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ARTICLE: The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education

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\*\* Fictional character created by the authors as they view a student's life in the project.

**SUMMARY:**

... There have been private grassroots activist projects such as Centurion Ministries, law firm projects, journalism school projects, volunteer law school projects, and law school clinical projects. ... Cardozo Law School started the first innocence project law school clinic in 1992. ... Creating a new program within a law school typically begins with discussions with the administration regarding such topics as course content, credit hours, number of students involved in program, faculty-student ratio, teaching resources, student selection, grades, and physical plant needs. ... The California Innocence Project is a two-term program and students earn three credits per term. ... In the California Innocence Project we started with two faculty members and twelve students. ... The California Innocence Project is directed by a full-time administrator who has more than ten years of law school teaching experience, and the clinic is co-directed by a full-time faculty member with more than twenty years of law school teaching experience. ... Selecting students for an innocence project in a law school that has not had a great deal of experience with clinical education can be difficult. ... The California Innocence Project requires at least a two-term commitment from all of the students involved in the project. ...

**HIGHLIGHT:** Now I realize how straightforward the first year of law school really was. I was given books to read and I was told to figure them out. It felt like I had no support, but everything I needed could be found in those books, or in commercial outlines available at the bookstore, or if all else failed, by visiting my professors' offices and asking. Those were the good old days.

Now that I'm a second year clinic student, the answers don't come so easily. I think that I know more, but the questions are tougher. Instead of being given books to figure out, my clinic professor started the term by giving me a stack of meticulously handwritten letters. They came from prisons like Folsom and San Quentin; places I had only heard about in movies and Johnny Cash songs. They were all filled with sad stories and desperate pleas for help.

After reading the letters, I read questionnaires completed by the inmates who sought our help and legal briefs that had been filed for them in the past. All of the briefs I read had been unsuccessful and I was able to apply my first year skills and figure out why. But that was not the question I was asked to figure out. My tasks were to determine whether there was a sufficient factual basis to prove that the inmate was actually innocent and to find a legal vehicle he could drive through the courts and out of prison.

Most of the cases I've been assigned seem hopeless. Many of them are old cases where all of the evidence that could prove innocence has been destroyed, or they are cases where there seems to be some good evidence of innocence, but that evidence has already been presented to jurors or judges who have rejected it.

I do have one case though that keeps me hopeful that I can succeed in helping an innocent person out of prison, yet sickens me as to the failings of the criminal justice system. Anthony was convicted of murder based on the testimony of his cellmate and a vague description of the perpetrator that would match Anthony and 1,000,000 other people. The cellmate claimed that Anthony confessed to committing the murder while they were locked up together, but the cellmate's testimony was inconsistent with the facts of the crime, and every time he told the story it changed. Anthony was tried three times and there were two hung juries. No connection, other than the cellmate's testimony, was ever established between Anthony and the victim, and Anthony's girlfriend testified that at the time of the crime he was in bed with her. There was very little investigation done by any of Anthony's lawyers and there were skin scrapings obtained from under the victim's fingernails that have never been tested for DNA.

Last week I met with Anthony's girlfriend, who gave me all of the trial transcripts and a lot of background information about the case. Next week I'm going out to meet Anthony in prison to get as much information as I can from him. After twenty phone calls and a 200-mile drive I confirmed that the fingernail scrapings are still available for testing and I'm in the process of drafting a motion to get them tested. If Anthony is excluded by the test, hopefully that will be enough to get him a new trial. But I'm not sure that will be enough so I have to keep looking for more evidence. Was it only last year when the questions were as simple as defining a crime, spotting a tort, or deciding if a contract has been formed?\*

**TEXT:**

[\*414]

The need for quality post-conviction representation is well documented. Although the Supreme Court has declared that inmates have no right to counsel beyond the initial appellate process, n1 studies have shown that inmates cannot reasonably represent themselves in state or federal post-conviction proceedings. n2 Over the past ten years, innocence projects have [\*415] been involved in approximately 100 post-conviction exonerations of innocent people who had exhausted their right to counsel. n3 These innocence projects have taken many forms. There have been private grassroots activist projects such as Centurion Ministries, law firm projects, journalism school projects, volunteer law school projects, and law school clinical projects. n4

Although the primary goal and the impetus for innocence projects is the post-conviction representation of innocent people, innocence projects have also contributed to fulfilling the need for practical legal education. n5 Students in the projects have had the opportunity to learn by doing, under the supervision [\*416] of attorneys and professors, as opposed to traditional learning in the classroom.

This article will explore and explain the evolving role of innocence projects in the context of legal education. It will review the various models that have been developed and the major components that allow an innocence project to serve the needs of clients, while providing an excellent educational environment. The article is written from the perspective of the people who work in the California Innocence Project. As a result, that project is discussed at length in various sections. We have, however, made an effort to discuss the structure of other law school projects in various sections of the article.

### I. Brief History of Clinical Education

The method of legal education in the United States has come full circle. The first American law school was established sometime between 1774 and 1784, in Litchfield, Connecticut, by Trapping Reeve. n6 In 1815, in his first lecture as Royal Professor of Law at Harvard College, Isaac Parker proposed the establishment of a law school attached to a university to train those intending to become lawyers. Within two years, America's first university law school was founded at Harvard. n7 However, by the late 1800s, there were still very few schools with legal curriculums. n8 Instead, the majority of those interested in practicing law studied with attorneys as apprentices. n9 Apprenticeships enabled aspiring attorneys to learn the law by observing practitioners and engaging in practice themselves. n10

As the study of law moved from law firms to law schools, the method of study became more theoretical than practical. n11 The case method of teaching, [\*417] first introduced in 1870 by Dean Christopher Columbus Langdell of Harvard Law School, ultimately became the most common teaching device used by legal educators. n12 This method is based upon synthesizing law into organized bodies, as is done in teaching sciences, and using legal textbooks comprised

of judicial appellate opinions to teach law. n13 Simply stated, students study the outcome of prior cases in order to learn how to argue future cases.

