

3-1-1996

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Recommended Citation

Steven Zeidman, *Sacrificial Lambs or the Chosen Few? The Impact of Student Defenders on the Rights of the Accused*, 62 Brook. L. Rev. 853 (1996).

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BROOKLYN LAW REVIEW

Volume 62

1996

Number 3

ARTICLES

SACRIFICIAL LAMBS OR THE CHOSEN FEW?: THE IMPACT OF STUDENT DEFENDERS ON THE RIGHTS OF THE ACCUSED*

Steven Zeidman[†]

INTRODUCTION

Over thirty years ago, in *Gideon v. Wainwright*,¹ the Supreme Court declared that states must provide attorneys for indigent defendants accused of felonies in state court. In the wake of *Gideon*, public defender offices began to spring up across the country, and the number of individual attorneys assigned to criminal cases increased dramatically.² Commenta-

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¹ 372 U.S. 335 (1963).

² See, e.g., *Johnson v. Commission of the City of Aberdeen*, 272 N.W.2d 97, 100 (S.D. 1978) (assignment of attorneys increased five-fold in the ten years after *Gideon*); LAWRENCE HERMANN, *THE RIGHT TO COUNSEL IN MISDEMEANOR COURT*

tors, recognizing that implementing the mandate of *Gideon* was a formidable task, searched for viable alternative sources of representation for poor people accused of crime. Professor Henry Monaghan observed that "the logistical problems occasioned by the new principle are . . . substantial."³ He noted presciently that "it is quite apparent that an army—a very large one—must be raised if the victory is to be a lasting one."⁴ He then asked whether those he called "student soldiers" could be part of that army.⁵

Almost a decade later, the Court ruled in *Argersinger v. Hamlin*⁶ that a defendant could not be incarcerated in any case—felony, misdemeanor or petty offense—unless he or she had been provided counsel.⁷ In a concurring opinion, Justice

(Ohio State University Press 1973); SHELDON KRANTZ ET AL., *THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* (Executive Summary) (Nat'l Inst. of Law Enforcement and Criminal Justice et al. eds., 1976); NAT'L LEGAL AID AND DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE* 13 (1973); William M. Beany, *The Right to Counsel*, in *THE RIGHTS OF THE ACCUSED IN LAW AND ACTION* 147 (S. Nagel ed., 1972); John F. Decker & Thomas J. Lorigan, Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1969).

³ Henry P. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U. L. REV. 445, 446 (1965).

⁴ *Id.*

⁵ *Id.* Monaghan was not alone in calling on students to fill the void. See *United States v. Simpson*, 436 F.2d 162, 169 (D.C. Cir. 1970) ("Use of law students to counsel and advise with prisoners . . . may well provide the key toward serving a need without excessive drain on community resources."); John R. Brown, *The Trumpet Sounds: Gideon—A First Call to the Law School*, 43 TEX. L. REV. 312 (1964) (urging law schools to respond to the need for defense attorneys by providing clinical programs and by emphasizing the importance of criminal law in general). But see NAT'L LEGAL AID AND DEFENDER ASS'N, *NATIONAL STANDARDS FOR INDIGENT DEFENSE SERVICES* 4 (1976) ("It is deplorable that law students are now filling gaps that should be filled by the practicing bar."); Charles H. Miller, *Living Professional Responsibility—Clinical Approach*, in *CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING* 101 (CLEPR ed., 1973) ("We are also skeptical about the use of legal clinics as a panacea for the provision of legal services to substantial strata and interests in our society which presently lack access to representation by counsel. The responsibility for making real the guarantees of *Gideon* . . . must remain the responsibility of the legal profession itself.")

⁶ 407 U.S. 25 (1972).

⁷ Justice Douglas, writing for the majority, rejected the argument that counsel was not necessary in petty offenses, stating, "We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Id.* at 33. Justice Powell, concurring, pointed out that many petty offenses involve complex factual and legal issues, and that "[t]he

Powell observed that "[i]t is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel" and predicted that "backlogs" and "chaos" would result in the state courts.⁸ Justice Brennan's concurrence addressed only the concerns raised by Justice Powell. Justice Brennan commented:

Law students . . . may provide an important source of legal representation for the indigent I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.⁹

Against this backdrop, it is not surprising that the 1960s and 1970s saw an increase in clinical legal education with law students representing poor people in a variety of fora, including in criminal cases.¹⁰

Given this call for student criminal defense practitioners, and the corresponding creation of law school criminal defense clinics in which students, in essence, usurp the role of constitutionally mandated counsel,¹¹ one would expect to find a number of studies that attempt to compare student representation in live-client clinics¹² with that provided by defense attorneys

consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'" *Id.* at 47.

⁸ *Id.* at 55-56. This sentiment had been voiced previously by other courts. *See, e.g.,* *Brinson v. State of Florida*, 273 F. Supp. 840, 845 (S.D. Fla. 1967) (If *Gideon* were extended to misdemeanors, "[t]he demands upon the bench and bar would be staggering and well-nigh impossible.").

⁹ *Argersinger*, 407 U.S. at 40-41.

¹⁰ *See* David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87 (1990) (noting that among the themes of clinical education were the provision of legal services to disadvantaged groups and the instilling in students of a desire to help those groups throughout their careers); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974); William Pincus, *The Clinical Component in University Professional Education*, 32 OHIO ST. L.J. 283 (1971); *Argersinger v. Hamlin: The Challenge to the Law Schools*, CLEPR NEWSLETTER, 1972, at 1.

¹¹ For a discussion of the requirement that a defendant must consent to student representation, see *infra* note 48.

¹² The term "live-client clinics" will be used here to refer to clinics in which students, under faculty supervision, represent clients. Such clinics are known generally as "in-house" clinics. A recent survey found that 80% of ABA-approved law schools offer in-house clinical programs. Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35

for the indigent.¹³ Yet, what Professor Charles Knapp stated a quarter of a century ago—that “[t]here is precious little hard information now available on the performance of student lawyer programs”¹⁴—is just as true today.¹⁵ Clinical legal education continues to expand with an increasing number of law schools offering a variety of clinical courses.¹⁶ There is an abundance of literature about the method and pedagogical benefits of clinical legal education.¹⁷ Nonetheless, there is a dearth of studies examining the quality of student representa-

N.Y.L. SCH. L. REV. 239, 242 (1990). For descriptions of such clinics, see, e.g., J. Michael Norwood, *Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. REV. 265 (1989); Harry I. Subin, *Clinical Pedagogy—The Educational Program of the New York University School of Law Criminal Law Clinic*, in CLINICAL LEGAL EDUC. 254 (Ass'n of the American Law Schools et al. eds., 1980).

¹³ A number of studies have evaluated indigent defense representation. See, e.g., ROBERT HERMANN ET AL., COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA (1977); NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR—METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (ABA Standing Committee on Legal Aid and Indigent Defendants ed., 1982); LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT (American Bar Found. ed., 1965); Carol Kocivar et al., *The Right to Effective Counsel: A Case Study of the Denver Public Defender*, 50 DENV. L.J. 45 (1973); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87); Jean G. Taylor et al., *An Analysis of Defense Counsel in the Processing of Felony Defendants in San Diego, California*, 49 DENV. L.J. 233 (1972); *The Allegheny County Public Defender Office: A Study*, 32 U. PITT. L. REV. 533 (1971); *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448 (1969).

¹⁴ CHARLES KNAPP, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS 1, 20 (CLEPR ed., 1971).

¹⁵ The most extensive effort to study this subject, which took place in 1973, did little more than solicit the subjective views of clinic students, supervising attorneys, program directors, the judges before whom the students practiced, and the clients whom the students represented. The study did not attempt in any way to compare the outcomes of cases. See *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 353 (Documentary Supp. 1973) [hereinafter *Student Practice*] (the study relied on questionnaires designed to elicit the respondents' perceptions about the educational, legal and social impact of student representation).

¹⁶ See McDiarmid, *supra* note 12.

¹⁷ See, e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979); Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977).

tion and its effect on defendants. Rather, the assumption that student representation is satisfactory has gone unchallenged and unexamined.

This Article addresses this disturbing lack of information. It examines student performance in the Criminal Defense Clinic of New York University School of Law¹⁸ by comparing student lawyering with that of attorneys for indigent defendants in the Criminal Court of the City of New York. Scrutinizing the results of students' cases in comparison with those of the other defense providers in the Criminal Court enables clinicians to be satisfied that students are competent, effective advocates. Put another way, even as clinicians emphasize the pedagogical purposes and benefits of clinical education,¹⁹ it is imperative that every step be taken in order to ensure that the clients represented by students do not receive results inferior to those of defendants represented by practicing attorneys.²⁰ It is one thing to have a "gut sense" or an intuition that student representation is at least as good as that provided by an overburdened defense counsel;²¹ it is another to attempt to

¹⁸ For a discussion of the operation of the Criminal Defense Clinic, see *infra* text accompanying notes 46-58.

¹⁹ Although clinical methodology is addressed primarily to educating students in the optimal way, few if any clinicians would argue that the quality of service to the client is not of the utmost concern. For discussion of the aims and goals of clinical legal education, see, e.g., William Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 27, 28 (Meilen Press 1973) (observing that a law school's "primary interest and responsibility is education, although it must provide service of the highest caliber in the educational process and be responsible to the clients being served"). For an analysis of the tension between service and education, see, e.g., Earl Johnson, *Education Versus Service: Three Variations on the Theme*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 414 (Meilen Press 1973).

²⁰ The proliferation of clinical programs mandates that clinicians assure themselves that student representation is satisfactory. See McDiarmid, *supra* note 12, at 242. This is an especially important inquiry in criminal defense clinics where students supplant constitutionally required counsel. See *infra* note 48. In many civil clinics, having a student attorney is most likely better than the alternative—no counsel at all.

²¹ Articles which deplore the quality of appointed counsel in criminal cases are legion. See *infra* note 104; KRANTZ ET AL., *supra* note 2, at 158. In New York City, in particular, there have been studies critical of the representation provided by institutional defenders of indigents. See HERMANN ET AL., *supra* note 13; McConville & Mirsky, *supra* note 13.

compare the lawyering performance and the actual results in order to provide empirical foundations for this assumption.

Criminal justice systems also stand to benefit from an examination of the strengths and weaknesses of student lawyering. To the extent that they permit or condone student representation, criminal justice administrators must monitor its effects. Moreover, public defenders, struggling to provide effective assistance of counsel, should analyze the performance of student defenders to see if there are lessons to be learned which can be applied to their institutional practice.

Part I of the Article explores possible methods for comparing student representation with that provided by assigned counsel. It analyzes studies that have examined the quality of various types of criminal defense attorneys, and discusses the advantages and disadvantages of using an outcome based analysis as opposed to one focused on the degree of effort expended and the type of work performed by the attorneys. Part II discusses the means used to collect the relevant data, and then compares the outcomes of cases handled by students with those of other defense attorneys. Part III analyzes the nature and quality of the performance of lawyering tasks by students and defense attorneys for the indigent. In the course of that analysis, the Article addresses the extent to which outcomes or results can be related to the effort put into the representation.

I. STUDIES OF CRIMINAL DEFENSE ATTORNEYS

Numerous articles attempt to compare the performance of publicly provided counsel with privately retained counsel,²² as well as the performance of the various types of publicly assigned counsel.²³ Some studies employ an outcome or result

²² See, e.g., Morton Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases—An Empirical Study*, 24 ARK. L. REV. 442 (1971); Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in *THE DEFENSE COUNSEL* 151 (W. McDonald ed., 1983); Robert V. Stover & Dennis R. Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265 (1975); Jackson B. Battle, Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DENV. L.J. 101 (1973).

²³ For discussions of the three basic types of indigent defense counsel (assigned counsel, contract counsel and public defender), see, e.g., ROBERT L. SPANGENBERG

based comparison,²⁴ others focus on the lawyering performance or effort expended by the attorney,²⁵ and some combine versions of both approaches.²⁶

A. Outcomes

Comparing defense attorneys based on outcomes focuses on collecting data relating to discrete events during the pendency of a case. By far the most common outcomes examined have been the rate or likelihood of conviction and the severity of sentence upon conviction.²⁷ Some studies also have looked

ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY (1986); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361 (1991); Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts*, LAW AND SOC. INQ. 393, 394-95 (1989).

For studies that compare the practices of the various types of indigent defenders, see, e.g., Larry J. Cohen et al., *Assigned Counsel Versus Public Defender Systems in Virginia: A Comparison of Relative Benefits*, in THE DEFENSE COUNSEL 127 (William F. McDonald ed., 1983); Pauline Houlden & Steven Balkin, *Costs and Quality of Indigent Defense: Ad Hoc vs. Coordinated Assignment of the Private Bar within a Mixed System*, 10 JUST. SYS. J. 159 (1985); Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176 (1985); Stuart S. Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404 (1973).

²⁴ See, e.g., Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 535 (1988) (noting that studies that attempt to compare different types of defense counsel "are directed at the end result of the representational process, i.e., what happens to the defendant-client").

²⁵ See, e.g., Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1284 (1984) ("Professional performance cannot reasonably be measured primarily by its outcome.").

²⁶ See, e.g., McConville & Mirsky, *supra* note 13; Anthony Platt et al., *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619 (1967-68).

²⁷ See, e.g., HERMANN ET AL., *supra* note 13, at 155; PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEAS PROCESS 327, 357-58, 464-66 (Univ. of Illinois Press 1988); Feeney & Jackson, *supra* note 23, at 386 n.110 (noting that convictions and severity of sentence are "the two most important outcomes in evaluating counsel effectiveness to date"); Lehtinen & Smith, *The Relative Effectiveness of Public Defenders and Private Attorneys*, 32 NLADA BRIEFCASE 13, 17 (1972); Silverstein, *supra* note 13, at 54-59; Taylor et al., *An Analysis of Defense Counsel in the Processing of Felony Defendants in Denver, Colorado*, 50 DENV. L.J. 9, 30, 35-37 (1973); David Willison, *The Effects of*

at the frequency of dismissals,²⁸ preliminary hearing dismissals,²⁹ acquittals,³⁰ deferred dispositions,³¹ guilty pleas,³² sentences of probation³³ and charge reductions.³⁴ The most recent comprehensive study, conducted by the National Center for State Courts, compared the results of cases handled by criminal defense attorneys for the indigent in nine jurisdictions with those of privately retained counsel.³⁵ The outcomes compared were conviction rates (trial and plea), charge reductions, incarceration rates and the length of prison sentences.³⁶ Out-

Counsel on the Severity of Criminal Sentences: A Statistical Assessment, 9 JUST. SYS. J. 87 (1984).

²⁸ See, e.g., Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263 (1980) (comparing private counsel, specialized juvenile defender and individually assigned counsel in two juvenile courts in North Carolina); Gitelman, *supra* note 22 (analyzing privately retained counsel versus publicly appointed counsel in nine cities in Arkansas); Paul B. Wice & Peter Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161 (1974) (looking at public defender offices in nine large urban cities across the United States).

²⁹ See, e.g., JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 190-226 (Little Brown and Co. 1977) (comparing public defenders, assigned counsel and private counsel in Detroit, Baltimore and Chicago).

³⁰ See, e.g., ROGER A. HANSON ET AL., *INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL* (National Center for State Courts ed., 1992) (examining public defenders, assigned counsel, contract attorneys and private counsel in nine counties across the country); Wice & Suwak, *supra* note 28.

³¹ See, e.g., Sterling, *supra* note 22 (studying public defenders, court appointed counsel and privately retained counsel in Denver, Colorado).

³² See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206-55 (1975) (looking at public defenders, appointed attorneys and privately retained counsel in ten urban jurisdictions across the United States).

³³ See, e.g., Gitelman, *supra* notes 22, 28; Nagel, *supra* note 23 (comparing counsel vs. no counsel, public defender vs. assigned counsel, and hired vs. provided counsel in 194 counties throughout the country).

³⁴ See, e.g., HANSON, *supra* note 30; DAVID W. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* 204-07 (Gen. Learning Press 1974) (studying public defenders versus private attorneys in medium-size industrial town in Illinois); Sterling, *supra* notes 22, 31.

³⁵ HANSON ET AL., *supra* note 30.

³⁶ HANSON ET AL., *supra* note 30, at 52-60. The study concluded that indigent defenders do as well as privately retained counsel in gaining favorable outcomes for the clients. Simply stated, there are few statistically significant differences in conviction rates, charge reduction rates, incarceration rates, and the lengths of prison sentences in cases represented by different types of criminal defense attorneys (public defenders, contract attorneys, assigned counsel, and privately retained counsel).

comes related to events that occur prior to the ultimate disposition of the case include determinations as to bail or release, and the rate of defendants' failure to return to court. The primary benefit of a result based analysis is the reliance on objective, empirical data as opposed to subjective evaluations.

Although outcome studies have certain benefits, comparing attorneys based on results has shortcomings. For one thing, the end product of a case may not necessarily reflect the quality of the lawyering or the nature and quality of the effort expended by the attorney.³⁷ One can easily imagine a lawyer working diligently and expertly and yet ending up with an unfavorable result (or, conversely, doing very little and ending up with a favorable result). Concerns such as these have led others to try to compare types of attorneys by focusing on the quality of their use of lawyering skills and performance of lawyering tasks.

B. *Effort Expended*

Recognizing the qualitative limits of outcome-based studies, a number of studies have attempted to evaluate the quality of different types of attorneys by scrutinizing the effort put into the representation. Studies of this sort explore the attorneys' performances of a variety of lawyering tasks such as counseling and interviewing,³⁸ factual and legal investiga-

HANSON ET AL., *supra* note 30, at 103.

³⁷ See, e.g., James P. Levine, *The Impact of "Gideon": The Performance of Public & Private Criminal Defense Lawyers*, 8 POLITY 215, 218 (1975) (noting that most studies of types of defense counsel analyze case outcomes, "but they do not examine whether the various activities done by the two kinds of lawyers on behalf of their clients differ significantly"); Wice & Suwak, *supra* note 28, at 178 (discussing the use of dismissals as a measure and observing that "[a]n obvious deficiency . . . [is the] inability to measure the quality of public defender work involved in unsuccessful cases").

³⁸ See, e.g., JONATHAN D. CASPER, CRIMINAL JUSTICE—THE CONSUMER'S PERSPECTIVE 23-24, 29-30 (Nat'l Inst. of Law Enforcement and Crim. Just. ed., 1972) (public defenders tend to confer briefly with their clients in the courthouse while retained counsel are more likely to visit their clients in jail and spend more time in consultation with their clients); HERMANN ET AL., *supra* note 13, at 50, 97-99, 138-39 (retained counsel spend more time consulting with their clients than do assigned counsel or public defenders); Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views*, 4 INT'L J. CRIMINOLOGY AND PENOLOGY 177 (1976) (examining when defendant was first contacted by attorney and length and frequency of attorney-client visits); Levine, *supra* note 37, at 223-24

tion,³⁹ and related aspects of representation.⁴⁰ Some commentators have attempted to examine the nature of the attorneys' practices to determine whether they can be characterized as "adversarial" or "combative."⁴¹ Still other studies ask judges and prosecutors to express their views of attorneys' general trial skills.⁴² The majority of these analyses gather data via interviews (of the attorneys, their clients, judges and prosecutors), observation, and review of case files (both the court files and the attorneys' files).⁴³

Even though this method compensates for deficiencies in the outcome approach, it also has its drawbacks. Focusing on the work that the attorney puts into a case runs the risk of overlooking what the attorney accomplishes. It is difficult to evaluate the attorney's effectiveness without considering the outcome. It is also not enough merely to ascertain whether a specific task was performed. One can imagine an attorney who counsels his or her clients early and often and tracks down and interviews all relevant witnesses, yet performs these tasks

(private attorneys spend almost twice as long in the initial client interview than do appointed counsel).

³⁹ See, e.g., Kocivar, *supra* note 13, at 63-68 (fact investigation by public defenders); McConville & Mirsky, *supra* note 13, at 758-74 (percentage of assigned counsel who interviewed witnesses); Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation*, 1981 ARIZ. ST. L.J. 523, 534, 537, 545 (percentage of public defenders, assigned counsel and retained counsel that visited the crime scene); Stover & Eckart, *supra* note 22, at 275-78 (attitudes of public defenders and private attorneys as to fact investigation).

