Actual Innocents: Considerations in Selecting Cases for a New Innocence Project

Daniel S. Medwed
Northeastern University, d.medwed@neu.edu

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Daniel S. Medwed*

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* Instructor of Law, Brooklyn Law School. B.A., Yale College, 1991; J.D., Harvard Law School, 1995. I am indebted to William Hellerstein, my comrade in operating the Second Look Program Clinic at Brooklyn Law School, as well as to Stacy Caplow, Linda Feldman, Claire Kelly, Dana Brakman Reiser, and Paul Schwartz, all of whom provided thoughtful comments on earlier drafts of this Article and support throughout the writing process. This Article was also influenced by discussions I had with other Brooklyn colleagues, participants in the Clinical Theory Workshop at New York Law School at which I presented a version of this paper, and members of the Innocence Network, including Ursula Bentele, Adele Bernhard, Steve Ellman, Ted Janger, Minna Kotkin, Marcia Levy, and Jayne Ressler. I would also like to thank Dean Joan Wexler for supporting this project through the Brooklyn Law School Summer Research Stipend Program, two Brooklyn law students, Katherine Goldberg ('04) and Kristin Harrison ('03), for their invaluable assistance, and Bobbi Bullock for her administrative talents. Finally, I am grateful to my friends and family, especially my wife Sharissa Jones.
A few years ago, the New York Times published a cartoon with the caption “Free a Death Row Inmate! It’s fun! It’s cheap! It’s educational! It’s shockingly easy!,” a spoof on the wave of student-assisted exonerations of prisoners based on post-conviction deoxyribonucleic acid (DNA) testing. Beneath the caption, a sequence of drawings depicted children combing for prospective clients through advertisements in glossy magazines and raising funds through bake sales. Tongue-in-cheek aside, this cartoon reflects the notion that working on behalf of an innocent prisoner has gripped the popular imagination. As demonstrated by the recent proliferation of law school innocence projects designed to assist wrongfully convicted inmates, there is also a sense that such work can be “educational” and, depending on the nature of the specific enterprise, not necessarily cost-prohibitive (though perhaps not “cheap”). Moreover, the growing demand for

2. Id.
3. For purposes of this Article, I will define a law school innocence project as an in-house law school clinic, or an organization somehow affiliated with a law school, that is devoted to the post-conviction representation of prisoners on claims of actual innocence or wrongful conviction. There are currently more than twenty-five of these projects across the country. See Jan Stiglitz et al., The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education, 38 CAL. W. L. REV. 413, 415 n.4 (2002); see also Univ. of Wisconsin Law School Innocence Project, Innocence Projects 2001 (unpublished report, on file with author) [hereinafter Wisconsin Report]. This Article will not examine other types of innocence projects, such as those associated with journalism schools. For a discussion of the role that journalists might play in this area, see Rob Warden, The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions, 70 UMKC L. Rev. 803 (2002).
4. Projects that focus on DNA claims could bear significant expenses considering that DNA analysis may cost $2,500 to $5,000 per case. See Teresa Johnson, Orange County’s Innocence Project, ORANGE COUNTY L., Dec. 2001, 18, at 19. Al-
these projects may signify that students perceive the work to be fulfilling and “fun,” on some level, a chance to work in criminal defense without the moral ambiguity many people may associate with representing factually guilty clients.\(^5\)

Nevertheless, “shockingly easy” is a phrase not often linked to innocence projects. First, even if an inmate’s case involves biological evidence that could be appropriate for DNA testing, the evidence is often difficult to locate and many states do not have statutes that expressly provide for post-conviction testing.\(^6\) Second, in the vast majority of criminal cases, there was never any biological evidence to begin with and, thus, nothing is available for testing. In such cases, prisoners typically must not only find newly discovered evidence that proves their innocence through more taxing means—interviewing trial witnesses, searching for exculpatory information withheld by the prosecution, and canvassing neighborhoods—but may also face onerous time restrictions in the pursuit of post-conviction remedies.\(^7\) In juris-

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5. See Eva S. Nilsen, The Criminal Defense Lawyer’s Reliance on Bias and Prejudice, 8 Geo. J. Legal Ethics 1, 36-37 (1994) (noting that whereas guilt or innocence should be irrelevant to a criminal defense lawyer given the obligations of zealous advocacy, “it would be simplistic to say that the student’s perception of the client’s guilt or innocence has no effect on what she does or how she feels”). Abbe Smith has explored the dichotomy between a criminal defense attorney’s relationship to the truth in situations where her client is almost surely guilty and those in which she is quite possibly innocent. In the former, defense lawyers seldom dwell on the truth because “most criminal defendants are not innocent, and the truth is usually not helpful to the defense,” yet in the latter “there is a stunning change of perspective . . . Suddenly, there is nothing more important than the truth . . .” Abbe Smith, Defending the Innocent, 32 Conn. L. Rev. 485, 511-12 (2000).


7. Post-conviction remedies could be available at the federal and/or state level depending on the nature of the claim and the jurisdiction. Pursuing a remedy through filing a federal habeas corpus petition may be a possibility in some actual innocence cases, but procedural requirements implemented by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) may pose formidable barriers. See 28 U.S.C.A. §§ 2244, 2254 (2001). Moreover, the United States Supreme Court has held that a claim of actual innocence does not comprise a ground for federal habeas corpus relief without the existence of an independent constitutional violation. Herrera v. Collins, 506 U.S. 390 (1993); see also Arleen Anderson, Responding to the Challenge of Actual Innocence Claims after Herrera v.
dictions where statutes of limitations do not pose insurmountable obstacles, pursuing an innocence claim years after a conviction has occurred still means grappling with foggy memories and long-dormant investigative leads.

Given the wide array of law school cultures and clinical resources, it is no surprise that innocence projects can and do take many different forms. Several schools have largely student-run volunteer projects with minimal faculty supervision, while others have full-fledged in-house clinics directed by faculty members. Yet another law school model places students at a local public defender organization and fuses that externship placement with an in-house classroom component. Programs also vary in the kinds of cases they handle; for exam-
ple, some clinics are restricted to claims only involving DNA testing or those stemming from a particular geographic region. Despite the differences between law school innocence projects, however, they tend to share a common emphasis on (1) seeking the release of prisoners whom members of the project believe to be innocent of the crimes for which they have been convicted and for whom there are few other alternatives for legal representation, while (2) simultaneously providing a first-rate educational experience for students.

The prospect of taking on an innocence case can be alarming for students and faculty alike. And the reality that handling such a case is never easy and, in fact, may require years of hard work dictates that case selection is of critical importance. Indeed, this Article examines one of the main challenges facing any newly formed law school innocence project: finding suitable cases. First, this Article addresses the practical considerations inherent in case selection. How does the project define its intake criteria and tap into a source of potential clients? Should the project look at all types of claims or just those with distinct characteristics? What is the precise procedure for developing a pool of inmate candidates and evaluating inquiries? What role do ethical concerns play in selecting cases? Next, this Article explores the pedagogical issues related to law school innocence projects and assesses whether these projects are appropriate vehicles to serve the

10. See Wisconsin Report, supra note 3; Stiglitz et al., supra note 3, at 421-30.
11. Stiglitz and his colleagues note that “inmates have no right to counsel beyond the initial appellate process,” and the United States Supreme Court has explicitly found that indigent criminal defendants lack the right to counsel for state habeas corpus proceedings. Stiglitz et al., supra note 3, at 414.
12. See id. at 421, 430. The Texas Innocence Network (TIN) at the University of Houston Law Center, for example, declares that[the twin aims of the TIN are pedagogical and service-oriented. From a pedagogic standpoint, the TIN gives students the opportunity to conduct non-scripted factual investigations. . . . From a service standpoint, the TIN provides a resource for inmates who did not commit the crime for which they were sentenced.](http://www.law.uh.edu/faculty/ddow2/dpage2/undercon3.html (last updated Nov. 26, 2002)).
13. See Suni, supra note 4, at 924 (“All projects are heavily engaged in the screening of cases, a time-consuming but necessary task to attempt to separate the most compelling claims of actual innocence from the many claims that are made. This screening is an essential function for projects given the limited resources available for investigating and litigating actual innocence claims.”).
14. This Article will not address some of the matters, including funding, that would tend to precede the innocence project case selection process. See Stiglitz et al., supra note 3, at 421 (“Creating a new program within a law school typically begins with discussions regarding such topics as course content, credit hours, number of students involved in [the] program, faculty-student ratio, teaching resources, student selection, grades, and physical plant needs.”); see also SHEILA MARTIN BERRY, So You WANT TO START AN INNOCENCE PROJECT, at http://www.truthinjustice.org/ipstartup.htm (last visited Jan. 10, 2003).
goals of clinical legal education—specifically, what are the educational benefits of involving students in case selection? I suggest that, in light of the vagaries of the experience in litigating innocence cases, active involvement in the case selection process itself may provide the most meaningful learning opportunity for students enrolled in an innocence project.

Since the Second Look Program Clinic at Brooklyn Law School, the innocence project that William Hellerstein and I formed in March 2001,15 is still in its infancy, I am unable to offer definitive answers to many of the questions I raise here. Over time, I hope that law school innocence projects will continue to analyze these considerations and create procedures that weave as seamless and effective a blend of them as possible.

II. PRACTICAL CONSIDERATIONS

A newly formed law school innocence project needs clients and, therefore, its founders must focus on the creation of case selection criteria and procedures that will yield matters for students. Much has been written recently about the hallmarks of wrongful convictions—erroneous eyewitness identifications, police and prosecutorial misconduct, false confessions, ineffective assistance of counsel, racial bias, dubious forensic testing methodologies ("junk science"), and occasionally fraudulent conduct by forensic scientists themselves.16 In recognition of the wide-ranging causes of wrongful convictions and their drastic consequences, innocence projects are justifiably wary of imposing too many prerequisites for the cases they handle. Even so, prescribing some restrictions can help a project expedite its case selection process and convey its specific mission to the public. Due to meager resources, innocence projects must find the most promising cases in an efficient manner and not waste inordinate time investigating baseless claims.17 Accordingly, it is essential to craft a project's parameters at

15. William E. Hellerstein serves as the Director of our Program. He is a Professor of Law at Brooklyn Law School and a seasoned criminal defense lawyer, having spent sixteen years as the Attorney-in-Charge of the Criminal Appeals Bureau of the Legal Aid Society of New York City. I am the Assistant Director of the clinic and worked at the Criminal Appeals Bureau as Associate Appellate Counsel prior to joining the Brooklyn Law School faculty. For a discussion of the issues related to staffing a new clinic, see Philip G. Schrag, Constructing a Clinic, 3 CLINICAL L. REV. 175, 186-90 (1996).
17. Ellen Suni has noted that the scarcity of resources "impacts innocence projects on a daily basis." Suni, supra note 4, at 924 n.15; see also Paul R. Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. REV. 1101, 1103 (1990) (stating that legal services organizations generally operate based on a model of "scarcity" under which they must devote significant attention to screening cases so as to ration their legal services).
the outset to ensure that the steady stream of cases the clinic so desper-ately seeks does not evolve into a flood and that adequate sifting mechanisms are in place to uncover the claims with the most merit.

A. Defining Your Scope: Determining What Kinds of Cases You Want

When William Hellerstein and I formed the Second Look Program as an in-house clinic, we envisioned that the viability of the project hinged upon—more than anything else—identifying worthwhile cases for our students. To that end, we devoted the summer of 2001 to finding cases in preparation for our first class in the fall. Before embarking on this venture, however, we needed a roadmap for selecting cases.

Early on, we decided to handle only claims of actual innocence by inmates whose convictions occurred in New York State, whose appellate remedies had been exhausted, and whose claims would not involve DNA testing. These criteria emerged primarily for practical reasons. First, both of us had experience practicing New York criminal law and limited exposure to criminal practice in other jurisdictions. Second, by restricting our services to claims of actual

18. Our clinic has three main components: a biweekly seminar that examines the substantive and procedural law involved in the investigation and litigation of innocence cases in New York State, work by student teams on cases we have accepted for representation, and the screening of prisoner inquiries by individual students. Loath to ask students to commit to a full year in an untried clinic during the 2001-2002 academic year, we structured it as a one semester course for three credits (one academic and two clinical) with the choice to enroll for a second semester, an option that all eight of our students exercised. In addition to the biweekly seminar, we divided our students into four teams of two, and assigned a preselected case to each team and a handful of inmate inquiries to each student for evaluation. We formally met with each team once a week to discuss the progress of their cases and had many impromptu sessions with individual students. Since this Article concerns the case selection process, I will not delve into the other aspects of our course in depth, except to note that the three components are symbiotic and have a dynamic inter-relationship. Interesting issues that arise during the case selection process have altered the course of our seminar discussions and prompted us to change our assigned readings. For a brief description of the Second Look Program Clinic, see http://www.brooklaw.edu/courses/index/courses/course=116 (last visited Jan. 10, 2003).

19. Schrag notes that the intake criteria for new clinics usually flow from decisions supervisors have already made about the types of cases the clinic will handle. See Schrag, supra note 15, at 231. Having leeway in the case selection process is a luxury that clinicians, unlike most practitioners, enjoy. See, e.g., Stacy Caplow, A Year in Practice: The Journal of a Reflective Clinician, 3 CLINICAL L. REV. 1, 19 (1996) ("[C]linics are a safe harbor for clinicians . . . . We rarely have to take a case; we enjoy considerable, if not total, autonomy over case selection for our programs, and we choose the areas in which we specialize and even the individual clients.").

20. See supra note 15 and accompanying text.
innocence rather than the broader universe of wrongful convictions, we aimed to deploy our resources to what we perceived to be the most deserving cases and, not incidentally, make ourselves more attractive in grant proposals to prospective benefactors. Third, we concluded that undertaking direct appeals for inmates who were already entitled to representation at that stage would be both a misallocation of our resources and a departure from our self-proclaimed mandate of taking a "second look" at cases that had not been overturned via regular appellate channels. Fourth, neither of us had any expertise in DNA issues—plus we had Barry Scheck and Peter Neufeld as our neighbors and specialists on post-conviction DNA testing across the East River. We, like all innocence projects, have tried to cope with the practical issues of intake standards and procedures, and arrive at a system consistent with our objectives and funds.

1. Substance: Limitations on Case Content

As a threshold matter, a law school innocence project ought to choose whether it wants to handle wrongful convictions generally or confine itself to claims of actual innocence. The distinction may be seen in the following example: a man confesses to murdering his child and counsel is assigned to represent him. The attorney neglects to file a motion to suppress the confession even though his client has told him that the confession was the product of a custodial interrogation and he was never apprised of his Miranda rights; moreover, no Miranda waiver form surfaces during discovery. With the confession comprising the sole direct evidence against him, the client is convicted.

21. For obvious reasons, working on behalf of innocent prisoners may be a good "sell" to philanthropic organizations, especially those that are not principally devoted to funding criminal justice projects. See, e.g., Suni, supra note 4, at 929 n.38.
22. The Innocence Project at Benjamin N. Cardozo School of Law, directed by Barry Scheck and Peter Neufeld, was founded in 1992 and litigates cases where post-conviction DNA testing of evidence can produce conclusive proof of innocence. http://www.innocenceproject.org (last visited Jan. 10, 2003).
23. The Director of Clinical Education at Brooklyn Law School, Stacy Caplow, and the Dean, Joan Wexler, were both extremely supportive of the Second Look Program Clinic. This backing allowed us to begin designing the clinic even before we had received any outside funding. Fortunately, prior to the fall of 2001, we were awarded several grants to offset expenses.
24. In short, wrongful convictions encompass a range of legal errors and violations of rights; actual innocence, however, typically "means real, factual innocence: the inmate did not commit the crime of conviction or some related crime." http://www.hamline.edu/innocence/faq.htm (last modified Jan. 8, 2002); see also Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 RUTGERS L. REV. 1317, 1346 n.92 (1997) ("Actual innocence means what it says—the defendant did not commit the crime of which he has been convicted. Wrongfully convicted defendants may or may not be actually innocent; their defining characteristic is that their convictions were secured as a result of a material legal error.").
of murder and the conviction is affirmed in the state appellate courts, in no small part because any purported error surrounding the interrogation was not preserved for review. That case might be a wrongful conviction that a clinic could try to overturn, but, without a claim by the defendant or any evidence to the effect that he did not commit the crime, it is not a case of actual innocence.