The American Bar Association (ABA) created the committee on Legal Education and Admissions to the bar in 1878. n14 By 1892, the ABA began recommending a minimum of two years of formal study before a law student could sit for the bar examination in any state, n15 and by that time very few states required apprenticeships for bar admission. n16 This led to a large movement from apprenticeships to formal schooling. n17

The marriage between formal schooling and practical training came about in 1893 when the University of Pennsylvania opened the first American law school clinic. The clinic provided the legal assistance of law students to indigent clients and it was referred to as a "legal dispensary." n18 Other law schools soon opened their own clinics. University of Denver opened a legal clinic in 1904; Harvard opened a clinic in 1913; George Washington opened a clinic in 1914; Yale opened a clinic in 1915; and University of Tennessee opened a clinic in 1916. n19 Also in 1916, Wisconsin Law School implemented a six-month mandatory externship as a graduation requirement. n20

[\*418] Legal Aid organizations and law school clinics have historically maintained strong ties. John Saeger Bradway, the Secretary of the National Association of Legal Aid Organizations during the 1920s, set up Legal Aid clinics at The University of Southern California in 1928 and at Duke in 1931. n21 Bradway's advocacy of law school clinics, and the advocacy of Judge Jerome Franks, is largely credited for the Council on Legal Education for Professional Responsibility, Inc. and the Ford Foundation offering large grants to law schools that created legal clinics from the 1920s through the 1940s. n22 By the end of the 1950s there were thirty-five law schools with some affiliation to a Legal Aid clinic. n23 Of the thirty-five, thirteen had in-house clinics. n24

The late 1950s and early 1960s brought financial incentives for law school clinics. Donations from the Ford Foundation led to the establishment of the National Council on Legal Clinics and funding for in-house law school clinics. n25 From the 1960s through the 1980s, skills based courses expanded in law schools across the country. n26

## II. The Need for Clinical Education and Indigent Defense Resources

### A. The MacCrate Report

In 1989, the ABA and the Association of American Law Schools assembled a group to study the ways in which law schools could better prepare new lawyers with professional skills. n27 The task force was chaired by Robert MacCrate. n28

The report focused on the tenuous connection between law school education and the practice of law and proposed solutions for this problem. n29 The [\*419] report stressed that although lawyering is a continuing education process, the most critical learning must occur in law school. n30 The report further recognized that the majority of law school clinical programs may be unable to "duplicate the pressures and intensity of a practice setting," n31 yet the experience gained in a clinical setting could also be one "that might not be readily available in actual practice." n32 The report found that most law students completed classes in legal research and writing and trial advocacy, but that very few students went on to take courses "that employ[] the methodologies of skills instruction." n33 Thus, the report recommended that law schools move towards offering students more legal programs with hands-on experience. n34

The report ultimately concluded that to provide legal services for their clients, lawyers must have the following skills:

legal problem solving, analysis and reasoning; legal research; factual investigation; communication; counseling of clients; litigation, negotiation, and alternative dispute-resolution procedures in dealing with opposing and third parties; organization and management of legal work, and resolution of ethical predicaments. n35

In accordance with the MacCrate Report, the ABA amended its standards for accreditation of law schools. n36 Law schools are now required to offer to all students ""adequate opportunities for instruction in professional [\*420] skills," and ""live-client or other real life practice experiences." n37 Some schools were quick in making "curricular changes which were consistent with the report's recommendations, or directly as result of them." n38 However, most schools were slower to react. n39

### B. The Need for Free Legal Services

The emergence of legal aid programs began in the late nineteenth century. n40 These programs were primarily staffed by pro bono attorneys, some of whom had private practices on the side. n41 Students volunteered in poor communities through law school legal aide programs. n42 Yet, even in combination, these programs were only capable of providing a "very limited amount of legal services" to the poor. n43

During the 1970s and 1980s Legal Services Corporation n44 provided a significant amount of legal services to the poor. n45 By the mid-1980s, however, the Reagan administration, motivated by the "fiscal crisis in the United States," engaged in tremendous cuts of government funding for indigent defense programs. n46 The combination of government cut backs and unaffordable attorneys' fees has resulted in many inmates having to resort to self-representation. n47

Another major factor in the provision of pro bono representation is competence. Many inmates in need of free representation are those seeking assistance with post-conviction appeals, especially in capital cases. n48 These appeals are extremely complex and require attorneys with experience. n49 Despite some state bars' encouragement of pro bono services, n50 there remains a [\*421] great shortage of willing competent attorneys. n51 Thus, there is a great need for law school clinics that provide students with hands-on practical training while assisting members of the under-represented public at no cost.

### III. The Innocence Project Clinical Model

Cardozo Law School started the first innocence project law school clinic in 1992. n52 This clinical model was unique in a number of ways. First, the clinic provided legal assistance to inmates who had been tried, convicted, and typically had exhausted their appeals. n53 Second, the clinic focused its resources on representing inmates who claimed innocence. n54 Third, the clinic limited its clientele to cases where innocence could be proven through DNA testing. n55

The Cardozo clinical program was, and continues to be, a tremendous success. Since its inception, the clinic has assisted in more than one hundred cases that have led to the exoneration of an innocent person. As a result of these successes, and the recognition of the educational value of the program, innocence projects have been started in fifteen other law schools. n56 Each one of these projects has been structured to serve the needs of the individual schools. They have all faced common questions in structuring their programs, and all of the programs serve the same basic goals of providing legal assistance to the wrongfully convicted while providing an excellent educational experience for the students enrolled.

#### A. Structuring a Law School Project

Creating a new program within a law school typically begins with discussions with the administration regarding such topics as course content, credit hours, number of students involved in program, faculty-student ratio, teaching resources, student selection, grades, and physical plant needs. When and if administrative support is gained, a course proposal is written to [\*422] be considered by the faculty. There are a number of factors to consider related to each of these topics when creating the structure of an innocence project.

##### 1. Course Content

The course content for an innocence project should be driven by the needs of the individual project's projected casework. In other words, the curriculum should be a combination of substantive and skills topics necessary to work effectively on the cases.

The curriculum for the California Innocence Project includes three types of classes. First, we devote several classes to giving the students an understanding of the criminal trial and appellate process in order to enable them to understand what has happened with the clients' cases. We also spend some classes dealing with the law and procedures that govern attempts to reopen cases. In those classes we discuss state and federal habeas practice, claims of new evidence, and ineffective assistance of counsel.