⁴⁰ See, e.g., Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 37 (1967) (when and how was the possibility of a guilty plea first suggested by retained counsel, public defender and assigned counsel); Kocivar, *supra* note 13, at 62-63 (public defenders filing all necessary and appropriate motions); Lance B. Payette, *Adequacy of Criminal Defense Lawyers' Preparation for Sentencing*, 1981 ARIZ. ST. L.J. 585, 611, 613 (retained counsel, public defender and assigned counsel meeting with the Department of Probation in anticipation of sentencing).

⁴¹ See, e.g., NARDULLI ET AL., *supra* note 27; Jackson B. Battle, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60 (1971).

⁴² See, e.g., ANTHONY PARTRIDGE & GORDON BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1978); Dorothy Linder Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUND. RES. J. 105.

⁴³ See, e.g., DEBORAH S. EMMELMAN, *DEFENDING INDIGENTS: A STUDY OF CRIMINAL DEFENSE WORK* (1990) (a study based on courtroom observations and interviews with public defenders); McConville & Mirsky, *supra* note 13; Platt et al., *supra* note 26.

poorly. The problem then becomes the difficulty in measuring objectively the nature and quality of the performance.⁴⁴

The method used in this Article, therefore, employs both result based and process or input based analyses. Although both approaches have their limits standing alone, taken together they provide the basis for a thorough examination. The Article begins with an analysis of outcomes, and then examines the performance of fundamental lawyering skills with an eye toward determining the manner in which performance affects outcome.

II. STUDENTS VS. ATTORNEYS—OUTCOMES

My analysis of student performance begins by examining the results of the cases they handled. Outcomes are an appropriate place to start given that the ultimate disposition of a case is no doubt a criminal defendant's greatest priority. Moreover, certain results in criminal cases are readily quantifiable and provide a baseline or context from which to further evaluate the students' performances. Also, in the final analysis, it is impossible to imagine assessing lawyering performance without looking at the results achieved by a lawyer.⁴⁵

⁴⁴ See HANSON ET AL., *supra* note 30, at 61; Klein, *supra* note 24, at 535 ("It is difficult to compare the performance of appointed counsel with those privately retained because assessing the quality of representation entails significant subjectivity."); Stewart O'Brien et al., *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 288 (1977) (discussing the merits of comparing defense counsel by examining the services they provide and noting that "[t]he problem with this approach is that it is difficult to define a 'good' lawyer solely in terms of services").

⁴⁵ See HANSON ET AL., *supra* note 30, at 61 ("Moreover, it is virtually impossible to assess the effectiveness . . . without examining the results."); AALS. *Clinical Legal Education Panel: Evaluation and Assessment of Student Performance in a Clinical Setting*, 29 CLEV. ST. L. REV. 603, 613 (1980) [hereinafter *AALS Panel*] ("Ultimately, the quality of legal representation is tested under the cold light of result.").

Some commentators, searching for appropriate ways to measure lawyer performance, have cautioned against the use of outcomes. Douglas Rosenthal asserts that "there are relatively few types of legal practice which produce clear-cut wins or losses." Douglas E. Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257, 264 (1976). However, he goes on to concede that an outcome or result based analysis may have "some applicability to . . . criminal practice." *Id.* at 264. Certainly, there are some units of measurement in criminal cases, such as percentage of dismissals, about which most would agree on what constitute "clear-cut wins or losses."

A. *The Operation of the Criminal Defense Clinic*

New York University School of Law's ("NYU") Criminal Defense Clinic is a fourteen-credit, year-long course for third year law students. Clinic students represent indigent defendants charged with misdemeanors in the New York County (Manhattan) Criminal Court. Students act as defense counsel pursuant to the provisions of the Student Practice Order of the New York State Supreme Court, Appellate Division, First Department.⁴⁶ In pertinent part, the Student Practice Order allows students to "advise" and "represent" clients, from arraignment through hearing and trial, by "performing all duties, functions and responsibilities of attorneys . . . including interviews with clients and witnesses, investigations, legal research, drafting documents, briefs and memoranda of law, and appearance before courts and administrative agencies"⁴⁷ The Student Practice Order requires that the defendant consent in writing to student representation;⁴⁸ the student practitioner be supervised by a lawyer admitted to practice in the State of New York; and the supervisor be present in the courtroom during court proceedings and approve any legal advice given to the client.⁴⁹

⁴⁶ *In re Application of Washington Square Legal Services, Inc.*, pursuant to JUDICIARY LAW § 478 (McKinney 1965), for approval of a program of activities for law students in their second and third years of study under the supervision of Washington Square Legal Services, Inc., in cooperation with New York University School of Law [hereinafter Student Practice Order] (on file with the author).

⁴⁷ Student Practice Order, *supra* note 46 at 8.

⁴⁸ In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court extended the right to counsel to those cases in which a sentence of imprisonment is actually imposed. In New York State, counsel must be provided in any case when a sentence of imprisonment is authorized. N.Y. COUNTY LAW § 722, 722(a) (McKinney 1965). Since the defendant has a sixth amendment right to "counsel," he or she can decline student representation.

Although defendants must consent to student representation, it is by no means apparent that there is any real, voluntary, carefully considered consent. Only once in 430 cases has a defendant declined student representation. It is my belief that this is less because the defendants are able, in that moment when they are asked to sign the consent form, to weigh all the advantages and disadvantages and decide that a student will likely provide them with a more vigorous defense than a harried, overworked and/or incompetent government assigned attorney. Rather, my sense is that it is more a product of resignation; it is simply another form placed in front of them to sign, and rather than appear uncooperative or "difficult," everyone simply signs in the designated location. A copy of the consent form used in the NYU Clinic is on file with the author.

⁴⁹ Student Practice Order, *supra* note 46, at 7. The sixteen students in the

The Clinic handles misdemeanor custody cases exclusively—in New York City Criminal Court parlance, “on-line” cases. In these types of cases the defendant remains in custody awaiting arraignment,⁵⁰ rather than being released by the arresting officer after receiving a desk appearance ticket.⁵¹ The students meet their clients for the first time in the arraignment courtroom.⁵² Typically, this is about twenty-four hours after the defendant has been arrested.⁵³

Indigent defendants in New York State are provided counsel pursuant to Article 18-B of the County Law.⁵⁴ In New York City, the Legal Aid Society is designated as the primary defender, and in cases in which Legal Aid has a conflict of interest or “other appropriate reason” for declining to represent a defendant, counsel is provided pursuant to the joint plan of the New York City and New York County Bar Associations.⁵⁵

Clinic are supervised by two faculty members. Although faculty members conference all cases with the students and are always present when the students are in court, the students are the ones who actually interview their clients, conduct factual and legal investigation, negotiate with the prosecutor and advocate to the court.

⁵⁰ N.Y. CRIM. PROC. LAW § 1.20(9) (McKinney 1992) [hereinafter C.P.L.], defines “arraignment” as “the occasion upon which a defendant against whom an accusatory instrument has been filed appears before the court in which the criminal action is pending for the purpose of having such court acquire and exercise control over his person with respect to such accusatory instrument and of setting the course of further proceedings in the action.” See C.P.L. § 170.10.

⁵¹ C.P.L. art. 150 permits police officers to give defendants tickets directing them to appear in court at a later date in lieu of holding them pending a bail determination by a judge. Two types of such tickets are issued in New York City. One is referred to as a DAT (desk appearance ticket), and the other is commonly called a summons.

⁵² The students spend the bulk of the first six to eight weeks of the semester preparing to represent indigent clients in the New York City Criminal Court. The methodology of the training is comprised of the three discrete activities of reading about, observing and simulating the tasks that they will perform as defense counsel. Each of these discrete activities is then reflected upon, discussed and evaluated. The students are assigned one eight-hour arraignment shift each semester, and represent anywhere from three to nine clients over the course of the year.

⁵³ In *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 570 N.E.2d 223, 568 N.Y.S.2d 575 (1991), the New York Court of Appeals upheld the ruling of the appellate division that C.P.L. § 140.20(1), which requires that a defendant be arraigned “without unnecessary delay,” presumptively mandates a 24-hour cap on arrest-to-arraignment time.

⁵⁴ N.Y. COUNTY LAW § 722 (McKinney 1965).

⁵⁵ Executive Order No. 178, City of New York, Office of the Mayor (Nov. 27, 1965). In 1966, and in every year since, New York City and the Legal Aid Society have entered into a contract whereby, in exchange for an annual fee, Legal Aid

Counsel assigned pursuant to this joint plan have come to be known as "18-B" attorneys. In the Manhattan arraignment courtroom, court personnel distribute misdemeanor cases randomly to Legal Aid and 18-B attorneys.⁵⁶ In 1989, NYU negotiated a contract with the Legal Aid Society which permitted Clinic students to practice as Legal Aid attorneys.⁵⁷ As a result, the students from the Clinic receive their cases in the same fashion as do Legal Aid attorneys.⁵⁸

has agreed to be primarily responsible for representing indigents charged with crimes.

⁵⁶ Although Legal Aid has been named as the principal defender, the increased number of arrests due to the proliferation of "crack" cocaine in the mid-1980s, led to 18-B attorneys being assigned cases in addition to conflicts and those that Legal Aid declined to handle. During the 1990s, Legal Aid handled approximately two-thirds of the misdemeanor cases in Manhattan Criminal Court, with the remainder going to 18-B attorneys. The number of misdemeanor cases handled by privately retained counsel was negligible. Interviews with Hon. John Walsh, Supervising Judge for Arraignments, Criminal Court, City of New York (Jan.-Feb. 1997); Telephone Interviews with Elliot Cook, Principal Court Attorney to Hon. John Walsh, Supervising Judge for Arraignments, Criminal Court, City of New York (Jan.-Feb. 1997).

⁵⁷ The contract is on file with the author.

⁵⁸ During the 1993-94 academic year, for example, the types of cases handled by students, as well as the numbers of those cases, are as follows: N.Y. PENAL LAW § 220.03 (McKinney 1989) [hereinafter P.L.] (Criminal Possession of a Controlled Substance) (22); P.L. § 221.40 (Criminal Sale of Marijuana) (8); P.L. § 120.00 (Assault) (7); P.L. § 155.25 (Petit Larceny) (6); P.L. § 205.30 (Resisting Arrest) (4); P.L. § 140.15 (Trespass) (4); P.L. § 140.35 (Possession of Burglar's Tools) (4); P.L. § 145.00 (Criminal Mischief) (3); P.L. § 120.15 (McKinney 1988) (Menacing) (3); N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1986) (Driving While Intoxicated) (3); Miscellaneous (6). Most of the Clinic's clients were charged with more than one offense. For purposes of giving an overview of the cases, when that situation arose, I chose the charge that best illustrated the case.

The only exception to the general rule of random case assignment is that the Clinic does not handle cases where the defendant is charged with prostitution. The Criminal Court in Manhattan "processes" prostitution cases en masse in a matter of minutes, and it is clear that interviews of the length that students conduct would be frowned upon by court personnel.

For the view that students' cases in criminal defense clinics should be selected carefully instead of distributed randomly, see Robert Oliphant, *Reflections on the Lower Court System: The Development of a Unique Clinical Misdemeanor and a Public Defender Program*, 57 MINN. L. REV. 545, 551 n.15 (1973).

B. Outcomes Selected for Comparison and Sources of Data

I examined outcomes for two distinct stages of representation: arraignment⁵⁹ and post-arraignment (those cases that were not disposed of at the arraignment). For both of those stages I culled the conviction⁶⁰ and dismissal rates.⁶¹ In all cases that ended in a conviction, I further examined whether the charges were reduced⁶² and what sentence was imposed.⁶³ In addition to the dismissal rate, I charted the percentage of cases that resulted in an adjournment in contemplation of dismissal ("ACD").⁶⁴ For arraignments, I also compiled

⁵⁹ See *supra* note 50.

⁶⁰ A defendant charged with a misdemeanor may plead guilty at his or her arraignment. See C.P.L. §§ 340.20, 220.10. A guilty plea has the same effect as a conviction after trial. See C.P.L. §§ 340.20, 220.30. In the post-arraignment analysis, where a conviction can be by virtue of either a plea or a guilty finding after trial, all convictions in the Clinic cases were by guilty plea. The rate of trials in New York City Criminal Court is less than 1%. OFFICE OF COURT ADMINISTRATION, STATE OF NEW YORK, TWELFTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURT (1990) (the rate of trials in New York City Criminal Court for 1989 was less than one-third of 1%); CRIMINAL COURTS COMMITTEE, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK (1983). The three Clinic cases that proceeded to trial resulted in acquittals.

⁶¹ A case can be dismissed for many reasons including insufficiency of the accusatory instrument, C.P.L. §§ 170.30(1)(a), 170.35(1)(a), 100.40; denial of a speedy trial, C.P.L. §§ 170.30(1)(e), 30.30, 30.20; and in the interests of justice, C.P.L. § 170.30(1)(g), 170.40.

⁶² In New York State, misdemeanors are classified as either "A," "B" or unclassified. P.L. § 55.05(2). "A" misdemeanors carry a maximum jail sentence of one year. P.L. § 70.15. "B" misdemeanors have a maximum sentence of 90 days. *Id.* Unclassified misdemeanors carry varying sentences which are specified in the laws defining the particular crimes. *Id.* A defendant charged with an "A" misdemeanor can, with the consent of the prosecutor and the judge, plead guilty to a "B" misdemeanor.

New York law also classifies certain prohibited behavior as noncriminal offenses. Such offenses are called "violations," and carry a maximum sentence of 15 days. *Id.* Most noteworthy about violations is they do not result in a criminal record because they are noncriminal offenses. See C.P.L. § 160.55. A defendant charged with an "A" or "B" misdemeanor can, with the consent of the prosecutor and the judge, plead guilty to a "violation."

⁶³ Sentencing in New York State is governed by P.L. arts. 60.00 (Authorized Dispositions of Offenders), 65.00 (Sentences of Probation, Conditional Discharge and Unconditional Discharge), 70.00 (Sentences of Imprisonment), 80.00 (Fines), and 85.00 (Sentence of Intermittent Imprisonment); C.P.L. arts. 410.00 (Sentences of Probation and Conditional Discharge), 420 (Fines, Restitution and Reparation), and 430 (Sentences of Imprisonment).

⁶⁴ If the prosecution and the judge consent, a defendant can receive an

the percentage of defendants that were released from custody,⁶⁵ and for post-arraignments, the percentage of defendants who were released from custody at their arraignment and subsequently failed to return to court, thereby receiving a bench warrant for their arrest.⁶⁶

The students' cases that I used came from three academic years—1991-92, 1992-93 and 1993-94. During this period the Clinic represented a total of 230 people. In order to ensure accuracy, I verified and cross-checked all results against the official court records, and then I inputted the relevant information into a database. Compiling comparable numbers from the Criminal Court was equally time consuming and difficult. The record keeping that exists is woefully inadequate.⁶⁷ After reviewing documents from the Criminal Justice Agency ("CJA"),⁶⁸ the Office of Court Administration,⁶⁹ the Division of Criminal Justice Services,⁷⁰ the New York City Police De-

adjournment in contemplation of dismissal ("ACD"). An ACD is in essence a dismissal in the interests of justice. The case against the defendant is adjourned for six months and, unless the case is restored to the court calendar upon a finding that the promised dismissal would not be in the furtherance of justice, the charges are dismissed and sealed at that time. C.P.L. §§ 170.55, 160.50, 160.60.

A defendant charged with certain designated marijuana crimes may receive an ACD specific to marijuana cases. Significantly, the consent of the prosecutor is not necessary, and the period of the ACD is one year. C.P.L. § 170.56.

⁶⁵ At a defendant's arraignment the court can release the defendant on his or her own recognizance or set bail. C.P.L. §§ 510.10, 530.20(1).

⁶⁶ If a defendant fails to come to court as directed previously, the presiding judge may issue a warrant for his or her arrest. C.P.L. § 530.60.

⁶⁷ An analysis of the New York City Criminal Court from 30 years ago found that the "statistical record-keeping of the courts which administer criminal justice is grossly inadequate." SILVERSTEIN, *supra* note 13. More recently, Professor Harry Subin noted the difficulty in locating accurate data from the New York City Criminal Court. Telephone Interview with Harry Subin, Professor of Law, New York University School of Law (Aug. 1991); see Harry Subin, *The New York City Criminal Court: The Case for Abolition*, OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE (1992). One common problem is the commingling of all sorts of data (e.g., combining misdemeanors and violations, see *supra* note 62, and combining "on-line" cases with appearance tickets, see *supra* note 51 and accompanying text).

⁶⁸ CJA is a not-for-profit corporation serving New York City's criminal justice system under contract to the Office of the Criminal Justice Coordinator.

⁶⁹ The Office of Court Administration is responsible for the oversight of all courts in New York State.

⁷⁰ The Division of Criminal Justice Services for the State of New York is a criminal justice support agency. Its responsibilities include advising the Governor on programs to improve the effectiveness of the justice system, and collecting and analyzing statewide crime data.

partment,⁷¹ the Office of the Deputy Mayor for Public Safety,⁷² the Legal Aid Society and the Assigned Counsel Plan ("18-B"), I concluded that the best source of data for comparison came from CJA. CJA provided me with two sets of numbers. One was arraignment statistics for the calendar years 1991-94, and the other was a study of 2,400 cases from October 1, 1992 through September 30, 1993, which CJA had compiled for its own research purposes.⁷³ That one-year sample was analyzed according to my specifications so as to form as close a match as possible with the students' cases.⁷⁴

The tables that follow reflect the results achieved at arraignment, post-arraignment and overall. Table 1.1 reveals a

⁷¹ The New York City Police Department Office of Management Analysis and Planning.

⁷² Now known as the Office of the Criminal Justice Coordinator, this office was established pursuant to Section 13 of the City Charter. It serves as the Mayor's advisor on criminal justice policy and legislation, and is responsible for coordinating the activities of the city criminal justice agencies. In 1990, Mayor David Dinkins elevated the position of Criminal Justice Coordinator to Deputy Mayor for Public Safety. In 1994, Mayor Rudolph Giuliani redesignated the position as Criminal Justice Coordinator.

⁷³ The data provided by CJA does not distinguish between cases handled by Legal Aid and 18-B attorneys. Efforts to determine which cases were represented by which type of attorney proved futile, given the lack of accurate record keeping. See *supra* note 67. In the 1990s Legal Aid has handled approximately two-thirds of the misdemeanor cases and 18-B attorneys have been assigned the remainder. See *supra* note 56.

A prior study of indigent defense in the New York City Criminal Court found similar guilty plea rates for clients of 18-B and Legal Aid attorneys. HERMANN ET AL., *supra* note 13, at 86 note j. Additionally, an expansive study of representation of indigent defendants in New York City found that the "quality of indigent representation . . . was fairly constant, regardless of whether the attorney was a member of the 18-B Panel or the staff of the Society." McConville & Mirsky, *supra* note 13, at 746 n.805. Studies that compared assigned counsel with contract counsel in other jurisdictions also found that their results were comparable. See, e.g., Houlden & Balkin, *supra* note 23.

⁷⁴ To make the sample data more compatible, CJA factored out the types of cases that the clinic did not handle. This required CJA to remove all appearance ticket cases, as well as cases where the defendant was charged with prostitution. See *supra* note 51 and accompanying text; *supra* note 58.

