
THE UNIVERSITY OF SAN DIEGO CRIMINAL CLINIC: IT'S ALL IN THE MIX

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Although many legal educators would place the birth of clinical legal education in the 1960's, legal scholars have convincingly traced it to the early twentieth century.¹ Nevertheless, in the wake of *Gideon v. Wainwright*,² and its progeny,³ law school criminal clinics in particular proliferated.⁴

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¹ See Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 C L. REV. 1, 6-12 (2000) (describing the history and future directions of clinical legal education). For seminal articles on the need for clinical legal education, see Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907 (1933) (criticizing the Langdellian approach to legal education); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591 (1917) (advocating clinical legal education as instrumental to building professional character).

² 372 U.S. 335 (1963) (holding that the Sixth Amendment, applicable to the states through the Fourteenth Amendment, requires states to provide attorneys for indigent defendants in criminal prosecutions). In *Gideon*, the defendant was charged with a felony and requested the court to appoint counsel for him. *Gideon*, 372 U.S. at 336-37. The court apologetically declined to do so, indicating its authority was limited to appointing counsel in capital cases. *Id.* at 337. The defendant represented himself at trial. *Id.* He was convicted and sentenced to serve five years in state prison. *Id.* For a retrospective and prospective analysis of *Gideon*, see Yale Kamisar et al., *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135 (2004) (recording a moderated panel discussion).

³ *Argersinger v. Hamlin*, 407 U.S. 25 (1972), clarified *Gideon* by holding that no person may be imprisoned for any offense, whether petty, misdemeanor, or felony,

The University of San Diego (USD) offers law skills training through a variety of legal clinics, including its Criminal Clinic. In response to *Gideon's* trumpet, USD's Criminal Clinic first appeared as a course offering in 1973,⁵ but

unless he was represented by counsel at trial. *Argersinger*, 40 U.S. at 25. In *Argersinger*, the defendant was convicted of carrying a concealed weapon and sentenced to serve ninety days in jail. *Id.* at 26.

⁴ In *Argersinger*, the Court emphasized that the high volume of misdemeanor and petty cases inevitably leads to rushed justice and that the presence of counsel in these cases is critical to insuring fair trials. *Id.* at 34-37. In a concurring opinion, Justice Brennan observed that law students in law school clinical programs could be expected to play an important role in providing legal representation to indigent criminal defendants. *Id.* at 44 (Brennan, J., concurring); see Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 *BROOK. L. REV.* 853 (1996) (studying the effectiveness of student defenders and concluding that they provided better representation than professional defenders in terms of results achieved and the nature and quality of representation).

⁵ Rodney Jones, currently in private practice in California, joined the USD law faculty in 1973. Telephone Interview with Rodney R. Jones, former faculty member, University of San Diego School of Law (Sep. 1, 2004). The then law school dean, Don Weckstein, charged him with developing an in-house Criminal Clinic. *Id.* With grants from the Ford Foundation and later from Title IX programs, Jones developed an in-house Criminal Clinic. See Barry et al., *supra* note Error! Bookmark not defined., at 18-20 (describing the funding available for clinical legal education from 1959 to 1997). Although Jones toyed with the idea of obtaining special prosecutor status and developing a prosecution clinic, the clinic offered defense services only. Telephone Interview with Rodney R. Jones. Walk-ins, San Diego State University students (by contract), jail inmates with post-conviction problems (motions to modify probation, but not appeals or petitions for writs), referrals from USD's Civil Clinic and court appointments provided the client base. *Id.* From its inception, the Criminal Clinic had a class component that examined select topics. Eventually, the law school would offer prosecution and defense externships too. *Id.*

For perspectives on criminal clinics from this time in clinical education's history see C. Paul Jones, *Law School Clinical Programs: The View from the Defender's Office*, in *CLINICAL EDUCATION FOR THE LAW STUDENT* 181 (1973) (arguing that law students in criminal clinics have an important role to play in reforming the criminal justice system) and Robert D. Bartels, *Clinical Legal Education and the Delivery of Legal Services: The View from the Prosecutor's Office*, in *CLINICAL EDUCATION FOR THE LAW STUDENT* 190 (1973) (arguing that benefits outweigh costs to prosecution agencies participating in law school prosecution clinics). For example, in 1973, Professor Bartels noted "a fairly widespread feeling among law students that there is something [sic] inherently bad about prosecuting people." *Id.* at 210. The pendulum

the current course is the product of an evolutionary process. The current Criminal Clinic is neither a prosecution clinic nor a criminal defense clinic. Instead, it brings together students who fancy themselves future prosecutors and future criminal defense attorneys.⁶

I. THE STRUCTURE AND CONTENT OF USD'S CRIMINAL CLINIC

Criminal Clinic I is a four-credit course consisting of two distinct components: the externship component and the class component.⁷

may have swung. In the wake of the tough-on-crime politics of the 1980's and 1990's, I have found law students more inclined to prosecute than defend criminal defendants.

⁶ I do not know how many law school criminal clinics are defense-only clinics, as opposed to prosecution-only clinics, or clinics that bring together student-prosecutors and student-defense attorneys. Clinic designations are often vague in that regard. For example, the designations "Criminal Practice Clinic" and "Criminal Justice Clinic" tell us little. See Robert F. Seibel & Linda H. Morton, Field Placement Programs: Practices, Problems and Possibilities, 2 *CLINICAL L. REV.* 413, Appendix B (1996) (reporting a nationwide survey of externship programs).