The second type of class we have is the "firm meeting." During these classes students present their cases to their classmates. This process forces students to closely analyze and understand their cases because they are expected to field and respond to questions during their presentations. These classes give each student the opportunity to make presentations in front of a group, a basic lawyering task that many students are unprepared or loathe to do, and provide a forum for collaboration and creativity in doing the work.

The third type of class we have consists of informational video lectures, live guest speakers, and occasional field trips. During these classes we have used the videos provided by Cardozo Law School for its interactive innocence class n57 and have had guest speakers on a variety of topics including DNA, investigation, and federal habeas practice. Our field trips have included visits to prisons, crime labs, and courthouses. n58

[\*423]

## 2. To DNA or Not to DNA

An important decision to make early on in creating a project is whether the casework will be limited to just handling cases in which DNA testing will be the primary vehicle for demonstrating that a client has been wrongfully convicted. This limit can be tempting. Limiting the casework to DNA cases makes it easier to screen cases and to train and supervise students. [\*424] Also, the majority of successful exonerations of recent years have been through the use of DNA. n59

The California Innocence Project, however, does not limit the caseload to DNA cases for a number of reasons. The primary reason is that limiting the focus to DNA cases only serves a small portion of the population of the wrongfully convicted. DNA exonerations illustrate the reality of wrongful convictions, but certainly do not exhaust the field. DNA evidence that can lead to exoneration is typically limited to rape cases, but an equal probability of wrongful conviction exists in robbery, burglary, battery, and murder cases. In addition, the number of viable DNA cases is limited in ways that other cases are not. In California, for recent convictions, DNA testing was likely done at trial. n60 Alternatively, with very old convictions, there is less of a chance of finding preserved, testable evidence. n61 Finally, the lawyering skills learned by having students work exclusively on DNA cases is limited, particularly in a state like California where there is a statute that provides for DNA testing. n62

On the other hand, there have been significant problems in opening the door to all claims of wrongful convictions. First, the workload is quite heavy. The California prison population is 156,551 n63 and many of those inmates have a great deal of time and no disincentive to stop them from seeking the project's help, even when they are guilty and the evidence of guilt is overwhelming. As a result, students spend most of their time screening cases. As will be discussed, we think the screening process provides a great educational benefit. Unfortunately, for a number of reasons, students sometimes get depressed by the work. Students come into the course envisioning themselves as knights in shining armor rescuing the weak and helpless. Slogging through files is not particularly glamorous. Moreover, many of the potential clients are obviously guilty. Finally, even when students are successful at finding some new piece of evidence to support a claim of innocence, [\*425] the time and nature of the up-hill battle needed to overturn a conviction is daunting. n64

## 3. Open Intake vs. Closed Intake

Given the limits of human and financial resources, new innocence projects have to make a decision as to whether to have what we will refer to as "open" versus "closed" intakes. An open intake project will continuously accept requests for assistance and investigate the claims of innocence. A closed intake project will take a fixed number of cases/requests, work them until they are done, and then look for other cases. The California Innocence Project has chosen an open intake model.

The obvious problem with an open intake system is the resulting flood of requests. This means a lag in response time to the clients and that some good cases might languish for a while. Currently, half the cases that our students are working on are based on questionnaires and requests for help that we received well over a year ago. A second problem is the amount of attention that each case receives. Our students each have a case load of approximately twenty-five cases. This can be a considerable burden, given that the project only represents three credits of the fifteen that the average student carries.

The major benefit to the open intake system is that good cases (i.e. cases with a believable, provable, and procedurally viable claim of innocence) are relatively rare. The more cases the project takes on, the better the chances of finding those cases where the ultimate goal is attainable: freeing those who have been wrongfully convicted. n65

## 4. Credit vs. No Credit and Number of Credit Hours

Creating a successful law school program of any kind without allocating credit for the students' work can be very difficult. Students love the idea of working in an innocence project; however, when they face the reality of the work in-

involved in screening, investigating, researching, and writing, along with balancings that against their classes, the project will suffer. Exams, papers, and even Halloween parties will frequently make it difficult to keep the students' attention.

[\*426] Ultimately, it is possible to justify anywhere from one to ten credits for participation in an innocence project. The California Innocence Project is a two-term program and students earn three credits per term. n66

#### 5. Number of Students and Faculty-Student Ratio

A variety of factors must be considered in determining how many students to allow into a project. The first consideration is evaluating how much time it will take to properly supervise the students. In a traditional classroom course, unless a student seeks help, the members of a class are allowed to sink or swim on their own. In a law school clinic, the sink or swim rationale is not a viable option because the client will sink with the student.

The educational benefit of a clinical experience only begins with a student's work on a case. The critical part of the education occurs when the student's work is reviewed by his or her supervisor. In addition, since clinics serve clients, the supervision must be at a level that allows the supervisor to know that the clients are receiving adequate representation.

A second and related consideration in determining how many students to admit is the project's case load. Much of the work of innocence projects is screening cases. Without an adequate number of students to screen the hundreds of questionnaires that come in each year, the good cases will never get identified.

A third consideration is ensuring a critical mass. Students learn from each other. An important part of this clinical experience is learning the benefits and frustrations of working in teams and relying on the efforts of others. Nothing illustrates the importance of documenting efforts more than having to re-plow the same ground because a file lacks evidence of what had been done previously.

In the California Innocence Project we started with two faculty members and twelve students. Therefore, we have a student faculty ratio of 6 to 1. Every semester each faculty member has primary responsibility for six of the students, and at the end of the semester, we swap students. This has two benefits. First, students get the benefit of working with two different lawyers. Second, each supervisor will eventually become familiar with all of the cases. n67

[\*427]

#### 6. Faculty vs. Non-Faculty Supervision

Again, the factors relevant to the decision as to who should supervise revolve around the fact that the project has a dual mission. Clinics are designed to both educate the students and serve a client population. For the latter, traditional faculty are not necessary. In fact, unless the faculty members have actually practiced criminal law in the trial or appellate courts of the project's jurisdiction, a traditional academic/scholarly faculty member could be disastrous. The work on the cases requires a broad range of experience and lawyering skills and much of the work is nuts and bolts. Also, clear paths from problem to solution are frequently lacking, so having both a macro and micro knowledge of criminal law and practice can be extremely helpful in finding or carving out the path to success.

