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From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic

Stacy Caplow

Brooklyn Law School, stacy.caplow@brooklaw.edu

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From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic

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I. INTRODUCTION

Law students have worked as interns in the chambers of judges for many years, well before the modern era of clinical education.¹ Various labeled externships, internships, or student clerkships, offered both for credit and to volunteers, these programs are fixtures on the law school scene.² Despite their popularity with students and judges, judicial clerkship programs have never enjoyed much credibility with clinical teachers³ even though few clinicians probably would dispute that the clerkship experience can be intellectually rigorous and per-

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1. Although law school clinical programs have existed for many years, the growth of clinical legal education is generally associated with the vision and financial support of the Council on Legal Education for Professional Responsibility (CLEPR) through the late 1960s and early 1970s. Lester Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 56 (1973); David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87 n.1 (1990); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 172-73 (1974); .
 2. In 1986, a survey of all A.B.A.-approved law schools turned up the remarkable fact that, as of 1984-85, all 143 respondents had some kind of judicial internship program. William B. Powers, A.B.A., *A Study of Contemporary Law School Curricula Part II, Professional Skills Courses* 16 (1988).
 3. Until the past few years, the only writing about judicial internship programs has been almost entirely descriptive. See, e.g., Robert C. Casad, *The Kansas Trial Judge Clerkship Program*, 18 J. LEGAL EDUC. 75 (1965); Roger S. Haydock, *Clinical Education: The History and Development of a Law Clinic*, 9 WM. MITCHELL L. REV. 101, 114-15 (1984); David F. Herr, *Supervised Judicial Clerkships: A Valuable Clinical Experience*, 9 WM. MITCHELL L. REV. 151 (1983); William B. Peden, *Obtaining Courtroom "Know How": The Judicial Assistanceship Program at the University of Louisville*, 12 J. LEGAL EDUC. 431 (1960); Jack B. Weinstein & William B. Bonvillian, *A Part-time Clerkship Program in Federal Courts for Law Students*, 68 F.R.D. 265 (1975). See also Paul R. Baier & T. John Lesinski, *In Aid of the Judicial Process: A Proposal for Law Curricular and Student Involvement*, 56 JUDICATURE 100 (1972). But see, Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537, 555-56 (1990)(discussing problems and concerns unique to judicial internships as one species of field placement program); Linda F. Smith, *The Judicial Clinic: Theory and Method in a Live Laboratory of Law*, 1993 UTAH L. REV. 429 (comprehensive description about fieldwork and curricular possibilities of judicial clinics).

sonally rewarding,⁴ and should be considered a bona fide "clinical" program.⁵

After years of being a doubter, in 1991 I began teaching our Judicial Clerkship Internship Program, known as the "Judicial Clinic." As a veteran of more than fifteen years of in-house clinical teaching, I typified the clinician in need of convincing that serious and structured learning, reflection, and analysis could occur systematically and dependably in placement clinics.⁶ I was particularly skeptical of judicial internships where the rules of confidentiality and the prestige of the judge make it all the more difficult to set and enforce educational standards.

At that time, the Judicial Clinic was an established segment of our clinical course offerings. Initiated by a faculty member who went on to become dean of the law school and is now a federal district court judge, the Judicial Clinic had been available to our students since the mid-1970's and had been taught exclusively by full-time, non-clinical faculty members. On average, about twenty students interned each semester in a variety of local, state, and federal courts. The classroom

4. Increasingly, United States District Court Judges and Magistrate Judges have come to depend on law student assistance to alleviate their crushing workload and treat their interns as extra law clerks. JOHN B. OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 27-28 (1980). As one federal district court judge observed about his student interns, "Their work made a major contribution to the court. They functioned as law clerks, except that their work load was much lighter; they observed trials and conferences and were assigned memoranda and research papers. Their written work was revised and criticized by me." Honorable Jack B. Weinstein, *Proper and Improper Interactions Between Bench and Law School: Law Student Practice, Law Student Clerkships, and Rules for Admission to the Federal Bar*, 50 ST. JOHN'S L. REV. 441, 446 (1976). State and local judges also routinely welcome student interns into their chambers. What began as a public service rendered by judges to the law schools has evolved into a mutually beneficial arrangement. See Weinstein & Bonvillian, *supra* note 3, at 277; see also Honorable Jack B. Weinstein & William B. Bonvillian, *Law Students As Part-Time Court Law Clerks*, 15 JUDGE'S JOURNAL 58 (1976)(observing that "The benefits to both students and the courts have been substantial and no serious problem has been brought to our attention.").

5. The general definition of clinical legal studies contained in the REPORT OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS-AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980)[hereinafter GUIDELINES] is very inclusive. As the project director notes, this definition is "broad enough to cover work as a lawyer-consultant to a government agency or as a clerk to a judge." *Id.* at 42. "[T]he mastery of basic lawyering skills and the better understanding of professional responsibility, substantive and procedural law, and the theory of legal practice" can be accomplished to one degree or another in an enormous variety of settings. *Id.* at 12.

6. "Although the clinical movement began with practitioners used as supervisors, many clinical teachers came to believe that student supervision by practitioners was problematic for a methodology in which teaching was not incidental to enterprise but rather its primary function." *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992).

component was sporadic and often consisted of "my day in court" anecdotes. The program has grown since I took over in 1991. Enrollment has expanded to between forty and sixty students per semester who are placed in a variety of state and federal courts.⁷ For three credits, students must work 12-15 hours a week in court, but most work many more. Classes meet regularly with a prescribed curriculum: required readings, journals, and specific observational assignments. The students' final grade (high pass, pass, unsatisfactory pass, fail) is based on a combination of an evaluation by the judge and my assessment of their class work.

In Part II of this Article, I posit, despite my initial reservations, that student clerkship programs are effective vehicles for teaching many of the lawyering skills and values inventoried in the MacCrate Report.⁸ I offer student journal entries to support this argument. After five years of teaching this program (8 semesters and 4 summer sessions), I have been convinced by the responses of my students that many of the MacCrate skills and values can be imparted, modelled, practiced, and/or reinforced by the experience of working for a judge while the students engage in some genuine legal work and a great deal of critical participant-observation.⁹

Clearly, a student clerkship is a singular species of clinical education. It is nothing like the typical live-client clinic in which the student learns through role assumption. Nor do they resemble other kinds of field placement programs in which students learn in a subordinate position. Yet, few would argue with the proposition that the post-graduate clerkship provides an accelerated course in litigation, an insider's view of the court and decisionmaking process, and

7. In Spring, 1996, a representative semester, the fifty-three clinic enrollees were placed as interns in the following courts: United States District Court (24), United States Bankruptcy Court (2), United States Court of International Trade (1), New York State Supreme Court, Appellate Division (2), New York State Supreme Court, Civil and Criminal Terms (13), New York State Surrogate's Court (3), New York State Family Court (2), New York City Civil Court (5), and miscellaneous administrative agencies (1).

8. Section of Legal Education and Admissions to the Bar, A.B.A., *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM* (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, 1992)[hereinafter *MACCRATE REPORT*].

9. Support for the thesis that much can be learned from demonstration or modelling can be found in the writings of some in-house clinicians. See, e.g., Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 298-300; Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 199-202 (1989). An argument for learning from the models in the work place based on the experiences of students in the Northeastern University School of Law co-op program is found in Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL. EDUC. 1 (1995)(Students in internships "have opportunities to observe and emulate the craft of ordinary, perhaps even gifted, practitioners.") *Id.* at 12.

daily exposure to a host of substantive issues as well as lawyering skills and lawyer personalities. Student clerkships offer a small slice of that rich learning experience which cannot be obtained in a traditional classroom. I maintain that clerkship programs furnish abundant material from which to generalize thoughtfully about lawyering and the legal profession, court systems and the litigation process.

Part III of this essay recounts and assesses my effort to create a meaningful academic component for the Judicial Clinic.¹⁰ Having convinced myself that students learn a great deal from clerking for a judge and observing in court, I found myself asking some serious existential questions: If their off-site education is so effective, what, if anything, can a clinical teacher add to improve that experience? How can you get them back to school once they have seen the Paree of the courthouse? As law schools increasingly turn to externships in an era of shrinking resources, are traditional clinical teaching methods and values relevant to that world, particularly in the face of student resistance? I hope to describe a curriculum that offers a satisfactory rebuttal to those who might answer "Nothing," "You can't, so don't try," and "Not very," to these questions.¹¹

My struggle to design and implement the academic portion of the clinic has been ongoing.¹² I have tried to develop a manageable for-

10. As I elaborate *infra*, Part III, I reject the term "classroom" component as unnecessarily differentiated from the term "fieldwork." These terms suggest a separateness of goals and an antagonism that does not accurately reflect reality and probably sabotages the credibility of the efforts of the teacher to integrate experience and reflection. I have, therefore, adopted the more inclusive term "academic" to describe the different kinds of assignments I require that give texture to the "experiential" learning component. I, thus, use the term "academic" to describe the teacher-directed rather than experience-driven requirements of a clinical "course." This is really a term of convenience, an alternative to the artificial classroom-fieldwork component language.

11. See, e.g., Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 286, 352-53 (1994) (arguing for the rejection of "educator-centric views about legal education" and taking issue with the MacCrate Report's deference to in-school based experiential learning); Givelber et al., *supra* note 9, at 46 (rejecting the pedagogical model espoused in the MacCrate Report).

12. An externship program of fifty or more students in widely variant placements is a difficult setting in which to encourage structured reflection and awareness either of self or of the world outside, particularly in a large law school classroom. In fact, it is hard to imagine a classroom environment less conducive to openness, candor, and thoughtfulness, even if, in the privacy of a one-on-one discussion or in a journal, each and every student would be capable of articulate introspection. However, I have stayed with the large-class model for two reasons: it is the most efficient use of my own time and I wanted to take up the challenge of designing a meaningful curriculum for a large group.

In 1991, I simply plunged into the design of the classroom component drawing on many years of live-client and other externship teaching. Since then I have experimented regularly with classroom format (lectures, discussions, guest

mat that offers the students an environment in which to describe and question what they have observed, share with other students the similarities and differences in their respective placements, and generalize about judges, litigators, courts, and the litigation process. By conceiving of their semester as more than a series of tasks and assignments, they are encouraged to "turn thought back on action."¹³

Both parts of this article address distinct questions about a judicial externship program: First, is it a good experiential learning opportunity? Second, if the conventional wisdom that a classroom component improves the off-campus learning experience is correct,¹⁴ how should an effective on-campus academic component be designed? The bridge between these two parts—the courtroom and the classroom—is student journal writing. Throughout this article, therefore, I will discuss how journal writing helps the students discover what they think they have learned and what skills they have acquired during the clerkship. At the same time, the task of journal writing forces students to progress beyond the concrete level of doing to the more abstract plane of theory building about law practice and jurisprudence. This compelled self-expression can advance the students beyond the mere description of past experiences to the beginnings of some conceptualization about the work of the legal profession that can be useful in the future.

By describing the Brooklyn Law School course and evaluating my capacity as clinical teacher to complement and enhance the absorbing fieldwork taking place at the judge's chambers and in court, I hope to persuade skeptics that these internships are valuable educational endeavors that teach certain skills and values, and help students 'learn how to learn,' an often declared goal of clinical teaching.¹⁵ I also hope that this article will contribute to the fledgling literature about the contents of the classroom components of extern clinical courses,¹⁶ and

speakers, break-out groups) and assignments, and persist in characterizing my academic component as a "work-in-progress."

13. DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER* 50 (1983).
14. The ABA recommends a contemporaneous classroom component for field placement programs, and mandates a classroom component for programs awarding more than six credits per semester. *STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS*, Standard 305(c) Interpretations 2(e)(5), 2(h)(1) (ABA adopted February 1993).
15. See, e.g., *Report of the Committee on the Future of the In-House Clinic*, *supra* note 6, at 513; 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, 284-85 (1981); Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 220 (1989); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Fieldwork in American Law Schools*, 19 N.M. L. REV. 287, 325 (1989).
16. See, e.g., Maher, *supra* note 3, at 600-02; Linda Morton, *Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy*, 45 ME. L. REV. 19, 44-52 (1993); Motley, *supra* note 15, at 227-28; Stickgold, *supra* note 15, at 319-23.

particularly judicial clinics.¹⁷ By explaining my pedagogical evolution, and by offering a detailed description of my teaching goals, premises, and materials, I hope to provide information about program design and curriculum that could help others in the process of either creating or improving judicial clinics. Finally, I hope to make a convincing case that in an externship program of the size and diversity of my own program, journal writing is an effective method of encouraging students to take control of their own education and thus to teach them to learn independently in the future.

II. FULFILLING THE GOALS OF THE MACCRATE REPORT

By now, the MacCrate Report¹⁸ is familiar terrain to legal academics, and particularly to clinicians. Its Statement of Skills and Values (SSV) provides a standard against which to set teaching goals and to measure the accomplishments of students who have participated in lawyering work. When setting their goals or assessing their progress, students echo its goals, even if those same students are ignorant of the Report's existence or its specific terms.¹⁹ At the end of the semester, when students are asked to evaluate what they have gained from clerking, they almost uniformly mention MacCrate skills such as, improved research and writing competence, heightened legal analytical ability, a more developed capacity to judge advocacy performance, and better work place skills. They frequently acknowledge personal changes in their values and attitudes about the law, the participants in the litigation system, and their own relationship to the law.

With virtually no exceptions, my students complete their internships satisfied with their learning experience.²⁰ However, student

17. Smith, *supra* note 3. Some of the subjects of study that Professor Smith proposes are: "applied jurisprudence" or how judges analyze and apply the law, discussions of the organization, operation and roles of the courts, and classes devoted to topics of judicial selection, socialization, and ethics. *Id.* at 464-69.

The first text for use in judicial clinics was published last year. REBECCA A. COCHRAN, *JUDICIAL EXTERNSHIPS: THE CLINIC INSIDE THE COURTHOUSE* (1995). While it contains some very useful standard materials, it does not meet the needs of my syllabus. Another text I found impossible to adapt to my course goals is ROBERT E. KEETON, *JUDGING* (1990). The wide-ranging coverage of subject matter in the typical externship academic component makes it difficult for the instructor to rely on commercially prepared materials. Seibel & Morton, *infra* note 41, at 431 n.46.

18. MACCRATE REPORT, *supra* note 8.

19. Almost all students express the same general goals: to acquire better skills (research, writing, and oral communication); to learn about how courts function, judges work, and cases are processed; to observe lawyering performances in order to acquire some insight into good and bad written and oral advocacy; to bridge the theory/practice gap; and to make contacts, develop a mentoring relationship, or investigate possible areas of law practice.

20. This enthusiasm corresponds to the findings of the recent *Learning Through Work* study in which the authors report that the judicial internship was one of

satisfaction with the internship does not necessarily guarantee the acquisition of MacCrate skills. The many semesters of descriptive written comments of my students have convinced me that they indeed learn several fundamental lawyering skills, even though they do not represent clients, handle their own cases, or have the active supervision of a professional educator. Quotations from representative journal entries illustrate what student law clerks believe they have learned and how they have been exposed to the skills and values cataloged by the MacCrate Report.

A. Research and Writing

The most obvious general skills to be learned and enhanced during internships are legal research²¹ and writing²² because students spend much of their time drafting bench memoranda or opinions. Research for preparation of a judicial decision, whether to be rendered in writing or orally, is different from the problem-solving approach typically associated with legal research. In the judicial setting, the "problem" has been defined by the parties in the pleadings, or the particular motion or proceeding before the court. Despite this seeming head start, students must analyze the reliability of the research conducted by the lawyers on the particular case. One of their most common discoveries, regardless of the court in which the case is pending, is the inaccuracy or distortion in the use of authority by counsel. In the course of their research, students evaluate the hierarchy of authority, investigate new resources, formulate a research plan, look at legislative history, and weigh the applicability of precedent. In the process of conducting

the two most favorably rated jobs among the students participating in the Northeastern University co-op program. Givelber, et al., *supra* note 9, at 29. Legal Aid and public defender offices rated slightly higher. The authors hypothesize several explanations for this high degree of satisfaction. First, the kind of work students perform for judges is familiar—research and writing—so they feel capable of doing it and can do it well. The chambers environment is more intimate, making much coveted immediate feedback and supervision more readily available. Also, the judge or the clerks are more likely than other supervising attorneys to see themselves as teachers. *Id.* at 30 n.117. Students may well be comfortable in chambers because the intellectual challenges of a clerkship resemble most closely familiar academic enterprises, a point that has been made in criticism of the bell jar quality of post-graduate clerkships. See William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129 (1986) (clerkships are too much of an extension of the academy). A few other reasons for the popularity of these internships come to mind. The courthouse ambience, the excitement of active litigation, and the ability to leave the library and head for the courtroom, all seem to be highly valued by the students. Finally, coming from the typical law school culture that esteems post-graduate judicial clerkships, some students view the internship as a status symbol and a "resume builder."

21. MacCrate Skill §3.

22. MacCrate Skill §5.

their research, they often discover more resources, or learn to use known resources more effectively.

Over the course of the semester, a student usually assists in the preparation of three or four decisions or orders. Typically, after a discussion of the issues with either the judge and/or the law clerk, the student writes a draft, which undergoes considerable editing by the law clerks, and then receives a final series of edits from the judge. This revision process requires a considerable commitment of supervisory time by everyone in chambers, and is at the heart of the student's sense that she has been taught research, analysis, and writing skills by the judge and law clerk.

Writing for a judge is vastly different from most of the student's prior experiences in law school or at other legal jobs. The student is not writing on behalf of a client or advocating a position, nor is she writing in her own voice. From the judicial perspective, the student writer must consider the goals, logic, language, and style of another author, while remembering the unique responsibility of a judge to clearly explain and justify the outcome. The student must consider who the audience is for the opinion and what kind of decision the case requires. She begins to distinguish from the inside, rather than as a mere reader, the different objectives and functions of a trial court or an appellate court in announcing its ruling. She also perceives how the type of case (fact-based, law-based, policy-based, discretionary) determines the contents, organization, and emphasis of the decision.

Increased self-confidence in research and writing abilities is a common theme. Although research and writing are part of the basic law school curriculum, all of the student interns recognize that their work has advanced. A few of their more detailed representative comments include:

The most valuable skill I got out of this experience was that I finally feel I know how to fully research all kinds of legal issues—from the book too.

I learned that clarity of expression is just as important as clarity of thought.

I think my research and writing have become more result oriented as opposed to law school's more theoretical bent.²³

B. Legal Analysis

In the context of assisting a judge in writing an opinion, students sharpen their legal analysis and reasoning.²⁴

I wanted to be correct in my analysis. I thought over and over how I [thought the judge should] decide the motion. It is much harder than law school exams or papers. Since it is a real life situation, I felt incredibly responsible.²⁵

23. Quotes were selected from journals submitted by students enrolled in the clinic in 1992, 1994, 1995, and 1996.

24. MacCrate Skill §2.

25. Student journal, *supra* note 23.

They are working in an indeterminate universe in which there simply may be no direct answer to the questions posed by their assignments, forcing them to develop theories, analyze by analogy, or venture into unexplored areas of the law.

Some assignments require a student to work on both substantive and procedural issues and understand the nexus between them. For example, when working on a habeas corpus petition, a typical assignment in federal district court, a student must read state court trial and appellate records both to determine the facts underlying the conviction and to assess the legal validity of the procedural errors claimed by the petitioner. In addition, the student must master the doctrinal rules concerning collateral attacks on state convictions. Furthermore, since these petitions are usually filed *pro se*, the student often finds himself in the position of deducing and framing the relevant legal theories on behalf of the petitioner. In so doing, he must identify the salient facts, decide which facts are relevant to which theories, determine how the procedural rules bear on the court's ability to decide the merits of the claim, critically examine the reasoning of the parties, and even identify alternative theories on which to grant or deny relief. In this process, the student encounters case law and judicial attitudes concerning the responsibilities of judges toward *pro se* plaintiffs.

While most students report that they learn a lot of substantive law, many also appreciate that their analytical abilities improved through the connections they make between the legal doctrine they previously had studied and its application in actual litigation. As a first year Criminal Law teacher, I have had to endure remarks like: "I learned more about Criminal Law and Procedure this semester than I did in the entire course." If anything, this comment supports the claim that experiential learning is a (more) powerful method for teaching legal analysis than the traditional classroom.

One student aptly described her accomplishments by saying:

I have also honed my problem-assessing and problem-solving skills. I have learned to quickly figure out what's *really* going on with people. . . . I've learned to look beyond the face value of [a claim].²⁶

Another was able to set some goals for the future:

I am amazed at how quickly the judge gets to the heart of the case. She is brilliant at cutting through all of the lawyer's puffery. It's the quality I most admire in her and most want to replicate.²⁷

C. Advocacy Skills

Although the students do not work directly as advocates, their observations of hearings, trials, appellate arguments, and other proceedings, as well as their exposure to documents such as pleadings,

26. *Id.*

27. *Id.*

motions, and briefs, enable them to acquire knowledge of the fundamentals of litigation.²⁸ In the course of their observations, they begin to develop a critical capacity to judge the quality of the written and oral abilities of the lawyers appearing in court. Their own impressions of the work of advocates, combined with their insider's awareness of the judge's opinion of the attorneys' competence, gleaned from conversations in chambers or observations of the judge on the bench, offer them keen insights into the level of ability of these lawyers. Moreover, they often reach conclusions about competence independently through their own analysis of issues in comparison to the presentation of the lawyers on a case. In court, after watching both sides sum up before a jury or after seeing a succession of lawyers argue motions, the students learn to identify the ingredients of good or poor lawyering, and form their own opinions about effective advocacy. Although they are not learning from their own repeated performances of a task, they nevertheless are developing standards and criteria against which to construct their individual models of personal competency²⁹.

Student journals are packed with comments about the lawyers whose papers they have read, oral arguments they have witnessed, and trial skills they have seen. In their journals, students delight in offering fulsome, even dramatic, descriptions of lawyers in court, offering their opinion about details ranging from style and appearance, to the impact the lawyer had on the judge and/or jury, to the quality of the arguments. Some of the students' more trenchant observations include:

I find I constantly say to myself 'that was effective' or 'that wasn't very good' when watching lawyers. I'll take what I learned into my career.

The lesson for the day from this trial, is when you get what you want from your witness, shut up and sit down.

The clinic experience has provided me with a list of lawyering 'do's and don't's'. I also learned how a good lawyer should conduct him/herself in a courtroom, in a conference with a judge, toward his/her adversary, and in written work.