Take the same hypothetical and add the twist that the client has confessed yet asserts that it was a false confession induced after hours of police interrogation and the promise that he would not be charged if he complied with the detective's demands for a statement. The client steadfastly maintains his innocence and tells his lawyer about an alibi, that he was bowling with friends on the night of the murder. Notwithstanding this information, his attorney neither files a suppression motion nor mounts an alibi defense, much less initiates any sort of investigation. The client is subsequently convicted and this decision is affirmed on appeal in the state courts. The rumor in the community is that the client's wife actually committed the crime and, years after the appeals have run their course, she indicates she may be willing to come forward and acknowledge her culpability. That might be a case of actual innocence for a clinic to litigate, depending on the specific post-conviction remedies available in the jurisdiction, by asking the wife to execute an affidavit and testify at a state court hearing to set aside the conviction based on newly discovered evidence.

On the one hand, the bulk of law school innocence projects exclusively represent inmates with claims of actual innocence. In a world of scarce resources, concentrating on the most worthy cases makes a lot of sense, presupposing one views the presence of a factually innocent person ("he didn't do it") languishing in jail to be a greater injustice than that of a wrongfully convicted prisoner ("even if he did it, he shouldn't have been convicted"). Also, working on actual innocence claims may prove helpful in raising funds from the outside world and

25. For an interesting essay on false confessions and their role in the conviction of innocent persons, see Richard A. Leo, False Confessions: Causes, Consequences, and Solutions, in Wrongly Convicted: Perspectives on Failed Justice 36 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

26. This might be grounds for a hearing in New York, for instance, although the defense would have to prove that this evidence could not have been found with due diligence at the time of trial. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 1994).

27. See, e.g., Wisconsin Report, supra note 3.

28. See, e.g., http://www.ncip.scu.edu/cases_we_take.htm (last visited Jan. 10, 2003) ("[R]esources . . . are extremely limited. Therefore, the Northern California Innocence Project (NCIP) only considers cases of California prisoners who were convicted in Northern California courts and are seeking to advance a claim of factual innocence.").
in selling the project internally to the school administration and faculty.29

On the other hand, several projects are open to all claims of wrongful conviction.30 To some degree, this approach may offset a criticism that criminal defense lawyers often level at innocence projects: that a focus on innocence presents a warped picture of the criminal justice system to students and the public at large and, even worse, may provide a disservice to most criminal defendants.31 That is, for many criminal defendants, who likely are factually guilty yet may have been wrongfully convicted, the increased emphasis on innocence has arguably obscured the importance of their own otherwise valid claims. Even if projects restricted to actual innocence claims cast a fun-house mirror image of the criminal justice system—accentuating aspects that may be disproportionately small in comparison to more pervasive systemic warts—they clearly fill a void considering the absence of assigned counsel on most post-conviction matters and the investigative expense of pursuing claims based largely on factual error. Also, these projects ideally have a profound deterrent effect in that heightened awareness that some inmates are innocent may, in turn, lead to heightened protection of all defendants’ rights at trial.

Another factor in shaping the contours of a project’s intake criteria pertains to innocence claims that would involve the DNA testing of biological evidence. Although most law school innocence projects accept both DNA and non-DNA cases, some projects limit themselves to handling DNA claims.32 As noted above, our Second Look Program

29. See supra note 21 and accompanying text.
30. For example, the Center on Wrongful Convictions at Northwestern University School of Law, one of the most prominent and successful projects, evidently handles both actual innocence and wrongful conviction claims, although at present it appears to restrict its intake to actual innocence cases. See Wisconsin Report, supra note 3, at 4; http://www.law.northwestern.edu/depts/clinic/wrongful/newcases.htm (last revised Jan. 13, 2002); see also Suni, supra note 4, at 926 (“Some projects are set up so as to handle only claims of absolute innocence . . . other projects will handle all claims on behalf of an individual making a claim of innocence and will continue representation even if it is determined that the defendant is not factually innocent.”).
31. Some criminal defense lawyers seem convinced that a focus on innocence is misguided. In their view, although releasing innocent people from prison is a good thing, those cases constitute a non-representative sampling of criminal defendants and the popular fascination with innocence deflects attention from more banal miscarriages of justice.
32. The Cooley Innocence Project and the Innocence Project at Cardozo restrict their intake to DNA cases. See Stiglitz et al., supra note 3, at 425 n.45. Several other projects that utilize law students—including the Florida Innocence Project and the New England Innocence Project—have also indicated that they exclusively handle DNA claims. See Wisconsin Report, supra note 3; http://www.criminaljustice.org/public.nsf/Defense Updates/New England Innocence?Open Document (last visited Jan. 10, 2003). The majority of law school innocence projects, how-
Clinic is solely devoted to non-DNA cases. Jan Stiglitz and his colleagues at the California Innocence Project at California Western School of Law have analyzed many of the arguments surrounding the “To DNA or Not To DNA” debate. Not only have most of the exonerations in the last decade resulted from DNA testing, signifying that a project’s efforts may more likely bear fruit by handling those cases, but making the availability of a DNA claim mandatory also simplifies the screening process. Nevertheless, DNA testing is only an option in a smattering of cases, and it can be costly—an important variable for most start-up projects.

In contrast, handling non-DNA claims allows a project to explore a greater variety of inquiries and lacks the fixed cost of scientific testing, even though the work may be laborious at the case selection as well as the investigation and litigation stages. Non-DNA cases can linger for years, testing the patience and resolve of clinic students and faculty, and accrue significant investigation expenditures. Also, for projects restricted to actual innocence claims as opposed to wrongful convictions generally, there might be the innate problem of determining whether the prisoner is, in fact, innocent. One benefit of the ever, appear to accept cases with either DNA and/or non-DNA components. See Wisconsin Report, supra note 3.

33. See Stiglitz et al., supra note 3, at 423-25.
34. On its website, the Innocence Project at Cardozo offers an up-to-date calculation of the number of DNA exonerations across the United States. http://www.innocenceproject.org (last visited Jan. 10, 2003).
35. See Stiglitz et al., supra note 3, at 423-25.
36. See supra note 4 and accompanying text; see also Aliza B. Kaplan, The Necessity of Funding for Post-Conviction DNA Testing: The Amended Rule 30(c)(5) of the Massachusetts Rules of Criminal Procedure, 4 SECTION REV. (Mass. B. Ass'n, Boston, Mass.), Winter 2002, at 75-76 (noting that as of early 2002, only eleven of the twenty-four states with post-conviction DNA statutes allocated funds for the tests). Innocence projects do not necessarily have to shoulder the financial burden for these tests. For example, the Innocence Project at Cardozo explains on its website that “while defendants are not charged for our legal services, they and their advocates are responsible for funding the costs of DNA testing. We simply do not have the resources to provide pro bono DNA testing.” http://www.innocenceproject.org/about/faq.php (last visited Jan. 10, 2003). The emergence of DNA testing has provoked some legislators to support bills, such as the California Innocence Protection Program, that earmark funds for organizations to conduct these tests as part of investigating innocence claims. See, e.g., NCIP Receives State Funding, INNOCENCE Q. (N. Cal. Innocence Project/Santa Clara Univ., Santa Clara, Cal.), Spring 2002, at 3.
37. The cost of investigating an innocence claim is contingent upon numerous elements, including the specific facts involved and the ability of clinic students to perform many of the investigative tasks. In our experience with non-DNA claims, it may be necessary to hire private investigators to conduct polygraph tests and interview certain witnesses.
38. See, e.g., Barry Scheck & Peter Neufeld, DNA and Innocence Scholarship, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 241, supra note 25, at 248-49.
advent of DNA testing is that, where it applies, it can provide a modicum of certainty to support a person’s claim, e.g., where the semen from a rape committed by one perpetrator is tested and the results show that another person committed the crime. One downside, perhaps more theoretical than actual, is that this development has raised the bar for proving innocence in non-DNA cases; where there is no scientific proof of innocence, prosecutors and judges could conceivably be even more skeptical of claims than they were in the past. Alternatively, exonerations based on DNA testing could (and should) be construed as the tip of the iceberg, a warning that a similar error rate presumably applies in cases without biological evidence and that members of the criminal justice system should be receptive to legitimate non-DNA claims of innocence as well.

One additional substantive limitation to consider, especially with regard to non-DNA innocence cases, is whether to require that the inmate have an alibi or otherwise possess evidence showing he in no way participated in the conduct at issue in the crime. In claims where there is no biological evidence and the newly discovered evidence alleged by the defense consists chiefly, if not entirely, of witness statements, presence at the scene can be a difficult hurdle to overcome. Indeed, the Wisconsin Innocence Project at the University of Wisconsin Law School declares that:

Because of the difficulty of proving innocence in certain types of cases, the program usually cannot help in the following situations: (1) where a defendant admits to killing (or assaulting) someone, but claims that it was done in self-defense; (2) where a defendant admits to sexual contact with a person, but claims that the person consented to the contact; (3) where a defendant was convicted as an accessory (or as a party-to-the-crime) and seeks to show that he or she did not play a major role in the crime.

Similarly, the Center on Wrongful Convictions at Northwestern University School of Law “is restricted to handling only cases of persons who assert that they were in no way involved in the crimes for which they were convicted.” The Second Look Program Clinic has not ruled out the possibility of accepting a case involving self-defense, con-

39. See id.
40. See Scheck et al., supra note 6; see also James S. Liebman, Comment, The New Death Penalty Debate: What’s DNA Got To Do With It?, 33 Colum. Hum. Rts. L. Rev. 527, 546-47 (2002) (stating that in DNA cases, “[i]f it were not for the sheer accident that a biological sample happened to be available, the miscarriage never would have been discovered. . . . Suddenly and starkly, DNA reveals us and our institutions to be what they strive to escape notice for being: inherently but often unknowably—and thus incurably—flawed, unreliable, and untrustworthy.”).
sensual sex, or culpability as an accessory, though, in actuality, it is unlikely we would undertake one.\textsuperscript{43}

2. Form: Procedural, Jurisdictional, and Other Limitations

Along with guidelines relating to the substance of the cases that an innocence project may accept for representation, each project should consider whether to formulate additional intake criteria. Although several clinics have a national reach, such as the Innocence Project at Cardozo, most only evaluate cases deriving from a particular state or region.\textsuperscript{44} Some projects are extremely strict in this regard: the Innocence Project New Orleans originally required that a prospective client’s conviction occurred in Orleans or Jefferson Parishes in Louisiana.\textsuperscript{45} Crucial factors in determining a program’s geographic scope could include where faculty members involved with the clinic are licensed to practice law (or have extensive contacts) and the proximity of comparable innocence projects in the area. For instance, the Innocence Project of Minnesota accepts cases from its home state as well as North Dakota and South Dakota, which do not have their own projects.\textsuperscript{46} Likewise, the Center on Wrongful Convictions handles

\textsuperscript{43} Among the five cases that we have accepted for full representation, there is evidence supporting the inmate’s alibi in four of them and evidence in the fifth that our client, though present at the scene, was several yards away from the stabbing of an inmate in a prison yard.

\textsuperscript{44} See Wisconsin Report, supra note 3. Some projects limit their scope not only to a particular region, but also to state court convictions in that jurisdiction. See http://www.ncip.scu.edu/cases_we_take.htm (last visited Jan. 10, 2003) (indicating Northern California Innocence Project requires conviction from California state court); cf. http://www.law.wisc.edu/FJR/innocence (last visited Dec. 30, 2002) (“The Wisconsin Innocence Project primarily takes cases from individuals wrongly convicted in state and federal courts in Wisconsin.”).


\textsuperscript{46} http://www.hamline.edu/innocence (last modified Jan. 8, 2002). The Innocence Project of Minnesota, headquartered at Hamline University School of Law, may accept cases from outside these states only “in extraordinary circumstances, for example, where there is no innocence project serving the inmate’s area.” Id. Similarly, on rare occasions, the Wisconsin Innocence Project will consider cases from several neighbors in the Upper Midwest—Illinois, Indiana, Iowa, Michigan, and Minnesota—but advises that inmates from outside Wisconsin “should attempt to find an Innocence Project that is nearer to their location.” http://www.law.wisc.edu/FJR/innocence (last visited Dec. 30, 2002). The Innocence Project Northwest, located at the University of Washington School of Law, covers cases arising from Alaska, Idaho, Montana, and Oregon, in addition to Washington. http://www.law.washington.edu/ipnw/cases.shtml (last visited Dec. 30, 2002).
cases from Illinois, its home base, and from states that lack innocence projects.47

To merit consideration, innocence projects also frequently require cases to be in a precise procedural posture and clients themselves to be in a specific income bracket. First, the exhaustion of all direct appeals is a common prerequisite.48 Second, many projects demand that inmate applicants have been convicted of a serious felony and/or have a significant prison term left to serve,49 a reflection of the lengthy time frame often needed in litigating these cases and the desire to aid only people in the most dire straits. For the North Carolina Center on Actual Innocence, at least three years must be left on the inmate's sentence,50 whereas the Wisconsin Innocence Project generally refuses to accept cases with less than seven years of imprisonment remaining.51 The Center on Wrongful Convictions dictates that a minimum of ten years must remain prior to the inmate's parole date (for non-DNA claims),52 and the Thomas M. Cooley Innocence Project in Michigan simply requires a "substantial sentence."53 Third, a prisoner's inability to pay for private counsel or obtain appointed counsel may also be a requirement, be it explicit or implicit.54 This condition echoes the oft-stated mission of many innocence projects (and other

47. See Wisconsin Report, supra note 3.
48. See, e.g., http://www.law.wisc.edu/FJR/innocence (last visited Dec. 30, 2002) ("Wisconsin Innocence Project takes cases only after a person has been convicted and all direct appeals have ended or the time for filing a direct appeal has passed."); http://lawschool.unm.edu/student_orgs/iip/about (last visited Dec. 30, 2002) (providing similar requirements for New Mexico Innocence and Justice Project).
49. Some innocence projects specify that a certain number of years must remain on the inmate's sentence, whereas others, like the Northern California Innocence Project, state more broadly that the prisoner must have been convicted of a major crime. See, e.g., http://www.ncip.scu.edu/cases_we_take.htm (last visited Jan. 10, 2003) ("The inmate must have been convicted in California state court of a serious felony or a felony involving a three-strikes sentence.").
53. http://www.cooleylaw.edu/innocence/home.htm (last visited Dec. 30, 2002); see also http://www.hamline.edu/innocence (last modified Jan. 8, 2002) (stating that the Innocence Project of Minnesota also requires a "substantial sentence"). To satisfy its intake criteria, the Innocence Project New Orleans currently prescribes that an applicant "[m]ust be serving a life sentence at the Louisiana State Penitentiary in Angola." http://www.ip-no.org/process.html (last visited Jan. 22, 2003).
clinics, for that matter) to provide a service that is otherwise unavailable. Finally, some projects insist that the prisoner must not be currently represented by an attorney at all.

Another variable to consider in the case selection process revolves around the prisoner’s prior criminal record and how his potential release might fare in the court of public opinion. As a practical matter, many innocence cases are resolved in the political arena rather than in a courtroom because lawyers handling these cases may try to thwart potential problems by arranging to meet with the District Attorney’s Office prior to commencing litigation. The goal for this meeting might range from asking prosecutors outright to agree to a vacatur of the conviction, imploring them to join in (or not contest) a motion for a new hearing, or suggesting they begin their own investigation into the case. Getting the opposition “on board,” so to speak, can make it more difficult for a court to deny a claim on the motion papers alone, and conceivably can allow the prosecution to make some political headway by coming across as fair-minded and open to

nefs assist inmates who “cannot afford counsel and who no longer have a right to appointed counsel”).

