The Struggle Between Legal Theory and Practice: One Law Student's Effort to Maintain the "Proper" Balance

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By Fernando M. Pinguelo*

I. INTRODUCTION

In 1881, Oliver Wendell Holmes wrote that the law is not simply logic, but experience.¹ The experience to which Justice Holmes refers embodies my understanding of the reason I decided to complete my legal education with a rigorous clinical experience.² My decision to fill the gap between legal theory and practice through “living scholarship”³ not only improved my

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (quote reads, “It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience.”); see also Oliver Wendell Holmes, Jr., The Use and Meaning Of Law Schools, and Their Methods of Instruction, 20 AM. L. REV. 919, 919 (1886) (“The main part of intellectual education is not the acquisition of facts but learning how to make facts live.”).

2. Recognizing that my legal education thus far had not stimulated my curiosity for a practical application of theoretical principles, I searched for and found that a clinical experience satisfied this longing for certainty. For an understanding of how clinics are designed to overcome the shortcomings found in traditional legal education, see Gary Laser, Significant Curricular Developments: The MacCrate Report and Beyond, in Symposium on the MacCrate Report: Papers from the Midwest Clinical Teachers Conference, 1 CLINICAL L. REV. 425, 426 (Fall 1994) [hereinafter Laser, Significant Curricular Developments].

3. Richard A. Boswell, Theories of Practice: The Integration of Progressive Thought and Action, 43 HASTINGS L.J. 1187, 1194 (1992) [hereinafter Boswell, Theories of Practice].
legal marketability, but more importantly, it established a foundation of legal understanding as I entered the legal profession.

I wrote this article intending to provide law students, law school professors and practitioners with a detailed description of the types of experiences law school clinical programs offer to students, clients and the legal profession. These experiences are distinct from those typically embodied in traditional classroom simulations and lectures. These distinctions should be important enough to place such programs on equal footing with traditional law school curriculum. In fact, I advocate that clinical programs should be a strongly encouraged, if not mandated, part of every law student’s legal education because properly organized programs help build self-confidence, expose students to the realities of legal practice, encourage the development of socially conscious attorneys and provide students with legal dilemmas that cannot be simulated in a classroom.

This article begins with my experiences as a first year law student, continues with my second year course selection process and career planning strategies, and details my revelation as a third year law student searching for a more complete experience and finding that such an experience existed through a criminal

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4. For an in-depth analysis on the bureaucratization of universities, see William Twining, “What Are Law Schools For?” from BLACKSTONE’S TOWER: THE ENGLISH LAW SCHOOL, at 50 (London, 1994) (“The growth of the ‘research university’ in some countries has often lead to the neglect of students by ambitious scholars.”) Ironically for me, this gap manifested itself not by the law school institution, but by market forces insisting on experienced and trained applicants. According to Boston College Law School Office of Admissions, Placement Statistics: Class of 1996, only 42.6% of law students were placed in a large law firm (50 or more attorneys). It seems that smaller law firms expect more in the way of legal experience than larger firms. For an interesting critique of the inadequacies of law school, see, e.g., Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, Jr., Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice, 64 S. CAL. L. REV. 1231, 1245 n.59 (1991) (author recognizing that “there is something perverse about a legal education that forces students to spend additional money and time learning black letter law for the bar examination after three years of education and instruction.”).

5. Supporters of clinical legal education defend clinical teaching methods by arguing that they emphasize the realities of legal practice, the legal system and the legal profession. These practical skills cannot be effectively taught in the traditional law school curriculum. See, e.g., Burger, Some Further Reflections on the Problem Of Adequacy of Trial Counsel, 49 FORDHAM L. REV. 1 (1980); The Place of Skills in Legal Education: 1944 Report of the Committee on Curriculum of the Association of American Law Schools, 45 COLUM. L. REV. 345 (1945).
clinical program. A synopsis of the Criminal Process Program at Boston College Law School is provided before the article takes the form of weekly journal entries describing the experiences and insights of the program. The journal entries trace the problems encountered by a student who is thrust into the forefront of the criminal justice system armed with only two and one-half years of theoretical legal training and a lifetime of common sense. Each developmental process begins with actual experience and ends in reflective evaluation. These are fundamental to any successfully-run clinical program.

My initial exposure to the indoctrination of the legal profession occurred on the first day of law school, where I was confronted with the anxieties associated with relearning how to read, write and think in the then foreign language of law. After enduring the harsh realities of the first year, I found myself joining most of my classmates in pursuing the "big firm track" of legal education without even contemplating other available options and without making an informed decision as to which path best represented my interests. Although the second year of law school offered the intellectual freedom of choosing elective

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7. Gary Bellow, "On Teaching the Teachers: Some Preliminary Reflections on Clinical Education As Methodology," in Clinical Education For the Law Student 414, 379-94 (Council on Legal Education for Professional Responsibility 1973) (during this conference on clinical education, Bellow urged (1) the placement of students in a professional role, (2) the use of student experiences as a focus for instruction, and (3) teaching under the tensions inherent in the teacher-student relationship of clinical practice).

8. The first-year curriculum at Boston College Law School includes the traditional first-year courses in Property, Legal Reasoning, Research and Writing, Civil Procedure, Constitutional Law I, Contracts and Torts. In addition, the curriculum also includes a course entitled Introduction to Lawyering and Professional Responsibility. This course came as a result of the school's belief that issues of professional responsibility and lawyering skills are essential to the proper practice of law. Boston College Law School Admissions Catalogue (1996-97) at 10. The only way I can explain the first-year law school experience is to describe it as being analogous to a child starting kindergarten class. As a five-year old experiences the novelty of the English language and the customs of our society, so too do first-year law students begin to scrape the surface of the seemingly infinite world of American Jurisprudence.

9. For a sample of the daily life of a first-year law student, see SCOTT TUROW, ONE L (New York 1988). Although my experience with Boston College Law School was more humane than Turow's experience at Harvard Law School in the 1970s, his book accurately describes the academic challenges of a legal curriculum.
In addition to the academically challenging second year course load that I selected, I embarked on the infamous "big firm" hunt which had me traveling to cities like Newark, Philadelphia, Portland, and Minneapolis on a weekly basis. Ultimately, I found the right law firm fit for my summer associate experience and I continued to follow a path that seemed almost predetermined.

Consequently, my third year course selection process changed as I reflected on my summer associate experience. Through my summer associate responsibilities, I discovered that I wanted to avoid a legal specialization, and instead focus on a broad-based legal curriculum. Rather than relying on other people’s opinions about which courses I should take, I exercised true academic freedom and selected courses emphasizing more practical skills such as writing and trial practice.

Recognizing the value of a historical understanding of the law and the legal profession, I enrolled in an English Legal History and an American Legal Education course. Through these courses, I looked at the law and the legal profession from a historical perspective. Realizing the importance of legal writing and advocacy skills, I enrolled in advanced legal writing courses and a criminal clinical program. The legal history course coupled with my clinical experience enabled me to conceptualize the law and the profession in a manner that fostered a learned experience. This learned experience extracts the best that theory and practice have to offer and combines them into a unique personal understanding of how the law becomes the vehicle for attaining one’s aspirations.

To gain the most from my clinical experience, I researched clinical scholarship to understand the goals, experiences, and

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10. By “traditional” courses, I am referring to Evidence, Corporations, Criminal Procedure, Taxation I, and Conflicts of Law.

11. See David R. Barnhizer, The Clinical Method of Legal Instruction: Its Theory and Implementation, 30 J. LEGAL EDUC. 67, 71 (1979) (author asserts that the difference between the casebook method of law teaching and the clinical method is that “(t)he Langdellian casebook method uses vicarious legal experiences as its central core of educational material while the clinical method uses direct or ‘first-hand’ legal experience.”). See generally Fernando M. Pinguelo, Laboratory of Ideas: One State’s Successful Attempt to Constitutionally Ensure a Healthier Environment, 4 BUFF. ENVTL. L.J. 269, 277-78 (1997) (example of how law can be used to implement necessary social change).

12. Clinical scholarship describes the scholarly writings of clinicians while my use of the term “traditional scholarship” describes the traditional doctrinal scholarship that
aura associated with such programs. The fruits of this research revealed a broader, more encompassing understanding about the origins of modern clinical programs and the goals and dilemmas facing such programs. For example, I discovered that the last twenty years have been marked by a great tension between those legal educators who believe that coming to a comprehensive understanding of law is best accomplished through thought and those who maintain that it is better acquired through experience. However, these are tensions that have been in existence since the beginning of the legal education movement. Gary Laser revealed at a symposium on the MacCrate Report that "the problems of the legal profession have far more to do with the ways in which lawyers apply what they learned in law school to the uncertainties, uniqueness, and value conflicts that arise in their practice . . . ." My research further revealed that clinical scholarship has not taken advantage of the clinical pro-

dominate the legal academic literature. See Boswell, supra note 3, at 1194, n.8, 10 (although not dispositive, the author's informal survey of legal scholarship led him to conclude that most legal writings fall into these two categories).

13. See id. at 1187 (this tension in legal education manifested itself in the birth of the modern clinical movement). For an insightful view of the development of these tensions, see ROBERT GRANFIELD, American Legal Education and the Making of the Legal Profession, in MAKING ELITE LAWYERS (New York, 1992); ALFRED Z. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA, 210 (1928) (exploring the early law school movement and the tension it created with respect to the apprenticeship method), reprinted in WILLIAM S. HEIN, HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE (1987).

14. Amy M. Colton, Eyes to the Future, Yet Remembering the Past: Reconciling Tradition With the Future of Legal Education, 27 U. MICH. J. L. REF. 963, 964 (1994) (“Criticism of Legal Education is nothing new. Law schools themselves found their genesis in criticism, as dissatisfaction with the colonial system of student apprenticeship grew. In an odd twist of fate, today's cries for reform seem to point back in the direction of apprenticeship, and to stress the need for practical experience in lieu of abstract legal theory.”) (article explores the reason for this phenomenon and the need for a proper balance between theoretical and practical experiences in legal education).