Prepare, prepare, prepare.

I was expecting to see some bad lawyers, but not so many and not so bad. I am inspired to rise above this level of incompetence.

Fifteen weeks in a federal court have prompted me to consider a healthy practice in malpractice law. . . . Most attorneys were obstinate without cause and often more interested in making personal attacks than expressing the state of the law.

I never realized how small things like a person's dress or the number of times he interrupts with objections could actually affect an outcome. It seems like

28. MacCrate Skill §§8.1 and 8.2.

29. MacCrate Value § 1.

the jurors' view of [an] . . . attorney shapes the decision about the defendant's credibility.³⁰

Whenever a student works on an assignment, at some point he or she discusses the case with the judge. In this conversation, the student may have to defend a particular perspective or recommendation, a form of advocacy-in-disguise. Although few students predict that the internship will be an occasion for improving oral communication skills, it is indeed. They have to persuade the judge that their recommended analysis and reasoning is sound, as well as listen and defer to the judge's view of the case, like any advocate would. Those students who are convincing to the judge report enormous boosts to their self-confidence in their ability to explain and defend a point of view, a skill transferable to any aspect of their future lawyering.

Students also watch the judge in the roles of mediator and administrator. Since many judges engage in settlement conferences or play a role in plea negotiations, students become familiar with the concepts and dynamics of non-litigative mechanisms.³¹ In some lower courts, judges even occasionally delegate to students some of the responsibility for "conferencing" the case with the parties or their lawyers, a quasi-judicial role that is intensely gratifying when the student feels that he or she has worked effectively with the parties or their attorneys.³²

I do not claim that this program alone equips students to be effective litigators, particularly because they do not experience the internship from the perspective of that role. But no clinician would claim that a clinic achieves much more than laying a solid foundation on which to continue to build. The clerkship does offer, however, a glimpse of advocacy from the inside-out, a perspective that may teach enduring and influential lessons about effective oral and written communication.

30. Student journal, *supra* note 23.

31. MacCrate Skill §8.4. *E.g.*, "The impact of a trial looming on the parties was astounding In the course of several discussions with the judge, the parties quickly reached a settlement Importantly, the parties settled not because of the relative strengths of the legal issues, but rather because neither party wanted to testify in open court The price of settlement was less than taking the risk of what information would become public in the courtroom." Student journal, *supra* note 23.

32. *E.g.*, "The highlight of my experience [in Family Court] was conferencing two cases. . . . On my last day, . . . I spoke with the parties . . . about their situations, determined what they wanted to do and advised them of their rights [as the judge had instructed me]. It was a really good experience that allowed me to combine all of my observations and research by working directly with the parties." Student journal, *supra* note 23.

D. Work Place Skills

An internship also offers the student an opportunity to learn how to organize and manage legal work.³³ In what is generally a very busy and intimate setting, students may have to share computers, desks, and other facilities with the full-time clerks and other student interns while they are setting schedules, meeting deadlines, figuring out systems, and getting along with others. For some students, managing these relationships poses the internship's greatest challenge. For most, figuring out how to ask for help, to request timely and detailed feedback, and to deal with criticism and uncertainty are important skills learned from the program that the students rarely anticipate.

A few examples of their wide-ranging comments about the lessons learned about their own working styles are:

I learned to work out problems on my own, to set out my own deadlines.

I have become more aware of my work habits and the realization that although I fear more than anything being in a pressure environment, I need it to do my best. I have to find a way to discipline myself to perform even when I am in a relaxed environment.

Personally, I think I've learned more patience, less emotion and that putting the proper time into something pays off.

I realized that given the right challenge, I am able to push myself. In my entire academic career and work experience, I have always been satisfied with my 'mediocrity'. For some reason, in this setting I pushed myself and was happy with my work.³⁴

These comments reflect an almost universal sense of increased self-confidence about getting work done competently ("I can do this.") and a greater degree of comfort that an insider's view of the process affords ("The court is no longer a mysterious place.").

E. Professional Values

One of the clearly articulated goals of all of our clinics is the development of a sense of professional responsibility.³⁵ Even though students are not applying ethical rules in the context of client representation, they nevertheless are adjusting to a particular set of professional norms that might revise their preexisting expectations. Even in this limited role, students must abide by certain specific behavioral rules in their interactions with lawyers and parties and respect the confidentiality of chambers. Even if they never work in a judicial setting again, the message that professional ethical norms must be learned and observed is transferable to any future employment.

33. MacCrate Skill §9.

34. Student journal, *supra* note 23.

35. MacCrate Skill §10.

Through their observations, students reflect on the values of other individuals and those of the institution in which they are working. They witness all kinds of behavior against which they inevitably measure their own sense of fairness and justice.³⁶ Often they learn some harsh lessons about race or gender bias, lawyer immorality, indifference and incompetence, or judicial temperament. Many of their observations are counter-intuitive. For example, they may see judges treat *pro se* litigants with patience and convicted criminals with dignity and even compassion; on the other hand, they might see judges lose patience, lash out, or behave intemperately.³⁷ They observe the human factors that influence the exercise of judicial discretion. In some courts, they see people whose lives and problems have been previously unimaginable or only a curiosity in the newspapers. When they see someone sentenced to a long prison term or encounter innocent-looking, but not acting, children, they gain an appreciation of the human and personal consequences of a judge's decisions.

Sometimes they are disabused of preexisting idealism about the adjudication process or find their faith validated. Sometimes they realize that the contentious life of litigation is not for them. Sometimes they uncover sympathies and emotions that they will never forget. Whatever the specific content of their reaction, they emerge from the semester with more information, feelings, and attitudes to process.

A selection of these insights are expressed below:

I've learned about people. I have both more respect and less respect for the people who must travel through Family Court. . . . I've learned to dispel generalizations and look at issues and people on a case-by-case basis.

I've changed in that it is harder for me to separate the agony of life that so many experience from my own life.

We sue too much. Lawyers scam too much. The entire civil litigation drama is built on a foundation of deception.

I've been exposed to an efficient, overwhelmingly just and fair legal system due to this experience. It has changed me for the better, I hope.

Ironically, during my first year of law school every time I read a case there existed a subliminal thought in my head that I would never get caught up in emotion to decide a case Yet in my first case, I found that I was ready to find any avenue around the law because of the compassion I felt for this man and his wife. I learned that I am more human than I thought.

I can understand being a partisan advocate, but I think lawyers have an ethical obligation to at least argue the law as it really is, even if they cast it in a shade more favorable to them. I am going to do my best to do that when I start to practice.³⁸

36. MacCrata Value § 2.

37. Students often have difficulty criticizing their own judge, even when criticism, or at least, reservation, might be appropriate. Not only do they usually genuinely respect the judge, but they are also so totally absorbed into the chambers environment that any disapproval feels like disloyalty.

38. Student journal, *supra* note 23.

These excerpts are a small, but characteristic, sample of the outpourings I have read over the years that contain references to selected MacCrate skills and values. The students need no convincing that they have learned enormous and lasting lessons about judges and lawyers, have gained confidence in their written and oral communication abilities, and in their judgment. Often, they even understand that while they may not know all of the answers yet, the internship has taught them to ask productive questions.

III. THE ACADEMIC COMPONENT OF A STUDENT JUDICIAL CLERKSHIP CLINIC

Over the years, volumes of thoughtful articles have been written about clinical methodology. But most have discussed the particular challenges of the academic segment, typically called the classroom component, only superficially or incidentally.³⁹ In the sub-category of externships, the role of the clinical teacher, either in the classroom or in individual sessions, has until quite recently, been virtually ignored.⁴⁰ This is probably because very few organized educational activities were taking place. The academic component of externships has been accorded little legitimacy or attention for many good reasons: the heterogeneity of placements; the typical "running" rather than teaching of externships; the use of administrators or adjuncts instead of full-time faculty; and the tendency among clinical teachers to favor the in-house model and to find few personal or professional rewards from any association with this kind of program. Recently, the second-class status of externships has diminished as these programs have

39. See, e.g., Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections in Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374, 386-90 (1973)(suggesting four pedagogic methods: "presentation [including] lectures, readings, or direct reaction to student responses, mutual inquiry and discussion, demonstration and example, role-playing and other forms of simulation enactment"); John M. Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 94, 106-08, Edmund W. Kitch, ed. (University of Chicago Law School Conference Series No. 20, 1970); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974). See also David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979)(virtually ignoring the seminar component in favor of a lengthy discussion of individual supervision as a form of teaching).

40. See, e.g., Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95, 108 (1987)(briefly sketching possibilities such as shared readings followed by discussion or simulations); Motley, *supra* note 15 at 212 (mention of group meetings, but no details); but see Morton, *supra* note 16, at 36-52 (description of earlier approaches to classroom teaching followed by details and analysis of experience with new methodology).

gained more respect and recognition for both pedagogical and practical reasons.⁴¹

One reason for, as well as a reflection of, this change is the upgrading of the academic portion of externship programs. The data collected recently by Robert Seibel and Linda Morton disclose that 68 of the 98 externship programs responding to their survey, which included twenty-one judicial programs, had a "classroom component."⁴² While some placement programs deliberately eschew the formal classroom altogether,⁴³ and others may have the luxury of a small enough enrollment to permit individual student-faculty conferences,⁴⁴ apparently the majority do conduct some kind of formal class.⁴⁵

This historic tendency to give short shrift to the externship academic component has been even more pronounced in the case of judicial clinics. In 1987, before ABA Standard 305 and its interpretations motivated many law schools to add academic components, 64.5% of all non-judicial extern programs reported no academic component, while 71.3% of 143 judicial extern programs had none.⁴⁶ Even those judicial programs with scheduled classes met less frequently than other courses, and were conducted largely as a "my day in court" session.⁴⁷

41. Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practice, Problems, and Possibilities*, 2 CLIN. L. REV. 413, 429 (1996).

42. *Id.* Their published findings did not cross-tabulate how many of the judicial clinics have classroom components, but data available from the authors indicate that 15 of the 21 reported judicial programs had classroom components. Letter from Robert F. Seibel to Stacy Caplow (July 12, 1996)(on file with author).

43. See, e.g., Liz Ryan Cole, *Lessons from a Semester in Practice*, 1 CLIN. L. REV. 173 (1994)(about Vermont Law School's Semester in Practice); Thomas P. Campbell, *Training Law Students Outside the Classroom: Some Experience and Some Comments*, 26 J. LEGAL ED. 208 (1974)(about cooperative education program at Northeastern University School of Law).

44. Robert Condlin's model of cooperating outside offices calls for tutorials with the professor in lieu of seminars. *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 63-64 (1986). Similarly, Stephen Maher recommends "practiced supervised" programs in which no law school faculty members are involved. Maher, *supra* note 3, at 562.

45. Seibel & Morton, *supra* note 41, at 430.

46. Powers, *supra* note 2, at 16-17.

47. The existing descriptions reveal classroom components that are neither impressive nor demanding. One early judicial clinic required students to enroll in a course in judicial administration. Casad, *supra* note 3, at 80-81. At William Mitchell College of Law, students met in class four or five times during the semester to discuss their experiences in court. Herr, *supra* note 3, at 154-55. In contrast, Linda Smith offered many intellectually challenging discussion topics for an externship class. See Smith, *supra* note 3. Yet, the outlines of her ambitious proposals do not supply enough implementation details for a clinic like mine which enrolls students of wide-ranging abilities and divergent degrees of commitment to the academic segment of this course, places them in courts of very diverse jurisdictions, and awards no additional credit for the "extra" reading and assignments that comprise the academic component.