On the other hand, the educational component of the clinic mandates that at least one person involved in supervising the enterprise be an educator. Students learn best by performing under supervision, and although the adage of "those who can't do teach" may not be true, it is certainly true that those who can do, cannot necessarily teach. In other words, sometimes the most talented lawyers cannot teach.

Beyond the question of whether to have a teacher working in the project is the question of whether that teacher should be a full-time faculty member in the law school. There are a number of benefits associated with having a full-time faculty member working in the project. First, law school students are subject to the rhythms and seasons of the law school year and outsiders simply do not know enough about law school pressures, procedures, problems, and policies to adjust their expectations to those of the students. Second, outsiders may not know the students (or students generally). As will be discussed, *infra*, if students are selected for the course (based on interviews, resumes, etc.) the in-house supervisor will have a better sense of what to expect and what to look for. Outsiders generally will not have a sense for the level of education, ability, and sophistication that they are likely to encounter with their student population. Third, outsiders might not be able to generate or maintain the cooperation and goodwill that a clinic must have from the [\*428] rest of the institution. Support of the faculty, staff, and administration of the law school is critical to a clinic's success

and a full-time faculty member can often gain that support more readily than a teacher who is not a full-time faculty member.

The California Innocence Project is directed by a full-time administrator who has more than ten years of law school teaching experience, and the clinic is co-directed by a full-time faculty member with more than twenty years of law school teaching experience. Both also have considerable experience as criminal defense attorneys.

#### 7. Selecting Students for the Clinic

Selecting students for an innocence project in a law school that has not had a great deal of experience with clinical education can be difficult. Law schools are often set up with egalitarian approaches to registration and law students are ready to challenge any perceived inequity. However, since law clinics must be concerned with client service, selection of dedicated students who have the intellectual capacity to handle the work of the project is critical.

The California Innocence Project began using the law school's open registration process, but in the second year of operation lobbied the law school to change the registration policy for the project. Commencing in the second year all students were required to apply and be interviewed prior to being accepted by the project. Also, as part of the process, students were required to solve a research problem in order to test their ability to engage in the sort of creative problem solving required succeed in doing the work of the project. n68

[\*429]

#### 8. One Term vs. Two Terms

Students require a significant amount of information just to begin working on innocence cases. Therefore, the longer students are enrolled in the project, the fewer resources are allocated towards training. In addition, there is a critical continuity requirement in this work. Even the best cases take time. Unless students can stay with a case for eight months, the project administrators have to constantly re-invent the wheel. Continuity is also required in terms of processing a case. Typically, a great deal of student time is spent tracking down information through repetitive calls and letters. Unless a student is devoting five or more hours per week, each and every week, the follow-up calls and letters will be neglected and the cases will never move forward. The California Innocence Project requires at least a two-term commitment from all of the students involved in the project. n69

#### 9. Grades vs. Pass Fail

There are many different philosophies when it comes to giving grades vs. pass/fail in a clinic. On the one hand, receiving a good grade can motivate a student to work harder and do better work. On the other hand, sometimes grades can create an unhealthy competitive atmosphere in a law school clinic. Moreover, the subjective quality of the work makes it much more difficult to grade as compared to more traditional law school classes.

In the first year of operation, the California Innocence Project was a graded course. These grades caused morale problems after the first term, made worse by the fact that California Western has a curve mandating grades down into the "C" range. As a result, the project switched to a Pass/Fail system. n70 Although the jury is still out, morale seems to be better right now without grades.

#### 10. Support Staff and Physical Plant Needs

The amount of support staff needed and the nature of the space requirements will vary based on the size and nature of an innocence project. However, it would be very difficult to run an innocence project without support staff to receive and sort mail, answer the telephone, respond to email, and [\*430] maintain a case management system. Also, space, computers, phones, and file cabinets are needed to support this work.

The California Innocence Project is housed in several offices, file rooms, and student workrooms at California Western School of Law. We have an administrator n71 who spends between twenty-five and thirty hours per week dealing with phone calls, correspondence, recording keeping, file management, and student and faculty support. We also have work-study students that assist our administrator. The number of work-study students varies, but we need at least forty hours per week of student support.

For the next school year, the project plans to add two more positions to our staff. First, we will have an attorney who will be responsible for drafting and/or supervising the drafting of all litigation documents. That person will also be

the on-site resource person for the constant stream of questions that students have. We are also going to have a lawyer/school administrator who will have two primary functions. First, this person will make sure that the cases are being worked. Second, this person will pick up a variety administrative tasks that will help the program, including fund raising and publicity.

Beyond salary costs, other costs for the program include mailing, copying, telephones, computers, and software.

#### B. Lawyering Skills Developed in an Innocence Project

As indicated, clinics in general, and innocence projects in particular, exist to serve two goals: providing legal services to clients and providing an education to students. In terms of the latter goal, the work of the California Innocence Project has helped provide the students with training in a variety of skills needed for the successful practice of law.

First, the work of the clinic requires a great deal of writing. Students have to write a fairly comprehensive memo for each file. During the course of each semester, we expect that a student will have written at least twenty-five multi-page memos about the cases. We expect the memos to be comprehensive in scope and precise in analysis. Students groan but grow as they learn that "draft" does not mean "unproofed." One professor has a rule that he stops reading a memo after five spelling, form, or grammatical errors. Over the course of the year, the amount of red ink on student memos decreases dramatically and the development in this area is rewarding for both students and faculty.

Second, students learn to handle legal questions "on the run." For example, when an inmate says, "Yes, I was in the car but I didn't know the driver went into the store to rob it," the student will have to check the law on accessory liability before being able to know whether is a viable claim of innocence. Or when the client says, "I was planning on having the car 'chopped' and didn't know that anyone was going to get killed," the student [\*431] needs to find out the limits of the felony murder rule and also determine what the client was sentenced for and what the result would be if only one of two counts of conviction gets reversed. Thus, the responsibility of handling individual cases frequently requires students to independently learn both substantive and procedural law.

This is very similar to what happens in practice. Clients don't come into a lawyer's office and say, "I have a cause of action in negligence that needs to be litigated." Clients bring problems and provide lawyers with an assortment of facts. Lawyers have to figure out the legal issues, and those issues changes as cases evolve and new information comes to light.

