To Prosecute Is Human

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1. . . . to defend divine. Criminal defense clinics have claimed the higher moral ground as well as the more populous number. This Article asserts the proposition that a prosecution-based clinic, while perhaps lacking divinity, provides law students with practice opportunities equal to, and in some aspects, superior to, those offered in other clinical settings.
I. INTRODUCTION

During the late 1960s and early 1970s, amid a climate of perceived public dissatisfaction with the abilities of lawyers and a desire to broaden the availability of legal services to client populations in need, clinical programs in law schools burgeoned. The availability of grant funding sources for such programs enabled the growth and development of clinical and skills programs as component parts of the mission of legal education.

The mission of traditional legal education is to teach students analytical approaches to legal issues, often described as the ability to "think like lawyers." Proponents of clinical legal education acknowledge this traditional imperative while recognizing the reality that very few graduates will earn a living by merely thinking. In fact, the average young lawyer is likely to be called upon to practice law. Therefore, it is useful for law schools to educate students not only to think like lawyers, but also to act like lawyers. "Lawyering skills" such as client counseling, interviewing, construction of facts and proof, negotiation, trial advocacy and oral advocacy skills, and the business skills involved in operating a law practice have increasingly been recognized as valuable and appropriate subject matter within the legal education curriculum.

Pressure continues to be placed on law schools to provide increased skills training. The practicing bar and the public consumers of legal services expect and demand practical competence from those admitted to the bar. When the profession admits new attorneys to the practice of law, it implicitly warrants their competency to the consumer cli-

2. By 1975, there were 346 clinical programs listed by the 127 ABA-approved law schools responding to the annual questionnaire prepared by the Council on Legal Education for Professional Responsibility. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1974-1975 iii (1975).
6. Memorandum from James P. White, Consultant on Legal Education to the American Bar Association Section of Legal Education and Admissions to the Bar (Feb. 10, 1992)(on file at the University of Nebraska Law College Library).
TO PROSECUTE IS HUMAN

ent. Historically, the study of law involved substantial periods of tutelage with practicing members of the bar and many practice settings which new law graduates enter today involve professional mentoring. However, given current economic constraints, the profession has been less able to provide supervised skills training for young lawyers. Thus, law schools are the natural places where students should learn to become competent to practice law.

Certainly the legal profession is responding to the need for continuing legal education within its ranks. However, continuing legal education programs sponsored by the bar are designed to supplement the basic competency level expected of the practicing bar. Because continuing legal education is geared toward established members of the bar and not to new lawyers, law schools must provide their graduates with the basic fundamental proficiency expected of all members of the bar.

However, clinical legal education programs have not been, nor are they now, accepted by the core of traditional legal educators as equivalent in importance or status to the Socratic classroom. Clinical programs and clinicians have struggled to gain recognition for the importance of skills training. Some schools have incorporated an acceptance of clinical education within their pedagogical mission. Others have not. Nonetheless, the vast majority of American law schools now offer students at least some optional clinical training during their legal education.

There are at least three different types of clinical programs operating in law schools today: In-house clinics, externship placement clinics, and skills simulation courses. In-house clinics are live-client clinics that undertake direct representation of clients and where students, supervised by faculty members, do actual legal work. Extern-

9. “Over the last thirty years or more, overhead costs for law firms have skyrocketed. These costs reflect the increases in associates' salaries and the escalating costs of training, office space, equipment, libraries, and computers. As a result, efficiency has become a priority while the mentoring and personalized training of new lawyers and associates has almost vanished. Associates, therefore, are given superficial and inadequate training in order that they may be very ‘productive’ more quickly.” Edward D. Re, The Causes of Dissatisfaction with the Legal Profession, 68 ST. JOHN'S L. REV. 85, 95 (1994)(footnotes omitted).
12. Grosberg, supra note 7, at 349 n.3.
ship placement clinics are programs in which law students are placed in settings outside the law school and are often supervised by non-faculty members. Externship placement clinics typically include law school faculty teaching components of the course beyond the direct supervision of the legal work performed by students. A faculty member may teach the academic classroom component of the clinic and guide the student in processing and learning from the experiential component of the clinic in either classroom, small group, or individual settings.13 Skills simulation courses are performance-based, skills-oriented courses where student performance of skills is based upon a set of assumed facts in a simulated environment. Role-playing and critique of student performance are central to simulation courses.

With respect to in-house or live-client clinics, the nature of civil law clinics is myriad. From the original model of legal services-based programs to the more recent AIDS clinics, housing development clinics, and business law clinics, civil clinics have served an important role in the provision of legal services to underserved client populations within the context of providing a quality educational experience for law students. In-house or live-client criminal clinics understandably have been narrower in focus. They have been developed as either defense-style clinics at the trial and/or appellate level, or as prosecution-based trial level clinics.

There are far fewer criminal prosecution clinics than there are criminal defense clinics.14 There appears to be an implied assumption that criminal defense clinics provide a better educational experience for law students in a setting more consistent with the aspiration of law schools to engage in legal work with an appropriate political mission. This Article reexamines the assumption that criminal prosecution clinics do not accomplish these purposes as effectively as criminal defense clinics.15

14. It is difficult to say with precision how many criminal clinics exist within American law schools. The Association of American Law Schools Section on Clinical Education's 1996 directory lists only four criminal clinics identifying themselves as "Criminal Prosecution" clinics. ASSOCIATION OF AM. LAW SCH. SECTION ON CLINICAL EDUC., 1996 DIRECTORY 118. It should be noted, however, that the directory also has categories for "Criminal," "Criminal Justice," "Criminal Law," and "Criminal Litigation" clinics, some of which may be criminal prosecution clinics. Id. at 111-18.
15. The author does not intend to undermine, in any fashion, criminal defense clinics. The purposes of such clinics, the excellence of their work, and the important educational opportunities they provide law students need no justification. In the author's opinion, any law school would benefit by having two strong criminal clinic programs: one defense-based and the other prosecution-based.
The University of Nebraska College of Law has operated an in-house, faculty-supervised criminal prosecution clinic since the inception of its criminal clinical law program in 1976. The Criminal Practice Clinic at the University of Nebraska is a one semester, six credit hour course. It is an intensive litigation-oriented clinic. Each clinic student is expected to devote a minimum of twenty hours per week to fulfilling clinic requirements.