In 1970, at the dawn of the modern clinical education movement, John Ferren observed that "[a]lthough fieldwork experience alone can be educational (but also misleading), students can achieve few if any of the goals [of clinical education] without formal interchange of some sort about the experience."⁴⁸ In a large externship program,⁴⁹ limited personnel resources prevent such formal interaction through seminar classes, regular tutorials, and other such personal exchanges between student and teacher. Indeed, an historical *raison d'être* for many externships has been their cost-effectiveness in enrolling large numbers of students without consuming significant, if any, faculty resources. More individualized interactions would undermine this economy of scale as the externship begins to more closely resemble the in-house clinic with its low student-faculty ratio.⁵⁰

An externship academic component often relies on the shared experiences of the students for its basic curriculum.⁵¹ According to Seibel and Morton, common topics covered in externship classes are: 1) skills, 2) substantive law or procedure, 3) legal process, 4) legal institutions, 5) professional role, and 6) personal reflection, but their data further suggest that skills and substantive and procedural law are the most popular subjects.⁵² My classes ignore substantive law because the students work on such varied issues. I briefly discuss procedure in order to familiarize the students with the powers of certain courts and the flow of cases. I do, however, cover all of Seibel and

48. Ferren, *supra* note 39, at 106. Early assessments of student fieldwork programs found that strong classroom components had gained widespread acceptance as a regular ingredient of clinics. "Referred to by some as an 'integrative' or 'reflective' seminar, its content is still a matter of some dispute but its essentiality has gained near-universal approbation." Lester Brickman, *supra* note 1, at 79 (footnotes omitted). See also Howard R. Sacks, *Student Fieldwork as a Technique in Educating Law Students in Professional Responsibility*, 20 J. LEGAL EDUC. 291, 299 (1968).

49. While many schools limit the scale of their programs, some to less than ten students, Seibel and Morton report that 10.2% of their reporting schools offered an externship program to more than 41 students, and 18% offered an externship to between 20-40 students. In larger schools, the programs tend to be larger. "Programs with over forty-one students make up 10% or less of the available programs at small and medium schools, but include over 20% of the programs at larger schools." Seibel & Morton, *supra* note 41, at 425.

50. The average faculty-student ratio in in-house clinics surveyed was 1 to 8.41. The great majority (84%) of in-house clinics have a ratio of lower than 1 to 10. *Report of the Committee on the Future of the In-House Clinic*, *supra* note 6, at 552.

51. It is possible that the clinic design could intentionally replicate a more traditional classroom by, for example, conducting a course in Judicial Administration or Jurisprudence. When I was originally planning this class, for the classroom component I asked Anthony Alfieri for his syllabus from a judicial clinic he was then teaching at New York Law School. His class, entitled "Perspectives on American Legal Thought: Judicial Decisionmaking," included assigned readings of Holmes, Cardozo, Wechsler, Posner, etc.

52. Seibel & Morton, *supra* note 41, at 431-34.

Morton's other subjects, even though the class size and diversity of placements make it difficult to focus on the students' individual experiences. Because of the diversity, I strive to locate the common ground shared by students regardless of their specific court placement.

In designing the academic part of the clinic, I have had to take into account not only the difficulties of diversity, but also the constraints imposed by courts' confidentiality requirements.⁵³ Furthermore, I accept that students hardly ever value the time spent in a formal extern clinic class. They cannot figure out what they are supposed to be learning. From their perspective, most of the discernible educational benefit of the clinic is occurring "on-the-job," not in the classroom. Students are learning skills through their work and their observations at court. They are learning about substantive law through their research projects, and about court procedures and rules through participation inside the system. What additional benefits can be derived from a class conducted by someone who is not a judge, who is not teaching them a concrete skill that can be taken back to the court, and who, except very superficially, cannot even help them with their research and analysis? There is no essential body of factual knowledge, no definitive set of answers or blackletter legal principles, or any other

53. The question of confidentiality should concern any externship teacher, and perhaps judges as well. See Weinstein, *supra* note 4, at 445-50. There are no specific guidelines with respect to student confidentiality. Presumably general admonitions applying to judges and judicial personnel which prohibit public comment about pending matters would extend to students. ABA CODE OF JUDICIAL CONDUCT Canon 2(A)(6) (1977); CODE OF CONDUCT FOR LAW CLERKS Canons 1 & 2, in CHAMBERS HANDBOOK FOR JUDGES' LAW CLERKS AND SECRETARIES 171, Federal Judicial Center (1994). Law faculty involvement in the resolution of pending decisions would probably also violate Canon 3(A)(4). The commentary to this Canon includes law teachers within its prohibition against receiving communications from outsiders concerning a pending proceeding. If a student seeks advice from her professor about an issue in a case, then her question and the professor's answer probably would violate Canons 2(A)(6) and 3(A)(4).

Formal rules provide no specific guidance to students when they are relating their experiences in their journals. Obviously a journal has little value if the students are so cautious that they severely censor their work and only write vague and general comments like "continued research." Some topics clearly are not confidential: 1) any facts or events that are part of a public record, or occur in public, and 2) any of their own perceptions or reactions to what they see or do. All other topics are subject to their discretion. This usually means that students write about the issues on which they are working in fairly general terms, omitting references to names or other identifiers.

This is not an insignificant impediment to the usual clinical teaching method. While confidentiality concerns arise in all externships, judges are probably both more sensitive and more conservative than other supervisors. Judges are also more accustomed to having exclusive control over their courtrooms and supervisees. Some judges expressly forbid their interns from keeping journals because they consider every aspect of the student's experience to be confidential. One judge even discontinued taking our students after years of cooperation with our program when he found out about the journals.

special knowledge such as students are accustomed to receiving when they attend a law school class. In my course, this problem is compounded by the fact that students do not even have grades or extra credit motivating them to participate.⁵⁴

In the face of these obstacles, I have tried to design a curriculum that will engage the students and, even if they resist my efforts, will compel them to develop the habit of reflecting on their actions and those of others at the courthouse. Rather than just completing those tasks that are assigned, students are required to bring their insights back to the group for affirmation, development, or questioning through the class discussion.

I see my job as clinical teacher as encouraging and enhancing the students' fieldwork experience by engaging them in the class discussions and journal writing that are tools for their self-education. As their "metaguide,"⁵⁵ my presumptive role is to assist the students to set, maintain, revise, and meet goals, and also to help them interpret their experience. I do this even if my guidance, or its significance, is lost on them. Indeed, in their course evaluations students reveal that even when these classes are appreciated they still play a subordinate and supportive role to what they perceive as their "real" learning activity. The hand of the metaguide, therefore, is largely invisible. Of course, students are aware that I will be giving them a grade, that there are some course requirements to fulfill, and that I am available to help them with research or problems. But they see me primarily as a kind and concerned resource person, and not as a didactic or demanding pedagogue.⁵⁶

The academic portion of the course is not really a formal class at all. Instead, it is a process of self-directed learning through fieldwork, as described and processed in journals, which is then enhanced and directed to other practical experiences through discussion. The final step in this process takes the students' reflections and applies them to future experience.

There are fourteen weeks in the semester. Following an orientation class,⁵⁷ my syllabus devotes the initial three classes and two writ-

54. According to Seibel and Morton, externship programs are less likely to award grades than non-clinical courses. Siebel and Morton, *supra* note 41, at 434. Even extern clinics with classroom components do not necessarily award grades (only 43% of programs with classroom components do so). *Id.*

55. This term is used to describe "the human agent in the learning process" who focuses the student on the "reflective moment." Michael G. Wodlinger, *April: A Case Study in the Use of Guided Reflection*, 36 ALBERTA J. EDUC. RES. 115, 117 (1990).

56. My course evaluations from the clinic tend to use adjectives like accessible, congenial, flexible, helpful, and informative to describe my effectiveness as a teacher.

57. During this class, I cover the course requirements, an orientation to the courts, guidelines concerning confidentiality, supervision, directions on handling some

ten assignments to the "skills" that the students themselves will perform: research, analysis, and written and oral communication. By the fifth week in the semester I have finished direct skills teaching. I then move to a model that uses the students' descriptions of their fieldwork experience,⁵⁸ in all of its personal and professional dimensions, as a substitute for the "case" in the "case method."⁵⁹ To complete the analogy, student experiences described in their journals, whether open-ended or focused, are the course materials. Nine of the ten remaining classes build on two types of reflective student journals: "free writes" from which I select some shared themes to develop in class (4 classes), and structured "Questions & Observations" (Q & O's) that are accompanied by a fairly light reading assignment (5 classes). The "free write" themes address the professional roles of judges and lawyers, lawyering skills, the litigation process, and personal reflections about subjects such as individual competence, adjustment to the work environment, and individual growth and change.

The final class is based on the "quality of mercy" scene from *The Merchant of Venice*,⁶⁰ to which I append some short background readings.⁶¹ The balance of this section will describe each of these components in greater detail.

A. The Skills Classes: Analysis, Writing, and Research: Weeks 2-4

I spend three weeks on two simulations that focus on some of the MacCrate skills that will be utilized and developed in this program: legal analysis, writing, and research, and, less directly, oral communication. During this time period, I also arrange for, but do not person-

common types of problems, and, finally, a pep talk. I also talk about the "non-legal conflict" assignment which I discuss *infra* Part III.B.1.a.

58. In order to rely on the fieldwork, some obvious quality controls have to be in place. Careful screening of placements, a clear articulation of expectations and standards for supervision, and regular monitoring of the quality of the overall experience are vital. All of our extern clinics distribute written materials to supervising attorneys and judges, collect student evaluations of the placements at the end of each semester, and, with less regularity, conduct site visits or have personal conversations with the supervisors.

59. This analogy is not original. Elliott Milstein has been quoted as claiming, "I like to think of the field placement as the equivalent of the textbook, the equivalent of reading the case, it is the beginning point for education, it is not the education itself." Maher, *supra* note 3, at 594 n.189 (citing to remarks made at the AALS/ABA Joint Site Evaluation Process Workshop, 1990 AALS Annual Meeting). Milstein argues that outside practitioners cannot accomplish the educational objectives of these programs since the student learning process in the field was too isolated and location-specific. *Id.*

60. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1.

61. Jane M. Cohen, *Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction*, 25 TULSA L.J. 657, 678-86 (1990). See also Jonathon Mansfield, *How Do Judges Decide? A Shakespearean Dialectic*, CT. REV. 6 (1992).

ally conduct, optional advanced research sessions which students attend according to their own needs.⁶²

The two simulations are designed to recreate the interaction between a student and a law clerk or a judge when a student receives a typical assignment. Each simulation gives the student the opportunity to dig into the files of a federal civil case and a state criminal case.⁶³ This exercise allows the students to learn something about their own methods for attacking and organizing information, communicating their findings to a third person, and synthesizing their research and analysis into a written product.

One of the cases is a cross-motion for summary judgment in a federal civil matter involving the validity of a deceased soldier's change of life insurance beneficiary designation. The movants are the plaintiff, each of the co-defendants, and the third-party co-defendants. The facts of this case are relatively simple and are all contained in the distributed documents. The procedural posture is somewhat complicated given the impleader and the cross-motions. The applicable standard of review is familiar, and the governing legal principles are contained in approximately four cases. The motions call for a fairly typical formalistic decision in which the students determine the proper legal standard, and then apply it to the facts.

