

BENEFITS OF AN INTEGRATED (PROSECUTION & DEFENSE) CRIMINAL LAW CLINIC

*Linda F. Smith**

This article describes the University of Utah's Criminal Clinic (the Criminal Clinic), which operates on the externship model, placing students in both prosecutor and legal defender offices. It briefly reviews the evolution of this program and its current structure, describing both the nature of the work the students undertake as well as the "classroom component" that compliments their work. It relies upon data from course evaluations and excerpts from student papers in presenting the advantages of an "integrated" clinic in which both prosecutor and defender interns meet in one class while working in different placements. The article shows how this clinic allows students to acquire the skills of criminal law practitioners as well as to critique the criminal justice system and explore the students' personal values in these roles.

Professor and Clinical Program Director, University of Utah S. J. Quinney College of Law. This article was supported by the S. J. Quinney College of Law Faculty Development Fund. The author is grateful for the comments from her colleagues, professors Erik Luna and Daniel Medwed. She is indebted to her former students, including Chris Bown, Candace Coy-Dymek, Lance Fitzgerald, Steven F. Goodwill, David R. Hall, Angela Hendricks, Joseph M. Herbert, Daniel V. Irvin, Erik N. Jensen, Joel J. Kittrell, Shane Krauser, Heidi M. Nestel, Aaron A. Nilsen and others who have agreed that excerpts from their papers may be reproduced here.

I. HISTORY

The University of Utah's Criminal Clinic traces its history to the early days of clinical education. In 1971, Professor Ronald Boyce established a relationship with the Salt Lake City County Attorney's office in which law students were placed to assist in felony prosecutions and to handle (under attorney supervision) misdemeanor cases over the course of their third year.¹ Professor Boyce also developed an accompanying one-hour course for the fall semester where he lectured the students regarding what they needed to do during each stage of prosecuting a criminal case (from charging through trial) and on related topics (ethics, relationship with judges, etc.). Students also completed various observations separate from their case responsibilities, some required and some optional. Professor Boyce's assistant maintained complete case files for the students to use at the law school, and Professor Boyce undertook the enormous task of reading every pleading and each "trial brief" the students wrote in their twelve required cases. Students also wrote one paper on any issue that arose from their clinic work. The goal of this part-time program was to enable students to acquire all the basic skills needed to pursue a career as a prosecutor, and many graduates of the program went on to staff prosecution offices in the state.

During the mid-1980s, the law school's clinical program underwent an internal assessment that led to major restructuring. Defender students were included in this program, and a different faculty supervisor was retained to oversee their work. The class was adjusted so that Professor Boyce described not only what the prosecutor should do to prepare the case, but what defense counsel should do as well. Certain assignments were adjusted—for example, rather than preparing trial briefs in all cases, defender students had to prepare a

¹ See R BOYCE, PROSECUTOR INTERN HANDBOOK (1971) (handbook used in the Clinic, available at the University of Utah S.J. Quinney Law Library).

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memorandum analyzing plea agreements. By this point, the law school curriculum had added a trial advocacy course, and this course was made a pre- or co-requisite for all criminal clinic students.

In the late-1990s, new faculty took charge of the clinic and created the structure that exists today. We altered the fall class to rely less on lecturing about the steps in the criminal process and more upon the students reading about the process and then working through representative mock problems for each stage. These faculty also perceived that, beyond skills instruction, the class could provide a forum for students to reflect about the criminal justice system. Accordingly, the classroom component was changed to a three-credit year-long graded course while the externship became a five-credit program requiring 250 hours of work.

II. THE PROGRAM TODAY—A DESCRIPTION

The program still aspires to help all students acquire the basic skills needed to be an effective practitioner of criminal law. Students are placed in one of various local prosecution (District Attorney, City Attorney or U.S. Attorney) or public defender (Salt Lake or federal) offices. Their experiences vary somewhat based upon the difference in work from office to office.² Students “second-chair” two felony cases (when their placement handles felonies), working on those cases where they can be maximally involved or on those cases most likely to proceed to trial. Students spend the bulk of their time handling ten misdemeanor cases under attorney supervision. Students appear in court to argue motions, present guilty pleas and argue at sentencing hearings. While many cases settle, students are also able to serve as lead counsel in trials of misdemeanor cases. These year-long placements require 250 hours of observation and work.

² Occasionally, a student has other goals, and they are met by externing with the Rocky Mountain Innocence Center (investigating provable claims of actual innocence)

A. Oversight

There are three strategies for providing oversight to insure the students' placement experiences are appropriate and supervision is adequate: 1) the criminal process course, which includes reflection and discussion (described below); 2) monthly reports; and 3) review of pre-trial briefs, pleadings and other planning documents.

The oversight of the students' work is divided between two co-teachers—one for prosecution placements and one for defender placements—to avoid any conflicts of interest or damage from unintended breaches of confidentiality. Each month, the student provides a brief synopsis of his experiences: observations, hours, case names and work accomplished in each case. This is sufficient to tell whether the student is being assigned appropriate and sufficient work. Each prosecution student must also submit a packet of material for each of his twelve required cases, including a case overview (name of case, charges, essential evidence, procedural steps accomplished and outcome) and a pre-trial brief that sets forth all law, legal issues and evidence needed to prove elements (and source of evidence), any evidentiary issues and intended cross-examination.³ Students may also submit work product (after it is filed) for review. Defender students submit the same documentation, except they may submit a case-analysis worksheet in lieu of a pre-trial brief where the client wishes to proceed to plead guilty. The worksheet outlines the interview and client counseling and analyzes the propriety of any plea.

or with a pro bono attorney handling a death penalty habeas corpus case. These students often participate in the classroom component of the criminal clinic, adding a useful post-conviction perspective on this work.

³ Originally, Professor Boyce was deputized as a prosecutor and reviewed the pre-trial brief with the student prior to trial. Today, supervising faculty review this material after the proceeding to insure adequate on-going supervision and student competence.

All oversight is accomplished by the one appropriate faculty member who reviews written submissions and follows up with private conferences as needed. None of these oversight practices occur during the accompanying class.

B. Criminal Process Course—the Classroom Component

Accompanying the externship work is a three-credit year-long class that focuses upon the steps for handling a criminal case during the fall semester and supports reflection upon the criminal justice system during the spring semester. Since the students have already completed evidence and trial advocacy courses, the skills part of the course is geared to all of the other strategic choices the practitioner faces. These sessions include:

- Investigation & Charging
- Defense Interview & Assessment
- Arraignment & Preliminary Hearing
- Pre-Trial Motions
- Discovery & Investigation
- Negotiation Planning, Dynamics & Ethics
- Plea Bargaining & Sentencing
- Trial Preparation—the Pre-Trial Notebook
- Jury—Selection & Charging
- Trial—Problems in Real Time
- Sentencing, Post-Trial Motions & Appellate Consideration

For each session, the students complete relevant background readings⁴ and are given mock cases to analyze in light of local law and procedure.⁵ The course uses four different problems

⁴ Many readings are from ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (5th ed. 1989) and the AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d ed. 1992). Articles written with the practitioner in mind are also included.

⁵ The students must also rely upon Utah Code Annotated and Utah Rules of

that develop over the course of the semester, providing opportunities to confront typical issues.⁶ Each week, the students must provide written answers to the strategic questions faced at that stage in one or more of the cases. In answering these mock problems, students alternate between taking the roles of prosecutor or defender so that all students experience both perspectives. During each class session, local practitioners (many of whom also supervise the students) participate in class to provide a thorough discussion of the questions presented and how they should be addressed. The use of field supervisors in this way provides the students with concrete and up-to-date answers to their questions, lets supervisors know what instruction the students have received and permits faculty and supervisors to meet and work as a team. The use of these mock cases permits students and supervisors to discuss typical case-handling challenges without the risk of anyone revealing confidential information about an actual, on-going case.

The class is never used as a forum to discuss current cases or to hold "case rounds," which avoids the risk of breaching confidentiality. However, two class sessions during the fall semester are used to provide *indirect* oversight and supervision. The first class includes an orientation to the program, introduction of coordinating supervisors and advice about best practices in this program. At the mid-term, there is an "Open

Criminal Procedure.

