THE CRIMINAL/JUVENILE CLINIC AS A
PUBLIC INTEREST LAW OFFICE:
DEFENSE CLINICS; THE BEST WAY TO
TEACH JUSTICE

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I. INTRODUCTION

There is a debate among clinicians about how clinical programs should be structured, what kind of legal work they should do, and the extent to which clinical programs should stress the involvement of students and faculty in social justice issues. Some believe that in recent years, clinical education may not have been true to its roots as it has moved away from emphasizing the provision of legal services to the poor.¹ Others rightly assert that because clinical programs are part of the law school’s teaching mission, service should be balanced with appropriate opportunities for reflection on lawyering experiences.²

In this article, I argue that both objectives can be realized through the creation and maintenance of a clinical program that is focused on making justice systems better and that clinical programs that focus on criminal justice have perhaps the best potential for teaching justice. I attempt to do this by providing examples of cases handled by our clinical program that have taught our students, that have informed judicial decision-making, and that have supported the cause for reform

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in the public interest. By no means do I suggest that other forms of practice are not essential components of any well-balanced clinical program. And I admit that having been engrossed in criminal and juvenile defense practice for thirty-five years, my views may be a bit skewed. But those thirty-five years have taught me that, for students, the experience of seeing first-hand the relentless tragedy that is our criminal justice system from beginning to end--pre-trial detention, trials, and prison is an invaluable means of both gaining experience and forming a life-long commitment to social justice issues.

II. SIX STORIES FROM A CRIMINAL JUSTICE CLINIC

Story 1

We first represented Johnnie Brown in 1979 when he was charged with burglary. I negotiated a plea for Mr. Brown that resulted in him enlisting in the Navy. He remained in the Navy for years and then was dishonorably discharged, the signs of mental illness beginning to show. Mr. Brown came back to Chicago where he soon was charged with two armed robberies and a sexual assault. My students and I represented him again. We won one trial and lost another. Mr. Brown was sentenced to eight years in the penitentiary.

While in the penitentiary, from 1985-1992, Mr. Brown was diagnosed with chronic schizophrenia. After his release from the penitentiary, he promptly picked up another charge--an armed robbery. The weapon in question was a knife. The proceeds of the robbery: twenty-five cents and an adult book store token. We declined to represent him again thinking that he might do better with another lawyer. He was again convicted. This time he was sentenced to thirty years in the penitentiary based in large part on his criminal record. Mr. Brown's family contacted us after his conviction and sentence. We found that no evidence had been presented at trial or at sentencing concerning Mr. Brown's mental health problems. We initiated state post-conviction proceedings and lost in the Illinois courts. We lost in the federal district court, but
won in the Seventh Circuit. The Seventh Circuit held that Mr. Brown had received ineffective assistance at trial because his mental health status was not presented at trial or at sentencing. A succession of students was involved every step of the way.

In its opinion, the Seventh Circuit stated:

This case exposes a tragic breakdown in the Cook County, Illinois criminal justice system. A mentally ill criminal defendant of recent vintage was arrested, put on trial, convicted of armed robbery, and sentenced to a term of thirty years without anyone taking proper notice of the fact that this same defendant had been diagnosed on more than one occasion, confined and treated (from 1986-88), and medicated intermittently for chronic schizophrenia for an extended period of years. His court-appointed attorneys provided a half-hearted defense, neglecting to thoroughly investigate his medical condition and failing to procure medical records establishing that he suffered from a myriad of psychiatric problems. Thereafter, the attorneys proffered self-serving affidavits once their lackadaisical lawyering was revealed and challenged. Their less-than-lawyer-like attention to duty caused problems for the court-appointed psychologist and psychiatrist. These doctors, relying on inadequate data, filed reports with the court that could best be classified as incomplete, as they ignored essential documentation of his medical history... a basic element and requirement of any competency evaluation, and furthermore overlooked important information easily ascertainable from the defendant’s family members. The state probation officer, in preparing the pre-sentence investigative report, neglected to interview the defendant’s family members, to make a thorough inquiry about Brown’s prior confinement, (i.e., his adjustment to his institution), to investigate the circumstances surrounding his general discharge from the Navy, or his mental health history. Thus, the sentencing judge was less than well-informed of critical information, including the defendant’s long and well-documented history of mental illness, as well as his prolonged period of treatment and confinement in a psychiatric unit during his prior impris-
After the case was remanded to the state court and dismissed upon the motion of the State, the newly assigned judge to the case said to Mr. Brown:

On behalf of the Chief Judge of the Circuit Court of Cook County, the Honorable Timothy Evans, and on behalf of the Presiding Judge of the Criminal Division, I want to extend to you my sincere apology for what has happened to you in the last 12 years on this case.