The second case is a state court motion to set aside a guilty verdict based on juror misconduct. This criminal case requires the students to read closely a detailed statute that gives the judge several choices and permits an exercise of discretion. The students must justify the judge's discretionary decision whether to grant or deny the motion, with or without a hearing, in a statutory context that gives the judge wide latitude.

The instructions for both of these cases are basically the same. In role as a law clerk, I hand them the civil file and say, "This is your first assignment. Read the entire file and come back to see me next week. Then, we'll talk about the case and you can give me your thoughts. I don't know much about the case, and neither does the judge." According to the students, this is a reasonable facsimile of their typical instructions. Prior to the first class, the students independently review the files and take notes, especially about anything they do not understand. They are also supposed to read what they determine to be the four most significant cases cited by the parties.

62. Students can participate in advanced Westlaw training and/or attend an advanced research lecture conducted by several of our reference librarians.

63. The federal case is one that I prepared while on a sabbatical year in practice. In order to avoid embarrassment (both mine and the students') I redact all of lawyers' names which means I occasionally have to listen to criticisms of my work. The state case was brought to my attention by a former student intern who arranged with the judge for me to get copies of the motion papers. The files are too voluminous to reproduce here, but are available upon request.

At the first class, they meet in collaborative small groups to brainstorm the case, followed by a "conference" with me in the role of "law clerk" when the class resumes in a plenary session. I attempt to guide the conversation in role. We discuss the facts, the procedural setting, the legal issues, the standard for granting the motion, and answer any questions. Their instructions for the second class are: "Finish your research. Then, figure out how you recommend the judge should rule. Make a list or outline of your reasons." In the second class, the students meet again in their small groups to "decide" the case. Sometimes everyone in the small group agrees about an outcome; more often the students debate each other.⁶⁴

The final class focuses on writing. The students are required to draft a statement of facts and a detailed outline of the decision in the federal case. Class discussion concentrates on audience, rhetoric, and approaches to different types of decisions. The students begin to appreciate that a judicial opinion is a form of persuasive advocacy which attempts to convince the reader of its correctness. Toward the end of the class, the actual decision is distributed for the students to critique.⁶⁵ For those students who had "ruled" differently from the real-life judge, and had actually drafted part of a decision defending their views, it is easier to criticize the result and the judge's reasoning. Even those students who agree with the holding often disagree with the reasoning after their own in-depth study of the case. For all of them, their personal investment in thinking through the possible decisions provokes very detailed and energetic attacks on and support for the real opinion. In the final analysis, the class empowers them with some confidence to be critical of a particular decision and to defend the analysis they believe to be correct.

For the criminal case, I ask the students to draft a two-page bench memo for the judge to use at oral argument on the motion, a fairly common assignment for an intern. To do this, they need to read only the statute, some fairly short motion papers, and no more than four cases. The statute gives the judge the discretion to order a hearing or deny the motion without a hearing. In the actual case, the judge denied the motion, ruling that the moving papers contained insufficient, non-hearsay allegations. This simulation not only gives them a

64. In this summary judgment motion, the students could reach three possible results—deny, grant for plaintiff, grant for defendant. A decision for the defendant could be based on two possible theories. When we again reconvene in the large classroom to compare recommended rulings, they are ready to defend their views after a half-hour in small group deliberations. Inevitably, there are at least three versions of the proposed ruling and the underlying analysis, a provocative outcome that engenders lively discussion about the unpredictability of decisionmaking and whether there is a "right" result.

65. *Ortiz v. United States of America and Prudential Insurance Co.*, CV-92-9866 1993 WL 289434 (E.D.N.Y.).

slightly different writing assignment (different audience, different purpose), but it also enables them to compare different kinds of decisionmaking. For this assignment, I read, critique, and return their written work. My comments touch on both writing and content, but are necessarily perfunctory since I have so many papers to read and, in order for the exercise to have any utility, I have to read and return the students' work promptly.

By the time these three classes are over, the students are well into the semester and are receiving their own decisionmaking/writing assignments. To complete the "skills" portion of the curriculum, I require them to hand in two other assignments. First, they submit a research log that describes their initial research assignment, indicates the steps in their research, and identifies any research problems.⁶⁶ If they are experiencing trouble, I contact the students. This assignment also enables me to check whether they are being assigned appropriate work by the end of the first month of the externship, although problems of this sort are rare. To demonstrate the sophistication and range of issues students are assigned, recent clinic students have researched:

- what are grandparental visitation rights;
- what would be the effect of removal from state to federal court on the rulings made in the state court prior to removal;
- whether a civil R.I.C.O. complaint was properly pleaded;
- whether an oral charitable pledge made by a testator is enforceable against his estate;
- whether the defense of lack of personal jurisdiction is waived by a post-answer motion for a change of venue;
- under what circumstances can grand jury minutes be released to people other than those authorized by statute;
- whether a dispute over common charges between the owners of a commercial condominium unit and the board was subject to arbitration;
- whether the passenger in a taxicab has standing to challenge the search of the cab;
- whether the Financial Institutions, Reform and Recovery Act of 1989 (FIRREA) applies retroactively.

66. *Research Q & O*: For some students, this clinic will be your first opportunity to conduct legal research in an open universe where there is no plan, guidance, or preordained research trail. In order to see how well you are able to handle research assignments, fill this out as soon as you have completed your first research assignment.

- A. What were the issues presented by your first assignment?
- B. How did you begin your research?
- C. In chronological order, number and describe the subsequent steps you took.
- D. What problems, if any, did you encounter in the process?
- E. Did you discover any new resources or research techniques? If so, what were they?
- F. What was the end-product of your research?
- G. Is there any particular instruction in legal research techniques you would like to have during this semester?

For the final skills assignment, I give the students some materials on judicial writing styles⁶⁷ and ask them to locate one of their judge's published opinions, preferably by conducting an on-line search that reveals the range of issues their judge has decided. They then outline and critique the decision in order to become acquainted with their judge's style of organization, prose, and analysis. It is my hope that they will be better able to construct their first writing assignments after deconstructing a decision authored by their judge.

B. The Journal-Based Classes: Weeks 5-13

1. Objectives of Journal Writing

Journal writing in conjunction with a particular course is a widely used tool for self-education. In law schools, journals are particularly favored in clinics, especially in extern programs where individual supervision of student work and regular personal contact with the students can be sporadic and cursory. Even in smaller extern clinics, or in-house clinics where individual interaction is more likely, a journal is a valuable device for the self-reflective dialogue between student and teacher.⁶⁸ In addition to furnishing a means of communication, journals generally empower students to take some responsibility for what they learn away from the formal structure of the classroom by having to describe, explain, and elaborate on the work they have performed at their placements. By choosing the topics and the language of their narrative, students exercise a degree of control over their ex-

67. I have assigned one or more of the following books and articles: FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL (1991); FEDERAL JUDICIAL CENTER, CHAMBERS HANDBOOK FOR JUDGES' LAW CLERKS AND SECRETARIES 139-70 (1994); RUGGERO J. ALDISERT, OPINION WRITING 263-75 (1990); Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 735-41 (1979); Richard A. Posner, *Judge's Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1421-26 (1995); Dwight W. Stevenson & James P. Zappen, *An Approach to Writing Trial Court Opinions*, 67 JUDICATURE 336 (1984).

68. According to Seibel & Morton, 44 of 98 externship programs require students to keep a journal and of those, 56% (18) use student journals as a basis of student grades. Seibel & Morton, *supra* note 41, at 435 n.50 (1996). See also, Cole, *supra* note 43, at 178 (stating that daily journals help students reflect on their experiences during the semester); Motley, *supra* note 15, at 213 (explaining that students' journals are used for determining numerical grades).

An excellent example of journal writing in connection with an externship is Lynne Weaver, *Daily Log of Independent Fieldwork*, in LAW STORIES 169-195 (Gary Bellow & Martha Minow, eds. 1996). Journal writing, of course, is not limited to extern clinics. Sandy Ogilvy has used journals in a live-client clinic, an academic support program, an externship program, simulation courses, and a first year civil procedure course. J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLIN. L. REV. 55, 57-58 (1996). See also, Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37, 59 (1995); Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLIN. L. REV. 299 (1994).

perience that they may not be feeling while in the judge's chambers awaiting feedback.

I am convinced that the student journal, rather than assigned readings or even classroom discussion, is the centerpiece of the academic portion of the course. Journals are the springboard for class discussion; a guaranteed tool for student self-assessment and instructor evaluation; and a medium in which to lose, as one student put it, the "tunnel vision" that causes them to ignore their surroundings due to their absorption in the immediate task at hand. As my reliance on student journals has expanded, my understanding of the value of journal writing has evolved. Whereas I used to consider journals a primitive vehicle by which students simply report their experiences so that I might keep track of their work, I now consider journals more as a deliberate pedagogical tool.

To understand the educational potential of journal writing, clinicians must borrow from other disciplines.⁶⁹ The use of journal writing in undergraduate and even secondary education is widespread. Proponents of journal writing claim that the process promotes the development of independent thinking and writing skills. Describing a significant experience and then reflecting on what has been learned from that experience makes the writer/student an active participant in his or her learning process. The students' own lives and stories contribute to their education as they integrate their observations and experiences with their personal beliefs. In a professional school internship, the journal invites the student to connect with the task he is performing and to make this connection in his own voice, rather than his professional voice which is the more typical mode of self-expression expected of a law school intern writing in the lawyer/judge role.⁷⁰

69. See, e.g., PAT HUTCHINGS & ALLEN WUTZDORFF, *KNOWING AND DOING: LEARNING THROUGH EXPERIENCE* 63-74 (1988); Gary R. Cobine, *Effective Use of Student Journal Writing*, ERIC DIGEST (1995); Kevin F. Grennan, *The Journal in the Classroom*, 24 EQUALITY & EXCELLENCE 38 (1989); Lynn McAlpine, *Learner Narrative as an Instructional Device: Developing Professional Conversations*, 4 J. EXCELLENCE C. TEACHING 79 (1993); Frank Nicassio, *SwampLog: A Structured Journal for Reflection-in-Action*, 9 WRITING NOTEBOOK 13 (1992); Gary M. Shulman et al., *Using the Journal Assignment to Create Empowered Learners: An Application of Writing Across the Curriculum*, 4 J. EXCELLENCE C. TEACHING 89 (1993); Phyllis A. Walden, *A Learning Journal as a Tool to Promote Lifelong Learning Skills*, 3 FEMINIST TCHR. 14 (1988); Mark Weisberg & Jacalyn Duffin, *Evoking the Moral Imagination: Using Stories to Teach Ethics and Professionalism to Nursing, Medical, and Law Students*, CHANGE 21 (Jan./Feb. 1995).