⁶ The four cases include: "The Forgery" (a felony that raises issues of conspiracy and competency as well as selecting the proper charge and conducting a preliminary hearing); "The Booze Case" (a misdemeanor that raises issues of conflicts of interest, prosecutorial ethics in charging and prosecutorial discretion in plea bargaining as well as determining the proof necessary for the possible charges); "The Spouse Abuse Case" (a felony in which the identity of the "victim," the case's relationship with a child protective case, access to records and plea bargaining are all issues); and "The Drug Bust" (a felony where probable cause to stop, consent/cause to search, constructive possession, discrimination in jury selection and misconduct at trial are all issues). All cases were developed in consultation with field supervisors who suggested typical scenarios and challenges.

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Mike” session in which students share any challenges they have faced and solutions they have found. This session focuses on systemic challenges within these offices and interpersonal challenges with supervision and can be carried on without revealing confidential information or discussing specifics about cases. However, the class can break into two groups (one of prosecutor interns and the other of defender interns, each with a faculty supervisor) if needed to better address the systemic or interpersonal concerns.

During the spring semester, the class readings and discussions help students reflect upon the criminal justice system, usually by introducing them to relevant social science theories and findings. These class sessions are usually lead by a social scientist or lawyer well-versed in the topic.⁷ Typical topics include:

- Causes of Crime
- Prison & Punishment
- Race & Ethnicity & Crime
- Juvenile Justice
- Mental Health Issues (competency)
- Sex Offenders
- Drug Court
- Domestic Violence
- Victims Rights & Interests
- Restorative Justice
- Community Policing

The sessions that deal with crime, punishment and court structure and operation are usually presented from a sociological perspective. Psychologists often lead the class sessions that

⁷ Students may also complete research papers on how social science may inform the cases they have encountered. One student wrote an excellent paper on what social science tells us about deterring drunk driving through sentencing. Another student wrote a useful survey of drugs and criminal law enforcement that we have since used as an introductory reading on this topic.

consider mental illness, competency, sex offenders and domestic violence. These sessions explore why certain individuals commit certain criminal acts and what can be done to deal with the problems of violence, sexual predation and drug abuse. Students are encouraged to relate this information to their prior cases, in hopes that it may help them better understand what they have encountered. For example, we explore how our knowledge about domestic violence might inform policies on plea bargaining or how the recidivism rates from drug court and prison might lead prosecutors to make discretionary decisions.

Students also submit brief reflective writings about some of these topics prior to the class session, reflecting upon how the social science information relates to their own case-handling experiences. Ultimately, each student must write a more thorough, analytical paper (ten-fifteen pages) reflecting upon any aspect of the experience. We have used these reflective assignments during the second semester rather than year-long weekly journals for a variety of reasons. By waiting until the second term to require reflection, students have accumulated a range of experiences and impressions, become comfortable using their skills in their placement and have had the opportunity to understand their particular role and responsibility in the system. We think that at this juncture they are psychologically ready to undertake critical reflection and very unlikely to negligently reveal any confidential information or work product.⁸ Asking for written reflections before the class session also has the merit of guaranteeing that the students will read the materials (which otherwise are not covered in any exam!)

⁸ I cannot remember any instance where classroom discussion evoked a comment that may have revealed confidential information to others. The students begin this program very loyal to their individual "side" of the system and protective of their role in their placement, and nothing we do in the class invites them to share information about an on-going case. If anything, the dynamic of the class over the course of the year is to encourage students to see that both "sides" have much in common and that there is much about the criminal justice system that we can (and should) talk about in order to improve it.

and this enhances the class discussion with our guest speakers. Since we are able to read their reflections prior to the class session, we can also invite appropriate sharing of students' insights during the class discussion, thus making sure the social science speaks to the students' experiences while protecting against the inadvertent sharing of confidential information.

During the spring semester there are two class sessions that explicitly require the students to reflect upon their experience. The first spring semester class considers prosecutorial discretion and defense "ethics" (discussed below). The last session(s) of the year involve students presenting their reflective papers to one another.

III. CLINICAL PEDAGOGY, ADULT LEARNING AND THE IMPORTANCE OF REFLECTION

The Criminal Clinic was designed with foundational theories about clinical legal education, externship structure and adult learning theories in mind.

One of the most important things an externship program⁹ can accomplish is to prepare students for a personally and professionally satisfying practice after law school. Anthony Amsterdam asserts that the unique contribution which clinical education makes is to help students learn from experience:

When we were students, law school did absolutely nothing to prepare us to learn from our experience in practice after graduation Practice after graduation was either

⁹ In designing this "externship program," we decided that the field placement component should be accompanied by an academic component in which experiences in the field will be critically considered and reflected upon because that was "best practices" in clinical legal education. See AM. BAR ASS'N, COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 20 (1980). "The classroom is the basic forum in which the teacher can integrate theoretical and empirical data with students' experiences in assuming and performing lawyer roles and participating in legal processes." *Id.* at 68-69.

ignored as a potential source of education or viewed as an entirely different kind of education—the school of hard knocks—having no institutional affiliation or functional connection with the school of law.

. . . [W]e realize what a misguided and pedagogically unproductive view that was. . . The students who spend three years in law school will spend the next thirty or fifty years in practice. . . They can be a purblind, blundering inefficient, hit-or-miss learning experience in the school of hard knocks. Or they can be a reflective, organized, systematic learning experience—if the law schools undertake as a part of their curricula to teach students effective techniques of learning from experience.

Robert Condlin explains why field placements are ideal for such reflective learning from experience:

Students should learn about lawyer practices . . . in a setting that represents the one in which those practices are typically carried on. . . . Protection against being overwhelmed by the vocationalism of the law office milieu or its concomitant pressure to turn intellectual analysis platitudinous or instrumental should come from a law professor who intervenes when these dangers threaten.¹¹

Condlin further explains why an extern program is a better way to promote discussion and critique than simply having a class that studies critical theories about practice:

¹⁰ Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 615-16 (1984) (emphasis added).

¹¹ Robert J. Condlin, "Tastes Great, Less Filling": The Law School Clinic and Political Critique, 36 J. LEGAL EDUC. 45, 62-63 (1986). See also Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 216 (1989)("[T]he internship serves as a laboratory for experimenting with skills and for observation of and reflection about the legal profession."); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287, 325 (1989) ("The most important teaching task the law school can perform is giving students the ability to learn from their experience for the rest of their lives. This should be the primary function of any classroom component").

[I]f one is interested in a moral philosophy of lawyering it is necessary to deal with these questions in the first person. Moral understanding is arrived at by critical reflection on activities that have been experienced pre-reflectively and begun to be internalized as dispositions. Until disposition is present, at least in some minimal or beginning form, the moral character of action cannot be fully understood. Without the experience of acting in lawyer role moral philosophizing will be just so many words.¹²

The students' experiences as externs (or as paid clerks) will result in their "learning," whether they reflect on it or not. In addition, other learning from the externship experience is subconscious, involving the feelings, attitudes, and values of students. Often students are not aware of how their sensibilities are being influenced as a result of their externship experiences unless they are urged to examine these influences explicitly.¹³

Because our students are experiencing and being influenced by the world of practice, it is incumbent upon the law school curriculum to promote reflection upon practice.

Just as Tony Amsterdam¹⁴ complained that his legal education had ignored practice, viewing it as "the school of hard knocks," so, too, do other professionals criticize their professional schools for having inadequately prepared them for practice:

Practitioners report that their professional education programs do not prepare them to deal with the profound moral conflicts and developmental challenges of their working lives. They experience tensions between personal and professional values, organizational mores and individual commitments, and bureaucratic expectations and their own standards, and they feel ill-prepared to work productively

¹² Condlin, *supra* note 11, at 66-67 (emphasis added).

¹³ Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 *NOVA L. REV.* 95, 109 (1987).