You did, in fact, as the Seventh Circuit Court of Appeals indicated, receive the very worst that the criminal justice system has to offer. I am shocked and ashamed at the conduct of your lawyers in this case.

The State’s Attorney’s Office also is deserving of criticism in this case too, because it seems to me that it was impossible for the State’s Attorney not to know that the affidavit presented to the Court was perjurious [sic] as the Seventh Circuit again found.

Your lawyers, when given an opportunity to straighten out their incompetent representation of you, chose to lie, and chose to lie to the Court, sending you on a 12-year saga of up and down the court system.

I’m also, Mr. Brown, aware of my obligations under In Re Himel, and I intend to fulfill my obligation in that regard. I can only say to you that I am deeply sorry, I am deeply sorry.

I agree with the Seventh Circuit in its entirety. I think your lawyer who picked up your case the day of your trial and then proceeded to try you for a Class X felony, having met you an hour or so earlier, was in exhibition of gross incompetence.

I extend to you, as I indicated, the apologies of our court system. It offers better when it functions properly. Your lawyers thought more of hiding their incompetency than your freedom.

Good luck to you, Mr. Brown.³

³ Brown v. Sterner, 304 F.3d 677, 680 (7th Cir. 2002).
Story 2

Dino Titone was charged in 1983 with two counts of murder. The two victims were found bound in the trunk of a car shot to death. According to Mr. Titone’s family, the lawyer they hired to represent Dino demanded money from them (in addition to a fee) to give to the judge in order to guarantee that the death penalty would not be imposed. After the money was allegedly given to the judge, the Greylord Scandal broke in Cook County. The judge got nervous, returned the money, convicted Mr. Titone, and sentenced him to death. My then colleague at Northwestern, Ian Ayres, had been appointed by the Illinois Supreme Court to represent Mr. Titone. Together, we appeared in court to file a petition alleging that the judge, before whom we were filing the petition, had extorted money from our client. The case was assigned to another judge, and of course, our petition was dismissed in the trial court. Numerous appeals later, and after the judge was sentenced in federal district court for his corrupt judicial behavior, a very respected trial judge granted Mr. Titone post-conviction relief. The judge stated:

I cannot truly articulate the pain that I have borne in listening to the horrible things that went on in this case in what is supposed to be a courtroom of law and justice. And no amount of procrastination on my part, no amount of reluctance on my part can wipe out the fact that under the circumstances that have been presented here what went on in that courtroom as to Dino Titone was not justice. And Dino Titone did not receive the kind of a fair [sic], impartial trial before a fair, unbiased, impartial judge that his constitutional right as a citizen required.

And I am going to reconsider my prior denial of Titone’s motion that this entire process be wiped out, this entire corrupt process be wiped off the books, and that he be given an opportunity to have his case heard in a courtroom not tainted and besmirched with a corrupt judge and a corrupt defense attorney, but that he be given the kind of a trial that our Constitution promises to every citizen charged with a violation of criminal laws of this state or of the United States. And
I'll write an opinion to that effect.5

**Story 3**

In 2000, Sarah Sanchez6 was charged with murdering her new-born infant. A penniless immigrant from Guatemala whose husband had left her, she gave birth alone in her apartment and nearly bled to death before she was found by a family member. Her infant daughter died before medical help arrived. The State charged that Sarah suffocated her child, claiming that Sarah told the police that she put a blanket over her new-born child's mouth to prevent her family members from hearing the child cry. Sarah had not told her family that she was pregnant. Our expert witnesses countered the State's assertion that Sarah was guilty of murder. A physician familiar with the effects of blood loss on cognitive ability testified that Sarah could not have made an accurate statement about the death of her child. A nationally-known neonatologist testified that the baby died from respiratory failure as the result of a pre-existing infection, not from suffocation. The judge found our client not guilty. In finding Sarah not guilty, the judge stated:

