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# AUTOPSY OF A MURDER: USING SIMULATION TO TEACH FIRST YEAR CRIMINAL LAW

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## I. INTRODUCTION

Much has been said and written in recent years about simulation as a form of clinical teaching.<sup>1</sup> Over the years, clinics have come to rely heavily on simulation exercises for their seminar components to accomplish several goals: 1) to teach legal process and specific skills; 2) to universalize the students' experiences; 3) to emphasize certain pivotal decision making; and 4) to raise concerns about professional responsibility and values. Many clinicians chose not to teach specific substantive law in the seminars, addressing those issues instead as an inevitable aspect of case planning and decision making.

Because I have used simulation exercises in teaching a criminal law clinic, it seemed a natural and obvious extension of this experience for me to use these techniques in a larger class in order to enliven the student's experience by putting a substantive criminal law case in its procedural and lawyering context. Instead of relying on the simulation to teach the various skills and topics mentioned above, I used the role playing techniques more modestly to unfold the doctrinal law somewhat so that the students could feel how lawyers plan, deliberate, analyze and make choices in a universe of facts that is not wholly predetermined. This kind of effort is supported by the existence of a standing committee on Integration of Clinical Teaching Methodology in the Traditional Curriculum of the Section on Clinical Legal Education of the AALS and by the momentum behind the ABA Professional Skills Conference itself.

During my second semester three-credit Criminal Law course in Spring 1986

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1. ASSOCIATION OF AMERICAN LAW SCHOOLS/AMERICAN BAR ASSOCIATION GUIDELINES FOR CLINICAL LEGAL EDUCATION, (1980) Guideline VI at 23. See also 71-80; JOSEPH D. HARBAUGH, SIMULATION AND GAMING: A TEACHING/LEARNING STRATEGY FOR CLINICAL LEGAL EDUCATION (1979), AALS/ABA Guidelines at 191; Patricia A. Hollander, *The Simulated Law Firm and Other Contemporary Law Simulations*, 29 J. OF LEGAL EDUC. 311 (1978); MICHAEL MELTSNER & PHILIP G. SCHRAG, TOWARD SIMULATION IN LEGAL EDUCATION: AN EXPERIMENTAL COURSE IN PRE-TRIAL LITIGATION (1975); Donald B. King, *Simulated Game Playing in Law School: An Experiment*, 26 J. OF LEGAL EDUC. 580 (1974). Many materials have been developed for use in simulation classes or courses. Among them are materials by Gerard E. Lynch, Mark F. Pomerantz & James S. Liebman, *United States v. Barnes and Thomas: Materials for a Simulated Criminal Litigation* (1986) (available from the authors at Columbia University School of Law); LYNN M. LOPUCKI, DEBTOR-CREDITOR GAME (1984); Melissa L. Nelkin & Mark K. Schoenfeld, *Problems and Cases in Interviewing, Counseling and Negotiation*, NAT'L INST. OF TRIAL ADVOCACY (1983); RICHARD B. PARNELL & GLEN W. SHELLHAAS, TRIAL ADVOCACY: CASES, EXERCISES, AND PROBLEMS (1982); THOMAS A. MAUET & WARREN D. WOLFSON, MATERIALS IN TRIAL ADVOCACY (1981); James H. Seckinger & Kenneth S. Broun, *Problems and Cases in Trial Advocacy*, NAT'L INST. OF TRIAL ADVOCACY (1979); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: PROBLEM SUPPLEMENT (Civil and Criminal) (1978).

in which eighty first year students were enrolled, I developed a large scale simulation based on a high publicity murder case then pending in New York City. I wanted this simulation to extend beyond a trial based on canned facts.<sup>2</sup> By developing facts, making the charging decision, attempting to negotiate a guilty plea, and collaboratively preparing the case, even these first year students would have a much clearer sense of the process behind the prosecution and defense of a case. A lot of time and student effort was contemplated; much more synthesis of process and law was anticipated. At the same time, I continued to teach three hours a week following my regularly assigned syllabus, requiring that the students devote extra hours to this project because I was unwilling or insecure about giving up any portion of my normal course coverage.<sup>3</sup>

In the final analysis, a long term simulation can be pulled off even in such a large class. On a more cautionary note, however, while it was very useful for the students to examine criminal doctrine in its procedural context, I am not wholly convinced that the project added to the depth and breadth of the students' knowledge of substantive criminal law to justify the extra time and effort required of all the participants.<sup>4</sup>

My purpose in writing this piece is simply to describe the project, publish the materials I developed, and set forth my impressions of its value. Other criminal law professors interested in experimenting with a simulation may be persuaded to consider trying it; others already inclined to try may be discouraged by my admittedly mixed feelings about the success of the project as a supplement to the traditional first year course.

## II. TEACHING ASSISTANTS

Managing eighty students alone was a logistical impossibility so I hired four upper class teaching assistants.<sup>5</sup> Fortunately, I recruited four very able students.

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2. The year before, I had conducted a rewarding but limited simulation exercise at the conclusion of the spring semester course. With about 40 students in that section, I prepared a trial simulation based on a real case in which a battered spouse defense was raised to a homicide charge. I prepared statements and assigned roles to the students, encouraging but not requiring collective preparation. During their last day of the semester, the students conducted a full trial, performing all of the essential lawyering tasks (opening argument, direct and cross examination, closing statement). In addition, they undertook to argue certain motions *in limine* with respect to evidence, prepare and deliver charges to the jury, and act as witnesses and jurors. One particularly informative and entertaining aspect of that trial was the closed-circuit viewing of the jury deliberations. This simulation, however, ignored any pre-trial information gathering and planning because the students were restricted to the prepared facts.

3. The text I use is SANFORD H. KADISH, STEPHEN SCHULHOFER & MONRAD G. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* (1984). I do not, however, assign the materials contained in Chapter 2 about the criminal adversarial system.

4. Although my main method of evaluation of this project was a student questionnaire which expressed generally positive reactions, I noticed no marked improvement on their exams. I did try to integrate the simulation into the exam by asking a question based on the simulated case.

5. In order to execute this expanded project in an efficient and manageable way, I received permission from the law school to hire four teaching assistants to help me prepare the problem. They also taught several supplementary small classes of 20 students in order to work with more manageable numbers. These classes involved prepared exercises as well as informal guidance and advice.

Brooklyn Law School recently has been engaged in a long term program to encourage new teaching models in the first year curriculum including greater use of simulation and role play, better integration of legal writing and substantive courses, and non-traditional organization of course material. Hence the support for the teaching assistants was no surprise.

Three of them were in their second year; one was in his third year. Each had had some experience working in the office of either a prosecutor or defense attorney. This practical criminal law background gave them a greater ability to recognize issues and analyze them, particularly because each of them had a career interest in criminal law. In addition, their own experiences gave them the credibility to function as counselors and role models for the first year students.

The teaching assistants' main roles were to help prepare the problems, to teach certain designated classes, and to be a resource to the first year students in developing and executing the simulated trial. Before each class they taught, we met for approximately two hours to discuss the goals for the class and to create a lesson plan. In addition, the teaching assistants were responsible for some of the administrative details of running the program, such as assigning roles, taking attendance, answering questions about the problems, and overseeing the mechanics of their execution.

### III. PROBLEM DEVELOPMENT

#### A. Goals

Identifying and creating a simulation exercise for a substantive course is substantially different from the same process for either a clinic or a simulation course such as Negotiation or Trial Advocacy. In the latter, teaching specific skills (whether concrete such as direct examination, or abstract such as ends-means thinking) through experience or role play generally are the main objectives of the simulation. The kinds of problems that are best suited for such simulations generally involve factual disputes containing evidentiary issues which balance the sides of the case so that all students have an opportunity to perform relatively equally. They also expose the students to as much of the specific skill or issue as possible because simulation exercises often compensate for a deficiency in the experience provided by an actual case, e.g., while a real case may settle before discovery is completed, a student still needs to learn the proper method for drafting interrogatories. Usually such a simulation contains built-in controls so that the pedagogical plan can be accomplished. Little, if anything, is left to chance because certain results are needed to move the exercise to its next step or to fill in the gaps of actual cases.

The goals of the simulation for my substantive criminal law class were different from those which I have just summarized above. I excluded any real issues of factual dispute because I did not intend to teach fact investigation. The facts, however, were sufficiently complicated so that they had to select from among them to find those that best supported their case theory.