16. Laser, supra note 2 at 425, 434 (Professor Laser not only believes in helping the legal profession through improving the quality of legal education, he is actually focusing on one such effort. He, along with others at Chicago-Kent Law School, has developed a unique clinical program entitled: Litigation and Alternative Dispute Resolution (LADR)). For a cursory review of various types of law school clinics and approaches taken by different law schools, see Selected Summaries of Law School Clinical Programs, 29 CLEV. ST. L. REV. 735, 735-815 (1980) (summarizing the operations of fifty-seven law school clinical programs).
gram's greatest strengths — the daily or weekly experiences and the reflective process associated with understanding the significance and the purpose of those experiences. Noticing this void in legal scholarship, I set out to expose the workings of a clinical program and the inner thoughts with which a participant of such a program struggles.

Through my experience as a participant in the Boston College Law School Criminal Process Clinical, I discovered a wealth of educational opportunities that clinically-based programs offer. As a student criminal defense attorney who represented indigent people, I was able to confront the anxieties associated with being a new attorney in a manner that fostered a learning from those anxieties through reflective means.

17. In other words, the existing legal scholarship does not "serve as a bridge between these important participants [clients, lawyers, and judges] in our sociolegal system." Boswell, supra note 3, at 1192. New clinical scholarship need not supplant the critical theories of the past two decades, but rather it should inform each constituency about the other. Id. at 1194. Scholarship that focuses on what clinicians talk about and experience on a daily basis in their interactions with clients, students, lawyers, judges, social workers, and legislators will enable critics to understand the benefits of clinical programs. Id. Clinical scholarship that willingly addresses and grapples with moral and ethical questions might help to draw links between each of these important constituencies and help develop a mutual understanding that may lead to more nonpartisan efforts toward legal education reform. Id.

18. Through research, I discovered one attempt to express the internal workings of a clinical program from the perspective of a student undergoing the experience. See Robert Rader in Confessions of Guilt: A Clinic Student’s Reflections on Representing Indigent Criminal Defendants, 1 CLINICAL L. REV. 299 (Fall 1994) (Rader attempts to capture what it meant to him to be a criminal defense attorney and whether he was capable of becoming a criminal defense attorney upon graduating from Harvard Law School). However, Rader's focus is geared more to whether he sees himself being able to handle the realities of criminal defense attorneys. In contrast, this article focuses on the weekly experiences of a clinical student and my personal reflections on those experiences. My focus is on the experience itself and how those experiences made me a better (or a worse) attorney. In other words, one need not desire to be a criminal defense attorney to truly appreciate the experience of being one for five months.

19. The clinical program I chose was Criminal Process. See Boston College Law School: Course Selection Handbook (1997-98 Edition) [hereinafter Course Selection Handbook] for complete course description and requirements. Ironically, this seven credit-hour course allots a mere three of those credits to actual clinical work. In reality, I found myself working between ten and fifteen hours per week on my caseload in addition to the required four hours of classroom time per week.
II. THE CRIMINAL PROCESS CLINICAL AT BOSTON COLLEGE LAW SCHOOL

The Criminal Process Clinic at Boston College Law School began in the early 1970's. The program offers students an opportunity to experience actual litigation cases. This one-semester course provides seven credits to a limited number of third year law students who are selected to participate. Half of the student attorneys represent indigent defendants and are supervised by defense attorney supervisors. The remaining students prosecute cases under the auspices of a District Attorney's Office and are guided by a prosecution supervisor.

Student prosecutors are assigned to handle one or more cases each week for 10-12 weeks. Student defense counselors will handle one or more cases during the semester, which will include numerous court appearances. Students handle a wide range of cases primarily in adult court including assault, larcenies, drug offenses, motor vehicle offenses, and burglaries.

The classroom component of the course provides four hours of instruction per week. Part of the class meetings are conducted in the presence of both prosecutor and defense students. The remainder of the class meetings are conducted as separate sessions whereby prosecutor and defense students each focus on their issues. Classes and supervision sessions attempt to pro-

20. Interview with Professor Phyllis Goldfarb, Boston College Professor of Law and Director of the Boston College Law School Criminal Process Clinical, in Newton, MA (March 18, 1997).
21. MASS. SUPREME JUDICIAL CT. R. 3:03 (allowing "(1) A senior law student in an accredited law school . . . who has successfully completed or is enrolled in a course for credit in evidence or trial practice, with the written approval by the dean of such school of his character, legal ability, and training, [to] appear without compensation . . .") (West Publishing 1997); see Course Selection Handbook supra note 20, at 15.
22. The clinical selection process at Boston College Law School requires that students interested in applying for a limited number of class openings fill out an application. In addition to questions about which courses a student has taken (certain courses are a prerequisite), a student is asked to explain why he or she wishes to participate in the program.
24. Id.
26. Id.
27. Id.
28. Id.
29. Id.
vide students with an overview of the local criminal system, on the roles of actors in the system (with special attention focused on the attorney-client relationship and on the prosecution function), and the ethical issues that arise in criminal casework.\textsuperscript{30}

The first two weeks of classroom instruction offer an orientation on Massachusetts criminal law and procedure. The next few weeks focus on trial simulation and exercises based on pending student cases.\textsuperscript{31} Finally, the last phase of classroom instruction focuses on ethics, discrimination, and conflicting values within the criminal justice system. In addition, throughout the course, the students independently appear in court and investigate their cases.\textsuperscript{32}

Students examine criminal justice issues, while learning the habits of the mind and behavior necessary to function effectively in the justice system.\textsuperscript{33} They are expected to have taken (or to concurrently take) Criminal Procedure, Evidence and Trial Practice. In addition, students are advised of the "substantial commitment of time and energy [the class will take,] and it is strongly recommended that interested students speak with students presently or previously enrolled in order to obtain the fullest possible picture of the commitments involved."\textsuperscript{34}

\textsuperscript{30} See \textit{Course Selection Handbook} supra note 20, at 15.

\textsuperscript{31} Id.

\textsuperscript{32} See Frank Bloch, \textit{The Andragogical Basis of Clinical Legal Education}, 35 \textit{VAND. L. REV.} 321, 352 (1982) (author explores the importance of direct client representation and the way in which clinical programs should be organized: "The important point from an andragogical perspective is that students must be able to relate what they are learning from the clinic experience to their own projected future careers. Clinical programs operating under this type of case selection process will capitalize on law students' particular readiness to learn and their orientation toward learning; they will also avoid the danger of becoming involved in a narrow, mechanical course in how to file a divorce or how to defend against a public housing eviction in the local trial court."). This recognition of the importance of clinical training is not a recent phenomenon. See Benjamin F. Butler, \textit{Plan For the Organization of a Law Facility and For a System of Instruction in the Legal Science in the University of the City of New York}, (New York, 1835) (p. 13) (Letter/report to Rev. J.M. Mathews, D.D., Chancellor of the University of the City of New York in compliance with the Chancellor's request for a plan for a law school.) ("Every man knows that the mere reading of books on naval architecture, or nautical science, will never qualify one to build, or to navigate, a ship. In like manner, the most laborious course of Law reading, superadded to the ablest lectures on the theory of the science, will be equally insufficient, without some practical training, to prepare the student for the arduous and responsible labors of the legal profession.").

\textsuperscript{33} See \textit{Course Selection Handbook} supra note 20, at 15.

\textsuperscript{34} Id.
Some of the articulated goals of the clinical program include: (1) examine the criminal justice system and measure it against conceptions of fairness; (2) develop skills in learning from one's own and from others' experiences (with special emphasis on habits of self-evaluation and critique); (3) develop skills of informed, creative, ethical, sensitive, and independent judgment; (4) foster the ability to recognize and address ethical and moral issues that inevitably arise in casework and explore the meaning of professional responsibility in all of these contexts; (5) discover and learn to articulate the theories, values and assumptions by which one is acting and making decisions, and develop habits of examining, elaborating and improving these constructs; (6) foster the ability to integrate knowledge of lawyering and various fields of law developed throughout legal education; (7) stimulate ideas for improving the criminal justice system; and (8) develop adequate levels of competence in the skills of criminal case preparation and presentation to enable the participation in the criminal justice system that facilitates the preceding goals.  

III. THE PRACTICE OF LAW

JOURNAL ENTRY FOR WEEK OF JANUARY 5, 1997: "EXPECTATIONS"

I have been looking forward to participating in this legal clinic because it is an opportunity for me to transform learned legal concepts into legal solutions. More importantly, representing clients and reflecting on my experiences in an academic setting offers me a valuable insight into my ability to apply theoretical concepts to legal problems requiring solutions. These

37. Assistant Professor of Law at Boston College Law School Frank R. Herrmann, S.J. says: "The clinical programs offer students an opportunity not only to practice law, but to meet people they may not have met before. For example, in Criminal Process, students encounter indigent people who are in a time of crisis. This broadens students as individuals and as lawyers. A clinical program is not just a one-time, one-semester experience for students; it can have a ripple effect through their lives." Id. at 20.
Professor Herrmann's belief manifests itself in John Gilmore Childers, graduate of Boston College Law School Class of 1981, Assistant U.S. Attorney, prosecutor in the
detailed journal entries trace my progression and reveal lessons that can only be learned through actual client representation. Through these journal entries, I hope to expose the valuable experiences that a well run clinical program offers to its students.

As a student attorney in this program, I intend to learn as much as possible. I anticipate that the first few weeks will expose me to the details of the criminal justice system\(^3\) — criminal law, procedure, and local rules. This important foundation will help enable me to effectively represent my clients.

I cannot explain exactly why I chose to represent indigent clients instead of prosecuting them. Maybe it is because I have thought of a career as a District Attorney or an Attorney General and I wanted to see what it would be like representing the "other side." Maybe it’s my perception of the injustice that exists within the criminal justice system.\(^4\) Maybe it is my drive to come to the aid of the "underdog" — the desire to help someone who no one seems to want to help.\(^5\) Whatever romantic or utili-

World Trade bombing case, and the Justice Department’s security coordinator for the Summer Olympics. U.S. Attorney Childers claims: "My clinical experience in the Criminal Process course was a memorable time. I worked as a student prosecutor in the Middlesex County D.A.'s office, and even though I didn't get to do anything of real meat, I was trying cases, I was part of the judicial system. It developed in me a love for representing the people as a criminal prosecutor." Id. at 21.  

