

## This Porridge is Too Hot: Pre-Trial Misdemeanor Criminal Defense Clinics & Innocence Projects – Is Anything Just Right?

For 15 years I taught a traditional direct client representation pre-trial criminal defense clinic at Pace Law School.<sup>1</sup> Two years ago, I moved in a different direction and started a post-conviction “innocence project.” This essay compares my experiences and draws some conclusions. First I describe each clinic, identifying the factors in each practice that offer a unique platform for teaching skills and values. Then I try to figure out what to do with the rest of my life. More seriously, I explore whether there are lessons I can draw from my successful teaching experience with the criminal defense clinic and apply to my less successful post-conviction clinic.<sup>2</sup>

### I. The Criminal Defense Clinic: An Overview

Each fall, after an application process and an interview, the criminal defense clinic accepts eight students, who are generally in their final year of law school. The clinic is a full year course, so I have plenty of time in the fall semester to thoroughly prepare students in the class room for the fast paced practice they are about to begin. During the first six weeks of the year, students read about and practice in simulation the skills they will later use in the hectic, informal, results-oriented world of criminal practice.

In mid-October, I begin accompanying students to arraignment shifts in the Bronx Criminal Court. Arraignment in New York is the first stage in the life of a criminal case. After arrest, police bring the individual charged with a crime - the defendant - to central booking. The assistant district attorney on duty discusses the charges with the arresting officers, hears their

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<sup>1</sup> I have the good fortune to teach at Pace Law School where clinics were highly valued and where the clinic directors have supported me in my teaching.

<sup>2</sup> Susan Valdez Carey discusses various different styles of “in-house clinics,” including the recent growth of Innocence Projects, which she characterizes as engaging in “Impact Litigation” in “An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice” XXXXXX. See also, Nina Tarr, “Current Issues in Clinical Legal Education,” XX Howard Law Review XXXX (1993)

version of the incident leading to arrest, looks at their reports, and, in some cases such as domestic violence, may speak with the crime victim. If a decision is made to bring charges, the prosecutor drafts an accusatory instrument and the police transfer the defendant from central booking to the criminal court so that the charges can be reviewed by a neutral magistrate who will determine bail or release conditions. That review is known as arraignment.

Prior to arraignment, defendants meet with counsel. Every defendant too poor to engage private counsel is provided a lawyer assigned by the court. In New York City courts this crucial first meeting between client and counsel occurs in the “pens” behind the courtroom – hours or minutes before the arraignment. Clients are in custody. They may not have slept for a day or more; they may not know what they are being charged with; they will definitely be afraid and distrustful of their assigned lawyer.

Students in the criminal defense clinic meet their clients in that rushed and emotionally charged interlude before arraignment. In that crowded and highly pressured environment, students interview clients, negotiate with the assistant district attorneys assigned to the arraignment shift, call the clients’ family, friends and witnesses in order to prepare bail applications, and then stand before the bar and for the first time on their own argue for bail or occasionally for dismissal of the charges. A heady moment. The clients whose cases survive the arraignment become the clinic docket. Students represent those clients until their cases are completed – either by dismissal of the charges, the entry of a negotiated plea, or through trial.

Because the police arrest so many individuals on minor charges,<sup>3</sup> almost half of the cases brought into New York City criminal courts are resolved at the arraignment stage.<sup>4</sup> The combination of the relative insignificance of the charges (possession of minor amounts of illegal

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<sup>3</sup> Nyc policing

<sup>4</sup> Court reports

substances, or trespass or disorderly conduct, for example)<sup>5</sup> and the difficulty of mounting a defense (court is held during the day, so those who demand a trial will inevitably lose days of work and suffer embarrassment) pressures most people to simply resolve their case with a plea to a reduced charge, which they anticipate will not remain on their record, and submit to a sentence of a fine or community service.

Prior to the student interviews, I review the pending accusatory instruments hoping to select cases that won't be resolved at the arraignment and that will provide students with opportunities to litigate and time to build relationships with clients. To construct a deep and challenging docket, students attend several arraignment shifts, meeting and interviewing many clients, negotiating many resolutions, and arguing for the release of many clients.

During the remainder of the year, clinic students engage in fact investigation, motion practice, pre-trial diversion work, legal research and writing and some actually get a chance to use their trial skills in an actual hearing or trial. Discussions in seminar focus on the issues, investigations and strategy conundrums arising from our pending cases with everyone participating in lively brainstorming sessions.

For an example of a typical case on the CDC docket, students represented a client charged with criminal nuisance, charges arising from a dispute between a gypsy cab driver and a passenger – our client. The driver alleged that the passenger - angry over the cost of the ride - kicked the cab door, causing a large dent. The damage was significant for the cabbie, who owned her own taxi and faced the cost of repair. The client admitted storming out of the cab in anger and slamming the door hard, but he denied causing the dent and argued that the door was already damaged when he got in the cab. He believed the cabbie was trying to blame him for pre-

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<sup>5</sup> Clearly these charges have enormous significance to those who are charged, but they are still relatively insignificant when compared to felony matters.

existing damage because he got angry and was rude. He suggested that there were racial overtones. He was a tall attractive young black man who had never been previously arrested. He splurged on cab fare because he was late to arrive at his grandmother's house where he was supposed to help her move. The cab driver was a middle-aged Hispanic woman who didn't know the neighborhood well and got lost while trying to transport her passenger to his destination. She wanted him to pay to repair the cab. A perfect case for trial!

Students convinced the prosecution to require the driver to make her cab available for their inspection. They photographed the damaged door with a digital camera. Through discovery they obtained a copy of the estimate on the cost of repair. Students located the shop that had provided the repair estimate and questioned the proprietor. Shown the receipt, he remembered the car and the dent. After a few minutes of discussion, the body shop owner confided his belief that such a large dent could not have been caused by a kick. He was convinced that the dent must have been caused something more substantial than a human foot ramming into the side of the car.

Energized by this development, the students took their digital photographs to another body shop for a second opinion. When the second shop agreed with the first that the damage was too great to have been caused by a kick, they started preparing for trial. However, neither of the body shop owners would agree to testify. They were unwilling to sacrifice the time from work.

Undaunted, students searched for an expert witness they could hire. They found an accident reconstruction specialist who had spent his career testifying for and against auto manufacturers about the cause of accidents. His career had been lucrative. He wanted to "give back." He agreed to testify pro bono.

We spent multiple seminar sessions preparing the direct testimony of our client and others planning the cross-examination of the cab driver. In a troublesome, but hardly fatal development,

our expert explained that the taxi damage could have been caused by kicks, but not by one single kick. He suggested that if we could get the driver to admit in cross-examination that the damage had been caused by one single kick, then he would be able to testify that kick couldn't have been the cause of the damage. At the judge trial,<sup>6</sup> cross examination proceeded as planned with the driver conceding that there had been only one kick to her door. Unfortunately, the story didn't end there.

The prosecution rested after the driver's testimony. The defense felt elated. Confidently, we put our client on the stand, and planned to close the case with the testimony of our expert, who was in court ready to testify, looking professorial in a herring bone jacket with leather patches on the elbow. Our elation was short lived. During the client's testimony, I felt a tug on my sleeve. Our expert was trying to attract my attention in a less than subtle way. Just moments before his anticipated remarks, he noticed something about the photographs of the car door that he had overlooked until just that moment.