As both sides in their final arguments did state to me that this is a tragedy, and there is nothing short of being a tragedy when a child dies shortly after child birth.7

However, I don't find even from the statement itself that this was preplanned event. My impression of Ms. Sanchez is that if I don't do anything, nothing will happen, and I don't have to worry about it is my impression of what happened here. She was hoping it would all go away . . . But I don't see that there was a planned intent to murdering of the baby as argued in part of the State's argument.

That I then looked at the testimony of the experts. As to Dr. Donoghue, he stated that he relied on the statement itself

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6 Ms. Sanchez's real name has been changed.
in saying that was something outside of the evidence that he had. And based on that, that he found that this was a death by asphyxiation and that the cause of death was homicide.

That Dr. Harris, the neonatologist, testified that he stated this was a respiratory death due to pulmonary disease. That he doesn’t believe that it was an asphyxiation type situation.

That Dr. Areford has stated that he believed it was asphyxiation.

And I had to weigh the testimony of the medical examiners. And Dr. Teas stated that there was something that could not be determined. She was also the medical examiner expert through [sic] the defense stated from the evidence that she saw that there was no way that you could determine what the cause of death was.\(^8\)

So that I did look at the acts, looking at the statement itself, I went back to look at the statement itself. And looking at the statement, I don’t believe even taking [sic] in the best light favorable to the State, and I did take into consideration Dr. Thomma’s testimony that this was woman when she testified would be someone who would be very suggestible. That she would try to avoid conflict. And [t]hat she may had [sic] been based on her loss of blood confused as to what happened. He was stating based on his opinion she may have memory problems as to what occurred during this period of time.

That I could not find at this point that this was a murder – that murder would be the—that this was intentional act or that she even knew what acts were talked about in the statement. It could have been something that was causing great bodily harm.\(^9\)

I remember being—hearing stories of Judge Went and Judge Went in several cases would say that six of them believed that this was a guilty. Six of them believed it was a not guilty. It was his finding that he was hung on this case.

I reworked out the testimony on both sides, and I found that I now understood what Judge Went was talking about . . . .

When I look at the end of Dr. Areford’s, his minimal level

\(^8\) Id. at 10-11.

\(^9\) Id. at 12.
of confidence, looking at Dr. Harris, the neonatologist, and I cannot beyond a reasonable doubt say that the death couldn't have resulted from something that was unconnected to the defendant and what was [sic].

So at this point there will be a finding of not guilty as to the charges.\textsuperscript{10}

\textit{Story 4}

An eleven year old boy was taken to the police department and questioned about the murder of his eighty year-old neighbor. The murder occurred a year before the interrogation. The child confessed to the murder after a relatively brief interrogation. No physical evidence tied the child to the murder, no witnesses saw the child with the victim. The child claimed that he confessed because he was told he could go home if he told the police he was guilty.

At trial, the child was represented by privately retained counsel. No motion to suppress the child's statement was made in the juvenile court trial. The child was convicted of murder. Our clinic took the case on appeal. Appeals failed in the Illinois Appellate and Illinois Supreme Courts.\textsuperscript{11} A federal district court judge granted habeas relief, and the Seventh Circuit affirmed, finding that our client's confession was involuntary:

Although we may not apply a per se rule, youth remains a critical factor for our consideration, and the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession. \textit{Hardaway v. Young}, 302 F.3d 757, 765 (7th Cir. 2002), cert. denied, 538 U.S. 979, 123 S.Ct. 1802, 155 L.Ed.2d 668 (2003).

Here, the circumstances weigh in favor of a determination that Morgan's inculpatory statements were involuntary. When Morgan sat, alone, in the police interrogation room, he

\textsuperscript{10} Id. at 13-15.