The clinic offices are located off-campus within a section of the Lancaster County Attorney's office. The clinical faculty are employees of the College of Law, not the County Attorney's office, but are deputized county attorneys for the purpose of supervising the clinic caseload. The faculty members have no responsibilities in the County Attorney's office other than the supervision of the clinic. The clinic adheres to all policies and procedures within the County Attorney's office that are relevant to the handling of the caseload, but otherwise the clinic is administered by the law school.

The clinic caseload consists of criminal misdemeanor cases. The cases students handle are obtained by the clinic from the Lancaster County Attorney's office at the pre-filing stage. The clinic faculty have the ability to control student caseloads by not accepting new cases from the County Attorney's office or by transferring existing cases back to the County Attorney's office staff. The clinic exercises control over the nature of the cases it accepts, thereby maintaining substantive diversity in the caseload.

Students screen cases and make initial filing decisions. They draft complaints and handle all subsequent stages of litigation in clinic cases. Typical of cases handled by clinic students are assault, theft, telephone intimidation, misdemeanor sexual assault, possession of controlled substances and drug paraphernalia, child abuse and neglect, criminal trespass, contributing to the delinquency of a minor, shoplifting, and resisting arrest. Some of the cases handled by the

16. Lincoln, Nebraska is located within Lancaster County, a county with a population of approximately 200,000. The Lancaster County Attorney is an elected public official who is responsible for representing the county in all civil matters and for prosecuting all violations of state criminal law occurring in Lancaster County.

17. The clinic has periodically handled some felony cases but has largely discontinued that practice. There proved to be significant court scheduling conflicts in a mixed felony and misdemeanor caseload and the felony cases did not proceed as quickly as do most misdemeanors. However, some students handle preliminary hearings as a clinical component of the law school's Advanced Trial Advocacy course.

18. The screening function of prosecutors includes reviewing cases in which arrests have been made, citations issued, or warrants sought. It is incumbent on the prosecutor screening the case to file appropriate charges, decline to file charges, or refer the case for further investigation.
clinic are fairly routine, while others offer complex legal and factual issues.\textsuperscript{19}

The clinic caseload is kept at a relatively high level so the pace of work is rapid. Students work in teams of two and each student team handles between eighty and one hundred cases during the course of a semester. Students are assigned several new cases for screening every week. Additionally, students are responsible for handling all court events in their ongoing caseload. Like all cases in the criminal justice system, most clinic cases will be resolved by a disposition without trial\textsuperscript{20}; the remainder will be tried, either to the bench or to a jury. Some cases will require post-conviction litigation as well.

The relatively high caseload is deliberate. Given the probability of disposition without trial in any given criminal case, a high number of pending cases is maintained in order to maximize the clinic students' trial opportunities. However, handling all of the other aspects of a case where prosecution is declined or a plea is negotiated provide the students with rich learning opportunities and skills practice outside of the trial context. Ideally, the clinic faculty is able to create a clinic caseload for each student that can be adjusted to maximize the students' learning opportunities while minimizing conflicts with other academic obligations.

\begin{enumerate}
\item Some of the most interesting cases handled by the clinic have involved the application of the criminal law to individuals who were exercising their rights to free speech at the time law enforcement believed they were engaged in criminal conduct. Examples include prosecution of anti-abortion protesters for violation of regulatory picketing laws, a prosecution of a fundamentalist preacher who was arrested for criminal trespass after having been warned not to distribute literature to children leaving school premises, and the citation of an individual for obstructing justice who was sitting on his front lawn displaying a large sign which read "Speed Trap 1/2 mile ahead" and pointing to officers who had set a radar enforcement location. Fourth and Fifth Amendment Constitutional questions are rampant in a criminal misdemeanor caseload and require assessment and sometimes litigation during the course of prosecutions. Child abuse prosecutions often involve interesting evidentiary questions relating to the admissibility of hearsay statements made by the victim to others and the admissibility of expert testimony about the dynamics of child abuse.
\item The percentage of clinic cases resolved by dispositions short of trial is consistent with the general experience within the criminal justice system, that is, most cases are plea bargained. Statistics compiled by the Nebraska State Court Administrator's Office show that 95% of the misdemeanor cases and 96% of the felony cases filed in Nebraska state courts are disposed of without trial (on file with the University of Nebraska Law College Library).
\end{enumerate}
III. DIRECT FACULTY SUPERVISION VS. THE EXTERNSHIP MODEL

Because externship programs\textsuperscript{21} require a lesser commitment of faculty resources, they allow law schools to provide clinical education opportunities to a greater number of students in a wider variety of settings and at a lower cost than do faculty-supervised clinical programs. A recent survey of American law schools documents the popularity of externship programs.\textsuperscript{22} Government placements are the single largest category of student clinical placements.\textsuperscript{23} The externship programs vary considerably with respect to the degree of faculty involvement with students. Almost all schools require that students must either enroll in a contemporaneous classroom component of the course or meet individually with a faculty member.\textsuperscript{24}

The University of Nebraska College of Law faculty has heretofore resisted the granting of educational credit to externship or non-faculty-supervised legal practice experience.\textsuperscript{25} Direct faculty supervision of clinical students offers advantages that the faculty has consistently found persuasive. The result has been solid support within the institution for a small core clinical program.\textsuperscript{26} Growth has been slow and difficult to sustain, yet consistent.

Faculty supervision permits the institution to retain control over the students' educational experiences with respect to both the substance and process of the clinical course. Relinquishing that control leaves the academic institution in a position to guide the students' reflections about the experience but denies it the opportunity to influence the students' actual experiences. The supervisory skills of the attorney directing the students' casework will greatly impact the students' clinical experience. Some law schools provide training for attorneys serving as externship placement supervisors in an attempt to control the quality and consistency of supervisors participating in the externship program.