The ideal comparison would be a matched sample of cases taken from the days that the students received their cases in arraignments. See *Student Practice*, *supra* note 15, at 396 ("The ultimate empirical test of student adequacy would be a comparison of all cases in which students have represented clients with similar cases in which counsel have been licensed attorneys."). An analysis of this sort was attempted for one of the three academic years. Even allowing for the inevitable errors in the court's record keeping, the results are remarkably similar to those provided by CJA.

dramatic difference in the rate of guilty pleas taken at arraignment. Nearly half of the clients of institutional defenders pleaded guilty at this initial court appearance, as compared with 27% of the students' clients. In those cases where the defendants pleaded guilty, students negotiated more pleas to reduced charges, and were slightly more likely to have secured a non-jail sentence. Students also achieved a somewhat higher rate of dismissals and ACDs. Of those cases that involved a bail determination (i.e., the case was not disposed of by plea or dismissal), students obtained a higher rate of release on recognizance.⁷⁵

Table 2.1 shows the eventual results of cases that were not resolved at arraignment. As a starting point it is important to keep in mind that primarily as a result of the lower plea rate at arraignments, 64% of the clients represented by students fall into this category, as compared with 44% of the clients of institutional defenders. The data reflect that the differences noted at the arraignment stage continue, and are in fact magnified. Students' clients pled guilty at a much lower rate (37% versus 53%), and were substantially more likely to plead to a reduced charge and receive a noncustodial sentence. The numbers also reveal that students achieved more favorable results in other areas. Students' clients were 20% more likely to have their cases dismissed (whether by outright dismissal or an ACD), and were half as likely as clients of institutional defenders to receive bench warrants for failing to return to court.

Table 3.1 lists the overall outcomes from arraignment through final disposition. It underscores that students' clients plead guilty far less often than do the clients of assigned counsel, and in cases where there is a plea, students' clients were far more likely to plead to reduced charges, and far less likely to be sentenced to jail. Additionally, students achieved dismissals or ACDs almost twice as often as did institutional defenders (44% versus 23%).

⁷⁵ This difference is especially significant when one considers that fewer of students' clients pleaded guilty, and therefore students had more cases where bail was contested.

C. *Comparison of Outcomes*

TABLE 1.1-ARRAIGNMENTS

	<u>Criminal Defense Clinic</u>	<u>Others</u>
GUILTY PLEAS	27%	48%
Sentences		
Conditional Discharge ⁷⁶	36%	43%
Time Served ⁷⁷	34%	27%
Postconviction Jail ⁷⁸	24%	28%
Fine ⁷⁹	5%	2%
Charge Reductions	37%	29%
DISMISSALS	2%	0.8%
ACDs	7%	6.8%
DEFENDANTS RELEASED		
FROM JAIL	70%	62%

⁷⁶ Sentences to a conditional discharge are governed by P.L. art. 65.00. P.L. § 65.05 provides that the court may sentence the defendant to a conditional discharge if it believes that incarceration or probation supervision is unnecessary. The court is authorized to require the defendant to comply with particular conditions such as performing community service or participating in a drug or alcohol treatment program. P.L. § 65.10(2)(e), (h). The period of a conditional discharge for a misdemeanor is one year, calculated from the day the sentence is imposed. P.L. § 65.05(3)(b). A defendant can be charged with violating a conditional discharge if he or she fails to comply with the court's conditions or commits an additional offense. C.P.L. §§ 410.10, 410.30.

⁷⁷ A sentence of time served means exactly what it suggests—the sentence is the amount of time that the defendant has been incarcerated as of that moment. In Manhattan Criminal Court, time served is more commonly a sentence for a guilty plea at arraignment than post-arraignment. See *infra* Tables 1.3 and 2.3. In that context, the sentence of time served is equal to the amount of time that the defendant has been in custody awaiting arraignment. See *supra* note 53 and accompanying text.

⁷⁸ Postconviction custody refers to a sentence that requires the defendant to remain incarcerated for a specified time after pleading guilty. That time period can be as high as 15 days for a violation, 90 days for a "B" misdemeanor, and one year for an "A" misdemeanor. P.L. § 70.15.

⁷⁹ The maximum permissible fine is \$1000 for an "A" misdemeanor, \$500 for a "B" misdemeanor, and \$250 for a violation. P.L. § 80.05.

TABLE 1.2 - ARRAIGNMENTS
(Numbers Represent Percentages)

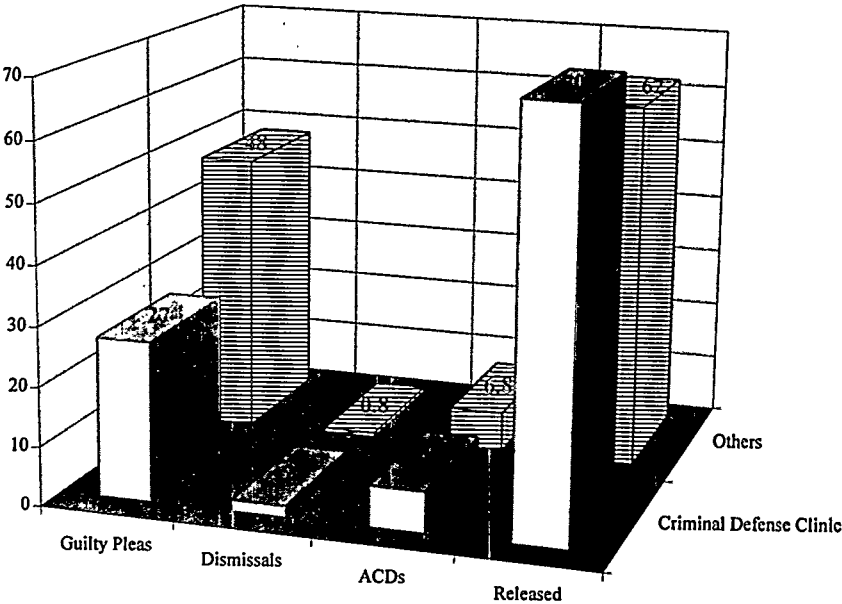
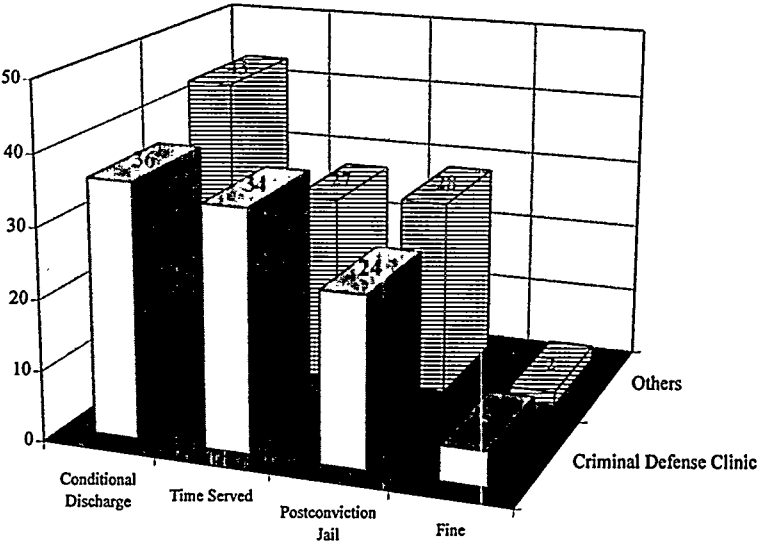
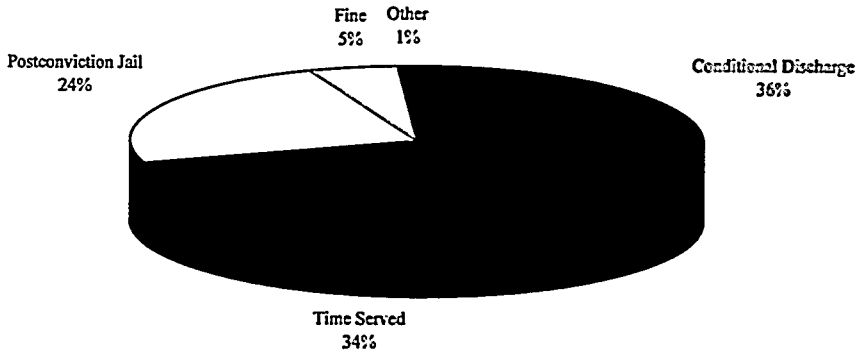


TABLE 1.3 - SENTENCE RECEIVED FOLLOWING GUILTY PLEA AT
ARRAIGNMENT
(Numbers Represent Percentages)



**TABLE 1.3(a) - SENTENCE RECEIVED FOLLOWING GUILTY PLEA AT
ARRAIGNMENT
Criminal Defense Clinic Representation**



**TABLE 1.3(b) - SENTENCE RECEIVED FOLLOWING GUILTY PLEA AT
ARRAIGNMENT
Other Representation**

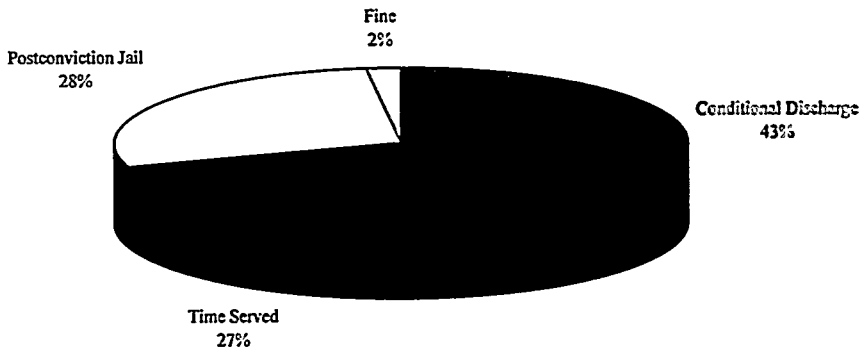


TABLE 1.4 - CHARGE REDUCTION FOLLOWING GUILTY PLEA AT
ARRAIGNMENT
(Numbers Represent Percentages)

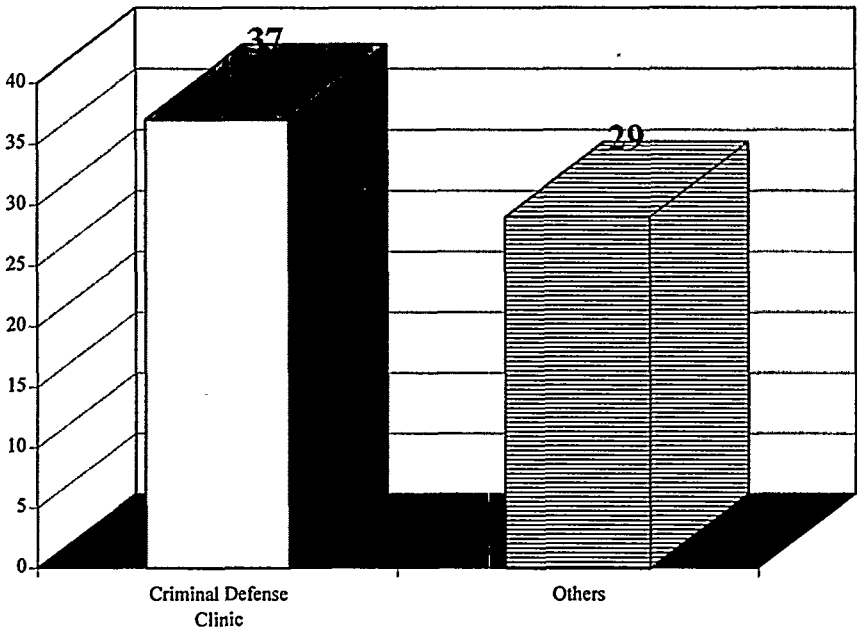


TABLE 2.1-POST ARRAIGNMENTS

	<u>Criminal Defense Clinic</u>	<u>Others</u>
GUILTY PLEAS	37%	53%
Sentences		
Conditional Discharge	64%	49%
Time Served	14%	11%
Postconviction Jail	14%	34%
Fine	7%	5%
Split Sentence ⁶⁰	2%	—
Probation ⁶¹	—	1%
Charge Reductions	47%	24%
DISMISSALS⁶²	42%	28%
ACDs	12%	6%
BENCH WARRANTS⁶³	14%	27%

⁶⁰ A split sentence requires the defendant to serve a period of incarceration in addition to a period of probation. P.L. § 60.01(2)(d).

⁶¹ The period of probation is three years for an "A" misdemeanor and one year for a "B" misdemeanor. P.L. art. 65.00(3)(b), (c). Probation is not a permissible sentence for a violation. P.L. § 65.00(1).

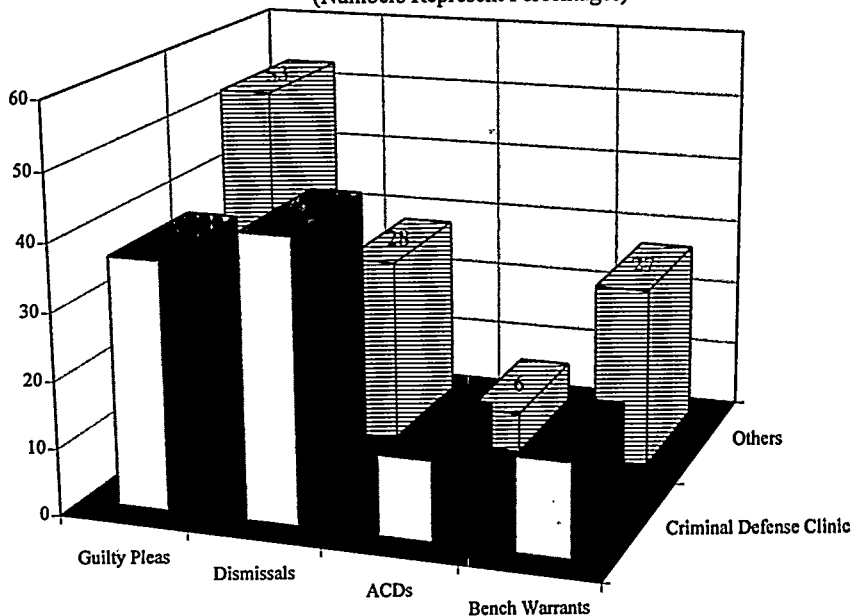
⁶² The bases for dismissal of the Clinic cases are as follows:

- a. Denial of a speedy trial (48.5%) (C.P.L. §§ 30.30, 170.30(e), 210.20(g));
- b. On motion of the prosecutor (typically, because they felt they could not prove the charges beyond a reasonable doubt in that the complainant either refused or was unavailable to testify) (22.7%);
- c. Covered by another case (a felony that resulted in a plea bargain that included the pending misdemeanor charges) (13.6%);
- d. Insufficiency of the accusatory instrument (4.5%) (C.P.L. §§ 100.15, 100.40(1), 170.30(1)(a), 170.35(1)(a));
- e. Laboratory report negative for the presence of a controlled substance (4.5%);
- f. Acquittal (3%);
- g. Defendant found not competent to proceed (1.5%) (C.P.L. §§ 730.30, 730.40).

Once again, comparable numbers from Legal Aid and 18-B attorneys were not available.

⁶³ Warrants may be issued at any point in the proceedings when the defendant fails to appear for a regularly scheduled court date, including pre- and post-plea dates. C.P.L. art. 530. Calculating, and then comparing, the percentage of warrants is a formidable task. CJA calculated a "failure-to-appear" ("FTA") rate of 27.4% by dividing the number of cases that had a warrant issued, by the number of cases that were not resolved at arraignment. The percentage they found, 27.4%, is an artificially low number because the category of cases not resolved at arraignment included an unknown number of cases in which defendant remained in custody until the case was resolved. Put another way, the defendant never had the opportunity to have a warrant, or was never "at risk" of a warrant.

TABLE 2.2 - POST- ARRAIGNMENTS
(Numbers Represent Percentages)



Using the same approach for Clinic cases yielded a warrant rate half the size—14%. The discrepancy between numbers is even greater when one factors in that students were more likely to get their clients out at arraignments. *See supra* Table 1.1. The more clients that are out of custody, the greater the number who are “at risk” of getting a warrant.

Regardless of the best ways to measure warrant rates (e.g., by defendant rather than by case, factoring out all those in which the defendant remained in custody until the case was completed, and so forth), students’ clients return to court at much higher rates.

TABLE 2.3 - SENTENCES RECEIVED FOLLOWING GUILTY PLEA POST-ARRAIGNMENT
(Numbers Represent Percentages)

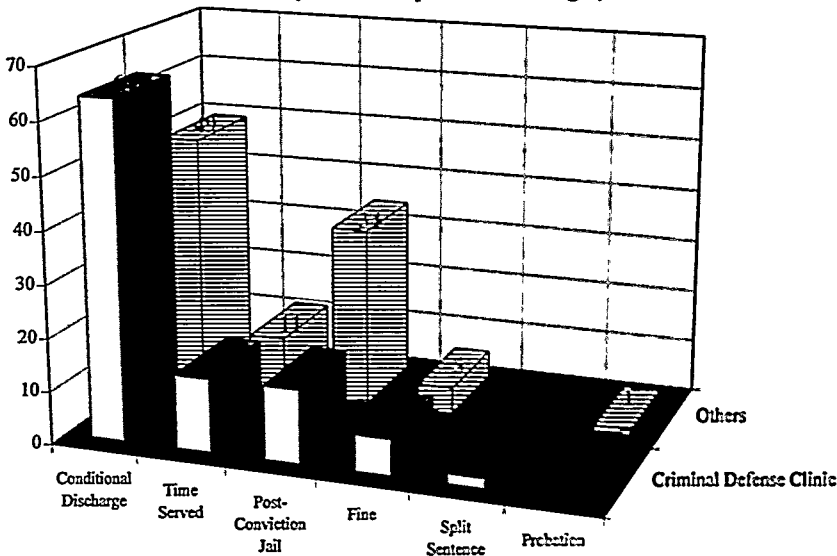


TABLE 2.3(a) - SENTENCE RECEIVED FOLLOWING GUILTY PLEA POST-ARRAIGNMENT
Criminal Defense Clinic Representation

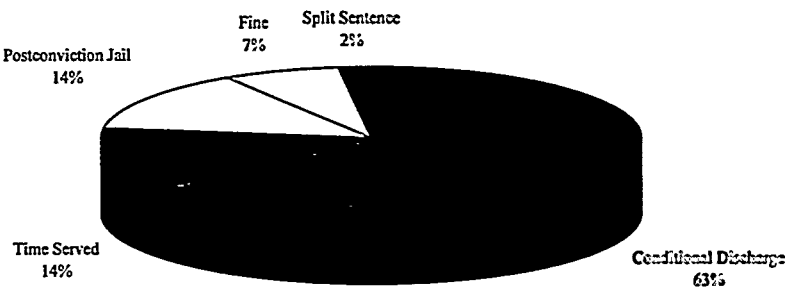


TABLE 2.3(b) - SENTENCE RECEIVED FOLLOWING GUILTY PLEA POST-ARRAIGNMENT
Other Representation

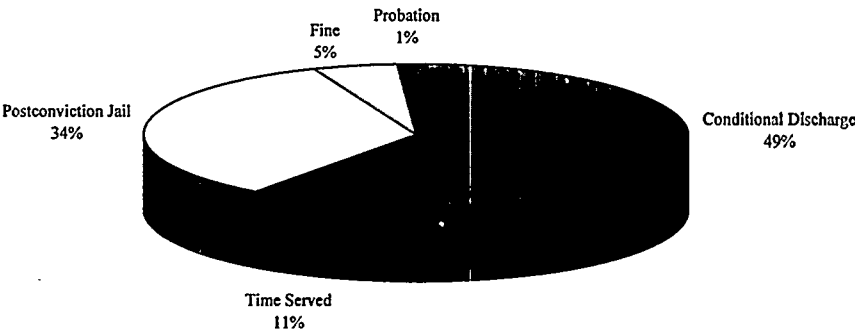


TABLE 2.4 - CHARGE REDUCTION FOLLOWING GUILTY PLEA POST-ARRAIGNMENT
(Numbers Represent Percentages)