70. The importance of using this personal voice is demonstrated in the following excerpt:

Learning law, practicing it as a lawyer, or teaching it, depends more than we have previously recognized on what we think and imagine of ourselves as persons. The continual exposure to law and legal thinking affects our inner world of images, emotions, and fantasies. Law and

A journal entry typically can take two forms. These two forms can be written independently, can coexist in a single entry, or can be interspersed throughout the entire journal, depending on how the instructor intends to use them. The first, a dialogic entry, is essentially a written conversation that is intended to encourage communication rather than mere description, and requires some active participation by the instructor.⁷¹ The second, the expository entry, reacts generally to a work environment and permits students to reflect and respond contemporaneously to their experiences. In either form, the journal records events (facts) and feelings (phenomena) in a comparatively safe and private medium. At the end of the course, the journal has the potential for being a comprehensive, accurate recapitulation of an experience that enables the student to assess expectations and goals against eventual reality. The continuous writing process also inevitably unlocks the student's ability to express ideas more imaginatively and fully. By the end of the course, not only can the students review the events of the term, but they can also actually measure their own progress as writers and observers.

My students have to submit two types of journal entries that are simultaneously dialogic and expository. The main assignment is the weekly activity journal, a "free-write," in which the students describe their activities and what they have learned. In addition to their free-write journal entries, the students have to complete a series of structured journal assignments that I call "Questions & Observations" (Q & O).

2. *Weekly Reflective Journals*

At the beginning of the course, I analogize each day at the courthouse to the time spent in a law school class. The journals then become the equivalent of class notes in which a student describes an event or feeling and then discusses its meaning. As with any other form of instruction, some students accept and discharge the free-write requirement with commitment and enthusiasm, while others resist.

legal thinking, the talking and listening we do as lawyers, shape our view of the world and become a world view.

Introspective writing is one means by which we connect our knowledge and our work with our subjectivity, our sense of self. Introspective writing validates subjective experience, brings it into view, and gives it a place in professional life.

James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 WILLAMETTE L. REV. 45, 52 (1993). See generally, Donald W. McCormick, *Critical Thinking, Experiential Learning, and Internships*, 17 J. MGMT. EDUC. 261 (1993).

71. Neila C. Seshachari, *Instructor-Mediated Journals: Raising Critical Thinking and Discourse Levels*, 42 C. TEACHING 7, 10 (1994)(arguing that teacher responses motivate higher levels of discourse).

At first, the students have difficulty with the free-write entry's lack of structure. Most of their initial journal entries tend to be objective, unelaborate, and descriptive without a critical eye. In the beginning, the entries also tend to be self-centered. The students express anxiety about their new situations, their new relationships to the judge and the law clerk, confusion about expectations, insecurity about their abilities, or, on a more positive note, excitement about the new challenge and environment. Slowly, the students' writing evolves and becomes more affective, detailed, and introspective. Despite complaints that the journals are time consuming and sometimes repetitious, at the end of the semester the students appreciate the value of an account of their journey.⁷² The journal provides them with a linear measure of their semester since their first entry is a statement of goals and their last entry requires them to answer a series of open-ended questions.

a. The First Free-Write Assignment

In order to expedite this transformation into more relaxed and perceptive writing, my first journal assignment is a little unusual for a law school class. I ask the students to describe a situation involving a conflict resolution which they either observed or participated in, and then recount whether and how the conflict was resolved. Initially, I used this assignment to build a class about the contrasts between conflict resolution in daily life and within the judicial system. This exercise was intended to roll back the clock to make them think about conflict in its pre-legal context, and to highlight characteristics of the formal litigation process, the limitations imposed by formal rules and roles, the restrictions on available resolutions, and the allocation of power.

I quickly realized that this personal statement served another purpose. Students generally submit witty and articulate stories about conflicts with roommates, relatives, neighbors, storekeepers, and even strangers, that allow me to discover something about their personal lives and their style of written self-expression. Many of them take the opportunity to write creatively, to tell an exciting or funny story, to reveal something of their personality and character, to make an impression on me, and even to exorcise a bad experience. They write in their own voices without worrying about topic sentences, citation form, or even logic. The subject matter and timing of this exercise frees them to write more openly and with few of the inhibitions of their normal law school writing. This exercise encourages the stu-

72. "I enjoyed the journals. Besides a 'record' for the clinic program, I found them personally satisfying and am glad to have my own 'history' of my experience." Student journal, *supra* note 23.

dents to write candidly, expressively, subjectively, and succinctly in their weekly journals about less wholly subjective occurrences.

b. Later Assignments: Observations and Potential Concerns

As the semester progresses, most students write volumes about themselves. They write about reactions to their surroundings and to the people and events they encounter. They write about their relationship to their work. The students' flowing prose belies any criticism that the journals are "tedious" and "burdensome." At the end of the term, student comments about the journals are generally positive. Students note that the journals are a good record of their experiences, the details of which they might have otherwise forgotten. Other students readily admit that journal writing, even though laborious, helped them to put their experiences into perspective.⁷³

Many students easily fall into patterns of self-diagnosis, moving from the concrete experience, to the initial reflection, to reacting to the reflection, to acquiring confidence in their capacity to observe critically. My favorite example of this type of journal entry is one in which the student rereads an earlier entry and then continues or revises an earlier view independently, without even the benefit of an intervening reaction from me. This mode of expression is almost epistolary ("You remember how I described my frustration about my research project—I just couldn't get a handle on it and no one was around to discuss it. Well, this week, it's fine. I had a long talk with the law clerk and she straightened things out.") Even though the journal entry is addressed to me, the writer is autonomously interacting with her experiences, and solving her own problem.

The journal entries tend to fall into categories. At first, the students are preoccupied with their adjustment to the new milieu—the people, the assignments, the formalities.⁷⁴ They move from self-absorption to involvement with the particular legal issue in their first assignment. They minutely examine their approach to the organiza-

73. Comments about the journals include:

They were a good outlet for my frustrations at work.

The logs were perhaps the most important thing I worked on. By actually writing down what I learned, I saw how my attitudes and previous beliefs have changed.

[They] forced me to be aware of what I was doing instead of just passively observing.

It's nice to be able to communicate thoughts to a third person without fear of reprisal.

It was a pain after a day's work to sit down and type. . . BUT!! Now, . . . I appreciate it so I won't forget the particulars of what I did.

Id.

74. Coming into court from the robing chambers feels significantly different than entering through the main doors.

tion, research, and analysis of the law.⁷⁵ Either shortly afterwards, or even simultaneously, they begin to discover the world of the courtroom and are entranced by the lawyers' performances,⁷⁶ witness testimony, and judicial role or demeanor.⁷⁷ They also write about their personal

Last week was a living hell. I had to brief the judge on the issues in a case I had researched last month that was coming up for oral argument and I had to finish my second assignment. All in the space of a week.

On my first day in chambers, I was given a tour of the important sections [of the courthouse] and I happily accepted the judge's offer to sit in on a conference.

From the minute I walked in, I knew this clinic would be very different . . . There was so much going on, a jury trial, the law clerks busy writing opinions and jury charges. . . . I quickly learned that this was a high pressure chambers.

First day! The quarters are a bit cramped. Everybody seems nice, except for the people who seem brusque. The judge seems like a friendly person—somehow I didn't expect that.

On my second day, I . . . sat at the clerk's table beside the judge . . . when the judge came off the bench, he asked me what I thought and we discussed the case. I was both happy and surprised that he wanted my initial opinion.

Id.

75. For example, one student wrote, "I'm quickly becoming an expert on the Noerr-Pennington doctrine." Another said, "I learned something about the applicable law, but I still don't understand the procedure." With respect to the feedback on her first assignment, a student wrote, "The draft was very, very good . . . The best thing that I am learning from this process is to focus on detail and extensive editing." A second semester, third year student observed, "Issues have begun to show up multiple times in my short legal career. I had to deal with the same issue as an intern in the Attorney General's office [two summers ago]." *Id.*

76. I was most impressed by the [prosecutor]. She was dressed absolutely garishly, but was a great story-teller. Her opening was educational and riveting.

The plaintiff's attorney was horrible. I really felt bad for the plaintiff because even a first year law student could have done a better job. Not only did the plaintiff's attorney seem to be completely unfamiliar with the facts of the case, but he was mumbling and was speaking very law. In contrast, the defendant's attorney was very sharp, articulate and a pleasure to listen to.

The most powerful element of his opening was his ability to create a compelling story from the facts. *Id.*

77. The judge was patient in answering my questions and gave me ample direction on where to find the law. However, they did not suggest the conclusion—that was up to me to determine and convince them with legal arguments.

I guess I never knew that judges have already decided opinions read from the bench even when the parties are coming in for oral arguments. I think it's disingenuous to have the parties argue if you already know what your decision will be.

It never really occurred to me that a judge would agonize over how to decide an issue. I guess I'd projected the image of Solomon onto the whole occupation: presented with some seemingly unsolvable issue, a judge would come up with the right decision, without missing a beat. [I

interactions, primarily with the people in chambers, but also with denizens of the courthouse. Their journals contain a lot about their reactions to feedback from the judge or the law clerks. These reactions range from disappointed, ("When I ask for guidance, I'm usually told 'I'm too busy.'") to elated ("The opinion I wrote for my judge was published in the *N.Y. Law Journal*. I was so happy when I found out I almost cried.").

It is important to reiterate that the demands of the judicial clerkship role, in particular the limits imposed by formal rules of confidentiality and the personal dictates of the judge, can inhibit information sharing. Neither the journals nor the classroom are vehicles for gossip or secrets about the working or personal lives of the judges or law clerks. Nevertheless, students are free to discuss lawyer performance in court and on paper, judicial conduct on the bench, and any of their own impressions and opinions based on observations that do not derive from their privileged position as a guest.⁷⁸

Role relationships can also constrain students and distort their observations, so that many students become incapable of distancing themselves from their environment. Critical observations can then feel more like criticisms and students are often unwilling to seem critical of a judge because of their admiration or loyalty.⁷⁹ These sensitive boundaries are reminders of the eternal tension between the goals of clinical education and the limitations engendered by the specific outside placement.

c. Providing Feedback Through Class Discussions

Although I read every journal entry, it is simply not possible to respond personally to each entry when I have so many students en-

was amazed to see] the judge pace around the room and exhibit all of the same signs of frustration that I do when I am trying to write a memo.
Id.

78. For example, there is an obvious difference between a judge publicly berating a lawyer in court and privately revealing anger to the student, although both circumstances could make a student uncomfortable. Certainly judicial demeanor is a common topic for all students. It might be a rich discussion to explore whether and under what circumstances it is proper for a judge to express negative feelings from the bench—the student is not revealing any classified facts, but all of the students could then discuss how a lawyer should respond to anger from the bench. Sometimes, the student feels understandably awkward speaking with anyone else in chambers about the judge's courtroom behavior for fear of seeming critical, but nevertheless needs a forum in which to discuss what has happened.
79. In this vein, a student recently wrote about her conversations with some other interns working in the same court while observing a particular case: "It was extremely interesting to get the other interns' perspectives on the proceeding. Each person's response afterwards was colored by what their judge would have done. . . . I think there is a definite loyalty that evolves to one's judge and to a lesser extent to the law clerk."

rolled in my clinic.⁸⁰ This is an definite drawback in the design of my recommended model. To overcome this weakness, I have devised an indirect method of providing feedback and consequent motivation. I use the journals to develop class agendas. I ask certain students to facilitate a class discussion either by making a brief presentation or by contributing to the discussion itself. These discussions cover topics the students have mentioned in their journals.⁸¹ The students know that they are responsible for providing the "course materials" for at least fifty percent of the class sessions. This responsibility encourages them to be good observers, to select interesting or unusual topics, and to articulate these ideas for the group during class.