In addition, the students get first-hand experience with law school's dirty little secret: the practice of law is more about finding and proving facts than about finding and establishing the law. In screening each file, the students have to make two determinations: do they believe the client is innocent and can they prove it?

Another critical skill that students learn is organization and time management. Students in substantive classes have a luxury that frequently goes unappreciated. Their professional lives are fully scheduled. They know when classes are scheduled, they have a syllabus for each course, and there is a set date for a final examination. In reality, the practice of law is not so neat. A practitioner can walk in on a Monday morning, expecting to work on the Jones brief, and never even open that file because of a new client or a new emergency in an existing case.

Even without interruptions and surprises, students in our project are simply unprepared at the beginning to know how to organize, prioritize, and self-direct the work that needs to be done. With time and supervision, the clinic provides a safe environment in which to develop those skills.

Finally, students learn about the kinds of people who will play roles in their professional lives. They get exposure to supervisors, clients, relatives, adversaries, bureaucrats, clerks, judges, etc. Once again, the clinic provides a safe environment in which to understand the needs and demands of the people with whom they will have to interact as attorneys.

#### IV. The Future of Innocence Projects

Innocence projects are here to stay for two fundamental reasons. First, law students will continue to need the skills training provided by these projects. Second, even with the advent of DNA and improvements in the criminal justice system, the frailties of human decision-making will continue to result in innocent people being wrongfully convicted. With over 200 law schools in America, there is a tremendous opportunity to expand the work of the projects and for the projects to work cooperatively in forging changes in the criminal justice system that will decrease the number of wrongful convictions while providing much needed representation.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Rights Law Prisoner Rights Access to Courts Criminal Law & Procedure Criminal Offenses Homicide Murder Felony Murder Penalties Legal Ethics Public Service

**FOOTNOTES:**

n1. Under the Sixth and Fourteenth Amendments, indigent defendants have a constitutional right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963). The right to counsel extends to the initial appeal of a criminal case as well. *Douglas v. California*, 372 U.S. 353, 357-58 (1963). However, in 1987, the Supreme Court held that indigent defendants have no right to counsel in state habeas proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Even in cases where inmates are facing capital punishment, the Court has held that the constitutional right to counsel does not extend beyond the initial appeal of right. *Murray v. Giarratano*, 422, U.S. 1, 10 (1989). See also Letty S. Di Giulio, *Dying for the Right to Effective Assistance of Counsel in State Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 *B.U. Pub. Int. L.J.* 109, 110-11 (1999); Clive A. Stafford Smith & Remy Voisin Starns, *Folly By Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 *Loy. L. Rev.* 55, 57-58 (1999).

n2. See Smith & Starns, *supra* note 1. A study conducted by Mark D. Cunningham & Mark P. Vigan, in the spring of 1997, examined the competency level of self-represented Mississippi Death Row inmates. The subjects of the study were forty-four of the fifty-two inmates on death row. Competency was rated based on an individual interview, an objective verbal intelligence test, and a reading comprehension test. The subjects were also required to take the LSAT and were evaluated on their knowledge of the legal terms and procedures typically required in drafting post-conviction motions. Finally, personality tests were administered in order to evaluate their emotional and mental well-being. Based on the testing, it was concluded that it was highly unlikely that any of the inmates could comprehend post-convictions statutes and case law. None had the necessary schooling prerequisite and the highest level of education amongst the subjects was completion of high school. The average vocabulary level of the subjects was below the average of the general population of the United States and roughly twenty-seven percent of the subjects fell within the range of potential mental retardation. The average score on the Verbal I.Q. Test for attorneys across the country is 125, with the lowest score of 110; the highest score of the subjects was 103. The subjects scored very poorly on their understanding of the law to be applied and the subjects answered only seventeen percent of the questions correctly, in comparison to forty-two criminal defense attorneys who answered sixty-nine percent correctly. Many of the subjects were found to have had "a level of psychological symptoms that would interfere with their effectively representing themselves." *Id.* at 75. The subjects obtained a mean score of 19.2% on the multiple-choice section of the LSAT, where one should be able to score at least twenty percent by chance alone. This score was surpassed by ninety-nine percent of the potential law students who took the LSAT between 1994 and 1997. *Id.*

n3. As of January 8, 2002, 101 inmates have been exonerated. An overwhelming majority of those exonerations were based on DNA evidence. Of the first seventy DNA exonerations, two cases involved wrongful convictions based on DNA inclusions, six were based on other forensic inclusions, fifteen were based on false confessions, sixteen were based on testimony of informants/snitches, seventeen were based on false witness testimony, twenty-one were based on microscopic hair compression matches, twenty-three involved substandard lawyering, twenty-six were based on defective or fraudulent science, thirty-four involved prosecutorial misconduct, thirty-eight involved police misconduct, forty were based on serology inclusion, and sixty-one were based on mistaken identification. See <http://www.innocenceproject.org/causes/index/php>. Of the ninety-nine wrongfully convicted people who have been released, twenty-seven were sentenced to life, thirty-eight were sentenced to twenty-five years or more, and eleven were sentenced to death. <http://www.innocenceproject.org>.

n4. There are currently thirty-three innocence projects around the country. Of the thirty-three, sixteen are based in law schools, ten are private organizations who are affiliated with law schools or use law student volunteers, six are private organizations not affiliated with law schools, and one is based in a Public Defender Office.