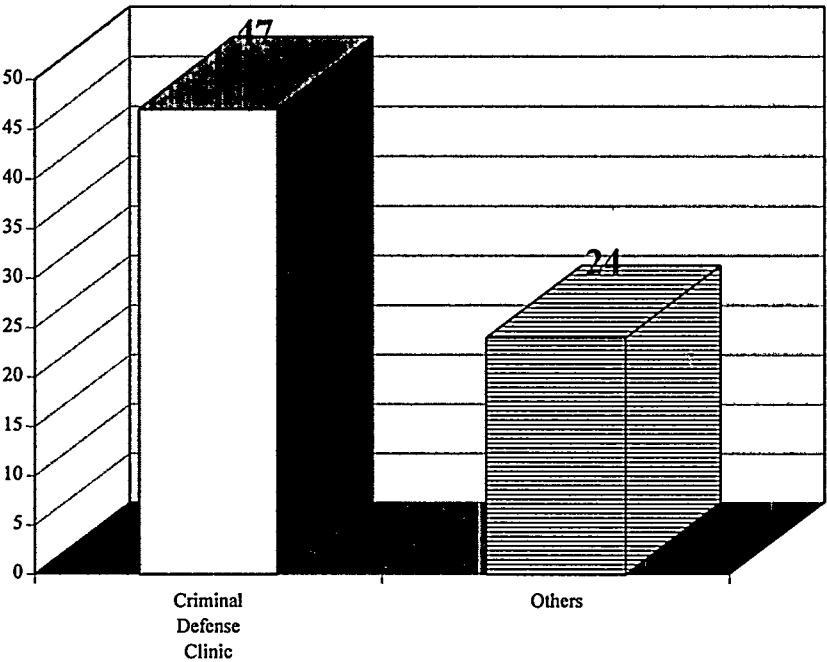
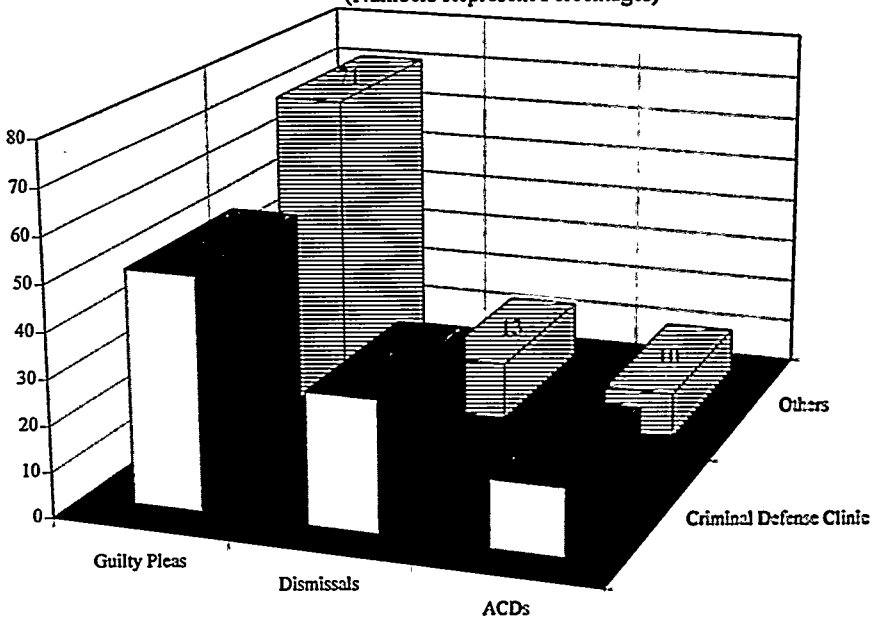
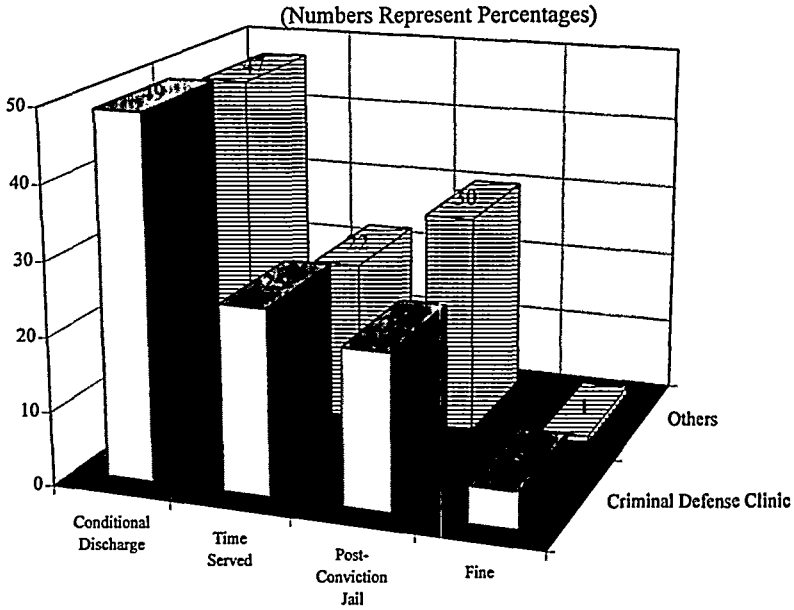


TABLE 3.1-OVERALL DISPOSITION OF CASES

	<u>Criminal Defense Clinic</u>	<u>Others</u>
GUILTY PLEAS	51%	71%
Sentences		
Conditional Discharge	49%	47%
Time Served	25%	22%
Postconviction Jail	21%	30%
Fine	5%	1%
Charge Reductions	41%	28%
DISMISSALS	29%	13%
ACDs	15%	10%

TABLE 3.2 - OVERALL DISPOSITION OF CASES
(Numbers Represent Percentages)

**TABLE 3.3 - SENTENCE RECEIVED FOLLOWING GUILTY PLEA
(OVERALL)**



**TABLE 3.3(a) - SENTENCE RECEIVED FOLLOWING GUILTY PLEA
(OVERALL)**

Criminal Defense Clinic Representation

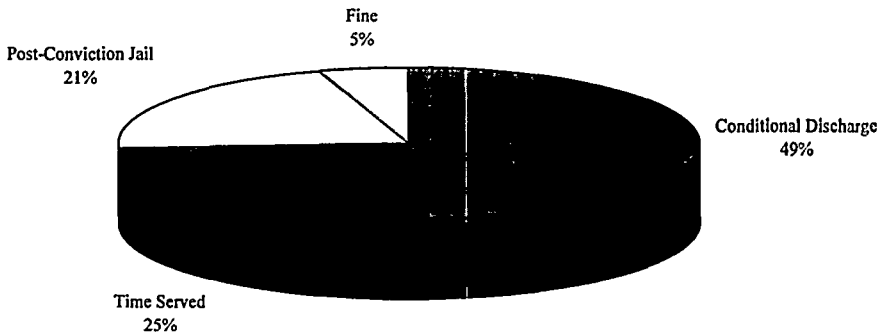


TABLE 3.3(b) - SENTENCE RECEIVED FOLLOWING GUILTY PLEA
(OVERALL)
Other Representation

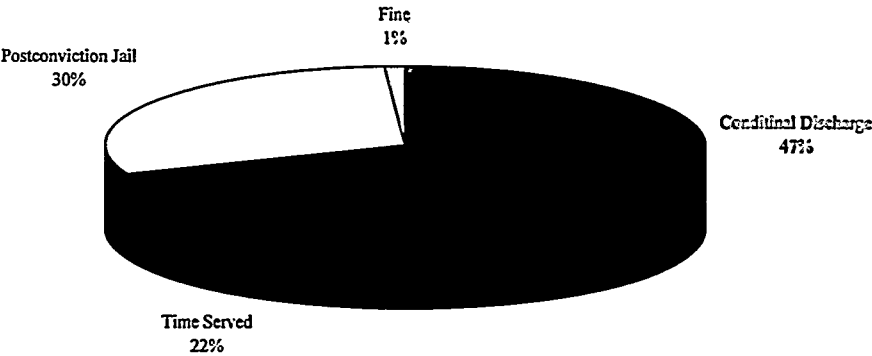
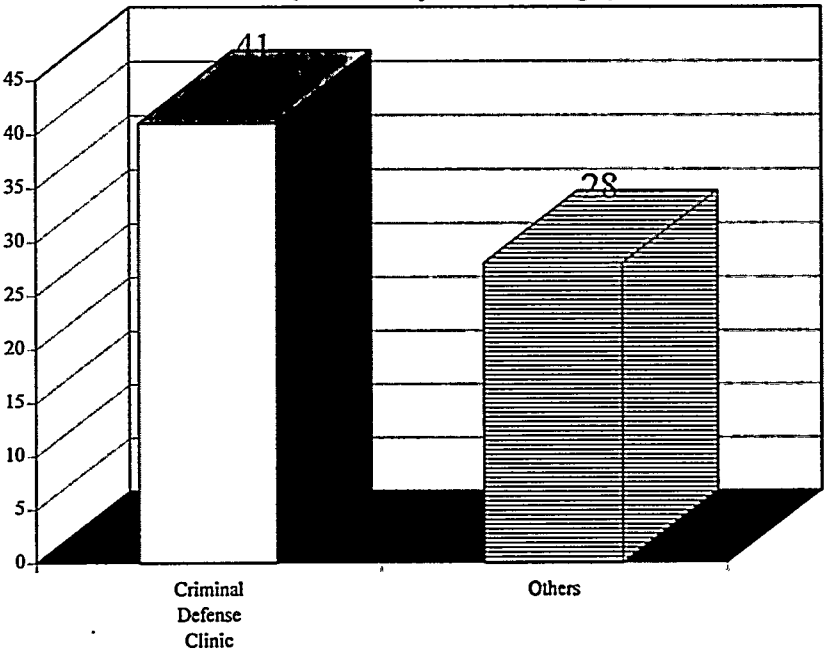


TABLE 3.4 - CHARGE REDUCTION FOLLOWING GUILTY PLEA
(OVERALL)
(Numbers Represent Percentages)



III. STUDENTS VS. ATTORNEYS—LAWYERING PERFORMANCE

Having compared the outcomes of students and attorneys, my focus now shifts to the performance of lawyering skills and a subjective, qualitative evaluation based on the clinical literature and on my experiences, observations and impressions teaching in the NYU Criminal Defense Clinic. In many ways, the comparison is between an idealized view of student practice, or the aspirational model of student representation, and the reality, as reflected in numerous studies, of how assigned counsel actually perform. Students do not always perform at the aspirational level, and my impressions are no doubt influenced by my status as a participant-observer. Similarly, counsel for indigent defendants are not monolithic, and their skills range from incompetent to outstanding. Nevertheless, in my experience, the nature and quality of student lawyering is vastly different in discernable ways from the lawyering of assigned counsel.

Attempts to evaluate attorney performance are not unprecedented. Indeed, the legal system strives to measure performances of attorneys in a number of ways. For instance, in legal malpractice actions, a jury is asked to determine whether an attorney exercised the degree of care and performed at the level expected of a diligent, competent attorney.⁸⁴ When raising a claim of ineffective assistance of counsel in a criminal case, a defendant must show that the attorney's performance was inadequate when assessed under "prevailing professional norms."⁸⁵ Many jurisdictions that have some form of assigned counsel plan for indigent criminal defendants⁸⁶ have certification and recertification procedures which require assessment of an applicant's lawyering performances before appointing him or her to an indigent defense panel.⁸⁷

⁸⁴ See, e.g., RONALD E. MALLIN & VICTOR B. LEVIT, *LEGAL MALPRACTICE* (2d ed. 1981); Rothstein, *Lawyers' Malpractice in Litigation*, 21 CLEV. ST. L. REV. 1, 2 (1972).

⁸⁵ *Strickland v. Washington*, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984) (establishing a two-prong test in which the defendant must show that the attorney's performance was deficient and that the deficient performance prejudiced the defendant).

⁸⁶ See *supra* note 23.

⁸⁷ For example, in New York City, appointment to the assigned counsel panel is governed by rules promulgated by the Appellate Division, First Department,

The predicament which the legal profession has faced in this area is the lack of sophisticated techniques to measure lawyers' performance.⁸⁸ As a recent study by the National Center for State Courts concluded, "Attention needs to be paid to developing more-refined indicators of the quality of performance."⁸⁹

The necessarily subjective evaluation of lawyering performance is an intricate task. Clinical faculty who supervise live-client clinics are in a unique position to offer guidance to the legal profession in this regard. Clinicians engaged in the task of evaluating student performance have long emphasized the distinction between the effort extended and the outcome realized. In an Association of American Law Schools Clinical Education panel devoted to evaluation of student performance, Professor H. Russell Cort spoke of the differentiation between the "process of doing the task and the product of the task,"⁹⁰ and observed that "trying to distinguish between process and product was an interesting exercise."⁹¹ Indeed, the advent of clinical programs, and the attendant emphasis on performance

pursuant to Article VIII of the Plan of the Association of the Bar of the City of New York and Article 18B of the New York State County Law, and approved by the Judicial Conference of the State of New York. Section 612 of the Rules of the Appellate Division, First Department, provides for the creation of a central screening committee to adopt and enforce standards for appointment to the assigned counsel plan as well as for periodic recertification. As a member of the committee, the author can attest to the efforts made by committee members to try to assess the lawyering abilities of applicants. See U.S. DIST. CT. FOR THE S. DIST. OF N.Y., REVISED PLAN FOR FURNISHING REPRESENTATION PURSUANT TO THE CRIMINAL JUSTICE ACT OF 1964 (18 U.S.C. § 3006A) (1985) (applicants to the panel must supply information about their background and prior experience, and then a review committee decides whether to recommend the applicant for appointment to the panel).

⁸⁸ See, e.g., Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 7 n.19 (1978) ("[T]he legal profession has not devised good criteria by which to measure lawyer performance."); see also Robert L. Bogomolny, *General Thoughts on Admission to Practice in the Federal Courts of the United States*, 27 CLEV. ST. L. REV. 157 (1978) (observing that for many years commentators have been wrestling with the question of what are the appropriate standards to utilize when reviewing attorney performance); Marvin E. Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 614-15 (1977) ("There are no objective measures or tests of lawyers' competence."); Rosenthal, *supra* note 45, at 270 ("There is no agreement among lawyers, consumers of legal services or scholars on what constitutes competent performance, let alone the appropriate criteria for its measurement.").

⁸⁹ HANSON ET AL., *supra* note 30, at 52.

⁹⁰ AALS Panel, *supra* note 45, at 603, 604.

⁹¹ AALS Panel, *supra* note 45, at 603, 604.

of lawyering tasks, necessitated changes in the standard law school evaluation procedures (end-of-year exams and seminar papers), and focused attention on the capacity of clinicians to assess critically the quality of the students' lawyering.⁹²

In fact, a core task of clinical teaching is the evaluation of the lawyering performances of students in a variety of contexts.⁹³ Clinicians evaluate and review student performance in great detail, and aspire to instill in students an appreciation of the importance of self evaluation.⁹⁴ By "evaluation" I do not refer simply to the process of clinicians evaluating student performance for the purpose of giving grades, but to a more expansive process of observation, reflection and critique that characterizes clinical legal education.⁹⁵ Similarly, evaluation

⁹² For a discussion of one law school's efforts to change its student evaluation procedures in light of changes in the curriculum that put an increased emphasis on student performance, see John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 28-29 (1988).

For other discussions of evaluating clinic students for the purposes of grading, see Barnhizer, *supra* note 17, at 131-34; James Carr, *Grading Clinic Students*, 26 J. LEGAL EDUC. 223 (1974) (arguing against pass/fail grades for clinics and describing available criteria for assigning letter grades).

⁹³ See Barnhizer, *supra* note 17, at 75 ("The teaching essence of the clinical method is that the teacher can observe, participate, counsel, advise, reflect, review and criticize the student at the key points where the student *must* make the decisions, deal with institutions and adversaries, and perform the lawyering tasks which make up professional competence."); see also Lester Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 56, 70 (CLEPR ed., 1973) ("[A]t each juncture, the supervisor must review, criticize and redirect the student's efforts."); H. Russell Cort & Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980) ("Clinical educators confront the problem of defining and producing good lawyering on a daily basis").

⁹⁴ Clinical methodology seeks to inculcate students with the motivation and ability to learn from their own experiences so that they can continue the process of learning and improving as lawyers after the relatively brief three-year period spent in the academy. See, e.g., Amsterdam, *supra* note 17, at 617; Gary Bellow & Earl Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664, 676 (1971); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

⁹⁵ For a clear and trenchant description of the method of clinical legal instruction, see Amsterdam, *supra* note 17, at 616 (observing that "students' performance was subjected to intensive and rigorous *post mortem* critical review"); see also Bellow & Johnson, *supra* note 94, at 673 (noting that the activities that the students engaged in as attorneys were "critically examined and described" and "delimited and evaluated").

does not refer simply to an analysis and critique of the ultimate disposition of a case. As with all lawyering, students' fieldwork practice involves a series of discrete tasks, and the clinician spends a great deal of time evaluating the effort extended and the results of each of those specific tasks.⁹⁵

In order to assess lawyering performance, it is necessary first to delineate the component parts of lawyering. Put another way, before discussing how to evaluate performance, one must determine what to evaluate. What is it that lawyers actually do? Several surveys of practicing attorneys attempted to find out what skills they regularly employ in their law practices.⁹⁷ Although these studies enumerated a number of skills, among the more commonly mentioned were negotiation,⁹⁸ interviewing,⁹⁹ counseling,¹⁰⁰ oral and written advocacy,¹⁰¹ and fact gathering and organization.¹⁰²

Other delineations of attorney skills grew out of long-standing concerns about lawyer competency. In 1973, in a lecture presented at Fordham University Law School, Chief Justice Warren Burger expressed concerns about the "quality of advocacy" in the courts and called for the development of "standards of total advocacy performance" and the "means to measure those standards."¹⁰³ Chief Judge Irving Kaufman of

⁹⁵ See, e.g., Oliphant, *supra* note 58, at 557 ("Students should also be evaluated at every stage of their work in the program. This means that evaluations are made on their pre-trial preparation (including interviewing), the trial work and post-trial work. No aspect of a student's efforts should be overlooked.").

⁹⁷ These studies are generally aimed at determining the extent to which law schools actually prepare lawyers for practice. See, e.g., FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 123-64 (1981); Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978); Deedra Benthall-Nietzel, *An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education*, 63 KY. L.J. 373 (1975); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993); Mudd & LaTrielle, *supra* note 92; Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551 (1973).

⁹⁸ Baird, *supra* note 97, at 265; Mudd & LaTrielle, *supra* note 92, at 28; Stern, *Retrospection: What Recent Law School Graduates Think of Their Education: The University of Toledo Experience*, STUDENT LAW., June 1972, at 27.

⁹⁹ Mudd & LaTrielle, *supra* note 92, at 28; see Robert Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321 (1973).

¹⁰⁰ Baird, *supra* note 97, at 266; Schwartz, *supra* note 99, at 324.

¹⁰¹ Baird, *supra* note 97, at 265; Garth & Martin, *supra* note 97, at 508.

¹⁰² ZEMANS & ROSENBLUM, *supra* note 97, at 133; Benthall-Nietzel, *supra* note 97, at 383; Stern, *supra* note 98.

¹⁰³ Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training*

the United States Court of Appeals for the Second Circuit echoed Chief Justice Burger's complaints,¹⁰⁴ and appointed a committee (the "Clare Committee") to analyze the quality of advocacy in the courts of the Second Circuit and to recommend improvements.¹⁰⁵ The Clare Committee concluded that there was a dearth of competent advocates in the federal courts, and that the primary cause was a lack of training in necessary legal skills.¹⁰⁶ In the midst of the controversy generated by the Clare Committee's findings, Chief Justice Burger appointed a committee to investigate the quality of the advocacy in the federal courts.¹⁰⁷ This committee also concluded that there was a serious problem with the quality of advocacy in the federal court. Burger's committee recommended, inter alia, that law schools provide trial advocacy courses to all students who want them.¹⁰⁸

In 1979, the American Bar Association ("ABA") Section of Legal Education and Admission to the Bar entered the debate, creating a task force to examine lawyer performance and the role of the law school.¹⁰⁹ The "Cramton Task Force" reviewed

and Certification of Advocates Essential to Our System of Justice, 42 *FORDHAM L. REV.* 227, 236 (1973). In Chief Justice Burger's view, one of the causes of the prevalence of inadequate advocacy was the failure of law schools to provide programs that focus on advocacy skills. *Id.*

¹⁰⁴ Irving Kaufman, *The Court Needs a Friend in Court*, 60 *A.B.A. J.* 175, 176 (1974) (citing "lack of experience, lack of competence, and lack of integrity" as causes of poor advocacy).

