete legal need, which enable a student to participate in the full life cycle of a case—client interviewing and counseling, fact investigation, development of a case theory, negotiation, briefing, and trial before an adjudicator—in the course of a semester or academic year. Such an approach implicitly reflects a traditional vision of lawyering, one that is as court-focused as it is client-oriented, without meaningful engagement in other modes of persuasion, such as media advocacy, legislative and regulatory advocacy, and organizing. For many clinicians, this may reflect a combination of pedagogical preference, normative vision, and institutional imperative; the high demand for clinical opportunities and perceived expense of operating a clinic (as opposed to a conventional classroom) mean that students are often limited to one or two semesters in a clinic, often as a capstone experience in their last year of law school.

The second hallmark feature is to pair lawyering activity with persistent, structured practices of critical reflection. This is fundamental for teaching students to recognize complexity, contingency, and the reasons for their successes and failures so that they can not only appraise their work retrospectively but also derive insight for future application. Teaching students to "learn how to learn from experience" is central to many clinics. But critical reflection is, by necessity, a slow and often loosely directed process. It works best when the pace of lawyering allows students and faculty to step back from the moment-to-moment and day-to-day decision-making in order to evaluate context, consider alternatives, narrate histories, and engage with theory. It is as much an imaginative enterprise as an analytical one. For these reasons, many clinicians have concluded that the imperative for critical reflection counsels not only small cases but also slow cases.

Because law students are novices, and the clinical approach typically places primary responsibility for a real client in their hands, it follows that the model contemplates students making mistakes. The cliché of learning from our mistakes is baked in and activated by the central clinical practice of critical reflection. This is further reason for the clinical model to prefer smaller cases, lower-profile cases, and cases that operate outside of the glare of local or even national attention.

The clinic we coteach, the Worker & Immigrant Rights Advocacy Clinic (WIRAC), adheres to some of these traditional clinical practices but routinely departs from others. For example, our docket typically features a number of individual client representations, including in immigration court proceedings, which approximate the paradigmatic clinical experience of students taking a client's case from beginning to end, and engaging in a set of traditional lawyering activities, over the course of one or two semesters. More often than not, however, our individual client representation is not so readily cabined. Instead, in a case that begins in immigration court, we may initiate parallel habeas corpus proceedings, Freedom of Information Act litigation, or a damages action in federal court; engage federal or state actors in policy advocacy; collaborate with the community groups from whom we accept case referrals in mobilizing support for our client; or pursue media and communications strategies. Because current immigration laws are harsh and unjust, and because we often take difficult cases that other lawyers have turned down or on referral from community groups pressing for legal assistance, we and our students often conclude that we have no choice but to expand our strategies beyond immigration court. Such multifaceted lawyering helps to blur the line between individual representation and impact litigation, or between "big" cases and "small" cases; the lawyering methodology treats each case as big, and each case as potentially impactful. This approach invariably extends beyond a single academic year, requires new students to join existing matters rather than initiating representation themselves, and arguably decenters the lawyer-client relationship as the central site for student learning while introducing a different set of lawyering skills and approaches to the traditional clinical model.

In addition to this robust form of individual client representation, we engage in a small number of cases that more closely fit the model of impact litigation and therefore deviate even more significantly from the traditional clinical model. In recent years, this has included a multistate class action to challenge prolonged immigration detention, actions for money damages arising out of immigration raids and conditions of immigration detention, and the first lawsuit in the country to challenge the Trump administration's termination of the Deferred Action for Childhood Arrivals (DACA) program.

Three structural features of our program facilitate such a heterogeneous and unconventional clinical docket. First, our students are able to begin taking a clinic in the second semester of their first year of law school. Second, students may continue to take the same clinic for subsequent semesters, and some will elect to do so for a total of five semesters. And third, as clinicians, we have the institutional and financial support to undertake ambitious litigation and nonlitigation projects. As faculty in the clinic, we and our colleagues have elected to take advantage of these circumstances in order to advance a model of multifaceted lawyering that strives to be responsive to community priorities, even when those push us into accepting the hardest cases or entering unfamiliar practice areas. Taken together, these institutional features enable the clinic to engage in longitudinal lawyering and the students to engage in longitudinal learning. The comparatively longer tenure of students in the clinic deepens their own knowledge, skills, and strategic judgment and also helps to deepen the institutional competencies of the clinic as a whole.

It is against this backdrop that we turn to discuss crisis lawyering. We do so mindful that our program design, financial support, and elite institutional status make possible a scale and complexity of work that is not available in every law clinic. At the same time, everyone, everywhere operates within some form of institutional constraint. An emergency can disrupt clinical practices in even the most traditional of programs. A crisis can narrow or eliminate student preparation, compel an instructor to displace the underprepared student by performing the lawyering activity so as to protect the client's interest, and when the emergency is prolonged, delay the opportunity for reflection. But like all experiences, and despite its limitations, a crisis can be a teaching opportunity as well. And to the extent the student intends to become a lawyer whose practice includes crisis-response, a crisis can be a critically important learning moment. One challenge of crisis lawyering, then, is to determine how to both work within and push against institutional constraints when exigent circumstances require, so as to seize the potential for student learning amidst an emergency.

Stories from the Field

One theme of this chapter is that crisis lawyering is a feature, not a bug, of many law practices. Clinicians who aim to help law students develop legal competencies essential to a successful twenty-first-century law practice therefore may wish to prepare students for lawyering emergencies and the skills and strategies necessary to navigate them on behalf of clients. And because lawyering crises are endogenous to so much legal work, the skills

and strategies specific to this practice setting warrant special scrutiny. Before turning to lessons learned from crisis lawyering with law students, we present two brief case histories, one involving emergency structural reform litigation, and the other an emergency individual client representation. Both involve immigration and civil rights matters, as well as lawyering inside and outside of the courtroom.

The Muslim Ban

In the first days of the Trump administration, there had been talk of the government imposing a Muslim Ban, but when it went into effect on January 27, 2017, it nonetheless caught the nation by surprise. Indeed, the policy was not announced before it was implemented. Instead, it became known only when family members, friends, and lawyers awaiting the arrival of immigrants from affected countries discovered that these individuals were being detained. As word spread of detentions at airports across the country, the scale and human cost of the policy came into view.

The phone call we received that evening, just after 10 P.M., came from Becca Heller, a former clinic student and the executive director of the International Refugee Assistance Project (IRAP), and Justin Cox, also a former clinic student then working at the National Immigration Law Center (NILC). They reported that one, and then two, of their Iraqi clients were being detained at JFK Airport on the basis of the Muslim Ban and were facing the prospect of return to Iraq. Both clients possessed valid visas granted based on the likelihood that, by virtue of their work and association with the US military, their lives were at risk if they stayed in Iraq. As we would later learn, hundreds of people faced similar circumstances that evening, and tens of thousands of others were likely to be barred from the country soon thereafter.