In addition to eliminating factual disputes, I factored out most credibility issues. I preferred that they learn to develop a theory based on accepted facts rather than argue whether or not a particular witness is believable. How well the students could develop credibility questions was really not my main concern particularly since there was no "real world" in which to discover impeachment facts. Moreover, few students, if any, were skilled in eliciting impeachment material or understanding how to argue inconsistencies since none had taken a course in evidence. Therefore, I avoided any potential testimony which would

raise substantial evidentiary issues. Although many people question how first year students can possibly know enough evidence to try a case, once hearsay issues and foundation complexities are eliminated in the fact pattern, only comparatively simple matters of questioning form remain. Students can easily be tutored about this by assigning short readings or videotapes.<sup>6</sup> Therefore, I tried to keep the fact patterns free of any evidence that would require any knowledge of evidence other than basic objections to form (e.g., leading, argumentative, compound) for which I gave the students a checklist. Students thus were freed to concentrate on the facts rather than worry about theories or techniques for admitting evidence.

My key concern was that students use this simulation exercise to illuminate and synthesize what they had learned about certain areas of the substantive criminal law over the course of the semester, particularly murder and a range of defenses. Also, I wanted students to see how the trial process itself determined the issues on appeal and how lawyers and clients make strategy choices which shape all future considerations. The simulation, therefore, was not simply a trial experience but also included interviewing, drafting and negotiating in order to recreate the planning process as much as possible.<sup>7</sup> I wanted the students to think in the role of lawyer about the case from its inception to the verdict much as they might when handling a case in a live-client clinic. I also planned to tie in sentencing concerns in the last class of the semester by requiring them to sentence the defendants irrespective of the outcome of their trials.

I came to believe that the ideal problem consists of a murder charge in which there are few issues of disputed fact yet several potential defenses—provocation, justification, diminished capacity, and insanity—each of which, if developed properly at the trial, could affect the outcome differently. I also built into the problem a purely legal issue of the admissibility of expert testimony on an important evidentiary question, in this case the Vietnam Stress syndrome.<sup>8</sup> Thus, the students could consider some of the same issues on trial—the legal standards contained in the instructions, the admissibility of testimony—that they had reviewed when reading appellate cases on intentional murder, manslaughter, self-defense and insanity.

The structure of the ideal case began to emerge as one in which there would be several eye-witnesses to the facts each of whom possessed different, but not necessarily conflicting, amounts of information and whose testimony would

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6. For example, in THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 162-200 (2d ed. 1987), the author sets forth the proper liturgy for laying a foundation in a wide variety of examples. He also discusses questioning form in the chapter on Direct Examination at 85-175. See also, E.J. Saloinen, *Trial Manual on Predicate Questions* (1976) (unpublished materials); JAMES W. JEANS, *TRIAL ADVOCACY* 211-224 (1975); Nat'l Inst. of Trial Advocacy, *The Introduction and Use of Exhibits* (1987) (videotape No. EOX03).

7. I did not use the more sophisticated approaches to teaching fact evaluation and planning developed by such clinicians as DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION* (1984)—that is, to teach the importance of the interrelationship of fact, proposition and law—simply because of time and size constraints and because of my fear of being excessively theoretical about lawyering since this simulation was intended to counter-balance the theoretical Criminal Law course.

8. It is possible to tie in this kind of purely legal issue with the student's Moot Court experience in the second semester, thus adding another dimension of integration.

contain fairly elementary cross-examination material. One or more theories of defense would be possible. On top of all these concerns, the logistical demands of this exercise required that I develop a sufficient number of roles so that all of the students could participate and that the roles be fairly evenly weighted since I was going to give class participation points for this exercise.

In the design of this problem I had to take into account my format which was intended to advance the case in several stages leading up to the trial in order to familiarize the students with other lawyering skills as well as the relationship of the criminal justice system to substantive criminal law. My aim was to give them an interviewing, a drafting, and a negotiation (plea bargaining) exercise, as well as several classes in trial preparation which would force them to develop a unified theory of the case. Each stage would reveal more factual information to be incorporated into the trial case file. The problem, therefore, had to be designed to allow for factual disclosure in stages.

Before crafting this problem, I had to decide what my goals were in engaging in this rather cumbersome, burdensome, time-consuming exercise. At first I was motivated by my dogmatic belief that any importation of clinical methodology would enhance the Criminal Law course. As I engaged in the process, I came to realize that the reasons for doing this project shifted constantly, largely depending on my perception of how the students were reacting. Fearful of confessing that my goals were uncertain, I identified goals for the students in their order of importance to me: an opportunity at the end of the semester to synthesize principles of criminal law in applied form; an opportunity to delve behind the appellate cases into the earlier process of fact gathering in order to understand the impact of fact investigation on the development of the case at trial; an opportunity to understand a little bit about how lawyers make strategic choices with respect to what charges to bring and what defenses to raise; and an opportunity for the students to have an energizing, fun experience which would enable them to do some active rather than passive learning.

### *B. Summary of the Problem*

With all of these goals in mind, a murder case was clearly the most appropriate for this type of exercise. First, we study homicide extensively in class. Second, because I typically race through defenses at the end of the term, this was an occasion to reconsider some of the issues that had been treated somewhat hastily in class. Finally, our study of homicide, a crime graded on the basis of *mens rea*, involved not only absolute defenses but defenses that mitigated the charges so that the students were able to see how various defenses could interact.

The skeletal facts for the problem were based on a well known incident in New York City when a young black man standing on a subway platform was approached by the police for a minor infraction. The result of this confrontation was this man's eventual death at a local hospital several hours later. The transit police were tried for a reckless murder, although it was never totally clear which individual inflicted the fatal injuries. The novel theory of prosecution was based on a notion of reckless supervision.

The actual case was much too complicated for complete adoption. There were

too many co-defendants, the theory of the case was elusive and tricky even for the actual lawyers involved, the facts were actively disputed by the witnesses for each side, and there was a key issue of causation which could only be presented to the jury through the testimony of several expert witnesses. By using such a highly visible case, however, even in abbreviated form, the students were able to follow some of the real life developments, including the eventual acquittal of the defendants that summer.

To trim the problem to a manageable scale, I created a simple scenario involving two police officer defendants: an active participant (Glenn Lynch) and a passive superior (Roger Anderson). Lynch's conduct permitted both him and the superior officer to be charged as accomplices to an intentional crime. The superior could also be charged with reckless or negligent crimes based on his failure to intervene or supervise. Each defendant's personal history and circumstances allowed for separate defenses on the issue of intent, justification, and assorted other independent theories. Thus, the students were able to appreciate how in a universe of various possible charges and defenses, lawyers may have to choose from among competing theories in order to prosecute or defend a case coherently. This lawyering dimension, invisible to the reader of appellate cases in which the court reacts only to the choices of counsel as developed at trial, can emerge when the students have to creatively construct the case.

A co-defendant problem permitted the students to see another aspect of lawyering—the cooperation and conflicts of co-counsel and some of the potential ethical hazards that arise in such situations. Because each defendant had his own attorney, the defense teams could work separately or together. This may have overcomplicated the simulation because as it turned out, most students did not develop independent or inconsistent theories but rather relied on those that could be argued consistently between the co-defendants out of an inability (or perhaps naivete) to perceive how co-defendants with conflicting theories could co-exist in a single case. On a more pragmatic note, more roles were created for the students to perform.

The students had considerable difficulty sorting through the various defenses available, comprehending their interrelationships, and choosing among them. In the end, they tended to advance all viable defenses, for fear, I suppose, of being ineffective counsel. The active defendant, Lynch, could raise a defense of lack of intent, justification, insanity or extreme emotional disturbance.<sup>9</sup> The passive defendant, Anderson, could claim that he was not an accomplice, that he was not reckless or negligent, that he was justified, or that he intervened, albeit unsuccessfully, to prevent the assaultive conduct.

With an awareness of the possible defenses, the prosecution had to approach its case with a view toward disproving<sup>10</sup> or disabling the potential defenses. Even at the charging stage, the students exercised prosecutorial discretion when ex-

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9. N.Y. Penal Law §125.25 affords an affirmative defense to persons charged with intentional murder when committed under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse.

10. Under N.Y. Penal Law §35.00, justification is an ordinary defense. Insanity, on the other hand, is, like extreme emotional disturbance, an affirmative defense. N.Y. Penal Law §40.15.

amining the effect possible defenses (Vietnam Stress syndrome or justification) might have on the decision to indict and which crimes to charge.

#### IV. STAGES OF THE PROBLEM<sup>11</sup>

##### A. *Problem Drafting*

I intended that the simulation exercise begin at about the fifth week of the semester once the students had completed their moot court briefs. Before then, each teaching assistant prepared the statement of one of the key witnesses. Because these statements tended to be fairly skimpy, providing merely the bare bones of the witness's testimony, whereas the statements students were to receive had to provide many more details essential to an effective simulation, I edited and expanded their drafts. Only then, and really for the first time, were the teaching assistants able to appreciate the many dimensions of this project. It became a teaching tool for them as well because they were learning some of the same messages about fact development as the first year students, although by a slightly different means. Another series of revisions occurred after the students gathered facts in their interviews.