¹⁴ See Amsterdam, *supra* note 10 and accompanying text.

amidst these dilemmas.¹⁵

Professional education can be improved by coupling experience in the professional world with a forum for “reflection”¹⁶ on these experiences. Reflection should be supported and promoted in any adult, professional education program: “Reflection is essential for adult development in both the personal and professional spheres. It enables us to identify and correct distortions in our personal belief systems and it allows us to evaluate successes and failures in the workplace, providing opportunities to improve our performance.”¹⁷ Reflection is needed in adult education because adult learners bring with them habits of interacting and preconceived notions about proper behavior in their professional roles:

If we are to move our students from unreflective and reactive modes of coping based on their personal repertoires, it is necessary to evoke these implicit personal paradigms. Our challenge has been to engage students in recognizing their own paradigms, to explore their uses and misuses, and to test the usefulness of other paradigms.¹⁸

Although reflective learning has enjoyed a recent resurgence of popularity, it has the most classical of roots. In 1933, the educa-

¹⁵ James Wallace & Celeste M. Brody, Introduction to ETHICAL AND SOCIAL ISSUES IN PROFESSIONAL EDUCATION 1, 2 (Celeste M. Brody & James Wallace eds., 1994).

¹⁶ “Reflection is an important human activity in which people recapture their experience, think about it, mull it over and evaluate it. It is this working with experience that is important in learning. The capacity to reflect. . . it may be this ability which characterizes those who learn effectively from experience.” D. BOUD, R. KEOUGH AND D. WALKER, REFLECTION: TURNING EXPERIENCE INTO LEARNING 19 (1985).

¹⁷ Robert R. Klein, Reflections and Adult Development: A Pedagogical Process, in ETHICAL AND SOCIAL ISSUES IN PROFESSIONAL EDUCATION, supra note 15, at 89 (citations omitted).

¹⁸ Gordon Lindbloom, Learning about Organizational Cultures and Professional Competence, in ETHICAL AND SOCIAL ISSUES IN PROFESSIONAL EDUCATION, supra note 16, at 225.

tor and educational theorist John Dewey defined reflection: "Reflective thinking, in distinction from other operations to which we apply the name of thought, involves (1) a state of doubt, hesitation, perplexity, mental difficulty, in which thinking originates, and (2) an act of searching, hunting, inquiring, to find material that will resolve the doubt, settle and dispose of the perplexity."¹⁹ Dewey forcefully argued that "it is not sufficient to `know,' there also needs to be an accompanying desire to `apply.'"²⁰ He "characterized reflection as comprising five phases. . . . suggestions, problem, hypothesis, reasoning and testing."²¹

More recently, Donald Schön has focused on the need for reflection in a wide variety of professional areas of practice.²² Schön asserts that "the crisis of confidence in the professions"²³ is due to the recognition that professional practice is not simply rigorous instrumental problem-solving according to scientific

¹⁹ JOHN DEWEY, *HOW WE THINK* 12 (1933 rev. ed.).

²⁰ J. JOHN LOUGHRAN, *DEVELOPING REFLECTIVE PRACTICE: LEARNING ABOUT TEACHING AND LEARNING THROUGH MODELING* 4 (1996).

²¹ *Id.* at 5. "Suggestions are the ideas or possibilities which spring to mind when one is initially confronted by a puzzling situation. . . . Problem or intellectualization is . . . understanding the perplexity of a situation more precisely so that courses of action may be more fully thought through. . . . Hypothesis formation is when a suggestion is reconsidered in terms of what can be done with it. . . . seeing how the hypothesis stands up to tentative testing. . . . Reasoning is when the linking of information, ideas and previous experiences allows one to expand on suggestions, hypotheses and tests, to extend the thinking about and knowledge of the subject. . . . Testing is the phase in which the hypothesized end result may be tested." *Id.* at 5.

²² DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983). Schön both relies and expands upon Dewey's theories. *Id.* at 65.

²³ *Id.* at 14. "Over the last twenty years, however, my experience has been that all the professions have become confused. In all of these fields, . . . there is now some turbulence about what we mean by professional knowledge and how we should really educate students in it." Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 *CLINICAL L. REV.* 231, 232-33 (1995).

techniques.²⁴ Rather, professionals are confronted with problems of “uncertainty, uniqueness, and conflict” for which their classroom training fails to provide answers.²⁵ Schön compares problems of “uncertainty” to Dewey’s “problematic situation” in which the definition of the problem itself is the greatest challenge.²⁶ “Unique” situations do not fit the pre-defined categories of the classroom. And “conflict” includes circumstances where goals are “vague, unmeasurable or conflicting” so that the challenge is to decide upon what goal should be sought.²⁷ Schön asserts that competent professionals do deal with problems of uncertainty, uniqueness and conflict, but to teach students how to become such competent professionals, we should ask, “what is it that competent practitioners actually know when they are being competent [and handling such problems]?”²⁸ Schön believes that there is a “reflection-in-action” or “knowing-in-action” upon which competent professionals rely.²⁹

[T]he workaday life of the professional depends on tacit knowing-in-action. Every competent practitioner can recognize phenomena—families of symptoms associated with a particular disease, peculiarities of a certain kind of building site, irregularities of materials or structures—for which he

²⁴ “According to the model of Technical Rationality . . . professional activity consists in instrumental problem solving made rigorous by the application of scientific theory and technique.” SCHÖN, *supra* note 22, at 21.

²⁵ Schön, *supra* note 23, at 237; see also SCHÖN, *supra* note 22, at 21-49.

²⁶ Schön, *supra* note 23, at 237-39.

²⁷ *Id.* at 240.

²⁸ *Id.* at 242. This inquiry is in contrast to asking “how do we apply science to practice better?” or “how do we generate more useful science for practice?” *Id.* at 242.

²⁹ *Id.* Schön compares such professional “knowing-in-action” to individuals “knowing” how to right a wobbling bicycle without being able to explain what they do or why, being able to recognize faces without having a theory or explanation of how to do so, *Id.* at 242-243, and speaking in conformity with rules of phonology and syntax without being able to consciously describe such rules. SCHÖN, *supra* note 22, at 53.

cannot give a reasonably accurate or complete description. In his day-to-day practice he makes innumerable judgments of quality for which he cannot state adequate criteria, and he displays skills for which he cannot state the rules and procedures. Even when he makes conscious use of research-based theories and techniques, he is dependent on tacit recognitions, judgments, and skillful performances.³⁰

Accordingly, "the study of reflection-in-action is critically important."³¹ Schön describes the reflective practice which will allow the competent professional to "learn what he knows" and assist in educating the novice: "[T]he process of learning what you know is a research process. You have to observe the actual behavior. You then have to reflect upon it and construct a description of it and you have to test that description against further behavior"³²

[I]nquiry. . . turns into a frame experiment. . . . [T]he inquirer is willing to step into the problematic situation, to impose a frame on it, to follow the implications of the discipline thus established, and yet to remain open to the situation's back-talk. Reflecting on the surprising consequences of his efforts to shape the situation in conformity with his initially chosen frame, the inquirer frames new questions and new ends in view.³³

Schön argues that reflection upon practice can lead the professional to transform his relationship with his clients.

Here the professional recognizes that his technical expertise is embedded in a context of meanings. He attributes to his clients, as well as to himself, a capacity to mean, know, and plan. He recognizes that his actions may have different meanings for his client than he intends them to have, and he

³⁰ SCHÖN, *supra* note 22, at 49-50.

³¹ *Id.* at 69.

³² Schön, *supra* note 23, at 243.

³³ SCHÖN, *supra* note 22, at 269.

gives himself the task of discovering what these are.³⁴

The tools we rely upon in the criminal clinic provide just such a perspective for the student to consider the meaning of his professional actions. As the reflective professional re-considers her relationship with those she serves, the professional is freed to consider “What in my work, really gives me satisfaction?”³⁵

Involving the student in actual clinical work invites emotional reactions. It is incumbent upon us to offer our students a framework and a forum to process their reactions. This invitation to explore personal values, lawyering roles and professional responsibility is the most important component of the criminal clinic.

IV. EDUCATIONAL BENEFITS—WHAT OUR STUDENTS HAVE LEARNED & HAVE TAUGHT US

Our students' reflective writings are particularly rich documentation of the learning that has occurred during the course of the year. Their classroom discussion is also rich, but more fleeting and less easily documented. The students' course evaluations, perhaps the most scientifically valid evidence, also provide some insight.