He had believed that there were several dents in the car door. That belief was the basis for his opinion. He was planning to testify that one kick could only cause one dent. Multiple kicks would have been required to inflict multiple dents. That's why he wanted us to obtain the concession that there had only been a single kick. Now, at the eleventh hour, he realized with a shock that what looked like a second dent was actually a reflection in the shiny car paint - a reflection of my student taking the photograph of the car. With that realization, he concluded that there was actually only one dent and that one good hard kick delivered by our big strong client

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<sup>6</sup> In New York "A" misdemeanors carry a possible sanction of up to a year in jail. Individuals charged with "A" misdemeanors have a right to a trial by jury. "B" misdemeanors carry a possible penalty of up to 90 days in jail. Individuals charged with "B" misdemeanors or the even less serious violations have no right to a jury trial. Trials of "B" misdemeanors and violations are tried before judges. On the eve of trial the assistant district attorney assigned to the case, reduced the charges from an "A" to a "B." At trial, our client was charged with attempting to commit criminal nuisance.

could have caused it. He left the courtroom without taking the stand. We rested after the client's testimony. The judge convicted and sentenced our client to pay for the repairs.

What an experience. The students not only investigated the case, located and prepared an expert to testify, planned and executed direct and cross examination, but they learned multiple theoretical lessons. They wondered whether the client's story – so persuasive and compelling when they heard it at arraignment and before he took the stand – was true. The taxi driver had been pretty sympathetic on the witness stand. She was sure that she heard our client slam and then kick the door, and that she felt the cab shake as a result of his violence. Her testimony was consistent with her statements to the police. Nothing that she said really supported our narrative that she had blamed pre-existing damage on this client out of spite because he was rude and didn't want to pay.

Without the expert opinion to support our client's version of the facts, the taxi driver's testimony sounded more believable than the client's. Had we simply tried the case poorly? Or were we wrong to so thoroughly believe him. We had to consider that he might have fudged the truth to avoid responsibility for his actions, to avoid paying for the damage, or even to win the approval of the students. The students recognized that there really are two sides to every story. Even the nicest clients can misstate facts (intentionally or unconsciously and motivated by all kinds of factors). There's a danger in too uncritically accepting a self-serving version of the events. And, even experienced experts can base their conclusions on an incorrect impression of the facts. It pays to challenge conclusions and assumptions and probe for the underlying foundation.

It goes without saying that we all enjoyed de-briefing the case in seminar. Moreover, if the client really did kick and dent the door, well, his punishment – to pay for the repairs - fit the

crime. We were able to obtain a release from civil liability to mitigate the collateral consequences of the conviction.

The direct client representation criminal defense clinic is an excellent learning experience because it provides an opportunity to deeply learn many essential lawyering skills and values and experience real mastery – command and control over every aspect of the case – virtually total responsibility.<sup>7</sup> The features of the practice that contribute to success are easy to identify.

1. The Cases are Predictable.

Most crime that ends up being adjudicated in criminal court falls into a few identifiable categories. Those categories include arrests that result from observations police make of citizen activity on the road or in the street, such as:

- \* failure to pay for subway transportation,
- \* driving offenses (driving while impaired or without a license),
- \* loitering arrests (including trespass arrests for mere presence in a building without permission from a resident),
- \* disorderly conduct (making too much noise, shouting, or threatening in public), and
- \* possession and sale of illegal substances.

Other arrests result from citizens requesting police intervention, in cases such as:

- \* assaults or domestic violence,
- \* minor sex crimes, and
- \* crimes involving theft.

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<sup>7</sup> “Criminal law is an excellent area for clinical experience “ writes Normal Fell (??) in “Development of a Criminal Law Clinic: A Blended Approach” *Cleveland State Law Review* (1996). “The cases move rapidly through the legal process and the students can be involved with a good number and variety [of cases] during the course of one semester” (page?)

To ensure that citizens arrested for similar crimes are treated similarly, prosecutors in busy criminal courts set plea bargaining policies for the assistant district attorneys to follow. If an individual is arrested for the first time for driving while under the influence of alcohol while that citizen's blood alcohol was within a certain number of degrees over the legal limit and assuming there was no accident or child in the car, the prosecutor will offer a certain well established plea bargain. The policy is designed to ensure that everyone similarly charged will be similarly treated. Defense counsel can improve the standard bargain for individual clients by learning what factors influence prosecutor to make exceptions. It might make a difference that the driver has no prior arrests, has a clean driving record, is an older person, or was on his way home from a funeral. The offer will be more severe if the driver caused an accident, has a record for similar conduct, or had a child in the car. Naturally no lawyer can anticipate at the start of the case whether any particular client will accept the offered plea bargain or, instead, turn it down and proceed to trial. But defense lawyers quickly learn what plea and sentence will be offered on which category of case and what factors will impact that offer.

Additionally, every criminal case progresses along a similar procedural path. Cases may not progress through all possible stages on the continuum starting with the arraignment and ending with the trial and acquittal or conviction and appeal, but they all start at the same point and progress along the same path until resolution either by dismissal or entry of a plea. As a result, I know that in every case my students will: interview their client, negotiate with the prosecutor, make a bail application, engage in some fact investigation, conduct some legal research, file

motions, use the formal discovery mechanisms, and if we're lucky and the case doesn't end in a plea, cross examine witnesses at a hearing or trial.<sup>8</sup>

## II. Teaching Goals for Students in the Criminal Defense Clinic and Techniques for Achieving those Goals.

I expect every student to finish their year in the criminal clinic with a set of basic skills upon which to build. Everyone will know how to conduct an interview, engage in counseling, handle a negotiation, engage in statutory analysis, draft a straight-forward motion, file papers, read and understand criminal court documents, interact with other professionals, such as social workers or mental health professionals, and deliver an oral argument in court. I also expect students to possess a working understanding of the New York Criminal Procedure Law. My students will develop some perspective on the criminal justice system as a unique legal structure and some thoughts about how that system functions within society. Finally, they will understand what it means to be a professional and to take responsibility for a client. In the pages that follow, I explore explain why criminal court cases lend themselves to the creation of an organized progressive syllabus that prepares students well. Then I identify the characteristics of the practice that facilitate learning skills and values.

A. It is easy to design teaching materials because the cases are predictable.

Because criminal court cases involve predictable fact patterns and follow similar procedural paths, and because my students enroll in the clinic at the same time, the students engage in the same activities at pretty much the same time. As a result, it's easy for me to come up with strategies for teaching the students the skills they need and to provide controlled opportunities for practicing those skills. For example, using materials gleaned from cases

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<sup>8</sup> Because I can predict the path that most criminal court cases will take, I am less likely to err professionally. Criminal court cases "pose a lower risk of serious error or malpractice." Paul D. Reingold, "why Hard Cases Make Good )Clinical) Law" Clinical Law Review (1996) (page????)

litigated in prior years, I created a set of interviewing exercises designed to raise issues likely to arise in real life. After reading materials about interviewing techniques, students take turns playing the client role and interviewing each other in role. We tape the interviews and once everyone has engaged in the exercise, the class reflects on the experience. The exercise is fun, manageable, and gives us all plenty of issues to discuss. By the time the students meet their first client, although they are all nervous and bound to miss issues, they are quite capable of conducting an interview.

I designed simulations providing students with the simulated opportunities to practice almost every situation they will encounter in criminal court. They make bail applications, argue oral motions to dismiss, and negotiate with simulated prosecutors. What we don't practice in advance, we bring into seminar and review in class. Since I know we will all be engaging in discovery practice, we read the discovery statute together, discuss it as a class, and draft the first set of discovery demand letters and requests on all our cases, as a class assignment. Sooner or later every student will need to draft a motion to suppress evidence, so when I ask students to draft a motion to suppress on a hypothetical case situation motion, it is relevant to everyone's cases.