\textsuperscript{21} An externship clinical program involves placement of the student in an office or agency for a period of time. Direct supervision of the student's legal work is done by an attorney in the placement setting rather than a faculty member. Ordinarily, the student's overall experience is supervised by a law school faculty member in the context of a concurrent academic course or another structured process.


\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 21.

\textsuperscript{25} Recent data and scholarship argue that the externship experience is a valuable one for law students and the criticisms of externship programs are "exaggerated or simply baseless." Seibel & Morton, \textit{supra} note 13, at 416.

\textsuperscript{26} The consistency of the support for the core clinical programs at the University of Nebraska College of Law may be a reflection of the stability of the deanship at the law school. Harvey Perlman has been the dean of the College of Law since 1983.
Retention of direct faculty supervision over a clinic caseload also serves to protect the primary educational purpose of the clinic from dilution by the inevitable demands of the law practice. Depending on the source of the clinic's caseload, there is often pressure to take responsibility for a greater number of cases. Clinics often represent people in situations where demand exceeds resources and clinic administrators must balance the institutional purpose of creating the optimal educational environment for students with the competing interest of serving the clients. The demand for legal services requires efficiency. Teaching law students how to practice law is not particularly efficient in the short term. Maintaining a caseload that challenges students and provides them with a quantity of good experiences while giving them enough time to work on the issues and prepare their cases well is a constant process of caseload adjustment. The power to control the caseload in the interest of pedagogical goals can best be done by direct faculty supervision of the caseload and the student practice experience.

IV. ADVANTAGES OF A PROSECUTION CLINIC

Despite the paucity of faculty-supervised criminal prosecution clinics, the model offers some distinct pedagogical advantages worthy of consideration as a model for a law school clinic.

A. Litigation Opportunities

Courtroom opportunities are as great or greater in a prosecution clinic than in any other type of clinic. The relatively rapid pace of the lawsuit in misdemeanor prosecutions is an advantage in a clinical program. Students have a greater opportunity to see cases started and finished during their academic session than in the context of most civil litigation or appellate clinics. The clinic can accept a caseload that is high enough to maximize litigation opportunities while not too high to prevent students from giving due consideration to the issues presented in each case. In the Nebraska program, we currently accept three to four new cases per week per student.

In this type of clinic, cases are easy to obtain and the substance of the caseload is easy to control if the clinic has an agreement with the prosecutor's office that allows the clinic to participate in the selection of clinic cases and to control the number of cases the clinic handles. The problem many clinics face with respect to availability, consistency, and control of caseloads can be minimized in this type of

Selecting and obtaining our caseload requires very little time or effort on the part of the faculty.

B. Oral Advocacy Skills

Students in the University of Nebraska clinic make courtroom appearances several times in an average week. The nature of those appearances varies from arraignments to jury trials. To most law students even brief oral appearances before the court are valuable learning experiences. Clinic students suffer through many "firsts" during the course of the semester, such as speaking their first words in the courtroom and conducting their first cross-examination. Those are significant steps for the young lawyer who aspires to a trial practice. The level of student confidence, articulation, and enthusiasm grows visibly with each successful experience in the courtroom.  

Students in such a litigation-intensive clinic have a multiplicity of courtroom experiences. This gives them a basis for comparison of experiences and the opportunity to see objective improvement in their skills. Repetitive courtroom experience allows students to increase their level of comfort and confidence in the courtroom. There is a period of time, experienced by almost every new trial lawyer, of adjustment to the courtroom environment. Clinic students who have the opportunity for multiple courtroom appearances can undergo a portion of that acclimation process while still in school and under the supervision of someone who is experienced and committed to their success.

Students in the clinic will also experience "losing." Frankly, prosecutors ought to lose cases some of the time. Hopefully, our students learn to cope with loss within the competitive environment of the law appropriately and professionally. All lawyers lose at least some of the time. Trial lawyers need to measure their personal success by stan-

28. Dependence on the County Attorney's office makes independence in administering the clinic more difficult. It is true that a prosecution clinic performs a service for the government for which monetary compensation may be appropriate. However, with a financial interest in the clinic may come a demand for services that meet the needs of the prosecutor's office but compromise the quality of the clinic program. Nebraska's criminal clinic lost the small amount of funding it had been receiving from the Lancaster County Attorney's office in 1996 when the clinic refused to take on an additional misdemeanor caseload. The County Attorney's office used that money, along with other funding, to create a new staff deputy position assigned to prosecute misdemeanor cases. The move has forced the criminal clinic to downsize, but it has also provided an opportunity for the clinic to reassert its need to control the size and shape of the clinic caseload. The relationship between the College of Law and the County Attorney's office continues in a positive direction.

29. Success is not measured by outcome. Students are encouraged to feel successful about a court appearance when they are well-prepared for the appearance and competently complete it.
dards of effort and ethics rather than by traditional win/loss standards.

C. Factual Investigation

A prosecution model clinic offsets an arguable deficit in traditional law teaching pedagogy. Appellate case study does not teach students a great deal about the exploration and importance of facts in a lawsuit. Real cases at the pre-trial and trial levels, on the other hand, abound with fluid and undiscovered facts. Authentic cases teach students to discover and use facts in litigation. The prosecution model provides great opportunities to work with facts. In misdemeanor prosecutions it is fairly common that investigating police officers have not fully explored the facts and may not have adequate resources to do further factual investigation. Thus, as a practical matter, it often falls to the clinic student to participate in a limited yet direct way in the process of ascertaining the facts. This gives students a sense of the true nature of facts. Gathering facts in the context of the legal principles at stake in making charging decisions or developing a case theory teaches students to use facts in litigation. It is an essential skill and one that few lawyers feel they learn well in the law school setting.\(^3\)

Investigation and development of facts in the context of prosecution also gives students experience in dealing with a recurrent and rather subtle ethical issue. Students experience the fine line between investigating facts and influencing facts as they interview witnesses.\(^3\) If law schools are interested in really teaching students something meaningful about ethics, then the advantages of putting students in the position of experiencing these dilemmas with a faculty mentor present cannot be underestimated.