One of the major programmatic questions that was confronted in 1985 was whether the oversight and education of legal defender interns should be integrated with the then-existing prosecutor program. Today, this well accepted and popular integrated clinic seems natural to all. This article will rely upon the available evidence and show why an “integrated” clinic such as this can enhance both skills acquisition and, more importantly, the student's ability to think critically about the criminal justice system and to explore her own personal values and possible place within this system.

³⁴ Id. at 295.

³⁵ Id. at 299.

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A. *Course Evaluations*

Each “clinic” at the University of Utah College of Law includes certain extern placements coordinated with a “classroom component.” Students' course evaluations ask the same questions about each clinic, for example, whether:

1. The clinical/service experiences enhanced my learning in this class
2. This class prepared me for my clinical/service experiences
3. This class helped me reflect upon my clinical/service experiences

Students respond on a Likert Scale (1-6) from “strongly disagree” (1) to “strongly agree” (6).³⁶ Over the course of two recent years, students' responses to these questions in each of six clinics were analyzed revealing these data:

³⁶ Student responses could include: 1-strongly disagree, 2-disagree, 3-somewhat disagree, 4-somewhat agree, 5-agree, 6-strongly agree. Thus, 3.5 was “neutral” and any score about 4 was positive.

Question	Lowest Clinic Score	Highest Clinic Score	Average of all Clinics	Two-Year Average for Criminal Clinic	Two-Year
clinic enhanced class	4.17	5.78	5.19 (Crim. Clinic)	5.71	
class prepared for clinic	3.6	5.75	5.08 (Crim. Clinic)	5.31	
class helped me reflect	3.25	5.75	5.1 (Crim. Clinic)	5.5325	

These data demonstrate that the clinical program we operate is well-designed—the “classroom components” and fieldwork compliment each other; the classes are helpful both in preparing students for field work and in supporting reflection upon their experiences. As the data clearly indicates, the Criminal Clinic is better than the average of all clinics on each dimension, and one semester of the Criminal Clinic was the highest scoring section of any clinic on these issues. This high rate of satisfaction regarding the clinic/class interrelationship demonstrates the success of the design both as a method of preparing students for their criminal law practice experiences and as supporting student reflection about the criminal justice system and their possible careers in it.

B. Discussion of Values in an Integrated Clinic

Most of our third-year Criminal Clinic students are seeking or considering a career practicing criminal law. This career focus is ideal to engender their critical reflection about the lawyering roles in the criminal justice system.

Perhaps because of this career orientation, most of our students arrive at the clinic with a definite and strong preference regarding which “side” of the case they want to handle—most students prefer to serve as prosecutors.³⁷ Because placements are limited, students are asked if they are willing to participate on either side, and most students are indeed willing to switch sides if they have no direct conflict of interest due to clerkship work.³⁸

However, many have entered the program with a rigid view of their assigned roles and of the opposing attorney's attitudes. Many student prosecutors believe that a good prosecutor must always go for “the max” and that all defenders are bleeding-hearts who naively and unfailingly believe clients' stories and excuses. During the fall semester, while the students get acclimated to their offices, we do not ask students to reflect upon their roles or values. We do, however, make students analyze the mock cases from both perspectives, and we invite both defenders and prosecutors to most classes in which the problems are discussed. Often students note that both guests see the mock cases in the same way; the session in which a prosecutor and defender walk through their analysis and negotiation of a case is particularly useful in demonstrating this.

Then, the first class of the spring semester we ask these students to think critically about attorney roles and about the values in criminal law practice. We introduce this discussion with readings that focus on prosecutorial discretion³⁹ and defense “ethics.”⁴⁰ The readings are designed to encourage stu-

³⁷ In fact, there was only one year in the last twenty that the enrollment in the defender placements exceeded the enrollment in the prosecutor placements.

³⁸ We give priority to student “preferences” that are driven by a conflict due to clerkship work and seek volunteers for placement on the less preferred side from those without such conflicts.

³⁹ Students read excerpts from Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 186, 196 (1988), in which the author sets forth a theory about how prosecutors should exercise their substantial discretion.

⁴⁰ Students read excerpts from John B. Mitchell, *The Ethics of the*

dents that they have the right to define for themselves the role they will play and the moral justifications they will develop as a prosecutor or defender in the criminal justice system. The very fact that different people—these authors—have troubled to define their mission in a philosophically coherent manner is informing and liberating for the students.

Rather than discussing the philosophies of the articles, we begin class discussion talking about our feelings. Students are asked to consider what frustrations they have experienced in dealing the “the other side” or with “the system,” whether they had any preconceived notions about their own role and what difficulties they have faced in assuming that role. This session is attended only by the students and the faculty supervisors so that students will feel safe in talking (positively or negatively) about lawyers they have encountered. This class session is usually an intense experience where the students truly engage these issues on a personal level.

To begin the class discussion, each teacher shares one thing he or she finds most bothersome about attorneys on the other side. When Professor Paul Cassell and I co-taught the class, he explained how he hated it when, as a prosecutor, he would reduce charges and offer what he thought was an eminently fair plea bargain, only to have each defense attorney ask for more. He assumed the defense attorneys needed to play a game of bargaining to look good to their clients. I empathized with Paul's frustration; it seemed he really wanted to be thought of as fair and even-handed, and the negotiation game deprived him of this recognition. (Since our students saw Paul as a fair and decent professor, I think my analysis seemed credible to them.) I also told Paul that negotiation texts call his preferred approach “Boulwareism” and recommend against it because negotiators typically want to experience an even give-and-take. (This analysis, though different than Paul's analysis at the

Criminal Defense Attorney—New Answers to Old Questions, 32 STAN. L. REV. 293 (1980), in which the author answers the persistent question of how he can justify defending the guilty.

time, suggested to our students that there may be more than one way to understand and come to terms with difficult feelings experienced in practice.) In this way, we empathized with one another's frustration and tried to deal with our feelings by understanding practice and understanding ourselves. With this opening, we invite all the students to share what they have found most bothersome about their opponents or about the criminal justice system. We invite them each to share one aspect of the current role which has been difficult for them to assume. This invitation invariably leads to an out-pouring of thoughtful but widely varied reactions.

Almost every student identifies supervisors whom she sees as mentors. Some students recall the prosecutors and defenders who co-taught some early classes and express a new understanding that opposing counsel is not the enemy, but a fellow practitioner. Most students had silently disagreed with or felt critical of at least one supervisor. They recount their experiences or observations and explain why the supervisor's behavior seemed wrong-headed. Often, more than one student knows of a particular case or personality. Sometimes students on opposite sides of the aisle have reached similar conclusions about mentors and role models! Some students assert that their experiences had been exactly as they expected and had confirmed their desire to pursue this career. Usually, they can also point to particular aspects of the practice (e.g., the individual control of the prosecutor, the common esprit de corps of the defender office) which they enjoy. Some students have discovered they no longer want a career in criminal law, often for reasons (e.g., the harried pace and lack of preparation time) they had not anticipated.

During this discussion, it is not unusual for at least one student to explain that he had begun the year with a firm conviction that he could only serve as a prosecutor (or a defender), and now he has come to see that he could be satisfied in the other role as well. The degree to which this class supports the idea that both roles in the criminal justice system are respectable and valuable is well-illustrated by the fact that one

year, two students needed to have their placements adjusted to avoid conflicts of interest—one prosecutor intern had taken a clerkship with a defense attorney and needed to become a defender intern; a different defender intern had been hired as a clerk in the District Attorney's office and needed to become a prosecution intern!

Often, I have to assume my other identity as teacher of the Legal Profession class and remind students that prosecutors and defenders do not have parallel roles. Prosecutors have the duty (and freedom) to “do justice” while defenders have the duty to fully advise their clients but ultimately pursue the path their clients choose. (Defenders do have the freedom to speak in personal and candid terms to a client, but not to manipulate his decision.) Similarly, prosecutors may be obligated to dismiss a case, but defenders are always entitled to put the state to its proof. Students' natural feelings that it should be a contest with the same rules for all is ultimately tempered by their understanding of the complex system our Constitution requires.