Criminal clinics certainly take many forms. Professor Fell has described the Criminal Clinic at Thomas M. Cooley Law School as combining externship and class components. See Norman Fell, Development of a Criminal Law Clinic: A Blended Approach, 44 *CLEV. ST. L. REV.* 275, 291-93 (1996). The Cooley clinic, however, only placed students in defense externships at a single public defender's office. *Id.* at 292. As will be described further below, USD's Criminal Clinic uniquely places students in a variety of both defense and prosecution externships. Professor Subin described the Criminal Law Clinic at New York University (NYU) as combining fieldwork and classroom work. See Harry I. Subin, Clinical Pedagogy—The Educational Program of the New York University School of Law Criminal Clinic, in *CLINICAL LEGAL EDUCATION* 254 (1980). The NYU clinic, however, involved a live-client, in-house clinic, not externships, and student fieldwork was limited to criminal defense. *Id.*

⁷ The prerequisites for Criminal Clinic I are Criminal Law (a required first year course focusing on substantive law and the philosophical justifications for punishment), Lawyering Skills I (a required first year class on legal research and writing), Lawyering Skills II (an upper division elective exposing students to a variety of lawyering skills, including trial skills, and culminating in a mock jury trial), Criminal Procedure (an upper division elective focusing on the Fourth and Fifth Amendments), and Evidence (an upper division elective emphasizing the Federal Rules of Evidence). Because of the numerous prerequisites, most students who take Criminal Clinic will

A. The Externship Component⁸

In the externship component of the course, students engage in legal work at the local office of a criminal defense or prosecution agency.⁹ Six government

be third year law students.

Students who complete Criminal Clinic I can enroll in Criminal Clinic II for two, three, four, five or six credits. Students extern with a defense or prosecution agency four hours per week per class credit, for fourteen weeks. Accordingly, a student taking Criminal Clinic II for six credits will spend twenty-four hours per week for fourteen weeks with an approved agency. The Criminal Clinic II externship must be materially different from the Criminal Clinic I externship. Originally that meant students externing with a prosecution agency for Criminal Clinic I would extern with a defense agency for Criminal Clinic II or at least extern at a different prosecution agency (perhaps go from the District Attorney's Office to the U.S. Attorney's Office). The requirement has since evolved to include remaining at the same agency (for example, the District Attorney's Office) but changing units (going from the gang unit to the family protection unit or a branch court office) or obtaining a commitment from the agency to expose the student extern to different skills or stages of criminal litigation. For example, a Criminal Clinic I externship may have exposed the student extern to bail, motion and sentencing hearings, but the Criminal Clinic II externship will expose the student extern to trials. Criminal Clinic II has no class component. Students meet individually with the course instructor each month, maintain a journal and write a reflection paper.

Every year, Criminal Clinic I and II are offered both semesters.

⁸ Students gain important resume-building experiences in live-client, in-house clinics, externships and internships. At USD, externships are distinguished from live-client, in-house clinics and internships as follows. Students enrolled in live-client, in-house clinics provide legal services to clients of the law school clinic and receive academic credit from the law school for their efforts. Students enrolled in externships are placed with a legal office independent and separate from the law school, provide legal services to clients of that office and receive academic credit from the law school for their efforts. Externships differ from internships in that externship experiences are organized and supervised by the law school. Internship experiences are organized and supervised by the independent and separate legal office. Students may receive academic credit for their internship experiences through USD's Agency Internships program. The current USD Criminal Clinic involves externships at preapproved agencies.

⁹ USD places students at the local offices of government agencies primarily engaged in criminal trials and related litigation. We have shied away from allowing stu-

agencies regularly participate in the program.¹⁰ Students seeking a Criminal Clinic externship interview directly with the agencies of their choice. Students are free to choose among the externships offered to them by any one of these agencies.

Students interested in prosecution can interview with three agencies: the San Diego City Attorney's Office, which prosecutes misdemeanors committed within the city limits; the San Diego County District Attorney's Office, which prosecutes felonies committed in the county and misdemeanors committed outside the city limits; and the Office of the United States Attorney for the Southern District of California, which prosecutes federal crimes. These prosecution agencies have office units specializing in a particular type of crime. For example, students externing at the City Attorney's Office may be placed in the domestic violence unit, students externing at the District Attorney's Office may be placed in units specializing in family protection, gangs, narcotics, fraud or juvenile delinquency, and students externing at the U.S. Attorney's Office may be placed in units specializing in fraud, narcotics and general crime, including border crime.

Students interested in criminal defense can interview with three agencies: the Office of the Public Defender, which provides representation to financially qualifying criminal defendants accused of committing crime anywhere in San Diego County; the Office of the Alternate Public Defender, which provides representation to financially qualifying criminal defendants when the Office of the Public Defender has a conflict of interest; and the office of Federal Defenders of

dents to work for private criminal defense attorneys or government agencies doing primarily appellate work (like Appellate Defenders, Inc., or the State Attorney General's Office). Our concern with respect to the private criminal defense bar is a matter of quality control. As it stands, the course instructor monitors supervising attorneys at six agencies, but a chain of command and liaison at each agency facilitates the on-going relationship between the law school and the agency. Allowing students to extern with the private criminal defense bar would greatly increase the faculty time expended on the monitoring of supervising attorneys. Our concern with respect to appellate agencies was that appellate advocacy involves procedures and skills that could not be addressed adequately by the class component of the course. An upper division course in appellate advocacy is available to interested students.