\textsuperscript{11} A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004).
was not even old enough to be caddy on a golf course under Illinois law. [FN9] And to repeat, he had no prior experience with the criminal justice system. Detective Cassidy continually challenged Morgan’s statement and accused him of lying, a technique which could easily lead a young boy to “confess” to anything. No friendly adult, moreover, was present during the questioning. [FN10] When a youth officer was brought in, there is no evidence that he did anything to protect Morgan’s rights. As we made clear in Hardaway, “a state-provided youth officer who functions as nothing more than an observer will not be considered a friendly adult presence for purposes of the totality of the circumstances.” Hardaway, 302 F.3d at 765. Finally, after the first inculpatory statement was uttered, Morgan was given a standard version of his rights.

[FN11] Cf. Michael C., 442 U.S. at 726-27, 99 S.Ct. 2560 (a 16-year-old juvenile voluntarily and knowingly waived his Fifth Amendment rights under an interrogation where he had considerable experience with the police and had his Miranda rights explained to him); United States v. Male Juvenile, 121 F.3d 34, 40 (2nd Cir.1997) (confession voluntary after juvenile had rights explained to him by FBI agent). A comparison with Hardaway is relevant. There, “with the gravest misgivings,” we held that a state court’s decision that a confession by a 14-year-old with extensive prior history with the criminal justice system, including 19 arrests, was not involuntary was not unreasonable. Hardaway, 302 F.3d at 759. In contrast, here, Morgan was 3 years younger and inexperienced with the police. Considering these facts, we cannot say the state court’s decision was reasonable. The statements should have been suppressed. At the very least, the admissibility of his statements—on Miranda and voluntariness grounds—should have been vigorously challenged in pretrial motions by his counsel. Not to have done so compels the conclusion that counsel was ineffective.

FN9. See § 20 ILCS 205/2, which sets 13 as the minimum age for caddies in Illinois. Illinois law also severely limits children under the age of 16 from doing almost any kind of work.

FN10. As the Supreme Court has said, a juvenile in police custody needs “the aid of more mature judgment as to the
steps he should take in [his] predicament.... [A]n adult relative... could have given [the juvenile] the protection which his own immaturity could not." Gallegos v. Colorado, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). Of course, the Supreme Court has never required per se the presence of an adult, see Michael C., 442 U.S. at 718, 99 S.Ct. 2560, but it is, however, a significant factor in considering the "totality of the circumstances." In fact, "in marginal cases—when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings—lack of parental or legal advice could tip the balance against admission." United States v. Wilderness, 160 F.3d 1173, 1176 (7th Cir.1998).

FN11. There is no reason to believe that this 11-year-old could understand the inherently abstract concepts of the Miranda rights and what it means to waive them. See, Grisso, "Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis," 68 Calif. L.Rev. 1134, 1141-42, 1153-54, 1160 (1980) (finding that 96 percent of 14-year-olds lack an adequate understanding of the consequences of waiving their rights).


On remand to the Juvenile Court of Cook County, the State declined to prosecute and the case was dismissed.

¹² Id. at 800-01 (as cited on Westlaw).
Story 5

Our Clinic was appointed in 1989 to represent Leroy Orange, a condemned prisoner. Our first interview with Mr. Orange took place in the Menard Correctional Center in Southern Illinois. During this interview, Mr. Orange told us what he had told the trial court: his confession was the product of torture—electro-shock—administered by police officers at Chicago’s Area 2 headquarters. It was also apparent from reading the transcript of Mr. Orange’s trial that his privately retained lawyer had done no investigation into mitigation. The hearing that resulted in the death sentence being imposed took up less than a quarter of a page of transcript. In 1990, when we filed a post-conviction petition alleging that Mr. Orange had been tortured, neither the trial court judge nor the Illinois Supreme Court gave any credence to Mr. Orange’s, in our view, well documented claim that he had been electro-shocked.