D. Drafting Pleadings

Lawyers learn to be careful of what they plead, for they may have to prove it. The pace of criminal litigation, particularly misdemeanor litigation, is such that clinic students will probably have the opportunity to do precisely that in the course of a semester. There is no better lesson in pleading with precision and awareness of the consequences than having to attempt to prove an allegation that you filed. Students are required to focus on the precision and interpretation of language within statutes and pleadings because they have the burden of proof.

31. The desire to construct a persuasive theory of the case is often thwarted by the interruption of "bad" facts which one is naturally inclined to ignore or influence witnesses to disavow. Ethical lawyers must learn not to engage in this type of influence. See Richard C. Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1 (1995).
Jury instruction conferences and closing arguments demand that students understand and articulate the components of pleadings they may have drafted earlier.

**E. Case Analysis**

Students in the clinic are constantly required to analyze cases, to understand and frame the legal issues, and to apply facts to legal principles. Each casework or set of reports a student receives in the clinic is akin to a law school final examination question. Students use their issue-spotting skills learned in law school and apply legal principles to real situations. The practice of law requires that students integrate their knowledge of several discretely-taught areas of substantive law with all of their lawyering skills. Understanding and assessing a case are constant challenges for the clinic student. The facts, the law, the credibility of witnesses, and the equitable appeal of a case must be considered and measured.

There is constant interchange, verbal and written, between the student and faculty supervisor providing feedback on the student's evaluation of cases. Students are prodded to fully explore cases from both the prosecution and defense perspectives. Upcoming jury trials give clinic students the occasion to think about how and why people on a jury make decisions and how to present their cases in ways that will appeal to a jury. This is the "art" part (as well as the fun part) of trial advocacy. An abundance of real cases is the only way to give students an exposure to this aspect of trial work. A solid grounding in the nuts and bolts of trial advocacy skills gives students the confidence and latitude to think about the art of persuasion.

**F. Trial Advocacy**

At the University of Nebraska, a course in trial advocacy is a prerequisite for participation in the clinic. Trial Advocacy, a skills course, is available to second year students in the spring semester. A course in evidence precedes Trial Advocacy in the fall semester of the second year. Thus, clinic students begin with a solid foundation in advocacy skills and the design of the clinic reflects that assumption.

Students in the clinic typically prepare several cases for trial in an average week, working with the faculty supervisor in refining trial strategies and the content of witness examinations. Trial preparation involves not only basic lawyering skills such as the preparation of direct and cross-examinations, opening statements, and closing arguments, but strategic decisions such as the order in which to call witnesses, whether to object or to forego a possible objection, and when and how to elicit certain facts.
Throughout the course of the semester, students may approach trials at different levels of personal preparation thereby experiencing the increase in lawyer confidence in relation to the level of personal preparation undertaken. That lesson alone is worth the price of tuition.

G. The Burden of Proof

Each clinic student practicing law in the role of prosecutor always has the burden of proof—both the burdens of production and persuasion. Practicing in the plaintiff's role and bearing the burden of proof is an educational advantage. Prosecutors construct cases while defense attorneys destruct cases. An argument can be made that the best way to effectively learn to destruct cases or defeat proof is to learn how to prove cases. It is only with an understanding and appreciation of the elements of causes of action, the process of proof, and the quantum of requisite proof that the attorney can effectively attack the opponent's case. To start learning to be a trial lawyer by initiating the lawsuit, bearing the burden of proof, and presenting the plaintiff's case is to learn the basics. Because of the tendency of clinical programs to serve needy and disadvantaged clientele, many clinics involve more defense work than plaintiffs' work. The educational opportunity presented by legal work that is exclusively plaintiffs' work should not be overlooked as an institution assesses its clinical curriculum.

H. Developing as a Professional

The senior law student's clinical experience is the beginning of the student's career in the practice of law. The career development initiated in the clinic continues as the student is admitted to the bar and begins working as a lawyer.

A common experience that clinic students (and new lawyers) have is that of dealing with their emotions in the courtroom and in negotiations. The intensity of trial work and the interaction with people such as defense attorneys, witnesses, victims, and defendants invariably cause students to experience emotional reactions to their clinic work. Students often get angry or frustrated during some point in the semester, either at opposing counsel, judges, or witnesses. Child abuse cases often generate emotional responses in students. In addition, students may have experiences that cause them to feel embarrassed or defeated.

Accepting personal emotional reactions to one's work and learning what effect those emotions may have on one's lawyering abilities or sense of professional satisfaction is a task all lawyers undertake in the beginning of their careers. The clinical student has the opportunity to process these issues with her teacher and to learn to recognize and
control her emotional reaction to the provocations inherent in a caseload. This may be one of the most important experiences gained in the clinic. Students learn a great deal about themselves and the kind of lawyers that they want to be from struggling through these experiences and observing how other attorneys cope with emotion.

Students may also learn some important skills about managing a law practice. They must calendar and keep track of court commitments. They must develop habits with respect to correspondence and answering phone calls. They find out about their preferred style of working: alone or with others, in quiet or in chaos, writing or speaking. Law school is a good time to explore those sorts of questions.

I. Negotiation

Students in the prosecution clinic are constantly involved in negotiating the resolution of cases. Some of the negotiations are quite routine, others quite complex. Again, the quantity of experience is instructive. Students get to work with attorneys of many different dispositions and there is something to be learned from every encounter. Students are encouraged to assess the different attorneys they encounter in terms of style, effectiveness, and professionalism. By making this assessment, the clinic student begins to develop a picture of the kind of attorney she aspires to be. Students also learn from themselves in this process. They have the opportunity to try different negotiation techniques and compare the process and result.

Further, in many misdemeanor cases, win-win results are negotiated. The interests of justice and the interests of the defendant may both be well-served in a negotiated resolution. Even in a litigation-intensive environment, students have the opportunity to successfully resolve cases through negotiation. Experiencing the benefits of successful negotiation is an important lesson for the future lawyer. Students frequently have occasion to reflect about a negotiation conversation that did not go well. Students are encouraged to explore their own negotiation style and its consequences.

J. Caseloads

In a prosecution clinic, caseloads are easy to obtain, maintain, and control if the clinic has established an appropriate agreement with the prosecutor’s office. Thus, the pace of the clinic can be regulated to obtain relative consistency and is not subject to fluctuation of the client marketplace.