38. The course is based on Massachusetts Criminal Law and Procedure. Criminal Process Handbook, supra note 6. Each county in Massachusetts has at least one superior court and several district courts. See Massachusetts Law Digest, in MARTINDALE-HUBBELL LAW DIGEST, p. MA-19-21, (1996) [hereinafter Massachusetts Law Digest]. The superior court has jurisdiction to hear all criminal cases from the most serious to the most petty. Id. The district court has concurrent jurisdiction with the superior court over all misdemeanors. Id. Massachusetts defines a felony as any crime punishable by imprisonment in the state prison. MASS. GEN. L. ch. 274, § 1. All other crimes are misdemeanors. See id; Massachusetts Law Digest, at MA-20-21.  

39. MASS. R. CRIM. P. 2 (b)(1) ("'Indigent' means any defendant who is unable to procure counsel with his funds as defined in Supreme Judicial Court Rule 3:10.").  

40. See Keith W. Waters, Law Without Justice, NBA NATIONAL BAR ASSOCIATION MAGAZINE, 1-23 (Mar./Apr. 1996) (detailing the fatal shortcomings of our criminal justice system).  

41. The term originated in the United States. Literally the word means the beaten dog in a fight; figuratively, the word means one who is in a state of inferiority or subjection. The first recorded use of the word was in 1887 in the Daily Tel. 30 Apr. 3/3: "There is an identifiable expression on his face and figure of having been vanquished, or of having succumbed, of having been 'under-dog' as the saying is." THE OXFORD ENGLISH DICTIONARY, Vol. XVIII p. 961 (2d. ed. 1989).  

42. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990) (an excellent example of why criminal defense work is necessary in our society).
tarian reason for my choice (and it is probably the result of a combination of the above reasons) I am now the guide who will take my client through the criminal justice system.\footnote{43} Ironically, I suspect that it will be my clients who will be guiding me through this "maze."\footnote{44}

\textbf{JOURNAL ENTRY FOR WEEK OF JANUARY 12, 1997:}

"INTRODUCTION—THE CRIMINAL JUSTICE SYSTEM"

This week's classroom exercise exposed the class to the criminal process. The week started with mock direct examinations of witnesses. The exercise forced me to rely on my knowledge of evidentiary rules\footnote{45} as well as on my developing attorney instincts. During the examination of a witness, I became frustrated because of my failure to object to certain testimony I knew to be objectionable. For example, when cross-examining the police officer, he characterized my client as "a known car thief." As soon as the witness spoke those words, I knew that I should have objected to the unfair characterization.\footnote{46} However, I failed to object in time and I later rationalized my inaction by explaining that I didn't want to object and bring more attention to the unfair characterization.

The class critique following my performance proved to be quite helpful. One thing I have noticed about this program thus far is the sincere commitment of the professors and the students to improve each individual's lawyering skills. I expect that this collective effort will most certainly reinforce my efforts in developing a healthy balance between knowledge of the law and attorney instinct.\footnote{47} I understand that both of these traits come

\footnote{43.} \footnote{Ironically, my research into legal curriculum led me to an appropriate 19th century student prayer: "Student's Prayer before the Study of Law. 'Almighty God, ... enable me ... to attain such KNOWLEDGE as may qualify me to direct the doubtful, and instruct the ignorant, to prevent wrongs, and terminate contentions; And grant that I may use the knowledge which I shall attain, to thy Glory, and my own salvation ...'." \textit{DAVID HOFFMAN}, \textit{A COURSE OF LEGAL STUDY} (p. 751) (Baltimore, 1836).}

\footnote{44.} \footnote{\textit{See Criminal Process Clinical Handbook, supra note 6} (using the term "maze" to describe the path of a typical criminal case through the Massachusetts District Court System).}


\footnote{46.} \footnote{\textit{Id.}, § 4.4.4 (the only permissible form of character evidence that may be offered by the criminal defendant, or the prosecution in rebuttal is reputation evidence. Citing \textit{Commonwealth v. Roberts}, 378 Mass. 116, 129, 389 N.E.2d 989, 997 (1979); \textit{Commonwealth v. Binkiewicz}, 342 Mass. 740, 755, 175 N.E.2d 473, 484 (1961)).}

\footnote{47.} \footnote{For an interesting example of attorney instinct development, see Randolph N. Jonakait, \textit{Stories, Forensic Science, and Improved Verdicts}, 13 \textit{CARDOZO L. REV.} 343,
with experience, and I look forward to gaining such experience in this program.

I found the assigned reading material for this week to be very useful. Arguing mock bail requests in front of the rest of the class helped me formulate a sense of connection with the client, as well as improving my oral advocacy skills. Watching other students argue bail on behalf of the prosecution and the defendant revealed to me the different approaches used by each side. For example, as a defense attorney, my argument focused on characterizing my client in a favorable manner. I felt comfortable in so doing because it was an exercise in "humanizing" the defendant.

The bail argument is the first opportunity I have to portray my client in the most favorable light. Although my particular class assignment was not difficult, I did pay particular attention to the complexities of other bail arguments. Most vivid in my mind was a case where a student attorney agreed with a judge's (the clinical professor) recommendation of $200 cash bail. After the mock bail argument, the professor warned the class to be very skeptical about a defendant's ability to make bail because if bail is set too high, your client will not be able to pay and he or she will remain incarcerated.

Our trip to the Dorchester District Court was by far the highlight of this week. As soon as I walked through the metal detectors, a person asked me if I was an attorney and whether I knew Attorney Jones. This attorney identification brought to my attention the expectations and the responsibilities that I will have this semester and throughout my legal career.

346-48 (November 1991) (Jonakait reveals his experience with DNA profiling at a time when attorneys and the public knew little or nothing about the science).
48. See id. at 346-47.
50. See HARRY I. SUBIN, ET AL., FEDERAL CRIMINAL PRACTICE ch. 6, § 6.6 AT 82-83 (West 1992) (reviewing the importance of effective bail argument).
51. See James H. Stark, Preliminary Reflections On The Establishment Of a Mediation Clinic, 2 CLINICAL L. REV. 457, 521 n.37 (1996) ("The leading skills texts in both mediation and client interviewing and counseling tend to draw heavily on the work of Carl Rogers and other humanistic psychologists. Rogers' 'person centered' psychology emphasizes the importance of demonstrating empathic understanding and sincere positive regard for the client.") (citations omitted).
52. See id. at 521-22.
As I walked around the courthouse, I absorbed the surroundings. Everyone around me appeared to know what they were doing – where they were going. As I walked into the “First Session,”54 I observed arraignments and the diversity of circumstances and facts associated with each argument made to the court. I watched a public defense attorney argue bail and noticed his failure to focus on the personality of the defendant to the extent we had done in class. This deficiency in argument probably results from being assigned too many cases within a short period of time. I suspect that such time pressures make it almost impossible to delve into every detail of each client’s case.55

I also noticed that the judge presiding over the bail arguments seemed to carefully ponder the arguments made by both attorneys.56 He appeared committed to arriving at a just decision regarding whether to release the defendant on personal recognizance, or to hold the defendant on bail.57 This surprised me because I presumed that heavy caseloads would force judges to make rash and presumptive decisions.58 I was pleasantly surprised by his cautious approach.

Probably the most compelling experience of my court visit was the holding cell tour. The smell and the living conditions of the cells made them undesirable. Cold, stainless-steel toilets offered no privacy or comfort to the individuals held in the cell.

54. Name commonly used for the court session that hears arraignments.
55. See Robert L. Spangenberg & Tessa J. Schwartz, The Indigent Defense Crisis Is Chronic, 9-SUM CRIM. JUST. 13 (1994) (exploring the rising demands on our nation’s criminal justice system and how public resources devoted to criminal justice have not kept pace with these demands over the last few years).
56. Bail determination in Massachusetts is primarily governed by the Bail Reform Act, MASS. GEN. L. ch. 276, § 58, et seq. Massachusetts courts have interpreted the statute to establish the presumption of personal recognizance of the defendant unless such release will not reasonably assure the appearance of the accused before the court. Id.; Commonwealth v. Roukous, 2 Mass. App. Ct. 378, 381 (1974). The bail statute explicitly lists a series of factors a judge “shall” consider in determining appropriate bail. MASS. GEN. L. ch. 276, § 58, et seq. In a case argued in part by a Boston College Law Student from the Criminal Process Clinical, a 1992 amendment to the bail statute that attempted to make the defendant’s dangerousness a consideration in bail was ruled unconstitutional by the Supreme Judicial Court, primarily on due process grounds. Commonwealth v. Aime, 414 Mass. 667 (1993); see Daniel Kanstrom, et al., “Bail,” in Criminal Process Handbook, supra note 6.
57. For an exposé of why courts make bail choices as they do, see ROY B. FLEMMING, PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE OF FELONY BAIL PROCESS, (New York, 1982) (discussing pretrial detention policies and their justifications).
58. Id.
Some would argue that these “criminals” deserve nothing better than this.\(^{59}\) Others sympathize and defend those individuals who are viewed as the least desirable to defend.\(^{60}\)

Having visited the Dorchester holding-cell, I became acutely aware that my theoretical understanding of bail did not reflect this real-life experience. I am now starting to understand the importance of the arraignment and what is meant by the phrase “losing one’s freedom.” Although the clinical professors did emphasize in class that a person’s liberty was at stake when an issue of bail is argued, it was not until I witnessed the circumstances of the holding-cell that I truly understood what they meant.\(^{61}\)

**JOURNAL ENTRY FOR WEEK OF JANUARY 19, 1997:**

“MY FIRST CLIENT”\(^{62}\)

I received my first client, Andre. An initial review of his file left me with a few unanswered questions. First, there were a few discrepancies between the police report and a subsequent interview with the arresting officer regarding the burglarious tools that were confiscated pursuant to his arrest.\(^{63}\) I will need to arrange a meeting with Andre to discuss what occurred prior to his arrest.