The predictability and standardization of the practice ensures that all the tasks relevant for one student's case are equally relevant for all the others. Everyone needs to learn how to conduct an investigation, because everyone will conduct an investigation. What one student learns about interviewing witnesses will be interesting and helpful to everyone else in the class as they'll all be doing the same thing at some point.

Even the ethical issues can be anticipated. Each year someone will apply to work at the same local prosecutor's office against which we are litigating our cases. When will that job-

seeking clinic student have to inform the clients about the conflict? Many students will be confronted by a situation where the complaining witness in a domestic violence case asks their advice about how to convince the prosecutor to dismiss the charges. What can the student ethically say to the complainant? Can they answer the complainant's questions? Everyone finds all the seminar discussions fascinating because they always apply to some issue in everyone's cases.

1. It is easy to tailor and adjust the curriculum when cases are predictable.

Training can be precisely tailored to the situations students will encounter. I know, just to pick one example, chances are good that students will represent someone charged with trespassing.<sup>9</sup> If I want to, I can create a simulation where a student interviews a client arrested for trespassing. I can vary the scenario just slightly, raising most of the issues without too closely duplicating the experience they will have. This might be appropriate for a nervous student. Alternatively I can create more "exciting" hypothetical situations – where felony charges have been lodged, perhaps that will give the students experience interviewing without too closely previewing what they will be handling in court – depending upon the strength and experience of the class.

2. It is easy to vary student roles and variety to encourage critique and reflection.

Over the course of our practice sessions, students will take on the role of defense attorney, client, prosecutor and judge. In the bail exercises, each student has a chance to make or decide a bail application in all three roles. Students receive a set of papers that are unique to the defense counsel (they include a charging document, criminal record and bail recommendation made by a neutral agency) and some information about the client and the client's version of the

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<sup>9</sup> Trespass information

facts. The student who will play the prosecutor receives the same set of papers, absent the client information, and coupled with the police officer's version of the events and the "office's official" recommendation for bail. A third student receives only the court papers. That student is the judge. The students moot the bail argument; the judge decides; and the rest of the class comments. Would they have made the same decision? Why or why not? The judge explains what factors were the most convincing and which were weakest. Everyone steps into the shoes of everyone else in the courthouse and sees the arguments and the legal issues through a variety of vantage points.

### 3. Multiple Practice Sessions Encourage Reflection.

Because the students perform many simulations – one a week for six to eight weeks, at a minimum – they eventually learn to genuinely critique themselves and each other. Clinic teachers understand that continual professional improvement requires constant reflection. We talk about reflection and we model reflection for our students and hope that they will emulate the way we assess our own work. At the start of the clinical experience, however, most students are hesitant to deeply reflect on their own work and totally shy about providing feedback to each other.

Students don't have the vocabulary to engage in critique and reflection. They insist on providing vague encouragement and showing support – even when their colleague has done a half-hearted job, and even when they would be only too happy to unwind a scathing critique to a friend outside of class. What I hear is, "Ben did a really good job. Maybe he could have stood up straighter but overall it was really good."

The frequency, accessibility of the exercises, and the variety of roles encourage critique and reflection. If the entire class provides feedback routinely, feedback frightens less. If the

exercises are fairly simple and straightforward, everyone can think of something specific to say to colleagues. By asking students for feedback from the perspective of the role they played, I can elicit a more nuanced and productive conversation that feels less threatening.

Students aren't as defensive about voicing their opinions from the perspective of a client as they are about critiquing the student whose job it was to be the defense lawyer. There are no expectations about being a client. I ask the student playing the role of client whether all the relevant questions were asked and if not, what wasn't. I can ask whether the lawyer explained concepts clearly. Did the client understand what would happen at arraignments? Did the client understand what would happen if he took a plea of guilty? Did the client understand how long he would have to wait before seeing the judge? This is a more productive approach than asking the class whether the defense attorney asked the right questions. Over time students get the idea that feedback (although it can be painful) is more about learning what needs to be done than whether they did a perfect job (as though there ever could be a perfect job). They begin to get the idea that anyone's performance can be improved.

## B. The Practice Builds Skills and Values.

### 1. Immediate Success, Repetition and Feedback Builds Confidence.

Criminal court practice boosts confidence – at least in the short term.<sup>10</sup> After students practice in seminar, they take their new skills to court. Generally, they discover that they can survive an interview.<sup>11</sup> Their clients respond as anticipated. The clients sign the necessary release and retainer papers. They express satisfaction with having a student-lawyer as their representative. They actually confide in their student- lawyers and tell their side of the story,

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<sup>10</sup> It takes years to cynically conclude, as I now have, that defense counsel's efforts rarely impact the court's decisions.

<sup>11</sup> I've rarely had the experience, which was fairly common when I was in a criminal defense clinic in law school, of watching as a student comes dangerously close to or actually does faint their first time at the bar. I attribute my students retaining consciousness to our practice sessions in seminar.

hoping the students will free them from detention. Then, miracle of all miracles, the court clerk calls the case, the student steps up to the bench and delivers an impassioned bail application. The judge listens, asks the prosecutor for his recommendation, and orders the client released -- to everyone's great relief. Outside the courtroom, the client forcefully shakes the student's hand, the client's parents clap her on the shoulders, and onlookers ask for the student's card. A lawyer defender is born. When a task well executed leads to anticipated results, the result is elation, relief, and a powerful boost in confidence.

Criminal defense clinic students handle a number of cases. To ensure a full and challenging docket, CDC students meet and interview (with a partner) somewhere between 5 and 10 clients in the fall semester. The sheer number of cases and clients ensures that every student will have multiple opportunities to stand up in court and argue for bail, demand discovery, request more time – or make any number of innumerable applications. Even if the first experience isn't as successful as the one describe above, one of them will be.

## 2. Client Relationships Encourage Responsibility and Professionalism.

Clinics introduce students to more than lawyering skills. Students meet clients in clinic and shoulder – often for the first time – responsibility for other people's problems and concerns. The lawyer- client relationship is central assuming the role of a professional. Experiencing that responsibility is powerfully motivating.

Criminal court cases tend to resolve quickly, so we accept many cases and represent many clients. CDC students interview from eight to ten clients over the course of a semester. Some of the clients may be unattractive and difficult. Others will resist attention and attempts to intervene. But many will be responsive and appreciative. Students build relationships with those clients. They work harder for their clients than they have ever worked before for professors or

for grades. Suddenly, they realize that their skills and efforts are making an actual difference in the lives of real people.

Perhaps a bail application diligently researched and delivered with heart and soul convinces a judge to release a young father from jail. The experience of persuading a judge to do what you think is right through your compelling argument is a terrific motivator. Suddenly all the years of hard work and study in law school seem like a worthwhile investment. The students not only experience more confidence in their skills and abilities but often feel a renewed sense of purpose. They have a skill that can be put to the service of clients and the community.

3. Representing clients who are at liberty provides opportunities for holistic defense.

I select cases where I anticipate the clients will be released from jail at arraignments in exchange for posting a low bail or for promising to return. In other words I choose (to the extent possible) cases presenting legal issues that carry serious enough consequences to motivate clients to return to court and dispute the charges (maybe a fine, probation, or community service), but not such serious consequences that the judge will want to hold the client in jail during the pendency of the action.

Clients at liberty can assist their student lawyers prepare. They can explain exactly where the crucial events took place. They can introduce their student lawyers to witnesses and family members. They can obtain crucial records and sign documents without having to be interviewed in a hard-to-reach jail environment. Most important, they are available for private confidential consultations as frequently as necessary.