¹⁰ San Diego has a significant military presence. In addition to the six regular agencies, USD students serving in the military occasionally extern for the Judge Advocate General's Corps (more popularly known as the JAG Corps) of their military branch.

San Diego, Inc., which provides representation to financially qualifying criminal defendants accused of committing federal crimes.¹¹ These agencies are not divided into as many subunits as the prosecution agencies. Students externing at the Office of the Public Defender and the Office of the Alternate Public Defender may be placed in subunits specializing in juvenile delinquency. Although the Office of the Public Defender is divided into lawyers assigned to misdemeanors and lawyers assigned to felonies, students externing at this agency are typically assigned to both a team of misdemeanor lawyers and a felony mentor.

In Criminal Clinic I, students are expected to work for their externship site a minimum of fourteen hours per week for fourteen weeks, or a total of 196 hours. Students often work many more hours, because they are enthused by what is often their first “real world” legal experience. Others will often work many more

¹¹ Through the spring of 1995, students interested in criminal defense enjoyed a fourth option: an in-house criminal defense clinic. The clinic originally provided representation to adults accused of crime, but in 1985 the clinic began to specialize in juvenile delinquency. This clinic was a wonderful learning experience for students who functioned like lawyers with their own case load, representing juveniles accused of crime from the initial interview through any motions, trial (known as adjudication hearings), and sentencing (known as disposition hearings). Several factors led to its demise: (1) Declining student interest: Students facing a tight job market apparently preferred to extern with potential future employers; (2) Institutional resources: The clinic was limited to six students and team-taught by two full-time faculty members, raising issues of cost-effectiveness; (3) Declining faculty interest: Even with only three students per instructor, supervision of the in-house clinic was enormously time-consuming. Given the demands of tenure and various pay incentives (including merit pay increases and summer research grants), instructors became more interested in producing scholarship than cooling their heels in courtroom hallways; (4) Legal changes: California's Three Strikes Law came into effect in 1994, and it was unclear whether and when true findings in juvenile court (the equivalent of adult criminal convictions) would count as priorable strikes. The potential consequences for clients meant increased emotional and professional burdens for students and instructors. The first two factors have been identified previously as factors favoring externships over live-client, in-house clinics. See, e.g., Fell, *supra* note 6, at 286-87 (describing the Criminal Clinic at Thomas M. Cooley Law School). The third factor has been identified as an occupational hazard of sorts. See Russell Engler, *The MacCrata Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek To Narrow*, 8 CLINICAL L. REV. 109, 165 n.247 (2001) (attributing a diminution in clinical equal justice work to the assimilation into the legal academy of clinical instructors).

than the required hours because they want to impress their externship supervisors either to get a good letter of recommendation or a job offer after graduation.

USD's understanding with the approved agencies is that student externs will be exposed to a variety of lawyering skills, not simply as an observer but as a student-lawyer, with students conducting witness interviews, counseling clients, investigating facts, researching legal issues, drafting legal documents (like points and authorities in support of or in opposition to motions), doing other writing (like client letters), engaging in negotiations and making court appearances.¹² Most students spend the bulk of their time researching legal issues and writing motions (or in the prosecution agencies, responding to defense motions), and they will often argue these motions in court and handle any evidentiary hearings connected to the motions. Students receive their work assignments from one or more externship supervisors. Externship supervisors are lawyer-mentors on staff at the externship site.

At the end of the semester, students complete a writing assignment that requires them to reflect upon their externship experience.¹³ Externship supervisors complete a form evaluating the student's externship performance and are invited to attach letters further detailing the student extern's performance.¹⁴ Externship supervisors are also encouraged to give students feedback on their performance throughout the semester as they complete projects, like writing assignments, and make court appearances.

Student externs meet individually with the course instructor at least three times over the course of the semester. The point of these meetings is to make sure that students are getting a good educational experience. How are they spending their time at the externship? Do they have enough work? Do they have too much work? Are they doing appropriate work? How is the work environment? Are their supervisors available to them for guidance and feedback? Are supervisors abusive in any way or otherwise acting in inap-

¹² The State Bar of California certifies students to make court appearances under the supervision of a licensed attorney. Pursuant to Rule 983.2 of the California Rules of Court, law students are eligible for State Bar certification if they have successfully completed one full year of studies at an accredited law school and have completed or are currently enrolled in courses on Civil Procedure and Evidence. CAL. CT. R. 983.2. Pursuant to the local rules of the federal court, students are not allowed to make court appearances. S.D. CAL. CT. R. 83.3.

¹³ See App. A (final writing assignment guidelines).

¹⁴ See App. B (evaluation form completed by externship supervisors).

propriate ways? When a problem is detected, the course instructor may take action by contacting the student's externship supervisor, but usually the course instructor brainstorms with the student about what actions the student can take to improve the situation. For example, a student extern may have trouble connecting with an overextended supervisor. The course instructor might suggest that the student set up a regular meeting time with the supervisor (say, Mondays at 4 p.m.). To her disappointment, a student may find herself only researching and writing motions (or oppositions to motions). The course instructor might suggest that the student ask to argue any motions that she writes or suggest that the student meet with her externship supervisor to ask for other assignments. On a rare occasion, the agency may contact the course instructor with concerns about an extern's performance. These concerns are usually about attendance, inappropriate attire or other unprofessionalism. When the agency raises such concerns, the course instructor will meet privately with the student extern to discuss the matter.