##### B. *Interviewing*

I distributed the four initial statements at the first of two small group sessions to be taught by the teaching assistants. These two classes were constructed around an interviewing exercise. Each student, assigned to be either a defense attorney or prosecutor, would interview one of the witnesses for their respective sides of the case. Fifty percent of the class conducted the interviews as attorneys while the other half of the class participated in the role of one of the witnesses or defendants. The interviewer was to write up the questions that he or she was planning to ask, and the interviewee had to write up the facts that emerged from the interview. I intended to take any additional facts that the students had elicited during the interview and integrate those that were logical and that advanced the factual development of the case into the statements they had previously received. The students could see how their fact development during the course of the interview had an impact on the trial of the case.

The first interviewing class consisted of a basic introduction to the interview process. After this the students were asked, on the basis of nothing more than a press release sketchily describing the events of the case,<sup>12</sup> to decide what kind

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11. This section contains abundant detail, including descriptions of my mistakes and how they were corrected. Because I wanted to offer as much information as possible to others interested in trying such a project, I apologize to the more casual reader for the density of the discussion.

12. *INITIAL PRESS RELEASE*

*Dateline:* New York, New York

On September 3, 1985, Stewart Michael died at Bellevue Hospital at 10 p.m. He was brought to the hospital by Sgt. Roger Anderson and P.O. Glenn Lynch of the Transit Police Force. According to Anderson and Lynch, Michael, a 21 year old unemployed part-time student at Apex Technical School, was smoking on the subway platform. While the officers were trying to issue Michael a summons, he started to walk away. Their attempts to restrain him resulted in a scuffle during which the officers had to use necessary force to subdue him.

Michael was arrested for disorderly conduct, assault, obstructing governmental administration and re-



of questions they would want to ask at an interview. Before they were assigned roles, they were simply asked what they would want to know at the interview of each of prosecution witnesses, and at the interview of each of the defendants. The students developed a long list of questions and discussed some of the central messages about interviewing on the importance of listening, avoiding assumptions, and thinking of follow-up questions.

The second class followed the interview. The students described the facts that had been brought out at their respective interviews, discussed why they were important, and began to relate the development of the facts to the ultimate question that they were going to have to address next—the charging decision. They handed in their written work to the teaching assistants who, in turn, decided which additional facts to incorporate into each statement.

### *C. Drafting the Indictment*<sup>13</sup>

At the second interviewing class, the students received a copy of the appropriate New York Penal Law sections governing homicide and a sample indictment. Their tasks for the next week were to decide what charges, if any, to bring against each of the defendants in the case and to draft an indictment. They could chose the option of “no true bill” if they felt that the evidence against either defendant was insufficient. Thus, they were able to indirectly consider the role of the Grand Jury.

Using the Penal Law exposed the students to a specific coherent statutory scheme. They were able to absorb how the New York homicide statute was structured and to work with its peculiar attributes, particularly the extreme emotional disturbance affirmative defense. Because I structure Criminal Law as a statutory rather than a common law course, the students were forced to work within the limits of the statutes and see how the facts and theories of the case are determined by the particular statutory scheme within which a lawyer has to work.

At the second class, I wanted the students to concentrate on the charging decision rather than to learn how to draft indictments, although they were at least able to see the format of an actual indictment. I gave them a little bit of information about the standards of legal sufficiency of the evidence necessary to support an indictment, but their basic task was to determine what crimes had been committed by referring to the available facts.

After the indictments were “filed,” we met in the large class, coinciding with the end of the bulk of our work in homicide. The students explained the reasoning

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sisting arrest. As the police were transporting him to be booked, Michael collapsed unconscious in the patrol car and was rushed to Bellevue where he died in the emergency room.

*Dateline:* New York, New York

On September 5, 1985, Sgt. Roger Anderson and P.O. Glenn Lynch of the Transit Police Force were suspended from active duty pending an investigation of the events of September 3 leading to the death of Stewart Michael. Two eyewitnesses have come forward to accuse the police officers of using excessive, unjustified force.

13. An indictment drafting exercise really cannot qualify as an opportunity for students to learn drafting/writing skills because it usually follows a fairly standard format. At best, the student's attention can be drawn to possible legal inadequacies but such issues are highly technical and really are best raised in a Criminal Procedure course.

behind their charging decision, thus concretizing our more theoretical discussion.

Interestingly, this project yielded some critical information about my own planning of the case file. Given the way in which the particular witnesses' original statements had been worded, the majority of the students found that both of the defendants had committed no greater than a reckless crime, and some of the students found that the passive defendant had committed no crimes at all. I had planned, however, that some of the defenses that I had built into the problems would be defenses to intentional crimes. Consequently, I was rudely awakened to the fact that my fact patterns did not contain enough information to establish a *prima facie* case of an intentional murder. I had to build more facts into each statement or the problem I had originally devised was not going to work. Thus, I removed some of the power I had initially given to the students to control the destiny of the charges and the defenses.

Due to these factual inadequacies, I created additional witness statements in order to amplify the issues and to push the students in the direction I had hoped to achieve in the first place—a top count of intentional murder. While I had always planned to have more than two witnesses for each side of the case, it appeared to the students (for reasons I hope they did not suspect) that these new witnesses surfaced as a direct result of the work and thinking that they themselves had done. I prepared a “superseding” indictment charging intentional murder.<sup>14</sup>

From this mistake, I nevertheless claim some success. The students' own fact development led them to challenge the assumptions that I had been making about the adequacy of the evidence. Because I had to create more witnesses to allow for additional elements to be charged, I was able to convey to them that fact development could lead in several different directions. First, by extracting facts themselves they were able to arrive at a conclusion with respect to the most serious possible crime committed. On the other hand, by being given the additional statements, they were forced to realize that the existence of other facts discovered during a continuing investigation might influence the charge in unexpected directions.

At this point, I finally revised all of the original statements to incorporate the fact development that the students themselves had undertaken as well as the additional witnesses' statements. The complete package of statements that were intended for the students included three eye witnesses and one expert witness. The defense consisted of statements from each of the two defendants, an expert witness, and a friend of the defendant.<sup>15</sup> The medical examiner's report was provided to both sides.

#### *D. Plea Bargaining*

The next stage in the case was a plea bargaining exercise on behalf of the supervising police officer, the defendant whose guilt was more ambiguous and whose bargaining posture offered more alternatives to both sides. The students were assigned as either prosecution or defense counsel without regard to the

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14. *INDICTMENT*

15. The complete set of witness statements appears as an Appendix to this piece.

roles they had played in earlier exercises. In this way I hoped to avoid any identification with only one side of the case so that students could see that facts and interests could be argued or presented to support different sides. I prepared a complex series of instructions with respect to the sentencing laws in effect.<sup>16</sup>

#### 16. PLEA BARGAINING EXERCISE INSTRUCTIONS

Each student will play the role of either the prosecutor or the defense attorney for *Anderson*. If you were an "interviewer" in the interview exercise, you are the assistant district attorney; if you were an "interviewee," you are the defense attorney. Your assignment is to attempt to negotiate a guilty plea that will be acceptable to both the state and the defendant. If you cannot reach a disposition of the case through a negotiated plea, you will be taking the case to trial by the end of the semester.

The prosecutors should read the revised statements of Martinez and Copps as well as the new statements of Fran Herbert and Lt. Gene Colton. The facts contained in these statements have been revised or discovered as a result of your interviews and other investigations into the case. The defense attorneys should read the revised statements of Lynch and Anderson and the new statements of Mark MacDonald and Dr. Lionel Smith. Both counsel should read the medical examiner's report and the newly drafted indictment. Each attorney will receive a confidential file containing information known only to them which can be considered in any way during the exercise.

The plea bargaining exercise itself can last as long as you feel that there is some reason to believe that an agreement is possible. If you feel that there is no hope of arriving at a negotiated disposition, assume that the case will be placed on the trial calendar for early May. If you reach a disposition, there will be no trial.

Before meeting with your opposing counsel, think about what kind of plea bargain you consider reasonable and just in this case. Also, consider whether fairness is the actual objective of the plea bargaining process. Note all of the plea bargaining and sentencing limitations indicated in the section below on applicable law. When your bargaining session is over, fill out the plea bargaining exercise form.

##### *Indictment*

As a result of the newly discovered evidence, the Grand Jury has indicted both Glenn Lynch and Roger Anderson with acting in concert in the intentional murder of Stewart Michael. The single count indictment, contained in both the prosecution and defense packets, charges both defendants with Murder in the Second Degree.