55. See infra section III.A.
56. See, e.g., http://www.law.wisc.edu/FJR/innocence (last visited Dec. 30, 2002) (“The [Wisconsin Innocence] Project also is unable to assist inmates who are currently represented in their criminal case by another attorney.”). This condition seemingly relates to the indigence requirement because, given the absence of assigned counsel for most post-conviction matters, the existence of an attorney at this stage probably indicates she has been privately retained. Alternatively, even where a project does not exclude claims by inmates who are already represented by counsel, providing different screening procedures in those situations can increase efficiency. For instance, the Innocence Project at Cardozo advises that “[i]f the defendant is represented, you should have the attorney(s) contact us directly. That way, we can lend assistance to the case without having to go through the evaluation process.” http://www.innocenceproject.org/about/faq.php (last visited Dec. 30, 2002).

57. We approach the District Attorney’s Office before litigating most of our innocence cases based on the assumption that prosecutors, in general, dislike the notion of a person serving a prison sentence for a crime that he did not commit and would be willing to listen. Inviting them to work with us, as opposed to against us, in theory affords prosecutors a chance to correct an error and avoid tarnishing the reputation of the office. Although we are aware this strategy may alert the prosecution about our claim in advance of litigation, we think the potential advantages outweigh the drawbacks. So far, we have had mixed results. In one case, the prosecution readily agreed to meet and undertook its own re-investigation; in another, the Assistant District Attorney assigned to the matter told me he was not comfortable with these types of “extra-judicial” communications and recommended I go ahead and file a motion.

58. In New York, for example, the state trial courts are deluged with post-conviction motions and often summarily deny requests to vacate a conviction based on newly discovered evidence without holding a hearing. Approaching the prosecution to see if they will consent to a hearing may go a long way toward getting a day in court.
the truth. All other things being equal, assisting an innocent person without any prior convictions may be more palatable to the District Attorney’s Office than aiding someone who is innocent of the crime for which he is incarcerated but has an extensive criminal record. To that end, the Second Look Program Clinic factors an inmate’s record into deciding whether we can be of assistance, although we refuse to require that applicants have a minor record, let alone a clean slate.

59. District attorneys are theoretically accountable to the public by virtue of the simple fact that, for the most part, they are elected. See, e.g., Robert L. Misner, Recasting Prosecutorial Discretion, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (stating that over 95% of chief prosecutors are elected at the municipal and county levels). However, the true extent of prosecutorial accountability is subject to debate. See, e.g., Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393, 448 (2001) (noting that even if “the desire to maintain public accountability . . . propelled the current paradigm of the elected public prosecutor . . . proponents of this system did not adequately consider the private nature of prosecutorial decisions and the lack of public access to information about how and why prosecutors make decisions”); see also id. at 443 n.258. For a discussion of prosecutors’ duties in the context of post-conviction innocence claims, see Judith A. Goldberg & David M. Siegel, The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence, 38 CAL. W. L. REV. 389 (2002).

60. Jacqueline St. Joan and Nancy Ehrenreich have written about the manner in which practical politics affected their client selection in running the Battered Women’s Clemency Reform Project at the University of Denver College of Law. Jacqueline St. Joan & Nancy Ehrenreich, Putting Theory into Practice: A Battered Women’s Clemency Clinic, 8 CLINICAL L. REV. 171, 208-12 (2001). Seeking clemency from the governor for battered women convicted of crimes meant “dealing with a political process that is itself likely to be subject to good girl/bad girl thinking.” Id. at 209. As they surveyed the political landscape, they stated: Success seemed likely to be tied to whether the women’s cases conformed to prevailing images of who are “real” battered women (virtuous, victimized, married women), of what their relationships are like (punctuated by daily, one-sided, physical violence), and of how they behave (passively, timidly, pathologically). Cases where the woman’s conduct was particularly grisly, or where she was depicted in the press as angry and remorseless, seemed especially unlikely to succeed. Id. at 210-11. Describing their client selection decisions as “heart-wrenchingly difficult,” St. Joan and Ehrenreich offered no “easy answers to the questions they raised.” Id. at 211. Although a clemency clinic necessarily engages the political process more directly than do most innocence projects, these experiences are quite telling about the manner in which pragmatic assessments of the chance for success—that may have little or nothing to do with the factual and legal merits of an inmate’s case—can influence case selection choices. Moreover, innocence projects may occasionally file clemency petitions on behalf of inmates. See, e.g., http://www.law.northwestern.edu/wrongfulconvictions.documents/Heirens.htm (last visited Dec. 30, 2002) (discussing the Center on Wrongful Convictions’ effort to obtain clemency for William Heirens, who has served over fifty years in prison).

61. To an extent, and for similar reasons, we also consider a prisoner’s disciplinary history during his incarceration.
Like many other innocence projects, we impose substantive, procedural, and jurisdictional conditions in our Second Look Program Clinic. We formally require a claim of actual innocence that is not based on DNA testing and the exhaustion of direct appeals in a conviction that occurred within New York State before consideration by our project, and informally bear in mind the duration of the inmate’s remaining sentence, the prior criminal record, and whether another attorney has been retained. These requirements, however, are subject to exceptions; for instance, we accepted one especially promising case despite the fact that the direct appeal had not yet been filed and the inmate had a public defender assigned to perfect that appeal, and we have entered two other matters as co-counsel. Moreover, in another case, we helped to secure our client’s release on parole and are still contemplating whether and how to continue to assist him in his effort to overturn his conviction.\footnote{In certain situations, innocence projects might consider becoming involved in the parole process. In the fall of 2001, we handled a case where we were convinced our client had not committed the 1984 murder for which he was convicted. Unfortunately, there had already been a hearing at which much of the post-conviction evidence had been heard, and rejected, and we were having difficulty locating any new evidence that could serve as the springboard for a new hearing. So we intervened in the parole process, filing a document with the Parole Board asking it not to hold our client’s refusal to acknowledge his guilt against him (which the Board typically does) given our belief that he was innocent of the charge. The Board released our client on parole in the spring of 2002. For information concerning the New York State Division of Parole and the procedures followed by its Board of Parole, see http://parole.state.ny.us/ (last visited Dec. 30, 2002).} In essence, we found the facts of these cases to be particularly compelling and, as a result, found ourselves unwilling to decline the requests for assistance.

Overall, we have tried to ensure that the lines drawn around our project’s case selection methodology are clearly marked but occasionally permeable.\footnote{Although the exceptions seem to have swallowed the rules so far in selecting cases for the Second Look Program Clinic, our intake criteria play a vital role in evaluating inmate inquiries daily and helping us to isolate the strongest claims.} Too rigid a line between inmate requests that qualify for consideration and those that are immediately ousted would fail to account for the subjectivity inherent in the case selection process and the fact that innocence cases are often messy and ill-suited to categorization. When it comes down to it, intake criteria are useful guides but should not be taken as gospel; any project would be hard-pressed to abandon a convincing case of innocence. Ultimately, the deft screener must be mindful that valid claims may fall outside the scope of the project and that accommodations should sometimes be made or, at the very least, the case should be forwarded to another organization.
B. Putting Theory into Practice: How Do You Get the Cases You Want?

The way in which a particular law school innocence project defines its intake criteria often reflects a balance between its objectives and its resources. As discussed above, most projects aim to help the neediest candidates, namely, factually innocent prisoners with long sentences and no other recourse for assistance. It is one thing, though, to devise the theoretical parameters for an innocence project; it is quite another to put theory into practice and actually ferret out cases that come within those parameters.

1. Inflow: Gathering Prospective Innocence Claims

Law school clinics traditionally obtain clients through a variety of means, including court assignments, referrals from community organizations and legal service providers, and inquiries generated through the use of the media.\(^6^4\) In accumulating potential clients so far, the Second Look Program Clinic has relied primarily on a combination of referrals from local attorneys and unsolicited inquiries from inmates who have heard of us through either the prison grapevine and/or publicity about our project in the media.

In particular, an article in the *New York Law Journal* in January 2001 about William Hellerstein’s successful effort to reverse the wrongful robbery conviction of a former Golden Gloves boxer and his intention to form a clinic to take a “second look” at cases spurred a torrent of letters from inmates across the state before we had even

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\(^6^4\) Use of the media could even, depending on local bar rules, include advertising. See Schrag, supra note 15, at 229. Obviously, one structural benefit of affiliating in some fashion with a public defender organization is the existence of a ready-made base of potential clients. See Donald M. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Educational Opportunity*, 31 U. Mich. J. L. Reform 1, 10 (1997) (“By associating with a group like a prosecutor’s office, child advocacy group, or a public defender’s office, a clinic can select the most interesting cases at their educationally most valuable stage and then return them to the office when they no longer suit educational purposes.”). Many clinics procure clients through multiple sources as opposed to relying on any single source in particular. See, e.g., Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. Rev. 1423, 1436 (1998) (noting that the Immigration Law Clinic at the U.C. Davis School of Law takes referrals from the immigration court in San Francisco, attorneys, legal services organizations, and the immigrant community itself); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 Gonz. L. Rev. 1, 9-11 (1997-1998) (explaining that the Appellate Clinic at the University of Idaho College of Law receives cases from the Ninth Circuit, public defender organizations, referrals from other organizations, lawyers, and individuals, or by commencing an appeal from the general clinic’s criminal and civil cases).
launched a formal project.65 Within a few months we had received over 150 requests for assistance, an initial perusal of which quickly revealed that many did not even concern innocence; rather, they were pleas for research help, information about filing civil suits against prison officials, and other unrelated questions. While we acknowledged there could be some gems within this batch of correspondence, we also knew it might take a tremendous amount of time to spot them. And time was of the essence. Given our desire to locate cases in advance of our inaugural class of students in the fall of 2001, we soon decided that polling our contacts in the New York legal community and finding referrals through them might be a wise path to take.66 Although our approach could be criticized as “creaming”—skimming the best cases off the top of overloaded attorneys’ desks at other offices—this practice can be justified by the fact that we aim to provide high-quality legal and investigative services in a timely manner and fill a niche in the region.67

One advantage of seeking cases through “creaming” is that there is a built-in vouching function. A lawyer, presumably a respected and experienced one, has already reviewed the claim and determined it may be worth pursuing.68 One potential disadvantage, however, could arise if and when a project disagrees with the referring lawyer’s judgment and decides to reject the matter, a decision that could cause interpersonal strain. Also, the degree to which the referring organization or attorney wants to participate in the handling of the case could create problems, such as in a co-counsel arrangement where there is a dispute as to how to proceed and the division of authority is not adequately defined.69

Together with establishing a referral network,70 reaching out to journalists with ideas about stories, granting interview requests, at-

66. Referrals might be a desirable method of obtaining cases for any new clinic, especially clinics that have a specialized subject matter or other limitations. See Schrag, supra note 15, at 229.
67. Duquette, supra note 64, at 10 (discussing “creaming”).
68. Schrag observes that referring lawyers or organizations may even have provided some pre-screening services by interviewing the client beforehand. Schrag, supra note 15, at 229.
69. In the cases that we have entered as co-counsel, we have tried to make our role clear. In one case, our role is mainly secondary—to provide support for another attorney on a federal habeas corpus petition that the attorney filed. In another case, we have taken more of a primary role in devising strategy and drafting motions, much to the relief of our overburdened co-counsel.
70. The Innocence Project at Cardozo has been instrumental in creating a national Innocence Network, a consortium of projects that can serve as a resource for referrals and tactical information. See http://www.innocenceproject.org/about/other_projects.php (last visited Dec. 30, 2002). Listing a project on one or more of the other innocence project directories available on the internet can be a helpful
tending conferences, creating a website, and brainstorming with members of the school’s public relations staff may all be feasible methods to enhance a project’s profile with an eye toward generating inquiries from prospective clients. Naturally, these approaches may have the same deleterious side effects as unsolicited inquiries have generally—being inundated with requests, many of which have nothing to do with innocence—coupled with the ever-present risk of bad publicity. Accurately predicting how a reporter will portray the clinic may prove elusive, and the possibility that negative facts about a client or a prospective client could surface in the media should not be ignored.

2. Outflow: Procedures for Evaluating Potential Cases

In due course, receiving a sufficient number of requests from inmates seeking assistance turns out to be the least of an innocence project’s problems. Well-known organizations like the Innocence Project at Cardozo amass thousands of new requests each year and even smaller, recently formed clinics like ours can be smothered with correspondence.\(^7^1\) The challenge then becomes how to implement a system to unearth the best claims from within this epistolary mountain.

We have developed a process designed to winnow out the cases that meet our intake criteria and appear to have the greatest likelihood for a positive resolution. As is evidently the situation with all of the current law school innocence projects, we embrace an “open intake” system:\(^7^2\) instead of accepting a discrete number of cases and seeing them to fruition before taking on others, the Second Look Program Clinic constantly evaluates new claims regardless of how many clients we have agreed to represent. This practice improves the odds of finding viable claims of actual innocence within our mandate, which may be few and far between.\(^7^3\)

I like to think of our case selection method as a funnel with several stages, after any of which a case may be rejected yet only after the successful completion of all may a case be accepted. Upon initially

referral device as well. \(\text{See, e.g., http://www.ga-innocenceproject.org/nationwide-}
\text{innocence-projects.htm (last visited Dec. 30, 2002); http://www.law.wisc.edu/FJR/}
\text{innocence/other_ipa.htm (last visited Dec. 30, 2002); http://www.ncip.scu.edu/in-
\text{nocence.projects.htm (last visited Dec. 30, 2002); http://www.truthinjustice.org/}
\text{ipcontacts.htm (last visited Dec. 30, 2002).}\)

\(^7^1\) During our first year of operation, we received requests for assistance concerning roughly 450 different inmates. \(\text{See also California Innocence Project Reviews More Than 1,400 Cases in First Year of Operation, ICDA News (Inst. for Criminal Defense Advocacy, California Western School of Law, San Diego, Cal.), Fall 2001, at 1. Sometimes family members or friends of an inmate will initiate contact through a telephone call. In those circumstances, I typically recommend that they ask the prisoner to write to me so that I can open a file on the matter and establish a direct channel of communication with the prospective client.}\)

\(^7^2\) \(\text{See Stiglitz et al., supra note 3, at 425.}\)

\(^7^3\) \(\text{Id.}\)
receiving a request for assistance, William Hellerstein or I will make a
determination as to whether to reject it outright or to pursue the mat-
ter further. If it is evident that we cannot be of assistance to the in-
mate, we will send what we refer to as an “A” letter.74 Examples of
situations where an “A” letter may be appropriate include where the
inmate is not making a claim of innocence involving his current con-
viction in New York or the substance of the letter indicates such a
claim undeniably lacks merit.75 If the letter mentions or even merely
alludes to a palpable claim of innocence in a current New York case,
we send a “B” letter,76 along with a copy of our screening question-
naire and a form authorizing us to begin a preliminary investigation.
On the whole, we are rather lenient in slotting requests into the “B”
letter category.77

After receiving the questionnaire, we assign a student to review
the file thoroughly and then write an “Evaluation Memorandum” of-
fering an assessment of the case. The format for the Evaluation Mem-
orandum is straightforward: a one to two page description of (a) the
materials received from the inmate, (b) the procedural history of the
case, (c) the prisoner’s criminal record, (d) the facts of the incident
relating to the conviction, (e) contact information for the inmate's fam-
ily members and prior attorneys, and (f) a preliminary prognosis as-
sessing the viability of the innocence claim and proposing a course of
action. I try to meet with students routinely to discuss their recom-
mendations and analyze how they reached those conclusions. In addi-
tion to these conferences, I periodically update a master “Screening
Summary” by taking excerpts from the Evaluation Memoranda and
allocating each inmate's request to a specific category: Worth Pursuing

74. Here is the “A” letter language that we use (subject to revision if further explana-
tion is needed, as is often the case): “This will acknowledge receipt of your letter
to the Second Look Program Clinic at Brooklyn Law School requesting assis-
tance. However, due to the nature of your request, we are not in a position to
provide you with the type of assistance that you are seeking.”

75. In accordance with our intake criteria, we also generally turn down requests at
this point when the inmate is currently represented by an attorney and/or seeks
help in a pending matter (i.e., with a direct appeal). See supra notes 48-56 and
accompanying text. We frequently refer inmates to other innocence projects
when they were convicted out-of-state or their claim hinges on DNA testing.