B. The Class Component¹⁵

The class component of Criminal Clinic is an indispensable part of the course,¹⁶ using simulation exercises to introduce students to the various stages

¹⁵ Some legal scholars take issue with the word "component" in this context. See, e.g., Erica M. Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 *CLINICAL L. REV.* 659, 660 n.2 (2004). They argue that the word carries a negative connotation and describes a class that is partial or diminished in value as compared to other classes. *Id.* I use the term here quite literally. Criminal Clinic I at USD consists of at least two components or two parts. That said, Criminal Clinic's class component could easily be offered as a stand-alone class, and other legal educators use the course textbook to teach a stand-alone simulation class (i.e., students are not required to work simultaneously in externships). In fact, over the years, Criminal Clinic I students have suggested offering the class component as a prerequisite for an externships-only clinic (students would not be required to attend class simultaneously but could apply what they learn from the class-as-prerequisite throughout their externships). The suggestion is motivated by the fact that some externs will encounter aspects of criminal litigation at their externships before those aspects are covered in class.

¹⁶ In its Accreditation Standards, the American Bar Association (ABA) has expressed a preference for supplementing externships with classroom instruction. See Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?* 10 *CLINICAL L. REV.* 681, 683 (2004) (tracing the

of criminal litigation. At USD, we use *Criminal Litigation in Action*,¹⁷ published by NITA, as our textbook. The book tracks a realistic but fictitious criminal case (*People v. Battistone*) from arrest through sentencing (but not trial),¹⁸ providing students with an overview of criminal litigation. The case unfolds in the fictitious State of Nita. The book includes a partial law library based on California law and practice but compares and contrasts procedures from different jurisdictions. For example, although most felony cases proceed by way of preliminary hearing in California, the book compares and contrasts grand jury proceedings with preliminary hearings. It further compares and contrasts different approaches to grand jury proceedings and preliminary hearings (for example, in most but not all jurisdictions, hearsay is admissible in grand jury proceedings).

In the various simulations, students are assigned to play the role of either the prosecutor or defense counsel at a particular stage in the *Battistone* litigation.¹⁹ For example, when we study pretrial release, students are asked to

history of ABA regulation of externships). Nevertheless, the notion of requiring a classroom component has engendered a fair amount of criticism. See, e.g., Eisinger, supra note 15, at 664-65, 669-70 (arguing, inter alia, that the more varied the placements the less compelling the classroom component); Seibel & Morton, supra note 6, at 439-40 (criticizing the ABA's "micro-management" approach to externships and arguing that flexibility in the design of externship programs will best advance pedagogical goals). See also Daniel J. Givelber et al., Learning Through Work: An Empirical Study of Legal Internship, 45 J. LEGAL EDUC. 1 (1995) (concluding on the basis of an empirical study that, even when professional educators are unin-volved, law office work has significant educational value for law students).

¹⁷ LAURA BEREND & JEAN MONTOYA, CRIMINAL LITIGATION IN ACTION (2002).

¹⁸ The class component of Criminal Clinic spends little time, if any, on trial advocacy skills. Instead, the course emphasizes pretrial litigation and explores plea bargaining followed by sentencing.

This aspect of the class component is not unproblematic. Certainly, plea bargaining is the more common route to the resolution of criminal cases. See *In re Alvernaz*, 830 P.2d 747, 752 (Cal. 1992) (observing that "plea bargaining is an integral component of the criminal justice system"). Moreover, students taking Criminal Clinic have already completed a trial advocacy course (Lawyering Skills II), and students interested in honing their trial advocacy skills can take Advanced Trial Advocacy. Lawyering Skills II and Evidence are prerequisites. It occurs to me, however, that this aspect of the class component may be inadvertently sending the message to students that plea bargaining is the preferred method of resolving criminal cases.

¹⁹ Some of the simulations do not involve a judge. For example, the

assume that the defendant is in custody, his bail is set at an amount certain and the matter is set for a bail review hearing. All the students are given the same police report, but each pair of opposition counsel are given a different rap sheet (detailing the defendant's criminal history) and bail report (detailing the defendant's family, work and community ties). Counsel address the court, arguing for or against the defendant's release on his promise to appear (also known as OR), or arguing that the bail amount should be raised, lowered or remain the same. Counsel are given the opportunity to respond to each other's arguments and are expected to address any questions or concerns raised by the court. Following the court's ruling, students and the course instructor debrief. During debriefing the course instructor will lead a discussion regarding the immediately preceding student performances and explore the choices made by the student advocate. Sometimes the course instructor will examine the substance of the argument by inquiring: What were your points? What unmentioned facts would have lent additional support to those points? What other points might you have raised? Did you consider calling witnesses, identifying people in the courtroom audience as the defendant's supporters or supplying the court with letters documenting family, work and community ties? Sometimes the course instructor will make observations about style or professionalism: The argument seemed overly defensive; try making an affirmative argument. Did you mean to attack opposition counsel's intelligence? Opposition counsel's integrity? What was gained? Lost?