##### *Applicable Law*

The following provisions regarding punishment apply to this plea bargaining exercise. These are *not* wholly accurate representations of New York State sentencing provisions, which are too complicated for this exercise.

a. Murder in the Second Degree is a Class A felony which carries a mandatory prison sentence of a minimum of 25 years and a maximum of life. There is no possibility of probation or any other non-incarcerative sentence.

b. The sentencing laws permit the prosecution to offer a plea bargain to no lower than a Class C felony (two degrees lower) which carries a mandatory minimum of three years imprisonment if a prison term is imposed. The statutory maximum is 15 years. In contrast to the felonies of greater degree, a defendant convicted of a Class C felony can receive a non-incarcerative sentence such as probation or a fine. Also, the district attorney's office has recently begun a campaign to promote community service sentencing where appropriate in order to make "the punishment fit the crime."

c. A Class B felony conviction carries a minimum sentence of at least seven years imprisonment; the statutory maximum is 25 years. Any defendant convicted of a Class B felony must go to prison.

d. New York has a parole system. A prisoner is eligible for release to parole any time after serving his or her minimum sentence; there is no guarantee that the prisoner will be released at the earliest possible time. Once the prisoner is released, he or she is under supervision until the expiration of the sentence imposed.

e. Given the facts of this case, both Manslaughter in the First (a Class B felony) and Second Degree (a Class C Felony) would be lesser included offenses of the intentional killing. Therefore, at trial both defendants could end up being convicted of either of these crimes instead of Murder in the Second Degree because the judge may instruct the jury to consider any charge possible based on a reasonable view of the evidence. Assume for the purposes of this exercise, that both the prosecution and the defense expect the judge to instruct the jury on two theories of Manslaughter in the First Degree (both intentional murder committed under circumstances evincing an extreme emotional disturbance, and death caused as a result of intentionally inflicted serious physical injury) and Manslaughter in the Second Degree (reckless).

f. In addition, both prosecution and defense expect that the evidence adduced at trial will be sufficient

Because of the intricacies of the New York State sentencing law, I gave students only partial information, but was careful to point out when the information was incomplete. In addition, I prepared two confidential statements, one for the prosecution<sup>17</sup> and one for the defense,<sup>18</sup> and supplied some motivational and factual information, private to each side, that could be taken into consideration during the exercise. For this exercise, each student received a revised indictment containing intentional homicide as the top count, statements of the witnesses for

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to warrant an instruction on Criminally Negligent Homicide (a Class E Felony) for Anderson.

g. The jury does not have to render the same verdict for each defendant. The facts in this case would permit legally reconcilable dissimilar verdicts.

h. The jury always has the option of acquitting either or both of the defendants.

#### 17. CONFIDENTIAL FACTS: PROSECUTION

There was a great deal of publicity about this case charging that the police department knowingly allowed an emotionally unbalanced officer to remain on the force. Initially, the District Attorney's Office thought that the charge should be Murder in the Second Degree on a theory of depraved indifference to human life, but the decision was made, after reviewing the statements of Martinez, Copps and Herbert that the only charge that would truly reflect the prosecution's view of what happened was intentional murder.

The state plans to oppose any attempt to introduce evidence about Lynch's purported "Vietnam Stress Syndrome." The prosecution will argue that Lynch deliberately beat up and mortally wounded the deceased without any justification, that Lynch simply reacted badly to a situation and then tried to cover up his initial misconduct by the most drastic means available: murder. The prosecutor is unaware of any case law permitting the introduction of expert testimony about this particular syndrome in New York, although evidence about post-traumatic stress syndrome has been admitted in other jurisdictions. The state further intends to argue that Anderson knew about Lynch's drinking and erratic behavior but did nothing to prevent the beating or to stop Lynch from inflicting the fatal blows in the patrol car.

The prosecutor has some serious concerns about jury nullification. Not one conviction was obtained in any of the 11 cases involving assault or murder charges against police officers in the past five years. Furthermore, since the case against Anderson rests on a theory of omission, the district attorney is especially concerned because the Court of Appeals is about to decide a case about the legal duty of a commanding officer for negligent supervision of a subordinate. This case should settle the now conflicting views of the Appellate Division on the open question of whether a supervisor can be held as a principal for such criminal acts.

The prosecutor is willing to allow Anderson to plead guilty of Manslaughter in the Second Degree and receive a sentence of probation if Anderson agrees to 1) testify against Lynch, 2) retire from active duty on the police force, and 3) perform 200 hours of community service at a local youth group. The prosecutor takes no position with respect to Anderson's pension since resolution of that issue can only occur at a departmental hearing. The Police Department will, however, strongly consider any recommendation the prosecutor may make. This plea represents the bottom line offer of the prosecution but the state would be more than happy to obtain a more serious degree of conviction as long as Anderson's testimony against Lynch were guaranteed.

#### 18. CONFIDENTIAL FACTS: DEFENSE

Sgt. Anderson is very willing to plead guilty to Criminally Negligent Homicide because he wants to stay out of jail at all costs. Another of Sgt. Anderson's key concerns is the loss of his pension, which is worth approximately \$25,000 a year on retirement. Department policy permits a convicted felon to receive one-third of his or her normal pension if the conviction "does not dishonor the force." This issue would have to be resolved at a Departmental hearing; the prosecutor cannot guarantee the outcome.

While Anderson's attorney is quite worried about how other officers will perceive any cooperation with the prosecutor against a fellow officer, he is willing to sacrifice this short term loss of standing in the police department in order to stay out of jail and to retire with some financial comfort.

After researching the issue, Anderson is unsure how the question of his responsibility for Lynch's acts will be resolved by the Court of Appeals. Although he thinks his chances are better that the court will not hold a supervisor accountable for the actions of a subordinate on a theory of accessory liability, he would prefer not to take the risk and have the judge instruct the jury on this theory.

Anderson had no idea how severely emotionally disturbed Lynch really was, but he knows that if he is asked he will have to admit that he had noticed that Lynch occasionally seemed high while on duty. Anderson genuinely believes that Lynch was acting within his legal bounds to subdue a resisting suspect and that Lynch had used necessary and appropriate force which explains his failure to intervene.

their respective side of the case, and the confidential information. Each student also received a copy of the medical examiner's report.<sup>19</sup> Students were to attempt to negotiate a plea and complete a form,<sup>20</sup> requiring them to identify, in advance,

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#### 19. MEDICAL EXAMINER'S REPORT

##### AUTOPSY

Case No. K83-3532

Approximate Age 21

Approximate Weight 164

Height 5'11"

Identified by

Residence unknown

Stenographer Mary Turner

Residence unknown

I hereby certify that I, Joseph Cartucci, M.D., have performed an autopsy on the body of Stewart Michael at on the 4th day of September, 1985.

#### AUTOPSY PERFORMED BY DR. CARTUCCI, ASSOCIATE MEDICAL EXAMINER.

In the presence of Forsythe &amp; Howell.

On September 4, 1985 at 11 a.m.

##### EXTERNAL EXAMINATION

Description of the deceased: The body is that of a well-developed, well-nourished, unknown white male with tentative name of Stewart Michael, the stated age is 21 years, the body weight is 164 lbs. and the body length is 71". The head is normo-cephalic with blond hair on the scalp and on the scalp are several lesions which will be described later. The external ear canal earlobes, are all unremarkable. The irises are brown in color, the pupils are dilated circular in shape and even. Conjunctivae on both sides are free of lesions. In the nostrils gray, thick mucus is noted. The arches are with natural teeth in good repair. Well-trimmed beard is noted on face. The chest and abdominal walls are unremarkable. The external genitalia are those of an adult white male where the penis is circumcised and normal sized testicles are found in the scrotum. The lower extremities are unremarkable. Examination of the back is unremarkable. At the time of the autopsy, rigor mortis is generalized.

##### PRIMARY INCISION

The usual y-shaped incision is made and extended to the symphysis pubis. In the right chest cavity 800 cc. of fresh fluid blood is found. Blood is collected for seriology. In the area of the surgical procedure hemorrhage is noted in the anterior chest wall, also at the base of the neck on the right side anteriorly, extensive hemorrhage is noted. The left chest cavity is free of blood, the mediastinum is congested throughout. There is fracture of the 8th rib on the right side on the area of the middle axillary line. The remaining ribs are all free of fractures. Also the upper portion of the sternum is with multiple fractures.

##### SERIOLOGY

Tests indicate alcohol level of .07.