One defender student shared his experience when he (and his supervisor) chose to develop a candid and personal relationship with a particular client. When the client effusively thanked them for arranging a desirable plea bargain, the student replied that the thanks he sought was the client's firm commitment to support his new wife and young child. The student commented that such communications were not effective for every client, but that where it might matter, he (like his supervisor) wanted to include care and concern in his practice.

This class session is often a cathartic experience. The students are affirmed that it is all right to feel challenged and not entirely at-one with the office mentality. They are also reaffirmed that outlandish behavior often seems outlandish from all perspectives within the criminal justice system. Thus, they conclude, they need not be the most heartless prosecutor nor the most bleeding-heart defender to pursue a balanced career in this challenging area of law. They gain some encouragement to begin to develop their own philosophy for practice.

C. Further Reflections About Values and Roles

Later in the semester, students submit an analytical “thought paper” arising out of their experiences in the field of criminal law. Their topics vary widely from analyzing how discretion is and should be exercised in domestic violence cases to exploring the ethics and skills of plea bargaining with an un-represented defendant. The final reflective papers of all students from one year were analyzed with respect to the topics and common themes. Most of the papers focused on: a) the student's assumption of role; or b) the roles played by others in the office; or c) systemic challenges and suggested changes and improvements to the criminal justice system. A few papers dealt with a particular experience or set of experiences (e.g. losing a case at trial) and then focused on what the student learned from that experience about himself, how to act in her role or about the system. A brief synopsis of the topics or essential themes follows:

Prosecution Student Papers

Role of the Good Prosecutor—not to convict the innocent & need for training

Role of the Good Prosecutor—neither overzealous nor underzealous

Role/Systemic Structure—of juvenile, JP, district & drug court

Role/Systemic Challenges—rural attitudes toward federal court misdemeanors

Systemic Challenges—domestic violence cases

A Trial I Lost—what I learned about trial strategy in a misdemeanor

Defense Student Papers

Role of the Defense Attorney—the “nice” vs. the “aggressive”

lawyer

Role of the Defense Attorney—dealing with difficult cases and strong emotions

Systemic Challenges—differences between the ideal of justice and actual practice

Systemic Challenges—problems with the federal sentencing Guidelines

Systemic Challenges—problems with the death penalty

As this listing demonstrates, both prosecutors and defenders reflected about the role they had assumed and recognized the challenges of carrying out that role. Both recognized problems with some aspects of the criminal justice system or its practice in some areas. Of course, most students saw problems from the perspective of their own role, rather than from some universal critical perspective. Defenders saw problems in which their clients were treated unfairly, and prosecutors saw problems in which they were unable to obtain the outcome they thought was just. Nevertheless, their insights and commentary were often consistent. Relying upon the papers from this year alone, one can discover a handful of common themes.⁴¹

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Since students' papers varied widely—some taking one topic and developing it thoroughly and others expansively discussing many experiences—it is not possible to use these papers to prove anything about the uniqueness or commonality of all students' experiences. The male gender is used to refer to the student author where necessary as a grammatical convention.

1. Prosecutorial Discretion

One theme was prosecutorial discretion, with both prosecutors and defenders making some critical comments. Prosecutor Student (PS) #1 argued that although a count should be dismissed if there was inadequate evidence to obtain a conviction, a few prosecutors would press such a count in a multiple-count case simply to “scare” the defendant. PS #2 and PS #4 criticized some cases as unwisely filed in the first instance. Defender Student (DS) #2 and DS #4 both argued they had seen “over charging” and DS #5 wondered about the fairness of seeking the death penalty in a particular case.

PS #1 made these points about the prosecutor's power to charge or not:

I have noted that the role of the prosecutor is omitted from virtually every examination of the protections afforded a defendant; that is, the accused's first line of defense is, indeed, the prosecutor. . . . Prosecutors are sworn to uphold the Constitution. . . they do not . . have any interest in convicting the innocent. . . . Every day the government abandons cases it does not think it can win. . . .

However, in the same vein, there are also prosecutors who will pursue a criminal conviction in the face of a lack of evidence with the intent to simply scare or antagonize the defendant. . . . [But] prosecutorial agencies have a heavy burden to ensure that they are seeking justice and not some personal agenda in the name of the people.

PS #3 discussed his respect for the Juvenile Court while musing why certain cases were even brought:

What I didn't like was that many of the cases just don't seem to belong in the criminal system at all. A fight at school . . . I now realize that maybe it was proper . . . [to get adequate resources for the youth. What might appear as an insignificant case on paper may be the last straw at

school where detention and expulsion have failed to deter bad conduct.] Unlike schools, the court can compel the parent's involvement in the case.

The discretionary decisions of prosecutors to charge was considered by DS #2, #3, #4 and #5. DS #2 noted one case in which the client had sought and received informal approval from a police officer for possessing a weapon that he was later charged with possessing illegally. DS #2 also represented a "civil rights activist who was charged with disturbing the police when he refused to leave a crime scene [because he] was concerned with the use of force by responding officers." DS #3 questioned the decision to press charges against a defendant who had previously gotten a co-habitant abuse action protective order against the "victim" in this case, in light of the tit-for-tat retaliation that appeared to be occurring between the victim and defendant. DS #4 stated that federal prosecutors might consider dismissing the federal charges (perhaps permitting state charges to be filed) where the federal sentencing guidelines were "excessively harsh." DS #5 worked extensively on a death penalty case and researched the various problems with fairness in death cases. DS #5 wrote "I could not help but wonder "Why is the death penalty sought on this case, but not on other cases that are similar in fact?"

2. Pressure to Plea Bargain Cases

Another common theme was the existence of and the problems with the "economic pressure" for plea bargaining, which prosecutors (PS # 2, 4) understood as a institutional pressure to settle/plead out misdemeanors that were not worth trying, and defenders (DS #1) felt as subtle pressure from the District Attorney and the judge to talk their clients into taking the plea bargain offered.

PS #2 referred to the problem of "under-zealousness":

I would agree that prosecutorial overzealousness is a

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serious problem . . . I am also equally concerned about prosecutorial under-zealousness . . . [and] the reasons underlying prosecutorial decisions to dismiss rather than prosecute . . . [or for] obtaining overly lenient penalties . . . Many [federal misdemeanor defendants] are charged with relatively minor violations such as chopping up picnic tables or snow boarding on property that belongs to the VA [and we] were expected to plea bargain and dispose of the vast majority of cases. . . . Proceeding to trial in such cases is considered a waste of scarce resources. . . .

On the other hand, I have had federal officers and frightened family members relate to me their own outrage [at the case being dismissed or settled with a light punishment].

PS #4 was troubled that an officer spent days investigating and pursuing a group on federal lands before arresting them, when simply informing them they were violating permit requirements in the first instance would have been better law enforcement. This student reported other cases where the defendants had chosen to break federal laws as a form of civil disobedience, and calling forth costly federal prosecution was part of their protest plan.

DS #1 wrote movingly about two "types" of defenders reacting to the pressure to settle misdemeanor cases:

Certain lawyers (A) respond to this pressure by encouraging every client to accept a plea bargain. . . . Other lawyers (B) find this pressure to be a personal challenge and therefore pressure every client to go to trial. . . . Lawyer A is a very nice person. He believes that his clients have had difficult lives and that the criminal justice system is unduly harsh. . . . Lawyer A believes that in almost every situation accepting a plea bargain is in the client's best interest. . . . He believes that most of his clients are guilty. He does not hold this guilt against the client, but rather sees the client as someone who needs help. Lawyer A believes that entering a guilty plea will provide the client with two services. The first . . . is eliminating the possibility that the client will be convicted of multiple charges instead of pleading guilty to one. This reduces the amount of time that the client can

spend in jail. The second service Lawyer A provides his clients by negotiating plea bargains is arranging for the clients to get the treatment they need to deal with the problems they have in their lives.