While the contours of "crisis lawyering" may be contested, it was clear to us on that Friday night that we were confronting a crisis. Prior to his election, Donald Trump had made his animus toward Muslims clear, promising a "total and complete shutdown" of Muslims entering the United States. This was one part of candidate Trump's project to make a broad and consistent assault on immigrants and refugees a centerpiece of his campaign, which also included his reference to Mexican immigrants as murderers and rapists, as well as his repeated equation of Syrian refugees with terrorists. Within the first days of his presidency, he issued three executive orders on immigration. The first promised a host of changes in interior enforcement, including an intention to hire additional Immigration and Customs Enforcement (ICE) officers and to cut funding to so-called sanctuary cities. The second concerned

border security and expressed a commitment to expanded use of detention at the US-Mexico border and the building of the long-promised border wall. The third and final executive order was the Muslim Ban. But unlike the first two orders—which announced broad shifts in immigration policy that would take months or years to execute—the Muslim Ban was implemented the day it became public, with visibly harmful effects. Indeed, the Muslim Ban was the first policy of the new Trump administration to produce such observable material change. Families were split apart, refugees were threatened with return to their deaths, and chaos broke out at airports across the country. A new, radical, and devastating policy was unfolding in real time.

The breadth and severity of the new policy came into focus only as it was being enforced in airports across the country that Friday night. The executive order became public only after enforcement had begun. It suspended entry of immigrants from seven Muslim-majority countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen; indefinitely suspended entry of Syrian refugees as "detrimental to the interests of the United States"; imposed a 120-day moratorium on the refugee resettlement program as a whole; and reduced the annual cap on refugee admissions from 110,000 to 50,000. On its face, the order applied to lawful permanent residents (green card holders) as well as temporary visitors. In practice, immigration officials were also barring entry of dual citizens.

Returning to that Friday night phone call, we recognized the opportunity and imperative for action and also understood that this was the leading edge of a broad assault on immigrants.[1] At 10:46 P.M., one of us emailed the entire WIRAC class—a group of approximately thirty students[2]—with the subject line "EMERGENCY—IRAQI REFUGEE TRAPPED AT JFK, NEED TWO-PAGE HABEAS PETITION DRAFTED AND FILED IN EDNY."[3] (A habeas petition, or petition for the writ of habeas corpus, is a procedure with deep roots in Anglo-American law for challenging the legality of the detention of an individual in government custody.) We also spoke with colleagues from NILC and the ACLU, a number of whom were former colleagues and clinic students.[4] Within a matter of minutes, a half-dozen current students began responding. Shortly after 11 P.M., we convened a conference call between WIRAC, IRAP, NILC, and the ACLU, during which we discussed the facts that were known to us, possible legal claims, and overall strategy. We also agreed on a timeline, determined by the flight schedule from JFK: a quick internet search told us that flights to Europe, through which our JFK clients had traveled, would not resume until 6 A.M. We therefore set a target of 5 A.M. to file our complaint, giving us about five hours from the time we all hung up the phone.

In the course of our late-night conference call, and a second one held around 2 A.M., the ambition of our project expanded significantly: from the two-page habeas contemplated in the subject line of the first email message sent to our students, to a nationwide class action on behalf of all individuals who had been or would be denied entry to the United States on the basis of the executive order. In the latter call, lawyers, teachers, and students debated whether to seek relief for a narrow class of persons detained only at JFK; a broader class, such as those detained at airports within New York State or the relevant judicial district; or even a nationwide class of all persons at all airports in the country. On the one hand, class-action litigation would invite many additional legal problems for us, beyond the already difficult legal challenge to the executive order itself. In other words, if we filed a broad class action seeking relief for people stranded in airports around the country, there was a real danger that the government could raise ancillary procedural and technical objections to the proposed class action that might delay or derail relief for Mr. Darweesh and Mr. Alshawi personally. On the other hand, defendants in class-action litigation frequently grant relief to named plaintiffs in order to moot out a case, so it might be that the likelihood of relief for Mr. Darweesh and Mr. Alshawi *increased* if we filed a large class action under his name. Moreover, as a number of students emphasized, no other lawyers were in a position to seek relief for the hundreds or thousands of unknown Muslim refugees and other travelers flying in the night skies or already stranded at a US airport. If we did not request broad relief, thousands of people might be returned to persecution or death. Persuaded by the students, one of us expressed a willingness to sign his name to a complaint for a nationwide class, and the other lawyers came to agree.

Our work plan therefore consisted of researching and drafting both a complaint for classwide habeas corpus relief and a motion for class certification. Students worked on the habeas petition and the class certification brief, under the supervision of three supervising attorneys from WIRAC[5] and in collaboration with attorneys from IRAP, NILC, and IRP. Some attorneys, including the two of us, drafted portions of the documents directly. Email and text messages and phone calls continued throughout the night, as everyone worked from their respective homes across the country. Ultimately, we produced a twenty-page complaint alleging that the executive order violated multiple statutes and constitutional protections, plus a twelve-page motion for class certification. The documents were far from perfect. There were typos and formatting errors, and one of our names was left off the signature block. But at 5:32 A.M., we filed both documents—warts and all—electronically with the US District Court for the Eastern District of New York and emailed a service

copy to the United States Attorney in Brooklyn. *Darweesh v. Trump* became the first lawsuit in the country to challenge the Muslim Ban.

As day broke on Saturday, January 28, the chaos wrought by the Muslim Ban came into view. Television, the internet, and social media showed distraught friends and family members at airports waiting for their detained loved ones. Volunteer lawyers working with IRAP or other organizations, or operating on their own, took up residence in airport terminals to offer legal advice. And throughout the day, local grassroots organizations and spontaneous social media posts encouraged thousands of people to descend at airports across the country to protest the Muslim Ban, producing now-iconic images of resistance to the ban and to the Trump administration more generally. At Yale Law School, more and more WIRAC students joined the effort, taking over the clinic work spaces in the basement of the building and setting up war rooms in two conference rooms.

Around noon, we got word that the government was releasing our first named plaintiff, Mr. Darweesh, but to our knowledge Mr. Alshawi remained detained. While we expected his release as well in a government stratagem to moot our case and were heartened that the lawsuit was already having success, we remained committed to our putative class. It soon dawned on us that the filing of our complaint, early on a Saturday morning, was only the first step to trying to stop the Muslim Ban. We needed to get in front of a judge. But because it was Saturday, the courthouse in Brooklyn was closed. Other attorneys on the team learned the identity of the emergency "duty judge" on call in Brooklyn that weekend (judges deal with crises also), and we sought to contact her chambers. We soon learned that the duty judge would not take up the case unless we filed a third document requesting emergency relief.