##### CARDIOVASCULAR SYSTEM

The heart weighs 450 gms. and is globular in shape. On opening the cardiac chambers are with a normal shape and size. There is hypertrophy of the left ventricular wall which measures up to 1.7 cm. in thickness.

##### RESPIRATORY SYSTEM

The right lung weighs 550 and the left 350 gms. The upper airways are with aspirated blood and mucus. In the hilum of both lungs calcified lymph nodes are noted. The pulmonary arteries reveal evidence of embolism.

##### CENTRAL NERVOUS SYSTEM

The scalp and calvarium is opened by the usual fashion. Scalp shows 8-10 lesions. There is severe bruising of the calvarium. There are also several hematoma of the brain tissue and to the back of the cranium. The brain weighs 1250 gms. with symmetrical, cerebral hemispheres. The remaining portions of the brain tissues on section are all with hemorrhages. The pituitary gland is present and grossly normal.

##### CAUSE OF DEATH

Embolism resulting in comatose state followed by failure of respiratory and cardiovascular system.

Name: Stewart Michael

Identified by: Mary Michael

Relationship: Mother

Signature:

Date:

#### 20. PLEA BARGAINING EXERCISE

Name \_\_\_\_\_

Prosecution [ ] Defense [ ]

What was your objective when you began the plea bargaining process? What kind of conviction and

their objectives, the plea they were looking for and why, and the strengths and weaknesses of their position. This process also allowed them to report the result of their negotiations. I told the students that if a negotiated disposition were reached on the case, they would not have to try the case. I allowed them to consider that fact in their plea bargaining. None of the students admitted to arriving at a disposition solely to avoid a trial, however.

Students had one week to negotiate their pleas, although I think that most of them probably met either the day before or the day of the class when they were supposed to hand in their plea agreements. Many of them failed to reach an agreement. While some of them did reach an agreement, I did not keep my promise because, irrespective of the agreement, I was not prepared to sacrifice the trial for the sake of verisimilitude.

Another flaw in my planning surfaced at this point. Many of the students reached a plea agreement which included testimony by one of the defendants against the other, mainly because I presented this option as part of the background information. If I had been totally flexible and true to life, the prosecutors could have made a deal with that defendant in exchange for his testimony. My simulation, however, required that both defendants remain charged. As a consequence, I basically had to ignore the very sensible direction the case was taking as a result of the students' strategy. This put me in the position of having to undercut their tactical decision and to discuss in class how their plea agreement in exchange for cooperation was perfectly appropriate and, in fact, might well happen in an actual prosecution. The teaching assistants also conducted a class on plea bargaining in which the students had to outline the strengths and weaknesses of the case, examine their motivations, and justify the results they had reached. There was little development of negotiation as a process and no discussion of any theories of negotiation. At the conclusion of that class, one student told me that he had always wanted to prosecute this case but, after he had represented the defendant during the plea bargaining session, he was now convinced that the defendant was not guilty. This kind of prismatic thinking was exactly what I was hoping to encourage by keeping the role assignment flexible.

### *E. Trial Preparation*

At this point, I finally asked all students to tell me what roles they would like to play at the trial. I did not do this sooner because I thought that, by role playing lawyers for both sides as well as witnesses and defendants, students would develop neither a commitment nor an aversion to a particular side of the case, nor a strong identification with any of the witnesses. I also informed the students that class participation points were going to be given so that the students who requested and played more active roles would be rewarded. For the most part I

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sentence were you seeking?

Did you think in terms of a range or an absolute fixed plea? Describe.

What were the strongest arguments you made in support of your position during the negotiation process?

What were your weaknesses?

Did your adversary raise arguments that reflected your weaknesses? or that you anticipated?

What result did you reach?

[ ] No plea

[ ] Plea—state terms

was quite pleased with their responses. Every student who requested an active role was given one and very few students requested the more passive roles of witness or judge.

Because of its mammoth size, I divided the class into two groups of approximately forty students. Accordingly, the prosecution team consisted of ten attorneys examining witnesses (five on direct, five on cross), one attorney delivering an opening statement, one delivering a closing argument and one attorney arguing the law opposing the admissibility of expert testimony about the Vietnam Stress syndrome. The defense team consisted of nine examining lawyers (four conducting direct exam, four cross-examining prosecution witnesses), as well as one on behalf of each defendant on opening and closing, and one person arguing in favor of admitting the expert testimony. Finally, we designated four students for each trial as judges whose responsibility was to decide on and then prepare the jury instructions on the charges and defenses to deliver at the trial.

Before each trial, the teaching assistants met twice with the prosecution and defense teams. The objective of these meetings was to plan the theory of the case and to strategize how certain witnesses would be used to support this theory. These classes were very basic because, even after considerable fact development, the students still were limited to a closed universe of facts. Also, the exercise was not designed to present sophisticated concepts about developing factual theories or fact investigation.

The students also met independently several times with their respective groups to work on the case. In this way, they could prepare a coherent presentation which hopefully would avoid the risks of fragmentation inherent in this kind of enterprise where so many students are working on the same project.

The students playing witnesses met with the lawyers conducting their direct examination in order to specifically prepare their testimony. The witnesses were told that the direct examination would require them to be well schooled in the prepared testimony but that they could fill in any gaps with logically consistent testimony. Finally, students were assigned certain supplementary materials, namely tapes and written work on reserve in the library, to instruct them about the fundamental skills involved in direct and cross-examination and opening and closing statements.<sup>21</sup>

A few days before the trial, the student judges met with me with a draft of their jury instructions which I then edited. They relied heavily on pattern jury instructions.<sup>22</sup> Their charges included the substantive crimes and their elements, ordinary and affirmative defenses, and definitions of pertinent terms and concepts such as accomplice liability and serious physical injury. We discussed the options a judge may have in deciding which crimes and defenses to charge the jury.

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21. Mauet, *supra* note 1; PAUL BERGMAN, TRIAL ADVOCACY (1980); F. LEE BAILEY & HENRY B. ROTHBLATT, FUNDAMENTALS OF CRIMINAL ADVOCACY (1974); Nat'l Inst. of Trial Advocacy, Evidentiary Objections (1987) (videotape No. E0X02) and Direct and Cross Examination of a Witness in a Criminal Case (1987) (videotape No. DCX02).

22. Criminal Pattern Jury Instructions New York (1983).

### *F. The Trial*

Each trial took place over a five-hour period on two consecutive days at the end of the term. I told the students to act and dress as professionals, a difficult transition from the typical end-of-year attitude and attire. A group of students from another criminal law class sat as jurors in the case. In addition, each of the teaching assistants was available to help either the prosecution or the defense teams.

Although time limits were imposed on the students to keep the trial to a manageable length, I allowed them to develop as fully as possible their lines of questioning, as long as they were productive and not repetitious. Generally, the students questioned longer than the time period allowed but their questions usually were relevant even if not always well formulated and incisive.

The main problem I saw on the part of both prosecution and defense teams was their inability to relate facts to the arguments they were advancing to the jury. Rather than clearly indicating which facts proved an element of a crime or a defense, the student simply elicited all facts without perceiving possible inconsistency or illogic or emphasizing strengths while rationalizing weaknesses. For example, in order for the defense to argue justification, the reasonableness of the defendant's actions would have to be demonstrated. This claim was difficult to reconcile with the extreme emotional disturbance defense based on a Vietnam flashback. The students, however, brought out all given facts without trying to weave the divergent conclusions into a coherent theory.

On the whole, the witnesses were well prepared by the examining counsel. Every student had invested a lot of time planning his questions and the best responses. Through frequent meetings between the teams and their witnesses, we had eliminated, as much as humanly possible, even the most difficult coordination problem—that of making the case consistent when almost fifteen individual “lawyers” were responsible for the presentation of the evidence and the arguments to the jury. By involving the witnesses in the strategy sessions, inconsistencies were largely avoided and the students role-playing the witnesses were more invested in the exercise.

When assigning the roles to the students, I tried to honor their requests in order to justify awarding class participation points for their work. I also wanted to give some of the more reticent students a chance to perform so that I could see how these traditionally silent students could do when given an opportunity in a non-classroom setting. Not surprisingly, many of the students who had been passive during the year requested the least demanding roles. This affirmed my impression of their disconnectedness and also disappointed me because I had hoped that this exercise would engage some of the inactive students. On the positive side, however, a small number of quiet students not only asked for demanding roles but performed them with surprising skill and creativity, thus revealing a command of both the substantive law and the art of examination and/or persuasion. This confirmed a frequently expressed faculty belief that many excellent students simply do not care to or are too intimidated to actively participate in class.