The greatest danger is in acquiring too voluminous a caseload. The prosecutor’s office may exert direct or indirect pressure on the clinic to accept more cases than that which is educationally optimal. Supervising faculty must maintain control of the caseload and the deputy
county attorneys must be continually reminded that the primary purpose of the clinic is educational.

However, in those instances where a genuine crisis exists, the assistance of the clinic should be offered. Clinic students learn how to work cooperatively by rendering assistance at those times. Working under pressure is a common experience in practice and is a useful experience for the clinic student. Furthermore, professional collegiality and a collective ethical obligation to the client demands that all attorneys within a prosecutor's office assist in solving problems of this nature.

K. A Dilution of the Ethical Dilemma

A difficult ethical issue arises frequently in live-client clinics. The supervising attorney ultimately bears the burden of discharging the lawyer's ethical responsibility to the client. As an example, assume a clinic student has been handling a case. The evidence is complete, the case is close, and closing argument is around the corner. The student lawyer is prepared to give the closing argument. However, this will be her first closing argument to a jury and she is nervous. The supervising attorney is a lawyer with twelve years of trial experience. Assume that the supervising attorney is capable of giving a more polished and more persuasive closing argument than the student lawyer will probably render. Does the professional responsibility of zealous advocacy compel the supervising attorney to make the closing argument? Is it in the client's best interest to permit the student to give the argument? Can the client make an informed decision to consent to the student representation? What should the supervising attorney tell the client? How would the supervising attorney's intervention affect the lawyer-client relationship and the student-teacher relationship?

It is certainly in the student's best interest to make the argument and it is in the institutional interest for the student to have this learning experience. However, are these interests more important than the client's interests? Concluding that they are is antithetical to the lawyering value of commitment to the client. A prosecution-based clinic considerably lessens the compelling nature of this issue. Certainly, prosecutors have a duty to their client, the governmental entity that initiates the lawsuit. However, it is obviously a less personal, less compelling quandary.

Prosecution clinics are the one place where students can gain personal experience in the practice of law without the specter of "live" clients. A prosecutor is bound by the Code of Professional Responsibil-

32. For example, on the Tuesday after a three-day weekend during one of the court's jury terms, there may be a large number of arrested persons in jail and few deputies available to screen cases.
portunity to seek justice. It is not inappropriate or divorced from the concept of justice to use the prosecutorial role in the criminal justice system to help students learn to be competent lawyers. The system benefits from that learning in appropriate cases without concentrated risk borne by any individual. Essentially, if it is ethical to let students "practice" their lawyering skills in any context other than simulation, the role of the prosecutor may be the ideal context in which to educate new lawyers. The costs to the client are acceptable and are borne by the public as a whole rather than a single individual.

L. Public Service Orientation

Prosecutors are public service lawyers whose client is the community and whose sworn duty is to serve "justice." This requires the student to continually think about the public interest and the needs of the community. During the course of a semester in the clinic, students have the opportunity to assist injured people, be they victims or defendants, in obtaining "justice" without being compensated for their services. Hopefully, this experience is personally and professionally rewarding to the student and promotes a life-long commitment to public service work and a sense of the legal profession's responsibility to those who need, but have difficulty obtaining, legal services.

M. Exercise of Public Discretion

The student lawyer acting as a prosecutor has tremendous discretion in handling his caseload. Combined with the responsibility to seek justice, the exercise of this discretion is an invaluable learning opportunity for students. In particular, students who are members of minority groups who have had limited access to positions of public power may, through participation in the clinic, have access to such a position of power for the first time. Students are part of the system and have the ability to make the system work. For a person who has

33. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." Model Code of Professional Responsibility, EC 7-13 (1980).

34. "[T]he prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all." Id.

35. As one student commented in his or her journal:

I am finding some of my attitudes evolving. I am starting to feel like I will have to do at least some pro bono work defending indigent criminal defendants, at least for these minor offenses. If they cannot get a PD, and legal aid won't help them, some of them are purely stuck. They can't get any help and it seems unfair for them to go up for a bench trial so helpless. If the crimes were more serious, they could get a PD, but for these little things, they can still end up with a record. It just isn't right.
always been outside the system, that can be an empowering experience.

Being a part of the system generates a personal investment in it. All lawyers have a stake in the system. Whatever the individual opinions and theories about what parts of the system need improvement, society relies on the legal profession to maintain an interest in the system itself, distinct from any particular case or principle. Bar associations and voluntary law-related organizations depend on individual attorneys who feel invested in the system as a whole to expend time and energy in endeavors that seek to improve the system. Having the experience of being a part of, rather than apart from, the legal system is a particularly important experience for traditionally disenfranchised groups. It is neither the intent nor the purpose of the Nebraska prosecution clinic to indoctrinate radical reformers into a conservative law and order system of justice. Rather, we hope the "radical" student gains professional tools to carry on her revolt with all due respect to the basic tenets of governance by law integral to our democracy.

The criminal justice system itself also profits from the involvement of diverse groups of people. Justice, as a conceptual goal of case resolution, surely benefits from the perspective and voice of the minority law student. A prosecutor’s office benefits from the continual infusion of new perspectives, experiences, and voices in its continuing mission of defining and dispensing justice. Additionally, in times of increasing pressure to provide more governmental services with fewer tax dollars, the prosecutor’s office experiences a practical benefit from the clinic’s assumption of a portion of its caseload.

N. Application of Ethical Principles

The prosecution clinic is a course in applied ethics. There are few hypotheticals in the clinic and truth is indeed stranger than fiction. The prosecution model presents advantages in the exercise of ethics. The unique requirement that prosecutors “seek justice,” the fact that the “rules” of the system are different for the prosecutor than for the defense lawyer, and the express ethical requirements imposed on prosecutors by the Code of Professional Responsibility result in an imperative that prosecutors take the ethical “high road.”