From 1990 to the present, working with a team of lawyers who documented at least sixty similar claims of torture at the hands of the same officers involved in Mr. Orange’s case, the following has occurred. The Illinois Supreme Court has ordered hearings in at least three “Area 2” cases, Governor George Ryan pardoned Mr. Orange, Ronald Kitchen, and Stanley Howard based on his conclusion that the statements made by these men were coerced by torture, a special prosecutor has been appointed to assess the claims of torture to determine whether criminal charges should be brought against the police officers involved. The claims brought by these men, along

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with investigations of other cases led by our Center on Wrongful Convictions, result in Governor Ryan’s decision to commute all sentences of prisoners on Illinois’ Death Row. This announcement was made at the Northwestern University School of Law in January of 2003. Since then, Northwestern’s Center on Wrongful Convictions has obtained exonerations for other prisoners\textsuperscript{16} and has been influential in securing the passage of legislation designed to minimize the possibility that wrongful convictions will occur in the future.\textsuperscript{17}

\textit{Story 6}

Four years ago, a fifty-three-year-old Korean woman was working behind the counter of a dry cleaning store on West Roosevelt Road. She and her husband hoped to buy the business. Two men walked in. One demanded money. The other acted as a look-out. The woman turned to get money out of the cash register. One of the men shot her in the back, paralyzing her from the waist down. Our client, an African American male, was arrested a few hours later, allegedly because he was wanted for a previous robbery of the same store. He was given a gunshot residue test (Atomic Absorption, a test no longer used by our crime lab because it has been shown not to be a reliable indicator of the presence of gunshot residue) on his hands. His clothing was tested for gunshot residue using Scanning Electron Microscopy technology. The Atomic Absorption test revealed low levels of barium, antimony, and lead. The state crime lab technician found the results consistent with handling a gun, firing a gun, or being in close proximity to a fired weapon. The Scanning Electron Microscopy test revealed


two gunshot residue particles on the cuff of our client's jacket. Under state crime lab standards, three such particles were required for a finding that gunshot residue was present. The State presented evidence that our client resisted when the police attempted to swab his hands for gunshot residue.

Thirty-six hours after the victim emerged from surgery, investigating officers went to the hospital with photographs of suspects. The investigator said that he showed the victim five photographs. The victim, in various out-of-court and in-court statements, was inconsistent about how many photographs the police showed her. On one occasion, she said that she was shown two to three photographs. In another statement she said that she was shown one photograph. At a pre-trial hearing, she testified that she could not remember how many photos she was shown. But she did remember that she picked out the photograph of our client as the man who shot her. Our client denied the charges. He did not testify at trial. We represented him at trial. A jury found him guilty. We believe that he is innocent, a victim of a mistaken identification and unreliable scientific evidence.

Before trial, we sought leave of the court to call as a witness at trial a nationally known psychologist with expertise regarding the reliability of eye-witness identifications. We sought to bar evidence of the unreliable Atomic Absorption gunshot residue testing evidence. We also sought to call a psychiatrist to testify about the effects of trauma, extensive surgery, and pain medication on the ability of the victim to make a reliable identification. All of these motions were denied except that we were allowed to call an expert to testify about the effects of trauma, surgery, and pain medication on a "hypothetical" person.

We are now preparing a motion for new trial. We are also preparing for sentencing, in a case that will likely result in a substantial sentence. We are considering whether we should represent the defendant on appeal or whether we should recruit new counsel who could review the record and make decisions about which issues to raise on appeal without the baggage of having made decisions regarding the representation
during trial.

The students who participated in this case did so from beginning to end. They interviewed the defendant, conducted the investigation with the assistance of a seasoned investigator, prepared pre-trial motions, put on witnesses at the hearings on the motions, argued the motions, and sat at counsel table during the trial. They became well-versed in the relationship (or lack of it) between conducting and presenting thorough research and winning and losing motions, the relationship (or lack of it) between presenting sensible and compelling legal arguments and success and failure, the incredible tension and hard work involved in trials, the dynamics between lawyers who represent opposing interests, and the awesome power of the jury in our system of justice.

When "crunch time" for trial preparation began, our clinical faculty and our students pulled together. They prepared a pre-trial plan, including final steps in investigation, discovery, and the filing of pre-trial motions. They prepared trial notebooks. They prepared the voir dire, opening statements, witness examinations, closing arguments, and jury instructions. They (students and faculty) were together almost full-time, for three weeks. Our clinical faculty and students who worked on this case put their collective heart and soul into the representation of this client.

The two week trial was a difficult one. Emotions ran high on both sides. The senseless tragedy that befell the victim could not be denied. On the other hand, the deficiencies in identification procedures and reliance upon an outdated scientific test raised serious doubts about the reliability of the State's case against our client.