Others also bemoaned the lack of competent attorneys. Judge David Bazelon, focusing on attorneys for indigents accused of crime, noted that "a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment." David L. Bazelon, *The Defective Assistance of Counsel*, 42 *U. CIN. L. REV.* 1, 2 (1973); see David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 *GEO. L.J.* 811, 812 (1976) (observing that attorneys for the "poor, uneducated and unemployed" are often "walking violations of the Sixth Amendment") (citation omitted).

¹⁰⁵ Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 *F.R.D.* 159 (1975) [hereinafter *Clare Committee*]. The Clare Committee was also charged with making recommendations regarding advocacy programs in law school, rules of admission to practice in the federal courts, post-admission educational projects, and standards for professional discipline. *Id.* at 161.

¹⁰⁶ *Id.* at 164.

¹⁰⁷ Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 79 *F.R.D.* 187 (1978) [hereinafter *Devitt Committee*].

¹⁰⁸ *Id.* at 201-02.

¹⁰⁹ AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS OF THE ABA

studies of skills that attorneys reported using most frequently and outlined "certain fundamental skills" necessary for lawyer competence.¹¹⁰ These skills were the ability to analyze legal problems; perform legal research; collect and sort facts; write effectively; communicate orally with effectiveness; interview, counsel and negotiate (what the Cramton Task Force referred to collectively as "tasks calling on both communication and interpersonal skills"); and organize and manage legal work.¹¹¹ Recently, in a report commonly known as the "MacCrate Report," the ABA revisited the issue of lawyer competence and performance in great detail.¹¹² In an ambitious undertaking, the MacCrate Report reviewed the attorney survey literature, the judicial committee reports, the ABA task force reports and scholarly articles¹¹³ that addressed the competencies or skills

SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1979) [hereinafter Cramton Task Force]. The Cramton Task Force was formed primarily to respond to the allegations of Burger, Kaufman and the Clare and Davitt Committees that law schools were partly responsible for the deficient state of advocacy in the courts. Prior to confronting the merits of that charge, the Cramton Task Force addressed what is meant by lawyer competency, how it relates to adequate performance and what are the components of competency.

¹¹⁰ *Id.* at 9.

¹¹¹ *Id.* at 9-10.

¹¹² Robert MacCrate, *Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS & THE PROFESSION [hereinafter MacCrate Report].

¹¹³ See, e.g., Amsterdam, *supra* note 17, at 612 (discussing the importance of developing in students "ways of thinking within and about the role of lawyers—methods of critical analysis, planning, and decision-making which are not themselves practical skills but rather the conceptual foundations for practical skills"); Cort & Sammons, *supra* note 93, at 406 (delineating six "major" competencies—oral, written, legal analysis, problem-solving, professional responsibility and practice management—and a number of "specific" competencies within each of the major competencies); John S. Elson, *The Case Against Legal Scholarship, or If the Professor Must Publish, Must the Profession Perish*, 39 J. LEGAL EDUC. 343, 346 (1989) (arguing that law school education neglects necessary lawyer competencies such as "creating innovative approaches to problem solving; analyzing risks of alternative courses of action and planning strategic and tactical approaches; learning rhetorical performance skills in contexts such as negotiation, trials and appellate argument; planning and conducting thorough and creative fact gathering; working cooperatively with colleagues to solve mutual problems; learning to interview and counsel clients; learning how to think and act from a partisan perspective; understanding and coping with the economic realities of law practice; and developing methods for learning from one's own experiences.") (citation omitted).

According to some commentators, there is apparent consensus among scholars and practitioners as to the skills a competent attorney should possess. See, e.g.,

needed for competent legal practice. The MacCrate Report specified ten "fundamental lawyering skills" and broke down each of these skills into its component parts.¹¹⁴ The ten essential skills outlined in the report are problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.¹¹⁵

Using the above-described articles and reports as guides, I developed an inventory of skills to use in evaluating performance in a criminal defense clinic. I concentrated on the following six skills: interviewing, fact investigation, negotiation, counseling, problem solving and litigation. These skills are regularly employed by clinic students,¹¹⁶ viewed as important by practitioners,¹¹⁷ denominated as critical or "fundamental" by the Cramton and MacCrate task forces¹¹⁸ as well as legal schol-

Joanne Martin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 443 (1993) ("There seems to be relative agreement among legal academics and the practicing bar regarding the identification of skills that a competent lawyer should have").

¹¹⁴ MacCrate Report, *supra* note 112, at 141-207.

¹¹⁵ MacCrate Report, *supra* note 112, at 141-207.

¹¹⁶ The New York Student Practice Order permits students to represent clients from arraignment through the disposition of the case. *See supra* notes 46-47 and accompanying text. In the course of that representation, the students engage in the full panoply of criminal defense practice and all the concomitant lawyering tasks.

For a description of the duties of students in other criminal defense clinics, see Rose E. Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility*, 14 SANTA CLARA LAW. 246, 249, 264 (1974) (noting that students "must identify the problems and issues, collect the pertinent facts, apply the correct doctrine and legal principles, and then develop proper strategy" and that after acquiring the "fundamentals of interviewing and negotiating . . . [the student should move] to a more sophisticated level where the intricacies of advocacy and the subtleties of litigation [are] explored at first hand"); Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1291 (1993) (describing the responsibilities of students as including participating "in every aspect of client representation from arraignment through disposition" and in the course of that representation "negotiating with prosecutors, obtaining discovery, investigating crimes, developing treatment and disposition plans, interviewing clients, drafting motions, and conducting research").

¹¹⁷ *See supra* notes 97-102 and accompanying text.

¹¹⁸ *See supra* notes 109-111 and accompanying text; *supra* note 112 and accompanying text.

scholars,¹¹⁹ and are particularly germane to criminal defense practice.¹²⁰ According to one study, criminal practitioners rated interpersonal skills such as negotiation and interviewing as extremely important to their practice.¹²¹ More recently, a survey of criminal defense attorneys found that "abilities in interviewing, counseling, and negotiating are critical to effective pretrial criminal representation."¹²² One commentator has stressed the defense attorney's roles as advocate, advisor and negotiator.¹²³ The ABA Standards for Criminal Justice emphasize the importance of prompt and thorough fact acquisition for effective representation,¹²⁴ and outline the guidelines for defense counsel during trial litigation.¹²⁵ Finally, as the MacCrate Report recognized, problem-solving is an essential conceptual skill for most aspects of lawyering.¹²⁶ Each of the six skills on which I focused are discussed in turn.

A. Interviewing

The ABA Standards state that "defense counsel should seek to establish a relationship of trust and confidence with the accused"¹²⁷ Commentators¹²⁸ and courts¹²⁹ have

¹¹⁹ See *supra* note 113.

¹²⁰ See Levine, *supra* note 37, at 218 (discussing criminal defense attorneys for the poor and the "necessity of acquiring systematic data about the kind of 'lawyering' routinely done on behalf of poor defendants." He goes on to argue that "it is indispensable that we replace our vague inklings and folk knowledge with precise facts about what lawyers actually do (and what they do not do).").

¹²¹ See Zemans & Rosenblum, *supra* note 97, at 131.

¹²² Robert L. Doyel, *The National College—Mercer Criminal Defense Survey: Preliminary Observations about Interviewing, Counseling, and Plea Negotiations*, 37 MERCER L. REV. 1019, 1023 (1986).

¹²³ Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 478 (1993).

¹²⁴ AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-4.1 (3d ed. 1993) [hereinafter ABA STANDARDS].

¹²⁵ *Id.* § 4-7.1 to 4-7.9. Even though generally viewed as an essential component of criminal defense, trial-level litigation is an extremely rare phenomenon in Criminal Court, see *infra* note 232; and therefore it is not surprising that defense attorneys do not rate trial skills as central to their practice. See, e.g., ZEMANS & ROSENBLUM, *supra* note 97; Doyel, *supra* note 122.

¹²⁶ MacCrate Report, *supra* note 112, at 148-51.

¹²⁷ ABA STANDARDS, *supra* note 124, § 4-3.1.

¹²⁸ See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 52 (1986) ("Because a

also recognized the pivotal nature of the attorney-client relationship. The time to begin trying to build rapport is in the initial interview of the defendant.¹³⁰

Appointed counsel typically fail to create such a bond. Part of the problem is due to clients' distrust of lawyers generally,¹³¹ and part is endemic to being an institutional indigent criminal defense attorney.¹³² Institutional defenders are pro-

defense attorney plays so many roles in our system of justice—advocate, adviser, negotiator, spokesperson, champion and, sometimes, friend—the accused's interest in the quality of his rapport with counsel lies at the very core of the right to representation.”); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 74 (1986) (“The major obligation of defense counsel is to try to make herself effective. This means . . . attempting to develop an effective working relationship with the defendant.”).

¹²⁹ See, e.g., *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., concurring) (stating defense counsel's duties can be “most effectively discharged [] if the attorney and the defendant have a relationship characterized by trust and confidence”); *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) (“Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel.”). In *Slappy*, the Court held that the Sixth Amendment does not guarantee a “meaningful relationship” between an accused and defense counsel. See *Mann v. Reynolds*, 46 F.3d 1055, 1060 (10th Cir. 1995) (“Until it can be established as a general principle emotional bonding is required for the kind of counseling that meets constitutional muster, we are unwilling to find such a need within the confines of the Sixth Amendment.”). Although a conviction may not be reversed on ineffective assistance grounds where the claim is lack of a meaningful attorney-client relationship, it is certainly the case, as the ABA Standards urge, that defense counsel should strive to create such a relationship.

¹³⁰ ANTHONY G. AMSTERDAM, TRIAL MANUAL 4 FOR THE DEFENSE OF CRIMINAL CASES 1-77 (1984) (“The lawyer's primary objective in the initial interview . . . is the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect.”).

¹³¹ See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 575 n.333 (1990) (noting that the lawyer-client relationship is characterized by extensive mistrust, particularly in the criminal context); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1669 (1986) (“[M]any, if not most, relations between attorney and criminal defendant begin with distrust.”); Wice & Suwak, *supra* note 28, at 171 (initial meetings between lawyer and criminal defendant “occur in an atmosphere of suspicion”).

¹³² See, e.g., *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting) (“It is no secret that indigent clients often mistrust the lawyers appointed to represent them.”); Berger, *supra* note 128, at 50 (noting the “grim reality of indigents' pervasive mistrust of their lawyers”); Goodpaster, *supra* note 128, at 74 (“defendants often do not trust defense counsel, particularly when the attorneys are public defenders or court appointees”); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473,

vided at no cost to the defendant in a society that is indoctrinated to believe that you get what you pay for;¹³³ they are appointed by the government and suffer accordingly from skepticism as to their allegiances on behalf of their clients;¹³⁴ and because they regularly come into contact with the same prosecutors and judges, and typically develop friendly relations with them, institutional defenders tend to interact with judges and prosecutors in a manner that feeds clients' suspicions about their lawyers' loyalties.¹³⁵

474 ("That many clients are suspicious of, sometimes even hostile towards, their defenders has been repeatedly documented."); Gerald R. Wheeler & Carol L. Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice—Type of Counsel, Pretrial Detention, and Outcomes in Houston*, 26 CRIME AND DELINQ. 319, 331 (1980) ("The ultimate negative consequence of defendants' distrust of assigned counsel is seen when a defendant chooses to remain in jail instead of making bail in order to afford a private attorney.").

¹³³ See, e.g., CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 306 (1978) ("[M]any defendants feel that he who pays the piper inevitably calls the tune; in their view, what you don't pay for, you don't get."); Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had A Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971); O'Brien et al., *supra* note 44, at 305.

Studies have found that clients using civil legal services programs similarly prefer the option of choosing their own attorney. See, e.g., Samuel J. Brakel, *Styles of Delivery of Legal Services to the Poor: A Review Article*, 1977 AM. B. FOUND. RES. J. 219.

¹³⁴ See, e.g., Casper, *supra* note 133, at 7; Donald C. Dahlin, *Toward a Theory of the Public Defender's Place in the Legal System*, 19 S.D. L. REV. 87, 89 (1974); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 667 (1986) ("The indigent defendant may view his defender at first with suspicion since the same source of funds that is paying the police to arrest him and the prosecutor to prosecute him, is also paying for his counsel."); O'Brien et al., *supra* note 44, at 309.

¹³⁵ See, e.g., Arcuri, *supra* note 38, at 187 (more than 80% of defendants interviewed felt that their appointed lawyer and the prosecutor were working in collusion with the judge); Platt et al., *supra* note 26, at 634 (observing a similar suspicion on behalf of indigent juveniles toward their appointed counsel); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 144 (1972) ("Some clients voiced suspicion that the public defender and the district attorney are not actually adversaries, but rather secretly or openly cooperate with each other.").

This seemingly intractable problem was noted by the National Advisory Commission of Criminal Justice Standards and Goals ("NAC"). NAC Standard 13.9, Performance of Public Defender Function, provides that "[t]he public defender must negate the appearance of impropriety by avoiding excessive and unnecessary camaraderie in and around the courthouse and in his relations with law enforcement officials, remaining at all times aware of his image as seen by his client community." NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A PROJECT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (1973).

Other impediments to the ideal relationship envisioned by the ABA Standards are functions of lawyering performance. Although some have commented on the lack of data on what transpires in attorney-client interactions,¹³⁶ there is evidence that the interviewing practices of indigent defense attorneys thwart the possibility of achieving satisfactory relationships with their clients.¹³⁷ A study of the interviewing practices of attorneys in a civil legal services office found that the attorneys dominated the interview by controlling the "timing and topic of utterances."¹³⁸ Similar complaints are voiced by defendants in criminal cases when asked to describe the nature of their interactions with their court appointed attorneys.¹³⁹ Typically, defendants report being uninformed as to what were the possible defense strategies,¹⁴⁰ and that rather than "giving advice, providing information and offering suggestions, . . . the public defender tried to tell them what to do."¹⁴¹

Another characteristic of the interview between appointed counsel and indigent defendants is its hurried nature. Defendants consistently reported that their conversations with their attorneys were rushed and brief.¹⁴² To compound the prob-

Other factors may contribute to inadequate attorney-client relations. Defense attorneys are often of different social classes and racial and ethnic backgrounds from their clients. See, e.g., Berger, *supra* note 128, at 54 n.233.

¹³⁶ For a discussion of the lack of articles exploring attorney-client interactions, see Dinerstein, *supra* note 131, at 577 n.342 (pointing out that the few articles that attempt to describe the attorney-client interaction are "retrospective reconstructions" rather than "contemporaneous observations," and are further limited by issues of attorney-client confidentiality).

¹³⁷ Many studies examine the so-called consumer's perspective as to indigent defense attorneys. Interviewers have questioned defendants about the nature of their relationship with their attorney, their view of the quality of the lawyering on their behalf, their satisfaction with the outcome, and so forth. The common themes that emerge suggest that one can draw certain conclusions about the nature of these attorney-client interactions. See *infra* notes 139-142 and accompanying text.

¹³⁸ Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 605 (1979).

¹³⁹ See, e.g., Wilkerson, *supra* note 135, at 144-45; Casper, *supra* note 133, at 8.

¹⁴⁰ See, e.g., Wilkerson, *supra* note 135, at 144-45; Casper, *supra* note 133, at 8.

¹⁴¹ JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE—THE DEFENDANT'S PERSPECTIVE* 109 (1972).

¹⁴² See, e.g., Arcuri, *supra* note 38, at 180 (quoting defendants who stated that their public defender saw them for five or ten minutes); Casper, *supra* note 133, at 6 (defendants reported spending five or ten minutes with their attorneys, typically in a hallway or holding cell in the courthouse); Klein, *supra* note 134, at 667

lem, the evidence shows that defense attorneys rarely speak with their clients after the initial interview, other than for fleeting moments on the day the client's case is heard in court.¹⁴³

Certainly, one reason for infrequent client interviews, and for the rushed nature of those interviews that actually occur, is the overwhelming caseloads of many indigent defenders.¹⁴⁴ Obviously, the more cases an attorney has, and the more responsibilities those cases entail, the less likely it is that an attorney will be able to meet with his or her clients early and often. This problem is of particular concern at present given the record number of people who are being arrested and incarcerated,¹⁴⁵ and the fact that an increasingly high percentage of the defendant population cannot afford to hire an attorney.¹⁴⁶

Growth in caseloads, however, does not appear to be the only reason for the lack of adequate interviewing. In a recent article, a question was raised whether public defenders even care about the level of dissatisfaction expressed by defen-

("The defender needs to win over the trust and confidence of the defendant, but the hurried attorney anxiously wishing to conclude the interview so that he can go to the next court and see other defendants, is not likely to invite and encourage his client's trust."); Platt et al., *supra* note 26, at 634 (noting the same conduct in juvenile court).

¹⁴³ See, e.g., Arcuri, *supra* note 38, at 179-80; Edward J. Berger & Roger Handberg, Jr., *Symbolic Justice: Disappointed Clients' Views of Their Attorneys*, 2 CRIM. JUST. REV. 113, 115 (1977); Casper, *supra* note 133, at 7; Thomas E. McLaughlin, *Through Prisoners' Eyes*, A.B.A. J., Feb. 1995, at 100; O'Brien et al., *supra* note 44, at 301; Wilkerson, *supra* note 135, at 142.

¹⁴⁴ See, e.g., Taylor et al., *supra* note 27, at 13 (suggesting that heavy caseloads may be the underlying reason for the infrequency with which the public defender sees his or her clients). For a discussion of the debilitating effects of caseload pressures on public defenders in general, see Klein, *supra* note 134, at 663-75.

¹⁴⁵ In the last fifteen years the number of people in prison or jail or on probation or parole has almost tripled. A record 5.3 million Americans were either incarcerated or on probation or parole at the end of 1995. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995 (1996).

¹⁴⁶ Up to 92% of defendants in urban areas are provided with counsel by the government. See CRIMINAL JUSTICE: LAW AND POLITICS (George F. Cole ed., 1993); Paul C. Drecksel, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV. 363, 367 n.21 (1991) (citing Jim Neuhard, *Free Counsel: A Right Not a Charity*, 14 N.Y.U. REV. L. & SOC. CHANGE 109 (1986) ("In metropolitan communities, over 90% of all criminal defendants cannot afford counsel.")).

dants.¹⁴⁷ Indeed, one study found that only two of twenty-seven public defenders interviewed stated that their clients' perceptions of their performance was an "important concern."¹⁴⁸ Apparently, some defense attorneys do not meet with their clients because they believe that what the client has to say is often irrelevant.¹⁴⁹ Others feel frequent client contact is unnecessary "handholding."¹⁵⁰ This failure to pursue a relationship is exacerbated when the client is incarcerated.¹⁵¹ For many appointed counsel, their failure to visit clients in jail is a function of having too many cases, but for others there are different reasons. One commentator suggests that visiting the jail is seen as "an unpleasant chore."¹⁵² In another study, defenders responded that jail visits are usually unimportant.¹⁵³

Law students are better situated to gain the trust and confidence of their clients. Unlike the appointed counsel scenario, in which a court assigned attorney is thrust upon a defendant, student attorneys are obliged by the terms of the student practice order to solicit a potential client's consent to student representation.¹⁵⁴ As a result, the defendant has a say as to who will be his or her advocate.¹⁵⁵ Requiring that defendants assent to student representation has other salutary effects because a part of the initial interview necessarily will include the student attempting to persuade the defendant to permit him or her to be their attorney. One commentator noted the positive effect on the lawyer-client relationship when public defenders actively try to "sell" themselves to clients.¹⁵⁶

¹⁴⁷ See Feeney & Jackson, *supra* note 23, at 411.

¹⁴⁸ John Rosecrance, *Accommodating Negative Client Perceptions: A Process of Neutralization*, 58 SOC. INQUIRY 194, 199 (1988).

¹⁴⁹ See, e.g., Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253, 261.