36. Students in the clinic are required to write a paper of some kind. Many of their topics relate to actual issues or policies encountered in the clinic. I have periodically provided copies of papers to our County Attorney and Chief Criminal Deputy. I know that the perspectives articulated by students in some of those papers have impacted policy decisions made within the County Attorney’s office.

37. “The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if
tion arises, the prosecutor must err on the side of ethics. The same is true for the clinic student. For example, if the student is not sure whether evidence is exculpatory, he is instructed to disclose it to the defense. Students also disclose evidence that the rules of discovery may not technically require them to disclose if disclosure seems the right and just course to follow. Students are encouraged to consider the relevant legal and ethical guidelines as they make the series of decisions necessary to dispose of a case. The volume of the caseload in this type of clinic may allow the student to experience a multiplicity of decisionmaking contexts.

Ethical considerations are not an occasional occurrence in prosecution work. Rather, issues with ethical ramifications arise almost daily. The student begins to understand that professional responsibility is a series of decisions, many of which are seemingly small. The prosecution setting allows students to integrate ethical considerations into the daily experience of lawyering.

The clinic student's first experience with "applied ethics" takes place in a lawyering role that holds her to a very high ethical standard. This is a good position from which to begin lawyering. In future, differing roles, students may be ethically bound to do that which seems unjust. Recognition of the arguable "injustice," an understanding of the basis of the lawyer's duty, and an appreciation of the difficulty of the ethically-compelled course of action serves to heighten a lawyer's care and circumspection. The reality is that ethical decisions are frequently difficult and experience in the pursuit of the elusive concept of justice serves to enhance an attorney's ability to do what is right in all contexts.

O. Institutional Critique

Theory and reality converge on the clinic student. Students in a prosecution-based clinic are exposed in a literal and concrete way to the systems of law enforcement, criminal justice, and corrections and they see how those systems work and fail to work. Students in the clinic are encouraged to reflect about and critique existing rules, procedures, and institutions. This reflection equips students to enter the legal profession knowledgeable about how the system operates and puts students in a position to improve the system. Students who actually practice law in the context of those systems have a much richer experience and perspective from which to critically analyze the efficacy of the status quo. The morass of the criminal justice system, particularly on the misdemeanor level, provides rich fodder for critique of the system. Participation in the system gives the student a unique

understanding of the obstacles to systemic reform as well as the perils of complacency.

V. DISADVANTAGES OF THE PROSECUTION MODEL

There are some important lawyering skills and professional concepts that a prosecution-based clinic is not conducive to teaching. Those inherent limitations should be considered and acknowledged in the clinical format. Each clinical course offering should be designed around concrete learning goals. No single clinic can teach everything and there are some things that a prosecution clinic does not purport to teach.

A. Client-Centered Lawyering

Lawyers practicing law as prosecutors make "client" decisions—decisions that in other contexts would be made by clients. A potential peril for the prosecution clinic student is a misapplication of the lawyer-client division of decisionmaking in other legal settings. The prosecution clinic student does not gain experience in working out what decisions are in the client's province and which are in the lawyer's. Care must be taken that students understand the uniqueness of the prosecutorial role with respect to this crucial point.

On the other hand, new theories of ethical lawyering are enlarging upon the traditional notion of client-centered lawyering. Scholars argue that the ethical lawyer has an independent interest within the advocacy role. Her role is to advise her client with respect to which options result in the best outcome in general, not only with respect to the client's interests. The argument is that it is ethical for the lawyer to urge the client to forego some potential advantage in the interest of a more just resolution to the conflict.38

Further, the lack of a client, in the sense of an individual person whose interests are at stake in a controversy, may be an opportunity for students to learn how to represent an "amalgamated" client. Many clients that a student may represent in the future are not individuals, but rather groups of persons or entities such as corporations. The experience of owing one's professional duties to a group or an entity and needing to discern and represent the interests of the group as a whole rather than the individuals who compose the group is a useful lawyering skill.

B. Philosophical Issues

Clinics have been one of the ways in which law colleges have contributed to the legal profession's obligation to provide pro bono legal services. Part of the mission of law school clinics has traditionally been understood to be public service, perhaps because of the growth of law school clinics during the late 1960s and early 1970s as a result of the infusion of grant money carrying with it a requirement of representing the poor. Many clinics serve a legal services clientele, the elderly, AIDS patients, or some other underrepresented group in need of legal services. Thus, most criminal clinics that developed in the climate of this public service philosophy were trial or appellate level defense clinics or prisoners' rights clinics. Service to those populations was, and is, viewed as ideologically noble legal work.

Because of this atmosphere of "public service," prosecution-based clinics have been criticized by members of the legal profession. Indeed, an argument can be made that it is inappropriate for a law school to contribute resources to the effort to "imprison the poor."39 Nebraska's prosecution clinic has been likened by some members of the faculty to providing free legal services to IBM. This serious reservation with respect to prosecution clinics is at least somewhat unjustified.

The conclusion that prosecution is not public service work is flawed. In one sense it is a pure and undiluted form of public service lawyering. The prosecutor represents communities and, collectively, the people who live in them. Utilitarian theories of the public interest are, by definition, the prosecution's interest.

While the victim of a crime is not the prosecutor's client, in many instances the victim's interest in a prosecution and the societal interest in a prosecution converge. Since victims are not typically "represented" at all in the criminal justice system, the prosecution often assumes the role of representing the victim's interests in court, at least insofar as these interests are not inconsistent with the public interest. Even when the victim's interest or position is divergent from the public interest, the prosecutor often facilitates the victim in ex-

39. As one student stated in his or her journal: "At one point, I even went in and spoke with Prof. X (he had been my Crim. Law teacher; although he is one of the greatest guys in the world, his class had a unique twist: The law, he seems to believe, is little more than a tool used by elitist, power-drunken, old, white men to oppress the guiltless minority masses) about what steps to take to prepare myself for a career in criminal law. During our discussion, the topic of the Criminal Clinic came up. You probably will not be too thrilled with his assessment of the program. To begin with, Prof. X tempered his attack by letting me know that he would 'not think any less' of me if I decided to take the Criminal Clinic. Nevertheless, he let me know, in no uncertain terms, that he thought that the clinic was a bad idea. According to Prof. X, the Criminal Clinic does nothing more than 'prosecute people who don't need to be prosecuted in the first place.'"
pressing her position to the court. The reality in many criminal prosecutions is that the victim perceives that the prosecutor has assisted the injured individual in participating in the process and achieving a desired outcome.