Examples of some class topics include: how the court deals with the *pro se* litigant; the judge as mediator and caseload manager; pressures on judges to dispose of cases; emotional moments such as a jury verdict or sentencing; the relationship between the judge and the jury; the role of the judge when one of the parties fails to raise a viable issue or claim; and expert witness cases. Topics like these illustrate to the students the commonality of their experiences despite their very different settings while giving them the chance to learn about how these issues play out in other courts.⁸²

80. Recently, I have begun to experiment with e-mail as a means for submitting journals. I find it easy to respond on the computer as soon as I receive the journal. I also have set up a private discussion group for my most recent clinic class, but so far the experiment has not been very successful. I have some hope that changes in the computer culture will make the students more comfortable with this method of communicating.

81. At the beginning of the semester, I tell the students that they should indicate in the journals whether their entries are private and not for possible class use. Even so, I try to contact the students whose observations will be the centerpiece of a particular class, not so much to request their permission, as to prepare them to take some responsibility for the class.

82. Given our location in New York City, the students often attend high publicity cases. Some students have worked in courtrooms in which Court TV was filming while others have interned with high profile judges who are often in the news. In the spring 1996 semester, students in the clinic were working with judges who were in the midst of several high publicity cases such as the Joan Collins contract dispute, *Joan Collins To Get Additional Million*, N.Y. TIMES, Mar. 27, 1996, at A1; and the preliminary injunction motion against New York State's "Megan's Law," *Doe v. Pataki*, 919 F. Supp. 691 (S.D.N.Y. 1996); Don Van Natta, Jr., *U.S. Judge Block's State's Plan to Release Names and Addresses of Sex Offenders*, N.Y. TIMES, Mar. 8, 1996, at B6.

My students have a regular diet of complex and noteworthy litigation with an opportunity to observe everything from breast implant cases to organized crime trials. In class, we exchange information about cases to attend which facilitates their required court observations. These events permit discussion about cameras in the courtroom, and the impact of pretrial publicity on the conduct of the trial and on judicial behavior. Since the students are present in court in the midst of this media attention, they can comment on its effect on the participants.

Occasionally, some current events permit the class to explore topics at the same time as the public. This year, for example, we detoured from the planned

By selecting individual journal reflections for class discussion, all of the students are aware that I have read carefully all of their entries without my having to comment individually every week. Also, students seem to feel less inhibited about telling me their problems in writing than coming to me in person. This is very important because their complaints or concerns need to be addressed and because the placement is part of their academic program. We both expect a lot from the experience, and I feel responsible for their success. From time to time a judge is unfriendly or a law clerk is a poor supervisor which leads the student to feel insecure about his work or complain about mistreatment.⁸³ Sometimes students express worries about the quality of their assignments—not enough writing projects or, conversely, writing projects that are too demanding or diffuse. Usually these concerns are temporary and I can reassure the students, or equip them with some strategies for ameliorating or minimizing the problems. More often than not, their problems stem from unrealized or unrealistic expectations and are easily solved.

3. Questions and Observations

The Questions and Observations (Q & O's) assignments have two purposes. First, they are designed to bridge the gap created by the

syllabus because of the storm occasioned by two notorious cases in local courts in which the students regularly intern that were at the center of a national debate about judicial independence. In the first, a Brooklyn Criminal Court judge had released from jail an abuser who subsequently killed his lover. In the second, a federal district court judge sitting in the Southern District of New York sharply criticized the New York Police Department while granting a motion to suppress duffle bags of cocaine. The Governor of New York called for the Criminal Court judge's impeachment and disciplinary proceedings. Clifford J. Levy, *Pataki Calls for Judicial Panel to Remove Brooklyn Judge*, N.Y. TIMES, Feb. 26, 1996, at B1. President Clinton, among others, aroused ire by calling for the resignation of the federal judge. He later retracted his statement. Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1. We devoted two classes to a discussion of judicial independence, reading the decisions, news articles, and editorials, as Justice Rehnquist, the Chief Judge of the Court of Appeals for the Second Circuit, the President of the New York City Bar Association, and many others weighed in with their views. See, e.g. Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A23. Given the prominence of this issue, debate among lawyers and judges in the courthouse was commonplace and vocal. For their part, the students had first-hand awareness of how this publicity was affecting judicial independence. They also considered how their own views may have been influenced by their association with the courts and insider knowledge of the judicial branch.

83. My favorite story that I share every semester as an example of the worst scenario involved a federal district court judge who was completely detached from the students. One day the intern was working in the chambers' library when the judge came in to get a book. Not only did the judge fail to acknowledge the student's presence, as he exited, he turned off the light leaving the student literally in the dark.

vastly divergent placements and subject matter on which the students work. Because students pick the topics in their own journals, thus describing and reacting to phenomena that they have deemed significant, the Q & O's promote some thinking in areas which might otherwise elude them. Second, I use these directed journal assignments to formulate and focus designated class sessions. Each of these Q & O's is accompanied by a short (increasingly shorter over the years) reading assignment designed to provide some framework for their reflection. These three ingredients—reading, reflective writing, and discussion—account for five of the journal-based classes.

The Q & O assignments in chronological order are: "Judges and their Law Clerks," "Impressions of Court," "Decisionmaking," "The Jury Trial," and "Bias in the Courtroom." As part of this imposed regime, the students must also visit three courts other than the one in which they are working for at least an hour and write up their observations, with particular emphasis on the similarities and contrasts, to be handed in at the end of the term.⁸⁴

All of the Q & O's aspire to assist the students in interpreting their environment and to set a standard for their free write journals in which they select the topics they feel are important enough to describe. The early Q & O's on law clerks⁸⁵ and first impressions⁸⁶ attempt to coordinate with the students' transition into the chambers, courtroom, and courthouse milieu since they have not acclimated or participated enough to make more detailed observations. These assignments orient the students to their own surroundings and, through class discussion, introduce them to the other students' placements. Some students work in luxuriously appointed federal courts, others in deteriorating local courts; some work with newly graduated federal law clerks selected through the well-known competitive process, while others work with state court career clerks who often come to the position after many years of practice. These Q & O's force the students to pay attention to these roles and relationships, and to their surroundings before they have become too absorbed in the life of the court to take notice of these details.

The "Decisionmaking"⁸⁷ assignment is due at the mid-point in the semester, after the students have had ample opportunities to observe

84. It is amazing that students attending a law school located in New York City, surrounded by a wealth of state and federal, trial and appellate courts, all within walking distance, where some of the best lawyers in the world practice, and where volumes of exciting litigation takes place daily, rarely take themselves to any of these courthouses simply to observe. Despite the time that these visits require, the students really appreciate being forced to do something they know is good for them and that they should have done long ago.

85. See Appendix A.

86. See Appendix B.

87. See Appendix C.

the judge in court conducting hearings and trials, at settlement and status conferences, and have worked on at least one case in-depth. Unfortunately, many students do not have much personal contact with the judge, so some of the questions about how judges make decisions are difficult to answer except as speculation. The Q & O forces the students to make educated guesses and to at least think about decisionmaking as a process.⁸⁸ At this point, they have formed their own impressions about the quality of the written and oral advocacy submitted to the judge and are now asked to consider how the quality of lawyering affects the decisionmaking process. In addition, they have to identify and describe different types of decisions judges make, and note the varying significance of facts and law.

Although the majority of the students intern in courts of original jurisdiction, many students work in courts, such as Family Court, where no jury trials are conducted. The "Jury Trial"⁸⁹ assignment is simply intended to standardize their experiences by assuring that all the students watch lawyers performing for a jury, observe at least a little of the relationship between judge and jury, and consider the nature of the jury trial process. In class, students discuss issues arising in jury selection, juror behavior, and trial advocacy skills. When a verdict is reached, the students can assess the effect of the lawyering on that decision.

The final Q & O, "Bias in the Courtroom,"⁹⁰ is the most controversial. Few students see, recognize, or are willing to ascribe bias to the people with whom they work. Here, the assigned readings are very helpful since many of the excerpts describe instances of bias, forcing the students to admit that it exists, at least in some courts. The Q & O's the students submit rarely provide any examples, yet the class discussion prompts many students to recall or think about examples of race, gender, ethnic, or class bias. Of course, these topics would be sensitive in any classroom, and unlike a small clinic seminar, this group has not necessarily learned to trust each other or to communicate relatively comfortably. The externship classroom is more like the large law school classroom in which some people are silenced, some are disengaged, and others volunteer unhelpful remarks. In order to prompt participation, I often resort to telling some stories from my

88. At the beginning of the semester, one student remarked:

There are certain methods of decisionmaking on this level with which I am unfamiliar. For example, is it better to resolve all plausible issues early on, in the name of judicial economy, even when discovery might—but not likely—turn up something? Really, the story is there in its entirety regarding certain issues, but should they be left for later? How will a decision along these lines affect this litigation?

Student journal, *supra* note 23.

89. See Appendix D.

90. See Appendix E.

own experiences as a female litigator to awaken the class to some possible examples of bias in the treatment of lawyers. This often leads women students to complain about paternalism and condescension from older male attorneys. After that, the discussion becomes livelier, but usually stays within the comparatively safe zones of sex, youth, or class discrimination.⁹¹

Overall, the Q & O assignments are slightly less appreciated than the journal assignments, but the criticisms seem to be minor. Some students complain that Q & O's are duplicative of their weekly free-write journals, even though most concede that "they made me notice things that may have been overlooked." Others prefer their brevity, limited focus, and structure, particularly in contrast to the amorphous free-writes. Occasionally, some students simply do not have anything to contribute on a particular Q & O, resulting in some anxiety about satisfactorily completing the course requirements. But even these students express appreciation for the opportunity to hear about the experiences of their classmates. On balance, the students who are engrossed in the ongoing reflective journal-writing process engage just as enthusiastically in the structured journal assignments.⁹²

C. The Merchant of Venice: Week 14

Our last class, in which we relate the legal themes in *The Merchant of Venice* to contemporary judging, is lively and interactive. Students are cast to read aloud the "quality of mercy" scene. They also have to complete a pre-class assignment asking them to identify

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91. Every few semesters, the discussion heats up, usually due to the presence and lack of inhibition of either women or students of color. For example, this year an African-American student revealed how disturbed she was that a defendant had been the only black man in the courtroom and that none of the jurors had been black. Since she said that there had been no obvious discrimination in jury selection, most of the white students could not understand her disquiet. A lively discussion ensued, helped by the supportive perceptions of three other African-American students. In the same class, a Korean student described a Chinese gang criminal trial in which the defense attorneys persistently referred to their clients by the wrong names, a blunder the student did not think even the judge noticed. Other students express concerns about the fairness of trials at which interpreters are used. Many students draw connections between the lack of dignity in "poor people's courts" like Housing and Family Court and the fact that most of the parties in those courts are not only poor, but are also of color.

92. Some students really understand the objective of these assignments:

I thought that they were insightful and thought provoking about the relevant issues of our internships. I thought that the way they were combined with classes to raise various issues . . . was an effective way of creating interesting discussion.

Some of them did not relate too well to my particular experience, but the issues presented were all pertinent and help me direct my attention in a way I might not otherwise have done.