¹⁵⁰ Feeney & Jackson, *supra* note 23, at 408.

¹⁵¹ See, e.g., National Center for Defense Management, *Study of Indigent Services in Saginaw County, Michigan*, reported in LEFSTEIN, *supra* note 13, at app. F-36 (concluding that attorneys seldom visit clients in jail); National Center for Defense Management, *State of Kansas, Systems Development Study*, reported in LEFSTEIN, *supra* note 13, at app. F-20 (finding that attorneys rarely meet with their clients at the jail).

¹⁵² Flemming, *supra* note 149, at 261.

¹⁵³ Wilkerson, *supra* note 135, at 146.

¹⁵⁴ See *supra* note 48.

¹⁵⁵ For a discussion of the importance of choice to a defendant's perceptions of his or her attorney, see Casper, *supra* note 141, at 109; see also Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

¹⁵⁶ Wilkerson, *supra* note 135, at 148-50 ("The defender makes a strong impres-

Students also do not bear the burden of being government appointed. For defendants loathe to trust a lawyer paid by the same entity that pays the police and the prosecutor, the fact that the student attorney is affiliated with a school rather than a government agency is likely to be less threatening. Moreover, students generally do not have the kinds of friendly relationships with judges and prosecutors that tend to exacerbate clients' concerns about their lawyers' true allegiances. Furthermore, since students are not faced with the prospect of dealing with the same courtroom personnel on a daily basis, they do not have to make efforts—commonly seen by clients as inappropriate—to establish a particular type of relationship with the prosecutor or judge in order to achieve satisfactory results for future clients.

A student's interview of a client is vastly different from the one described by defendants who were represented by appointed attorneys. It is neither hurried nor brief, and students do not attempt to control the timing or content. Students delve into the circumstances of the alleged crime, the defendant's background, and whatever motivations of the defendant appear to be relevant.¹⁵⁷ For the students, this is the beginning of a process of engrossing themselves in their clients' lives and attempting to develop relationships of trust.¹⁵⁸

sion on the client and may well begin to gain his trust. This approach diminishes attorney-client tensions and forestalls the complaint of several interviewees that their attorneys did not even take notes—much less 'sell themselves' to the clients."). This is in fact what goes on with private attorneys. Upon meeting a potential client, much of that initial interview or consultation involves the attorney attempting to win the confidence of the client so that he or she will be hired. With nonpaying clients the effort to favorably impress a client is less, if at all, prevalent. See JEROME E. CARLIN, *LAWYERS ON THEIR OWN; A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 161-62 (1962) (arguing that clients are "expendable" when their lawyers do not rely on them for a fee); Alschuler, *supra* note 32, at 1244 ("A public defender, free of the constraints of a competitive marketplace, is less likely than a private defense attorney to conclude that producing satisfied customers is among his highest priorities.").

¹⁵⁷ Casper, *supra* note 133, at 6-7 (stating that public defenders usually did not ask about the "details surrounding the alleged crime, mitigating circumstances or the defendant's motives or backgrounds").

¹⁵⁸ For a discussion of the need for lawyers who work with the subordinated to familiarize themselves thoroughly with their clients' lives, and the failing of legal education to adequately train those who ultimately choose such a career, see Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 353-54 (1988-89) ("Generic legal education methodically disciplines students *not* to immerse

One commentator studied interviews of civil legal services attorneys and concluded that there was a "remarkable homogeneity of form and even detail," and that the attorneys described clients' problems in stereotyped ways "so that routinized courses of action [would] seem appropriate and be facilitated."¹⁵⁹ Scholars argue that indigent defense attorneys engage in similar stereotyping and routinized behavior.¹⁶⁰

The student approach to interviewing is geared toward learning all that the client has to say. Using techniques such as active listening, students try to convey empathetic understanding and thereby encourage their clients to participate thoroughly in the interaction.¹⁶¹ Students consider the component parts of interviewing and how to maximize the process.¹⁶² As a result, the interview is conducted in an open-ended way that maximizes the client's input rather than steered into a predetermined form that discourages or ignores what the client has to say.¹⁶³ Moreover, when counseling a client during an interview, students rarely, if ever, reduce the

themselves in their clients' lives—to extract and attend to only that which is 'legally' relevant"). Other criminal defense clinics also emphasize the need for students to develop trusting relationships with their clients. See, e.g., Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability and Age in Lawyering Cases*, 45 STAN. L. REV. 1807 (1993).

¹⁵⁹ Hosticka, *supra* note 138, at 606-07.

¹⁶⁰ See *infra* notes 250-262 and accompanying text.

¹⁶¹ See, e.g., DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 14, 20-23 (1977).

¹⁶² See Bellow & Johnson, *supra* note 94, at 673 (describing the components of the legal interview as "the structure of the questions employed, the organization of sequences, [and] the affective dimensions of response and counterresponse"); see also GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); MacCrate Report, *supra* note 112, at 167-68 (conducting an interview effectively requires, inter alia, an understanding of communication processes and interpersonal dynamics, question-asking techniques and employment of the process of formulating and revising hypotheses); Anthony G. Amsterdam, *Conducting the Interview* (1986) (unpublished materials for N.Y.U. Consumer Protection Clinic, on file with the author) (discussing concepts such as the art of listening and the form of questioning).

¹⁶³ For in-depth linguistic analyses of lawyer-client interactions, see, e.g., Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Toward an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991); Gay Gellhorn et al., *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245 (1994).

dialogue simply to telling the defendant what to do. They discuss the possible strategies or approaches that are available and seek their clients' input.

Obviously, this does not come naturally to all students. Through hypotheticals and simulations, students learn to think through the lawyer's role. They become familiar with the concept of "client-centered counseling," in which the lawyer counsels the client in ways designed to optimize the client's goals and decisionmaking.¹⁶⁴ During the early part of the fall semester, they observe institutional defense attorneys handle arraignments and conduct client interviews. Typically, that experience generates a great deal of discussion in class, with the majority of students expressing dismay at the manner and frequency with which defense counsel urged or told their clients what to do. The effect of these experiences is apparent in the students' performances in simulated arraignments that take place immediately thereafter. Students usually shy away from telling, or even advising, their "clients" how to proceed, preferring instead to fall back on comments such as, "It's up to you," or "It's your decision."¹⁶⁵

Students also tend to differ from institutional defenders with respect to the degree of motivation they bring to the task of developing relationships with clients, as well as the entire enterprise of criminal defense work. One study found that the strains on the attorney-client relationship affect appointed counsels' motivation to defend their clients vigorously.¹⁶⁶ There are also other factors that adversely affect institutional defenders' motivation. Criminal practice is viewed by the legal community as a low-status form of practice,¹⁶⁷ criminal prac-

¹⁶⁴ See generally DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). For a discussion of the substance and limitations of the client-centered approach of Binder, see Dinerstein, *supra* note 131; Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731, 1742-48 (1993).

¹⁶⁵ Over time, the students begin to experience and appreciate the differences between taking no position, advising their clients appropriately and simply telling their clients what to do. Although some have advocated that client-centered counseling requires that the attorney should not offer opinions as to which decision he or she favors, see, e.g., BINDER & PRICE, *supra* note 161, at 190-91, others disagree. See, e.g., Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987).

¹⁶⁶ HERMANN ET AL., *supra* note 13, at 85.

¹⁶⁷ See William J. Genego, *The Future of Effective Assistance of Counsel: Perfor-*

tioners are not highly regarded by the system in which they toil,¹⁶⁸ and defense attorneys are subject to public opprobrium.¹⁶⁹ The nature of Criminal Court practice further inhibits motivation. The Criminal Court has been compared frequently to an assembly line¹⁷⁰ with the primary goal of disposing of cases rather than accurate factfinding.¹⁷¹ Institutional defenders learn that hard work, such as preparing an extensive motion, is repeatedly ignored by judges,¹⁷² and that "shooting from the hip" is not actively discouraged.¹⁷³ Defenders stand by as their clients often are rearrested on new charges, drop out of various treatment programs, and fail to return to court. All too often the result is that public defenders develop what one study called a "patina of cynicism" about the work.¹⁷⁴ For many defenders, this cynicism manifests itself in an attitude that "they're all guilty anyway."¹⁷⁵ One scholar addressed the

mance Standards and Competent Representation, 22 AM. CRIM. L. REV. 181, 211 (1984) (poor working conditions and low pay make criminal practice less attractive to those entering the legal profession); Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RES. J. 155, 166-67 (lawyers rated criminal defense as a low prestige legal specialty); Slovenko, *Attitudes on Legal Representation of Accused Persons*, 2 AM. CRIM. L.Q. 101 (1964) (students cite low status and poor pay as the primary reasons for not pursuing criminal law); Andrew S. Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEX. L. REV. 289 (1964).

¹⁶⁸ See, e.g., Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 983 (1992) (Poverty lawyers labor in a system that "undervalues their work psychically, professionally, and, of course, economically.").

¹⁶⁹ See, e.g., James M. Pool, *Defending the "Guilty" Client*, 12 MASS. L. REV. 11 (1979).

¹⁷⁰ See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) ("There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.'"); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967).

¹⁷¹ HERMANN ET AL., *supra* note 13, at 15, 82 (the system is more administrative than adjudicative); Feeney & Jackson, *supra* note 23, at 373 (the norms of the adversary system may not have "full sway" in the misdemeanor courts).

¹⁷² HERMANN ET AL., *supra* note 13, at 83.

¹⁷³ HERMANN ET AL., *supra* note 13, at 83.

¹⁷⁴ HERMANN ET AL., *supra* note 13, at 83 ("[T]he acquisition of a patina of cynicism is encouraged by informal norms thought functional for survival.").

¹⁷⁵ See, e.g., Dennis R. Eckart & Robert V. Stover, *Public Defenders and Routinized Criminal Defense Processes*, 51 J. URBAN L. 665, 677 (1974) (only one public defender that was interviewed felt that "very few" of his clients were guilty, and he had only been a public defender for a brief period); Rosecrance, *supra* note 148, at 200 (One public defender commented, "Let's cut the bullshit! Our clients are mostly guilty."); David Sudnow, *Normal Crimes: Sociological Features of the Penal*

prevalence of "burnout" among public defenders and urged the need to find ways to sustain the motivations of public defenders.¹⁷⁶

Students do not report feeling the sting of public scorn, and they have not experienced the depressing realities of their clients accumulating new charges or failing to comply with court orders. Students also have not yet been oppressed by the monolithic machinery of the Criminal Court. In sharp contrast to institutional defenders' "patina of cynicism" and assumptions of their clients' guilt, students approach their tasks with a high degree of enthusiasm and, often, optimism. If they are not always convinced of their clients' innocence, they are usually emphatic about the fallibility of the prosecution's case and the likelihood of an acquittal. In those cases in which the chances of prevailing at trial are slim and a guilty plea seems advisable, students tend to channel their energy and enthusiasm into obtaining the best possible plea and sentence. Moreover, in guilty plea cases, as in cases likely to go to trial, students work wholeheartedly to help the client without regard to the client's guilt or innocence. Frequently, that help takes the form of arranging drug programs, training programs and the like.¹⁷⁷

The consequence of the factors discussed above is that students are more likely to gain the vital trust and confidence of their clients. The by-product of this necessary relationship is enhanced effectiveness of representation.¹⁷⁸ One aspect of

Code in a Public Defender Office, 12 SOC. PROBS. 255 (1965); Wice & Suwak, *supra* note 28, at 176.

¹⁷⁶ Ogletree, *supra* note 116.

¹⁷⁷ It has been observed that students in all sorts of clinics are highly motivated. See, e.g., Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976); Ogletree, *supra* note 116, at 1292-93; Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287, 315 (1989).

¹⁷⁸ Commentators have suggested that if a lawyer achieves understanding of his or her client, the lawyer will provide better services. See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2698-99 (1993). Others have emphasized the importance of empathy. See Ogletree, *supra* note 116. Ogletree defines empathy as requiring the listener to hear and understand her clients, and to have compassion for them. Ogletree, *supra* note 116, at 1272. He argues that if a lawyer takes an empathic view of the client, "the quality of . . . representation often will improve . . ." Ogletree, *supra* note 116, at 1274. Some have stressed particularly the importance of empathy for conducting interviews. See, e.g., ROBERT BASTRESS & JOSEPH HARBAUGH, *INTERVIEWING, COUNSELING AND*

that improved representation is the student attorney's ability to learn the relevant facts, discussed below.

B. *Fact Investigation*

It is beyond dispute that fact acquisition is critical to an effective defense.¹⁷⁹ ABA Standard for Criminal Justice 4-3.2

NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 116 (1990) (stating empathy is "the sine qua non for effective interviewing"); BINDER ET AL., *supra* note 164, at 40-42 (stating an empathetic lawyer more effectively interviews the client).

There are additional reasons why it is important that the defendant have a satisfactory relationship with his or her attorney. Jonathan Casper suggests that there are instrumental and normative grounds. Casper, *supra* note 133, at 9. The instrumental rationale posits that if the criminal justice system intends to try to teach a defendant how to behave, it must not be seen as "playing the same sorts of 'games' that the defendant himself is used to playing." Casper, *supra* note 133, at 9. Others have noted that if defendants blame others for their predicaments, then the possibility of rehabilitation is compromised. See, e.g., Dahlin, *supra* note 134, at 118 (noting that public defenders do not foster "increased belief in the fairness of the legal system and greater willingness to comply with the dictates of the law"); Klein, *supra* note 134, at 661-62 (arguing that the bitterness felt by defendants toward their appointed attorneys would "increase the anger and resentment felt by a convicted defendant toward 'the system,' after he is released from prison"); Rosecrance, *supra* note 148, at 195, 203 (rehabilitation is problematic in that the defendants blame their attorneys and the system, and see no need to change their behavior); Silberman, *supra* note 133, at 302 ("Nothing would contribute more to respect for law—and indirectly, thereby, to a reduction in crime—than to provide defendants with the 'effective assistance of counsel' guaranteed them by the Constitution.").

Casper also proposes a normative ground for caring about the defendants' perceptions of their relationship with their attorneys. Casper, *supra* note 133, at 9. Casper posits that "[t]he obligation to give citizens the feeling that they have been treated fairly is necessary both to protect their sense of integrity and dignity and to maintain the legitimacy of governmental institutions." Casper, *supra* note 133, at 9. Some commentators have argued that perceptions of fairness, and not just the results of their cases, are important to defendants. See, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW AND SOC'Y REV. 237 (1978); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW AND SOC'Y REV. 483 (1988); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW AND SOC'Y REV. 51 (1984).

A lawyer-client relationship grounded upon trust and confidence is also important so that poverty lawyers do not dominate their clients and thereby replicate the injustices their clients already feel. See Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469, 471 (1992); see also BINDER ET AL., *supra* note 164 (regarding client-centered counseling).

¹⁷⁹ See, e.g., ABA STANDARDS, *supra* note 124, § 4-4.1, at 181 ("Facts form the basis of effective representation."); Stover & Eckart, *supra* note 22, at 275 (stating

provides that "[a]s soon as practicable, defense counsel should seek to determine all relevant facts known to the accused."¹⁸⁰ The commentary to Standard 4-3.2 states that "[t]he client is usually the lawyer's primary source of information for an effective defense."¹⁸¹ If an attorney has a relationship of trust and confidence with his or her client, he or she is more apt to learn the critical facts. On the other hand, if the lawyer-client relationship is characterized by suspicion and mistrust, the attorney is less likely to learn the necessary facts, and the defense will suffer accordingly. One commentator, discussing the sequential activities lawyers utilize as part of legal problem-solving,¹⁸² states that the "obvious starting point" is getting the relevant facts from the client.¹⁸³ He suggests that "[i]f this first step is faulty it often undermines what follows."¹⁸⁴

ABA Standard 4-4.1 exhorts the defense attorney to engage in a "prompt" investigation.¹⁸⁵ The consequences of failure to investigate in a timely fashion can be irreparable. As the authors of an extensive study of the lower courts concluded, "When defense counsel does not engage in such investiga-

that fact investigation is "crucial to effective plea bargaining").

¹⁸⁰ ABA STANDARDS, *supra* note 124, § 4-3.2.

¹⁸¹ ABA STANDARDS, *supra* note 124, § 4-3.2, at 152; see *United States v. DeCoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) ("Realistically, a defense attorney develops his case in large part from information supplied by his client.").

¹⁸² For a detailed discussion of the conceptual skill of problem solving, see *infra* notes 241-246 and accompanying text.

¹⁸³ Rosenthal, *supra* note 45, at 271.

¹⁸⁴ Rosenthal, *supra* note 45, at 271; see Flemming, *supra* note 149, at 271 (citing to Lynn Mather, *The Outsider in the Courtroom: An Alternative Role for Defense*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 283 (Herbert Jacob ed., 1974) (describing a case where a defendant's failure to inform her attorney of her prior criminal record led to her going to trial, getting convicted and, after the extent of her record was discovered, receiving a lengthy prison sentence)); Mounts, *supra* note 132, at 486-87 ("Even if client satisfaction with defender services is not deemed to be of primary importance as a goal in and of itself, the effect of client dissatisfaction can be important. One not uncommon effect is that clients simply refuse to cooperate with defenders, to tell defenders their side of the charges, to assist in locating witnesses, etc. Such lack of cooperation in some cases has disastrous implications on the representation that can be provided.").

¹⁸⁵ *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968) ("Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed . . ."); ABA STANDARDS, *supra* note 124, § 4-4.1 ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . .").

tion, the defendant can be harmed by the inevitable narrowing of vision when the full flexibility of disposition is not considered."¹⁸⁶

As explained above, appointed counsel usually do not develop the types of relationships with their clients that foster open, complete discussions of the facts. As a result, they lack information necessary to represent their clients thoroughly. These same defense attorneys often fail to engage in pretrial investigation such as interviewing witnesses, obtaining and inspecting evidence, and viewing the scene of the alleged crime.¹⁸⁷ One survey of defense attorneys revealed an "absence of adequate fact investigation in a substantial proportion of cases."¹⁸⁸ Just as is the case with respect to deficiencies in client interviews,¹⁸⁹ it is by no means clear that the lack of appropriate investigations is due solely to high caseloads. As the authors of one study observed, "various factors prompt defense counsel to define the problem at hand as one of defending a guilty client. The situation is construed as 'standard,' and, therefore, pre-established organizational routines can be executed."¹⁹⁰ As a result, the need for essential fact investiga-

¹⁸⁶ KRANTZ ET AL., *supra* note 2, at 184. The need for thorough fact investigation is especially great for defense attorneys in jurisdictions like New York State, where the defense is not entitled to police reports and other vital information until after the jury is sworn. See C.P.L. § 240.45 (McKinney 1993); *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961). Although the defendant can seek subpoenas for a number of these documents, many judges refuse to sign them. See, e.g., *People v. Morrison*, 148 Misc. 2d 61, 559 N.Y.S.2d 1013 (N.Y.C. Crim. Ct. N.Y. County 1990); *People v. Cruz*, N.Y. L.J., Oct. 1, 1990, at 26 (N.Y.C. Crim. Ct. N.Y. County 1990).

¹⁸⁷ See, e.g., McConville & Mirsky, *supra* note 13; Lefstein, *supra* note 13; Note, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ. ST. L.J. 557, 576, 579.

¹⁸⁸ Doyel, *supra* note 122, at 1027; see Eckart & Stover, *supra* note 175, at 676 ("[I]n the early stages of a case, the public defender usually devotes minimal time and effort to an investigation of the facts."); Joseph D. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1246 (1970) ("the problem of counsel's failure to investigate . . . is a real one"); Klein, *supra* note 134, at 664 ("The most frequently successful appeal based upon ineffective assistance of counsel arises from the failure of counsel to adequately investigate the case and to call defense witnesses."); Levine, *supra* note 25, at 1371 (the most frequent ineffective assistance claim is the failure to investigate or introduce defense evidence).

¹⁸⁹ See *supra* notes 147-153 and accompanying text.