And so that morning students broke into teams. One team worked on a motion for injunctive relief—what we styled as an "Emergency Motion for Stay of Removal." A second team worked to develop a template habeas corpus petition that lawyers–including a number of clinic alumni who were now rushing to airports everywhere—could use in individual cases across the country. And a third student team began to respond to a flood of press inquiries, including speaking on a national press call with dozens of reporters, and to brief Muslim, Arab, and South Asian community groups and other allies about the lawsuit. Shortly after 4 P.M., we filed our motion for injunctive relief—the third complex document in a sixteen-hour period. Soon thereafter, we called the court and, somewhat to our surprise, someone picked up. We advised the court of our lawsuit and our motion, and the voice on the other end of the line said the court had seen both. We then said we wanted a hearing before a judge, and the clerk asked when. We asked that it be held at 7 P.M., and the court agreed.

With less than three hours before the hearing, we scrambled to figure out how to cover it. One of us was in New Haven and was not admitted to practice before the court in which we filed, while the other, although properly admitted in the court, was in Boston and unable to reach the Brooklyn courthouse in time. Our students would not be able to appear absent a motion for student appearance; even assuming we had filed such a motion, we would not have had adequate time to prepare any student practitioner, particularly given the high-stakes nature of the case. We ultimately asked Lee Gelernt, a talented and experienced attorney from the ACLU who was based in New York and with whom both of us had worked for many years, to handle the hearing. In the meantime, we coordinated with the US Marshal's Office to ensure that the hearing would be open to the public, notwithstanding the weekend timetable, and with organizers on the ground at JFK Airport redirecting protestors to the federal courthouse in Brooklyn. "The courtroom is open to the public," we were told. And so, we worked to ensure that the public was there.

By seven o'clock that evening, a massive crowd converged on Cadman Plaza. When the duty judge for that weekend, Ann Donnelly, took the bench for a remarkable Saturday night hearing, the courtroom was full to capacity, and the hundreds who were not able to enter remained outside the building protesting. For those of us not present, we sat by our phones waiting anxiously for updates. The hearing itself was brief. The judge immediately homed in on the risk of irreparable harm if members of our class were removed, as we had argued in our papers, an argument that the government struggled to refute. Gelernt represented to the court a report he had received that the government was threatening to return a detained individual to Syria that evening. The judge then addressed the government attorneys: "Apparently, there is somebody who they're putting on a plane—what do you think about that—back to Syria? Irreparable harm?" Less than twenty minutes into the hearing, Judge Donnelly announced her decision from the bench—"The stay is granted"—and signed the proposed order that our students had drafted, finding a likelihood of success that the motion to certify a nationwide class would be granted and that plaintiffs would prevail on the merits. Back in New Haven, in Boston, and around the country, we received text messages from our cocounsel in the courtroom that the government was barred from removing anyone from the country on the basis of the executive order.

The moment we received this news was one of indescribable elation. Less than twenty-four hours earlier, we had embarked on what felt like an impossible task and did so knowing that the legal arguments were difficult, time was against us, and the chances of success—at least in our estimation—were low. And then, with startling alacrity, a federal court had enjoined the first

major action undertaken by the Trump administration and had done so on the basis of our students' work. Over the course of our careers, each of us had been accustomed to uphill battles in which success came, if it came at all, after years, not hours, of struggle. The scale and aberrational nature of this victory was arresting.

Even as the homepage of the *New York Times* announced the court victory, our euphoria quickly dissolved under the weight of circumstances on the ground. Just as the mere filing of the lawsuit was not enough to secure judicial action, the issuance of a judicial order was not enough to ensure compliance. At our war room at the law school, students were fielding calls from attorneys across the country whose clients were still facing removal on the basis of the executive order. The US Attorney's Office in Brooklyn assured us that the order was being implemented, but lawyers in airports reported otherwise; their clients were still being told that they would be removed imminently. Omar Jadwat, an ACLU lawyer in Judge Donnelly's courtroom and the former clinic student of one of us, took pictures of the court order on his phone and emailed them out to advocates, leading lawyers to hold up their own phones to Customs and Border Protection officers in order to convince them that a federal court had barred the removal of the lawyers' clients. Not confident that the government would timely communicate the order to its own officials, one of us emailed a photograph of the order to the director of CBP, with this subject line: "URGENT: NATIONWIDE INJUNCTION HALTING REMOVALS PURSUANT TO EXECUTIVE ORDER."[6]

Sometime after 11 P.M., hours after Judge Donnelly had issued her order, we received word that the government had forced an Iranian Fulbright scholar onto a plane at JFK with the intention of returning her to Iran. From onboard the plane, she was in touch by phone with a cousin, who was with a lawyer inside the airport. One of us had an open line with the cousin and lawyer while speaking with the US Attorney's Office on another phone. As the plane pulled away from the gate, the government lawyer insisted that the individual was not being removed. The situation became increasingly desperate as the individual reported that the plane was taxiing down the runway. Inside our war room, students worked the phones. One tried to reach CBP at JFK, to no avail. Another contacted the carrier in Europe in an attempt to stop the plane. "Call air traffic control!" one of us finally suggested, prompting a first-year student, who had been in the clinic for all of two weeks, to instead track down a phone number for the Port Authority of New York and New Jersey police. He reached a live person, talked his way up to a supervisor, and then insisted that a federal court order prohibited the plane from taking off. The supervisor said he would call the control tower and told the student to hold.

We all waited, hearts pounding. Moments later, the student announced, "The plane is going back to the gate!" A couple of minutes later, the individual on the plane reported to her cousin that the plane was indeed turning around. A cheer went up in the room as we all marveled that a first-year law student had turned around an airplane taxiing toward takeoff.

That same day, and in subsequent days, dozens of new lawsuits challenging the Muslim Ban were filed, many of them individual habeas suits that used the templates that our students had developed. On the Monday following Judge Donnelly's order, the *Darweesh* case was transferred to another judge in Brooklyn, pursuant to the court's random-assignment system. The new judge had a different view of the case and, in an initial status conference, expressed significant doubt about the strength of our legal claims. But by then, other federal judges across the country had issued their own injunctions, and litigation on the merits of the executive order began in earnest. Our clinic's work continued at a rapid pace for an additional couple of weeks, including further court appearances, negotiations with the government, and media advocacy. Students were able to participate in some of these activities, such as media advocacy and judicial settlement talks, but not others. Notably, the court denied our motion for student appearances, and delayed ruling on a motion to reconsider, which ensured that we as supervisors and our cocounsel were the only ones with speaking roles in court.