76. The “B” letter language is as follows:
The Second Look Program Clinic at Brooklyn Law School has received
your recent letter in which you requested assistance with your current
conviction. In order to help us to make a preliminary evaluation as to
whether we can be of assistance, please answer the enclosed question-
naire as fully as possible and return it to us along with a signed copy of
the authorization form (located on the last page of the questionnaire). If
you need additional space to answer a particular question, please do so
on a sheet of paper indicating by number which question you are
answering.

77. Of the first 431 requests we collected, 190 received “A” letters and 241 received
“B” letters.
I (with enthusiasm); *Worth Pursuing II* (further investigation needed); *Possible* (further evaluation required); and *Not Worth Pursuing! Rejected.*

My estimate is that we reject roughly half of our cases shortly after consulting with students about their Evaluation Memoranda. Regarding the other cases, we have generally opted to ask for further documentation, such as transcripts and police reports, and/or to initiate a dialogue with one of the inmate's contacts, typically the trial or appellate attorney. If we choose to follow through with the matter after completing one or both of these steps, we assign the student who drafted the Evaluation Memorandum to continue the investigation under our supervision.

a. *Stage One: The Pre-Screening Assessment*

We have debated whether to omit our initial “A”-“B” letter assessment and send questionnaires in response to every single inquiry. Some innocence projects make their questionnaires available on their websites, intimating that they are not opposed to receiving a completed questionnaire as part of an inmate's opening salvo. Our lin-

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78. I also keep a master list of inmates accorded “A” and “B” status, updating it regularly to reflect notable changes, for example, when a “B” candidate is rejected at a later point in the evaluation phase. I will not say much about case-tracking devices, except to note the obvious—this consideration is important as the number of inquiries soars. The better the system, the easier it will be to respond to status requests and check for conflicts of interest. Several innocence projects use Amicus Attorney, a popular law office practice management program that permits students and faculty to edit, evaluate, and organize case data from their desktops. See Mary Likins, *NCIP Goes High-Tech with Amicus Attorney, INNOCEENCE Q.* (N. Cal. Innocence Project/Santa Clara Univ., Santa Clara, Cal.), Spring 2002, at 6.

79. Precise statistics are difficult to compute because in our formative months, when we had relatively few inquiries, we proceeded with some type of preliminary investigation for almost every case. Over time, for better or for worse, we became more decisive in rejecting claims based on the questionnaire and other supplemental papers.

gearing preference, after some reflection, is to keep our pre-screening system as a means of curtailing the overall amount of questionnaires to review. First, dispatching with the obvious rejections up-front streamlines the entire case selection process. Second, since we are wary of jettisoning potentially meritorious cases too readily, we err on the side of caution and send a questionnaire when there is any doubt whatsoever whether a query falls on the "A" or "B" side of the ledger. Finally, it is our view—and this may be mere rationalization on our part—that actually innocent prisoners generally will not be deterred by an initial rejection letter and will continue to write.81

b. Stage Two: The Questionnaire

An inmate questionnaire form, a crucial step in the case selection process, is used by virtually all innocence projects to discern whether a claim fulfills their intake guidelines. Because meeting each applicant in person is not pragmatic, for a whole host of reasons, including logistical problems with arranging and conducting prison visits,82 the questionnaire might be viewed as a proxy for a preliminary screening interview. The nature of the specific questions on the form, not to mention its length,83 varies from project to project, reflecting differences in selection criteria, but the objective remains the same: to gather information and separate the strongest claims from the weakest.

Keeping in mind the wide discrepancies in questionnaire format and, to a lesser degree, content, I will note some of the traits that unite them, mainly a combination of technical or procedural questions

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81. This resubmission occurs fairly frequently, especially when we modify our "A" letters to contain an explanation for our decision, e.g., "we only investigate claims of factual innocence and it appears as though you are alleging legal errors," and the inmate writes back, describing how his case supposedly satisfies our criteria. In those situations, we often respond by sending a questionnaire. The assumption that actually innocent prisoners will persist in contacting us may be misguided; in particular, inmates suffering from depression, mental illnesses or mental deficiencies might be unable to continue with their pleas for assistance. Moreover, some prisoners might simply become discouraged by the rejection letter and decide that further efforts would be futile.

82. Many state correctional facilities are in remote locations and institutional rules on visitation may also impair face to face access with prospective clients. See Suni, supra note 4, at 924 n.16.

83. We chose to craft a questionnaire that is rather brief (seven pages) on the grounds that a lengthier document could overwhelm both writer and reader and possibly hamper its very purpose as a sifting mechanism. The law school innocence project questionnaires that I have seen range from roughly two pages to seventeen. For copies of the questionnaires that are available on the internet, please visit the websites listed above, supra note 80 and accompanying text.
(who, where, when) and substantive ones (what, why). Although some questionnaires start with broad, open-ended questions about the basis for the prisoner's innocence claim, many begin with concrete questions about the case—the place and date of conviction, names of the attorneys involved, types of post-conviction motions filed, documents within the inmate's possession and so forth—and then lead into more substantive issues. These substantive questions tend to seek details about the conviction itself, such as the defense theory utilized at trial, what evidence was collected during the police investigation, and if the victim and/or other eyewitnesses identified the inmate. In addition, the inmate is almost invariably asked to describe precisely why he is innocent and, perhaps more importantly, list any evidence that could support that claim.

An interesting issue arises with respect to whether prisoners should be asked to send supplemental materials (appellate briefs, police reports, etc.) along with the completed questionnaire. Since the underlying rationale for questionnaires is to optimize the efficiency of the case selection process by targeting information that pertains to the project's intake standards, at first glance it appears counter-productive to solicit additional documentation at that point. In fact, many projects explicitly warn applicants not to send any extra written materials unless and until they are requested to do so from a member of the project. A problem with this approach, which became acute for us over time and a source of contention among our students, is that without any supplemental materials it may be difficult to gain a well-balanced sense of the case; the shrewd applicant may slant his depic-

84. Id. The sequence of questions differs for each form, so any attempt on my part to be definitive in characterizing them would be foolhardy. Some questionnaires have procedural questions at the beginning; others start with more substantive questions; others intermix technical or procedural questions with substantive ones. For instance, the first question on the Innocence Project Northwest Screening Questionnaire is “Please describe briefly why your case should be taken by Innocence Project Northwest. Explain why you are innocent and why you believe you were wrongly convicted.” http://www.law.washington.edu/ipnw/questionnaire.htm (last visited Dec. 30, 2002). In contrast, the first question on the Center on Wrongful Convictions' Intake Questionnaire asks: “Is there an impending filing deadline in your case? If so, explain.” http://www.law.northwestern.edu/depts/clinic/wrongful/newcases.htm (last visited Dec. 30, 2002).

85. See supra note 80 and accompanying text. Part I of the Northern California Innocence Project Screening Questionnaire asks the applicant to “Briefly Describe the Prosecution's Theory of Your Case at Trial" and “Briefly Describe the Defense's Theory of Your Case at Trial.” http://www.ncip.scu.edu/cases_we_take.htm (last visited Jan. 10, 2003).

86. See supra note 80 and accompanying text.

tion of events to bolster the chances for representation.88 Even more, an inmate might be so familiar with his own case that he leaves out important details in the questionnaire or he may not have the aptitude to express those details clearly. With the Second Look Program Clinic, these concerns came to light after a series of occasions where students, enthusiastic about an inmate's claim upon reviewing the questionnaire, followed up by asking for copies of the appellate briefs and then, after some delay due to the whims of the mail and inmate response time, read the briefs and came away with their enthusiasm dampened.

Reacting to student complaints, we decided to revise our questionnaire in the spring of 2002 to ask for copies of the appellate briefs submitted by both the prosecution and the defense in the case. We recognized this request could stall the process because prisoners often have trouble photocopying their papers and it would take longer for us to evaluate case files.89 The calculated risk we took was that the benefit of having a clearer understanding of the case on the front end outweighed any detriment resulting from the increase in the time needed to make an initial assessment. It is too soon to tell whether this initiative will pay dividends, although students have told me that reading the Statement of Facts sections from the briefs is extremely helpful in piecing together the background of the case and reaching a preliminary prognosis about the strength of a prisoner's innocence claim.

The format, length, and content of a law school innocence project's questionnaire are largely matters of taste, in the end. How much information does one need in order to diminish the amount of inmate requests to a manageable quantity before proceeding to the next stage of evaluation? Inasmuch as the answer to this question hinges on so many project-specific intangibles (one's comfort level before making rejections, the definition of manageable), I can only conclude that it is important to view the questionnaire as a dynamic work-in-progress with an editorial board consisting of clinic students and faculty together.

c. Stage Three: The Preliminary Investigation

After a member of the project has reviewed an inmate's questionnaire and is intrigued by the case, but is not convinced the project

88. See Stiglitz et al., supra note 3, at 424 (stating that many "inmates have a great deal of time and no disincentive to stop them from seeking the project's help, even when they are guilty and the evidence of guilt is overwhelming"); see also Suni, supra note 4, at 924-25 ("Virtually all work performed by innocence projects is pro bono work . . . . As a result, there are few incentives on the part of incarcerated individuals not to seek the assistance of such projects.").

89. Also, we anticipated that prisoners might send their original copies, a fear that was later realized and added to our care-taking responsibilities.
should accept it, the issue becomes determining exactly what the next steps should be. Questionnaires are often accompanied by forms asking applicants to authorize the project to begin a preliminary investigation while reserving for the project the right to withdraw from the case at any time and for any reason. Many of these forms explicitly seek permission for members of the project to discuss the case with the prisoner's former attorneys, witnesses, and others. In addition to facilitating review of individual inquiries, the presence of an authorization form offers institutional flexibility to re-direct a clinic's resources in the event it discovers that a particular claim lacks merit after the start of the investigation.

At this point in the evaluation process, students and faculty ordinarily begin to follow what David Protess has referred to as the "Paper Trail" and the "People Trail." Reviewing the trial transcripts, police reports, and appellate briefs obviously provides insight into the legal and factual issues involved and may add to the list of people with whom members of the project wish to speak. Phone calls to the inmate's previous attorneys can be especially valuable for students at this stage, even if only to confirm whether their budding lawyering instincts are on the mark or off-base. In my experience, attorneys are almost always willing and occasionally eager to chat about their former clients and the legitimacy of their purported innocence claims. Of course, interviewing the inmate is vital. We always interview prisoners in person before committing to a case and prefer to subject them to a polygraph test sooner rather than later.

During the preliminary investigation, members of innocence projects should look for certain factors that may indicate innocence.

91. Id.; see also http://www.cwsl.edu/icda/i_Innocence.html (last visited Dec. 30, 2002).
92. To be fair, this trait may be beneficial to innocence projects, but not necessarily to inmates. For example, a project's decision to stop investigating a case could send a negative message to the public about the merits of the innocence claim. See Suni, supra note 4, at 929-30.
94. Frankly, this willingness is somewhat disturbing in terms of professional responsibility and the duty of prior counsel to maintain client confidences even after the conclusion of the lawyer's representation. See Suni, supra note 4, at 939-40. Only rarely have we been asked to furnish a copy of the inmate's authorization form before the lawyer will agree to talk.
95. See SHECK ET AL., supra note 6.
While an analysis of these indicia is well beyond the scope of this Article, and recognizing that each case is unique, it is worth noting the “Signs of Innocence” that Protess utilizes in gauging innocence claims: a lack of physical evidence linking the defendant to the crime, the existence of an alibi, the absence of a credible confession and credible eyewitnesses, and the defendant’s background (i.e., a limited criminal record).96

C. Ethical Issues and the Case Selection Process

The case selection process for law school innocence projects raises important ethical concerns.97 First, there is the issue of whether an attorney-client relationship has been established before a project formally agrees to handle an inmate’s innocence claim, thereby creating duties of confidentiality, competence, and diligence, among other obligations.98 The Model Rules of Professional Conduct authored by the American Bar Association (ABA) offer little guidance in determining when an attorney-client relationship originates,99 although the Restatement (Third) of the Law Governing Lawyers suggests that such a relationship can be created where

a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person, and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .100

In the innocence project context, a prisoner’s inquiry could be construed as the manifestation of that person’s intent for the project to deliver legal services,101 and the project should be aware that the inmate—with few other outlets for assistance—may be relying on it to do so. Moreover, the comments to the Restatement submit that lawyers may demonstrate consent in multiple ways: “The lawyer may explicitly agree to represent the client or may indicate consent by action,  

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97. See Suni, supra note 4. Most law school innocence projects endorse what Suni terms either the “limited representation” or the “full representation” model. Id. at 926-30. Under the “limited representation” model, which seems to be prevalent, a project only represents prisoners asserting claims of actual innocence and may discontinue pursuit of an inmate’s claim if that claim is found to lack merit. Id. at 929-30. In contrast, the Center onWrongful Convictions and the California Innocence Project follow what Suni terms the “full representation” model whereby “once these projects accept a case, they will see it through even if they determine that there is not a credible claim of actual innocence . . . continued belief in actual innocence is not a prerequisite for continued representation.” Id. at 928.
98. Id. at 931.
99. Id. at 931-32.
101. See Suni, supra note 4, at 932.
for example by performing services requested by the client." As a result, it may be critical to clarify without equivocation to interested prisoners that the project does not consent to provide representation unless and until it notifies the inmate that it wishes to establish an attorney-client relationship. To avoid the inadvertent creation of this relationship, some questionnaire authorization forms specify that, while the clinic intends to begin a preliminary investigation, it is not representing the inmate. Additionally, all members of the project (faculty, students, and staff) should make a distinct effort at the preliminary investigation stage to shun using language or undertaking actions that might cause a prisoner to believe representation has commenced.

Second, provided that an attorney-client relationship does not arise inadvertently during the case selection process, a question remains as to whether a duty of confidentiality nonetheless arises. 102


103. For instance, our form asks inmates to consent to the following provision: "I understand that by conducting an initial investigation, the Second Look Program is not agreeing to represent me." See also Suni, supra note 4, at 934 ("[D]isclaimers should clearly state that any information being collected is for screening purposes only and does not indicate that representation has been undertaken."). When I presented a version of this paper at the Clinical Theory Workshop at New York Law School in the fall of 2002, several participants expressed concerns about the tendency of innocence projects to treat inmates as "non-clients" during the case selection process and suggested the possibility of entering into limited retainer agreements for the duration of the preliminary investigation. Similar concerns were raised briefly during the National Innocence Projects Conference at California Western School of Law in January 2002. See Suni, supra note 4, at 922 n.9. My impression is that it would be difficult for an innocence project to comply with the increased obligations created by the formation of attorney-client relationships with hundreds, perhaps thousands, of inmates during the case selection process. Would a project be required to engage in a diligent and zealous preliminary investigation for each and every case? If so, what would that entail? Even more, the benefits of such arrangements may not be extremely significant given that the attorney-client privilege would still apply to confidential communications with prospective clients. See infra notes 105-13 and accompanying text. There should certainly be more discussion of this issue, however, in light of the potential harm to inmates. See, e.g., Suni, supra note 4, at 929-30 ("[I]f a project has been known to be actively involved in the investigation of a case, will its failure to pursue that case be construed to reflect a belief that the inmate may not be innocent?").

104. See Suni, supra note 4, at 933-34.

105. For information about the duty of confidentiality, see Model Rules of Prof'L Conduct R. 1.6 (1983). The ABA House of Delegates adopted a new Model Rule in February 2002 explicitly termed "Duties to Prospective Client." See Model Rules of Prof'L Conduct R. 1.18 (2002); Elizabeth Cohen, The Less You Know . . . New Model Rule Clarified Obligations to Prospective Clients, A.B.A. J., Dec. 2002, at 62. Model Rule 1.18 explains that, first, "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client" and, second, generally "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective
The applicable rules suggest that a lawyer’s duty to protect information may attach prior to initiating actual representation, that is, during preliminary consultations with a prospective client about whether to offer legal assistance. Therefore, essentially any information procured during the questionnaire and preliminary investigation phases by an innocence project should be treated as confidential and only disclosed with the consent of the inmate. To protect this information, Ellen Suni urges innocence projects to treat correspondence with prisoners as “legal mail.” This allows project correspondence to circumvent the ordinary processing method, in which correctional facilities often open and read prisoner mail, because legal mail typically is not read by prison staff and must be opened in the inmate’s presence.