The jury deliberated for two hours. It then sent a note to the judge that it was deadlocked, 11-1 for conviction. We asked for a mistrial. The motion was denied. Two hours later, the jury asked for a transcript of the victim's testimony. The judge turned to us and asked us for our position on the jury's request. We asked for time to think about it. Finally we agreed. Luckily, we had the transcript, but side bar conferences had to be deleted. While this was being done, the jury came back with
its verdict: guilty on all counts. The jury was out for about six hours.

III. DISCUSSION: CRIMINAL CASES AS LABORATORIES TO SUPPORT EDUCATION, PUBLIC INTEREST ADVOCACY, AND RESEARCH

How do these stories tie together to support the proposition that clinical legal education in the criminal justice system provides, perhaps, the best form of clinical education for law students?

In attempting to answer this question, let me focus on five themes common to each of these cases: 1) caring about the client; 2) demonstrating and developing lawyering skills; 3) demonstrating a model of representation to students and to others engaged in criminal justice, including trial and appellate courts; 4) strategic decision making for the long-haul; and 5) placing representation in social and historical context in order to demonstrate why effective representation of criminal defendants matters to our society.

A. Caring About the Client

In an age when so many decisions regarding representation are made on business rather than professional considerations, representation of criminal defendants in the law school clinical context teaches basic, and perhaps now lost, values of the legal profession. In the old days, lawyers developed personal relationships with clients. Clients trusted lawyers as personal advisors and as friends. While there was a tension between the two roles (lawyer and friend), the conflicts were often resolved by the fact of a long history of close association. Now, many law students, especially those who enter big firm law practice, never see a client; they are in practice to provide support to the senior members who do. A law school clinical program may provide a student with her only opportunity to interview, to represent, and to care about a client from the time she enters law school until she makes partner. Hopefully, the lessons learned from this experience in law school will be remem-
bered long after graduation. This will be especially true if these lessons are learned in the context of the representation of criminal defendants.

Why? Because no client is so disenfranchised and faces more severe consequences as the result of his legal predicament than the indigent criminal defendant. These facts on the one hand make it a challenge to develop a meaningful lawyer-client relationship (a learning experience in itself) and make the relationship more meaningful as it develops. Often, the lawyer (the student lawyer) is the only friend the client has. If the relationship develops to its optimum level, a trust evolves that provides students with the opportunity to appreciate the value of a lawyer's advice and counsel. Because of the tensions that are inevitably involved in this relationship (breakdown of trust on both sides because of tensions over approach, potential and actual results, and the threat of severe adverse consequences to the client), the nature of the relationship and the extent of mutual trust shift, making the relationship dynamic and difficult to anticipate and to manage.

The development of a trust relationship with the client is key in criminal representation. Inevitably, the law students enter into the relationship knowing something about the nature of the legal challenges faced by the client, but knowing far less about the clients expressed and often unexpressed concerns and needs. The same dynamic is in place in any other lawyer-client relationship. Developing trust requires first a demonstration of caring. By this I mean more than an expression of empathy. Caring involves empathy and a demonstration of commitment to advance the client's interests. In the context of criminal representation, a law student must have an ability to communicate, to empathize, and to demonstrate that all that can be done will be done. The latter element of this trust relationship is particularly important in the context of criminal representation.

If law students are not provided with these experiences in law school, they may wait several years after graduation before they are given the authority to manage even complex relationships with clients. If a law student can develop a meaningful
and constructive relationship with a criminal defendant facing trial and imprisonment, it is likely that she will have the skills necessary to establish constructive lawyer-client relationships with even the most sophisticated business client. At a minimum, she will have as the result of her clinical experience in law school, the experience upon which to base continued learning in this most important area. Nearly all in the legal profession agree that the ability to make relationships with clients is key to successful representation and to successful practice.