Moreover, the client’s file revealed that he was on probation for a Continuance Without a Finding\(^{64}\) ("CWOF") in West...
Roxbury. Concerned about the affect that his most recent arrest would have on that CWOF, and about the fact that he had defaulted on a scheduled probation hearing on January 2, 1997, I conferred with my clinical supervisor regarding this matter. After discussing the situation, I called the court clerk at West Roxbury District Court to verify the status of my client’s prior case. Fortunately for my client, the clerk informed me that Andre’s case was closed.

Clearing Andre’s record was my first official task as a student attorney. I felt confident in my ability to acquire the information I needed from the court clerk and use it to analyze Andre’s case strategy. Going to trial for a possession of burglarious tools charge may have been likely because my client was facing six months in the house of correction for his previous CWOF.

I found this week’s simulated client-counseling classroom exercise to be helpful. As an attorney interviewing the “client” (a student playing the role), I recognized the need to first earn her trust before I could expect her cooperation and openness.65 Earning a client’s trust begins by addressing her concerns.66 Since confidentiality concerned this client, I explained my role and the scope of my representation of her. Moreover, I also noticed her boyfriend’s importance in her life. I recognized that since he was the driver of the motor vehicle, he was probably charged with the same offense and thus was a co-defendant.67 Recognizing this potential conflict of interest, I opted not to advise her to cease communicating with her boyfriend. As an outsider, I calcu-
lated that such a request would violate her sense of security and thus result in a strained relationship between her and me.

Finally, in my effort to connect with "the client," I read *Black Robes, White Justice* by Bruce Wright.\(^6\) The author, a former New York State Supreme Court Justice, argues that our legal system is fundamentally unfair toward African-Americans. This controversial book documents this assertion with many cases drawn from his experience as a lawyer and a judge. The subjects covered include affirmative action, police power, law schools, the United States Constitution, and the deeply ingrained prejudices of many white judges. Bruce Wright's book provided me with another perspective into the legal system and the lives of minority clients.

**Journal Entry for Week of January 26, 1997:**

"arguing arraignments - oh, by the way, you have a pre-trial conference too."

This week I underwent sensations of uncertainty, confusion, and lack of direction during my first experience with arraignments. This was in part due to the fact that the preparation-time between client assignment and argument was limited because defendants appeared before the judge hastily. Indeed, this first experience was coupled with the additional burden of preparing for a pretrial hearing.\(^6\) The burden itself was neither the work nor the hours associated with researching and writing the proper motions and discovery requests. Rather, the burden was the fact that I did not have much of an understanding of which motions to file. I found no systematic method of determining which motion to file and how and when to file it. This lack of clarity encouraged me to just pick the best motions and file them. I admit that I am uncomfortable about this unscientific method of motion picking.

The problem lay in the fact that there was no other way in which to prepare for this experience, other than doing what I did

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\(^6\) Bruce Wright, *Black Robes, White Justice* (Stuart 1987).

\(^6\) The Pretrial Hearing stage of the Massachusetts criminal process gives the criminal defense attorney the opportunity to learn what the Assistant District Attorney has as evidence. It also gives the defense an opportunity to negotiate discovery requests and possibly a plea agreement. *Criminal Process Handbook*, supra note 6. For a detailed explanation of the ethical obligations of a Prosecutor and a Defense attorney, see Mass. Supreme Judicial Ct. R. 3:08 (Prosecution and Defense standards).
and directly engaging in the process.\textsuperscript{70} I suppose the exercises associated with this stage of the criminal trial process will be conducted later in the semester.\textsuperscript{71} Notwithstanding these anxieties, I found the experience to be educational because I now recognize that the practice of law is full of ambiguities and I could never be “taught” everything one needs to know to be a criminal defense attorney.\textsuperscript{72} I am finding that legal education is more of a process—a trial and error experience.\textsuperscript{73}

Finally, my current lack of clarity of the criminal process makes it difficult to develop a strategy for my client. The availability of my clinical supervisor and other clinical students make it easier to share and discuss possible theories for my case. I also understand that this is the first week of the program and that these initial feelings of confusion will dissipate.

I met my client and investigated the crime scene this week. This on-site meeting with my client was much different than my initial meeting with him. Here, I was able to walk through the incident in detail and ask more precise questions. More importantly, this meeting helped me to gage my client’s credibility and veracity as he answered each question. If he hesitated or glossed over the answer to my question, I tended to disbelieve him. This meeting reinforced my initial reaction to push his case forward to the next level. After walking through the incident with my client and having him explain everything, I believe he may be innocent.\textsuperscript{74}

\textbf{JOURNAL ENTRY FOR WEEK OF FEBRUARY 2, 1997: “ARRAIGNMENTS – MONDAY MORNING CHAOS.”}

\textsuperscript{70} See William P. Quigley, \textit{Introduction To Clinical Teaching For the New Clinical Law Professor: A View From the First Floor}, 28 AKRON L. REV. 463, 478 (1995) ("Only when the student confronts her own lack of knowledge and begins to grapple with the hesitation and awkwardness of setting out to blaze her own trail, will real self-learning begin.").

\textsuperscript{71} Id. at 475 ("If the student’s experience in clinic results in merely the transmission of certain skills from teacher to student in the course of representing people in legal matters, [this] is not actually clinical education.").

\textsuperscript{72} See Ann Juergens, \textit{Using the MacCrate Report to Strengthen Live-Client Clinics}, 1 CLINICAL L. REV. 411, 417 (1994) ("The educational content of live-client clinics . . . is characterized by its creative chaos and lack of boundaries.").


\textsuperscript{74} I later found out that my client may in fact have been guilty and that this early assumption was probably incorrect.
Monday's arraignments were both challenging and personally rewarding because I realize that I am learning more and more about the criminal process. All four of the clients assigned to me on Monday were placed in the holding cell. The chaos of the lock-up on that day was particularly confusing because the cells were filled and clients were being transported into the cells only after suspects were moved out of the cell. Despite this initial confusion of locating my clients, I discovered that each client offered me a personal experience I will never forget—one of which deserves special mention in this week's journal entry.

The police arrested Rose for disorderly conduct. 75 The Assistant District Attorney did not challenge my suggestion to have Rose's charge dismissed. I approached Assistant District Attorney Alice before arraignment and asked her to dismiss the charge upon my client's completion of community service. 76 However, Rose's probation record indicated that she defaulted on a court appearance in Roxbury District Court and that the court had issued a warrant for her arrest. When I brought this situation to my client's attention, she insisted that the default was incorrect and that she was scheduled to appear in court next month for that charge. Three other clients waiting for my representation prevented me from verifying her claim. Thereafter, the judge called Rose and dismissed her disorderly charge 77 in exchange for community service. However, the judge insisted on holding Rose for the outstanding warrant in Roxbury.

Although I argued for my client's release and explained to the judge the reason behind the default (as told to me by my client) he, nonetheless, insisted on holding her. It was only after her arraignment that I realized I should have asked the court to confer with Roxbury to verify the validity of the outstanding warrant. Nevertheless, I asked the client's fiancé to go to Roxbury District Court and explain to them the default discrepancy. Fortunately, he returned with the necessary information to remedy the misunderstanding; and the client was subsequently released. This lesson taught me that a client may be telling the truth, and it is his or her attorney's responsibility to

75. The charge of Disorderly Person is pursuant to MASS. GEN. L. ch. 272, § 53.
77. MASS. GEN. L. ch. 272, § 53.
verify their story. Actually, it was not the fact that I did not believe her claim, but I was unsure of how, or if, I could ask the court to verify her story. Next time I will ask the court to do so without hesitation.

This week’s arraignments dovetailed well with the small group discussion on Thursday. The main focus of the discussion was William Simon’s essay: *Lawyer Advice and Client Autonomy: The Mrs. Jones Case*. The issue of paternalism in representing clients was very clear to me during my arraignment days in the Dorchester District Court. The concept of paternalism derives from the interaction between a parent and a child. More specifically, the term refers to a child who is completely vulnerable and dependent upon the support of a parent. In many ways, my relationship with the four clients who were held in Dorchester this week was paternalistic. Being incarcerated is probably one of the most vulnerable situations in which an adult will find himself or herself. This apparent dependency overshadows the attorney-client relationship and I believe it remains as the relationship continues. Of course, there are varying degrees of paternalism and an attorney can consciously increase or decrease the dependency of the client.

Although I do not condone an attorney’s conscious effort to increase the client’s dependency, I do recognize a client’s “need” to know what his or her attorney thinks about a particular legal strategy decision. I believe that it is my duty to render an objective legal opinion to my client based on the circumstances of the case. However, this open exchange should be qualified and all other options and their potential consequences should also be disclosed.

Finally, the case of the client charged with possession of burglarious tools ended. Although my role in this case was limited, I learned a great deal from it. First, I learned that if you

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79. *Id.* at 220-25
80. *See* Gary Bellow, *Steady Work: A Practitioner’s Reflection On Political Lawyering*, 31 HARV. C.R.-C.L.L. REV. 297, 301(1996) (“Yet, the practice of law always involves exercising power. Exercising power always involves systemic consequences, even if the systemic impact is a product of what appear to be unrelated cases pursued individually over time.”).
are arguing a Motion To Suppress, you MUST have an affidavit of facts signed by the defendant himself. It is not acceptable for the attorney to attest to the facts of the suppression motion because the attorney was not present when the evidence was gathered. Second, I learned that some judges play "hard-ball" and will not issue a CWOF if the defendant has had one in the past. In this case, the client wound up pleading guilty and was placed on probation. And third, the Boy Scout motto reigns true in the legal world: "Be Prepared."  

Time and time again, I'm realizing that you cannot simply teach these experiences or read about them in a book. One must experience what it is like to be a criminal defense attorney in order for one to have the lasting impression needed to be a skilled trial attorney. Feelings of uncertainty, confusion, and sheer inexperience can only be overcome when one is forced to make quick judgment calls and quick decisions. The real learning begins when you are confronted with the consequences of those hasty decisions. Sometimes the consequences are positive, and sometimes they are negative. It is the thought process of sorting out all this data that brings lasting lessons to a student involved in a clinical program. I find myself reevaluating my performance and rethinking better ways to make informed decisions.

JOURNAL ENTRY FOR WEEK OF FEBRUARY 9, 1997:  
"PRESSURE – HOW DO I KEEP UP WITH THE CONFUSION?"