After completion of the evidence and the summations, student judges instructed the jurors on the law. The jury charges, although heavily edited in advance, were nevertheless labored and confusing. Even this apparent defect in the trial contained an important message for the students who had studied cases challenging the propriety of jury charges in an appellate context during the semester. They realized that the average juror must have considerable difficulty understanding and applying the judge's charge no matter how legally correct. One significant development that nailed down the lesson about the connection between testimony and jury instructions occurred when, in both trials, the attorneys questioning the defense expert witness failed to elicit a sufficient opinion from the expert to justify a requested charge on insanity. The bench appropriately ruled, to the students' considerable surprise, that no insanity defense would be submitted to the jury. Although this lesson may have been a little drastic, the defense team, at least, will probably never forget what happened to their case when the record did not support a specific request to charge.

The students sitting as jurors<sup>23</sup> received a list of the charges<sup>24</sup> and verdict sheets<sup>25</sup> to help them deliberate. Their deliberations were videotaped and si-

23. Students from the same section could easily serve on the jury. Since their roles are much more limited, a clearly communicated decision has to be made in advance of soliciting student preferences for roles whether class participation points will be awarded to jurors.

24. JURY CHARGES

THE PEOPLE OF THE STATE OF NEW YORK

— against —

GLENN LYNCH and ROGER ANDERSON

At the judicial conference yesterday, the judges presiding over this case have considered all requests to charge submitted by counsel and intend to instruct the jury on the following crimes, defenses and legal concepts (assuming the defense case offers the testimony of Dr. Smith):

GLENN LYNCH

*Crimes*

Murder 2 (P.L. § 125.25(1))—intent to kill

Manslaughter 1 (P.L. § 25.20(1))—death resulting from intentionally inflicted serious physical injury

*Defenses*

Mental Disease or Defect (P.L. § 40.15)

Extreme Emotional Disturbance (P.L. § 125.25(1)(a))—resulting in conviction for Manslaughter § 125.20(2)

Justification (P.L. § 35.30(1))—use of physical force or deadly physical force by a police officer

ROGER ANDERSON

*Crimes*

Murder 2 (P.L. § 125.25(1))—intent to kill as accomplice or based on theory of failure to supervise

Murder 2 (P.L. § 125.25(2))—recklessness evincing depraved indifference to human life based on failure to supervise

Manslaughter 1 (P.L. § 125.20(1))—death resulting from intentionally inflicted serious physical injury as accomplice

Manslaughter 2 (P.L. § 125.15(1))—recklessly causing death

Criminally Negligent Homicide (P.L. § 125.10)

*Defenses*

Justification—(P.L. § 35.30(1))

*General Legal Principles*

Accomplice Liability—(P.L. § 20.00)

25. POSSIBLE VERDICTS

PEOPLE V. LYNCH

*Lynch*

1. Is Lynch guilty of Murder 2 (intentional) Y/N?

If *No* because lacked intent to kill, proceed directly to #2

If *Yes*, was Lynch justified in his use of deadly force; if justified then acquit of all charges

If *Yes and* not justified, is he nevertheless, not guilty by reason of mental disease or defect—  
if yes (insane), acquit. [Author's note: In fact, the jury was never allowed to consider the insanity

defense to elicit legally sufficient evidence to justify the instruction.]

If *Yes*, but neither justified nor insane, was he acting under extreme emotional disturbance?

If *Yes* (intended to kill but Lynch proved he acted under EED), convict of Manslaughter 1

If *No* (intended to kill but Lynch failed to prove he acted under EED), convict of Murder 2

STOP—ONLY CONSIDER #2 IF NOT GUILTY OF MURDER 2 BECAUSE NO INTENT TO KILL

2. Is Lynch guilty of Manslaughter 1 (intentional infliction of serious physical injury causing death) *Y/N*?

If *No*, acquit

If *Yes*, was Lynch justified in his use of deadly or physical force?

If justified, acquit; if not justified convict of Manslaughter 1

VERDICT:

Lynch—Not guilty

Guilty of \_\_\_\_\_

#### PEOPLE V. ANDERSON

*Anderson*

1. If Lynch *guilty* of either Murder 2 (intentional), or Manslaughter 1 (intentional SPI) then Anderson is guilty of identical charge if:

he was acting as accomplice and/or

he had a duty to intervene and intentionally failed to do so

UNLESS

Lynch was justified and Anderson was also justified

OR

Anderson was independently justified

2. If Lynch *not guilty*, OR if Anderson not an accomplice, AND/OR he had no duty to intervene AND he was not justified

is Anderson guilty of Murder 2 (extreme reckless indifference to human life)

if *Yes*, convict of Murder 2

if *No*, is Anderson guilty of Manslaughter 2 (Simple recklessness)

if *Yes*, convict of Manslaughter 2

if *No*, is Anderson guilty of Criminally Negligent Homicide

if *Yes*, convict of CNH

if *No*, acquit

VERDICT:

Anderson—Not guilty

Guilty of \_\_\_\_\_

CIRCUIT COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

—against—

GLENN LYNCH and ROGER ANDERSON

Defendants.

Index No. 9876/1985

#### COUNTS

#### MURDER IN THE SECOND DEGREE

THE GRAND JURY OF THE COUNTY OF NEW YORK, BY THIS INDICTMENT, ACCUSES THE DEFENDANTS, ACTING IN CONCERT WITH ONE ANOTHER, OF THE CRIME OF MURDER IN THE SECOND DEGREE COMMITTED AS FOLLOWS:

THE DEFENDANTS ON OR ABOUT SEPTEMBER 3, 1985, IN THE COUNTY OF NEW YORK, INTENTIONALLY CAUSED THE DEATH OF STEWART MICHAEL.

A TRUE BILL.

FOREPERSON

CAROL DELEON  
DISTRICT ATTORNEY

multaneously observed by the trial teams on closed circuit television. The mood of the student lawyers and witnesses at this viewing was quite ebullient and not a little self-satisfied. Each side was convinced, like their real life counterparts, that they had won the case.

Ultimately, neither jury was able to reach a unanimous verdict in the time period allowed, although in both cases the jury determined that the prosecution proved that the active defendant, Lynch, was unjustified and intended to kill, leaving the question of degree of culpability undecided. Therefore, although neither jury completed its deliberations, their eventual result for Lynch had they been allowed to continue was fairly foreseeable: he would have been convicted of either intentional murder or manslaughter, mitigated as a result of his extreme emotional disturbance. When I interrupted them, they were weighing the credibility of the Vietnam Stress defense to determine its effect on the intentional murder conviction.

Anderson's verdict was more difficult to predict because his guilt could be established as either a dependent or independent variable of Lynch's. Jurors could have found him guilty of either intentional murder as an accomplice, reckless murder or reckless manslaughter based on the failure to supervise theory, or acquitted him altogether. Ironically, the weakness in the evidence which had initially led the students to charge lesser degrees of homicide appeared to have been cured in the actual presentation of evidence because it never arose during jury deliberations. The jurors were seriously considering his culpability as an accomplice to Lynch's intentional act, but without the possibility of mitigation to manslaughter.

The closed circuit television in the jury room gave the students the opportunity to watch the deliberations and to see which particular arguments had been persuasive. This surveillance was very educational and not a little entertaining. Even law student jurors, confused about the proper legal standards, had to request supplemental charges about justification and burdens of proof. They also frequently resorted to emotional or illogical argumentation to make their points.

## V. CONCLUSION

For a first attempt, I was satisfied with the enthusiastic efforts of most students, their general appreciation of the goals of the project, and their apparent integration of process and substance in the various stages of the simulation. Their written feedback at the end of the term was fairly insightful, revealing good feelings about the simulation. Their comments tended to criticize the demands of the project which they viewed as extra work for the course even though they were given considerable class participation points in recognition of their contributions. Students also suggested that I improve written instructions for each problem. Other comments addressed very specific aspects of the project, such as the ability of the individual teaching assistants to communicate instructions clearly. Students criticized the plea bargaining exercise for being somewhat confusing, reflecting my own reservations about its value given the intricate New York statutory sentencing structure.

My evaluation of the project was mixed as well. While I, too, felt it required a lot of extra work and worry, it afforded me new insights into possibilities for

the integration of clinical teaching methods and substantive courses. Clearly there were several design defects in the problem and the directions to the students which I would remedy at least to keep the students feeling more secure. More importantly, I realized that to make this project truly worthwhile, I needed to rely less on the teaching assistants and spend more of my own time knitting together the legal and process issues before and after each exercise.

To be candid, however, after my enthusiasm abated over time, I now do not think a simulation paralleling the substantive course is guaranteed to enhance the student's grasp of criminal law doctrine. I had assumed that participation in a process in which legal principles were identified as relevant and then applied would be a more effective teaching model. I now realize that this method, unlike the labor intensive supervision commonly practiced in clinical courses, cannot accomplish as much as it hopes, mainly because it is impossible to assure the quality of each student's experience and because there is no time for individual feedback. Perhaps if I had dared to replace whole classes on homicide and defenses with the simulation, using the assigned textbook reading as background, the project could stand as an alternative means of teaching the law.