B. Demonstrating and Developing Lawyering Skills

Because of the nature of the cases taken on by a criminal and post conviction clinical program, the model of representation must be one in which students and clinical faculty collaborate. Common sense dictates that the seriousness of the offense charge determines the extent to which students will play a lead role. For that reason, some would argue that serious criminal and post-conviction cases are not the ideal for clinical education because of the difficulties involved in students playing a lead role. I argue, quite to the contrary, that these cases are the best for providing a good clinical experience precisely because they force clinical faculty and students to work together. It is in this context that clinical faculty can best model lawyering skills and in which the modeling of lawyering skills becomes a credible way of imparting learning. In this setting, the clinical teacher puts her skills on the line, just as the student does, allowing her (the teacher's) skills to be modeled and judged by students.

This “colleague” model of representation in the law school clinical setting also requires that the clinician maintain a high level of skills—client interviewing, legal writing and research, investigation, case planning, organization and prioritizing of work, trial skills—necessary to model effective representation. In this context, the clinical professor’s critiques of student performance are taken to heart. Students are able to see first hand what it takes to provide effective representation in the criminal context.

The involvement of clinical faculty at this level of intensity
in the representation of clients should not diminish in any way the role of the clinician in the academy. In fact, the “colleague” model of supervision should provide clinical faculty with current and valid information about the practice that is relevant and that encourages meaningful critiques of practice informed by actual experience. Without day-to-day experience working with clients in the justice system, it is difficult for faculty to construct meaningful messages about how students should practice.

This model of supervision, necessitated by the nature of the representation, also permits students and faculty to set joint goals and to assess whether those goals have been met. By this I do not mean solely whether the case was won or lost, but whether the preparation and decision making that constituted the representation were effectively implemented. If the outcome was a “win”, what was it about preparation and strategy that dictated the outcome? If the outcome was a “loss” how could preparation and strategy have been modified to achieve a better result? It is impossible for clinical faculty to have this kind of discussion with a student unless there is a joint and deep personal commitment and experience in the representation of a client.

C. Demonstrating a Model of Representation to Students, and to Lawyers and Judges in the Criminal Justice System

The role of law schools is to provide legal education to students and to engage in activities (scholarship, the study of legal systems, continuing education) that will promote the fairness and efficiency of our legal system. Before the advent of new initiatives in clinical legal education that began in the late 1960’s, the latter function of law schools was the task of full-time law teachers who, for the most part, did not practice. With the advent of clinical legal education, law schools have become more engaged in the teaching of practice, and clinical law professors have taken the lead in developing links between legal academia and the practice. For the most part, however, the practicing bar has been well ahead of law faculties in developing new approaches to practice. The leaders in practical initia-
tives to change the practice have, for the most part, been lawyers, not law professors or law schools.

This should change, particularly as the historical paradigm relates to criminal practice. There should be closer collaborations between the practice and the academy. While the private bar will take it upon itself to promote advances in the practice in practice areas in which there is a profit to be made, the same does not hold true in criminal justice. The clients who can afford to pay lawyers are few. The private criminal defense bar is relatively small, with some, but not overpowering influence on the way in which criminal courts and associated agencies operate. As a consequence, our criminal justice system cries out for independent appraisals and assessment. Much of this work is now accomplished admirably by such organizations as the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Organization. Until recently, however, law schools have had little to do with developing initiatives for reform.

Fortunately, this is changing, and it is changing primarily because law school clinical programs have become involved in criminal justice reform initiatives. These initiatives range from programs that involve students in criminal practice in order to encourage them to maintain an interest in the area after graduation, to programs that have taken on issues including the death penalty and wrongful convictions due to systemic failures such as false confessions to bad forensic work. Law school clinical programs have also taken the lead in modeling effective representation in juvenile courts and criminal courts and have provided technical support and training to defender organizations.

The educational benefits that flow to students who participate in such programs are many. Through representation of individual clients, students see the strengths and weaknesses of our justice system first hand. Almost any case could have been prosecuted, defended, and tried in a better fashion. While not every case seems at the beginning to offer the data for reform many individual cases do offer this opportunity, the stories included at the beginning of this article are based upon
cases that at the outset did not appear to hold promise as the basis for reforms. Yet, the range of problem areas brought to light by those cases—the need for thorough preparation, the identification of mental health issues, the elimination of judicial corruption, the admissibility of children's confessions, the reliability of eye-witness identifications—are systemic issues that clinical programs, if properly staffed by experienced lawyers directly engaged in the practice, have the capacity to identify and to address.