I dealt with some very interesting issues this week and I am left with two cases that have been continued to March 31 and April 24. I am also following up on two other cases. The first involves a client who is having problems with his probation record because his brother, who is currently serving a 40-year sentence, used my client's name on various occasions. I am helping him deal with the Probation Office bureaucracy in order to clear his record of his brother's wrongdoings. The second follow-up case involves a client who was committed to Shattuck, a detoxification hospital. Her commitment is a condition of her pretrial probation. I am checking to see whether or not she successfully completes her probation.

82. WILLIAM "GREEN BAR BILL" HILLCOURT, THE OFFICIAL BOY SCOUT HANDBOOK 42 (9th ed. 1984).
Before I get into the two cases that are continued for a Pre-trial Hearing, I'd like to write about a few dilemmas I experienced this week. Monday's arraignments were hectic because of the sheer number of people involved and the lengthy probation records that each defendant seemed to have. This context produced some tense moments between me and the Assistant District Attorneys.

The first tense moment involved my client Dornel, who was summoned to appear in court for Threatening to Commit a Crime (he allegedly told his landlord that he was going to "kick his f--ing a--"). Because of the high volume of cases being arraigned, defendants were being shuffled between courtrooms. When Dornel's case was finally called, the court clerk switched the case to the Second Session (one of three courtrooms in Dorchester District Court). Dornel was visibly upset because he told me that the Assistant District Attorney (who I later found out was not the Assistant District Attorney but the court clerk) told him that given the nature of his charge, it would probably be dismissed. He was concerned with switching courtrooms because he thought he would lose this "promise."

Based on the "promise" made to my client, I told Assistant District Attorney Adam that a deal was promised to my client by the Assistant District Attorney in the First Session. I informed Adam of the promised dismissal as we waited for the judge to return. Adam was confused and the judge arrived before we were able to clarify the situation. As the judge addressed us, Adam loosely agreed with the dismissal. Fortunately, the judge refused to adopt our agreed dismissal because of my client's lengthy 10-page probation record. As it turned out, Adam's agreement to dismiss Dornel's case was based on false information because the person who "promised" the dismissal was not an Assistant District Attorney, but rather a court clerk who merely gave his opinion, without the benefit of all the facts, on what would probably happen to Dornel's case. This false pretense could have posed some very serious ethical problems even though I too was unclear about what had transpired. I never intended to mislead Adam. Notwithstanding my intentions,

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83. MASS. GEN. L. ch. 275, §§ 2, 4.
84. MASS. R. CT., CANONS OF ETHICS, DR 1-102(A)(4) (West 1997) ("A lawyer shall not: Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").
this episode strained my relations with Adam. I noticed a drastic attitude change in him. Before this episode, we cordially greeted each other and we even spoke about law school and what it was like being an attorney. After the episode, he wouldn't even make eye contact with me as we passed each other in the hallway.

Reflecting on what had happened, I concluded that the real problem derived from the fact that I was not familiar with the people who surrounded the judge and the roles they played. For example, it wasn't until recently that I realized that someone who I thought was an Assistant District Attorney was in fact a victim/witness advocate. Also, there were times when I thought that the court clerks were Assistant District Attorneys.

Another misunderstanding also occurred on Monday. I represented David, a 17-year old charged with Malicious Destruction of Property valued over $250. The defendant arrived in court at 8:30 a.m. with his mother and his girlfriend (the person whose property he damaged). Since his case was not heard until 5:45 p.m., I had the opportunity to spend some time with him. After speaking with David throughout the day, I found out that the incident in question resulted from his drunkenness and that he had an alcohol problem. He indicated that he wanted some institutional help with his alcohol problem. He recognized his problem and he asked for my help. Apparently, every time he drinks he becomes uncontrollable.

David's case was finally called before the judge and Assistant District Attorney Adam offered to dismiss the charge upon completion of 50 hours of community service. Since I was busy representing other clients at the time, my supervisor represented my client with little information about how I was planning to negotiate the outcome. Recognizing the plea offered by Adam to be reasonable, my supervisor accepted the dismissal on the condition that David complete 50 hours of community service. As soon as my cases settled, I rushed over to the Second Session to check on David's case. To my dismay, the agreement made was not what my client and I had discussed. Concerned about the outcome, I asked the court clerk to recall the case. Now, you need to understand that my request was made at 5:30 p.m. and that most of the court business is completed by 5:00 p.m. So in other words, the court clerk was ready to tear my

85. MASS. GEN. L. ch. 266, § 127.
head off when I asked her to recall a "settled" case. I argued my case before the judge, apologized for the confusion, and recommended that my client's case be dismissed upon completion of an alcohol rehabilitation program and 25 hours of community service. Despite the havoc this episode caused, the judge accepted the offer and David had access to institutional support.

Adam could not understand why I argued against his "lenient" recommendation and instead asked for a "harsher" condition of 25 hours of community service and alcohol detoxification review. In fact, I sensed that he was quite upset about this episode. I can only speculate, but I think that I may have made him look bad — who ever heard of an Assistant District Attorney asking for a less harsh plea than a defense attorney. However, the fact of the matter was that my sentence was better for David in the long run.

I understand that the long-term purpose of this plea agreement may often conflict with goals of immediate representation. However, this case was different and I had my client's consent to go with the "harsher" agreement.

The following day, Adam would not even look at me. This really perplexed me because I didn't think that what had happened the previous day warranted such a drastic response. Concerned about this feeling of resentment on his part, I decided to approach him and apologize for any misunderstandings that may have occurred the previous day. I wanted to do this partly because I did not want him to have a negative impression of Boston College Law School students and also because I felt uncomfortable knowing that he probably questioned my integrity. I felt obligated to explain to him my version of what had happened, and at the very least convey to him my true intentions and the circumstances which tainted them.

Fortunately, he received me openly (after avoiding me all morning), and offered me the opportunity to explain what had happened. He told me he understood and that everything was fine. Although I sensed some lingering bitterness on his part, I think I successfully diffused the tension.

The above-mentioned experiences in human interaction provide me with an insightful look into the adversarial system. No matter how friendly you may think you are with your adversary, that relationship can be severely damaged when perceptions of dishonesty are realized. Fortunately, I noticed and addressed
the misunderstanding before it anchored itself. I believe that an attorney, despite the fact that he or she has his or her clients to worry about, must be aware of his or her relationships with the other system players if he or she is to successfully represent his or her clients. 86 Any negative feelings between you and the Assistant District Attorney (or any adversary for that matter) can have an adverse effect on your future clients. 87

Finally, I am still struggling with the daunting task of distinguishing between truthful clients and deceptive clients. 88 Making such a determination does not involve a scientific method. Experience is the only possible way in which one can develop a sixth sense about these things. I can't wait until I can rely on my instinct with regard to such matters. In the meantime, I must live and learn (and take notes on what happens with each and every client).

Currently, I have two Pre-Trial Hearings scheduled in late March and April. I am researching the law on each individual charge. I want to get a clear sense of what the status of the law is and what the elements of the charges are before I interview the defendants and any witnesses.

JOURNAL ENTRY FOR WEEK OF FEBRUARY 16, 1997: "FOLLOWING THROUGH – RESEARCHING THE LAW AND GETTING THE FACTS STRAIGHT."

I spent this week familiarizing myself with the facts of the two continued cases and the law associated with the respective charges. The first pre-trial hearing is scheduled for March 31, 1997. I am representing Dornel. He is charged with Threatening to Commit a Crime. 89 This charge is a misdemeanor and carries with it a maximum six-month sentence in the house of correc-

86. See Uphoff, supra note 77, at 113 n.150 (recognizing that a criminal defense attorney must be mindful that damaging his/her relationship with a prosecutor may adversely affect future negotiations).

87. See Bellow, supra note 81, at 305 (author commenting on how surprised his clinical students are with the degree to which "effective advocacy depends on knowledge of, involvement with, and empathy for one's adversaries. Lawyers continually nurture reputation, relationships, and insider knowledge.").

88. Uphoff, supra note 77, at 125 n.208 ("Indeed, as an experienced criminal defense lawyer knows, while the client deserves the benefit of any doubt as well as counsel's non-judgmental attitude, counsel should be wary of blindly accepting a defendant's assertions of fact as true.") (citation omitted).

89. MASS. GEN. L. ch. 275, § 2.
This is a civilian complaint issued by James, my client’s landlord.

After speaking with Dornel about this matter, he informed me that he had an argument with his landlord regarding his apartment. He said that it was the landlord who initially threatened to throw him out with all of his belongings. He also claimed that his landlord had both of Dornel’s cars towed (which I later verified). It was after these incidents that Dornel threatened to “kick his [landlord’s] a--.”

According to my research of chapter 275 § 2, a “threat” requires (1) expression of intention; (2) ability in circumstances; and (3) justified apprehension. In other words, a reasonable person would believe that the defendant had the ability to cause harm. I believe the critical issue is whether the Commonwealth can prove its burden of showing that my client actually said what is alleged. Assuming that what he told me is true, I think a legitimate argument could be made that it was the landlord who was threatening the defendant, and this complaint was just one more way to harass him. In thinking about my closing argument, my theme would be “landlord retaliation.” The landlord knows that my client has a history of criminal activity so it would be easier for the landlord to file a complaint as a method of retaliation.

The case of the Commonwealth v. Jamal seems on its face to be a bit more complicated. Jamal is charged with Receiving a Stolen Motor Vehicle. This charge is a felony and carries with it a maximum 2 1/2-year sentence in the house of correction or a 15-year maximum sentence in the state prison, a fine of not more than $15,000, or both a fine and imprisonment. A pre-trial hearing for this case is scheduled for April 24, 1997.

I have not had the opportunity to speak with Jamal about his case because during his arraignment, the court docket was so backlogged that defendants were being arraigned quickly. Within the span of exactly two minutes, I had to find out a little about his background, and argue his bail status. Bail was set at $100 and he was carted away. He gave me the name and phone number of a friend who could bail him out and he asked if I

90. Id.
91. Id.
92. MASS. GEN. L. ch. 266, § 28.
93. Id.
would call him. I am in the process of obtaining the police report. There is a co-defendant in this case and the attorney assigned to him is Ms. Eileen. I am amazed at just how much reliance is placed on a criminal defense attorney. More often than not, I am finding myself in a position where I am the last resort, the last bit of hope for these indigent defendants. I take this responsibility seriously.