Within a matter of weeks, our case was overtaken by other cases, and as more and more lawyers flooded in and new developments arose, we chose to recede into the background. Over the next few months, the original executive order would be replaced by a second, narrower executive order, which itself superseded by a still narrower presidential proclamation. Challenges to that proclamation—the third Muslim Ban—were eventually heard and rejected by the United States Supreme Court. We did not reach a final settlement of our case until early September 2017, but the bulk of our work was done in just the first few, intense hours and days.

Nury Chavarria

In the months after President Trump's inauguration, US Immigration and Customs Enforcement made numerous dramatic changes to its enforcement practices, with catastrophic results for millions of people around the country. Executive actions such as imposition of the first Muslim Ban had immediate, dramatic consequences, but other changes were less visible. For instance, in the years before 2017, many local ICE offices had entered "orders of supervision" for thousands of immigrants. Similar to an order of probation or parole

in the criminal justice system, these arrangements allowed a person ordered removed to live and work at liberty in the community, provided the person checked in regularly with ICE and did not commit any criminal offenses. Under the new Trump administration, however, when people arrived for their regular ICE check-ins, officers began revoking these orders of supervision and directing people to leave the country promptly, at their own expense, or else face arrest and forcible deportation. In addition, when people ordered to depart began filing emergency motions to reopen their old deportation cases—often with a new attorney or based on changed country conditions—ICE no longer agreed to temporary stays to allow the immigration courts to adjudicate these motions.

In other words, rather than undertake time-intensive investigations to arrest and deport persons with serious criminal records or who posed a national security threat and who were in hiding, ICE agents could sit at their desks, wait for the least dangerous, lowest priority people to arrive for a check-in, arrest them, revoke their order of supervision, and then deny a temporary stay even when the person pursued a meritorious emergency motion in court. In response, immigrants and advocates around the country began testing resistance strategies. One approach was reflected in the decision by some people to seek sanctuary in a local religious institution, in the hope that ICE would not undertake an enforcement action at these houses of worship.

On July 20, 2017, six months to the day after Trump's inauguration, a woman named Nury Chavarria became the first person to seek sanctuary in Connecticut. A native of Guatemala, Ms. Chavarria had entered the United States unlawfully when she was nineteen, applied for political asylum, and been denied. She remained in the country, however, and by summer 2017 had lived in the United States for nearly twenty-five years, now the mother of four US citizen children, ages nine to twenty-one, the oldest of whom has cerebral palsy. With the assistance of her attorney, Glenn Formica, for many years Ms. Chavarria had lived and worked openly while checking in regularly with ICE as requested. At a summer 2017 check-in, however, ICE ordered her to return to Guatemala by July 20. She planned to comply, but at around noon that Thursday, she and community supporters instead met in New Haven with religious leaders from whom she requested sanctuary. Pastor Hector Luis Otero agreed, and she took up emergency residence in the church he leads, Iglesia de Dios. She was the thirteenth person in the United States to have sought sanctuary since the Trump administration had taken office. Over the course of the day, members of the church held a prayer vigil, and community supporters led by Kica Matos, Ana María Rivera Forastieri, Alok Bhatt, and members of the Connecticut Immigrant Rights Alliance and Unidad Latina

en Acción assisted Ms. Chavarria in managing intense media interest, visits from elected officials, and a rally of supporters in front of the church. That evening, one of us forwarded an article in the *New Haven Register* on the developments to the clinic listserv, which includes all term-time and summer students and supervisors.

At first, Ms. Chavarria's attorney was outraged at her choice to seek sanctuary. "I stormed into the church, profane and boorish, worrying how I'd ever get my client out of there past what I thought were crazy radicals," Formica later told the *New York Times*. But that afternoon and evening, as Formica listened to his client and her allies, "I did a 180 on sanctuary right there." The next morning, a Friday, Formica called and emailed one of us. His email message was empty; the subject line read simply "It's Glenn Formica I need you."[7]

As a general rule, law school clinics do not take on new matters in late July, when regular students are away and summer coverage arrangements, often tenuous, are typically strained. In our clinic and many others at Yale Law School, we rely on a handful of summer interns to work full-time covering client matters that perhaps thirty students might handle on a part-time basis during the school year. In the summer of 2017, five students worked full-time in WIRAC, and they were fully engaged managing the existing docket in late July. Nevertheless, soon after speaking with Formica that Friday morning, one of us wrote the clinic listserv with a synopsis of the case, possible next steps, and a request for volunteers. Several summer students responded immediately, as did one term-time student, and before long all five summer students, one term-time student, and a summer student from another clinic were all working on the case.

That afternoon, one of us, together with the WIRAC clinical fellow Ruben Loyo and several summer students, went to the Iglesia de Dios to meet with Ms. Chavarria and conduct an initial interview. Her father, who had come to the United States even earlier than Ms. Chavarria, soon arrived, and we divided into two teams to speak separately with Ms. Chavarria and her father. By the evening, we decided to undertake the representation, which came to involve one of us, Mr. Loyo, and professor Marisol Orihuela, another codirector of the clinic, jointly supervising the six summer students and one term-time student.

Over the next several days, the students and supervisors worked day and night to undertake a substantial fact investigation, including interviews with Ms. Chavarria and some of her family members as well as detailed research into country conditions and efforts to obtain records from Guatemala and files from her first immigration attorney, back in the 1990s. The team also arranged for visits to the church by potential expert witnesses, and one supervi-

sor coordinated efforts of a range of local officials to provide further support for the emergency motions to be filed on Ms. Chavarria's behalf. Supervisors and students consulted with attorneys around the country who had handled cases involving Guatemalan asylum-seekers; lawyers at the Asylum Seeker Advocacy Project (ASAP) at the Urban Justice Center, a new organization founded by four WIRAC alumnae, provided especially critical assistance. This emergency fact investigation yielded two new theories of relief that Ms. Chavarria had not previously pursued.[8]

In addition, over the weekend one of us asked senior legislative staff, and eventually Senator Richard Blumenthal (D-CT) personally, to introduce a private bill for the benefit of Ms. Chavarria. For many years, immigration officials had a practice of granting a temporary stay of deportation upon the filing of a private bill, so as to afford Congress time to consider the legislation. In May 2017, however, the Trump administration had suspended this long-standing courtesy to members of Congress. Senator Blumenthal, moreover, had not previously sponsored many such bills. He nevertheless agreed to do so for Ms. Chavarria and, on an emergency basis, filed the proposed bill on the following Tuesday, July 25. Because ICE would no longer grant a temporary stay, Ms. Chavarria turned to the Immigration Court, and the pendency of the private bill became a third ground on which Ms. Chavarria sought an emergency stay.