Notwithstanding this reservation, I wholeheartedly endorse the adoption of a simulation that covers several key stages of a criminal case culminating in a trial. The students' own comments satisfied me that they had learned some very important lessons. Most students conceded that the project had educational value despite their gripes. Their remarks revealed that they did indeed see how the choices of lawyers interpreting substantive crimes and their defenses affected the course of the case. They understood the need to elicit supportive facts from witnesses at an interview or a trial because the facts lead to the charging decision and each party's theory. They understood that each step in the procedural system required a reevaluation of the substantive law of the case. They appreciated how a trial attorney had to be able to think multi-dimensionally and spontaneously despite preparation and that "justice" can depend on how skillfully the lawyers develop and present the case.

Feeling enthusiastic about being a lawyer, especially at the end of the typically enervating first year was a big plus for the students; feeling energized about a course that I have taught more than a dozen times was a big plus for me.

## APPENDIX

### STATEMENT OF IDA COPPS

I am 36 years old and work as a manager for a Citibank branch. I am married to a lieutenant on the police force. We have four children ranging in age from four to fifteen. At approximately 8:35 p.m. on September 3, 1985, I was waiting for a downtown train in the 14th Street/IRT subway station. I remember I was looking down the tracks to see if the train was coming when I heard a lot of yelling.

I looked down the platform and saw two police officers with a young man about 10 feet from the turnstiles. They were about 30 feet away from me. I saw one of the officers take something from his pocket which looked like his memo

book. Suddenly there was more yelling and the young man started to run. I heard the police officers yell "stop," but when the man didn't stop, they chased him and ran down the platform, through the turnstiles and out the exit about 20 feet.

The big officer lunged at the man and tackled him just as he began to ascend the flight of stairs leading to the street. I could see the young man hit the stairs really hard and bang his head. I then saw the big patrolman drag the man down the bottom few steps of the stairs and as he dragged him, the man's head hit each step. The other guy, the sergeant I think, was standing by holding his gun on the suspect but doing nothing else.

As the big officer dragged the young man in front of the steps, I heard the officer scream: "You're dead, Charlie." Then I could see him twisting the man's body around from side to side until finally the man was on his stomach on the platform floor. The big officer pressed his knee into the man's back while he put handcuffs on him. As he was lifting him off the floor, I saw the big officer take the young man by his arms which were cuffed behind him, lift him up a few feet, then drop him to the floor. The big officer grabbed him up from the floor and said "Get up here you V.C. scum." The two officers took him by each arm and dragged him up the subway steps. At this point the young man was struggling, crying and screaming for help.

A train arrived in the station then and I left. I read the next day in the paper that two police officers were being investigated for killing some young man at the 14th Street station. I am here because my husband said I had to tell my story. I don't like to think that police officers are capable of this kind of violence. I certainly know my husband isn't, but I know what I saw and I think that these two police officers mistreated this young man.

#### STATEMENT OF JOSE MARTINEZ

I am 19 years old and a student at Apex Technical School. I know Stewart Michael from going to school with him there. Both of us are on a scholarship. I am the oldest of nine children and I work part-time at two different jobs to support my mother and my brothers and sisters. I have never been in any trouble but one of my brothers is in jail waiting trial on a drug case.

I know Stewart Michael slightly, we were both students together at Apex Technical School studying electronics. I had seen Michael earlier at the local bar across from school. We both had a few beers with some classmates and then we went to the subway. I was on the uptown IRT platform at 14th Street and I had a pretty clear view of the opposite side. In fact I remember seeing Michael over there and I waved hello to him from across the platform.

I could see Michael was smoking a butt, but so what, who cares about something like that. Two uniformed cops sauntered over to him and they seemed to be ordering him to put it out. Michael seemed to not hear them or to ignore them. The cops came over to Michael and the bigger one grabbed him by the collar and began to push him around a bit. Michael broke free and started to run down the platform towards the stairs. As he got to the stairs I lost sight of them for a minute because a pillar was blocking my view, but I moved over and

then I saw the sergeant was standing with his gun drawn watching the big cop bang Michael's head once against the floor. The young one had a knee in his back and was lifting Michael up by his collar and dropping his head on the ground. While the cop was doing this, Michael was trying to roll away, but since he was handcuffed I don't see how he could have avoided getting beaten up that way. After a few minutes, each of the police officers grabbed him by an arm and yanked him up the stairs to drag him away. He seemed to be conscious but it was hard for me to be certain since his head was dropping on his chest.

I had no idea that Michael died until the next day. The beating didn't look that bad, but it sure looked to me like Michael didn't start it.

#### STATEMENT OF FRAN HERBERT

I run a newsstand at the top of one of the stairs leading to the 14th Street subway station. On September 3, 1985, I witnessed the worst incident I've ever seen after all my years in this crazy city.

Two transit cops were dragging this young kid up the steps. The kid's arms were cuffed behind his back while one cop pulled him by each arm. The kid was struggling and begging them over and over to stop. I heard the big cop say to the sergeant: "We'd better take care of him or we'll get in trouble with the lieutenant. I'd better shut him up for good." I could hear him clearly as they walked past the newsstand. He seemed pretty much under control although his uniform was dishevelled. The sergeant kept looking around as if to see if anyone was watching while he was also trying to hold onto the kid and calm down his partner.

As they were about to get into the patrol car, the big cop pushed the kid into the back seat and climbed in after him. I saw him strike the kid in the head with his nightstick a few times. I don't see how the kid could have been doing much fighting with his hands cuffed behind his back.

After about five minutes of standing by the door to the car, the sergeant finally pulled the big cop out of the car, leaving the kid in the back seat. They seemed to be arguing but it was clear to me that the sergeant was trying to calm down his partner. Finally, the sergeant got in the driver's seat while the big officer got in back. I could see the big cop's head in the rear window but not the kid's.

#### STATEMENT OF POLICE OFFICER GLENN LYNCH

Shield #232—84th Precinct Transit Police

I am 35 years old and have been on the police force since 1973. My rank is patrolman. Prior to enlisting in the police, I served for four years in the army and rose to the rank of sergeant while fighting in Vietnam. My height is 6'2"; my weight 225. While on the force, I trained in self-defense, acquiring a brown belt in karate. I also won my precinct championship in boxing in 1983. In 1978, I received a commendation for valor when I chased and arrested an armed robber. I was reprimanded on two occasions in 1984 and again in 1985, once for failing to correctly complete my paperwork on a case and once for being under the influence of alcohol while on duty. I have been married since 1980 and have two children ages two and five.

On September 3, 1985, I was on patrol with my partner Sergeant Roger Anderson. We were assigned to patrol the IRT train station at 14th Street. Part of our patrol required us to ride the train for approximately five stops in each direction and then return to our original station.

At approximately 8 p.m. at 14th Street, I observed a white male who I now know to be Stewart Michael, approximately 21 years old with long hair who was dressed in jeans, a sweatshirt and an olive green fatigue jacket. He was holding a lit cigarette. My partner Sergeant Anderson yelled at him to put out the cigarette to which the Michael responded by cursing and making an obscene gesture.

I started to make out a summons for smoking in the subway. As we approached, my partner, Sergeant Anderson, asked for identification. Michael continued to smoke, ignoring us and showing a real attitude. As we stood next to him, he turned and began to walk away quickly. We started after him and then he broke into a run. Before we caught him, he had run about 20 feet down the platform out the exit gates, past the token booth and toward the stairs. As we caught him, he tried to dodge out of our grasp. In order to stop him, I had to tackle him to the ground. He thrashed about violently, kicking at both of us with his fists during his frenzy when his arms and legs were thrashing about wildly. Eventually we were both able to hold him down. I took out my handcuffs, cuffed him and placed him under arrest while Sergeant Anderson held him at gunpoint.

We started to take Michael up the stairs and out of the subway, that much I remember. But then something strange happened. The subway station seemed to disappear. Instead, it was a night 15 years ago just outside of Danang in Vietnam.

My company had engaged the Viet Cong for four consecutive days and nights. We had been fighting mostly by day and trying to outmaneuver the enemy at night. The company had sustained heavy losses and not many of us felt that we would ever make it out of there alive.

On this particular night, the company had successfully retreated to a safer position after being pinned down for more than two days. We felt this was our best chance to save our skins because the enemy was unaware of our movements. At least, until one guy, Leon Mafucci, decided to light up a butt.