A description of how the class component unfolds over the course of the semester may be useful to new and seasoned clinicians alike. A synopsis follows.

For many years, we began the class component of the course with a charging exercise. It seemed logical to start there. At least in the state courts of California, most criminal cases begin with the prosecution's filing of a criminal complaint. Of course, while lawyer involvement in a criminal case might begin with charging by the prosecutor, a criminal case arguably begins earlier, when law enforcement first becomes involved.

simulations regarding charging, grand jury proceedings, discovery and plea bargaining either do not involve a judge or the judge's role is minimal. Other simulations involve a judge. For example, the simulated bail review hearings, preliminary hearings, motion hearings, and sentencing hearings require someone to play the role of the judge. Sometimes students are assigned to play the role of the judge. Sometimes the course instructor plays the role of the judge. Sometimes volunteer attorneys play the role of the judge. Students are particularly energized when volunteer attorneys play the role of the judge.

We now begin the class by discussing arrest, pretrial detention and the constitutional requirement of a prompt judicial determination of probable cause following a warrantless arrest.²⁰ Starting here allows us to highlight the distinct roles played by law enforcement officers, prosecutors and the courts in a typical case. Moreover, from the perspective of a criminal defendant, the central figure in a criminal case, the case begins here, with police investigation (or lack thereof)²¹ and restrictions on his liberty.

We then turn to charging. We talk about fact management and ask students to organize the known evidence in *Battistone* according to the elements of various crimes.²² Students also read and apply the Nita Uniform Crime Charging Standards. Should prosecutors file charges on the basis of probable cause or some other standard? When should prosecutors pursue additional investigation before charging? Under what circumstances should prosecutors dismiss charges?

We then turn to arraignment as an often *pro forma* hearing, and interviewing and counseling. Students are introduced to interviewing and counseling by conducting brief initial meetings with either the complaining witness (as prosecutor) or criminal defendant (as defense attorney). At these meetings, students encounter different classic personas, as played by other students. Prosecutors are introduced to the complaining witness who is reluctant to participate, perhaps recanting, distracted, hostile or unfamiliar with the criminal justice system. Defense attorneys are introduced to the hostile defendant (he wants a "real lawyer," not a public defender), the inexperienced and frightened defendant, as well as an agitated, indignant or lying criminal defendant. Following these meetings, the class instructor debriefs the class, persona by persona. How did or should the student lawyer handle the hostile defendant or recanting complaining witness (aka victim)?

After arraignment and initial interviews, we study pretrial release. Roger Battistone is in custody. Under what circumstances, if any, should he remain

²⁰ See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (holding that the Fourth Amendment generally requires judicial determinations of probable cause within forty-eight hours of warrantless arrests as a prerequisite to extended pretrial detention).

²¹ See Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1 (1993) (documenting the pro-prosecution bias in police investigation).

²² The topic of fact management is revisited in the classes on discovery, motions and trial preparation.

incarcerated pending resolution of the charges? What information is relevant at a bail review hearing and why? What options are available to the judge? Should the prosecutor always try to increase the bail amount? Oppose an OR release? Should defense counsel always seek an OR release? As described above, students engage in simulated bail review hearings in their role as counsel.

Following pretrial release, we study preliminary hearings as probable cause hearings and contrast these hearings with grand jury proceedings. What are the defendant's rights at each of these hearings? From the perspective of the state or the criminal defendant, is one type of hearing to be preferred over the other?

Following our study of preliminary hearings and grand jury proceedings, students are introduced to formal discovery. Both the student prosecutors and the student defense attorneys receive discovery packets based on *Battistone* (including photographs, witness statements and real evidence) and have to decide what they will turn over to opposition counsel pursuant to a reciprocal discovery statute. Formal discovery (pursuant to statute) is compared with informal discovery and the prosecutor's obligations pursuant to *Brady*.²³

Following the discovery exercise, students are introduced to motion work. The *Battistone* facts support several pretrial and in limine motions: a motion to suppress a confession as involuntary/pursuant to *Miranda*,²⁴ a motion to suppress evidence pursuant to the Fourth Amendment; a motion to suppress an in-court identification; a motion for a live line-up (defense); a motion for a handwriting exemplar (prosecution); a discovery motion; a motion to obtain personnel records of a law enforcement officer (known in California as a *Pitchess* motion),²⁵ and a motion to sever counts. Students are paired as opponents and argue the motions. Following the court's ruling, the class debriefs: When is the motion brought? What type of notice and format is required? What is the purpose of the motion? The grounds for the motion? Who has and what is the burden of proof? Are witnesses called? If so, who should be called to testify? What are the ethics of bringing or opposing the particular

²³ See *Brady v. Maryland*, 373 U.S. 83 (1963) (explaining prosecutor's duty to disclose evidence favorable to the accused).

²⁴ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁵ See CAL. EVID. CODE §§ 1043-1047 (West 2002) (providing for discovery of certain police officer personnel records); *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974) (holding that a defendant charged with assaulting a police officer or resisting arrest and claiming self-defense is entitled to discovery of information and documents that may help him establish the propensity of those officers to act violently).

motion? What effect will winning or losing the motion have on the case?

Following the discovery and motion exercises, students are in possession of new information which they must assimilate. Students are expected to evaluate the case from their perspective and their opponent's perspective for purposes of trial in light of the applicable law and all the known evidence. Students methodically analyze the strengths and weaknesses of each charge and defense, as well as each witness's credibility, and articulate their theory of the case.