Of the thirty-three innocence projects, nine handle DNA cases only, one handles everything but DNA cases, and the remaining twenty-three handle all claims of factual innocence. See report prepared by Jessica Harry of the University of Wisconsin Law School Innocence Project, *Innocence Projects 2001* (on file with the authors). For a complete list of all Innocence Projects see <http://www.law.wisc.edu/FJR/innocence/other<uscore>ips.htm>.

n5. See Legal Education and Professional Development - An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 A.B.A. Sec. of Leg. Ed. & Admissions to the Bar xi [hereinafter *The MacCrate Report*]; Judith A. Frank, *Lessons and Ideas: Skills Instruction in Large Law School Classes*, 3 T.M. Cooley J. Prac. & Clinical L. 307, 311-13 (2000); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 *Fordham L. Rev.* 2377, 2378 (1991); Douglas A. Blaze, *Deja Vu All Over Again: Reflections of Fifty Years of Clinical Education*, 64 *Tenn. L. Rev.* 939, 945 (1997).

n6. Reeve was a lawyer who decided that rather than follow his normal practice of taking students into his office for an apprenticeship, he would build a school-house, place students in it, and deliver to them a series of prepared lectures. Albert Harno, *Legal Education in The United States*, 28-29 (1953).

n7. *Id.* at 35-37.

n8. In 1850, there were fifteen university connected law schools. In 1860, there were twenty-one, and by 1870, there were thirty-one. Of those thirty-one, twelve were one-year programs, two were one and one-half years, and seventeen were two-year programs. All of the schools used the lecture method. See Charles Warren, *A History of the American Bar*, 364 (1911); See also Harno, *supra* note 6, at 38.

n9. Frank, *supra* note 5, at 309; James E. Moliterno, *An Analysis of Ethics Teaching in Law School: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 *U. Cin. L. Rev.* 83, 85 (1991).

n10. Frank, *supra* note 5, at 309. "In 1800, the majority of the states required a period of apprenticeship, but by 1860, with the rise of law schools (there were then 21 law schools in existence) very few states required any sort of apprenticeship." William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 *Akron L. Rev.* 463, 465-66 (1995).

n11. Keri K. Gould & Michael L. Perlin, "Johnny's in the Basement/ Mixing up his Medicine": Therapeutic Jurisprudence and Clinical Teaching, 24 *Seattle U. L. Rev.* 339, 339-40 (2000).

n12. Frank, *supra* note 5, at 309; Margaret Martin Barry, et al., *Clinical Education for This Millennium: The Third Wave*, 7 *Clinical L. Rev.* 1, 5 (2000); Maureen N. Armour & Mary Spector, *Epilogue: Theory in the Basement*, 51 *SMU L. Rev.* 1555, 1556 (1998).

n13. Moliterno, *supra* note 9, at 85-86.

n14. Frank, *supra* note 5, at 309. The ABA was created in 1878. Its creation was the result of attorneys grouping together locally, statewide, and nationwide in an attempt to "raise the standards of the profession, and to associate a body of professional values and responsibilities with members of the bar." Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 *Tenn. L. Rev.* 1099, 1101 (1997). See also Herbert L. Packer & Thomas Ehrlich, *New Directions in Legal Education* 27 (1972). In 1921, the ABA passed the Root Committee's recommendation that "before admission to the bar of any state a candidate should be required to have: (a) graduated from a law school complying with certain standards, and (b) passed an examination by public authority determining his fitness." *Id.* Currently five states (California, Connecticut, Maine, Wisconsin, and Wyoming) and the District of Columbia do not require graduation from an ABA approved law school prior to sitting for the bar. California allows individuals who have not graduated from an ABA approved law school to

sit for the bar after sitting for a mini bar. "Connecticut will allow graduates of law schools approved by the Connecticut Bar Examiner Committee to sit for the Bar exam." Official American Bar Association Guide to Approved Law Schools, 2001 Edition 38-39.

n15. Packer & Ehrlich, *supra* note 14, at 16. See also Frank, *supra* note 5, at 309.

n16. Quigley, *supra* note 10, at 465.

n17. *Id.* at 466.

n18. MacCrate, *supra* note 14, at 1103.

n19. Quigley, *supra* note 10, at 467.

n20. *Id.*

n21. *Id.* See also Blaze, *supra* note 5, at 940-41.

n22. Barry et al., *supra* note 12, at 10-11.

n23. *Id.*

n24. At this time, the term "clinical program" included "both credit earning and non-credit earning real life experiences for law students either in programs located within the law school or offsite at legal aid or public defenders offices." *Id.*

n25. "From 1959-1965, NCLC made grants of \$ 500,000 to nineteen law schools." Blaze, *supra* note 5, at 941.

n26. Norman Fell, Development of A Criminal Law Clinic: A Blended Approach, 44 *Clev. St. L. Rev.* 275, 276 (1996).

n27. Frank, *supra* note 5, at 310-11. See also generally Robert MacCrate, Symposium on the 21st Century Lawyer: Keynote Address - The 21st Century Lawyer: Is There a Gap to be Narrowed?, 69 *Wash. L. Rev.* 517 (1994).

n28. Robert MacCrate is a retired partner of Sullivan & Cromwell, and former President of the ABA. Robert MacCrate, Preparing Lawyers To Participate Effectively In The Legal Profession, 44 *J. Legal Educ.* 89, 89 (1994); Michael Norwood, Scenes From The Continuum: Sustaining the MacCrate Report's Vision of Law School Education Into The Twenty-First Century, 30 *Wake Forest L. Rev.* 293, 293 (1995).

n29. MacCrate, *supra* note 28, at 90.

n30. Norwood, *supra* note 28, at 297.

n31. *Id.*

n32. Id.

n33. Id. at 298.

n34. Although "the Report triggered an initial flurry of activity, ... there has been considerably less attention focused on the Report over the past few years." Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact And Identifying Gaps We Should Seek To Narrow*, 8 *Clinical L. Rev.* 109, 110 (2001). There have been mixed reactions to the MacCrate Report. Dean Costonis of Vanderbilt University School of Law has criticized the report for a number of reasons including the expense of clinical programs for law schools. See John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and The Future of American Legal Education*, 43 *J. Legal Educ.* 157 (1993). In April 1994, fourteen other law school deans co-signed a letter opposing the ABA's implementation of the Report's suggestions. This letter also raised the issue of the increase of schools' costs that come with implementing clinical programs. Engler, *supra* at 118 (citing Letter from Dean Ronald Cass, et al., to Deans of Law Schools Accredited by the American Bar Association (Apr. 28, 1994)). Other critics of the report have included traditional classroom teachers, legal research and writing teachers, alternative dispute resolution teachers, and even proponents of in-house clinics and externship programs.

Proponents of in-house clinics worried that the effect of the Report would be to lead to an expansion of simulation courses or externship programs at the expense of the in-house clinics. Externship proponents argued that the report had undervalued the learning that occurs in field placements and exalted a particular form of clinical pedagogy that relied too heavily on top-down supervisory structures.