Students representing at liberty clients on criminal court matters have other opportunities to assist and litigate on behalf of their clients outside the criminal court. Some clients arrested for driving violations will be separately charged with contestable administrative driving violations.

Juvenile clients are frequently suspended from school as a result of the criminal charges. Clinic students can represent them at suspension hearings. Clients charged with domestic violence frequently have collateral separate family court proceedings where students can assist.

#### 4. Representing a variety of clients encourages perspective.

When student experience is tethered to a single client, that client informs the students' entire perspective. If my students had only represented the client in the taxi cab case, for example, their default impression of criminally charged clients might have been that clients lie about the facts or are too embarrassed to admit the truth. Although lawyers need to be alert for dissemblance in their clients (whether in criminal cases or in civil ones), skepticism isn't the primary lesson I would hope my students would take away from a year in criminal court. If students are lucky enough to represent many clients, their understanding of the larger system can't be driven by a single client's unique point of view. Representation of multiple clients frees students to understand the system separately from their clients, incorporating perspectives drawn from multiple personalities.

Since they represent a host of clients in various circumstances, students in criminal court meet clients who admit fault and accept the consequences. They meet clients who deny responsibility and are eventually determined to be innocent or at least not responsible for the actions that resulted in criminal charges. Some clients are in court because they are driven to crime by chemical dependency. Others may be struggling with anger management. Still others are psychopathic. Others are simply poor. Getting to know a variety of clients reveals the full scope of the criminal justice system and protects against stereotyping.

5. Practicing before different judges teaches a variety of lessons.

Similarly, performing before many judges engenders perspective. Not all judges are created equal. Some came to the bench motivated by a progressive political philosophy. Those judges may desire to “help” your client – whether your clients want help and even the clients resist “help” - and despite your protests. Others are bored with criminal court and disappointed that they aren’t on the appellate division by now. (These judges often earned their JDs at Harvard). They tend to be short-tempered and cross. They don’t want you to take up too much of their time. Some judges are thoughtful, knowledgeable and clear. Some are patient with students. Others aren’t. Some enjoy teaching from the bench. Others don’t. Naturally, in their first practice experiences students aren’t capable of recognizing judicial personalities, and they can’t possibly adapt as circumstances might ideally require. But practicing before a variety of personalities on a variety of different kinds of cases teaches the students to appreciate the non-legal factors impacting legal practice. Having the right case and the best facts doesn’t always ensure victory. The qualities of the decision-maker count too.

6. Criminal court practice encourages conversation about racism and poverty.

Practicing law in a busy city court opens students’ eyes to the pervasive effects of poverty and racism. No one who walks into the Bronx Criminal Court criminal can miss noticing that just about everyone charged with a crime is a member of a minority group. The power of this simple observation isn’t muted by the diversity of the judges, prosecutors, court officers and police. Students immediately see who is arrested. Within weeks they understand that many people are charged with relatively minor crimes, and that just being arrested causes each accused individual a significant hardship. I don’t have to raise the issues of police overreaching or institutional

racism artificially. Students bring up the issues themselves. I simply facilitate the conversation, assign relevant reading and encourage their thinking.

7. Rapid case resolution requires student responsibility and professionalism.

Criminal court cases resolve quickly. Each year my pre-trial misdemeanor clinic handled between 30 - 35 cases.. Students would experience the entire path of a case during their year in the clinic. Some matters end almost as soon as they begin – with charges dismissed at arraignments. Some end at the very next court appearance. Others linger for the full school year, permitting discovery and motion practice and a trial. But regardless of what happened during the year, only one or two cases remained unresolved at the end of the years students prepared for graduation.

The advantage of quick resolution isn't simply theoretical. Yes, it's great that students experience every stage in the path of a case, but, more importantly, when students finish what they start, they experience the direct consequences of their own work. The student trying to draft a memorandum of law in support of a motion to suppress immediately comprehends the consequences of not having done an adequate job at the foundational suppression hearing. A mistake in discovery undercuts subsequent formulation of cross examination. A failure to keep notes and records will soon be regretted.

There is an advantage for the teacher as well. If cases are completed during the academic years, the teacher has time over the summer to think and write just like the non-clinical teachers in the law school.

8. Court imposed deadlines are an asset.

It's also a benefit that deadlines are set by the presiding judge. It is the judge who controls the court calendar, ordering parties to appear, to file motions, and to begin the trial.

Students can't fight with their teacher to obtain more time or complain about unreasonable workloads around exam time. They have to fight with the judge. Teachers' advice and importuning can be ignored, but the court's can't.

Moreover, judges provide feedback. Frequently judges will call my students up to the bench after a hearing or an argument and say something (most often flattering) about the student performance. Comments from the court have a powerful impact. The judges represent success and authority. What they say matters to my students, and that approval can be helpful. If the judge appreciates an argument that the student worked on in seminar, that judicial approval communicates the value of preparation. In other words, it's not just the crazy teacher who thinks every argument should be practiced, the judge agrees.

#### 9. Criminal court provides opportunities to learn by watching.

Criminal court provides unlimited opportunities to learn by watching others. Sitting in court waiting for their case to be called, students observe multiple other lawyers (of all sizes and shapes, colors, genders and ages) making applications and arguments. Depending on the court room acoustics and the pace of the proceedings, students can learn from watching which arguments the judge responds to, which lawyers sound convincing and why, which lawyers look like they spent the night in a flop house and whether that matters, which lawyers look as though they care about their clients or even know anything about their clients' lives. Some of the arguments are admirable, others much less so. Students can think about what makes an argument persuasive and what doesn't.

#### 10. Criminal court permits student autonomy.

With sufficient preparation, the CDC students can handle criminal court cases as well as – if not better than - a more experienced lawyer. Naturally, I control the environment through case

selection, and I prepare the students with multiple tailored exercises, but once they've prepared, they really can handle cases on their own. Nine times out of ten, there is no advantage to teacher intervention.

The only times I have found myself interrupting an application to rescue a client or a student is in the middle of a bail application when I fear that an omission from the application will lead the judge to set bail. Apart from that one circumstance, I find that the more I stay in the background, the better things go. My professorial intervention can make things worse. For example, my long experience in criminal court has made me very impatient with young assistant district attorneys. Their youthful righteousness on behalf of victims, their immovable belief that all those who have the chutzpah to dispute the charges must be lying, and their slight tinge of superiority irritate me. If I try to help my student in a negotiation, that irritation will inevitably surface. I don't have a poker face. The prosecutor will feel my attitude and his position will harden.

The students don't react the way I do. They admire the prosecutors. They hope they will be prosecutors themselves. The prosecutors are where they hope to be next year. When they negotiate, they bring admiration, wide open eyes, and camaraderie to the conversation. No wonder they can achieve better results than I. As a result, there is little incentive for me to intervene<sup>12</sup> and students fully accept responsibility for the in court work on their cases.

### C. Disadvantages for students in criminal court practice.

Criminal court practice has a few disadvantages as a learning environment. The primary drawback I have noticed is that the practice is not conducive to collaboration. I divide students into teams of two and bring them to the arraignment sessions in teams. The team reviews court

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<sup>12</sup> "The act of intervention disturbs the student-teacher and student-client relationships in way that can produce undesired and unintended consequences." George Critchlow, "Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene" *Gonzaga Law Review* (1990/1991) (page???)

papers and prepares for the interview together before meeting the clients. After that the collective spirit evaporates. Although there is sufficient room for both students and the client sit to around a table and talk together, predictably whichever student begins the interview takes control and the partner sits silently and listens.