If Lawyer A does not notice that the police did not give the defendant the Miranda warnings before interrogation, Lawyer A is not providing effective assistance of counsel However, I would argue . . . that Lawyer A's bigger ethical problems are directly connected to being "too nice" . . . to the extent that Lawyer A is worried about pleasing the court and the prosecutor. . . . This conflict of interest become more serious in light of Lawyer A's belief that being nice will help his clients to collectively receive better deals. Lawyer A does not owe a duty of loyalty to his clients as a collective

I feel that I learned the most from working with attorneys who were not nervous about being "aggressive." I am not a particularly asserting human being and so for me observing the differing ways in which people defend the interest of their clients was very helpful. . . . I learned that lawyers work in an adversarial system and that the structure of that adversarial system is such that our every word will have an adversarial impact, regardless of how polite and reverential we appear when we say it. This means sticking up for my client through motions and trials should not make judges and prosecutors like or dislike me If I act with respect and good faith my slowing down the judicial process in the name of due process should not be seen as a problem.

A related theme was the prosecutor's difficulty in effectively negotiating with an unrepresented defendant so that the defendant could make an informed decision about whether and how to plead and how well the courts dealt with these unrepresented defendants. (PS # 2, 3, 4). All three students regretted situations where clearly guilty defendants had no defense attorneys to advise them that the rational thing was to accept the plea bargain. However, these students also all observed cases in

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which the unrepresented and unwise defendant's case came out all right in the end.

[An individual under extreme stress assaulted an officer. Denied counsel, he refused to plead guilty.] On the day of trial, after the defendant had an opportunity to express his outrage, he eventually pleaded guilty. Unexpectedly, however, despite there being no substantial reduction in charges, the defendant seemed to feel better. (PS #2)

The most difficult part of the job, ethically and intellectually, was . . . [plea bargaining with unrepresented defendants, who often failed to accept a generous offer.] The pro se defendants were not unlike a deer staring into the headlights of an oncoming car, they would fumble through their own defense, invariably take the stand and offer incriminating admissions, and then stand there waiting to get hit with the punishment. I always momentarily lost my breath when the judge would say "30 days jail" and then pause while she wrote out the sentence, a long pregnant pause, and finally say, to my relief and certainly to theirs "suspended with payment of fee." I always wondered what the defendant was thinking during that long pause. (PS #3)

We expressed our desire to the Magistrate to try to keep the trials focused on the issues the defendants have been charged with to prevent it from turning into a long day of just bashing the federal government. The Magistrate expressed a different view, he acknowledged that almost everyone that challenged their citations in his court were 100% guilty. In fact, most of the time the defendants never factually contested the officer's version of the events, but rather, felt that their dislike of the federal government should be a defense. . . . The Magistrate felt that the purpose of the trial was not only to determine guilt or innocence, but also to let the defendants have their say. The Magistrate felt that most of the defendants just needed their day in court and then they would calm down and pay the fine.

At first, I considered the Magistrate's philosophy to be

somewhat ridiculous and a waste of time. . . . However, after having time to reflect, I think this philosophy illustrates . . . the goal of that court was to resolve or reduce conflict. "Listening is more important than talking" when trying to revolve conflict and distrust,⁴² as a way for the defendants to get their anger and frustration off their chest. Part therapy, part justice.

[One of these misdemeanor trials] took over five hours, about three hours longer than it probably should have taken. . . . [The defendant] never really contested the underlying facts of the case [but] introduced all kinds of evidence that had little or no relevance to the case. . . . Hearsay seemed to be fair game as long as it was not double hearsay. Finally [the defendant] rested. It took the Magistrate about two second to render his verdict: guilty, and another second to impose sentence: \$500 fine. [But] the magistrate's philosophy seemed to work. There was a drastic change in [the defendant's] demeanor from when the trial started to when it ended. . . . When he arrived that morning . . . he was very combative and unwilling to speak with us. By the end of the trial he was actually having conversations with us and being polite. And this was despite the fact the verdict was guilty. . . . Whatever the cause, the trial process had actually seemed to resolve some of [the defendant's] anger even though he lost the case. (PS #4)

⁴² Jeffrey Z. Rubin, Conflict From a Psychological Perspective in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN 135 (1993).

3. Disjunction of Theory and Practice

Both prosecutor and defender students noted that the discovery of "truth" may lose out to other goals of the criminal justice system and came to terms with this reality. PS #1 noted that cases should be dismissed where there is inadequate admissible evidence to obtain a conviction, even though the prosecutor is convinced of the defendant's guilt. PS #3 noted the degree to which procedure overwhelmed getting to the merits in district court: "Everything was mired in procedure. The Court was not focused so much on resolution or problem solving, but instead centered on keeping people in jail." PS #4 ultimately accepted that court trials were "Part therapy, part justice." PS #5 wrote "of many experiences that I had that exposed the justice system's apathy and the justice system's inability to solve the problems of domestic violence." DS #1 wrote about the personalities of defenders (nice vs. aggressive) that might influence, improperly, how a case is handled for the client. DS #3 wrote about this disjunction between the law and procedure on the books and the ways in which law in practice can fall far short of these ideals, citing a domestic violence case in which both members of the couple seemed committed to using the legal system to fight an on-going interpersonal battle. A second example involved the ideally cooperative client who consistently asserted his innocence and had an eminently triable case, but who, at the last second, walking to the assigned courtroom for trial, decided to accept a plea bargain.

I was beside myself, thinking we had come this far and now my client thinks it is better to settle the case. I will never know the real reason why he decided to do this and I can only speculate that he was concerned about getting his probation revoked from a prior unrelated charge if he was found guilty on the pending charge. . . . The cynic might say that the goal of the defense attorney is to get the client off. . . . [However my view,] at the risk of sounding

softhearted, is that the ultimate aim should be justice for all clients involved, whether the state or the alleged criminal.
(DS #3)

DS #4 commented upon personal and political constraints within law enforcement on the prosecutor's willingness to dismiss charges:

Class discussions during Criminal Process have shed some light for me on prosecutors' reluctance to dismiss charges. I have learned that dismissing charges can cause tension between law enforcement agencies and the prosecutor. Because prosecutors are dependent upon law enforcement agencies for investigation and follow-up on cases, it is imperative that prosecutors maintain amicable relationship with law enforcement.

4. Systemic Problem—Domestic Violence Cases

Problems with the criminal justice system's treatment of domestic violence intruded into various papers. (PS #3, 5 and DS #3). PS #3 wrote:

Domestic violence cases are the bane of the Justice Court. DV cases are awful on so many levels. They are like a glimpse into the dark-side of society, they seldom get resolved, and the system is ill equipped to handle them. The number of cases I have personally dismissed or have observed others dismiss due to 'witness problems' is embarrassing. The judicial system falls apart dealing with DV. The police are skeptical, the abusee is reticent, and the abuser is blameless. The children are the true victims in most of these cases and yet there is little that can be done to address their problems.

PS #5 wrote an extensive and moving analysis of all the failures in this system and all the changes that should be pursued. PS #5 said that the judges usually do not make their encounter

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with the defendant meaningful in the way that the Drug Court Judge both calls to account and cares about drug court defendants. The police see the cases as hopeless, with one officer discussing a plea agreement made after the wife refused to testify by saying he didn't care about the plea agreement because "either they would stop doing this to each other or they would end up killing or really hurting each other." He reported that a prosecutor, after a day in which all victims either failed to appear for the trial or appeared and refused to testify, commenting that he "hated domestic violence cases" because they were "evidentiary nightmares." The majority of victims the student encountered were unwilling to testify or press the charges, most had already talked to defense counsel, and some thought that "spousal immunity" would excuse them from testifying. PS #5 noted that defense attorneys advise their clients and negotiate outcomes based on the victims' refusal to testify.

The student mused about solutions:

I have looked into the possibility of charging the victims with false information to a police officer or perjury or contempt of court when they fail or refuse to testify. But such a reaction would only feed the apathy that is prevalent in the system today. Victims would grow even more fearful of involving the police, police would be viewed as the enemy, and the victim would no longer be viewed as an unwilling victim but an accomplice.

Better ideas included changed practices by prosecutors, defense attorneys, and in court proceedings:

It was enlightening in class discussion when someone mentioned that defense attorneys should help their clients see the destructive nature of their actions. I believe a defense attorney who lectures and counsels his client to be a good husband and take responsibility for his actions is necessary. . . . While I was never present when conversations occurred between the defendant and the defense attorney, I hope that the attorney did not con-

gratulate the defendant [after charges are dismissed] and send him on his way.