Many victims of crime are members of traditionally under-represented groups who are very much in need of legal assistance. Women and children are frequently the victims of crimes such as sexual assault, abuse, and domestic violence. Poor people and members of minority populations are victimized in significant numbers. Assisting victims is compatible with the desire to contribute effectively to the community by providing legal services that are needed by vulnerable populations.

Whether it is more noble to represent the individual charged with rape or to represent the state in prosecuting him is a question of personal values and philosophy. It is, at a minimum, not ignoble to seek to bring to justice people who have criminally victimized others.

VI. GUIDELINES FOR IMPLEMENTING A PROSECUTION CLINIC

In the final analysis, providing a pedagogically optimal setting for the law student’s educational experience should be of primary concern to the law school. The consistency of the clinic format with the political and philosophical values of members of the faculty is less important than the provision of an excellent educational experience. It is certainly possible to operate a prosecution-based clinic within a prosecutor’s office wherein the student is completely supervised by law college faculty. However, a successful program of this nature presupposes a well-defined relationship between the institution, supervising faculty members, and the elected or appointed public prosecutor. The relationship must respect the faculty member’s need to control the pedagogical setting to maximize the learning opportunity for the student. On the other hand, the program must, at a minimum, not interfere with the operation of the prosecutor’s office. Ideally, the clinic program will also meet certain needs of the prosecutor’s office.40

A program which is mutually beneficial has an optimal chance of long-term success.

40. The National Prosecution Standards promulgated by the National District Attorney’s Association officially encourage law school clinics within prosecutor’s offices. Standard 32.2 states that “[t]he prosecutor should actively cooperate with law school clinical programs for prosecution where they exist and actively promote their creation where they do not.” NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, THE NATIONAL PROSECUTION STANDARDS std. 32.2 (2d ed. 1991). The prosecutor’s interest is two-fold: “to foster and encourage interest in the prosecutorial field as a career choice and, secondarily, [to supplement] the resources of his own office.”
The public prosecutor must maintain policy control over the prosecutions within the office as a whole, including prosecutions handled by the clinic. Policies and guidelines governing all attorneys within the office must be respected and followed by the clinic as well. Faculty members must be skilled in finding and emphasizing common ground between the educational mission of the institution and the public service obligations borne by the prosecutor. The prosecutor must respect the institutional goals of the program and the individuals who supervise the clinic. The faculty member must appreciate the need for centralized policy control on the part of the prosecutor.

The University of Nebraska College of Law has a written memorandum of understanding with the County Attorney's office. It covers fiscal considerations as well as delineating fundamental responsibilities and understandings. Such a written document is recommended to clarify responsibilities from the inception of the program. Certain criteria are important to the successful operation of a prosecution clinic:

1. The supervising clinic faculty must retain the ability to control the clinic caseload. The clinic must be able to accept or reject cases referred by the prosecutor's office based upon considerations of caseload and case variety in order to maximize the educational objective of the clinic. No case or task should be accepted by the clinic that does not contribute to the pedagogical goals of the clinic.

2. The prosecutor must be willing to extend to the supervising faculty the same degree of discretion with respect to case handling that any deputy in the office enjoys. Optimally, the prosecutor will be the type of individual who permits deputies a broad measure of discretion in case management decisions and respects their individual judgments. It is important that the public prosecutor be involved in clinic staffing decisions. The law school should have the ability to decide which faculty will work in the clinic. However, the prosecutor should retain the right of consent to those decisions. The prosecutor should be involved in interviewing prospective applicants if the school is hiring faculty specifically for the clinic position. Ideally, there will be mutual agreement between the law school and the prosecutor as to the best candidate for the job. At a minimum, the prosecutor should not feel as though the law school's choice of clinic faculty is imposed upon her.

3. Clinic policies must be consistent with the policies and standards promulgated by the public prosecutor. The policies and procedures of the prosecutor's office should be explored and understood by the faculty prior to developing a prosecution clinic. The policies should not be inconsistent with the educational mission of the clinic.
Particular care should be paid to whether any of the office policies or the climate within the office have negative ethical implications. 41

4. The clinic cannot be perceived within the prosecutor's office as a place to dispose of "bad" cases. Deputies within the office should not have the ability to unilaterally transfer cases to the clinic. Further, it is incumbent on the clinic faculty to protect the integrity of the educational experience by refusing to place students in the difficult circumstances that may be posed by such "bad" cases. That is not to say that the clinic should not undertake to handle cases that are challenging in an evidentiary or legal sense. Losing a case offers a learning experience that is at least equivalent to winning a case. Challenging legal or factual issues may provide an optimal educational experience. 42

5. The prosecutor must be willing to refer to the clinic a variety of types of cases. Handling the same type of case repetitively for the entire semester will not provide the student with as rich an experience as handling a variety of types of cases. 43

6. Arrangements must be made for adequate physical space, support services, equipment, and supplies. The Nebraska clinic's arrangement involves a dedication of certain space within the County Attorney's office to the clinic program and joint funding of support staff and equipment. 44 Supplies are provided by the County Attorney's office.


42. Assault or child abuse cases which include mens rea elements of "recklessness" or "negligence" provide an excellent context for the student to think extensively about proof of facts, arguments with respect to inferences drawn from facts, effective case themes, and the process of persuasion.

43. However, there are certain types of cases that are typically very rich with issues, such as the average Driving Under the Influence case that includes scientific evidence, opinion testimony by experts and lay persons, and direct and circumstantial evidence.

44. Nebraska's clinic consists of misdemeanor prosecutions. The clinic handles very few traffic cases, but it does handle all types of misdemeanors including: possession of a controlled substance, third degree sexual assault, assault, child abuse, cruelty to animals, theft, shoplifting, disturbing the peace, criminal trespass, etc.