When the case is called before the judge for decision on bail, the student who took charge of the interview inevitably makes the formal bail application and follows up with the client. Thereafter, no matter how vociferously I insist that both students represent that client (and I require that both students go to court each time the client's case is on), the student who took the more active role in the initial stages of the representation will take primary responsibility for the case. As the semester continues I find that the student who conducted the bail application will draft the motions and investigate the facts – often without collaborating with the other student who was present for the interview and knows an equal amount about the case. If one of the cases should happen to proceed to a hearing or trial, I have to assign responsibilities to one student (you'll do the direct of the client) and other tasks to another (you'll do the cross of the police officer) to force them to work together.<sup>13</sup>

Students join the clinic with a disinclination to work collectively. Most of their previous efforts in law school have been individual. Most often, they read alone for class and study alone for tests. Even trial advocacy rewards solo performance. Solo efforts are rewarded with good grades and acceptance to journals or moot court teams. Students have little experience with collaboration and are worried that their performance will be hindered by a teammate. Because the criminal court cases are fairly simple and straight forward, a single student really can competently handle all aspects of the case. Even though it is always preferable for more than one

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<sup>13</sup> Perhaps the lack of student collaboration in the misdemeanor clinic isn't an inevitable consequence of the type of cases or the practice environment. It may be my omission as a teacher. I'll focus on what I could do differently in the last section of this essay.

law student to focus on the case, the misdemeanors don't absolutely necessitate team work until the trial stage. Neither the complexity of the legal issues nor the volume of essential tasks force the students to work jointly and so they don't.

The fault may not be entirely attributable to the practice setting. I have not particularly focused on teaching collaboration, and I could do more to encourage teamwork. I could focus explicitly on collaboration in our case meetings, asking how the team is functioning and stressing the importance of joint work. Finally, it is possible that I give mixed signals to the students as early as the first interview. While they interview the client, I stand and observe, and only join the conversation if it appears that a crucial piece of information is not being elicited or communicated. Partly because conditions are so bleak (smelly, cramped, noisy, vermin infested) in the pens, after a few hours, I start to want the interviews to end and haven't used that time to encourage team work.

Another possible disadvantage to the misdemeanor clinic is its focus on minor cases. Students only represent individuals charged with relatively insignificant charges, and because I review the cases prior to initial interview, they represent only individuals without a lengthy criminal record. They don't see the serious criminals - the rapists, the robbers, the drug dealers, or the gangsters. In client selection, the clinic work isn't truly representational of the criminal justice system. Perhaps that slightly skewed focus isn't really a disadvantage. There's no obligation to expose the students to more difficult cases. I don't really believe that those students who decide to go into a criminal practice will be disheartened when they meet clients charged with serious felonies. But I do feel slightly disingenuous discussing the criminal justice system in the context of the student perspective when I know they have a sanitized perspective.

D. Disadvantages for teachers in criminal court practice.

Criminal court practice is enormously time intensive and time is wasted in court. To provide feedback to students, clinicians must be in court with them. It is not possible to delegate court supervision if the teacher wants to observe and understand the student progress, and most clinic teachers want to watch their students every time they are in court. Reading journal entries and listening to discussion of what happened in court is an inadequate substitution for real observation. The courtroom dynamic is simply too complex and fast paced. Often the students can't even hear what the judges say because the judges speak rapidly and with large doses of jargon. How can a teacher see whether the student could have responded better to a question from the bench if the teacher isn't there to observe the questioning and hear the responses? How can the teacher assess the adequacy of her simulated arraignment sessions without attending arraignments to measure against the real thing? Without court observation the clinician can't alter teaching to assist the student who is in trouble, and can't adapt simulations to adjust to changing conditions. Materials and simulations quickly become dated.

However, court supervision means that the teacher is committed to spending hours in court alongside students and their clients waiting for cases to be called. That time can be used productively. There are always other lawyers to observe (for better or for worse and either way there are lessons to be learned), and watching the judge handle other matters is excellent preparation for the students and the teacher alike. The clinician will have plenty of opportunity to observe students interact with clients. Court observation provides endless useful fodder for seminar discussion. But no matter how creatively the clinician uses waiting time, there is a limit

to what can be freshly learned on each and every visit. Court time begins to feel endless. Even the most enthusiastic teacher can get bored and cranky.

### III. The Post-Conviction “Innocence” Project: An Overview.

John Jay Legal Services, Inc. – the umbrella corporation that houses the clinics at Pace Law School – continuously receives letters from incarcerated people asking for help with a variety of issues: health care, disciplinary matters, family concerns, and challenges to their underlying convictions. We receive the greatest number of letters from incarcerated people who complain that they were wrongly convicted. Before I began to handle post-conviction matters, clinic staff would answer the letters explaining that we weren’t in a position to assist and making a referral where possible. The letters alleging wrongful convictions started weighing heavily on my mind.

Meanwhile, in the mid 1990’s, the Innocence Project at Cardozo Law School started to use DNA testing of biological material found at crime scenes to exonerate the wrongly convicted. Innocence Project accomplishments encouraged more mail from incarcerated individuals and prompted me to wonder whether I shouldn’t be directing attention to the plight of individuals who were convicted of serious crimes in New York, but who lacked DNA evidence to prove innocence.<sup>14</sup>

Weren’t the errors responsible for wrongful convictions in DNA cases also present in robbery cases and murders that lacked the silver bullet of DNA evidence? The question begs the answer. Of course the same mistaken identifications, false confessions, and bad forensic

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<sup>14</sup> I will admit to feeling mildly competitive with one of the co-directors of the Innocence Project to whom I have been happily married for close to 30 years.

evidence permeate non-DNA cases. Someone needed to look at those cases.<sup>15</sup> And with the exception of the Brooklyn Law School's Second Look Program (now shuttered) and a few admirable private practitioners, no one was.

I started to read the inmate letters more carefully, and wondered whether the students in the criminal defense clinic could handle both pre-trial and post-conviction matters simultaneously. Theoretically, looking at both kinds of cases made sense. The post-conviction matters would round out the experience of the students in the misdemeanor clinic. The students would handle minor cases in the pre-trial stage and also read transcripts and police reports of clients who had already been convicted of serious crimes. They would participate in the adjudication of minor cases and review the adjudication of major ones. The combination of responsibilities sounded terrific. The students would see the criminal justice system from all perspectives. Tentatively, I assigned students in the criminal defense clinic the most promising letters to read and review. Their job was simply to determine whether the case presented a colorable claim of actual innocence and whether there might be new evidence meeting the definition of N. Y. C.P.L. 440.10.

I was encouraged in this new endeavor by what turned out to be an anomalous success in Nassau County. Almost as soon as I started assigning post-conviction letters to students, I was referred a post-conviction non-DNA homicide case from Lynbrook, Long Island. Three defendants had been convicted of the rape and murder of a young girl in the mid-1980's. To make a very long story very short, the Pace Clinic co-counseled the case with the Cardozo Innocence Project and the Centurion Ministries<sup>16</sup> so that each defendant would be represented by

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<sup>15</sup> At about the same time that I started taking on non-DNA Innocence cases, the Brooklyn Second Look Project did as well. Dan Medwed, currently of Utah XXXX, writes about what he learned working with William Hellerstein in the Second Look Clinic @ XXXXXX. The clinic has now closed.

<sup>16</sup> Explain

individual counsel. The students and I drafted a series of requests to the local police departments demanding records under New York State's Freedom of Information Law. Our FOIL letters eventually uncovered untested biological material (semen) removed from the victim during autopsy. The Nassau County District Attorney's office agreed to DNA testing of the semen, which excluded all three defendants. On the strength of the test results, the Nassau District Attorney joined our motion to vacate the convictions. After one of the defendants, represented by the Centurian Ministries, was re-tried to acquittal, the District Attorney agreed to dismiss the charges against the other two. The victory whetted my appetite for more post-conviction work, but combining pre-trial and post-conviction screening in one clinic was not a success.