Engler, *supra*, at 119.

n35. Frank, *supra* note 5, at 311 (citing *The MacCrate Report*, *supra* note 6, at 138-41).

n36. Frank, *supra* note 5, at 312.

n37. Id. at 312-13 (2000) (quoting A.B.A. Sec. of Legal Educ. and Admissions to the Bar, *Standards for Approval of Law Schools*, 42 (1998)).

n38. Engler, *supra* note 34, at 123.

n39. As reported by clinical faculty at the Midwest Clinical Teachers Conference in October, 1993. Id. at 124.

n40. Louise G. Trubek, *U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective*, 5 *Md. J. Contemp. Legal Issues* 381, 382 (1994).

n41. Id.

n42. Id. at 382.

n43. Id.

n44. Legal Services Corp. is a federally funded civil legal aid system originally housed in the Office of Economic Opportunity. *Id.* at 384.

n45. *Id.* at 388.

n46. *Id.*

n47. "Even when free legal representation is available, the quality and adequacy of such representation is in question." Michael J. Davis, Foreword, 28 *Wm. Mitchell L. Rev.* 1 (2001). "It appears to have become an accepted social fact that those who provide counsel for the poor are overworked, underpaid, overwhelmed, and under qualified." *Id.*

n48. Di Giulio, *supra* note 1, at 118.

n49. *Id.*

n50. Although the California Rules of Professional Conduct do not include a requirement for pro bono service, the Board of Governors of the State Bar of California adopted a resolution at its December 9, 1989 meeting urging all attorneys "to devote a reasonable amount of time, but in no event less than 50 hours per year" to providing pro bono legal services. See Pro Bono Resolution, adopted by the Board of Governors of the State Bar of California, Dec. 9, 1989 (on file with the authors).

n51. Philip Houle, Rights of The Underrepresented, 23-SUM Hum. Rts. 11 (1996).

n52. The Innocence Project: About the Innocence Project, available at <http://www.innocenceproject.org/about/index.php>. Centurion Ministries, founded in 1983 by Jim McCloskey, was actually the first innocence project, although Cardozo had the first law school project. Centurion Ministries, available at <http://www.criminaljustice.org/public.nsf/Freeform/CenturionMinistries?OpenDocument>.

n53. The Innocence Project: About the Innocence Project, available at <http://www.innocenceproject.org/about/index.php>.

n54. *Id.*

n55. *Id.*

n56. See report prepared by Jessica Harry of the University of Wisconsin Law School Innocence Project, Innocence Projects 2001 (on file with the authors).

n57. These videos have included: Videotape: Eye Witness Identification (Gary Wells, University of Iowa); Videotape: False Confessions (Richard Leo, University of California, Irvine); Videotape: Snitches (Larry Marshall, Center on Wrongful Convictions at Northwestern University); Videotape: DNA Evidence (Barry Scheck & Peter Neufeld, The Innocence Project at Cardozo School of Law); and Videotape, Habeas and Post-Conviction Remedies (Susan Klein, University of Texas, Austin) (all videos on file with the authors).

n58. Similarly, the Thomas Cooley Innocence Project holds weekly classes to discuss cases, has a weekly supervisory session, and takes the students on field trips to the state prison and the state police crime lab. Case discussions include factual discussions, legal discussions, and questions about the direction of the program. The

weekly supervisory session last approximately one to two hours. In addition, students frequently seek out faculty, who are generally available, for additional inquiries. See Questionnaire Completed by the Directors of Project, Norman Fell & Kathy Swedlow, Jan. 20, 2002 (on file with the authors).

The Northern California Innocence Project, of Santa Clara University, meets twice weekly for seventy-five minutes. Approximately one third of their classes are devoted to case rounds, during which students make presentations on select cases and then brainstorm strategy. The remainder of the classes cover aspects of appellate or post-conviction process, causes of wrongful conviction, DNA legislation, and innocence litigation. See Questionnaire Completed by the Director of Project, Cookie Ridolf, Jan. 20, 2002 (on file with the authors).

The Texas Innocence Network meets with students approximately seven times per semester. During these meetings they cover structure of appeals, ethical issues, and techniques for factual investigations. Once every one to two weeks they meet with student teams to brainstorm and review the status of cases. See Questionnaire Completed by the Director of Project, David R. Dow, Jan. 20, 2002 (on file with the authors).

The New Mexico Innocence and Justice Project is a coordinated effort of a student organization and a charity (501(c)(3)) clinic. The class structure is similar to that of the California Innocence Project in that it is comprised of some video lectures from Cardozo, some guest speakers, and some "firm meetings." Every month students meet with supervising private defense attorneys. They also meet with clinical supervisors bi-weekly. Cases are discussed monthly with the Board of Nonprofit, weekly with the class, and monthly with the Student Board. See Questionnaire Completed by April Land, Member of the Board of Directors of the Project, Jan. 20, 2002 (on file with the authors).

The Innocence Project, of Cardozo Law School, has introductory seminar classes preparing students for case work, conferences with one-quarter of the students at a time, and daily direct supervision of cases by staff attorneys and director staff attorneys. The introductory seminar classes include an introduction to forensics, DNA and conventional serology, hair exams, an overview of both state and federal post-conviction remedies, and reasons for wrongful convictions. In addition, there are weekly seminars where students prepare and submit status reports on cases. See Questionnaire Completed by Directors of Project, Barry Scheck, et al., Jan. 20, 2002 (on file with the authors).

Wisconsin Innocence Project, of the University of Wisconsin Law School, provides classes on wrongful convictions, post-conviction discovery, state and federal post-conviction remedies, basic forensic science and DNA, and the admissibility of evidence. During the fall semester, class meets for one and one-half hours, twice a week. One of these meetings is dedicated to the discussion of substantive course materials on the topics previously mentioned. The second is for discussion of the cases that students are working on. During the spring semester, class only meets once per week. That class is used to discuss the cases students are working on. In addition to classes, each student meets once a week with a supervising attorney to discuss each case. See Questionnaire Completed by Directors of Project, Keith Findley & John Pray, Jan. 20, 2002 (on file with the authors).