45. It is important to have a firm understanding with respect to physical space. Many prosecutors' offices suffer from inadequate space. Typically, the staff expands for a considerable period of time without commensurate building expansion. If the prosecutor's office views the clinic space as constantly negotiable, the clinic will need to perpetually battle to retain the space. Adequate physical space has proven to be essential to the quality of the student experience.

46. One three-quarter time secretary staffs our clinic. She is an employee of the University of Nebraska and works under the supervision of the clinical faculty. However, the County Attorney's office reimburses the University for her salary and benefits. Additional support staff resources are provided by the University.
Outside the purview of the prosecutor’s office, there are other external criteria essential to successful operation of this type of clinic. Some of these criteria are discussed below.

A. State Rules of Practice

Obviously, the rules of practice in the jurisdiction must permit the practice of law by law students. Clinic eligibility should be limited to those students who will qualify under the state rule. If the rule does not require “direct” or in-person supervision of students during in-court appearances, clinic policy should nonetheless require such supervisory presence on the part of the faculty member. Solo courtroom flights by law students are fraught with peril for the student and the clinical program. The presence of the supervisor gives students increased confidence and insures that the pedagogical goals of the experience are met. It is difficult to anticipate every possible outcome or spin a case may take in the courtroom. The supervising attorney ultimately bears the ethical responsibility to see that the client is represented competently. The supervisor cannot fulfill that duty if she is not present in the courtroom.

B. Cooperation from the Bench

The support and cooperation of the local judges before whom students will be appearing is crucial to the successful operation of a prosecution clinic program. The clinic must affirmatively encourage support for its program from the relevant members of the judiciary. Several steps assist the clinic in soliciting a helpful attitude from the bench. Immediately prior to each semester, each judge on the local bench is provided copies of all clinic students’ Supreme Court certifications along with their photographs. During the first week of the semester, a time is scheduled for the students to tour the court building. Judges are advised that the new group of students will stop in chambers to meet them. The Nebraska student practice rule specifically requires the court’s permission before a student may appear before that court. During the student’s first appearance before a given judge, the supervising attorney will introduce the student and request that such permission be granted. During subsequent appearances by the student most, but not all, judges prefer to dispense with this procedure. At the beginning of each court appearance, each student is required to state her appearance for the record, the fact that she is a senior certified law student, and under whose supervision she is appearing.

It is important that the clinic respect the priorities and goals of the court. Students must be prepared for court appearances. If student-conducted trials routinely take much longer than other trials, the court will be reluctant to permit students to appear. Further, the
court must be assured that students appearing in court are appearing in the role of attorneys whose primary obligation is that of client representation. The educational experience is secondary and collateral as far as the court is concerned. In the prosecution clinic, this means that the clinic does not refuse to negotiate cases simply because the students would like the experience of a trial. That desire for experience is an ethically inappropriate factor to consider in case resolution decisions. It is something that the courts as well as the defense bar become legitimately concerned about with respect to prosecution clinics. If the existence of the clinic significantly increases the caseload of the courts or the public defender’s office, negative implications for the clinic should be expected.

Close supervision by an experienced instructor alleviates most problems the court might have with the clinic. Less direct supervision seems to correlate with a greater number of complaints from the bench. The inexperienced and unsupervised law student in court will undoubtedly interfere with the efficient judicial system in the perception of many jurists.

C. Institutional Requirements

The student’s educational experience is optimized through concurrent participation in a classroom component or seminar as part of the clinical curriculum. Depending on the academic prerequisites for student eligibility in the clinic, the content of the classroom component may vary. Students who have not had a trial advocacy course prior to the clinic will need a classroom component focused on basic skills instruction. If criminal procedure is not a required prerequisite, then more classroom hours will need to be devoted to the constitutional, statutory, and procedural aspects of criminal litigation.

The classroom component is also an opportunity for students to step back from the immediate problems presented by the cases they are litigating and look at the issues from a broader perspective. The classroom should also promote reflection about the clinical experience and reinforce the self-learning model.47

Institutional conflict of interest situations should also be anticipated and resolved by a pre-established policy. As a matter of policy, Nebraska’s criminal clinic will not handle any case involving a law college student, staff, or faculty member. Other situations posing possible institutional conflicts of interest are resolved on a case-by-case basis.

47. One student commented in his or her journal: “I also realized that there’s still a lot to learn. In fact, the practice of law is a continuous learning process. The ability to accept constructive criticism will only improve my skill as an attorney. I’m learning not to be so hard on myself . . . .”
basis.48 A failure to recognize conflict of interest issues and to deal with them by policy in the abstract rather than as they arise in the context of actual cases can create troubling situations for a clinical program. Alumni relations may be impacted by the clinic. The appearance of improper collusion with the university may exist in certain cases. It is especially crucial for a prosecution clinic to avoid conflict situations. The prosecutor's ethical duty is to do justice and that charge is arguably compromised where the interests of the clinic, the law school, or the university itself are involved in a prosecution.

The faculty member who is also a deputized prosecutor must be recognized as a person who serves two masters. Situations may arise in which the obligations of confidentiality within the prosecutor's office conflict with some process or procedure at the law school. The law school must be willing to respect the dual obligations of the clinic supervisors. The public prosecutor is the individual who, by virtue of her office, has the authority and responsibility to set prosecution policy and standards. The deputized faculty member must respect that prosecutorial authority to operate a successful prosecution clinic. Likewise, the prosecutor must respect the institutional authority to administer the clinic in a way that serves its educational goals.

VII. CONCLUSION

The prosecutorial role offers law students unique learning advantages while minimizing the ethical conflicts involved in student representation of "live" clients. In most law schools, the possibility of a prosecution-based clinic is an unexplored option. Criminal prosecution may provide unequaled litigation opportunities for law students without upsetting the community balance of available legal services. Prosecution offers students the ability to serve the public, justice, and their own educational agenda in an exciting and challenging atmosphere.

48. The clinic does not view any case that involves the University police or University property as a per se conflict of interest. However, the clinic has declined to handle certain high profile cases involving the University where the University's counsel has sought to coordinate efforts with the prosecution. We believe those types of cases represent a potential perceived, if not de facto, conflict of interest.