Together, the students and supervisors researched and drafted a motion to reopen Ms. Chavarria's case and an emergency motion to stay her removal, with supporting briefs, declarations, and exhibits; proofread, cite-checked, authenticated, and assembled all the materials; and filed both motions at the Immigration Court in Hartford on Wednesday morning, July 26, fewer than five days after accepting the representation on Friday evening. Given the risk that ICE might arrive at any time to arrest and deport Ms. Chavarria, the three supervisors joined personally in the research and drafting, engagement with experts, communications with the client, and fact development. The supervisors were also substantially more directive than usual in their edits and comments on student work, at times drafting or redrafting entire sections of a brief or a declaration. In all, the motions advanced multiple new arguments for relief, each developed essentially from scratch over the weekend, and some of which contained multiple alternate theories. The filings themselves were also substantial, including two briefs that together exceeded sixty pages, four declarations, and an additional twenty-six exhibits.

Within hours, the immigration judge granted the emergency stay motion. That evening, Ms. Chavarria emerged from the church and announced to a scrum of media that, protected by the court's stay, she was going home to

her children. Joyful community allies, religious leaders, and elected officials celebrated the swift action that had, for the time being, turned back ICE and preserved a family. A clinical supervisor rather than a student spoke at the press conference. ICE has not sought to re-detain Ms. Chavarria since July 2017, and as a result she has returned to working and raising her children during the pendency of her case, which has slowed to a more routine pace.

The four and a half days from when the clinic accepted Ms. Chavarria's case to the filing of emergency motions, and the twenty-two hours from Friday night to Saturday night when the clinic helped secure a temporary restraining order in *Darweesh*, represent dramatic, high-profile examples of crisis lawyering in a clinical setting. Crisis lawyering is not uncommon in certain law practices, and neither, therefore, is crisis lawyering in a clinical setting. In our small clinic alone, for instance, one or both of us has supervised students providing emergency representation to thirty persons arrested by ICE in a summer raid in New Haven; multiple individuals in last-minute applications to the Board of Immigration Appeals or the US Court of Appeals for the Second Circuit, including for clients who have been within hours of physical removal; and traumatized children forcibly separated from their parents at the southern border and detained in Connecticut. We turn now to exploring some lessons learned from our experience of crisis lawyering in a clinical setting, which we believe have application to both extraordinary and common crises.

Reflections on Crisis Lawyering in a Clinical Setting

Lessons for Clinical Pedagogy

Among the core principles of contemporary clinical pedagogy is a commitment to teaching students to "plan, do, reflect" in everything they undertake. Underlying this commitment is the belief that, above all, clinical faculty must instruct students how to learn from experience, so that they may constantly refine and develop their lawyering competencies over a lifetime of practice. To emphasize the point, clinicians may caution students against the counterexample of the lawyer who questions a witness or counsels a client the same way in her last year of practice as she did in her first, never having reflected on her own methods to improve them. Of course, lawyering also involves a significant amount of spontaneity and improvisation, which no amount of planning can avoid. Nevertheless, it is fair to ask: Does crisis lawyering preclude teaching students how to learn from experience?

We conclude that it does not. As with all pedagogical choices, engaging in crisis lawyering involves tradeoffs. To be sure, crisis lawyering necessarily

compresses the planning and doing of lawyering tasks and, depending how long the crisis continues, may delay the opportunity for the structured reflection that is critical to learning. Still, our experience persuades us that crisis lawyering affords learning and service opportunities not otherwise available and is compatible with clinical teaching goals.

To begin, we emphasize a point made earlier: representation of clients necessarily involves coping with unanticipated emergencies, some of which require a form of crisis intervention by the lawyer. In other words, lawyering *is* crisis lawyering. That is true in individual representation of clients facing eviction, contesting a divorce, resisting deportation, defending against criminal or juvenile offense charges, and countless other settings. It is also true in the representation of grassroots organizations in legislative or regulatory advocacy, communications, and even strategic planning. For generations, clinical instructors have not declined representation in these sorts of matters merely because there are sometimes client emergencies. To the contrary, this is the heart of clinical practice. At the same time, we recognize that some forms of representation, such as the *Darweesh* and *Chavarria* litigation, constitute extreme versions of emergency. We have taken a few lessons from our experience supervising students in crisis lawyering, in both its more generic and more exotic forms.

First, in the planning phase, supervisors will at times have no choice but to be more directive than usual (we say "than usual" in recognition that supervisors already locate themselves along a spectrum of directedness). With less time for open-ended discussion, exchange of written drafts, exploratory research by students, and the like, a supervisor likely will have to terminate discussion, request a decision, or even propose a decision directly. In written documents, a supervisor likely will have to be more directive in comments, foregoing the usual practice of inviting further research or reflection by a student. And in preparing a student for a performative moment during a crisis, whether in court, before the media, or otherwise, a supervisor may also need to be more directive than usual, specifically discouraging certain approaches or suggesting particular language and strategies. In our practice, one example of this included the comparatively directive instructions provided to the student who handled the nationwide press call midday Saturday in *Darweesh*, hours after we had filed suit and less than 24 hours since we had accepted the representation. Similarly, at times, the supervisor may have to step in and draft documents or portions of documents directly, as we did in both *Darweesh* and *Chavarria*. Direct drafting by supervisors is not our usual clinical practice, of course, but at times of crisis it can be necessary to protect the client's interest.

Departing from our usual level of directedness is not a step we take lightly, and we are conscious of the educational opportunities that are lost. We think these are balanced to some extent, however, by the modeling that we provide instead (modeling that we do not usually offer our students). For instance, the shift in our own supervision style in times of crisis demonstrates a flexibility and adaptability in our teaching practices, as well as a willingness to subordinate our own preferences to the client's interest. Students observe us exit our own teaching comfort zones, at least for the duration of the crisis. In crisis moments in which more than one supervisor is involved—which is the norm, in our experience—students will also observe clinicians debating more directly with each other than usual and even challenging or criticizing each other's approaches. Like watching one's parents argue, this can be both thrilling and alarming. Because even cosupervisors tend to coordinate their feedback in the planning phase, the direct observation of clinical supervisors debating urgent, time-sensitive questions in real time can be illuminating for students. To be clear: We do not contend that the benefits of temporarily abandoning a nondirective approach to the planning process outweigh the costs, only that there are some benefits; the calculation involves not merely the loss of student agency.

Second, in the execution phase of clinical work during a crisis, instructors likewise may have no choice but to conduct the representation themselves. In *Darweesh*, the initial court appearances were handled by attorneys, not students, contrary to our strong practice; this was because of the limited amount of time to prepare, as well as the initial reluctance of the court to permit law-student appearances, not because of the high stakes in the case.[9] In the *Chavarria* matter, a supervisor rather than a student spoke at the snap press conference held upon our client's securing an emergency stay and leaving sanctuary to return to her family. Over the course of our careers and hundreds of different matters, on a handful of occasions circumstances of crisis have required each of us to step in to execute a lawyering task that we would, in ordinary conditions, require a student to perform.