The change the prosecutors must make is they need to make domestic violence prosecutions meaningful by talking with victims as people rather than just witnesses, by pursuing cases that are probable winners, and by making convictions memorable to the defendant.

[Another answer may be] restorative justice. . . [Now] the bad acts of the defendant are recognized and punished without creating a long-term solution that will allow reconciliation or closure on the relationship. . . It would allow the defendant a forum whereby his perspective can be examined and placed into the larger picture by community leaders and other parties invited to the conference. Relationships are more complex than the belief held by the system that one person is at fault and the other person is a victim. While no one deserves to be hit, that person cannot act in a way that provokes the attacker [if they are to live in harmony.] A restorative justice approach would allow the victim to help fashion a punishment that is suitable to the situation instead of forcing the victim to choose between two unchangeable and undesirable outcomes. The adversary system is not set up to deal with the victim and a perpetrator who are married and pursuing some of the same goals.

DS #3 wrote about a domestic violence case where the female (with a restraining order) was arrested when the boyfriend called the police alleging she was at his home and she threw things at him while he was trying to keep her away, in light of the restraining order. (The boyfriend subsequently loaned the defendant a vehicle to get to court; and the defendant told her lawyer to set the case for trial as soon as possible so it could be dismissed when the boyfriend refused to appear):

This is an example of what I see as the formal legitimacy of the law not mirroring its social effect, or not having the intended beneficial results. . . [Perhaps] the system was being abused intentionally or the system was deficient at dealing

with certain problems.

5. Personal Reactions to the Practice of Law

Most students provided some personal reaction to their clinical experience. Most happily indicated that they learned “I can do this!” and looked forward to getting a job in criminal law. (PS #1, #3, #6, DS #1, #2). Often their critique of some aspect of the system included comments that revealed how they felt. (See above.) A couple provided a self-assessment:

The Criminal Clinic . . . has given me an edge as I make the transition into the real world where a real paycheck but, more importantly, real lives are at stake. I have seen the “system” in action and, in the process, have recognized some of its weaknesses. As a result, I seek change in the form of better training for myself and those that seek to carry out justice in the name and money of the people. (PS #1)

All in all the experience has been very positive. In reflecting on my performance as a prosecutor and my experiences as an intern I realize now that I tended to approach my role as a prosecutor from somewhat of a centrist's point of view. I was not a soldier of the State and didn't prosecute all defendants with zealous abandon. I realized that I could still question authority and dismiss inappropriate charges and still be a very effective prosecutor—maybe a more effective prosecutor. Basically what I have learned is that I can be a trial attorney . . . The experience in the Criminal Clinic reinforced my desire to start my legal career in criminal law. I look forward to finding a job as a legal defender or prosecutor after graduation. Thanks. (PS #3)

My experience . . . has taught me that different parts of the country [urban vs. rural] sometimes require a different form of justice. . . I have also learned that as a prosecutor and an attorney it is essential that you understand the people for whom you serve. Only then can you resolve conflicts and

reach solutions. (PS #4)

One of the defender students wrote about the emotional impact of this work. The student prepared and tried a challenging case involving civil rights issues which attracted some public attention:

I never felt this type of pressure before. To get over my fear I focused my attention on the police officers I was about to cross-examine. I put myself in the shoes of the people in the community that find the time to look out for the rights I try to enjoy. Reflecting on this, I cannot think of anything in school that prepared me for the added pressure I was facing. I feared that if I failed I was letting down the countless numbers of volunteers who fight for minority rights in the community. . . .

Many of our clients were the forgettable first time DUI's or the defendant charged for the 3rd time with domestic violence. [This case] represented unique personalities. . . . [But] the clinical experience taught me that . . . each client requires the same amount of preparation, even in the face of the strong possibility that the case will not get to trial. (DS #2)

DS #2 also wrote about the need to deal with gruesome facts, the need to grieve losses, and the possibility that a gallows sense of humor is necessary to stay sane:

I speculate years of criminal defense work harden the stomach and the heart. I hope mine will endure. . . . I hope that I will always feel sick to my stomach looking at gruesome facts. . . . Even when a client is innocent the possibility of a real victim leads any human to feel compassion. I have no training in psychology, but perhaps as a coping mechanism it is easier to work on these cases if you can make light of it. . . . The public defender must be able to come up with distractions to keep some sense of reality.

[Salt Lake Legal Defenders provided some insight into how

to do this.] A tour of the office is unlike touring any firm downtown. In place of fine art on the walls a visitor will find in one office an "Olympic" weight set, in another, one of those old machines designed to help you lose weight by placing a vibrating belt around your hips. At first I felt this was just an eclectic mixture of poor taste in furniture. On closer inspection, I think it helps as a daily distraction to a day filled with depressing circumstances. (DS #2)

6. Reflections from Other Prosecutor Students

In addition to this complete set of student reflections from one year, there are other prosecutor student reflective papers from prior years where students reflect quite personally about their reactions to their prosecutor work and about how their clinical experiences have changed them. Here are some additional excerpts.

One student who began the Clinic as a "give `em hell" prosecutor discovered the ability to empathize with defendants and the capacity for seeing ambiguity:

First, I have discovered that while I am capable of being a prosecutor, I am also equally capable of being a defense attorney. Both have qualities that appeal to me. Second, my paradigm of the world has changed. Significantly, my conservative ideology of how the criminal justice system should operate has shifted a bit to the left. I no longer view every person charged with a crime as a `boil' on society's collective rear end. . . .

[During my childhood, adolescence and military career] I held firmly to my beliefs about right and wrong. Indeed, mine was a black and white world where all crimes were punished. . . . The clinic, however, changed all that. . . . I can remember my first day in Justice court. The defendant was a man not much older than me with four kids, a beat up station wagon, a low wage job, a wife and a drinking problem. In fact, the wife shared her husband's

taste for alcohol. The police report told me that a few civilians had witnessed a drunken couple fighting near their car. . . The fight became violent and the wife ended her day with a bloodied lip. . . . I had my witnesses, officers, the beer can, and a tough judge; I couldn't lose. But where was the wife? She was nowhere near [the courthouse] and I was incredulous. How could the victim not show? . . . My thoughts immediately shifted to burning this guy without his wife's presence as a witness. I am happy to report that we won the case and Mr. Tough Guy did some time in jail. This was only one among several cases that revolved around the same fact pattern and I never wavered on my principals. In my mind, anybody charged with domestic violence deserves no sympathy. Indeed, these domestic violence defendants would rot in jail if I had anything to do with it. I was rather dogmatic in my position, but one day everything changed for me.

Another day in Justice court brought another Class B misdemeanor of domestic violence, but this time the wife showed up. Unfortunately, it was in support of her husband and not against him. While her husband waited in the hallway I had a conversation with the victim where I tried to convince her that her husband had broken not only a criminal law, but a moral one as well. Before I could finish she interrupted me with a sharp "Why don't you grow up." I couldn't believe it.

Here I was an [older] law student with all the knowledge in the world and I was being challenged by an undereducated housewife (I was truly arrogant). She explained to me that "our" world was not black and white and that sometimes husbands and wives experienced problems and that I should just respect her wishes and let her and her husband go home. She concluded that "sometimes good people do bad things." In her eyes, he had changed over the several months since the charges were filed. To support her contentions she informed us that her husband had attended counseling and was attempting to improve his disposition voluntarily through professional help.

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The outcome of the case was a plea in abeyance and anger management classes. The outcome for me though was more profound. On that day I changed the filters on my lenses to the world. I believe that I could have convicted the defendant easily, but because the wife asked me not to I didn't. The supervising attorney had to clear this, but he believed that the defendant was sincere in his remorse and was confident that the violence would not be repeated. I know we were taking a chance, but I am convinced that we did the right thing. Even though I am married, and even though I consider wife battering reprehensible, I still listened to this person and feel fortunate that I did.

On that day I understood that I no longer had a lock on morality. Since then I have lived with the notion that sometimes good people do bad things; a notion, I believe, that motivates defense attorneys.