When this guy struck a match to light up his cigarette, I remember I shouted to him to put it out and he just said "go screw, Lynch." I was so scared and pissed off that all I wanted to do was strangle that guy to death, but I never did get the chance.

It wasn't long after Mafucci lit the match that the Viet Cong determined our position. They immediately opened fire upon us and didn't let up all night. If B Company hadn't joined us in the morning, we would have been finished.

The company was almost entirely wiped out and most of my buddies were killed including two childhood friends. It was the most terrible night of my entire life. One of the survivors was that jerk Mafucci. I'll never forgive him or forget what he did.

The next thing I clearly remember was sitting in the back of the patrol car while Sgt. Anderson drove. I was all shivery and sweaty. The kid we arrested was next to me on the seat unconscious. I guess I must have been responsible but I don't remember how it happened.

STATEMENT OF LT. GENE COLTON  
Shield #404—Brooklyn North Division

I am a transit police officer in charge of the Brooklyn North Division and have been on the Transit Police force for 25 years. I do not know, nor have I ever met, either patrolman Lynch or Sergeant Anderson.

In my opinion, Sergeant Anderson violated police procedure regarding the events of September 3, 1985. First, Sergeant Anderson should have intervened immediately once Officer Lynch began to exert unnecessary force in attempting to restrain the decedent. Secondly, after returning to the Precinct, Sergeant Anderson should have filed a report of the entire incident with his Commanding Officer. He did not file such a report until three days after Michael's death. Finally, Sergeant Anderson violated police procedure by not reporting to his Commanding Officer each prior flare up of temper, appearance of intoxication or use of unnecessary force by Officer Lynch.

In my opinion, a Sergeant Anderson's failure to file a complete report of the incident, as well as earlier problems with Lynch, violated established police procedure, and he should be brought up on Departmental charges.

STATEMENT OF SERGEANT ROGER ANDERSON  
Shield #7439—84th Precinct Transit Police

I am 40 years old and have been on the police force for 18 years. During that time, I rose from the rank of patrolman to sergeant and have received 14 decorations and commendations for bravery during the course of duty. About 10 years ago I went to college at night for my B.A. degree. I wanted to go to law school but two years ago I developed a heart condition, which, because I didn't want to jeopardize my pension, I concealed it from the Department.

On September 3, 1985, at approximately 8:30 p.m., my partner and I, P.O. Lynch were patrolling the 14th Street/IRT subway platform. I observed a white male in his late twenties with a beard, dressed quite sloppily who was smoking a cigarette. At this point I yelled at him to put out the cigarette. He responded with an obscene gesture and said "Fuck you." After that, my partner and I quickly approached him while Officer Lynch was taking out his summons book. When I requested identification from the man, he ignored us and attempted to run away. Lynch chased him for about 20 feet and grabbed him from behind. He actually had to tackle him in order to get him to stop.

This guy looked to me like a mad man. He was wildly kicking and swinging his arms and there was a strong smell of alcohol on his breath. I know he kicked me a couple of times including one very painful shot in the groin and he also seemed to be kicking and punching at my partner as well. Lynch struggled with the guy while I stood by with my gun out.

After Lynch subdued and cuffed him, we led the man to the patrol car while I read him his rights. I got in the driver's seat while Lynch sat in the back with the man. I could see in the rear view mirror that Lynch was holding him down onto the seat to subdue him. Lynch looked odd to me at that time, kind of wild eyed and frenzied but he was silent. All I heard on the drive to the precinct were moans from the back seat.



When I looked over again, Michael seemed to be unconscious and Lynch was staring out the window. Once I observed that, I proceeded to Bellevue Hospital to get them treated. We waited there at the hospital to check out Michael's condition and were told at about 10 p.m. that he was dead. Lynch didn't want to see a doctor.

Lynch and I had been partners for about six weeks. I liked the guy a lot although I had heard that he'd had some trouble at his last command. He had a reputation for drinking on the job. Usually no one wants to work with a guy who has a drinking problem, but to me he seemed fine—a little jumpy sometimes, but basically sound.

#### STATEMENT OF MARK MACDONALD

I am 36 years old and a finance manager for General Motors. I have known Glenn Lynch for the past sixteen years, ever since we met in Vietnam.

When we returned from Vietnam, he was deeply troubled by what had taken place there. We had seen some very heavy action and a lot of our buddies were killed.

About a year after our return, Glenn came to me because he was having trouble dealing with life back in the States. I suggested that he attend my Vietnam Support Group meeting with me the following night. He and I have been regularly attending these meetings together ever since.

Glenn seems to have a vivid picture of some of the things that really had bothered him in Nam. He really needed help dealing with a couple of particular events that he couldn't forget.

One event that he always mentioned was how his two hometown buddies were killed just outside of Danang. I remember that he said the company had been engaged in heavy combat and were totally outnumbered. One night, some jerk in the company lit a cigarette and tipped-off Charlie as to our position. They really gave it to us that night and a lot of Glenn's company were killed. Glenn seems to flashback to that night on occasion. He talks about how pissed off he was at the soldier who lit the match.

Flashbacks are by far the most common problem that the guys in the support group have. Some cannot seem to forget all the terrible things that happened. Most of the guys in the support group are depressed and some are even suicidal, but none of them are violent.

Glenn always seemed much better after he met with the group and was able to talk things over with people who knew what it was like in Vietnam. He is a really nice guy and has tried to hold his life together.

#### STATEMENT OF DR. LIONEL SMITH

My name is Dr. Lionel Smith, I am a licensed psychiatrist in the State of New York. I received my medical training at Cornell University Medical School and did post-graduate work at the New York Psychoanalytic Institute. I have been in private practice for 15 years and also work at the Brooklyn VA Hospital. I am a specialist in the diagnosis and treatment of Post-Traumatic Stress Disorders. I have authored seven monographs and am presently at work on a chapter on

Vietnam Stress Syndrome in a textbook on post traumatic disorders. I have been called upon to testify in both civil and criminal cases on 11 occasions about various Post-Traumatic Stress Disorders and their effects on the actions of individuals. I am considered to be an expert in this field.

Among the post-traumatic stress disorders with which I am fully familiar is "Vietnam Stress Syndrome." This is a recognized behavioral disorder or mental defect which is recognized by the American Psychiatric Association. The symptoms are also shared by survivors of atomic attacks, holocausts or natural disasters. Post-traumatic stress response symptoms include: depression; flashbacks to the trauma; inability to control one's impulses; violent, explosive behavior; frequent suicidal thoughts and recurring nightmares. There is often memory impairment and inability to feel close to people, an emotional numbing. There is a great deal of survivor guilt with this disorder. Because of the type of combat required in Vietnam, veterans of that conflict also have moral guilt. The disorder is not new but this particular variation was only recently recognized by the American Psychiatric Association as a bona fide mental disorder. Sixty percent of Vietnam combat veterans experience post-traumatic stress, a very high percentage. This is because units did not stay together, there was no real war objective, the soldiers were quite young, and drugs were freely available at a low price. Vietnam soldiers averaged 19.2 years, whereas those in World War II and Korea averaged 26½. The units in World War II stayed intact and came home together, whereas after Vietnam each veteran came home alone. Vietnam veterans with post-traumatic stress disorder tend to move from one job to another. Part of the syndrome is a hyper-alertness, where the person becomes easily irritated and agitated and startles easily. Sleep disturbances are part of the disorder. Twenty-five percent of all men in prison are Vietnam era veterans. The suicide rate of Vietnam veterans is 33-40% higher than that of others the same age. The alcoholism rate among Vietnam veterans is 60% higher than it was for veterans of World War II or Korea. The Veterans' Administration now recognizes post-traumatic stress disorder as a service connected disability for which treatment can be received. Stress in a person's emotional life can trigger dissociative reactions. Many Vietnam veterans suffering from post-traumatic stress disorder are being misdiagnosed as being alcoholics or having other disorders.

I examined Glenn Lynch, one of the defendants in this case, on two occasions in December for about one hour each. His mannerisms were exaggeratedly polite and controlled until he began to speak about the crime charged. Then he lapsed into war time slang and became very agitated and nervous. At one point, he began to cry during one of the sessions but my questions revealed that his tears related to his dreamlike recreation of a particularly affecting experience in a Vietnamese battlefield about 20 years ago rather than the circumstances of this crime.

From my experience treating veterans with this disorder, I believe that there is no time limit on the potential manifestation of the symptoms. In fact, it is more common for the symptoms to erupt years later when a stressful experience in civilian life resembles one occurring years earlier in war time.

Based on my examination of Officer Lynch, he was suffering from Vietnam Stress Syndrome on September 3, 1985.