There are three elements that the Commonwealth must prove with respect to the above charge. The first is that the defendant was in a position of trust and was entrusted with possession of a motor vehicle which belonged to another. Secondly, the defendant, as a result of the first element, converted the property to his own use without the owner's consent. Thirdly, the defendant took the motor vehicle with intent to deprive the owner of the motor vehicle permanently.  

To properly formulate a strategy, I will need to speak with the client, possibly the co-defendant (of course with the permission of his attorney), and the victim involved. I will also need to discuss this case with my supervisor to further assess the circumstances of the case.

JOURNAL ENTRY FOR WEEK OF MARCH 2, 1997:
"OVERCOMING AN OBSTACLE — THE UNCOOPERATIVE CLIENT."

I was alarmed to find that my client, Linda, failed to comply with the conditions of her pretrial probation. Linda was charged with larceny (stealing a refrigerator). Because Linda had outstanding warrants, she was taken into custody. When I first met Ms. Linda in the Dorchester District Court holding cell, she was visibly drugged (I later found out that she had taken a hit of heroin the day before).

As I interviewed Linda in the holding cell, she expressed her irritation with my line of questioning which related to the events that led to her incarceration. Given her visibly drugged state of mind, my questioning also addressed her apparent drug

94. See MASS. GEN. L. ch. 266, § 28.
95. MASS. R. CT., CANONS OF ETHICS, DR 7-104(A) (West 1997) ("During the course of his representation of a client, a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer . . . unless he has the prior consent of the lawyer representing such other party . . . ").
96. MASS. GEN. L. ch. 277, § 58A.
problem. After a heated exchange, she cursed and yelled when I asked if she had a drug problem and whether she wanted institutional assistance, her case was called. I asked her if she would be willing to undergo a detoxification program and she agreed as long as she would be released from custody. I explained to her that because she had a history of failing to appear in court, she would probably be facing a high bail. I suggested to her that I could argue on her behalf about her willingness to change her drug habit and enter a detoxification program. She agreed to my suggestion (she would have probably agreed to anything as long as she was released).

As soon as Linda appeared in the courtroom, the judge immediately addressed her apparent drug problem. After my arguments were considered, the judge agreed to my pretrial probation recommendation that would require Linda to successfully complete a 30-day detoxification program at a local hospital. Upon successful completion of her probation, her larceny charge would be dismissed.97

About three weeks later, I learned that Linda escaped from the hospital only after two days of treatment. This outcome troubles me because I thought I was doing the right thing when I advocated for her liberty. I knew that she would have been held at a high bail (or even without bail) because of her high default rate.98 Therefore, the only logical conclusion (so I thought) would be to suggest to the court her willingness to enter into a 30-day inpatient detoxification program. Although I still feel that the circumstances warranted the decision I made at the time, I cannot help but wonder whether I was right in assuming that she would comply with the terms of her probation. I'm not even sure if this should have been a consideration.

I am currently trying to locate her to remind her of her Pre-Trial Probation hearing which will be held on Tuesday, March 11. I expect that if she fails to appear, another warrant will be issued for her arrest. Even if she does appear,99 she will most likely be incarcerated anyway because she has outstanding warrants.

97. Ironically, her charge would have been dismissed anyway because it was the result of her being caught in the middle of two feuding landlords.
98. See supra note 56.
99. I later found that Ms. Linda failed to appear at her pretrial hearing on March 11, 1997. A warrant was issued for her arrest.
I have an interesting experience to share. This week, I had the occasion to speak with someone at the hospital where Linda was being treated. Although this supervisor was not supposed to disclose any information about patients over the telephone, she noticed my sincere concern for my client and basically told me what I needed to know—whether or not my client complied with the 30-day treatment. The hospital supervisor spoke to me at length about the type of treatment that was being administered and she showed a genuine concern for her patient. This was gratifying because I have often wondered about what happens once the client enters such a program. I must admit that it is comforting to know that caring individuals, like the person I spoke to on the phone, do exist out there in this "system" of justice. Moreover, to make my request for this medical status "official," I faxed the hospital supervisor a letter explaining my role as Linda's attorney and that I needed the information to adequately prepare her defense.

Finally, I am still working on the Dornel and Jamal cases. With these cases, I am about to file a series of motions and subpoenas.

**Journal Entry for Week of March 9, 1997: "Mid-Semester Reflection on the Criminal Process Clinical."**

This week's journal entry is a reflective exercise on the progression of the Criminal Process course. My role as participant and self-proclaimed observer of the program gives me, I think, a unique insight into the program. As I undergo the clinical process of the program, I am simultaneously researching and reading works written on clinical programs and their inception, progression, current status in law schools, and future role in the legal curriculum.¹⁰⁰

As I continue the program, I often find myself asking: What are the goals and objectives of the program? I guess this acute sensitivity to the program as a whole stems from my research in this area.¹⁰¹ Many of the articles I have read address the goals that particular programs have.¹⁰² Although students can easily identify the goals of practical skills experience that one finds in

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¹⁰⁰. See supra notes 2-7, 12, 14-15, 17 and 33.
¹⁰¹. Id.
¹⁰². Id.
clinical programs, I find myself looking for the loftier and more theoretical goals behind the program. In a school that is as committed to the public interest as is Boston College Law School, I would find it helpful to be exposed to the values that drive the program and its instructors. At this point, I'm unsure when this revelation would be appropriate (at the beginning or the end of the program). In fact, I'm not sure if such communication can or should be expressed. If a student independently inquires about the values of the program, then it would be appropriate to discuss the values as interpreted by that particular instructor.

That brings me to yet another point: Is it actually possible to communicate the values of such a program? It seems hard enough to get attorneys and professors to agree on anything, let alone values and goals. However, this fact should not preclude instructors from, at the very least, establishing fundamental goals for the program and communicating those goals to students. In that way, students will be prepared for what is to come throughout the semester. It is simply not enough to express the expectations of the course through logistical means (i.e., weekly journal requirements, class attendance, court appearance, etc.) although I do find those means helpful. I believe that it would be helpful to explain the basic purpose of the course and what each individual student should be doing to add to the experience. Students should have some involvement in the program's progression.

One particular aspect that comes to mind as I discuss my expectations is the role of the supervisor in relation to my role as a student undergoing an experiential program. It seems to me that the boundaries are unclear as to how much reliance can be placed upon a supervisor's insight into particular legal issues. As a student who has virtually no experience in criminal justice, I found myself frustrated with particular situations. It was unclear to me whether I should be asking my supervisor about what is usually done in particular circumstances or whether I am just supposed to determine that on my own. There are benefits to both approaches, and I often found myself relying on my own common sense in handling the situation with little or no guidance. I prefer this result, in many ways. However, I think it

103. See supra notes 2-7, 12, 14-15, 17 and 33.
would be helpful to know for certain which approach the program intends to take. This way, a student like myself would spend less time pondering whether or not to ask a "stupid" question and spend more time on finding an answer (whether it be on my own or with the help of a supervisor).

Journal Entry for Week of March 16, 1997: "Ethics in the Legal Profession and in the Criminal Justice System."

Although the focus of this journal entry is to explore ethical quagmires that I have experienced while a criminal defense attorney, I am compelled to address another issue. I will discuss the articles that were handed out during our last class and relate them to my own personal experiences. Although my experiences as a criminal defense attorney thus far have not yielded the extraordinary events that are found in "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, by Stanley Z. Fisher,\textsuperscript{104} I do have an experience which may represent the type of misinformation provided in the police reports that this article explores.\textsuperscript{105} Before I describe the event, I must reiterate Professor Fisher's insight into the power of the police report.\textsuperscript{106} Through their reports, police officers have control over the construction and presentation of the facts for a case, and all the other members of the criminal justice system must work from that framework of facts as constructed by the police.\textsuperscript{107}

The reality of this fact came to bear as I represented a client in an arraignment earlier in the semester. Jones was arrested as he parked his van in front of his house. He was charged with driving without a vehicle registration\textsuperscript{108} and possession of a stolen motor vehicle.\textsuperscript{109} Just prior to being arrested, he had borrowed the van (it was a public school vehicle loaned to him by a friend who was an athletic director) to pick up his friend who lived on Blue Hill Avenue in Dorchester. Unbeknownst to him, he was caught in the middle of a drug-sting operation. Under-


\textsuperscript{105} Id. at 4-5.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} In violation of MASS. GEN. L. ch. 90, § 11.

\textsuperscript{109} MASS. GEN. L. ch. 266, § 28.
cover police officers watched Jones get out of his van and ring his friend's doorbell. His friend's girlfriend came to the door and informed him that her boyfriend was not home. This prompted Jones to get back into the van and head home.

Undercover officers followed Jones from Dorchester to his home in Mattapan. As soon as Jones parked the van in front of his house, the officers pulled behind him and walked up to the van. According to the police report, the officers asked him what he was doing and then they asked him to get out of the van. The police report also stated that one officer searched the van (after receiving Jones' consent), while the other officer asked Jones to open his mouth. The report continued to say that Jones complied. However, the report then went on to describe that when the officer asked Jones to lift his tongue, "he closed his mouth and then swallowed before lifting his tongue." Although the police report concluded that no drugs were found, I later found out what the significance of this "swallowing" meant.

After striking up a conversation with a local public defender at the Dorchester District Court, I described to him this odd observation made by the police officer filing the report. (It was odd to me at the time because I did not recognize its significance.) He informed me that the "swallowing" represented a drug dealer or user hiding the drugs from the police by ingesting the substance. Moreover, I recalled that this was something the judge and the Assistant District Attorney recognized at first glance of the police report during Jones' arraignment.

Although this is mere speculation, the experienced attorney who offered his insight about the event suspected that the undercover officers were upset with the fact that they were unable to make a drug arrest in their stake-out of the area. Therefore, they needed to justify their misjudgment in some way by concocting this occurrence.