Following the case evaluation exercise, students engage in plea bargaining. Plea bargaining is presented as a complex matter,²⁶ requiring competent counsel to investigate the facts and law, assess the likelihood of conviction at trial, calculate the defendant's maximum exposure to imprisonment assuming conviction at trial, investigate the collateral consequences of a conviction and identify the aggravating and mitigating factors for purposes of sentencing *before* negotiating. Students negotiate in pairs of opponents. Any pair of students unable to reach an agreement discusses the matter with the judge in chambers. Otherwise, the various plea bargains reached are discussed during a debriefing period. Here, students also consider whether and how hard defense counsel should "lean on a client" to plead,²⁷ as well as how much say crime victims should have about the resolution of "their" cases by negotiated plea.²⁸

Following plea bargaining, the students study sentencing and, in particular, discretion in sentencing. Students are also paired as opponents and conduct sentencing hearings based on the *Battistone* incident but different pre-sentencing reports (detailing a particular plea agreement as well as criminal

²⁶ For a discussion of defense counsel's responsibilities in preparing to negotiate a plea with prosecution counsel, see Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

²⁷ For an excellent article on whether and how hard defense counsel should "lean on a client" to plead, see Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000). See also Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998) (arguing that defense counsel should be required to advise the client whether or not to accept a plea offer and try to persuade the client to accept counsel's recommendation).

²⁸ See Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1 (1998) (advocating for more collaborative relationships between prosecutors and crime victims).

history and social background of the defendant).

II. THE VALUE IN COMBINING CRIMINAL EXTERNSHIPS WITH CLASS MEETINGS

The class component of USD's Criminal Clinic is important for several reasons. First, no two externships will be exactly alike. Students are placed with different agencies. Even when students are interning at the same agency, they may be assigned to different units of the office. Even when students are in the same unit at the same agency, they may have different externship supervisors with different approaches to their cases. Even when students are at the same agency and have the same supervisor, they will typically be working on different cases. The class component of the course ensures that students share basic knowledge about the criminal justice system, and this common knowledge facilitates dialogue on normative issues.

Second, in a one-semester course, students will not always follow a case from beginning to end (arraignment through sentencing or dismissal) at their externships. Most students will research various points of law and write memoranda or motion papers. Many, but not all, of these students will argue these motions in court.²⁹ Some of these students may also write a sentencing memorandum (known as a statement in mitigation or aggravation). Many, but not all, of these students will argue at the sentencing hearing. Many, but not all, externs will conduct a preliminary hearing. Only some students will conduct plea negotiations. Most students will see a case only after charges have been filed. Most students will not actively participate in the trial of a case, but they may organize discovery, prepare the trial notebook and sit at counsel table with their supervisor. No student extern will ever observe grand jury proceedings,³⁰ but some may be peripherally involved. The class component of the course gives students an overview of the process, filling in the gaps in their externship experience, and crystalizing for students how the various stages of litigation are

²⁹ Not all students will get to argue the motions they write. Students sometimes confront scheduling conflicts because motion hearings are set outside their externship hours, perhaps during class time. Some externship supervisors are not as comfortable as others in allowing students to conduct hearings, particularly evidentiary hearings, especially when the stakes are high.

³⁰ San Diego prosecutors at the state and federal level have not allowed students to observe or actively participate in grand jury proceedings. It is not clear to me whether this is because they interpret governing statutes to prohibit the presence of student externs or because office policy prohibits their presence.

sequenced and impact each other.

Third, students generally come to the clinic with little or no real world legal experience. Even when they have been exposed to criminal defense or prosecution work, only rarely have they previously appeared in court. They are understandably quite nervous and appreciate the opportunity to preview the courtroom experience in the less intimidating, classroom setting. The simulation exercises afford students the opportunity to practice making oral arguments but also practice responding to an opponent's arguments and interacting with a judge.

Fourth, and perhaps most importantly, an "us-and-them" mentality and other prejudices seem endemic to practice and myopic lawyering can follow.³¹ Of course, being adversarial-minded is not necessarily bad. Our legal tradition regards the adversary process as the best means of ascertaining truth.³² More-

³¹ The vilification of opposition counsel is not uncommon. For example, a questionnaire study about bargaining tactics in the criminal justice system found, among other things, that "[d]istrict attorneys and public defenders exaggerated each other's stance on [] questionable tactics in the negative direction. That is, both sides thought the other would approve of [] questionable tactics to a greater extent than they actually did." Steven M. Garcia et al., *Morally Questionable Tactics: Negotiations Between District Attorneys and Public Defenders*, 27 *PERSONALITY AND SOC. PSYCHOL. BULL.* 731, 740 (2001). Apparently, it is not unusual for "groups at odds over an issue [] to exaggerate the stance of the other side." *Id.* at 741. Nevertheless, the study further found that the public defenders were more prone to exaggerate than the district attorneys. *Id.*

³² As the United States Supreme Court has observed in an often-quoted passage: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975) (holding that denying defense counsel the opportunity to make a closing argument in a bench trial violated a criminal defendant's Sixth Amendment right to the assistance of counsel).