Students were enthusiastic about helping wrongly convicted individuals. But they were quickly overwhelmed by the additional responsibility of handling the post-conviction cases in addition to their criminal court practice. Students moved at a glacial pace on the "innocence" cases. They infrequently wrote to their clients. They delayed calling witnesses. They procrastinated visiting courts, calling co-counsel, and locating transcripts. File maintenance was poor. None of the required tasks were objectively difficult, yet the students couldn't seem to complete them. I felt as though I was dragging the work out of the students. I became disappointed and cross at our lack of progress, and the students didn't understand my impatience. Part of the difficulty steamed from my failure to provide a clear teaching plan for fact investigation. I simply presumed that the students' enthusiasm would sufficiently empower them to gather the necessary information about each case to enable a considered evaluation. But fact investigation is not an inherent skill. It isn't taught anywhere in law school apart from in a clinic setting, and, even there, investigation is notoriously difficult to teach. There is little written

material about the subject, and what there is focuses mostly on legal issues inherent in witness interviewing.

Instead of spending time thinking about how to teach fact investigation – perhaps through hypothetical situations as I had taught skills in the pre-trial clinic - I simply reviewed the cases with the students periodically. In that review I asked them to report on their progress, and prompt them to consider other avenues to explore and other mechanisms for exploration. This was an inadequate response to the student difficulty, but I didn't see that. I felt frustrated with their lack of progress, but interpreted the slow pace to their lack of trying rather than to my shortcomings in teaching.

Moreover, lacking court imposed deadlines ensured that demands of their at liberty clients would take precedence over the less defined needs of incarcerated clients, most of whom were in prison far away from the school and with whom we communicated through letters or an occasional phone call.

After two years of trying to incorporate the post-conviction cases into the misdemeanor clinic, I decided the students weren't benefitting from the additional responsibility and the cases weren't progressing. Combining pre-trial and post-conviction cases just didn't work. But I wasn't ready to give up on the post-conviction clients. In fact as letters poured into the office, I was becoming obsessed with the challenge of figuring out how to provide a real service to these unrepresented clients while creating an excellent learning experience for the students. I figured that I just hadn't grasped the right formula.

I persuaded the law school to let me teach a free standing post-conviction clinic. I imagined the clinic would appeal to our evening students for whom our court based clinics were often an impossibility. Students could work on these cases at night and on weekends. Structuring the

clinic as a one semester course would attract those students interested in a criminal clinic who didn't want to commit to a full year criminal defense clinic, or students could do one semester of post-conviction work as a prelude to a semester as a prosecutor or a full year in the criminal defense clinic. And best of all, the students would only work on post-conviction matters. I'd have all their attention focused on the post-conviction cases all the time. I designed a curriculum similar to those used by other innocence clinics with readings highlighting the causes of wrongful convictions<sup>17</sup> and started off.<sup>18</sup>

In our first year as an independent clinic, Pace Post-Conviction student-attorneys divided their time between screening potential cases (by reading client letters, court decisions, transcripts and police reports) and working on cases I had already reviewed. In the second year I removed screening from the students. Despite some of my colleagues' opinions to the contrary,<sup>19</sup> I found student screening problematic for two reasons. It is time-consuming for the students to obtain the necessary documents, read a complete record and comprehend the facts and theories. And, more often than not, the person requesting our assistance turns out to be pretty clearly guilty and the jury's verdict sounds fair. Since the client's initial letters to the clinic denied guilt and sometimes deliberately misstated the evidence to induce us to consider their case, students realized with a little shock that the client in whose innocence they so much wanted to believe was not only guilty but also perhaps understandably but nonetheless a liar. I recognize the value for students in reading a trial transcript from start to finish irrespective of guilt or innocence, but the students were inevitable disappointed to realize that the evidence supported a guilty verdict.

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<sup>17</sup> Site to various IP descriptions

<sup>18</sup> That first year and the next I taught both the criminal defense clinic and the post-conviction project. Trying to manage two clinics at the same time was arrogant and not a good idea, but I don't think that mistake is worth discussing.

<sup>19</sup> Dan Medwed

Whatever the student learned about criminal adjudication and procedure through assessing the case was outweighed by their emotional reaction to their final conclusion.

Controlling the student experience more carefully, I now assign only cases that I have already evaluated. I must be convinced that there is a strong possibility of a miscarriage of justice and a good likelihood of finding new evidence of innocence before I introduce the students to the case.<sup>20</sup> For example, we represent Thomas Hammond<sup>21</sup> who was convicted of an attempted rape in the Bronx. The only witness was the victim herself. No other evidence connected Thomas to the crime, and the victim's identification was terribly compromised, not just by the emotional trauma but by her own disabilities. The clinic obtained DNA testing of the biological material found under the victim's fingernails. The NYC lab identified a male profile, compared that profile to our client' and excluded him as the contributor to the biological material. Now we must decide whether the exculpatory test results are sufficient to support a motion to vacate the conviction.

We also represent Tim Marshall, convicted of participating in a gunpoint robbery on a crowded street in Manhattan. Tim was sleepily sitting in the back of a friend's vehicle waiting for a ride home when Rayford, one of the two "real" robbers, jumped in the front seat only seconds after committing the stick-up with his accomplice who was never caught. Typically in an accomplice case like this one, I wouldn't take a client's protestations of innocence ("I didn't know he committed the robbery when he got in the car!") seriously. This time it looks as though Tim really had the bad luck to be at the wrong place at the wrong time. Rayford has been trying to exculpate Tim ever since they were both arrested. He refused to accept a plea bargain offered

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<sup>20</sup> Of course this means that I'm responsible for screening all the requests for assistance. I have had occasional and sporadic volunteer assistance with this task, but in the end, I spend all my free time and the entire summer screening cases. I'll discuss this more . . . .

<sup>21</sup> All names are pseudo . . . .

before trial with a substantially reduced sentence of eight years in exchange for inculcating Tim. Rayford steadfastly refused to swear that Tim was a participant in the robbery when he wasn't. Rayford's stubbornness and bravery cost him years. The judge declined to accept his plea of guilty, leaving Rayford with no alternative but trial. Rayford and Tim were tried together. The jury convicted and they are each serving 20 years. Students have obtained affidavits from Rayford and the driver that we hope to use to vacate Tim's conviction.

In a third case, the clinic represents Jason who was convicted in 1996 of raping and murdering a 12 year old girl who disappeared after taking a walk near her home in a small upstate hamlet. Police treated the case as a missing person investigation for over a year until the remains of the victim's body was found in a shallow grave. When the bones were discovered, police had no clues at all. They were embarrassed for having not investigated the case as a murder and under pressure to solve the crime. Fortunately for them, a teenage drug abuser who ran with a reckless crowd was arrested for something serious. To extricate herself from the unpleasant situation she gave the police information they desperately needed. She described witnessing Jason and her own boyfriend, Josh, rape and murder the victim right in front of her eyes in Jason's van. Her description sounds bizarre, especially since she continued to date Josh - after he allegedly raped and murdered a helpless young girl - and never mentioned to the police or to friends and family what she had seen or what she knew about the disappearance of a girl everyone in town was searching for.

Twelve years later Josh's family paid for DNA testing on hairs enmeshed in strands of a rope tied around the victim's legs and found in the shallow grave with her remains. Testing revealed that one of the hairs belonged to the deceased. The others do not match her, Jason or Josh. We

don't know exactly where this new evidence will lead. Our docket includes other cases, but those three provide a flavor of our work.