As when supervisors take a more directive approach in the planning phase, a supervisor who steps in to execute the lawyering task in the "doing" phase deprives a student of the opportunity to perform the legal task (and then reflect later on that performance). At the same time, there are some modest benefits that can result. For one thing, students seem to relish the experience of observing a supervisor perform, not least because it thrusts the student into the role of providing constructive feedback to the professor. For another, the supervisor is reminded, often powerfully, of just how difficult it is to undertake the lawyering activities in which we coach our students but that many

clinicians have not themselves done in some years. The butterflies, anticipation, sleeplessness, and concern are a humbling and physical reminder of sensations the students experience every day in our clinic but that we ourselves may not have suffered for decades.

Finally, that supervisors are available to step in on occasion in crisis lawyering situations, and then step back when the crisis subsides, allows us to undertake a wider range of matters than would be possible if we insisted on representing only clients in cases where the risk of a crisis was minimized. In *Darweesh*, students expanded their role after the initial crisis passed, drafting motions and settlement plans, participating in court conferences, and dealing directly with government attorneys and the media. In *Chavarria*, after the initial stay was secured, students undertook the substantive briefing on the case and all related motions, conducted court hearings, and otherwise litigated the matter as any other in a clinical setting. Had supervisors been unwilling to participate directly in the litigation for the brief, initial period of crisis, however, we would have declined the representation entirely.

As the *Darweesh* and *Chavarria* cases demonstrate, fast-moving, high-profile matters can have important service and pedagogical advantages. When IRAP and NILC reached out to us regarding the Muslim Ban, we recognized the opportunity not only to address an urgent matter of public importance but also for our students to do so as well. If the early days of the Trump administration left many feeling helpless, the litigation provided an important occasion for students to both witness and participate in the enactment of the lawyer's role in moments of national crisis. While we are wary of valorizing the legal profession, our participation in the Muslim Ban litigation highlighted the unique societal role that lawyers can at times play. Likewise, our involvement in the *Chavarria* case illustrated the special force that legal intervention can have to support an existing community mobilization and to resolve crises.

But our students' learning was not limited to an abstract reflection on a professional role. Rather, they experienced firsthand the immersive and messy processes of high-stakes lawyering against the clock and amid community and national struggles. The exigent circumstances forced the students to accelerate their research and writing, as well as to engage in greater risk-taking and risk tolerance than a more deliberately paced case might require. It may be that the courage and improvisational actions of our clients in confronting overwhelming state power also inspired a resourcefulness in their legal teams. Certainly, the legal theories crafted in each case were novel, untested, and arguably underdeveloped. But the time imperatives of each case demanded action, even if the action was imperfect. The students thus learned

another mode of lawyering and an associated set of skills beyond those that the prototypical clinical representation might afford. In this way, then, crisis lawyering can help to expand the set of competencies we understand lawyering to require and support a vision of multiple modalities of lawyering rather than a single, dogmatic view of lawyering skills.

In our experience, the final stage of clinical pedagogy—reflection—is the least threatened by crisis lawyering. If a crisis were to persist for days or weeks, it might delay the opportunity for meaningful reflection beyond the point of usefulness. That has not been our experience, however. The initial crisis in *Darweesh* subsided after the initial twenty-four to forty-eight hours, once the federal district court entered a nationwide order temporarily enjoining the original Muslim Ban and liberating thousands of travelers trapped in airports around the country. The litigation continued and was overtaken by other cases filed by other lawyers in other jurisdictions, but the initial all-nighter pace diminished almost immediately, allowing time for collective and structured reflection by students and supervisors within days, then continuing for weeks and even months. We made a number of internal mistakes in the first rush of activity, and as discussed below, students and supervisors spent months analyzing those choices, especially some of the ways in which gender bias influenced collaboration within the large team of students and among supervisors. In *Chavarria*, there similarly was no shortage of opportunities to reflect on our actions in the days and weeks after our client was freed from sanctuary. Ensuring time for structured reflection is the heart of clinical supervision, and in our experience, crisis lawyering may slightly delay, but need not displace, that critical activity.

Relationships Between Longitudinal, Non–Crisis Lawyering and Latitudinal, Crisis Lawyering

In time-exigent circumstances, one necessarily draws upon repositories of knowledge and habits of practice built up through prior, often nonexigent experience. Such was the case in *Darweesh* and *Chavarria*. With respect to *Darweesh*, for example, we and our students had represented detained immigrants in habeas proceedings, including habeas class actions, for a number of years. Because of our atypical curricular model, which permits students to be enrolled in a clinic throughout most of their law school career, some of the students who jumped suddenly into the Muslim Ban work had already worked on habeas matters and researched and drafted motions for class certification and injunctive relief. With respect to *Chavarria*, we had many years of experience representing individual immigrants who appeared to be out

of legal options, and we had developed an expertise in using a seemingly mundane procedural device—a motion to reopen—to prevent the destructive impact of deportation. Likewise, we had preexisting, deep relationships with community leaders, elected officials, and the media, whom we could quickly recruit and engage in support of the legal campaign for Ms. Chavarria. Thus, we possessed relevant institutional knowledge, expertise, and relationships. And because they were held not only by the faculty but also by some (but, importantly, not all) of our students, we were able to access them readily. Just as we had template documents to draw from, we had mental schema, legal heuristics, and social networks on which we could rely.

To put this another way: our longitudinal, non–crisis lawyering enabled us to engage in latitudinal, crisis lawyering. Our longstanding practices and pedagogy equipped us with the substantive knowledge, core lawyering skills, and a spirit of creative, aggressive, and tenacious lawyering to address the unique challenges of the Muslim Ban and the imminent deportation of Ms. Chavarria within the time constraints of each case. Although we had not in any conscious way anticipated these crises, we were in fact prepared for them.

Importantly, such preparedness was as much a function of the clinic culture we have cultivated over the past many years as the doctrinal and practice expertise we had developed. The clinic has a reputation for demanding work. Whether in individual cases, group representations, or "impact" cases, generations of clinic students and faculty have established a record of intensive and ambitious lawyering, of taking on matters that many other law practices or law clinics typically would not, and of frequently achieving unlikely successes. As instructors, we have attempted to foster a deep commitment to collaboration—and indeed to fun—as essential elements of our work. At its best, the clinic has enjoyed a can-do spirit built upon individual dedication, deep camaraderie, an appetite for risk-taking, and a shared vision of justice. These sensibilities—what we collectively understand as the culture of the clinic—were essential resources for our work in *Darweesh* and *Chavarria*. Indeed, they were prerequisites; they could not be established in the first instance when these crises emerged.