Nevertheless, some legal scholars, concerned about perceived adversarial excesses, have suggested that the English system of a unified criminal bar, a system in which the same lawyer may prosecute a criminal case one day and defend a criminal case another day, is to be preferred to our system. See, e.g., WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* (1999); William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 *U. COLO. L. REV.* 1027 (1996). But see Richard S. Frase, *The Search for the Whole Truth About American and*

over, the image of the prosecutor as villain may motivate at least some public defenders.³³ Nevertheless, we want our students to appreciate the opponent's perspective, not only to promote civility, respect and professionalism more generally, but also to enhance their competency as they better anticipate their opponent's motivations and actions.³⁴ To this end, we have experimented with

European Criminal Justice, 3 BUFF. CRIM. L. REV. 785 (2000) (reviewing Professor Pizzi's book). Others have advocated a unified bar, not to address adversarial excesses, but to make the adversarial system more fair by establishing parity between prosecutors and criminal defense attorneys. See, e.g., Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997).

³³ For example, in a study of the Cook County Public Defender's Office, Professor McIntyre observed the following:

The sort of cheating to which public defenders attribute their hostility toward police, prosecutors, and judges is something that public defenders say they see a lot. And though such cheating may be expected, public defenders find it unacceptable—and are not afraid to say so. It is ironic, but listening to public defenders talk about their cases and why they do what they do is like listening to someone who has just been mugged. Public defenders do feel as if they are often mugged—by the legal system. There is a lot of real and passionate anger

. . . Yet, the real frequency of misconduct is beside the point. The point is that most public defenders believe that such things do happen “all the time. It's something you really have to watch for” [].

Whether or not public defenders are correct in their assumptions that police lie, that prosecutors will often do anything to win, and that judges do not really care or know enough to be fair, it is quite clear that the way in which the public defenders see the world not only excuses their work but makes it seem important.

LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 147-48 (1987). Professor McIntyre describes the public defender's world view as an “enabling mechanism[.]” *Id.* at 148; see also Abbe Smith, Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender, 37 U.C. DAVIS L. REV. 1203 (2004) (identifying respect for client, pride in craft and outrage at injustice as motivations for public defenders); Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 HARV. L. REV. 1239 (1993) (identifying empathy and heroism as motivations to sustain public defenders).

³⁴ As a legal educator, I am a strong believer in requiring students to think methodically about a case through their opponent's eyes. Knowing my oppo-

role-switching, requiring students who are externing with a prosecution agency to play the role of defense counsel in the *Battistone* simulations and vice versa.³⁵ Even when we have not required role-switching, the debriefing period following a simulation exercise and other opportunities for discussion afford students the opportunity to debate various topics.³⁶

ment's case better than my opponent had served me well as a lawyer. In this regard, I owe a debt of gratitude to UCLA Professors Bergman and Binder, whose writing instilled in me an appreciation of considering my opponent's case and gave me the tools to do so. See, e.g., DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 58-76 (1984) (discussing evidence marshalling outlines).

³⁵ Students sometimes complain about role-switching. They sometimes argue that they are in a prosecution externship and need to practice being a prosecutor, not a defense attorney, and vice versa. Others have already cultivated a philosophical bent regarding crime and punishment and are virtually incapable of effective or even competent lawyering when they switch roles. Indeed, some have full blown aversions to their opponent's work. Most students are more flexible. These students see the value of stepping into their opponent's shoes to see how the other side works. Some are still unsure about whether they want to do prosecution or defense work after graduation and appreciate the exposure to the other side as they try to determine where they will be most satisfied personally and professionally.

In this regard, I have tried to be an example. Although I practiced law as a public defender, I used a sabbatical leave to intern with the Family Protection Unit of the local District Attorney's Office. It was eye-opening. As a public defender, I had a lot of empathy for my clients and their families, but gave little thought to the victims of my mostly guilty clients. As a prosecutor, I found myself motivated by victim and public-safety concerns. As sentencing approached, my attention turned to questions like, "How likely is this defendant to reoffend?" "What will it take, in terms of punishment or rehabilitation efforts, to keep the defendant from reoffending?"

³⁶ Even Professor Eisinger, who is generally critical of combining externships with classroom instruction, recognizes the value of a classroom component under the circumstances of USD's Criminal Clinic:

The value is particularly great when the class brings together students from opposite sides of the "v.," such as prosecutors and defenders. Often, these students become socialized early in the workplace to demonize their opponents or to see issues simplistically, which diminishes their abilities to represent clients effectively or to work cooperatively to improve the legal system. Dialog in class between externs from opposing sides can be useful to encourage both to look at issues more critically, from their opponent's vantage point or from a systemic perspective.

III. CONCLUSION

USD's Criminal Clinic mixes student prosecutors with student defense attorneys and combines externships with class meetings. Our formula aspires to achieve several pedagogical goals: to give students an overview of criminal litigation by studying its discrete stages in sequence; to promote critical thinking about the criminal justice system; to teach students about advocacy; and to develop students' competency, professionalism and creativity as future lawyers in the criminal justice system. If course evaluations are any indication, USD's Criminal Clinic is a winning formula. I suspect a synergetic effect. It would be a mistake, however, to read too much into the data. Consumer satisfaction is important, but the evaluations tell us only so much. For example, students evaluating the course are not making a comparative judgment, at least they are not comparing USD's Criminal Clinic with any other criminal clinic (for example, an externships- or prosecution-only clinic). It is, therefore, invaluable to participate in a symposium of the sort sponsored by the *Mississippi Law Journal*. The *Mississippi Law Journal's* symposium on prosecution clinics provides a forum for learning from each other's experiences.