Before I was given my lesson in human relations by that wise and compassionate woman, I viewed defense attorneys as "big fat arrogant bleeding hearts" whose only purpose was to impede real justice. . . . Fortunately, my education came at the hands of a victim and not a defense lawyer. . . . Because I took the time to listen to that victim, I adopted a new orientation towards the opposition that includes careful listening, cooperation and respect.

While the two-dimensional world view changed for that student so he came to see defendants in more complex ways, another prosecution student's world view was shaken by seeing law enforcement officials also do wrong:

What an eye opener this clinic has turned out to be for me. At the beginning of the year, I chose the prosecutor clinic with a certainty that, in retrospect, surprises me now. . . . I believed strongly that the State is society's white knight; its sword in the face of wrongdoers; the lone champion of all victims who'd ever been wronged by some despicable criminal somewhere. In short, I was pretty damn naive.

Over the course of the last nine months I have been sufficiently involved in the administration of justice to see the darker side of the State's handling of criminals. I have learned that cops do lie, and that some of the assistant district attorneys have a value system as loathsome as the defendants they snidely deride. I have to admit that when I learned these things first hand, my jaw dropped like the kid who has just learned the truth about Santa Claus. I suppose I should be more grown up about it, but it hurt a little bit to learn the truth about an institution I'd previously held in such high esteem.

Yet his conclusion was not defeatist; he presented a theoretical framework that required public servants to take their public service seriously:

My point has been to show that, as agents of the government, these people should operate according to a higher standard of conduct, but many are not. I recognize that they are human beings, like the rest of us, and subject to the same human frailties as the criminals they arrest and prosecute. But these people are charged with a special obligation. . . . Because the State. . . is acting on behalf of the people who've been wronged, I believe the State should act in a manner that affords dignity to the people it represents.

Other students were introspective regarding their personal reactions to the "thrill of victory and the agony of defeat." Prosecutor students explored how to deal with their personal need for order in their work and their devotion to law and order in dealing with others:

Five minutes before the [juvenile delinquency] trial was to begin, defense counsel asked for a meeting in the judge's chambers. There, defense counsel disclosed that his client had a severe drug problem and that she wanted help but could not afford such help on her own. Evidently presuming the drug paraphernalia and dangerous weapon allegations would not be proven, defense counsel proposed to admit to

the disorderly conduct allegation in exchange for the assurance that the judge would admit the youth into a state funded drug rehabilitation program. I remember sitting in the judge's chamber not believing that defense counsel was so assured at my incompetence that he would make such a proposal to cover his client when I would, inevitably fail to convict. Furthermore, I was offended at the notion that limited state resources would be spent on 'this girl' without her having to take actual responsibility for the more serious allegations before her. Although I did not say a word, the judge must have sensed my reaction to defense counsel's proposal because he quietly turned to me and said, "Remember. . . the most important thing here is to ensure this minor gets all the help she needs to rehabilitate."

I have to admit it took me a few days to understand the wisdom of this judge's statement. I finally realized that I had been so caught up in my own performance and the fact that I thought [the minor] should not receive assistance unless found guilty of the drug charges, that I had lost sight of the juvenile court's purpose, namely, to rehabilitate juveniles to become productive citizens; I realized that this trial was not just another competition—like debate, Moot Court and Trial Advocacy had been—rather [the juvenile] is a minor who needs and is willing to accept help and to rehabilitate herself. Therefore my job as a prosecutor was not to protect my own ego nor was it to go for the jugular—or to make [the minor] suffer as much as possible—rather, a prosecutor must be fair and aid in justice being found and served.

Another prosecutor student explored similar feelings about winning and losing:

The clerk of the court said 'Guilty' and that's exactly how I felt. I had just finished a case that I'd been working on for five months, . . . and the clerk had announced that the jury found the defendant guilty. I was happy — and I was guilty. Part of me just felt badly about how the rest of me felt. I've always wondered about how I would react to 'wins' and

'losses' in the courtroom, and perhaps the most good the Criminal Clinic has done for me this year is to help me learn how I would react and how I should react.

Our criminal justice system requires attorneys to place such a personal stake in the outcome of cases that it is extremely difficult not to look at those outcomes as wins and losses. I think that's sad, I think it leads in great part to the egos that turn many people off about attorneys, but it's also understandable. When I look back at this year, I think of two cases as typifying this lesson for me—one case I won and one case I lost.

The case I lost was a loser from the start. . . . I made an opening statement to the judge, I did all the directs and crosses, and I made a closing argument . . . I did all I could, and I lost. . . . I knew all along that the judge might have trouble with reasonable doubt, but I wasn't prepared for the feeling that I had lost. Somehow, when the judge said "Not Guilty" I felt like he was critiquing my performance, like I had somehow failed. I actually thought, "Gee, maybe I won't be a very good attorney." I was slightly embarrassed to go before the judge the next time after that trial because I felt like he would be viewing me skeptically, critically. I knew that our case was inherently weak (although I thought he was guilty) but for some reason that weakness didn't allow me to simply feel that I had done my best and had represented the government well. Instead, I felt like I had let the government down. I felt like the judge's verdict was aimed as much at me as at the defendant and the case. I made too much of the outcome of the case. I know that now and I knew that then, but I made too much of it nonetheless.

And then there's the case I won. It was a great case. . . . After about two hours the jury came in. The defendant stood up, the judge gave the clerk the verdict form and the clerk said "guilty." I was happy. I didn't show it, but I was happy. The judge thanked and dismissed the jury. We talked to some jury members and they told what a good job I had done and how they thought I'd be a fine attorney. I was

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happy.

Then I saw the defendant. I saw his wife crying. She just couldn't believe that her husband had been found guilty. . . . she had testified about how her husband had lost his job, . . . and about how their lives had been devastated. She was real and so was their pain. Her husband, the defendant, wasn't even that bad a guy. He'd just lost his temper. . . and had gone a little crazy for 15 or 20 seconds—and he'd changed his and his family's lives forever.

A Class A misdemeanor is not all that serious. There isn't even any jail time involved. Just a fine, restitution, and probably probation. They were devastated. As I would be. That's probably just another sign that this wasn't something these people were used to. They were devastated, and I was happy because I had `won the case.' I had proved myself. My worth was vindicated by that verdict. The jurors liked me. I had done well. And I realize that I had made too much of this victory, just as I had made too much of my previous defeat. . . .

I've made too much of these highs and lows, success and failure, wins and losses. But, for me at least, it was real and perhaps that's the greatest lesson I've learned during law school. I think the feelings will always be there—feelings of vindication and victory, of failure and loss. Of course, there's nothing wrong with this. Attorneys are human and they put a lot of time into cases so it's natural that they would come to feel a personal stake in the outcome. I guess I was just a little bothered both by the failure of `not guilty' and by the elation of `guilty.' Thankfully, this Clinic has also provided me with several great role models after whom to pattern my own behavior.

In [my supervisors] I've had the benefit of watching individuals intent on seeing justice done, whether or not that results in a conviction. I've seen people for whom the `wins' and the `losses' are not nearly as important as a job well done.

Both students gained important insights into their responsibilities as prosecutors and their (natural) tendencies to incorrectly approach this important work as a “contest” between winners and losers rather than as a public service in which justice is their sole aim.

CONCLUSION

In their class discussions and their reflective papers, the students focused upon what had happened in the courtroom or the law office and what had been said by judges, attorneys, defendants and witnesses. They complied with the programmatic request to reflect upon what they learned—not just about the law or the skills of a criminal trial attorney, but about the system of justice they encountered and about their own feelings. The excerpts provided above demonstrate the nature and variety of these reflections and demonstrate that our students did think critically about many of the issues raised in the classroom component. Nevertheless, it is impossible to know what effect the classroom readings and discussion may have had or whether there was an identifiable benefit of having both prosecutor and defender students studying and reflecting about their experiences together.

While theories about clinical education and adult learning support using extern clinical experiences to explore personal and professional satisfaction, the students' own words and thoughts provide the best proof that it is well worth the effort. There is no guarantee that these students will have consistently happy and successful careers in the practice of criminal law. However, having learned to reflect upon their experiences and their philosophies of practice, they are better prepared to face the challenges of the future.