¹⁹⁰ Eckart & Stover, *supra* note 175, at 677. For a discussion of the importance of defining the problem in the context of the conceptual skill of problem solving,

tion is not recognized or is omitted on the basis of often erroneous assumptions that it is unnecessary or certain to prove fruitless.¹⁹¹

Students often develop an affiliation with their clients that leads to a freer flow of information and discussion of the facts.¹⁹² The facts learned from their clients lead inevitably to the discovery of more facts (e.g., names and addresses of witnesses, important information regarding the scene and so forth). Moreover, because students generally do not fall into the conceptual trap of defining the problem as one of defending a guilty client, they do not lapse into routinized procedures. Instead, the students employ a version of what Professor Anthony Amsterdam has referred to as "hypothesis formulation and testing in information acquisition."¹⁹³ They select hypotheses to guide their initial information gathering, and then revise them as they learn additional information. In the course of acquiring information and testing various defense theories, students are able to avoid the "narrowness of vision" that afflicts those who fail to engage in fact investigation.¹⁹⁴

Furthermore, the students' lack of familiarity with courthouse routines liberates their approaches to information gathering.¹⁹⁵ In one clinic case, a student moved for the names and addresses of the prosecution's witnesses. The judge granted the motion readily and noted her surprise that other defense attorneys did not make the same request.¹⁹⁶ In another

see *infra* notes 247-249 and accompanying text.

¹⁹¹ See, e.g., Stover & Eckart, *supra* note 22, at 277 (stating defense attorneys underrate the importance of fact investigation as it relates to plea bargaining).

¹⁹² See *supra* notes 154-178 and accompanying text.

¹⁹³ Amsterdam, *supra* note 17, at 614; see MacCrate Report, *supra* note 112, at 163-72.

¹⁹⁴ See *supra* note 186 and accompanying text.

¹⁹⁵ The MacCrate Report, in its discussion of the skill of problem solving, notes the salutary effects of creative approaches to problems. The report maintains that "[e]ffective problem solving requires a person who is not content to follow customary practices blindly or to accept the advice of a more experienced attorney uncritically." MacCrate Report, *supra* note 112, at 151. For a more detailed discussion of problem solving, see *infra* notes 241-246 and accompanying text.

¹⁹⁶ The point is not that the student came up with a novel argument or cited some arcane case directly on point. The student merely read a statute and believed she was entitled to certain information. Other defense attorneys in the courtroom informed her that they were aware of the existence of such a motion but, having never seen it granted, simply stopped making it.

case, a student asked a judge to sign subpoenas for various police reports. Much to the astonishment of everyone in the courtroom, the judge agreed.¹⁹⁷

Student investigations are "prompt" as urged by the ABA Standards.¹⁹⁸ These "prompt" investigations serve several purposes. The more information you have, the better you are positioned to negotiate on your client's behalf.¹⁹⁹ Gathering information pursuant to early investigations can also facilitate the development of a relationship of trust and confidence with a client.²⁰⁰ If, as is likely, there is still some degree of skepticism or mistrust after the initial interview, it often can be overcome by a prompt investigation. If the student is able to achieve something tangible quickly on behalf of his or her client, and then inform the client of this accomplishment, their relationship will likely improve.²⁰¹

C. Negotiation

A key component of negotiating is procuring the pertinent factual and legal information necessary to assess the advisability of a negotiated resolution, and to plan and execute an effective

¹⁹⁷ Again, this was not a case of a student unearthing some unknown rule or making an especially creative legal argument. It was more a matter of the student being unencumbered by the courthouse knowledge that although judges are permitted to sign subpoenas for police reports, they routinely decline to do so. *See supra* note 186. Not knowing the futility of her request and the impression it might give that she was unaware of how to practice law in the Criminal Court, the student made her request unflinchingly.

¹⁹⁸ ABA STANDARDS, *supra* note 124, § 4-4.1. ABA STANDARD § 4-6.1(6) states that "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation . . . has been completed . . ." ABA STANDARDS, *supra* note 124, § 4-6.1. Commentators have argued that fact investigation is an essential precondition to plea bargaining. *See, e.g.,* Alschuler, *supra* note 32. Defense counsel, including students, often violate this admonition. As Table 1.1 reflects, 48% of the clients of institutional defenders plead guilty at arraignments, as do 27% of students' clients. Arraignment pleas, by definition, are typically entered without any independent fact investigation.

¹⁹⁹ For a discussion of negotiation, see *infra* notes 202-211 and accompanying text.

²⁰⁰ Many of the lawyering skills or competencies addressed in this Article are interrelated. *See* MacCrate Report, *supra* note 112, at 136.

²⁰¹ It is one thing to try to develop a relationship with a defendant by being understanding and empathetic. It is quite another to be able to show the defendant that you are actively and immediately working on his or her behalf. *See, e.g.,* Amsterdam, *supra* note 130, at 1-78.

tive negotiation strategy.²⁰² As suggested above, students are adept at acquiring the necessary information through client interviews and factual investigations.

As reflected in Tables 1.4, 2.4 and 3.4, guilty pleas in cases handled by students reflect a higher percentage of charge reductions. Typically, as a result of plea negotiations, a misdemeanor is reduced to a violation.²⁰³ Several explanations are possible. First of all, students' negotiations are informed by a knowledge of the facts. That knowledge is amassed from interviews with clients, immediate fact investigation, and a courtroom approach that is not constricted by familiarity with routine practices. Armed with factual information, the student is in a better posture to plea bargain and seek a plea to a reduced charge.²⁰⁴

The level of a defender's commitment to, and concern about, the client also likely affects plea negotiations. As discussed above, students endeavor to gain their clients' trust and confidence and are motivated to work diligently on their behalf. One commentator has suggested that if an attorney feels empathy for his or her client, he or she is more likely to care deeply and therefore defend zealously.²⁰⁵ One can imagine that zealousness translating into persistent negotiating. Institutional defenders, on the other hand, are often handicapped by their lack of motivation to defend their clients vigorously,²⁰⁶ and are presumably less inclined to earnestly and aggressively pursue favorable dispositions.

²⁰² MacCrate Report, *supra* note 112, at 185.

²⁰³ See *supra* note 62.

²⁰⁴ The literature on plea bargaining is voluminous. See, e.g., ABRAHAM BLUMBERG, CRIMINAL JUSTICE (1967); MILTON HEUMANN, PLEA BARGAINING (1978); Alschuler, *supra* note 32; Malcolm F. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (1982); Stephen J. Schulhofer, *No Job Too Small: Justice without Bargaining in the Lower Courts*, 1985 AM. B. FOUND. RES. J. 519. The critical point for present purposes is that in order to negotiate a disposition of the case effectively, an attorney must have investigated the facts. See, e.g., Michael Mello, *Rough Justice: Reflections on the Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert S. Vance*, 42 ALA. L. REV. 1197, 1248 (1991) (inadequate consultation with defendants and lack of witness interviewing render defense counsel ill-equipped to plea bargain); Stover & Eckart, *supra* note 22, at 275, 277; cf. *supra* note 198 (discussing fact investigation in the context of guilty pleas at arraignment).

²⁰⁵ Ogletree, *supra* note 116, at 1274.

²⁰⁶ See *supra* notes 166-175 and accompanying text.

Finally, students' unfamiliarity with courthouse lore regarding plea negotiating allows them to strive for results that might seem unattainable to an experienced defender. In some situations, the charges in a misdemeanor complaint are reduced as a matter of course pursuant to a plea.²⁰⁷ But in cases in which the defendant has a lengthy criminal record, it is rare that the prosecutor will offer a plea to a reduced charge. To an institutional defender the knowledge that prosecutors rarely reduce charges in that situation serves to deter them from even asking for this result. In the court system, as with other organizations, displaying knowledge of the way things are done is viewed as a sign of competence.²⁰⁸ Not wanting to appear uninformed or incompetent, the defender may refrain from seeking a charge reduction. Because the students are not restricted by this level of "knowledge," they comfortably pursue the "obviously" futile course of asking the prosecutor to reduce the charges. Although assistant district attorneys typically balk at the idea at first, they have been persuaded to offer such a reduction.²⁰⁹ A related factor that might explain the increased number of charge reductions in student cases is students' unencumbered, creative approach to possible dispositions or solutions.²¹⁰ They are able to suggest novel, innovative dispositions precisely because they are not constrained by the knowledge of "how things are done."²¹¹ Often those suggestions are instrumental in convincing the prosecutor to reduce the charges.

²⁰⁷ For example, in a misdemeanor case which represents the defendant's first arrest, the prosecution will often reduce the charges to a violation for the purpose of a plea bargain.

²⁰⁸ See, e.g., Flemming, *supra* note 23, at 397 (citing Sudnow, *supra* note 175).

²⁰⁹ Not only is asking for charges to be reduced when the defendant has an extensive criminal history seen as something only the uninformed would do, apparently so is the mere fact of calling the prosecutor to discuss possible dispositions. Numerous prosecutors have told students that it is rare for defense attorneys to call them to negotiate a plea. Although this could be explained by the accurate perception that charges will not be reduced, or that the likelihood of reaching an agreeable disposition is remote, it results in lost opportunities for successful negotiation.

²¹⁰ See, e.g., MacCrate Report, *supra* note 112, at 150 (stating creative approaches to problem solving require an attorney amenable "to explore novel and imaginative approaches").

²¹¹ MacCrate Report, *supra* note 112, at 182.

D. Counseling

The lawyer's role as counselor essentially begins with the initial interview of the client, since the relationship the attorney forms with the accused in that interview will affect whether he or she can function effectively as a counselor.²¹² As commentary to the ABA Standards recognizes, counsel must use that interview, along with regular follow-up meetings, to win the client's trust and confidence.²¹³ The ABA Standards further explain that counsel should use these meetings to keep the client "informed of the developments in the case," the "progress of preparing the defense,"²¹⁴ and the status and substance of plea negotiations with the prosecutor.²¹⁵

Appointed counsel do not consistently use the initial interview to form the desired relationship with the client,²¹⁶ they do not routinely engage in fact investigation that could help engender that sort of bond,²¹⁷ and they do not always keep their clients informed of developments in the case through "early and frequent" meetings.²¹⁸ Rather, they often interact with their clients only on scheduled court dates in court corridors or holding cells.²¹⁹

²¹² See *supra* note 127 and accompanying text.

²¹³ ABA STANDARDS, *supra* note 124, § 4-3.1, at 149 ("[E]arly and frequent discussions . . . should help to foster the relationship of trust and confidence for which defense counsel should strive.").

²¹⁴ ABA STANDARDS, *supra* note 124, § 4-3.8. The commentary to this standard notes that a common accusation against all attorneys is the failure to keep clients informed, and that in criminal cases, where it is difficult enough to establish a relationship of trust and confidence, the ability to achieve such a relationship is made harder still if the client is not kept informed. ABA STANDARDS, *supra* note 124, § 4-3.8, at 177.

²¹⁵ ABA STANDARDS, *supra* note 124, § 4-6.2.

²¹⁶ See *supra* notes 131-143 and accompanying text.

²¹⁷ See *supra* notes 187-188 and accompanying text.

²¹⁸ See *supra* note 143 and accompanying text; Feeney & Jackson, *supra* note 23, at 409 (public defenders often fail to keep their clients informed); Grano, *supra* note 188, at 1246 ("A frequent assertion is that counsel has not spent adequate time in consultation with the accused. Often there has been only one meeting of short duration or a few meetings which together amount to little consultation."); Klein, *supra* note 134, at 668 ("[E]valuations of defense systems have found grossly inadequate communication between attorney and client.").

²¹⁹ See, e.g., McConville & Mirsky, *supra* note 13, at 759; Mounts, *supra* note 132, at 486 (stating that the lack of attention manifested by unreturned phone calls and lack of visits in the jail make defendants hostile toward their attorneys).

As suggested earlier, students endeavor to cultivate the recommended relationship with their clients during the initial interview.²²⁰ Moreover, they engage in prompt investigation in order to gather facts, and in order to inform their clients of the concrete, tangible things they are doing on their behalf so as to advance the attorney-client relationship.²²¹ Students also meet with their clients early and often whether at jail, their client's home, the Clinic office or whatever location is convenient for the client.²²²

On those occasions when appointed counsel do meet with their clients, they do not invariably inform the defendants of the status of the case or seek their input on possible defense strategies.²²³ Instead, client counseling is often reduced to the attorney's telling the defendant what to do, and this advice is usually to plead guilty.²²⁴ Moreover, because the defender usually has not yet contacted the prosecutor to begin plea negotiations at this point, the advice usually takes the form of a general admonition to plead guilty rather than a discussion of the relative merits of a specific plea offer.²²⁵

Students, in contrast, attempt to gather facts and take affirmative steps on behalf of their clients. They promptly contact the prosecutor to begin the process of plea negotiations. When they meet with their clients, they inform them of the status of the case and seek input on possible defense strategies. The result of these efforts is likely to be the creation of the type of relationship envisioned by the ABA Standards.

²²⁰ See *supra* notes 157-163 and accompanying text.

²²¹ See *supra* notes 198-201 and accompanying text; see also MacCrate Report, *supra* note 112, at 178 (effective counseling requires that the lawyer acquire the relevant factual and legal information as well as information about the client's perspective on the decisions to be made).

²²² One client with a considerable criminal record told his student attorney that he had never before had counsel visit in the jail. Students have reported similar comments from their clients on numerous occasions.

²²³ See *supra* notes 140-142 and accompanying text.

²²⁴ Arcuri, *supra* note 38, at 183 ("The heavy majority of respondents who were against plea bargaining reported that they were pressured into pleading guilty."); Casper, *supra* note 141, at 106 (results of interviews with defendants revealed that "[m]ost of the men reported that among the first words uttered by their public defender were: 'I can get you—if you plead guilty.'"); Wilkerson, *supra* note 135, at 143 ("Real or imagined pressure to plead guilty is a frequent complaint of defender clients.").

²²⁵ See *supra* note 209.

The effect of this relationship can be seen when examining the rate of bench warrants issued in students' cases. Table 2.2 reflects that the clients of institutional defenders failed to return to court at twice the rate of students' clients.²²⁵ Indigent defendants not only fail to develop a relationship with their attorneys based on the interviewing and counseling practices of their lawyers, but commentators have observed that indigent defendants usually do not see the same attorney at each court appearance.²²⁷ One can easily imagine that if a defendant feels confidence and trust in his or her attorney, he or she is less likely to fear being "sold out" and therefore more likely to return to court. If a defendant truly has confidence and trust in his or her attorney, and believes there is somebody actively fighting on his or her behalf, he or she has less incentive to flee.

Tables 1.2 and 2.2 show different plea rates for students as opposed to other defenders at both the arraignment and post-arraignment stages. As explained above, appointed counsel frequently urge the defendant to plead guilty.²²³ Although it is often in the defendant's interest to plead guilty to limit exposure to greater punishment,²²⁹ and it is certainly "proper for the lawyer to use reasonable persuasion to guide the client to a sound decision,"²³⁰ the plea practices of institutional de-

²²⁵ See *supra* note 83.

²²⁷ McConville & Mirsky, *supra* note 13, at 752 (The 18-B "panel attorney designated to represent the defendant did not appear in over 40% of required court appearances"), 840-44 (discussing the low courtroom appearance rates of Legal Aid Society attorneys).

²²⁸ See *supra* note 224.

²²⁹ See, e.g., LYNN M. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL-CASE DISPOSITION (1979) (stating public defenders are motivated by what they believe are the defendants' concerns with minimizing punishment); Flemming, *supra* note 23, at 401; Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 62 (1967) (discussing defense theory that "emphasizes decisions most likely to maximize gain and minimize loss in the negatively valued commodity of penal 'time'"). Much has been written about the practice of judges sentencing defendants convicted after trial more severely than if they had entered guilty pleas. See, e.g., MALCOLM F. FEELEY, THE PROCESS IS THE PUNISHMENT—HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Alschuler, *supra* note 32; Brereton & Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW AND SOC'Y REV. 45, 55-61 (1981-82).

²³⁰ ABA STANDARDS, *supra* note 124, § 4-5.1, at 198; see ABA STANDARDS, *supra* note 124, § 4-5.2, at 201 ("counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice"); Alschuler, *supra* note 32, at

fenders are a cause for concern. Defendants report that all too often their interactions with their appointed counsel are comprised solely of the defender pressuring them to plead guilty.²³¹ While in some circumstances it may be permissible, or even appropriate, for the defender to urge that the client plead guilty, clearly it should not be the entire basis of the attorney-client relationship.

The sheer number of pleas also requires close inspection.²³² Table 1.2 reflects that almost half of the cases handled by appointed counsel resulted in guilty pleas at the defendant's arraignment. These numbers suggest that the lawyers may not be reserving the plea option for those cases in which it is necessary in order to protect the client from "disaster,"²³³ or in which the plea option is clearly in the client's "best interests."²³⁴ It is particularly problematic that these

1309; Amsterdam, *supra* note 130, at 1-229 ("[C]ounsel may and must give the client the benefit of counsel's professional advice on this crucial decision; and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is in fact in his or her best interest.").

²³¹ See *supra* note 224.

²³² As Table 3.2 shows, the overall guilty plea rate for institutional defenders is 71%. The high rate of misdemeanor guilty pleas in New York City is comparable to that of the rest of the country. See, e.g., BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 512-13, 518 (1992) (regarding guilty plea rates for the 75 largest counties in state courts in 1989). Guilty pleas represented 74% of total outcomes in federal district courts in 1991. *Id.* Throughout the country, criminal trials are a rarity. See, e.g., FEELEY, *supra* note 229, at 127; Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition after Strickland*, 17 LOY. L.J. 203, 223 (1986). In New York City Criminal Court, less than 1% of all cases go to trial. See *supra* note 60.

Plea bargaining and the role of the defense attorney have been discussed in numerous articles. See *supra* note 204. Commentators have suggested sundry reasons for the high incidence of pleas in cases handled by institutional defenders. These include high caseloads, institutional pressures, organizational cooptation and bureaucratic allegiances. See, e.g., Alschuler, *supra* note 32; Blumberg, *supra* note 40; Klein, *supra* note 134; Skolnick, *supra* note 229; Sudnow, *supra* note 175. For present purposes, the incentives that motivate defense counsel to urge their clients to plead guilty are less relevant than the manner in which they counsel their clients, and whether a guilty plea is a prudent decision.

²³³ AMSTERDAM, *supra* note 130, at 1-229.

²³⁴ ABA STANDARDS, *supra* note 124, § 4-5.1, at 198.

pleas are taking place at the arraignment stage where the defense attorney has usually not had an opportunity to conduct any independent investigation.²³⁵

One method of evaluating the wisdom of these arraignment pleas is to examine what happens to misdemeanor cases that are not completed at arraignment. If defendants are more readily convicted and/or receive harsher sentences post-arraignment, then the possibility exists that pleas at arraignments enable the client to avert "disaster," or at the very least, are in the defendant's "best interest." Table 2.2 shows the dispositions for cases that were continued past the defendant's arraignment. The students' cases indicate that rather than suffering from not pleading guilty at arraignment, more than half of the defendants had their cases either dismissed or adjourned in contemplation of dismissal ("ACD"). There is no indication, therefore, that defendants typically suffer worse consequences by not pleading guilty at arraignment.²³⁵

Students labor for relationships of faith and confidence with their clients and employ a client centered approach to counseling.²³⁷ They listen to what their clients have to say, aspire for clients to participate in discussions of options and strategies, and seek to ensure that clients meaningfully participate in choosing the course of action that best addresses their needs and goals.²³⁸ A component of this approach is empathy for their clients.²³⁹ Commentators have singled out empathy as a key ingredient of counseling.²⁴⁰ This model of the law-

²³⁵ See *supra* note 198.

²³⁶ For some defendants, the most important consideration may be to resolve the case as soon as possible. In that situation, although the outcome of the case as measured by likelihood of conviction and/or sentence received does not become more severe, the defendant may feel worse off by virtue of having to come back to court repeatedly. In that situation, a plea at the arraignment might be the best result.

²³⁷ BINDER ET AL., *supra* note 164.

²³⁸ BINDER ET AL., *supra* note 164.