Third, it is generally recognized that confidential communications made in the course of consultations with potential clients are privileged irrespective of whether representation is eventually undertaken and, thus, shielded from compelled disclosure. The attorney-client privilege, however, applies only (1) to confidential information obtained from the client for the purpose of procuring legal assistance and (2) in judicial or other proceedings where a lawyer may be called as a witness or otherwise ordered to furnish evidence relating to a client. Accordingly, in the unlikely event that a member of an innocence project shall not use or reveal information learned in the consultation . . . “

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106. See Model Rules of Prof’l Conduct R. 1.18(a)-(b); see also Suni, supra note 4, at 936-37.
107. See Restatement (Third) of the Law Governing Lawyers §§ 15(1)(a) (2000), 62; Suni, supra note 4, at 938. This duty should apply to information that relates to the representation of the client and is not generally known, even if it derives from third parties whose communications are not protected by the attorney-client privilege. Restatement (Third) of the Law Governing Lawyers § 59, cmt. b.
108. Suni, supra note 4, at 938-39.
109. Id. Designating correspondence as “legal mail” should also allow a project to comply with the duty to take “reasonable precautions” to guard against disclosure to unintended recipients. Model Rules of Prof’l Conduct R. 1.7 (2000); see also Restatement (Third) of the Law Governing Lawyers § 60, cmt. d (2000).
111. See Model Rules of Prof’l Conduct R. 1.6, cmt. 3. Suni observes that “[d]ocuments are covered only to the extent they manifest protected communications. Information contained in the questionnaires and requests for assistance
cence project is subpoenaed as a witness in a proceeding against an inmate whose request for assistance was evaluated by the project, the privilege could not be asserted regarding information obtained from people other than the inmate unless they qualify as agents of the inmate.\textsuperscript{113}

Finally, for projects that restrict their intake to actual innocence claims and assert a right to cease representation on a case they have selected if they later determine the claim lacks merit, there may be a threshold issue regarding whether this limitation is ethically proper.\textsuperscript{114} The Model Rules and the Restatement indicate that lawyers may impose reasonable limits on the scope of representation with the informed consent of the client.\textsuperscript{115} As Suni concludes, given the constraints on resources, “there is likely nothing unreasonable about projects limiting the kinds of cases they will take or continue to pursue . . . as long as the potential consequences are clearly understood” by the prisoner.\textsuperscript{116}

Although additional ethical questions may surface during the case selection process,\textsuperscript{117} law school innocence projects should be able to

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  \item provided by the inmate would be subject to privilege, while the underlying documents and records in the case would not.” Suni, \textit{supra} note 4, at 938.
  \item See \textit{Restatement (Third) of the Law Governing Lawyers} § 70, cmt. f (2000) (“A person is a confidential agent for communication if the person’s participation is reasonably necessary to facilitate the client’s communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence.”). Frequently, relatives and friends contact an innocence project on behalf of a prisoner and it could be argued that such conduct is “reasonably necessary to facilitate” communication with the inmate (a prospective client) in light of the restricted access to the telephone, visitation, and the use of mail in correctional facilities. See \textit{supra} note 82 and accompanying text. If the third party is not deemed an agent, however, the communications are not confidential and not privileged. See \textit{Restatement (Third) of the Law Governing Lawyers} § 70, cmt. e (2000).
  \item Suni, \textit{supra} note 4, at 929-30, 961-62.
  \item \textit{Model Rules of Prof’l Conduct} R. 1.18(c); \textit{Restatement (Third) of the Law Governing Lawyers} § 19(1) (2000); see also Suni, \textit{supra} note 4, at 929 n.39, 961-62.
  \item Suni, \textit{supra} note 4, at 962.
  \item See \textit{generally} Suni, \textit{supra} note 4, at 945-69. The duty to avoid conflicts of interest applies generally only where representation has already commenced, but, as Suni notes, this issue may affect the screening process, such as when co-defendants both seek assistance from the same innocence project or when an inmate requesting help is also a witness or suspect in another case being reviewed by the project. \textit{Id.} at 945-55. For instance, new Model Rule 1.18 specifies that a lawyer “shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter . . . .” \textit{Model Rules of Prof’l Conduct} R. 1.18(c) (2002); see also \textit{Restatement (Third) of the Law Governing Lawyers} § 19(2) (2000). To guard against potential problems in this area, Suni mentions the possibility of using advance waivers and advises installing a conflict-checking system for the
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comply with their professional obligations to prisoners in the preselection phase by taking care to clarify throughout the process that the project is not representing the inmate (until that decision is made), and to guard against the disclosure of information. To the extent that some element of disclosure is necessary to conduct a preliminary investigation, which it invariably is, the common practice of affixing an authorization form to the questionnaire and asking inmates to sign and return it may be prudent.  

Seeking referrals from trusted lawyers, reviewing detailed questionnaire forms, and traipsing down some stretch of the Paper and People Trails, while simultaneously abiding by one’s ethical obligations, can assist members of an innocence project in reaching a level of comfort about the legitimacy of a prisoner’s claim before accepting the case and plunging full-bore into the investigation. Even so, it strikes me that a project’s decision about taking on a client—in a non-DNA case, at least—ultimately has a lot to do with instinct. As William Hellerstein often says, drawing on his forty years of criminal defense practice, it is the amount of detail in the inmate’s correspondence, the credibility displayed during the prison interview, and a sense of “smell” that often convinces him a particular case warrants our services. One of the most fascinating aspects of the innocence project case selection process concerns whether the fresh, eager nostrils of clinic students are well-equipped to bear primary responsibility for this smell test. Regardless of the answer, the educational benefits of involving students in case selection must be examined.

III. PEDAGOGICAL CONSIDERATIONS

At first blush, it is unclear whether an innocence project is a desirable educational setting for a law school clinic. The fundamental premise behind clinical legal education is that students learn best

regular entry of the names of defendants, co-defendants, and witnesses involved in the cases under review. Suni, supra note 4, at 952-54. Suni also suggests that projects be mindful of potential conflicts related to the project’s staff. Id. at 954-60. As for other duties, the obligations to act with competence and diligence, and to keep clients reasonably informed, would appear only to attach upon formation of an attorney-client relationship. Id. at 960-63. Suni warns, though, that projects should not neglect these duties entirely for matters in the midst of screening; where advice is given at all, a lawyer must use reasonable care in rendering it and inmates should not be “led to discontinue other sources of possible relief in reliance on timely screening.” Id. at 963-64. Efforts by project attorneys to offer “quasi-representation” during the preselection phase, such as ghostwriting pleadings or making communications on the inmate’s behalf, may raise questions about the scope of the attorney’s authority, among other issues. Id. at 964-67.

118. In theory, there could be an issue regarding whether the forms commonly used by innocence projects are sufficient to allow inmates to provide informed consent, especially in situations involving mentally deficient or illiterate prisoners.
through experience—the process of doing legal work under the supervision of attorneys and reflecting upon that work allows students to hone their legal skills and prepare themselves for life beyond the classroom. Recognizing that learning is often enhanced where students bear primary responsibility for a case and are forced to engage in autonomous decisionmaking, most clinicians have embraced the concept of “non-directive” supervision—giving students wide latitude in devising and implementing lawyering tasks and only intervening when it is necessary to preserve their clients’ interests.

Innocence cases, however, are among the most time-consuming and cumbersome matters to litigate, much less navigate politically, and their inherent unpredictability makes it difficult for supervisors to cede control of case strategy and to foresee what skills a student might glean from working on them. Furthermore, the unusual procedural posture of these cases—in essence, the effort to revive a dormant matter—suggests the experiences in the clinic might not translate directly into the students’ likely practice areas and lawyering tasks after graduation. Still, it is my belief that law school innocence projects can serve the pedagogical goals of clinical legal education. In particular, involving students deeply in the case selection process can help compensate for a potentially lackluster education.

119. See, e.g., William P. Quigley, Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor, 28 Akron L. Rev. 463, 475 (1995) (“The single most critical defining element of clinical education is that it is experience-based learning... that students learn most effectively by participating in their own education by actually representing people.”); see also Margaret Martin Barry et al., Clinical Education for this Millennium: The Third Wave, 7 Clinical L. Rev. 1, 17-18 (2000); Kenneth R. Kreiling, Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision, 40 Md. L. Rev. 284 (1981).


121. For a discussion of the tension in clinical teaching between the theory of non-directive supervision and the professional demands of client representation, see George Critchlow, Professional Responsibility, Student Practice, and the Clinical Teacher’s Duty to Intervene, 26 Gonz. L. Rev. 415 (1991); see also Stark et al., supra note 120, at 45-47 (describing the difficulty many clinicians have in squaring their commitment to non-directive supervision with the desire to provide outstanding legal services to clients).

122. Working on DNA claims in jurisdictions that provide for post-conviction testing may be somewhat less difficult. See Stiglitz et al., supra note 3, at 424. Nevertheless, legal and practical obstacles often impede attempts to exonerate inmates through DNA testing, particularly statutes of limitations on motions based on newly discovered evidence and problems in simply trying to obtain the evidence. See Scheck & Neufeld, supra note 38, at 244-45. As Scheck and Neufeld point out, “[i]n 75 percent of [Cardozo] Innocence Project cases, matters in which it has been established that a favorable DNA result would be sufficient to vacate the inmate’s conviction, the relevant biological evidence has either been destroyed or lost.” Id. at 245.
tional experience in litigating an innocence case and offer each student a valuable learning tool in its own right.

A. Pedagogical Goals and Supervisory Methods for Law School Clinics: A Brief Look

Clinical legal education grew in the 1960s and 1970s primarily to address two major concerns: the lack of opportunities for students to develop practical skills via the traditional law school curriculum and the dearth of adequate legal representation for the poor. Historically, in-house law school clinics where students labor on behalf of indigent clients under faculty supervision have attempted to fill both of these chasms. The dual aims of most clinics, though, do not always overlap; the clinical teacher often must struggle to reconcile her pedagogical objectives for the student with her professional responsibility as an advocate for the client.

In terms of pedagogical objectives, law school clinics are typically designed to help students gain one or more of the skills required in the practice of law. Over time, clinicians and others have pinpointed a series of specific talents that clinics should aspire to help law students develop. The MacCrate Report, the product of an extensive probe into the state of legal education in the late 1980s and early 1990s, formulated a Statement of Fundamental Lawyering Skills and Professional Values that students ought to accrue during law school: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. During the same period, the American Association of Law

123. See, e.g., Anthony G. Amsterdam, Clinical Legal Education—A 21st Century Perspective, 34 J. LEGAL EDUC. 612, 615 (1984) (discussing the failure of the traditional law school curriculum, with its emphasis on appellate case reading and interpretation, to prepare students for the hazards of practicing law). Evidently, the “first wave of clinical legal education” in the early 1900s surfaced largely in reaction to the emergence of the casebook method in the 1890s. Barry et al., supra note 119, at 5.
125. See Critchlow, supra note 121.
126. Of course, the precise goals vary from clinic to clinic. For a discussion of the teaching goals that Philip Schrag and his colleagues identified for the Center for Applied Legal Studies at Georgetown Law School, see Schrag, supra note 15, at 179-86.
127. See MacCrate Report, supra note 124.
Schools (AALS) Committee on the Future of the In-House Clinic set forth nine chief goals of clinical education.128

Depending on personal preferences and the challenges of a particular clinic, teachers rely on a mixture of techniques to convey the practical skills they are entrusted with transmitting to students as a part of (and occasionally as a supplement to) supervising casework.129 While exposure to practical skills through working on actual and/or simulated cases in the role of a lawyer is a crucial component of clinical legal education,130 many instructors aim to go beyond that and encourage students to learn from their experiences, generally through the process of evaluation and self-reflection.131 Again, those

128. See Report of the Committee on the Future of the In-House Clinic, 42 J. Legal Educ. 508, 511-17 (1992) ((1) developing modes of planning and analysis for dealing with unstructured situations as opposed to the “pre-digested world of the appellate case;” (2) providing professional skills instruction in such necessary areas as interviewing, counseling, and fact investigation; (3) teaching means of learning from experience; (4) instructing students in professional responsibility by giving first-hand exposure to actual mores of the profession; (5) exposing students to the demands and methods of acting in the role of the attorney; (6) providing opportunities for collaborative learning; (7) imparting the obligation of service to clients, information about how to engage in such representation, and knowledge concerning the impact of the legal system on poor people; (8) providing the opportunity to examine the impact of doctrine on real life and providing a laboratory in which students and faculty study particular areas of the law; and (9) critiquing the capacities and limitations of lawyers and the legal system).

129. For instance, Peter Hoffman notes how clinicians may engage in a discussion of a case (dialectic teaching); provide information to the student (didactic teaching); evaluate a student’s lawyering skills (evaluation); demonstrate the method of performing a lawyering task (demonstration) or a combination of these approaches. Peter Toll Hoffman, The Stages of the Clinical Supervisory Relationship, 4 Antioch L.J. 301, 302 (1986). Robert Condlin suggests clinicians should incorporate “learning mode” behavior into their teaching, which he describes as “inquiry, the process of obtaining information about others’ statements; owning up, the process of sharing with others both intellectual and emotional reactions to their statements; and testing, the process of eliciting and assessing reaction to one’s own views in order to decide whether to agree or disagree.” Robert J. Condlin, Socrates’ New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction, 40 Mo. L. Rev. 223, 235 (1981).

130. Minna Kotkin has dissected the “role assumption” archetype of clinical teaching—in which “the student acts in the role of a lawyer representing a real or imaginary client”—questioning the notion that all students learn effectively through this method. Minna J. Kotkin, Reconsidering Role Assumption in Clinical Education, 19 N.M. L. Rev. 185 (1989). Some students may struggle to immerse themselves and learn from performing lawyering tasks, and may profit by first observing someone else conducting the activity, i.e., a supervisor providing a “role model.” Id. at 196-202. A potential pitfall with role modeling, however, is that when the client representation starts with the teacher in role as the attorney “the dynamic of authority . . . may be irrevocable.” Id. at 201.

131. See, e.g., Barry et al., supra note 119, at 17 (describing how self-reflection in clinical teaching methodology is exemplified in the work of Donald Schon and his concept of “reflective practice” or “reflection in action”); see also Kreiling, supra note 119, at 288-306; Nina W. Tarr, The Skill of Evaluation as an Explicit Goal of
who embrace this concept employ diverse methods for teaching the skill of self-reflection, ranging from holding periodic post-mortem sessions analyzing how a student fared in handling an aspect of a case to requiring that students keep a journal about their clinic activities. It is through this process of evaluation, many assert, that students truly sharpen their practical legal skills and obtain a mechanism for deconstructing and learning from their experiences that will permit them to improve their skills continually over the course of their careers.

Much of the scholarship regarding clinical teaching methodology has focused on the nature of the supervisory relationship. The debate turns principally on the extent to which supervisors should offer direction in overseeing student work. On the one hand, advocates of “directive” supervision suggest that providing detailed guidance to students—and sometimes even taking over primary responsibility for a case themselves—ensures that students do not flounder excessively and lose faith in their abilities. Directiveness in student supervi-

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132. To encourage contemplation, many clinicians ask students to keep a reflective journal. See J.P. Ogilvy, The Use of Journals in Legal Education: A Tool for Reflection, 3 CLINICAL L. REV. 55 (1996). For a discussion of the evaluation methods used in one clinic, the Housing Law Clinic at St. Louis University Law School, see Ziegler, supra note 131, at 585-90.

133. See, e.g., Kreiling, supra note 119, at 284 (“Clinical education should reach beyond skills training to provide the students with a method for future learning from their experiences.”). For an analysis of the process of providing feedback as part of a law school clinic, see Victor M. Goode, There is a Method(ology) to this Madness: A Review and Analysis of Feedback in the Clinical Process, 53 OKLA. L. REV. 223 (2000).

134. Schrag, supra note 15, at 213-14 (observing that supervisory methodology has been the subject of clinical scholarship perhaps more than any other topic); see, e.g., Hoffman, supra note 129; Michael Meltzer et al., The Bike Tour Leader's Dilemma: Talking About Supervision, 13 VT. L. REV. 399 (1989).