Student journals, *supra* note 23.

issues raised by the scene about the law and judging in order to force them in advance to think about the historical context of the play regarding the laws and values at stake. Usually they cite Portia's judicial (mis)behavior, her ethical (ir)responsibility, Shylock's self-defeating litigation strategy, the anti-Semitic bias of the court, and the ironic or malevolent twists of the dispute resolution process. The play also reminds the students, who have by this time become active participants in the American adjudication process, that other systems of law and dispute resolution exist, and that decisionmaking and procedure are culturally and historically relative.

From time to time, I hear complaints about the "relevance" of this class, but I have found it to be a refreshing use of an unconventional medium and an engaging way to synthesize many of the concerns that had surfaced throughout the semester about judicial conduct and decision-making.⁹³

Students see how the rule of law in Venice compelled the Duke to give even the outcast Shylock access to the Venetian court to enforce his contract (like all of those *pro se* habeas corpus prisoners whom students see trying their own cases). They realize that in Renaissance Venice unconscionability of contract was not a recognized doctrine, and that public policy favored enforcement of contracts regardless of their bizarre terms so that traders would be willing to do business with Venetian merchants (comparing activist to formalist judges). They hear the Duke and then Portia attempt to mediate the case (like all of those settlement conferences). They sympathize with the demand of the outsider, Shylock, to be equally protected by the law, but deplore his stubbornness and pride (like those parties who place principle ahead of practicality). They grudgingly admire Portia's clever manipulation of Shylock at "oral argument" so that he endorsed the very interpretation of law that she then turned against him, completely undermining his ability to contest her decision (is this the proper role of a judge?). They witness how the anti-Semitism of the community and the tribunal is permitted to contaminate the proceedings (are there subtler biases at work today?). They see Portia turn the tables on Shylock and not only cause him to be charged criminally with a complete absence of procedural due process, but force him into a "plea bargain" that strips Shylock of his wealth (an excessive fine?) and his religion (a violation of substantive due process?). They recognize the damage to the credibility of the decisionmaking process that

93. Once an Orthodox Jewish student objected to using what he believed were blatantly anti-Semitic materials in class. His protest itself raised interesting issues about dealing with the discomfort caused by bias. Unfortunately, we could never explore his concerns since he boycotted class that day. Nor could I discuss his objections privately with him since he vanished at the end of the semester.

arises when a judge has an interest in the outcome of the case and then deliberately conceals that bias from the parties.

This class is a wonderful conclusion to the semester. During the performance, the students are part actor, part audience, part critic—a balance of roles that by the end of the term replicates the role of critical participant-observer in which they have been engrossed all semester. We part company almost as if we were walking out of the theater after a satisfying, yet provocative performance, simultaneously stimulated and exhausted by the experience.

IV. CONCLUSION

Students receive so many vivid impressions throughout the semester that they learn a great deal even without the guidance of a teacher.⁹⁴ As most clinicians with externship teaching experience would ruefully admit, the students' own educational objectives are usually fulfilled in the courthouse. Indeed, I now concede that much more than I ever had imagined possible can be learned by a discerning student in the role of participant-observer. Yet, I believe that the readings, journals, and classroom discussions also provide an invaluable learning experience that enhances the perceptions of the student engaged in active participant-observation. The academic component of the semester emphasizes their self-learned lessons by providing them with opportunities and tools that make them responsible for their own education. When students participate in internships, they have to make a transition between formal schooling acquired in the classroom under a preordained protocol, and practical training gained by working in a professional environment. This transition requires that students learn to move from abstract concepts to application of these ideas to real situations. An education-driven extern clinical program, unlike a free-standing internship with no on-campus component, encourages one last step in this transition. Through their journal writing and class discussion, students take their practical experiences back to the academic community for review and reflection.

The student clerkship itself is usually described in superlatives. As one student gushed, "My role as an intern is a privileged one. I am submersed in the chambers, privy to many discussions, and am basically like a kid in Baskin Robbins who gets to taste all the flavors."

94. We run a slightly different program in the summer than during the school year. In the summer, students work full-time for eight to ten weeks, but only attend classes during the first three. They still maintain journals, but fewer classes are based on their journal observations. The Q & O's are submitted at the end of the internship. Obviously, the "academic" component is much less demanding. Nevertheless, at the end of the summer the proportion of favorable remarks concerning the journals and the Q & O's is roughly the same as during the school year when I am more involved with the students.

During the balance of their legal studies, as well as in their later careers, the cases they read will no longer be mysterious exercises occurring in some hypothetical universe in which lawyers have no identities, abilities, or scheduling conflicts; parties have no personalities, physical proportions, or opinions; and judges have no personalities, private lives, or preexisting views outside of court. As the students observe:

I now fully understand that judges are only human, sometimes grumpy, tired, excited, happy, friendly, angry, or distracted.

Being a judge requires a certain personality: people-oriented, while authoritative, rational, and objective.

Judges do not come to decisions as easily as I thought.

This experience also reinforces the notion that judges are also only humans and not omniscient automatons. Consequently, each judge brings his/her own life experiences in their position (and should).⁹⁵

Such contacts with the interior process of decisionmaking of a previously awesome and remote judiciary expose the students to the imperfections and imprecisions of that process. After this demystification, a term the students frequently use to describe their newly acquired insider savvy, they never again will read a case without wondering about and trying to decipher what *really* happened, and without appreciating the difficult process of arriving at, and then writing, a clear, logical, and persuasive decision.

During the remainder of law school, and more importantly into their careers, the students' insights from this experience will influence their grasp of the meaning of case law, statutes, and policy. If they have worked with ambiguities or gaps in a factual record, their appreciation for significance of facts has deepened. If they have worked with statutory interpretation, they will have developed a sense of the importance of words and their meanings. After graduation, their analytical and persuasive skills will be influenced by an understanding of how judges are influenced by the skill of lawyers. They will have role models to emulate or to avoid.

Although less appreciated and understood by the students, the opportunity to simultaneously practice law while being compelled to observe, describe, and analyze the phenomena in which they participate or witness teaches the students a new method for relating to their experiences. The classes and journals neither add to their knowledge of substantive law nor teach the specific skills that the students desire, but they inculcate a life-long habit of detachment from and honest reaction to their immediate surroundings, with an increasing awareness of circumstances that will indelibly inform their future law practice.

95. Student journals, *supra* note 23.

APPENDIX A

Q & O: *Judges and Law Clerks*

Briefly describe the working relationship between your judge and his or her clerks. How do the clerks participate in the decisionmaking process? What other roles do they play? Do they play any roles that you did not anticipate?

Reading Assignment:

J. Daniel Mahoney, *Law Clerks for Better or Worse?*, 54 BROOK. L. REV. 321 (1988).

JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS, 10-35; 113-14 (1980).

William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129 (1986).

John G. Kester, *The Law Clerk Explosion*, 9 LITIG. 20 (Spring 1983).

APPENDIX B

Q & O: *Impressions of Court*

There are many different symbols that judges can use to convey messages to the parties and the lawyers appearing before them, as well as to court personnel and spectators.

- A. Does your judge wear a robe in court? Why do you think the judge chose his or her style of dress? How does this symbol represent his or her style of judging?
- B. What other symbols have you observed used by either the judge, the court personnel or the "court?" What effects do they have?
- C. Describe your impressions of the court in which you are working.

Reading Assignment:

JEROME FRANK, *The Cult of the Robe*, in COURTS ON TRIAL, 254-61 (1949).

Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559-68 (1989).

FRANK M. COFFIN, *Places and Patterns of Work*, in THE WAYS OF A JUDGE, 67-80 (1980).

EDWARD J. DEVITT, YOUR HONOR, Federal Judicial Center (1986).

Shira A. Scheindlin, *A Year in the Life: Reflections of a New District Judge*, N.Y.L.J., Nov. 20, 1995, at 2.

The State of New York City Civil Court, 47 REC. ASSN. BAR CITY OF N.Y. C176 (1992).

APPENDIX C

Q & O : *Decisionmaking*

Although you may not see any single case from its inception through to its final stages, you should be able to observe most steps in the decisionmaking process. As you participate in the work of the judge, answer these questions as they arise (not necessarily in the order that they are asked, but in the order in which you make your observations).

- A. What does the judge do or think about at the beginning of the decisionmaking process? For that matter, *what* is the "beginning?"
- B. How much attention and weight does the judge appear to give to the written and oral advocacy of counsel?
- C. Does the quality of counsel's performance appear to affect the outcome of the case or the judge's attitude toward the parties? How?
- D. Have you observed occasions when the judge appears to have thought about or even decided how he or she will rule (the ends) before determining the reasoning or analysis he or she will rely on (the means) *or* does your judge defer reaching *any* conclusions until all of the research and advocacy is complete? Have you noticed any intermediate steps in the decision making process?
- E. Describe the process the judge uses to write an opinion.
- F. Have you observed any instances when your judge brought personal values or experiences into the decisionmaking process? Describe them.
- G. Think about the different *kinds* of decisions judges make. Indicate below specific examples of decisions you have observed, attempt to categorize them, and identify their ingredients and how they differ.
 1. Discretionary decision:
 2. Finding of fact:
 3. Application of legal standards or tests:
 4. Statutory interpretation:
 5. Other:

Reading Assignment:

THE JUDGE'S BOOK 239-75 (2d ed. 1994).

A.B.A. STANDARDS RELATING TO THE FUNCTION OF A TRIAL JUDGE Parts I-IX (1980).

Alex Kozinski, *What I Ate For Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993).

Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 50-60 (1988).

Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971).

APPENDIX D

Q & O: *The Jury Trial*

Plan to attend some jury trials at different phases of the trial: jury selection, testimony, and verdict (if possible). Try to observe these components in a single case.

- A. How did the judge structure jury selection? Describe the composition of the jury. Did you observe any examples of bias by the lawyers? If so, how did the judge handle it? Was the process efficient? Did you think the jury seemed "pro-defense" or "pro-prosecution?"
- B. During the trial, what observations did you make about the jury, e.g. its attentiveness, its response to witnesses or the judge?
- C. If you were present when the verdict was rendered (and if you were not, but learned of it later), was the verdict what you anticipated? Was the verdict what the judge expected?

Reading Assignment:

J.E.B. v. Alabama, 114 S.Ct. 1419 (1994).

THE JUDGE'S BOOK 205-23 (2d ed. 1994).

APPENDIX E

Q & O: *Bias in the Courtroom*

Race and gender bias in courts are problems now receiving considerable attention. Bias can surface during jury selection, in the treatment of people in the courtroom, in attitudes about the issues or the parties, and can be reflected in verbal and body language used in court and in the language contained in written decisions. Describe any instances of race, gender, sexual orientation, or other bias you may have observed involving the judge, court personnel, lawyers, parties, witnesses, etc. If such an incident occurred, how did your judge or the clerks respond? If your judge is a woman or a member of a "minority" group, consider whether this background affects her/his decisionmaking in any way?

Reading Assignment:

Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L.REV. 817 (1991).

Ronald L. Ellis & Lynn Hecht Schafran, *Avoiding Race and Gender Bias in the Courtroom*, in THE JUDGE'S BOOK 91-132 (2d ed. 1994).

Fair Speech: Gender Neutral Language in the Courts, NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS (1991).

Jann Hoffman, *Judge Hayden's Family Values*, N.Y. TIMES MAG., Oct. 15, 1995, at 45.

Excerpts from REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, (April 1991).

BRUCE M. WRIGHT, BLACK JUDGES ON JUSTICE 247-65, (Linn Washington, ed.)(1994).