²³⁹ See, e.g., Dinerstein, *supra* note 131, at 551 ("The client-centered lawyer's attention to his client's goals also can translate into increased empathy for the client."); Ogletree, *supra* note 116, at 1281 ("The empathetic lawyer quite naturally embraces the client-centered approach . . .").

²⁴⁰ See, e.g., BASTRESS & HARBAUGH, *supra* note 178; Ogletree, *supra* note 116, at 1274 (empathy allows attorneys to better counsel because it enables them to more fully hear their clients).

yer-client relationship does not result in students taking a "hands off" position on issues such as whether to plead guilty. They do exert persuasion, but it is circumscribed by the boundaries suggested by the ABA Standards and others, and even in those situations it does not become the sine qua non of their interactions with their clients.

E. Problem Solving

The MacCrate Report begins its inventory of fundamental lawyering skills with an analysis of the elements of problem solving.²⁴¹ The report breaks the skills and concepts involved in problem solving into five components: identifying and diagnosing the problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas.²⁴²

The report also calls for a "holistic" approach, whereby the attorney considers the "legal, institutional, and interpersonal frameworks in which the problem is set,"²⁴³ and for the appli-

²⁴¹ Problem solving is viewed by many commentators as being at the core of lawyering. See, e.g., Cort & Sammons, *supra* note 93, at 406 (including problem solving as one of their six major lawyering competencies); Rosenthal, *supra* note 45, at 270 (observing that "[l]awyers essentially perform a problem solving service").

It is also viewed by many clinicians as an integral part of clinical methodology. See, e.g., Bellow & Johnson, *supra* note 94, at 674 ("The primary orientation of the course is directed toward the dynamics of problem-solving . . .").

²⁴² MacCrate Report, *supra* note 112, at 142-48. Other commentators have made similar delineations. See, e.g., Bellow & Moulton, *supra* note 162, at 304-05; Cort & Sammons, *supra* note 93, at 441-43 (problem solving is comprised of identifying and diagnosing problems; developing, evaluating and selecting alternative solutions and strategies; and implementing strategies); Rosenthal, *supra* note 45, at 270-71 (noting that "[a]lmost all systematic problem solving involves five sequential sets of activities. These are: 1. getting information; 2. sifting it; 3. devising a preliminary strategy for going forward; 4. putting that strategy into operation; and 5. reviewing and revising the strategy in the light of new experience").

Scholars have also considered the many conceptual skills that are utilized in problem solving. For discussion of this subject, see, e.g., Amsterdam, *supra* note 17, at 614 (describing the problem solving technique of "ends-means thinking").

²⁴³ MacCrate Report, *supra* note 112, at 142. The ABA Standards sound a similar theme. See ABA STANDARDS, *supra* note 124, § 4-3.6, commentary at 172 ("Moreover, counsel's role at the pretrial stage is not limited to formal legal steps that should be taken in the accused's behalf. The accused often needs assistance with personal relationships that have been disrupted because the accused has been

cation of sound judgment and creativity.²⁴⁴ Discussing creativity, the report imagines an attorney "willing to look at situations, ideas, and issues in an openminded way; to explore novel and imaginative approaches."²⁴⁵ The report's definition of judgment is similar: "Effective problem solving requires a person who is not content to follow customary practices blindly or to accept the advice of a more experienced attorney uncritically."²⁴⁶

Institutional defenders commonly falter at the very first step of the problem solving process. An essential prerequisite for effective problem solving is to obtain the relevant information from the client at the initial interview.²⁴⁷ Because appointed counsel often fail to do this,²⁴⁸ the entire process of problem solving is adversely affected.²⁴⁹

Some have suggested that rather than working through a process of problem solving, appointed counsel learn, integrate and act in accordance with the standard operating procedures of the court. As one commentator observed about the defense attorney's role in the operation of the Criminal Court, "Just as a child learns to sort various four-legged animals into distinct categories of dog, cat, cow and so on, the members of the work group develop concepts about types of crime and types of criminals."²⁵⁰ Another commentator similarly described the defender as learning how to classify cases into various "normal crimes."²⁵¹ In this approach, "institutional defenders no long-

charged with a crime. This may require advising the accused concerning relationships with an employer, landlord, or creditors, or even direct efforts by the lawyer to persuade them to defer adverse action until final disposition of the case.").

²⁴⁴ MacCrate Report, *supra* note 112, at 150.

²⁴⁵ MacCrate Report, *supra* note 112, at 150.

²⁴⁶ MacCrate Report, *supra* note 112, at 151.

²⁴⁷ Rosenthal, *supra* note 45, at 271.

²⁴⁸ See *supra* notes 179-187 and accompanying text.

²⁴⁹ Rosenthal, *supra* note 45, at 271. The MacCrate Report discussion of problem solving begins with an explication of the means of identifying and diagnosing the problem. MacCrate Report, *supra* note 112, at 142-43. The attorney's failure to learn the relevant facts from his or her client and from investigation certainly impedes the ability to identify and diagnose.

²⁵⁰ CRIMINAL JUSTICE: LAW AND POLITICS, *supra* note 146, at 94. Others have discussed the notion of interrelated and beholden work groups comprised of judge, prosecutor and defense attorney. See, e.g., Blumberg, *supra* note 40 (discussing the defense attorney's allegiance to the "organizational goals" and "bureaucratic priorities" of the Criminal Court); Platt, *supra* note 26, at 631 ("[T]he court functionaries see themselves as colleagues rather than adversaries . . .").

²⁵¹ Sudnow, *supra* note 175. Sudnow defined "normal crimes" as "those occur-

er treated their clients as individuals; instead they put them into sociological cubbyholes according to offense type and classes of offenders.²⁵² The inexperienced defender is typically socialized into viewing the ability to recognize and sort out cases into the appropriate "type" as a sign of competence.²⁵³

The definition of the problem, an initial task of problem solving, most often applied by appointed counsel limits the solutions. For them the problem is narrowly defined as defending a guilty client in a typical case.²⁵⁴ Once a case is so classified, it is then resolved according to preexisting patterns.²⁵⁵ As one commentator put it, "Normal crimes [are] handled in the normal way."²⁵⁶ The situation is viewed as standard, and established routines guide the disposition of the case.²⁵⁷ When activities are routinized, there is no perceived need for creative problem solving.²⁵⁸ Moreover, the narrow framing of

istics of persons who commit them (as well as the typical scenes), are known and attended to by the [public defender]." Sudnow, *supra* note 175, at 260.

²⁵² Flemming, *supra* note 23, at 397. It is common to hear defense attorneys refer to various clients as "shoplifters," "jostlers" (defendants charged with pickpocketing), or "token-suckers" (referring to defendants charged with stealing subway tokens by jamming the token slot and then removing the tokens that are stuck by placing their mouths over the slot and sucking the tokens out). Flemming, *supra* note 23, at 397.

²⁵³ HERMANN ET AL., *supra* note 13, at 82 ("As one Legal Aid lawyer told us, six months of legal education and a knowledge of court routines and jargon are all a lawyer really needs to function in the criminal courts."); Flemming, *supra* note 23, at 397 ("Knowledge of normal crimes was a mark of competence and therefore acceptance and legitimacy . . ."); Sudnow, *supra* note 175, at 261 ("The achievement of competence as a [public defender] is signalled by the gradual acquisition of professional command not simply of local penal code peculiarities and courtroom folklore, but, as importantly, of relevant features of the social structure and criminological wisdom. His grasp of that knowledge over the course of time is a key indication of his expertise.").

For most institutional defenders, learning what a case is "worth" is a critical step toward developing competence. New cases are compared with prior ones to determine whether a proposed offer approximates the norm and is therefore acceptable. See Eckart & Stover, *supra* note 175, at 683. Understanding, or being aware of, standard dispositions or the norms is one thing; blind adherence to what is customarily done is an entirely different matter.

²⁵⁴ See *supra* note 190 and accompanying text; Skolnick, *supra* note 229, at 62 ("[M]ost defense attorneys operate on a defense theory which presupposes the guilt of the client . . ."). This phenomenon of attorneys defining their clients' problems narrowly has also been observed in the context of civil legal services. See, e.g., Bellow, *supra* note 17, at 108-09.

²⁵⁵ CRIMINAL JUSTICE: LAW AND POLITICS, *supra* note 146, at 94.

²⁵⁶ Flemming, *supra* note 23, at 397.

²⁵⁷ Eckart & Stover, *supra* note 175, at 665-66.

²⁵⁸ See, e.g., Eckart & Stover, *supra* note 175, at 666 (unroutinized activities are

creative problem solving.²⁵⁸ Moreover, the narrow framing of the task leads many of these attorneys to assume—erroneously—that there is no need for fact investigation²⁵⁹ or any sort of defense strategizing and planning.²⁶⁰

Institutional defenders rarely challenge the routine processing of cases in the Criminal Court. Some have suggested that defenders find routines helpful as they provide certainty and define approximate standards of justice.²⁶¹ Standardized approaches to cases may lead to greater predictability, but in the process they severely circumscribe the behavior of the defense attorneys.²⁶²

In this environment, it is inevitable that the attorneys' expectations of what they can accomplish on behalf of their clients are affected. One study noted that few of the public defenders interviewed felt that time and volume pressures significantly affected their practice.²⁶³ The authors posited, "It may well be that in the minds of defense attorneys, working daily in the modern criminal justice system, norms of adequacy become depressed, and that the attorney becomes conditioned to believe the 'best he can do' is equivalent to an effective defense."²⁶⁴ In further support of that position, the study found that the more experienced attorneys in the office were more likely to be satisfied with the adequacy of the clerical support, physical facilities and investigative assistance than were their less experienced colleagues.²⁶⁵ Another study concluded similarly that public defenders become content with outcomes that

²⁵⁸ See, e.g., Eckart & Stover, *supra* note 175, at 666 (unroutinized activities are generally preceded by problem solving activities).

²⁵⁹ See *supra* notes 190-191 and accompanying text.

²⁶⁰ See, e.g., Barbara A. Babcock, *How Can You Defend Those People?: The Making of a Criminal Lawyer*, 53 GEO. WASH. L. REV. 310, 315 (1984-85) (book review) ("Once part of the system, the inevitable next step is for the defender to do what everyone else in the system does: assume the guilt of the accused and act accordingly. This means thinking of plea bargaining rather than defenses . . ."); Flemming, *supra* note 23, at 397 (citing Sudnow's position that for public defenders "[t]here was no need to delve into details or to concoct defense strategies. Public defenders scanned their cases to see if the events and defendants fit the typical pattern and whether a typical disposition was appropriate.").

²⁶¹ ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE* 163 (1992).

²⁶² Eckart & Stover, *supra* note 175, at 666.

²⁶³ Kocivar, *supra* note 13, at 62.

²⁶⁴ Kocivar, *supra* note 13, at 62.

²⁶⁵ Kocivar, *supra* note 13, at 74.

are merely "satisfactory" as opposed to "optimal," and that these attorneys develop a compromised notion of what is an adequate defense.²⁶⁶

Student attorneys regularly employ problem solving approaches to their lawyering tasks. First, they actively follow all available leads in pursuit of information necessary for them to identify and diagnose the parameters of the problem.²⁶⁷ Beginning with the initial interview of the client, students immediately generate possible solutions and strategies. The day after arraignment, students meet with faculty and are asked to formulate their approach to the case. This includes what they know about the case, what they need to find out, how to locate the missing information, their client's views and goals and so forth. The meeting serves to highlight the need to approach the representation in a systematic yet expansive way. Although a wide variety of approaches are considered, the door is left open to the possibility that still other strategies may emerge, particularly with the acquisition of new information.

Inevitably, the students' solutions encompass what the MacCrate Report termed a "holistic" approach to lawyering.²⁶⁸ Students contemplate all facets of a defendant's situation; they consider the multifaceted framework in which the problem is set, and seek to assist with the defendant's employer, landlord, creditors and the like.²⁶⁹ As some commentators have observed, this level of involvement in the client's life and problems appears to lead to more effective problem solving because the attorney is better able to assess the client's goals and integrate them into an evaluation of possible solutions.²⁷⁰

Student representation also squarely fits the MacCrate Report's ideal of application of creativity and judgment in problem solving. The students' approaches to problem solving lead them to consider a myriad of possible solutions. They are con-

²⁶⁶ Eckart & Stover, *supra* note 175, at 666, 675.

²⁶⁷ See *supra* notes 192-194 and accompanying text.

²⁶⁸ MacCrate Report, *supra* note 112, at 150.

²⁶⁹ Students advocate for their clients in numerous fora other than Criminal Court. They negotiate with parole and probation officers, they appear before a variety of government agencies such as the Department of Motor Vehicles and the Human Resources Administration, and they attempt to persuade employers and landlords not to fire or evict their clients. Often these seemingly ancillary matters are their clients' greatest concerns.

²⁷⁰ See, e.g., Ogletree, *supra* note 116.

stantly generating new ideas and novel ways of implementing those ideas. Unlike institutional defenders, students are not bound by what is customary. Indeed, they do not know what is customary.²⁷¹ In a sense, they are liberated by their "ignorance" of the way things are typically done. Not knowing the routine or what is a "normal" crime or disposition, they cannot and do not fall prey to stereotypical thinking.

F. *Litigation*

Trial advocacy skills present perhaps the greatest challenge for students. Many courtroom participants who have observed student defense attorneys give them high ratings in all areas except for trial skills.²⁷² Commentators and clinical faculty have reached similar conclusions.²⁷³ The prevailing view seems to be that students perform most lawyering tasks competently except for in-court advocacy.

At the outset, it is important to recognize that an attorney's performance at trial turns in large part on the quality of pretrial preparation,²⁷⁴ and students conduct more thor-

²⁷¹ During one arraignment shift, a prosecutor made what appeared on the face of it to be an acceptable, albeit routine, offer to the defendant. As the judge began to write the disposition into the court papers, the student informed the judge that her client was not interested in the offer. Almost immediately, the same thing occurred with the same student and a different client. This time when the student informed the judge that there was not going to be a disposition, the judge called her to the bench and, in essence, demanded an explanation. The student had no way of knowing that in the routine processing of cases in the Criminal Court those pleas were customarily accepted.

²⁷² See, e.g., Student Practice, *supra* note 15, at 398 ("Most respondents agreed that students are slightly less than adequate in . . . using direct and cross examination, and raising timely objections."). Judges, in particular, often rate students as less competent than the defense bar in the areas of cross examination, oral argument and direct examination. See, e.g., SHIRLEY R. LEVITTAN, *THE CLINICAL PROGRAM FOR LAW STUDENTS—A VIEW FROM THE BENCH IN CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING* (1973); ALVIN B. RUBIN, *THE VIEW FROM THE BENCH IN CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING* (1973).

²⁷³ See, e.g., Bird, *supra* note 116 (noting the difficulty students had in raising timely objections at trial); Gary J. Galperin, *Law Students as Defense Counsel in Felony Trials: The "Guiding Hand" Out of Hand*, 46 ALB. L. REV. 400, 431 (1982) ("[C]linical students have been found less than adequate in organizing trial arguments, conducting direct and cross-examination, and raising timely evidentiary objections—the vital skills of trial practice.").

²⁷⁴ ABA STANDARDS, *supra* note 124, § 4-4.1, at 181 ("Effective representation

ough and vigorous pretrial preparation than do institutional defenders.²⁷⁵ Although students do not have the benefit of experience and are unable to raise timely objections or respond on their feet quickly, they work to minimize that deficiency through extensive pretrial preparation. They prepare their questions, plan for contingencies, view the relevant physical evidence, visit the scene²⁷⁶ and so forth. Their extensive pretrial preparation serves to minimize the effects of their trial advocacy inexperience.²⁷⁷

The student approach to trial litigation also serves to alleviate the impact of their lack of experience. In its discussion of litigation skills, the MacCrate Report appropriately emphasizes the role of a theory of the case in guiding the attorney's preparation for trial and performance during a trial.²⁷⁸ Students, unlike institutional defenders, endeavor to generate alternative theories in a manner that is receptive to new information and the possibility of having to revise existing theories. Because appointed counsel typically approach their cases according to standardized routines, they often proceed to trial without a case theory that is tailored to the unique facts of the case.²⁷⁹

On those occasions in which students have engaged in trials or hearings, they have performed competently. In the course of preparing students for the possibility of actual in-court contested litigation, clinicians seek to teach the "conceptual foundations for practical skills."²⁸⁰ In the process, various lawyering tasks, including those involved in the trial of a misdemeanor case, are discussed, simulated and critiqued. Nevertheless, simulations and other devices can only provide so much of a replacement for experience. For this reason

consists of much more than the advocate's courtroom function per se.").

²⁷⁵ See *supra* notes 187-197 and accompanying text.

²⁷⁶ See, e.g., Klein, *supra* note 134, at 665 (crime scene visit is part of comprehensive case preparation); McConville & Mirsky, *supra* note 13 (18-B attorneys rarely visited the crime scene).

²⁷⁷ See, e.g., William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 LEGAL AID BRIEFCASE 151, 152 (1970) (describing the typical misdemeanor trial as replete with inadequate preparation by the prosecution and the defense).

²⁷⁸ MacCrate Report, *supra* note 112, at 191-199.

²⁷⁹ See *supra* notes 250-262 and accompanying text.

²⁸⁰ Amsterdam, *supra* note 17, at 612.

so much of a replacement for experience. For this reason among others, clinicians and student practice orders require the presence of the supervisor during hearings and trials.

CONCLUSION

By comparing student criminal defense attorneys with institutional defenders on the bases of results achieved and the nature and quality of the performance of lawyering skills, this Article concludes that students provide superior representation on both counts. On several measures capable of empirical analysis, students achieve more favorable results. In the course of subjectively evaluating the students' lawyering, the Article suggests ways in which the outcomes obtained are related to the effort expended by the student attorney.

Central to the lawyering efforts of students are their efforts and ability to establish a relationship of trust and confidence with the client. This relationship, which is often overlooked or devalued by institutional defenders, enables students to perform better numerous fundamental lawyering skills, including interviewing the client, fact investigation, negotiation and client counseling. The effects of this bond between lawyer and client are evidenced by the reduced rate of bench warrants issued against clinic students' clients.

Earnest commitments to and empathy for their clients also enhance student representation. The degree of dedication felt by students leads them to pursue aggressively negotiations with a fervor not often manifested by institutional defenders. Students seek more favorable dispositions, actively pursuing offers from the prosecutor in cases in which the majority of defense attorneys would not make the effort. The vigor with which students negotiate is reflected in the greater number of charge reductions and non-jail sentences obtained by students.

Similarly, student counseling is client centered and empathy based. Students meet with their clients frequently and endeavor to keep them informed of the status of their cases. They actively seek the input and involvement of their clients throughout the case, and they present information and options in a manner that maximizes the client's ability to make decisions. The consequence of this counseling model is demonstrated by the lower rate of guilty pleas in students' cases.

As shown, the more favorable results obtained by students in each of these outcome measures can be attributed to their noncustomary, creative approaches to fundamental lawyering skills. In their approach to problem solving, students endeavor to acquire relevant information in order to identify and diagnose problems; they generate alternative solutions; and they prepare for the possibility that new information will necessitate revision of the case theory. Institutional defenders, on the other hand, typically act according to routinized processes that are activated at the initial meeting with the client. For appointed counsel, the task is seen not as one requiring problem solving, but instead as one in which the job is simply to obtain the standard disposition for a certain type of guilty client.

In all of these ways, students can and do make the "qualitative" difference in the representation of indigent criminal defendants envisioned by Justice Brennan in *Argersinger*.²⁸¹ It is hoped that further examination of student defense counsel will lead to improvements in the delivery of indigent defense services and suggest better ways to evaluate attorney performance.

²⁸¹ *Argersinger v. Hamlin*, 407 U.S. 25, 40-41 (1972); see *United States v. DeCoster*, 624 F.2d 196, 214 (D.C. Cir. 1976) (commending clinical education for its efforts to improve the quality of defense services); KRANTZ ET AL., *supra* note 2, at 279 ("[W]hatever the clinical model, it can operate to raise the quality of defense services.").