135. The process of supervision and evaluation is what separates clinical legal education from the relatively unstructured practical experiences that students might have by working in law offices over the summer or after graduation. See Peter Toll Hoffman, Clinical Course Design and the Supervisory Process, 1982 ARIZ. ST. L.J. 277, 280; see also Ziegler, supra note 131, at 575 (“The evaluation methodology distinguishes a clinic from a legal internship, clerkship, or associate position where assignments are given without detailed instructions and where feedback, beyond the supervisor’s expression of satisfaction or dissatisfaction, is incidental.”).

136. See Schrag, supra note 15, at 213; see also Hoffman, supra note 129, at 304 (discussing how supervisors may need to be directive at the beginning of a clinical course to avoid fueling student anxiety).
sion is often justified by references to the primacy of rendering top-notch legal services to clients, even if that means the educational aims for the student must take a backseat.\footnote{137}

On the other hand, proponents of "non-directive" supervision, who tend to predominate within the current ranks of clinical faculty,\footnote{138} insist that students learn best by engaging in their own decisionmaking about a case and by doing nearly everything themselves.\footnote{139} Non-directive supervisors lean toward fostering student independence and responsibility above all, often expressing reluctance to intervene in a matter unless absolutely necessary.\footnote{140} Furthermore, offering students significant freedom in performing lawyering tasks, some scholars attest, comports with adult learning theory—"andragogy" as opposed to "pedagogy"\footnote{141}—and the tendency of adults to absorb material most effectively as active participants in their own education in "a spirit of mutuality between teachers and students as joint inquirers."\footnote{142} Under this view, a clinical teacher-student relationship based on mutuality is a more egalitarian relationship and, for most students, is a welcome respite from the hierarchical interactions they have with other members of the law school faculty.\footnote{143}

Most clinicians, however, do not fall at either extreme of the directive/non-directive spectrum, but rather rest at some point along the continuum.\footnote{144} Studies have indicated that many self-identified non-directive supervisors are more directive than they intend or wish to be.\footnote{145} Likewise, supervisors may be more comfortable assuming a

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\item \footnote{137} See Stark et al., supra note 120, at 57 (stating that directive respondents showed a greater commitment to best possible client service than non-directive respondents and seemed less willing to compromise this goal).
\item \footnote{138} Id. at 35.
\item \footnote{139} See, e.g., Schrag, supra note 15, at 213-14.
\item \footnote{140} See Stark et al., supra note 120, at 38-42, 58.
\item \footnote{142} Id. at 330 (discussing the theories of Malcolm S. Knowles). Bloch suggests that “[p]roper implementation of andragogical methodology in a law school clinical setting requires that clinical faculty supervise students closely and directly,” but admonishes that “the possibility always exists that mutual inquiry will be forsaken and that the teacher will take control of the representation by lecturing to the student and directing him or her to do what the teacher knows—or has determined—must be done.” Id. at 348-49. In Bloch’s view, “[a]n andragogical model would specifically discourage this type of supervision, except to the extent that it is necessary to ensure competent representation in a particular case.” Id. at 349.
\item \footnote{143} See Kathleen A. Sullivan, Self-Disclosure, Separation, and Students: Intimacy in the Clinical Relationship, 27 Ind. L. Rev. 115, 123 (1993).
\item \footnote{144} Everyone who has chimed in on the subject seems to agree that some level of supervision is required in clinical methodology; the issue relates to the scope and nature of that supervision. See Stark et al., supra note 120.
\item \footnote{145} See id. at 61-62 (noting that “even among nondirective supervisors, only twenty percent said that they ‘often’ allow students to make decisions that go against their views,” and citing client interests and time pressures as the key factors in
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non-directive role with respect to certain lawyering tasks—and certain individual students—than with others.\textsuperscript{146} Indeed, Stacy Caplow has observed that "[w]hile the received wisdom among live-client clinicians tends to favor non-directive supervision, this is one area in which our instructional philosophy may romanticize our reality."\textsuperscript{147}

Moreover, the degree of directiveness that a faculty member utilizes in supervising students frequently shifts in response to the progression of a student’s skills during the clinic.\textsuperscript{148} At the start of a clinical course, students regularly feel unprepared and overwhelmed, eager to receive information and instruction.\textsuperscript{149} Over time, most students reach a point where they display greater confidence and assume greater responsibility for their cases, a period marked by the need for a more collaborative relationship with their supervisor.\textsuperscript{150} Ideally, students eventually reach a stage in which they are functionally acting as lawyers, with supervisors guarding against only grave errors.\textsuperscript{151} Although each student advances at a different rate and with varying results, Peter Hoffman has commented that students usually demand greater freedom over the course of the supervisory relationship and, if a supervisor balks at gradually relinquishing control, the outcome for students might be dependency, rebellion and, worse yet, a failure to internalize the skills being taught.\textsuperscript{152}

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\item Supervisors behaving more directively than they should).
\item Moreover, a supervisor's inclination to be non-directive may be tempered somewhat in states where the student practice rules prescribe that clinicians assume joint responsibility for casework and specifically list the responsibilities of the instructor. See Catherine Gage O'Grady, Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer, 4 CLINICAL L. REV. 485, 515 (1998).
\item \textsuperscript{146} See, e.g., Stark et al., supra note 120, at 44 ("While a large majority of respondents favored nondirective supervision of initial client interviews, only a minority endorsed a nondirective approach towards students' written work."). Also, since students learn differently, supervisors frequently must tailor their degree of directiveness to correspond with individual learning styles and abilities. See, e.g., Quigley, supra note 119, at 486-87 (stating that some students may become "deer caught in the headlights" and need more guidance).
\item \textsuperscript{147} Caplow, supra note 19, at 27; see also Quigley, supra note 119, at 485 ("Divining the appropriate mix of freedom and direction/control in the student-teacher relationship is one of the ongoing challenges of clinical educators.").
\item \textsuperscript{148} Hoffman, supra note 129, at 302 ("What may be effective supervision at the beginning of the course may, for instance, become stifling and overly restrictive by the end of the semester.").
\item \textsuperscript{149} See id. at 303-07; Michael Meltsner & Philip G. Schrag, Scenes from a Clinic, 127 U. PA. L. REV. 1, 33 (1978) ("Most members of the group usually resent the supervisors' decision to thrust so much responsibility on them, but they are unable to express this resentment at first.").
\item \textsuperscript{150} Hoffman, supra note 129, at 307-09.
\item \textsuperscript{151} Id. at 309-10.
\item \textsuperscript{152} Id. at 310.
\end{itemize}
Even if a student reaches a level of lawyering competency at which she needs minimal supervision, live-client clinics can still pose dilemmas for clinical teachers when their visions of what is educationally valuable for the student clash with their assessments of the professional duties owed to the client.\textsuperscript{153} In an article presenting the results of a survey they conducted about the measure of directiveness exerted by clinical supervisors, James Stark, Jon Bauer, and James Papillo remarked that “[a]lmost all clinicians feel substantial conflict about their competing obligations to students and clients,”\textsuperscript{154} and “[m]ost clinicians also indicated that they behave more directly with students than they think they should, and cited concerns about client welfare as the primary reason.”\textsuperscript{155} Meticulous faculty direction and even intervention in a case may benefit the client, but often at an educational price to the student.\textsuperscript{156}

In a nutshell, live-client clinics are generally geared toward helping students gain many of the practical skills they will need to succeed as lawyers, while at the same time trying to aid an under-served client population. There are lingering questions, however, regarding the best way to impart these skills, with the crux of the controversy surrounding the degree of direction that supervisors should provide and the manner in which supervisors should resolve the occasional collision between educational objectives and client service obligations. Just as clinicians continue to wrestle with these questions, they continue to explore new outlets for teaching lawyering skills, aiming to formulate innovative clinics that correlate with the changing, fluid nature of legal practice.\textsuperscript{157} It remains to be seen whether innocence projects are an appropriate forum for law school clinics in the twenty-first century; my sense, though, is that they can be.

\textsuperscript{153} See Critchlow, \textit{supra} note 121, at 415-16 (suggesting this situation could create “role confusion and professional conflict” for the teacher); see also Quigley, \textit{supra} note 119, at 485 (stating that this tension stems from the supervisor’s “responsibility as a teacher to the student to allow her to take maximum control of the case and learn by the fullest possible experience of representing the client versus the ethical responsibility of the lawyer-teacher to their client to make sure the client’s interests are well served”).

\textsuperscript{154} Stark et al., \textit{supra} note 120, at 66.

\textsuperscript{155} \textit{Id.} at 47.

\textsuperscript{156} \textit{Id.} at 67 (“If the clinician takes over aspects of the case, the student may feel that she has ‘failed.’”).

\textsuperscript{157} See Barry et al., \textit{supra} note 119, at 51-71 (discussing how law school clinics may need to adapt to changes in technology, demographics, and globalism, as well as shifts in the nature of law practice).
B. The Educational Value of Involving Students in Case Selection for Innocence Projects: A Close Look

1. Student Experiences in Handling Innocence Cases: An Educational Mixed Bag

Working on post-conviction cases of actual innocence, in theory, constitutes fertile terrain for students to cultivate practical skills while also offering legal assistance to an impoverished segment of the population, thereby advancing two main goals of clinical legal education. Optimally, the experience of serving as an advocate for innocent prisoners contains a heavy dose of fact investigation, interviewing, and counseling as well as some portion of the techniques—legal analysis, research, and writing—developed in traditional appellate clinics. Exposure to the criminal justice system and to the general skills of organization and time management are other potential rewards of working in an innocence project. Students may also confront and be asked to solve ethical quandaries, an integral part of teaching professional responsibility. Moreover, especially in the context of non-DNA claims, work in this field offers training in the art of creative problem solving (“thinking outside the box”) because these cases often lack a clear trajectory. Finally, merely participating in an innocence project and striving toward the exoneration of a wrongfully convicted prisoner has a certain intrinsic value: a chance for a student to associate herself with a socially desirable objective and, accordingly, derive some personal fulfillment from that association.

Nevertheless, the pedagogical problem with many actual innocence claims is that it is difficult to anticipate at the outset whether any particular case may be worthwhile for students. For innocence projects, the educational component of the matters chosen for representation is often a secondary consideration; there is an element of “take what you can get” with innocence claims and there are usually not enough meritorious claims within a project’s specific mandate to

158. See Stiglitz et al., supra note 3, at 430-31 (describing the range of skills involved in innocence cases, including writing, grappling with multiple legal issues simultaneously, fact investigation, organization and time management, and exposure to the major participants in the criminal justice system). For a discussion of some of the skills developed in an appellate clinic, see Laflin, supra note 64, at 19-46.

159. See Stiglitz et al., supra note 3, at 430-31.

160. See Suni, supra note 4; Hoffman, supra note 135, at 291.

161. Stiglitz and his colleagues comment that “the lawyering skills learned by having students work exclusively on DNA cases is limited, particularly in a state . . . where there is a statute that provides for DNA testing.” Stiglitz et al., supra note 3, at 424. Even in such cases, however, tracking down the biological evidence might necessitate strategic planning and creative thinking. See supra note 122 and accompanying text.
Prior to receiving our first set of students for the Second Look Program Clinic, William Hellerstein and I worked all summer to find viable cases, agonizing that we would be unable to discover a sufficient number of legitimate claims of actual innocence to assign to our students, let alone cases that presaged a gratifying clinical experience. Frankly, our judgment of each claim's legal and factual strength eclipsed any pedagogical concerns.

This case selection method differs significantly from the process for most in-house clinics, especially trial and appellate offerings, which typically put the perceived educational attributes of a case at or near the top of their screening charts. Kenneth Kreiling has argued that, to facilitate experiential learning, supervisors should make preselected cases available for students at the start of a clinical course and should bear three major factors in mind when choosing these cases. First, the cases should contribute materially to the goals of the course. Second, they should be selected such that, to the extent possible, their initial demands upon the students follow or at least coincide with the classroom component. Third, the tasks that must be performed in the near future should be sequenced so they will be within the capacity of the student with adequate faculty supervision. As part of ruminating about case selection, scholars have also

162. Stiglitz et al., supra note 3, at 425 ("Good cases (i.e. cases with a believable, provable, and procedurally viable claim of innocence) are relatively rare.").
163. We did not involve any students in this part of the case selection process because, on a practical level, we did not have any students yet and wanted to give them preselected cases to begin working on in the fall.
164. See, e.g., Duquette, supra note 64, at 9 ("The primary criterion for case selection must be legal education."). Educational considerations are rarely, if ever, the sole basis for selecting a case. Maureen Laflin explains that cases for the Appellate Clinic at the University of Idaho College of Law are chosen for "their educational value, student availability, the time constraints of the project, the interests and expertise of the clinical faculty and the law faculty in general and the client's prospects for securing other legal representation. The individual goals, interests, and capabilities of the available students also factor into case selection." Laflin, supra note 64, at 9-10.
166. Id.
167. Id.
168. Id. Kreiling's model, though noble in intent, may be difficult to realize. See Hoffman, supra note 135, at 290 ("Given the inherent variability of real cases, their use in role assumption creates problems of providing uniform experiences as well as achieving orderly learning. The larger the variation in each student's clinical experience, the more difficult it becomes to achieve the goals of the course and the greater the necessity for the teacher to show flexibility in responding to the learning needs of the class.").
analyzed the respective educational merits of selecting complex, "big" cases versus more discrete, "small" cases for students.\textsuperscript{169}

To be sure, estimating the educational value of an individual case might be an area where the norm does not match the ideal—speculating about the future course of a case and the succession of tasks involved might be a matter better left to a psychic than a lawyer, but I imagine experienced clinicians are quite adept at such prognostications. More to the point, selecting cases with high educational value is a worthy goal for clinics in general and arguably the most critical aspect of an effective clinical program.\textsuperscript{170} If the cases lack educational value, students will miss out not only on a learning opportunity but also on the chance to apply their clinical experience to their future careers.\textsuperscript{171}

Given that educational considerations are not always paramount in ultimately selecting cases for representation by an innocence project, it should not be a revelation that students have mixed learning experiences in handling those cases. During our first year in operation, the 2001-2002 academic year, we divided the eight students enrolled in the Second Look Program Clinic into pairs and assigned each team one of the four cases that we had vetted over the summer and decided to pursue.\textsuperscript{172} In short, the teams received the following cases:

- Team 1: An inner-city murder from 1991 in which two teenagers allegedly shot an off-duty corrections officer during a carjacking. We decided to intervene on behalf of one co-defendant, with the other co-defendant still represented by the zealous public defender who had argued the direct appeal years before. Our case rested chiefly on the purported eyewitness testimony of a felon who claimed that two other men had committed the crime.

- Team 2: A robbery at a suburban restaurant in 1999 where the perpetrator evidently stole money from a cashier at knife-point. The cashier did not identify the defendant at trial and testified that the perpetrator was "taller and fatter" than the defendant. Moreover, the defense had information suggesting that, at around the time of this incident, a taller, fatter man with facial features resembling

\textsuperscript{169} See Duquette, supra note 64, at 9; Michael Meltsner & Philip G. Schrag, Report from a CLEPR Colony, 76 COLUM. L. REV. 581, 589-90 (1976); Schrag, supra note 15, at 191-92.

\textsuperscript{170} See Duquette, supra note 64, at 8-9 (stating that selecting the right mix of cases is perhaps the most important ingredient of a good clinical program). It could be argued that giving students cases that lack extensive opportunities to perform lawyering activities is not altogether bad; to some extent it emulates what frequently occurs in practice, e.g., the corporate transaction that "blows up" before reaching the negotiating table.

\textsuperscript{171} See Bloch, supra note 141, at 350-51 (discussing the importance of selecting cases for their educational value because of application to future careers).

\textsuperscript{172} See supra note 18 and accompanying text.
those of the defendant had committed a string of robberies in the vicinity, but the judge deemed this evidence inadmissible. The only evidence connecting the defendant to the crime, which the jury apparently credited, came in the form of the testimony of the restaurant's cook, who identified the defendant at trial. We entered the case while the direct appeal was still pending and received carte blanche from the assigned public defender to begin our own investigation and, later, to substitute ourselves as appellate counsel.