Eisinger, *supra* note 15, at 668.

An anecdote may be appropriate here. We take two field trips in Criminal Clinic I. Prior to conducting bail review hearings, students tour a county pretrial detention facility. Prior to conducting sentencing hearings, students tour the R. J. Donovan Correctional Facility, a state prison located in San Diego County. On the latter field trip, students observe inmates in the yard, inmates in different types of housing units (dorms, two-person cells, administrative segregation), inmates in various work-related activities and inmates in a rehabilitation program. Students actually sit and talk with inmates in the rehabilitation program. I have observed an interesting effect of the prison field trip on the ability of criminal clinic students, future prosecutors and defense counsel alike, to empathize with criminal defendants. When the field trip precedes the plea bargaining simulation, the defendant in *People v. Battistone* tends to receive more favorable plea bargains than when the field trip follows the simulation.

Another anecdote: Interestingly, by the time students write their final papers for the course, prosecution externs are still inclined to prosecute rather than defend, but they often recognize that criminal defense attorneys have an important, and even noble, role to play in the criminal justice system.

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Appendix A

FINAL WRITING ASSIGNMENT

SUBMIT A TYPED, TEN (10) TO FIFTEEN (15) PAGE PAPER THAT ANSWERS THE QUESTIONS SET FORTH BELOW.

Writing Assignment Questions

1. What aspects of your legal education best prepared you for your placement? Did any deficiencies in your legal education surface while you were working at your placement? Would any additional subject matter or teaching methodologies have better prepared you for your placement?
2. Would you recommend other students to your placement? Why or why not? How can the placement be improved?
3. What was the tenor of the attorney/client or attorney/witness interactions that you observed? Condescending? Ambivalent? Positive? How so? Give examples. Did the character of these relationships affect the case or attorney in any way? If so, how so? Did you or would you handle these relationships differently? If so, how so and why?
4. What was the tenor of the attorney/opposition counsel interactions that you observed? Hostile? Ambivalent? Friendly? How so? Give examples. Did the character of these relationships affect the way that cases were handled? Affect the attorney? If so, how so? Did you or would you handle these relationships differently? If so, how so and why?
5. What was the tenor of the attorney/judge or attorney/courtroom personnel interactions that you observed? Respectful? Hostile? Friendly? How so? Give examples. Did the character of these relationships affect the case or attorney in any way? If so, how so? Did you or would you handle these relationships differently? If so, how so and why?
6. How did the lawyers at your placement interact with each other? Socially only (they "lawyered alone" meeting only for lunch, etc.)? Professionally only (training sessions, bouncing ideas around with each other, etc.)? Neither? Both? How did this aspect of workplace culture affect the lawyers personally and professionally? Did you or would you handle these relationships differently? If so, how so and why?
7. Describe your supervising attorney's emotional (versus professional) approach to cases? Detached? Zealous? Did the attorney's approach affect the way that cases were handled? Affect the attorney? If so, how so? Did you or would you approach your cases differently? If so, how so and why?
8. Race, gender and social class rightly or wrongly sometimes play a role in human relationships. Did race, gender or social class play any role for you or defendants, witnesses, attorneys or others interacting in the criminal justice system? If so, how so?

Give examples.

9. What was the prevailing philosophy of practice at your placement? Did this philosophy affect the way that cases were handled or people, including you, the lawyers, defendants, and "victims" were treated? If so, how so? Would you be more comfortable with a different philosophy of practice? If so, which one and why?

10. How would you describe the quality of lawyering at your placement? What factors most affected that quality? The individual characteristics of lawyers? Caseload? What would you recommend to improve the quality of lawyering?

11. Describe any patterns of preparation that assisted you and/or the lawyers with whom you worked in anticipating and responding to courtroom events?

12. Describe the case evaluation process at your placement (How were cases evaluated, issues approached, strategy developed and goals set?).

13. Describe any ethical quandaries that arose for you or others at your placement. How were they resolved? Would you have resolved them differently? If so, how so and why?

14. Could you be personally and professionally satisfied working for your placement after graduation? Why or why not? Could you be personally and professionally satisfied working for the opposition (i.e., the defense if you were placed with a prosecution agency or the prosecution if you were placed with a defense agency)? Why or why not?

15. Compare your initial versus final impressions of criminal practice and the criminal justice system.

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Appendix B

Evaluation Form
Criminal Clinic I
Fall 2004

Student: _____ Supervisor: _____

Placement Agency: _____

Please rate the student's performance in the following areas:

OUT OF COURT WORK: POOR OUTSTANDING

Research Skills		1	2	3	4	5
Writing Skills		1	2	3	4	5
Creativity in Preparing Legal Documents	1	2	3	4	5	
Comprehension of Legal Issues		1	2	3	4	5
Timeliness (Re: Deadlines)		1	2	3	4	5
Attitude Towards Job	1	2	3	4	5	
Interpersonal Relations (with clients, witnesses, co-workers)	1	2	3	4	5	

IN COURT WORK:

Court Demeanor		1	2	3	4	5
Preparation		1	2	3	4	5
Advocacy Skills		1	2	3	4	5
Level of Confidence		1	2	3	4	5

Please feel free to add any comments on the student's performance.

If you have any questions, please call Jean Montoya at 260-2327.