We have also made conscious efforts to integrate current students into larger networks of lawyers and advocates, locally in New Haven and around Connecticut, as well as nationally. And we have treasured the frequent opportunities to collaborate with former students, including clinic alumni at IRAP, NILC, and the ACLU in *Darweesh* and at ASAP in *Chavarria*. Our investment in networks of colleagues and allies is not merely transactional, of course, but nourishes our own professional relationships and work while introducing newer students to longtime coconspirators. Neither is the investment in

networks limited to clinic alumni; many of our most frequent collaborators have no particular relationship to Yale Law School. We have found a special joy in these connections and in the mutual support we provide to and receive from colleagues far from New Haven. In times of crisis, there is an asymmetry in the ability of clinical supervisors and students to draw support from these networks—supervisors are more senior and inevitably have developed more relationships, whereas students are transient and new to legal practice. But we have found that students, once invited into a supervisor's existing relationships, are consistently effective in mobilizing networks and allies in support of a client in crisis.

Just as this past-as-prologue account demonstrates the ways in which our clinic was well-situated to step into the specific crises, it predicts the inevitability of blind spots. In *Darweesh*, by virtue of our past experience, it was readily apparent that a writ of habeas corpus was the appropriate procedural mechanism for representing currently detained individuals and that a class action was the right method for the representation of a group of individuals with shared characteristics but whose exact numbers and identities were unknown to us. Similarly, our and our cocounsel's expertise with asylum and refugee law led us to focus our legal claims on the rights of refugees and asylum-seekers. However, our lack of significant prior experience with religious discrimination cases led us to give only cursory treatment to that critical dimension of the Muslim Ban. Although we included in the complaint a claim that the executive order violated the US Constitution because it was substantially motivated by animus toward Muslims and had a disparate impact on them, this was one of the last legal claims made in the complaint. Lacking expertise in religious discrimination claims, or the time to consult with experts in that field, we defaulted to claims within our wheelhouse, somewhat mechanically extending the framework of national-origin discrimination to religion. We did not include more robust claims, such as under the Establishment Clause or the Religious Freedom Restoration Act. These would become the central claims of subsequent challenges to the Muslim Ban, its second and third iterations, and the litigation before the Supreme Court.

Arguably, our doctrinal blind spots reflected a broader misapprehension of what was unfolding on that Friday evening. That legal claims regarding refugees and asylum-seekers predominated, in both number and order of presentation, over the single claim related to religious discrimination suggests a narrative understanding of the case as being, at base, a Refugee Ban rather than a Muslim Ban. Indeed, we did not recite candidate Trump's repeated statements about wanting to impose a Muslim Ban and did not focus on the elements of the executive order that indicated a targeting of Muslims

(e.g., the selection of only Muslim-majority countries, multiple references to honor killings), and religious discrimination is not mentioned at all in the introductory paragraphs of the complaint. Even in the first days of the litigation, we were inconsistent in describing the executive order. Our first press release referred to "Trump's Order Banning Refugees," though we and our cocounsel later embraced the Muslim Ban language and narrative. Looking back, it seems curious that we failed to center religious discrimination at the outset, not least because one of us is Muslim. But collectively, our predominant framework was one of immigrant and refugee rights, and our passing treatment of religion mirrored the relationship of anti-Muslim discrimination to immigrant rights advocacy more generally.

Although each of us had represented Muslims in the aftermath of September 11, we had rarely represented Muslim individuals or communities in WIRAC. Our reflections on the *Darweesh* litigation helped us to see this as an important gap in our work and led us to affirmatively seek out Muslim clients. Thus, one outcome of our crisis lawyering on behalf of Muslim clients in *Darweesh* has been for us to incorporate non-crisis representation of Muslim individuals and organizations into our longitudinal model.

Lessons for Case Selection

Clinical instructors have long debated, without resolution, whether it is better to teach students to lawyer on "small" cases—typically involving some form of summary process without discovery (such as eviction defense or political asylum cases) and a one-semester time horizon (such as misdemeanor charges)—or "big" cases that may last longer than one semester and involve greater legal, factual, or procedural complexity (such as federal employment discrimination or prisoner's rights cases). Collectively, we have supervised students in clinical programs for more than thirty years, and we have generally resisted the "big versus small case" argument because we perceive pedagogical value in all manner of cases.

In fact, in our clinics, we require students to handle both what some would consider small cases, such as an individual removal defense proceeding or veteran's disability benefits application, and large cases, such as complex civil rights and class-action suits. We do not build our docket around strategic litigation, but we do not hesitate to undertake bold or creative matters either; our primary goal on intake is to surrender the decision about how best to allocate our scarce representational resources to the communities we serve, organized through their own grassroots groups, labor unions, and faith organizations. Because these groups sometimes prioritize representation of individual mem-

bers (such as in wage-and-hour litigation or removal defense) around whom the groups are organizing, and at other times ask that our clinics represent the organization itself (often in legislative or regulatory advocacy or in strategic planning), we end up with a mix of matters. Our secondary goal on intake is to accommodate diverse and varying student preferences for certain kinds of matters or to engage with particular organizations, communities, and issues. We hold a tertiary goal of representing underserved communities and addressing unexpressed legal needs—for example, by aspiring to racial, ethnic, and gender diversity in our client population and by serving constituencies such as detained clients for whom grassroots organization is difficult if not impossible. The result is consistently an inconsistent array of cases of all sizes and shapes, but frequently they are ones that call on the students to engage in risk-taking and multipronged advocacy in collaboration with community mobilizations.

From the perspective of crisis lawyering, we observe that emergencies are more common in so-called small cases involving individual client representation. Many of our clients lead precarious lives: they are struggling with poverty, constrained by undocumented status, stigmatized by criminal history and mental health or other disabilities, suffering personal trauma, or confronting daily the burdens of racial and other prejudices. These circumstances regularly result in sudden challenges in our clients' lives—from unexpected homelessness to an encounter with law enforcement that risks deportation—which in turn require emergency legal interventions. These lawyering crises also arise in complex litigation, but in our practice they have been infrequent.

A desire to minimize crisis lawyering might then lead a clinical supervisor, counterintuitively, to *prefer* complex, multi-year litigation over the exigencies, and regular emergencies, of a housing, immigration, or family law practice. Yet these practice areas are far more dominant in clinical education than are cases such as *Darweesh* or *Chavarria*. If anything, we suspect that our occasional involvement in large-scale, high-stakes, high-profile cases renders our practice less likely to involve crisis lawyering than, say, a busy housing or family law practice.

Crisis Lawyering as Stress Test

Our experience suggests that crisis lawyering may function as a sort of stress test of equitable collaboration practices. In times of felt pressure, individuals working in groups may default to baseline, often regressive, practices. These can be corrosive, but the stress test of crisis lawyering may also reveal uncomfortable aspects of one's lawyering practice that are otherwise masked. Such exposure may, in turn, give rise to opportunity for critical reflection and reform.