- Team 3: A 1984 murder outside an urban “base house” where cocaine was sold and consumed. Our client's conviction rested almost entirely on the accusations of an alleged eyewitness who had received a reduced sentence on a pending drug charge in exchange for his testimony. The co-defendant in the murder case consistently maintained, first to his lawyer and then in a post-conviction proceeding, that he had acted alone and that our client had not been involved at all. With the appeals long since exhausted and the aforementioned post-conviction motion having failed, we entered a defense case in need of resuscitation.

- Team 4: A 1991 murder outside a nightclub stemming from a dispute between two groups of teenagers. By means of suggestive police tactics, the defendant was identified in a photo array by one witness, and multiple witnesses later testified against him at trial. In the ensuing years, five prosecution witnesses recanted—citing police and prosecutorial coercion as one of the factors in their false testimony—and several criminal defense lawyers had undertaken the case, most recently a former colleague of William Hellerstein who had filed a federal habeas corpus petition and was awaiting a decision from the Magistrate Judge about whether he would grant a hearing. We agreed to help with the hearing if one was ordered.

In hindsight, and after de-briefing the students, it seems as though Team 2 had the best educational experience in working on its case throughout the year while Team 4 had the worst. Team 2 engaged in extensive fact investigation by interviewing the defendant and the two eyewitnesses, visiting the family of the suspected perpetrator (who was incarcerated for the other robberies), consulting with the defendant's trial lawyer, and accompanying a private investigator on a canvass of the area. They utilized their legal writing skills by drafting affidavits, and they conducted research about the potential issues in the pending direct appeal. They also participated in many brainstorming sessions about approaching the District Attorney's Office and about whether to proceed with the appeal before filing a motion to vacate the conviction based on newly discovered evidence or vice versa. Although their stint in the clinic is over, both members of Team 2 have expressed a desire to continue working on the case and I envi-
sion they might play a role in drafting the appellate brief if we do not resolve the case through alternative avenues.

In contrast, Team 4's "investigation" consisted of a single meeting with our co-counsel at which we determined that all of the necessary legwork had been done and that, in essence, all we could do was wait until the Magistrate Judge ruled. Team 4 was poised to find and prepare the witnesses in the event of a hearing; however, the students completed their tenure in the clinic before we even received a decision from the court. We spent months trying to find Team 4 another case to work on, but nothing especially attractive arose at the proper time.

Team 1 appeared to have a mediocre educational experience. Its case, seemingly full of promise at the beginning, became mired in a series of negotiations with the co-defendant's attorney about strategy and later with the District Attorney's Office, which agreed to launch its own investigation. We had already met with the exculpatory eyewitness prior to assigning the case to the students and there was little for them to investigate, particularly considering our perception that the case, the murder of a corrections officer, was politically volatile. The contribution by the students on Team 1 was indeed significant, including a helpful inventory and analysis of the police reports in the case, yet their experience was largely passive; they were observers at many meetings and seldom active participants, a result I attribute as much to our unwillingness to relinquish command of the case as to any failings in the case itself.

Objectively, Team 3 had the greatest triumph during the clinic's first year—by the end of the fall semester, Team 3 had already helped to garner the release of its client on parole—but it nowhere met this level of success pedagogically. Shortly after assigning the case to the students, we discovered the investigation was a non-starter; the leads from seventeen years before had already been pursued or long since dried up. Moreover, much of the exculpatory evidence in the case had been presented during the previous post-conviction proceeding and, therefore, was not "new." Shifting our attention to the parole process, the students first conducted research (concerning the manner in which outside parties could intervene before the Parole Board in New York and what types of documents could be presented to it) and then wrote the first draft of a document for submission to the Board.

Soon after the excitement of learning that the Board had opted to release our client waned, we determined that continuing to work on his case alone might not be a productive use of Team 3's resources: our client was no longer in prison and the investigation had achieved

173. As fate would have it, in August 2002, the Magistrate Judge granted the request for a hearing and we assigned a new team of students to help prepare for the hearing in November 2002.
nothing up to that point. Fortunately, an intriguing new case materialized at the start of the spring semester and we assigned it to Team 3.174 Again, this case was older (an intra-prison homicide from 1986) and the bulk of the investigation had already been completed or was in the process of being completed by the attorney who had brought the case to us and with whom we had established a co-counsel relationship. It took time for Team 3 to gain familiarity with the trial and various appeals in this new case, but ultimately their understanding of the record proved instrumental in revising post-conviction papers that were filed with the lower court in the summer of 2002.

Overall, my impression is that only one of the four student teams (Team 2) had a truly stimulating and educationally rewarding experience solely through its work on an innocence case that we had preselected for representation. The experiences of Teams 1 and 3 were mixed and, for Team 4, highly disappointing. Some of the cases (Team 4) never got off the ground while others (Team 1) became fraught with complexity and the involvement of too many lawyers, in effect, grounding the students before they could take flight. Frank Bloch has observed how the complexity of a certain case might make students “effectively distanced” from the actual representation.175 In a sense, I noticed similar distancing by students in the Second Look Program Clinic—I think due in part not only to the complexity of the cases but also to our discomfort with non-directive supervision.176 The stakes simply felt too high to cease intervening and dictating strategy except when necessary. Speaking for myself, I often rationalized my tendency for intervention by recalling these stakes and my belief that any misstep could prove fatal to the inmate’s claim.

In retrospect, I feel I could have been much less directive without sacrificing the viability of the cases and, going forward, I intend to act upon this sentiment. Still, the reality is that innocence cases are often intricate, protracted, and politically sensitive, suggesting that faculty intervention, either actual or potential, to some extent may be an omnipresent cloud over student autonomy.

174. Upon reflection, we should have perhaps assigned this case to Team 4. At that point in the year, we were still hopeful, though not optimistic, that the Magistrate Judge would order a hearing on the federal habeas corpus petition and that Team 4’s services would be in demand. Meanwhile, we felt compelled to give Team 3 an active case.

175. Bloch, supra note 141, at 352.

176. The struggle to “shed the advocate’s desire to control the situation” appears to be a common problem for supervisors in a new law school clinic. Kreiling, supra note 119, at 301; see also Quigley, supra note 119.
2. Student Participation in the Case Selection Process: A Potential Pedagogical Treasure Trove

At first out of necessity and later out of choice, we decided the case selection process could provide a constructive pedagogical experience for students in the Second Look Program Clinic and assigned a handful of prisoner inquiries to each individual student as opposed to teams.\textsuperscript{177} The necessity flowed from the overwhelming volume of inquiries we had received; simply put, we needed student labor in this realm. The choice evolved over the course of the year when we noticed how excited the students were about the process, how effective they were in conducting it, and how they appeared to be improving their assessment skills over time in contrast to the inconclusive educational benefits of their work on the preselected cases. Individual participation in the case selection process entailed many of the skills cited in the \textit{MacCrate Report} and by the AALS Committee on the Future of the In-House Clinic, including developing modes of analysis and planning in unstructured situations, fact investigation, and written and oral communication.\textsuperscript{178} And, at the same time that students appeared to fortify their practical skills through screening cases, they also demonstrated boosts in confidence;\textsuperscript{179} in fact, some students assumed responsibility for numerous cases and became quite vocal in opining about their merits.

From our vantage point as supervisors, case selection became a vehicle to try on our non-directive training wheels; we found solace in our belief that the stakes were somewhat lower in allowing students to have autonomy in the preselection phase\textsuperscript{180} and in observing that the students almost uniformly displayed keen judgment about the validity of a claim. The perception that students seemed to be thriving in their case selection work also alleviated some of the pressure we felt to find prepackaged, interesting cases of actual innocence for students to work on for fear that they otherwise would not be getting what they had expected.

\textsuperscript{177} At most law school innocence projects, students appear to be heavily involved in reviewing inmate inquiries. Stiglitz et al., \textit{supra} note 3, at 425 (mentioning that students in the California Innocence Project are responsible for approximately twenty-five files apiece). Not every project follows this model; for instance, the case selection process at the Innocence Project at Cardozo is handled primarily by full-time staff members.

\textsuperscript{178} See \textit{supra} notes 123-28 and accompanying text.

\textsuperscript{179} Although the supervisors at the California Innocence Project “think the screening process provides a great educational benefit,” they note that students “sometimes get depressed by the work” for several reasons, including the obvious guilt of many potential clients and the fact that “[s]logging through files is not particularly glamorous.” Stiglitz et al., \textit{supra} note 3, at 424. We did not detect much gloom among our students regarding case selection, perhaps because we did not ask them to review a significant number of files during the year.

\textsuperscript{180} See \textit{supra} section II.C.
Granted, it would be disingenuous to imply that we awarded primary responsibility for the case selection process to our students without any direction whatsoever. As described above, the formulation and execution of our case selection procedure carries with it an element of directiveness. First, we had predetermined the intake criteria before involving students in the process, so inherently our case selection structure shows directiveness on our part; we set the rules and then asked students to play the game. Second, we maintained control of the initial “A”-“B” letter assessment, primarily because it seemed inefficient and rather unfair to mete out this largely ministerial task to students. Third, although students had far-reaching autonomy in reviewing the “B” files and writing the Evaluation Memoranda, their preliminary prognoses were subject to our second opinion; thus, while the proposed course of action for a case was student-generated, the final decision of whether to follow that course was made collaboratively with faculty input. Fourth, we eased students into the process by providing them with both an introductory memorandum describing what to look for, namely, our intake criteria, and a copy of an Evaluation Memorandum that I had drafted for use as a sample. That being said, our students eventually had an impact on the makeup of our case selection process in several ways, including the policy change to request appellate briefs at the questionnaire stage. Notwithstanding that the specific manner in which students participate in case selection continues to be refined, their extensive involvement in this area of our work seems to have many pedagogical advantages.

The primary educational benefit relates to experiential learning and the supervisory process. In light of the tension between the preferred clinical method of non-directive supervision and the demands of client service, a faculty member's decision to intervene in a matter

181. See supra subsection II.B.2.
182. Some directiveness is implicit in the formation of a clinic itself, such as determining what kinds of cases to handle (subject matter, complexity) and which specific clients to represent. See Stark et al., supra note 120, at 38. Schrag suggests that, at least in a "clinic's first year, supervisors could include students in making decisions on intake policy as a way of teaching them about client needs and policymaking in a legal office." Schrag, supra note 15, at 231. This might also enable students "to feel more responsibility for the clinic as an institution." Id.
183. Although we have a separate Second Look Program Clinic office at the law school, mail from inmates is routed to one of our faculty offices. This process allows us to keep track of the correspondence and to make prompt initial assessments.
184. This introductory memorandum mentioned our intake criteria, but it did not offer suggestions as to how students should actually proceed to review their "B" files. By presenting limited guidance regarding the evaluative process itself, I hoped to counteract the directive tone set by simply providing a description of our criteria and a copy of an Evaluation Memorandum.
185. See supra notes 87-89 and accompanying text.
often sends a "mixed message" to students. Specifically, this friction between telling students to run with a case and the penchant of supervisors to put the brakes on later can create a destructive, co-dependent relationship and detract from the students' learning. In the innocence project context, the professional obligations to the inmate are arguably limited prior to accepting a case for representation and, therefore, the supervisor may not feel—and, in fact, may not be—as duty-bound to intervene as in cases that the clinic has already formally agreed to handle. Moreover, there might be less of a practical need to intervene as gaffes in evaluating a claim or hatching a preliminary investigation plan can be more easily remedied at this stage than at a later juncture. In turn, without the presence of a professional duty (and the sense of practical urgency), supervisors may feel better able to send a clear message to students that they bear responsibility for a matter in the screening pipeline and may be in a better position to adhere to this message. Unimpeded by excessive faculty supervision or the threat of such, students can ideally learn from their own experiences in wading through the muddy waters of case selection, fulfilling the maxim of clinical pedagogy that experiential learning is the most effective form of learning.

Allowing students to have significant autonomy in the innocence project case selection process alone, though, is not enough to ensure that students will actually learn from their experience: a system that gives students wide control over case selection should be coupled with a sliding scale of directive supervision over the course of the clinic and an effort to teach self-reflection. We provided our students in the Second Look Program Clinic with information about our intake criteria and a sample (not model) Evaluation Memorandum at the outset to preempt their potential frustration with divining how to perform the task on their own.

To address the potential problem of dependency,

186. See Tarr, supra note 131, at 973-74 (discussing how supervisors may nurture student dependence by giving mixed messages).
187. The propensity of some students to want to be spoon-fed information by supervisors may exacerbate this problem. Id. at 972-78 (noting the phenomenon of students feeling dependent and supervisors subconsciously wanting students to rely on them, creating co-dependency).
188. See supra section II.C. For purposes of full disclosure, I acknowledge that I am not entirely comfortable with the notion that innocence projects assume few professional obligations to inmates prior to the actual representation stage, but I do feel that those obligations are significantly less extensive than upon formation of an attorney-client relationship.
189. Kreiling has observed that at the beginning of a clinical course "[w]ithout the basic understanding required to formulate coherent ‘theories of action,’ students are forced to go through the educationally inefficient and highly discouraging route of muddling through the task...the fieldwork supervisor or a classroom teacher must provide the basic information necessary to initiate the process of learning from experience." Kreiling, supra note 119, at 306-07; see also Hoffman, supra note 129, at 304 (suggesting supervisors ought to provide precise instruc-
that students might be wary of shouldering responsibility for their own files, we tried to make our objectives explicit—that each file assigned to a student for screening “belonged” to that student and that they should be prepared to assess the case, devise a plan of action for the preliminary investigation (if deemed necessary), and defend their assessment and investigative strategy. In addition to making these objectives explicit, we endeavored to abide by them throughout the year, and I think we managed to do so.

Initially tentative and reliant upon our guidance in making appraisals of inmate inquiries, the students, with one or two exceptions, gradually became more decisive in their case evaluations and more assertive in crafting theories of action for the preliminary investigations. In particular, many students during the fall semester seemed hesitant to recommend rejecting a case outright, likely because of a lack of confidence and a dread of feeling accountable for denying an inmate’s plea for help.\footnote{See Caplow, \textit{supra} note 19, at 26 (“[M]aybe students actually restrain themselves more than experienced lawyers do because they have not yet developed a sense of the limits of their lawyering ability so they err on the side of caution.”).} By the spring semester, many students were far less timid, frequently sanctioning rejection letters, yet never to the point where I felt they had strayed too far in the other direction and become overly cynical. Rather, their assessment skills appeared more finely attuned and their egos less in need of affirmation. This growth in confidence seemingly coincided with the loosening of the supervisory reins over case selection during the span of the year. In essence, I noticed an evolution in the supervisory relationship with students in the case selection sphere that resembled the stages described by Hoffman,\footnote{See \textit{supra} notes 148-52 and accompanying text.} whereas this development was markedly less pronounced with respect to their work on the cases that we had preselected for representation.\footnote{For instance, both members of Team 1 seemed to remain tentative in their work on the 1991 murder case, but became much more assertive in their case selection activities.} Furthermore, through their work in evaluating “B” files and, when appropriate, devising preliminary investigation strategies, students seemed to improve a number of concrete skills:

- The process of organizing the file, untangling the procedural chronology, and discerning the nature of the inmate’s claim helped with fact investigation and often encouraged students to engage in legal research to understand the inmate’s situation more fully.
- Drafting the Evaluation Memoranda bolstered the students’ writing skills.
Formulating a preliminary investigation plan, in cases that students decided not to reject, served to develop problem solving skills. The preliminary investigation itself often encompassed fact investigation as well as writing (client letters, Freedom of Information Act requests, etc.) and oral communication (contacting witnesses and the inmate’s former attorneys to discuss the case). The case selection process prompted important ethical questions, enabling students to confront problems of professional responsibility for which there were not always clear-cut solutions.

Case selection for an innocence project also provides a suitable means to teach students about self-reflection. As noted above, the prevailing wisdom in clinical circles is that experiences are most educational when repeated and reflected upon, with supervisors using assorted tactics for achieving this pattern of self-reflection. Performing a lawyering task, stepping back to assess that performance

**Notes:**

193. The *MacCrate Report* cited five chief elements of problem-solving: “identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas.” See *MacCrate Report*, supra note 124, at 142-48. The process of selecting cases for an innocence project, by its very nature, entails these five components, starting with the student's identification of the inmate's claim to creating an investigation plan to executing that plan.