Along with the tremendous amount of power that a police officer has, the Assistant District Attorney has at least as much power in their role. This week's guest speaker explained that the Assistant District Attorney has the power to pursue criminal complaints. I appreciated the openness of the speaker when he detailed his own experiences as an Assistant District Attorney. With what little exposure I have had thus far, I am beginning to recognize the over-zealous nature of some Assistant District Attorneys.
I appreciated the guest speaker’s awareness of the duty with which Assistant District Attorneys are expected to fulfill. In fact, this is the first time I have really appreciated this reality.

**JOURNAL ENTRY FOR WEEK OF MARCH 23, 1997: “ETHICS IN THE PROFESSION — PART II.”**

This week’s classroom discussion focused on the issue of ethics in preparing and presenting a case. The class discussion regarding this issue particularly intrigued me because of the diverging opinions of the prosecution and defense. I continue to be amazed at how the clinical participants and their views seem to be divided along the lines of their respective roles as prosecutors and criminal defense attorneys. I find myself doing the same thing. I seem to always look at any given set of facts from the eyes of the defendant. I can certainly understand similar tendencies from the student prosecutors.

I am finding that one of the greatest assets of the Criminal Process Program is the group discussions regarding our individual and collective clinical experiences. The views are as divergent as the sides we represent. This educational forum exposes the competing interests of prosecutors and defense attorneys.

An article handed to us by the clinical instructor sparked this week’s class debate. The article, written by Harry I. Subin, is entitled *The Criminal Lawyer’s “Different Mission”: Reflections on the ‘Right’ to Present a False Case.*\(^{110}\) The basic issue of the article is whether it should be the “duty” of a criminal defense attorney to take affirmative steps to subvert the government’s case when he or she knows that a particular witness is telling the truth.\(^{111}\) Subin argues that a criminal defense attorney can perform his or her duty fully even if not permitted to act in this way, and that if stricter limits on truth were instituted, the rights of persons accused of crimes would be generally enhanced.\(^{112}\)

The classroom discussion began with the question: What is the role of the adversary system? Is it to seek truth, or justice, or both?\(^{113}\) This question interests students of the law because it so

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110. 1 GEO. J. LEGAL ETHICS 125 (1987).
111. *Id.* at 125-27.
112. *Id.*
fundamental to the practice of law. It also seems to be a question with no apparent right answer. I suppose that the answer to these questions develop within each individual attorney over time and experience. The only problem is that when one engages in the practice of law, it is rare that one is able to find the time and/or the forum to ponder these fundamental questions. The best answer requires both experience and reflection on that experience.

The class discussion brought to the forefront some very interesting testimony by a class instructor. He shared two experiences whereby he was absolutely convinced that his client had committed the alleged crimes only to later find his conclusion wrong. Such an experience challenges the very basic premise that truth is objective. In many ways, it can be subjective in that when someone is given the authority to determine truth, such a determination can and is often tainted by such factors as prejudice, personal experiences and even subconscious animosity towards individuals of a particular background. This being the case, it would seem to be unjust to have an attorney (one person) determine the truth. The way the system is currently organized, it is a group of individuals (a jury) who are assigned that duty. Although not flawless, it seems that this truth finding formula may be the most accurate.

Another intriguing aspect of the class discussion was the concern over an attorney making a determination as to guilt or innocence too early on in the representative process. Such a premature determination poses the serious risk that an attorney will fail to adequately investigate the case. If such a conclusion is made too early on in the criminal process, one may stop asking probing questions of witnesses, victims, etc. This conduct produces an unjust result because the attorney may be failing to properly adjudicate the case to the detriment of his or her client, not to mention that there is the very likely possibility that premature assessment is incorrect. Not only does this result usurp the role of the jury, but it runs contrary to our notions of democracy and the presumption of innocence.

and provocative discussion of the problematic aspects of the criminal justice scheme. The author proposes an abandonment of formalism, which he believes impedes finding truth, and a return to the pursuit of justice).
Our ethical class discussions also led me to consider my roles as an attorney and a human being. Although I am convinced those roles are one and the same, I often wonder about the possibility of separating personal values from professional values. Since ethical rules are so often written in vague and ambiguous terms, one needs a moral compass to navigate through this ambiguous world of theoretical ethics in order to properly determine the mode of action.

JOURNAL ENTRY FOR WEEK OF MARCH 30, 1997:
“PREPARING FOR TRIAL — THE PRETRIAL HEARING.”

I experienced my first pretrial hearing this week. My client, Dornel, was charged with threatening to commit a crime.114 Dornel’s landlord filed the complaint against my client. Apparently, verbal threats were hurled on both sides of a dispute, and the landlord issued a complaint two days later.

Given the nature of my client’s charge, I thought the case would have been dismissed from the beginning. My client was summoned on the charge and he appeared as requested. However, the judge refused to allow a dismissal because of my client’s fifteen-page criminal record. So, a pre-trial hearing was set for this week. I was concerned about the case because although it seemed very simple and likely to be dismissed, my client did have a long record, and if he lost at trial, he would have probably received the full six-month sentence in the house of correction. My concerns were reaffirmed when I spoke with a couple of Assistant District Attorney friends who shared the same concern about my client’s criminal record.

Something troubled me about the case. It seemed as if the landlord harassed my client. Dornel informed me that the landlord poorly maintained his apartment. I pursued this possibility and called the Boston Housing Authority. I also conducted a Boston Globe and Boston Herald search to see if the landlord had a reputation for being a “slum-lord.” My newspaper search resulted in no leads and I experienced difficulty in contacting the Housing Authority. Finally, I connected with a person at the Boston Housing Authority. My past experience in dealing with state bureaucracies taught me that the best way to avoid getting channeled around was to identify the person I speak with (by

114. MASS. GEN. L. ch. 275, §§ 2, 4.
just asking his or her name) and ask for that same person in subsequent phone conversations.

When I identified Ms. Chetta at the Housing Authority, I found an over-worked city employee who was covering for people who called in sick that morning. I knew this would pose a problem because she would be so caught up in her day-to-day activities that she would not have time to process my special request. I politely asked her if she would furnish me with the housing records of my client’s landlord. She said she would and I told her I would fax a written request right away. In the written request I made sure to acknowledge her hard work and my appreciation for her effort to furnish me with the requested materials. (I find that government employees are rarely acknowledged for their hard work.) One and one-half weeks later, I received all the materials I needed.

My hunch about Dornel’s case was right. The landlord has been cited for numerous violations and my client was one of the complainants. What is so interesting about this scenario is that my client never told me about the housing complaints he filed against his landlord. I have been thinking about this fact ever since my investigation ended. I wonder whether my client remained silent about this because he did not think to tell me of the fact or because of insufficient questioning on my part. I suppose it was a little bit of both.

Armed with the valuable information I uncovered, I was ready to argue on behalf of my client. My client’s case was eventually called, and to my surprise, the Assistant District Attorney read two additional charges to the judge and two other witnesses were expected to arrive and support the charges. I quickly collected my thoughts and remembered that those charges sounded familiar. Fortunately, the Assistant District Attorney asked for a second-call because the victims had not yet arrived. I looked through my client’s probation record and found that the surprise charges had already been dismissed. When recess was called, I went up to the Assistant District Attorney and informed her about this fact. I then attempted to negotiate a dismissal on behalf of my client.

This negotiation, occurring in the noisy hallway of the Dorchester District Court had a very interesting dynamic. In my effort to negotiate with the Assistant District Attorney, I portrayed my client as the victim. I was careful not to disclose too
much information about my research, but I did mention that the landlord had numerous Housing Code violations. The Assistant District Attorney snapped at me and was offended by my attempt to convince her of my client's innocence. I guess she was insulted by the fact that I thought that she would accept that argument. I, of course, was serious about the argument but I decided to acknowledge her concern and continue with the negotiation. Finally, she agreed to dismiss the charge.

The case was eventually called for a second time. The landlord failed to show, and the Assistant District Attorney informed the judge that she wished to dismiss the case. The judge, on the other hand, was not convinced and asked me for an argument. I proceeded to explain the circumstances of my client's case and the results of my investigations. The theme of my argument was retaliation. I really got the sense that she was expecting a very good argument in order for her to agree to the dismissal. I emphasized the major themes of my argument, retaliation and the landlord-tenant relationship. Finally she agreed to dismiss.

Right after the argument, I had the opportunity to discuss my performance with my supervisor. I found this to be an invaluable opportunity. How often does an attorney get to discuss his or her performance in a constructive manner? I found her insight helpful, and she had recommended a few approaches that would have enhanced my argument. She identified for me that it was the "landlord-tenant" relationship that probably sealed the argument. She explained the concerns the judge had and she also discussed my negotiation tactic with the Assistant District Attorney. She had recommended that instead of arguing from the point of view of my client, I should instead argue from the facts and the research I uncovered. She explained that an argument based on facts is more credible in a negotiation with an Assistant District Attorney. She pointed out that Assistant District Attorneys rarely listen to a defendant's version of what happened in a particular situation. So the best argument is one made from facts and the law. I found this very insightful and potentially helpful in future negotiations.

In my experience with the clinic thus far, probably the most important aspect is the critique and suggestions that accompany the courtroom experience. I cannot imagine a better opportunity to learn the proper way of lawyering. In addition, the experien-
JOURNAL ENTRY FOR WEEK OF APRIL 6, 1997:
"ISSUES OF RACE IN THE CRIMINAL JUSTICE SYSTEM."

This week's guest speaker, a judge of the Massachusetts Superior Court, provided the class with an insight into race and its impact on the criminal justice system. The judge shared with the class his experiences in the law and his ideas on how the criminal justice system carries with it both subtle and explicit forms of racism and other stereotypes. The class discussion began with jury selection and its important role in the criminal system. He spoke about how his experience has revealed to him that juries do not properly represent a cross-section of the community. Specifically, he described a case over which he presided where there were only two African-American males on the jury. He explained how he actively ensured that both African-American males remained on the jury by assigning one the role of foreman and by removing the other from the lottery system whereby alternates were selected. He then asked both parties associated with the criminal case to challenge his actions if they saw fit. Neither party did so.