The cases are compelling. We have slowly but surely made progress. Student evaluations are generally positive. Nonetheless, I remain unsatisfied with the educational experience I am providing for the students. What follows is my analysis of why.

1. Difficulties presented by the cases.
  - a. When cases resolve slowly students get less outside feedback about their work.

Post-conviction cases take years to litigate. To pick one example, the University of Washington Innocence Project, under the direction of Professor Jackie McMurtrie, recently won exoneration for a client case after seven long years of work. Because the cases progress slowly, students see only stages in the life of the case rather than the entire course of litigation.<sup>22</sup> To me, that doesn't seem terribly problematic. Students don't need to personally experience the entire of a case to understand the larger procedural context or to develop a feeling of ownership.<sup>23</sup>

However, it's possible that it's a bit easier to avoid consequences for a failure of responsibility in a clinic where cases last for multiple semesters and are handled by a series of students. In criminal court work students bear the brunt of their own failures. If a student forgets to request Brady material in a discovery motion, the student won't have that Brady material when it's time to plan a cross-examination.<sup>24</sup> Next time, that Brady request will timely be made.

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<sup>22</sup> Check footnotes 93 & 94 in Susan Crowley's piece where she talks about drawbacks to law-reform approach

<sup>23</sup> Keith Findley, who directs the University of Wisconsin Innocence Project, believes that it is possible to structure an innocence project in a way that permits students to take more significant ownership of cases. Following Katherine Kruse's suggestions in "Biting Off What They can Chew: Strategies for Involving Students n Problem-Solving Beyond Individual Client Representation," *Clinical Law Review* (2002) (page???), he counsels that clinical teachers must provide: "(1) immersion; (2) a strategic approach to making the cases manageable, and offering a variety of experiential offerings within the innocence clinic." *The Pedagogy of Innocence : Reflections on the Role of Innocence Projects in Clinical Legal Education.* *Clinical Law Review* (2006) (page???)

<sup>24</sup> This example assumes that I didn't notice that the student omitted a Brady request in discovery, or that I noticed the omission and decided to let the student bear the consequences of the omission. I've never purposefully

If the student doesn't speak to a witness before serving an alibi notice, that student will be on pins and needles when the prosecutor assigned to the case speaks to that alibi witness.

In the post-conviction clinic, if students don't thoughtfully draft an affidavit, let's say, the only consequences are the teacher's critique and insistence that the affidavit be re-done. The students don't hear from a judge or any other outside expert that their first attempt at the affidavit was inadequate. There's no outside validation of my assessment of their work. As a result, some students accept my feedback and others think I am simply obsessive-compulsive.

Diminished teacher credibility is not a problem exclusive to clinics that handle complex litigation. I have experienced the issue of student resistance with professors who teach only in the class room and are sometimes plagued by hecklers or persistent show-offs.<sup>25</sup> However, I have found myself butting up against student resistance much more frequently in the post-conviction clinic than in the misdemeanor clinic, and I think it's because the students and I are so isolated in our post-conviction work, and because the cases don't resolve. The students and I work on the cases on our own in our own little clinic world. It's me, the students, and the clients. Not only is there no judge to chime in regarding the student work, no judge elevates my stature in the students' eyes. In the criminal defense clinic, every time I stepped into criminal court, judges, adversaries and other defenders greeted me. Somehow that familiarity improved my standing with the students. Many of my students hope to work in criminal court themselves. They'd like to be a judge, prosecutor, or a public defender, and since all those court-house characters know and acknowledge me, I am legitimized, someone worth listening to, and someone whose recommendation for a job might carry weight.

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allowed any student to experience the consequences of his shortcomings at the expense of a clinic client, but I am sure that I haven't caught every omission either.

<sup>25</sup> I don't know if students challenge teacher expertise more when the teacher is female or a minority.

Further, the students actually saw me in action in criminal court. While I worked to stay in the background on their cases, I am a chatty, lively person. I talk to clerks and court personnel. I talk to clients and their families. I introduced students to the judges. These insignificant routine interpersonal interactions seemed to increase my authenticity. Whatever the reason, students may have resisted my insistence on preparation and re-writing in criminal court, but that feedback was minor compared to the push-back I experienced in the Post-conviction Clinic.

b. The seriousness of the cases results in reduced student autonomy.

Post-conviction motions have enormous significance. Generally, clients have only a single opportunity to file a motion to vacate their conviction. The motion must be powerfully convincing and incorporate all the new evidence collected. If the motion persuades, the court will vacate the conviction, possibly release the client from jail, and if the case can't be re-tried, the client will be freed from the consequences of a felony conviction. If the court is unmoved, the motion will be denied with prejudice. Post-conviction motions are generally not renewable unless additional new material is located. Adding to the tension, I am not as confident about post-conviction work as I am about pre-trial criminal defense work. I am more concerned about making a mistake myself.

Pressed by the importance of each court filing and motivated by insecurity, I slide into taking a larger role in every aspect of case preparation – especially writing and editing. That is not to say that I permitted students to file motions in criminal court without my review. I didn't. I reviewed everything and required most substantive motions to be re-written multiple times. But even my fairly compulsive level of supervision pales in comparison to my level of involvement in post-conviction drafting. The more involved I am, the more difficult it is for me to permit my students autonomy. The more involved I am, the more the students may feel like associates at a

firm working under my direction, rather than independent actors making their own decisions – the exact opposite of what the clinic experience should be.

If we have only one chance to meet a witness, I admit I am less likely to let the student have control of the interview. If we are finally arguing a motion that's been pending for six months, it's very hard for me to permit the students to make the argument. Who is more likely to place the call the Bronx County District Attorney: me or my students?

c. Client Relationships are More Difficult to Establish in the Post-Conviction Clinic.

Developing relationships with clients is more challenging in a post-conviction clinic. Most clients are incarcerated. Prison facilities are dispersed around the state. Some clients are so far away that we can't manage a visit in a single day. Distance makes the prison visits both time-consuming and expensive. Meanwhile, letters and phone calls are not an adequate substitute for in-person contact. As a result, the students don't connect to their clients as powerfully and as honestly as they might if they could see them in person and more frequently.

Moreover, doubt about client innocence creates distance. Our clients have all been convicted of serious crimes. In every case twelve jurors reviewed the evidence and concluded there was proof beyond a reasonable doubt. We may determine that there is convincing new evidence that the jury should have heard. We may believe that the defense counsel tried the case badly and failed to investigate, sinking the client's chances. We may think that the prosecutor unfairly slanted the evidence and that the judge was mean, but in the end, we don't know whether the client is innocent.

In the Bronx attempted rape case, for example, the DNA testing of the biological material found under the victim's fingernails excludes our client, but that exclusion doesn't necessarily mean that the client is innocent. The victim could have gotten the male DNA under her

fingernails in other ways. Did she have a fight with her boyfriend? Did she work in a hair salon, a massage parlor, or a nursery school? Although the DNA test result is new evidence supporting a motion to vacate, it doesn't provide conclusive evidence of innocence. We will ask the Assistant District Attorney to test the possible other contributors so as to eliminate them as possible suspects, but the students and I will never experience the certainty that a DNA exclusion brings in a rape case where the perpetrator ejaculated and the semen is tested. Does it matter to the students that they don't know for sure whether their client is innocent? I think so. The uncertainty changes student-client interaction slightly. Students keep looking for that always elusive "proof." They wonder about what the client tells them and they wonder about the validity of the work they are performing.