Brooklyn Law School's Second Look Program holds seminar meetings every other week to discuss substantive criminal law issues. Each team of two students has a weekly one-hour meeting with the supervisor to discuss the cases on which they are working. Additional team meetings are arranged depending on the status of the investigation. Periodically, seminar meetings are used as a group brainstorming session. See Questionnaire Completed by the Assistant Director of the Project, Daniel Medwed, Jan. 20, 2002 (on file with the authors).

Midwestern Innocence Project at University Of Missouri Kansas City offers a two-hour class each semester on wrongful convictions. See Syllabus, available at <http://www.law.umkc.edu/suni/wrongfulconvictions>. Students enroll once and can continue with independent study thereafter. The program has been authorized by the school to run as a clinic. However, currently it is operating as an independent study until a full-time director can be hired. See Questionnaire Completed by Andre Moenssens, Jan. 20, 2002 (on file with the authors).

n59. To date, all of the Cardozo Innocence Project's exonerations have been as a result of DNA exclusions.

n60. In the early 1990s, California appellate courts excluded DNA evidence for failure to meet the Kelly-Frye standard. See Paul B. Tyler, California Supreme Court Survey: A Review of Decisions: September 1993-October 1994, Sec. VII. Evidence, 22 *Pepp. L. Rev.* 1274, 1288-89 (1995). But by 1995, the Court began finding

DNA evidence admissible. See *People v. Wilds*, 48 Cal. App. 4th 1740 (1995) (finding RFLP admissible), and *People v. Soto*, 48 Cal. App. 4th 924 (1994) (also finding RFLP admissible and use of product rule appropriate). The Kelly-Frye "general acceptance" standard remains the rule for admissibility of novel scientific evidence. See *People v. Leahy*, 8 Cal. 4th 587, 612 (1994).

n61. The Cardozo Innocence Project "turns down about seventy percent of requests from inmates due to the evidence being lost or destroyed." Jennifer Boemer, In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates, 27 *Wm. Mitchell L. Rev.* 1971, 1998 (2001).

n62. *Cal. Penal Code 1405* (West 2001).

n63. As of January 6, 2002, there were 146,875 male inmates and 9,676 female inmates. This information was provided by Sharon Madruga, of Avenal State Prison 559-386-0587, on January 11, 2002.

n64. Thomas Cooley Innocence Project and The Innocence Project of Cardozo Law School only evaluate and accept cases involving DNA. The Second Look Program at Brooklyn Law School accepts and evaluates cases involving any evidence except for DNA evidence. Northern California Innocence Project, Texas Innocence Network, New Mexico Innocence and Justice Project, Wisconsin Innocence Project of University of Wisconsin Law School, and Midwestern Innocence Project at University of Missouri Kansas City are similar to the California Innocence Project in that they do not restrict themselves to DNA cases. See Questionnaires, *supra* note 58 (on file with the authors).

n65. All of the above-mentioned projects follow the open intake model. See *id.*

n66. Cardozo students receive a total of five credits per year, three the first semester and two the second semester. Northern California students receive between three and six credits per semester, with a maximum of twelve credits per year. Texas Innocence Network students can receive up to four credits per year, with the option of receiving one or two credits per semester. At Thomas Cooley, students earn a total of three credits per year, one the first semester and two the following semester. At the Second Look Program students earn one academic credit and two clinical credits per semester. Finally, students at Wisconsin earn eight credits for the summer, three in the fall, three in the spring and anywhere between one and four if they stay on with the clinic. See *id.*

n67. There are twenty students in the Wisconsin Innocence Project, three part-time faculty, and one part time administrative assistant. New Mexico has between two and three students at a time and one to two faculty members. Midwestern's class is comprised of twelve to eighteen students, two faculty, and one part time student research assistant, who is responsible for opening mail, sending questionnaires, and processing files. The Second Look Program is taught by two faculty members and has eight students. Cooley's project has anywhere between six and eight students who are taught and supervised by two faculty members (part-time each) and one adjunct professor. In addition, Cooley has a receptionist and one work-study student who is employed ten hours per week. Texas Innocence Network is taught by one professor, has a student "project assistant", and has fifteen plus students. Northern California's Innocence Project is co-taught by three instructors. Support staff includes three research assistants, one secretary and one part-time administrative assistant. There are twenty-three students currently enrolled in the clinic. Finally, Cardozo has sixteen to twenty students during the year and eight to twelve students during the summer. There are four faculty members, one tenured, one clinical, one adjunct, and one staff attorney with no law school appointment. There are two full time co-director and a third part-time co-director. See *id.*

n68. Some sample questions used by the California Innocence Project to evaluate the students' abilities to problem solve for the class of 2001-2002 included: What DNA labs in CA are certified?; What is the so-called Burton Bill?; Who is the owner of San Diego's Star Of India Ship?; Name three ships that have been stationed in Coronado over the past year; What is the longest pier in California? Five other projects have similar methods of

selecting students, one that involves some form of interview. Cardozo uses interviews and has limited enrollment. Cooley requires students to submit a letter of interest and a resume and then participate in an interview process. Texas Innocence Network uses interviews as well; however, they grant permission to enroll to almost every student who is interested. Wisconsin requires students to submit a resume along with a letter of interest. The Second Look Program uses the general clinical department application process. This involves the completion of an application, which is submitted along with a grade report, and then students are interviewed. Three projects appear to be more relaxed in their selection process. Midwestern uses open enrollment. Northern California tries to take third-year students in order to give them the opportunity prior to graduation; however, some second year students are enrolled and groomed for multiple semesters, in order to maintain continuity. Finally, New Mexico uses any student wishing to volunteer in the clinic. See *id.*

n69. Wisconsin, Texas Innocence Network, and Cardozo require at least a two-term commitment from all of the students involved in the project. The Second Look Program allows students to enroll in one or two semesters, Midwestern requires a minimum of one semester, but students are not limited to one semester, and New Mexico allows students to participate in as many semesters as they would like. See *id.*

n70. Cardozo, Wisconsin, Second Look Program, and Midwestern give students grades. Texas Innocence Network, Cooley, and Northern California use pass/fail instead of grades. See *id.*

n71. Kim Hernandez (affectionately referred to as "Momma Kim" by the law students).