D. Strategic Decision Making for the Long Haul

Engagement of students in a criminal defense clinic can give them a chance to see how lawyers can simultaneously represent the interests of an individual client while identifying and addressing issues that affect the interest of a large group of persons similarly situated. Good defender organizations have recognized this fact. They pay attention to the systemic problems that affect the interests of their clients including the quality of police investigations, substance abuse, mental health, and after prison support. But these organizations are already over-taxed with the burden of representing individual clients. Law school clinical programs that involve students in criminal defense work have a particular advantage in this area because they have the luxury of picking and choosing cases.

In some jurisdictions, this very fact creates tension between defender organizations and law school clinical programs. But it need not. In fact, law school criminal clinics working together with defender organizations have the capacity to make significant impact if they work together. Examples of these kinds of collaborations are legion; the careers of Abbe Smith, Barbara Bergman, and Barry Scheck being three of the many examples of clinical teachers who have maintained active practices, who have forged constructive links to the practicing bar, and who have advocated for reform of criminal justice practice. Imagine how much law students learn from these skilled practitioners and effective teachers.

From their work, it can be seen that each of these teachers has identified issues that they feel should be addressed and
has pursued an agenda for "the long haul." Abbe Smith has practiced criminal defense and has written extensively on the ethical and emotional issues that surface in the representation of criminal defendants. Barbara Bergman has taken the lead in juvenile justice reform in New Mexico and nationally. She has also defended criminal and death penalty cases. She is President of the National Association of Criminal Defense Lawyers. Barry Scheck, a former president of the National Association of Criminal Defense Lawyers, heads Cardozo Law School's Innocence Project and is largely responsible for improving access to DNA technology for the wrongfully convicted. There are many clinical faculty who are following the lead of Smith, Bergman, and Scheck. Their activities have been a "win-win" for education, criminal justice reform, and the reputations of their law schools.

E. Placing Representation in Social and Historical Context in Order to Demonstrate Why Effective Representation of Criminal Defendants Matters

Representation of criminal defendants has historical and social meaning in our society. The evolution of the right to counsel is the story of race, of poverty, of class. It is now the story of an ever expanding prison population composed almost entirely of minorities and the poor. Representation of defendants in law school programs should be contextualized, so that students recognize the historical significance of the service they provide as well as the challenges they will face in the future. Law school clinical programs that focus on representation of criminal defendants are particularly well-suited to teaching lessons that will hopefully support a continuing and positive development of human rights in our country and around the world.

Here are some of those lessons:

1. There seems to be consensus in our society that our criminal justice system is as good as they come. It is widely believed that our system provides the fairest trials, has the highest degree of accuracy, and exercises the most restraint in its efforts to protect society. But is the consensus based upon
fact? A clinical program specializing in the representation of criminal defendants will allow future leaders of the bench and bar to make an informed decision about this crucial question.

2. There is consensus within the legal profession and within society at large that we can rely on government through defender organizations to provide adequate defense services. A student involved in a criminal defense clinic will be able to make a judgment about the correctness of that consensus.

3. Little attention is paid to the plight of those in our prisons and jails and to the long-term costs to our society of relying on the incarceration of so many. In part, this is because most in our society have never met a prisoner or have been inside a prison. A criminal defense clinic provides future leaders of the bench and bar with perspectives about the future of our prisons and jails as well as about our sentencing policy.

IV. CONCLUSION

Clinical programs that focus on the representation of criminal defendants can help future leaders of the bench and bar to identify practices that in the future we must change. The practices ripe for change suggested by the six stories at the beginning of this essay include judicial management of criminal dockets to ensure proper preparation of cases, the pervasiveness of mental illness in the criminal justice system, police misconduct, judicial misconduct, the need to evaluate the reliability of certain forms of evidence including confessions and "snitch" testimony, and the reliability of eye-witness identification. In law school clinical programs, teachers and students can "imagine" justice systems that do not have these flaws. If they can imagine more ideal systems, they will also wonder why we do not create them. Some students may do more than wonder. They may act. They may take the lessons learned in the clinic to their life's work. This is what teachers in criminal justice clinics hope for.