I started thinking about the impact of this uncertainty as I read student journals. Student reflections on interviews with incarcerated clients were confusing. It seemed as though the students weren't relating to the real client, but instead to a preconceived notion of who the client was supposed to be. For example, after an interview of a client convicted of homicide my student wrote in her journal that the interview was valuable because it convinced her of the client's innocence. Since the client had not revealed anything new or different from what we had known previous to the interview, I couldn't understand why the experience resonated so powerfully or what confirmation had been provided. When I pressed the student to explain, she couldn't provide a basis for her reaction. She mentioned that the client had looked at her in the eye, and that the gaze convinced her of the client's innocence. I realized the student was reassured because she needed to be reassured. She needed to bridge the gap created by doubts about innocence. She looked for what she needed and found it. It hadn't mattered what the client said.

The irrelevancy of the client's contribution to the students' experience taught me that the student was interviewing her idea of the client rather than meeting the client head on.

- d. Innocence Cases Don't Necessarily Illuminate The Problems Inherent in Our Criminal Justice System as Clearly and Predictably as Do Criminal Court Cases.

Reading transcripts and police reports, writing letters and reviewing the law, as well as visiting clients in jail are all activities from which law students can learn profound lessons. But those experiences, although undeniably valuable, don't always impart the same lessons about the criminal justice system as practicing in criminal court almost always does. Last semester two students, who were intimately involved with Jason's rape/homicide case, traveled to an upstate prison to meet him. They intended to explain to Jason how to draft an autobiographical memoir of his interrogations. I decided not to accompany them. The prison is a seven to eight hour drive from school. I have made the drive and didn't want to do it again. I believed that the students were competent to explain to the client what needed to be accomplished. I knew that they would enjoy meeting the client. I assumed the client would enjoy meeting them. There didn't seem to be any legitimate reason for me to accompany them on the trip.

Nothing went wrong. The students met the client and accomplished the task, but their journals reflected their feelings about the jail – not their impressions about the client or the case. Now, it's not necessarily bad to be impressed by visiting a maximum security prison, but I wasn't pleased that these students were so focused on themselves and their own experience. They thought about how the guards talked to them. They thought about how the guards searched them. They worried about whether they'd be able to leave. They didn't notice the racism or classism inherent in the situation because the context was too threatening to them personally. If I had been there, taking care of the details of the visit, making sure that all went smoothly, they

could have focused on the client. But since they were in charge, they could hardly think of anything other than prison logistics and their anxiety. Clearly next time I'll travel with the students to free them to experience the interview, but I am not convinced that the experience of visiting a prison will ever be comparable to the experience of actually representing a client in criminal court.

e. The Lawyering Tasks Necessitated by the Post-Conviction Cases are Unpredictable.

I can't predict which tasks the post-conviction cases will require. Because the cases are all at different stages of development, next steps vary greatly. This fall three student cases will require motions drafting, but this is the first time since I've started the project that more than one group of students will be working on the same task at the same time. Every other semester, each case has required a completely different set of tasks. In one case, students interviewed witnesses and prepared affidavits to record those conversations. In another case, the student filed FOIL requests and pestered police departments. In a third, students conducted legal research. Since the work is less predictable, I have more difficulty designing exercises and simulations to help the students prepare for the case work.

f. Reflection

To encourage reflection, I require the post-conviction students to prepare a journal entry every week. They can discuss the reading, their cases, or both. Is it surprising that the students find it easier to focus on the readings? They are happy to report that they enjoy the stories in "Actual Innocence" or to describe the holding in *Strickland v. Washington*. They are even pleased to compare the lessons of the readings to the facts of their cases. They read about false confessions and then they see how the police interrogated their client just as other police interrogated clients in cases where convictions were reversed and confessions were proved to be

false. What they don't seem to be able to provide is a description of their feelings about the cases, the clients, the prosecutors, or what they're learning.

#### B. Why handle Post-conviction cases at all?

If the post-conviction work presents so many difficulties, is there a reason to create a clinic focused on these cases? I think so. I see a couple of justifications, structural and personal. First, the clinic responds to student interest. Post-conviction exonerations are changing the criminal justice system. Exonerations reveal major problems in the criminal justice system and have created enormous momentum for transforming policing strategy, criminal procedure laws, and forensic science. Students know that when they begin their law school careers. Some begin law school with hopes of working in an innocence project. The idea of grappling with the cutting edge issues raised by innocence cases excites the students. I want to capture that energy and put it to work for the clients. I hope that the students' interest in innocence will spur them to learn more about criminal justice generally, about service to clients, and about excellence in lawyering. I believe that offering an Innocence Project attracts students who might not enroll in a clinic at all otherwise and creates energy in the school.

##### 1. The Post-conviction cases demand collaboration

Students must work together. No one wants to visit a jail alone. The drive takes too long. The prison is threatening. No students want to traipse around a strange town trying to speak with unfriendly witnesses. And, no one wants to draft a long complex motion to vacate a conviction by themselves. The students recognize that they can't complete the work alone, that they won't enjoy working alone and therefore, they are more willing to work with a partner.<sup>26</sup>

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<sup>26</sup> Nancy M. Maurer also found this to be true in her "Handling Big Cases in Law School Clinics, or Lessons From My Clinic Sabbatical." *Clinical Law Review* (2003) .

2. The cases truly fulfill the school's obligation to fill unmet needs.

The post-conviction cases satisfy the law school's service obligation in a way that my criminal court cases did not. The Legal Aid Society in New York City is contractually obligated to represent all poor people charged with crime in New York City – with or without our help. The city courts don't actually need our criminal defense clinic to represent clients in criminal court. We like to imagine that we are perhaps providing a slightly better service just because we have more time to devote than harried legal aid lawyers do, but clearly all the clients in the criminal defense clinic would be represented without us.

On the other hand, when we represent a client in a post-conviction matter, we are the only lawyer willing to take on that client's case. In New York and in most other jurisdictions, once a criminal defendant has been convicted and that conviction is affirmed on appeal, that defendant no longer has the right to appointment of free counsel. Thus, aside from a very few private counsel willing to work on post conviction matters, there is no assistance for the convicted defendant who has a valid claim of innocence. We provide a service to these individuals that no one else does.

Finally on a personal level I needed a different challenge. I was tired of criminal court cases. I was confident teaching through the criminal court practice, and I knew I could provide a valuable experience, but I wasn't sufficiently stretching myself professionally. I wanted the additional challenge provided by the post-conviction cases.

### Solutions

As I wrote this essay I realized that I inadvertently created some of the problems I identified as inherent to the post-conviction project. The problems aren't necessarily endemic to the work. They are my problems.

Clinical teaching at its most basic requires balancing concern for the clients with attention to the students. I let the pendulum tilt too far in the direction of caring about client outcomes. And, my insecurity about my capabilities to handle the work was the thumb on the scale. I wanted to help the clients because I believe that their convictions are unreliable and new evidence of innocence should be heard. But I also desired success to prove my own worth as a lawyer. I fear that I was in such a hurry to achieve results for the clients that I deemphasized the potential of the cases as a foundation for student skill development.

Reinvesting in teaching skills should improve the course. Some of the problems I address in this essay are a by-product of my own loss of focus. The problems may be avoidable. Imposing a skills curriculum on the syllabus in the same way that I did in the misdemeanor clinic should better balance the curriculum. This semester we will read about interviewing, practice interviewing and conduct a client interview – even if the case work really doesn't require an additional client interview. We will spend a session or two on fact investigation even if not all the cases require much additional fact investigation now. I'll invest time reviewing legal writing and research concepts before asking the students to plunge into drafting motions.