194. Our students did not generally interview prospective clients as part of the case selection process, partially because of the logistics involved in arranging visits to distant prisons and fears about raising the prisoner's expectations at a preliminary stage. When I presented a draft of this Article at the Clinical Theory Workshop at New York Law School in the fall of 2002, several participants observed that worrying excessively about raising expectations on the part of the potential client might be somewhat paternalistic and that the benefits of these visits (experience for the students, filling in the blanks to the inmate's claim) might often outweigh the detriments (time and money). In the future, I hope to include more of these visits to develop the students' skills and assist us in making our determinations, especially in close cases. See Jennifer Martin, *Humanizing the Post-Conviction Appellate Process: A Student's Perspective*, INNOCENCE Q. (N. Cal. Innocence Project/Santa Clara Univ., Santa Clara, Cal.), Fall 2002, at 3 (“In the post-conviction work I have done thus far, I've waded through cold transcripts, lists of physical evidence, complex and sometimes cumbersome briefs, and verbose opinions involving varied interpretations of the law. This work has been blind, blind to emotion and life. . . . Interviewing the convicted may help bring life back into the process.”).

195. See *supra* section II.C.

196. See *supra* notes 131-33 and accompanying text. Brook Baker contends that experience is most educational when it is repeated, varied, ability-appropriate, and valued by others in the workplace. Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 Ariz. L. Rev. 287, 324-32 (1994); Caplow, *supra* note 19, at 48. Kreiling proposes an ideal “supervision cycle” of six stages, including pre- and post-performance conferences, and suggests that this cycle should be repeated multiple times during a student's clinical experience. See Kreiling, *supra* note 118, at 318-36.
critically, and then undertaking the same task again—this time informed by the assessment—accelerates a student's development of practical lawyering skills.\textsuperscript{197} Self-evaluation compels students to be more responsible for their own education both in the clinic (the short-run) and later as practitioners (the long-run).\textsuperscript{198}

By compartmentalizing the clinical experience into digestible case screening chunks, there were ample opportunities to meet with individual students in the Second Look Program Clinic and embark on a feedback cycle.\textsuperscript{199} Based on informal consultations with students, my sense is that it took anywhere from two to ten hours for them to review a "B" file and draft an Evaluation Memorandum, depending upon the clarity of the questionnaire, both in terms of legibility and the lucidity of the inmate’s description of the incident, and whether the appellate briefs were already in the file.\textsuperscript{200} After a student submitted an Evaluation Memorandum, I would try to confer with her about how she reached her prognosis (the process) and why she reached it (the substance).\textsuperscript{201} These conferences gave me the chance, on which I did not always capitalize, to explore some of the economic, cultural, and ethical issues implicit in the prisoner inquiries and, concomitantly, the students' own beliefs and attitudes as demonstrated by their evaluations of the prospective clients’ problems.\textsuperscript{202} By the end of these conferences, the student and I had usually reached a mutually agreeable decision about a course of action for the case, more often than not the course initially prescribed in the student’s Evaluation Memorandum. Regardless of whether I agreed with the student’s recommenda-

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\item[197.] See supra note 196.
\item[198.] Tarr, supra note 131, at 969.
\item[199.] This opportunity was facilitated by the fact that we had only eight students and two faculty supervisors, a good student-faculty ratio. Cf. Schrag, supra note 15, at 187 (stating that as of the mid-1990s, the average student-faculty ratio for the Georgetown Law School clinic was 7:1). In some ways, it may be easier to maintain a consciously non-directive method of supervision when a clinic enjoys a low student-faculty ratio. See Stark et al., supra note 120, at 56 (discussing how they expected non-directive clinicians to supervise fewer students because in those situations it would appear to be easier to give students broad authority without harming client interests).
\item[200.] We initially did not require students to evaluate a precise number of cases and, instead, merely told them to take on as many as they wanted; foreseeing that some students would be busier than others with their active investigations, we wanted the flexibility of having students delve into case selection to varying degrees. In our second year of operation, we decided to require that each student review a minimum of six files during the fall 2002 semester.
\item[201.] During these meetings, students often focused on the substance of their decisions, although I tried to steer the conversations toward the evaluative process as well.
\item[202.] See Ziegler, supra note 131, at 579 (“Evaluation, in this context, means helping students in uncovering assumptions, raising questions about the derivation and purposes of their beliefs, and catalyzing discussion of underlying policy questions inherent in the clients' particular problems.”).
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tion, one of my goals was to help students critique their case assessments and acquire greater self-awareness about their own decisionmaking processes.

One explanation for the relatively successful results in involving students in case selection activities for the Second Look Program Clinic, and an argument in favor of the pedagogical value of affording students independence in this area, is that the students felt ownership over and, accordingly, responsibility for these “small” cases.\textsuperscript{203} By bestowing control over specific “B” files to individual students and vowing not to intervene in the preliminary assessment, we spurred the student, in effect, to become the expert on a particular case in the screening process, which altered the balance of power between student and teacher.\textsuperscript{204} Also, because of the relatively short time frame involved in determining whether a case might be appropriate for the clinic and the fact that many inquiries were rejected fairly early on in our case selection process,\textsuperscript{205} students could develop a sense of closure, of shepherding a case from start to finish.\textsuperscript{206} In short, a student could feel like it was “her” case, an empowering proposition and a feeling that students, for the most part, could not enjoy in regard to the larger cases preselected for representation and assigned to teams.

To foster this goal of establishing student ownership of some portion of an innocence project’s activities, it may be helpful to assign cases in the preselection phase to individual students, as we do, rather than pairs. Clinicians have written about the pros and cons of distributing assignments to students operating in teams, noting that paired students may learn more effectively because they teach and learn from each other and, from the client’s perspective, two heads are often better than one.\textsuperscript{207} Moreover, collaborating with a fellow student may help prepare the nascent lawyer for the “work teams” that are fixtures

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\item \textsuperscript{203} See supra note 169 and accompanying text.
\item \textsuperscript{204} See Critchlow, supra note 121, at 435 (“A teacher’s ability to improve on the performance of a student will be limited by the degree to which the teacher lacks relevant and specific information.”).
\item \textsuperscript{205} See supra notes 72-79 and accompanying text.
\item \textsuperscript{206} Because the preliminary evaluation of an individual request for assistance is rather self-contained and rarely takes inordinately long, this task can give students a sense of satisfaction with completing a project. Duquette, supra note 64, at 9 (“Students benefit the most when their cases are resolved, or at least progress significantly, during their term in the course.”). There are few types of cases that students can handle “from beginning to end, allowing them to experience, at the end of a case, the results of their decisionmaking and other work.” Schrag, supra note 15, at 194.
\item \textsuperscript{207} David F. Chavkin, Matchmaker, Matchmaker: Student Collaboration in Clinical Programs, 1 CLINICAL L. REV. 199, 204 (1994) (mentioning how the increased knowledge generated by a pair can result in better work product); see also Schrag, supra note 15, at 217-20.
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of contemporary legal practice\textsuperscript{208} and may serve as a motivational device.\textsuperscript{209} Pairing students also allows each student to do less work on the shared case, hypothetically freeing them up to do more thorough work on that matter or have exposure to additional cases.\textsuperscript{210} Still, collaboration has its drawbacks. There may be interpersonal conflicts within a student team, paralysis due to an unwieldy decisionmaking structure and, on a mundane level, trouble in coordinating schedules and so forth.\textsuperscript{211} These risks might not be worth taking in the context of the innocence project case selection process because the task of reviewing any particular case file is somewhat finite and manageable for one person, and assigning the cases on an individual basis might buttress the sense of ownership discussed above.

Furthermore, in the Second Look Program Clinic I found that allocating "B" files to individual students for evaluation dovetailed nicely with their teamwork on the "big" cases preselected for representation. First, this "small case/big case" mix lent itself to a cross-fertilization of experiences. Lessons gleaned from teamwork on a large case could be applied toward assessing small cases; similarly, the knowledge drawn from making unilateral case screening evaluations could be brought to bear on the innocence claim that the clinic was actively pursuing. On a macro-level, exposure to scores of less meritorious claims through the screening process may have reinforced the rarity and importance of the cases chosen for representation in the minds of our students and, likewise, difficulties in investigating and litigating the active cases may have impressed upon students that cases should not be accepted too readily. Second, just as work on the active cases may have

\textsuperscript{208} See, \textit{e.g.}, O'Grady, supra note 145 (arguing that collaborative pedagogy in the clinical experience has the potential to prepare students for modern-day practice with its swelling numbers of large law firms as well as conformance pressures). In addition to collaborating with other students, clinics allow each student to collaborate with a senior lawyer, namely, the supervisor. O'Grady asserts that this collaboration between student and supervisor may be unlike that of junior lawyer and senior lawyer in practice because of the "clinical educator's efforts to maintain an optimal teaching environment, coupled with the students' assumption of substantial responsibility for all aspects of case work and planning. . . . The dichotomy may leave students unprepared for the realities of collaborative work in practice." \textit{Id.} at 520; see also Susan Bryant, \textit{Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession}, 17 VT. L. REV. 459 (1993).

\textsuperscript{209} Peer pressure, especially the desire not to seem foolish in front of a classmate or to overburden one's co-equal, may make members of a team more motivated. \textit{See} Schrag, \textit{supra} note 15, at 217. Pairing students, though, does give each student a safety net; as David Chavkin notes, "shared responsibility may mean reduced responsibility." Chavkin, \textit{supra} note 207, at 215.

\textsuperscript{210} \textit{See} Schrag, \textit{supra} note 15, at 218.

\textsuperscript{211} \textit{See} Chavkin, \textit{supra} note 207, at 219-27. Chavkin warns that having teams larger than two students can aggravate certain problems and potentially deter the formation of a proper attorney-client relationship. \textit{Id.} at 242-43.
enhanced the students' advocacy-related skills, involvement in case selection served to hone their objective analytical skills, i.e., the ability to act as a "judge" in weighing the relative merits of a claim from a neutral perspective. Third, through a clinical experience that proceeded on a dual track—working alone and in teams—the students could preview the environments in which they will likely practice. While much has been made about the growth of large law firms and legal organizations in recent years, many students still wind up as solo practitioners or in very small partnerships where they will work mainly on their own matters. Fourth, this balance between individual and team-oriented work may have implicitly accommodated the different learning styles of our students, some of whom appeared to derive more from parsing through the issues in their "B" files largely on their own, while others evidently flourished to a greater extent in the give-and-take milieu of the student teams.

The greatest educational rewards may lie in forging a balance for students between case selection activities and work on matters preselected for representation. If case selection were the sole task performed by students in an innocence project, then utilizing that same skill set exclusively might soon reach a point of diminishing returns. But if work on an active case comprised the entirety of the student clinical experience in an innocence project, many students—including the members of Team 4 in the Second Look Program Clinic—would likely face profound disappointment.

The immersion of students into the case selection process as a focal point of a law school clinic may be rather peculiar to innocence projects. Clinicians often regard case selection to be the province of the faculty alone in light of the significance of finding cases with a high educational value. Also, the unique procedural posture of the cases examined by innocence projects—at the end of the litigation phase as opposed to the start—means there are few external time pressures on case selection, save situations where the exculpatory evidence might be in jeopardy or where the jurisdiction imposes a statute

212. See Meltsner & Schrag, supra note 149, at 9-10 (observing that clinics can afford opportunities to experience interpersonal and group dynamics in settings where an explicit aspiration is to analyze and discuss these dynamics).

213. See O'Grady, supra note 145, at 495 (discussing the growth of large, 100+ attorney law firms since 1980 and the marked decrease of solo practitioners).

214. See National Ass'n for Law Placement, Jobs & J.D.'s: Employment and Salaries of New Law Graduates, Class of 2001, at 28 (2002) ("Despite the publicity surrounding large law firms, of the eight firm size categories tracked by NALP, jobs in very small firms of 2-10 attorneys were the most common, accounting for about 27% of law firm jobs taken by the Class of 2001.").

215. See supra notes 164-71 and accompanying text.
of limitations on post-conviction remedies. To some degree, innocence projects have both the flexibility (the luxury of selecting cases without the burden of court appointments and many “hard and fast” deadlines) and the incentive (the need to devote attention only to the most meritorious claims, of which there may be few) to spend time scouring prisoner inquiries and rendering exhaustive evaluations, a job that students are well-equipped to conduct.

In sum, giving students significant freedom in the case selection process can have an array of pedagogical benefits. It offers a potentially effective medium for experiential learning about legal skills, including fact investigation, planning and analysis, and communication. It also provides a chance for students to develop the skill of self-reflection and have individual ownership over an aspect of the clinic’s activities. Last but not least, student autonomy in this sphere can help to offset a mediocre or even negative learning experience through work on a preselected innocence claim.

IV. CONCLUSION

The practical and pedagogical considerations in selecting cases for a new law school innocence project intersect with one another and together signal that extensive student involvement in the screening process is warranted. Projects typically construct intake criteria and procedures that achieve a balance between their objectives and resources. Regardless of how narrowly a project defines its intake criteria, it will undoubtedly be overwhelmed with inquiries to a point far beyond the capability of faculty supervisors alone to evaluate them adequately. Likewise, no matter how careful supervisors are in trying to choose cases with perceived educational attributes for clinic students, some of those efforts will likely go for naught given the unpredictable path taken in litigating most innocence claims. In addition to the institutional advantages of reducing the burden on a supervisor’s file cabinet, there are numerous pedagogical benefits to having students bear responsibility for inquiries in the midst of the case selection process. Moreover, since many of the duties of professional responsibility to a client attach only upon the onset of representation, supervisors may be able to quell many of their directive impulses when overseeing students engaged in the screening process and, in turn, adhere to the normative view that students often learn best when granted vast autonomy for a lawyering task.

Finally, integrating students into the case selection process may prevent a project from losing sight of the humanitarian aspect of its

216. See supra note 7 and accompanying text. For instance, evidence might be at risk if the key witnesses are in poor health or there is a chance that the biological evidence from a case may be destroyed in the near future.
mission in serving as a last resort for individuals in prison. A prisoner whom the Second Look Program Clinic declined to represent recently wrote me and declared that our rejection letter to him contained "anthrax" inasmuch as it conferred a "death sentence" upon him. Each inquiry to an innocence project carries with it more than its factual and legal assertions of innocence; it carries the hopes of a desperate person. This is all the more reason for innocence projects to provide thoughtful, thorough, and timely evaluations of requests for assistance, work that may best be conducted by involving students in the case selection process.

Many criminal defense lawyers suffer from cynicism about claims of innocence and approach their cases with what might be called a "Presumption of Guilt." The line between realist and cynic in criminal defense is a fine one, and one that I am fearful of crossing as a practitioner. With their fresh eyes, however, law students can look at an inmate's claim through a prism uncluttered by years of representing guilty defendants and by past failures, situations where purportedly innocent clients turned out to be guilty, leaving some lawyers feeling betrayed on an emotional level. Even if, particularly at the start of the year, our students tended to err on the side of caution in their case selection evaluations, signifying their distance from the realist-cynic divide, that seemed far better than the converse: to be participants in the cycle of disregard and skepticism to which inmates proclaiming innocence are accustomed throughout their experiences in the criminal justice system and in response to which many innocence projects were spawned.

217. See, e.g., Adele Bernhard, Effective Assistance of Counsel, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 220, supra note 25, at 231-33 (discussing "the unacknowledged but pervasive belief of all participants in the criminal justice system—even criminal defense attorneys—that anyone who has been arrested is guilty").

218. In comparing the performance of student criminal defense attorneys against that of institutional defenders based on results achieved and the nature and quality of the lawyering, Steven Zeidman concluded that "[i]n sharp contrast to institutional defenders' 'patina of cynicism' and assumptions of their clients' guilt, students approach their tasks with a high degree of enthusiasm and, often, optimism." Steven Zeidman, Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused, 62 BROOK. L. REV. 853, 899 (1996).