Our experience in *Darweesh* is particularly instructive. Although our work there with our partners and clients was wildly successful by many measures, our individual and collective practices were not without their problems. It was hard to ignore, for example, that it was a senior, white male, non-Muslim ACLU lawyer who stood up in court to speak. We were the ones who asked him to present argument, and we recognized that he was the most experienced attorney among cocounsel and a superb courtroom lawyer. We were also grateful for his willingness to shoulder the stress and challenge of representing the *Darweesh* plaintiffs at an extraordinary Saturday night hearing with no meaningful time to prepare. The resulting media coverage naturally highlighted his role, however, while obscuring that a diverse group of young students—women and men working overnight in our basement clinic space—had done much of the heavy lifting to file the lawsuit about discrimination against Muslims and refugees. Moreover, we found that in those first days of the case—when students and faculty alike were working until all hours creating work product on incredibly tight timelines in a case being closely watched at the national level—work distribution within the clinic began to assume gendered and racialized patterns. Who did the administrative work and who did the complex legal research? Who managed amicus briefs and who took the lead in drafting the merits briefing? We neither had nor made time in the moment to raise or confront these questions.

Patterns of social exclusion tend to replicate themselves, even in progressive spaces. Indeed, we should not be surprised when that happens. We are mindful that similar dynamics played out in our clinical program a generation prior, when students (including one of us) and faculty litigated on behalf of Haitian refugees interned at Guantánamo Bay. If, as we believe, exclusion is the result of structural forces, then we should not expect that individual goodwill, or the mere passage of time, will be sufficient to overcome those forces. Rather, it takes consistent and intentional practices, a willingness to engage in self-critique, and a commitment to trying new approaches. And in the absence of intentional practice, we should expect socially regressive practices to manifest.

But if crisis lawyering helps to reveal these practices, we should be honest in recognizing that even in times of non–crisis lawyering, our conversations about race, gender, and privilege tend to be impoverished, we tend to avoid them because they are difficult, and, as a result, the barriers to entry of such conversations remain high. Crisis lawyering in *Darweesh* illuminated and exacerbated these dynamics, but it did not create them. In the aftermath of our work on the case, our students initiated a deep—and at times painful—set of conversations around gender dynamics in our clinic. Over a period of

months, we reflected on our classroom and lawyering culture, our individual roles, and our normative vision for an equitable learning and practice environment. We adopted some changes in our collective practices, incorporated an explicit focus on gender into our classroom discussion of collaboration, and have tried to normalize gender as a constant and visible topic for examination and action. This is an ongoing and imperfect endeavor whose origins are in crisis but whose object is the routine study and practice of law.

Conclusion

From the Muslim Ban to the threatened deportation of Nury Chavarria to the extraordinary challenges now posed by COVID-19, our experiences in lawyering during a crisis persuade us that we cannot avoid the stress, improvisation, and errors that necessarily attend such work. Nor should we. We do best when we hold to our commitment to engage in critical reflection (even if the reflection must be deferred) and when we trust in each other and our networks and relationships. We try to remain vigilant to the ways in which emergencies can stress-test our routine practices and reveal less visible or corrosive practices. And when at a loss to divine any way forward for our clients, we still repeat to each other: "Call air traffic control!"

NOTES

1 IRAP knew that the president was likely to issue the executive order and had encouraged its clients around the world who were authorized to travel to the United States to do so immediately. Ms. Heller had been in touch with one of us earlier that week for referrals to prepare emergency local legal assistance to a handful of IRAP clients scheduled to arrive in various airports in the days before the executive order was issued. Individual counsel for Mr. Darweesh was at JFK, as were IRAP lawyers for other of their clients.

2 Over the course of the litigation, nearly every student in the clinic worked on some aspect of the case, including: Tiffany Bailey, Will Bloom, Adam Bradlow, Jordan Cohen, Catherine Chen, David Chen, Charles Du, Susanna Evarts, Bertolain Elysee, Natalia (Nazarewicz) Friedlander, Katherine Haas, Amit Jain, Clare Kane, Healy Ko, Aaron Korthuis, Andie Levien, Carolyn Lipp, Zachary-John Manfredi, Melissa Marichal, Adán Martinez, Joseph Meyers, My Khanh Ngo, Carolyn O'Connor, Megha Ram, Victoria Roeck, Thomas Scott-Railton, Yusuf Saei, Nancy Yun Tang, Emily Villano, Rachel Wilf-Townsend, Liz Willis, and Ricky Zacharias.

3 Email from Michael Wishnie (Jan. 27, 2019) (copy on file with authors).

4 In addition to Justin Cox and Becca Heller, our former students included Stephen Poellot at IRAP, and Omar Jadwat and Cody Wofsy at the ACLU. An even larger

number of former students engaged in other forms of advocacy regarding the Muslim Ban, from filing amicus briefs in *Darweesh*, to volunteering at airports across the country, to initiating their own litigation directly challenging the ban and its subsequent iterations. These included Sameer Ahmed, Amanda Aikman, Caitlin Bellis, Alina Das, Kate Huddleston, Ana Muñoz, Paul Hughes, Aadhithi Padmanabhan, Simon Sandoval-Moshenberg, Swapna Reddy, Yaman Salahi, Anjana Samant, and Sirine Shebaya.

5 In addition to the two of us, Elora Mukherjee, a clinical professor at Columbia Law School who c-taught the clinic with us that year, supervised the matter from that first night onward. Our colleague professor Marisol Orihuela joined the supervision the following day.

6 Email from Muneer Ahmad (Jan. 27, 2019) (copy on file with authors).

7 Email to Michael Wishnie, July 21, 2017, 10:07 A.M. (in possession of authors).

8 The summer students were Laika Abdulali, Rana Ayazi, Jessica Cisneros, Ana Islas, Yusuf Saei (a term-time student working in WIRAC that summer), and Cameron Sheldon, and the term-time student was David Chen. The recent clinic alumnae who founded ASAP, the organization that provided key assistance in the first few days of the representation, were Conchita Cruz, Swapna Reddy, Dorothy Tegeler, and Liz Willis.

9 We have supervised students in a number of high-stakes matters. In these, students have handled trial and appellate arguments, including in major suits before the Connecticut Supreme Court (twice), U.S. Court of Appeals for Veterans Claims *en banc* (twice), and the U.S. Courts of Appeals (four times in 2019 alone). To mention a recent example, in January 2019, the Second Circuit held oral argument in consolidated cases challenging termination of the DACA program. A third-year student presented the principal argument in one of the two consolidated cases, before a full courtroom and overflow room, while broadcast on C-SPAN.