The judge then posed the question to the class: "Would you have challenged my action if you were trying the case?" Surprisingly, students in the class failed to object. Eventually, the issue of reverse racism was raised. In other words, by doing what he did, isn't the judge perpetuating the exact use of stereotypes he is claiming to eradicate? Isn't the judge in essence saying that whites are incapable of fairly judging the guilt or innocence of a black defendant? These were the types of concerns that were voiced by the class.

A female student in the class challenged those concerns in a very interesting way. She said that such arguments will always be made as we try to eradicate racism. However, the problem


lies in the fact that if we sit back and act as if stereotypes do not exist, we actually wind-up perpetuating their subtle existence. She went on to say that just because it is so difficult to pinpoint racism in an empirical way, that does not mean that it does not exist. In fact, she continued, the reality of the matter indicates that individuals who undergo infringements of basic freedoms are the only ones who truly understand the double standard.

Interestingly, the clinical student supported her argument by sharing an experience she had with her black eighteen-year-old client whom she had been expecting to appear at a pretrial hearing. He never appeared because as he was walking to the courthouse, two white police officers pulled up next to him in their police cruiser and accused him of truancy. The officers refused to believe that he had a court appearance, and arrested him on a default warrant (which was later found to be incorrect). The student explained how distraught this individual was by this occurrence. She continued, “although it is difficult to prove racism, it seems that you just know it exists especially when you are targeted.”

JOURNAL ENTRY FOR WEEK OF APRIL 13, 1997:
“ON THE ROAD TO TRIAL.”

Having been recently assigned as co-counsel in the case of Commonwealth v. Deidra, I find myself once again thrust into a case which is in the middle of the criminal justice process. The trial date is set for May 14, 1997, and we are in the investigation and legal research stage of our case. At this late stage of my clinical experience, I find myself more comfortable with getting a case in the middle of its development. In fact, this seems to be a common occurrence in the legal profession. Prior to taking this clinical, I had been exposed only to theoretical legal practice whereby I was given a set of predetermined facts and I was expected to focus on one or two particular issues. Since this clinical experience began, I have learned that such a luxury will end once I enter the legal profession. My experience has revealed to me that there is no determined set of facts in trial work. For example, the facts of this case seem to change on a daily basis.

The client in this case is charged with Threatening to Commit Bodily Harm and Malicious Destruction of Property in excess of $250. Briefly, the facts are that the defendant has been accused by her ex-boyfriend’s girlfriend of threatening to cause bodily harm and of maliciously destroying the victim’s car. According to the victim, she heard a loud noise coming from her backyard; she ran to look out her window, and she claims to have seen the defendant vandalize the car and flee. The victim called 911, described the incident and identified the defendant to the 911 operator (we have subpoenaed the tapes and they verify the victim’s claim). Subsequently, the police arrived, took the victim’s statements and checked the surrounding area. The victim then filed a civilian complaint which led to a summons being issued against my client.

Our investigation included interviews with the client, the victim and the police. To our dismay, the more we pursued the facts of the case, the more our investigations seemed to support the victim’s contention and refute many of our client’s claims. However, the client was adamant about her innocence.

In our effort to bring the reality of her case to a level where she would better understand why the Commonwealth had a strong case against her, we invited her to testify in front of our class. The mock direct and cross examinations were videotaped. Co-counsel and I decided to make the simulation as real-life as possible, so we arranged to have the examination conducted in our school’s mock-trial classroom. By simulating the examination in a courtroom setting with all the anxieties that are associated with being “put on the stand,” we reasoned that she would be able to make an informed decision as to the viability of her case. The mock examination of our client in front of a “jury” (fellow classmates) would also give our client (and us) an insight into her testimony and demeanor at her future trial.

Our client arrived as we had prearranged, and she was visibly apprehensive about what we were having her do. We reassured her that the confidentiality of the case was maintained (none of the students were aware of the case particulars) and that this exercise was beneficial in helping her make an informed decision as to how we would proceed. Although our as-

118. MASS. GEN. L. ch. 275, § 2, 4.
119. MASS. GEN. L. ch. 266, § 127.
surance did not eliminate her anxiety, she did recognize the benefit of this exercise.

Co-counsel began by conducting his direct examination. He first addressed a few background issues, like where she lives, family life, and employment. He then proceeded to discuss the incident and where she was when the vandalism occurred. Her response was that she went home after work to care for her children. Her four children were the sole witnesses to her whereabouts. The student attorney successfully tried to emphasize her motherly qualities. The witness performed very well on direct. The class critique supported this view. Students felt comfortable with her demeanor and they were attracted to her motherly qualities. In fact, students had recommended that co-counsel spend more time developing her character and background (like education, work habits etc.). All in all, the class critique was very positive.

Next, it was my turn to conduct the cross-examination. Knowing very well the weaknesses of my client’s case, I began by focusing the jury’s attention on the time line of events. I began by restating that she left work at about 3:10 p.m. and then she walked to the train station. Next, I reestablished that she boarded her train at about 3:25 p.m. and that she arrived at her stop at about 4:00 p.m. Finally, I emphasized the fact that it takes her about 15 minutes to walk from the train station to her home. I emphasized her claim that she was home by 4:15 p.m. I then proceeded to ask her if she knew where the victim lived and whether she knew that the victim’s home was a mere three miles from her home. I then asked her if she was familiar with the Ashmont train stop, which was a mere five stops beyond the stop she normally took to go home. I asked her if she knew that the victim lived a couple of blocks from the Ashmont train stop. I then asked her if she knew that the victim called 911 at exactly 4:40 p.m. to notify police that she heard and saw her car being vandalized by the defendant.

My strategy continued as I focused the jurors’ attention on motive. I asked her if she knew that her ex-boyfriend was dating the victim. I asked her if she still loved him. I asked her if she knew about his other ex-girlfriends including the ones he had children with (she too has a child with him). I asked her if any of them had been accused of the crime. I asked her about an an-
swearing machine recording her verbal threat: "I am going to kick [the victim's] f—ing a—."

My cross-examination ended with my client's four-page criminal record. We anticipated that if we decided to have her testify, the prosecution would be able to refer to her record for credibility purposes. It became apparent that my client was uncomfortable with my line of questioning, and her demeanor changed dramatically as compared to her testimony on direct. My yes/no questions were answered with long, detailed answers. She was unsuccessfully trying to explain away all the negative inferences that my questions elicited.

After her cross-examination was complete, we opted not to have the class critique her cross-examination performance. We felt that a closed-door exchange with both student attorneys and the clinical advisor would be the most effective forum to weigh her options. The videotape would be an important tool to reassess her performance.

What I found most remarkable about this experience was the fact that despite my client's four-page criminal record, this was the very first time she took the stand and was cross-examined. Every one of her convictions was the result of a plea bargain. What often happens in the criminal process is that once a defendant begins the long and arduous process, they are almost always willing to settle the matter in any way possible just so they do not have to waste their time waiting for the criminal justice system to handle their case. 120

This is exactly what had happened with my client. She was facing at least a one-year incarceration because of her past criminal record. If it were not for the victim's recommendation of restitution, the prosecution could have very well pursued the charge to trial. I wonder whether the courtroom drama and all of its anxieties with regard to the verdict would be a good lesson to learn early on in a defendant's life.

JOURNAL ENTRY FOR WEEK OF APRIL 20, 1997:
BEHIND CLOSED DOORS.

The most insightful occurrence I've had throughout this clinical experience happened when my clinical supervisor, cocounsel and I met with Ms. Deidra last week regarding her

120. See supra note 56.
mock-trial performance. The mock-trial enabled us to objectively assess her case and advise her of her right to go to trial and weigh the strengths and weaknesses of her case. The discussion began with my supervisor asking my client what she thought about her performance, with particular focus on her cross-examination.\footnote{For an informative exploration of the attorney-client relationship and the rendering of legal advice, see William H. Simon, \textit{Lawyer Advice And Client Autonomy: Mrs. Jones's Case}, 50 MD. L. REV. 213 (1990) (author explores the notion of client autonomy ("informed consent" model) and advocates a contrary approach whereby he argues that good practice often requires lawyers to make judgments about clients' best interests and to influence clients to adopt those judgments ("best interest" model)).}

As we spoke to the client about her performance, we played the videotape frame-by-frame to show her our concerns about some of her answers on cross-examination. We pointed out how she answered yes/no questions with long confusing answers. We discussed our concerns with her credibility and jury perception. After playing each videotaped frame, we discussed her answers and their potentially adverse consequence on her trial. We explained that the trial will hinge on her testimony and the eyewitness testimony of the victim. Any credibility mistake could cost her the trial, at least one year in prison, and one year away from her four children, ages seven, ten, eleven and seventeen.

The clinical supervisor led the discussion. We found that the client's decision wavered between going to trial and accepting the plea bargained dismissal upon payment of restitution. I must say that the clinical supervisor handled the client skillfully. She honestly and directly gave her opinion as to the viability of my client's case while at the same time she spoke about the client's case as if we were going to trial (which we were prepared to do because most legal research and investigation were complete). We spoke about our trial strategy and how we would have to adjust our strategy given her poor cross-examination performance (given her performance, we would recommend that she not testify at trial). The instructor gave the client examples of criminal cases that she defended in the past and she offered her opinion about the possible case outcome in Ms. Deidra's case.

We also highlighted each option with its respective consequence. The client stood to lose a lot if she went to trial. There was direct evidence of her guilt, she had a record and she faced...
one year in prison. In particular, this was a problem because she had four children to care for. On the other hand, since this was a civilian complaint, the victim's attorney was offering a dismissal upon payment of restitution.

It was clear that Ms. Deidra could not pay $1,000 in restitution. But, it sure seemed like the best way to go. There was the possibility of setting up a long-term payment plan. We also thought about asking her ex-boyfriend to pay for all or part of the restitution. Finally, Ms. Deidra's case resulted in her accepting a dismissal upon payment of restitution.

IV. Conclusion

My purpose in detailing my experiences in this clinical program is to give readers an insight into the thoughts, expectations, insecurities, questions, tensions, and triumphs of a student undergoing an experiential learning process. I sincerely hope I have fulfilled what I had set out to do. Probably my greatest accomplishment as a student in this clinical program was that I learned about myself. I learned that this is a subject that can only be taught through experience and reflection on that experience. I think I have become a better person (and attorney) by having undergone this process.