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Steven Keith Berenson

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PREPARING CLINICAL LAW STUDENTS FOR ADVOCACY IN POOR PEOPLE'S COURTS

Steven Keith Berenson*

I. INTRODUCTION

Students often come to law school with a set of expectations regarding what courtroom advocacy will look like. In many instances, these expectations are not driven by actual courtroom experiences, but rather by portrayals of court cases in various forms of media such as films, television, and novels.¹ However, such portrayals are likely to differ significantly from the reality that clinical law students will experience in their own initial forays into the justice system. For example, in the popular television series *Law and Order*, many weekly episodes conclude with a protracted courtroom scene involving a jury trial, well rehearsed opening and closing statements and direct and cross-examinations, a learned and engaged judge, and a hushed and dignified courtroom setting.

By contrast, many clinical law students will have their first actual experience with courtroom advocacy in what Russell Engler has described as "poor people's courts."² His description includes courts that handle family, housing, and consumer cases.³ To this list I would add bankruptcy and some criminal courts.⁴ The experiences these students are

* Professor of Law, Thomas Jefferson School of Law, San Diego, California. Director, Veterans Legal Assistance Clinic. The author wishes to thank Paul Bergman, Deborah Cantrell, Luz Herrera, and Bob Seibel for helpful comments on an earlier draft. The author also wishes to thank Paris Baldacci and Ascanio Piomelli for helpful comments when this article was presented as a work in progress at an Association of American Law Schools clinical conference. Finally, the author wishes to thank Deanna Sampson for continuing support.

1. See, e.g., Kimberlianne Podlas, *Guilty on All Counts: Law & Order's Impact on Public Perceptions of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 5 (2008).

2. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 39 (2010).

3. *Id.*

4. Engler omits criminal courts from his description because his focus is on the phenomenon of self-representation, *id.* at 38, and, as a result of the U.S. Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), there is relatively little self-representation in criminal courts.

likely to have in court will differ dramatically from the picture of courtroom advocacy that most law students bring to their first year of law school. More particularly, rather than the “order” that one may witness in watching a courtroom scene from *Law and Order*, “cacophony” may better describe what one witnesses in observing proceedings in poor people’s courts. Rather than a single case proceeding at a time, dozens of cases may be scheduled for hearing at the same time. Each hearing may last no longer than a commercial during a *Law and Order* episode. Instead of a well-established and respectful order of presentation, the manner of presenting cases may seem haphazard and inconsistent from one case to the next. Formal rules of procedure may appear to be nonexistent or entirely ignored. Judges and other court personnel may appear to be disengaged or even actively hostile to the litigants. Many of the cases may be resolved in the hallways, rather than in the courtrooms themselves.⁵

Little in students’ pre-law school experience is likely to prepare them well for the jarring reality they will encounter their first time appearing in a poor people’s court. Moreover, little in their law school experience prior to their clinical experience will do much to bridge the gap.⁶ For example, most students’ first law school experience with courtroom advocacy comes in the form of a moot court competition. While it may be subject to debate whether the traditional law school moot court competition prepares students well for appellate advocacy in real courts,⁷ such competition does not resemble advocacy in poor people’s courts in any way, shape, or form. Also, in response to recent critiques that legal education prepares students poorly for the practice of law,⁸ more and more law schools have added courses that focus on litigation skills, such as pre-trial practice or motion practice. However, to the extent that such courses go further than moot court does in preparing law students for litigation in trial courts, they still fail to prepare students well for advocacy in poor people’s courts. Indeed, the types of proceedings conducted in pre-trial

5. See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers Negotiations With Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 108–09 (1997).

6. Caroline Kearney, *Pedagogy in a Poor People’s Court: The First Year of A Child Support Clinic*, 19 N.M. L. REV. 175, 180 (1989) (“Clinic students, having spent a year or two studying the legal system in its ideal form, have certain unrealistic expectations of what court will be like.”).

7. Compare Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178 (1997), with Michael V. Hernandez, *In Defense of Moot Court: A Response to In Praise of Moot Court—Not!*, 17 REV. LITIG. 69 (1998).

8. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

and motion practice classes are more likely to approximate those that their professors once had in federal court and in litigation between well-financed entity clients than those in poor people's courts. Thus, it will fall upon clinical law professors to do the bulk of the preparation in terms of getting their students ready for advocacy on behalf of poor clients.

As an aside, one might ask whether it is really worth it to prepare law students for advocacy in poor people's courts. After all, the vast majority of litigants in poor people's courts, criminal courts aside, are self-represented.⁹ The changing economics of legal education and the legal profession are such that it may not be possible for lawyers to make a living representing litigants in these types of proceedings. Thus, why prepare students for a practice that they are unlikely to engage in following graduation?

This article contends that, for a variety of reasons it is important to continue to engage law students to represent clients in poor people's courts through the clinical legal education experience.¹⁰ First, the skills that students will develop through representation in poor people's courts will be valuable to them throughout their careers, regardless of their future areas of practice.¹¹ Second, it is only through direct encounters with the way the legal system impacts the lives of ordinary people that students can gain a genuine understanding of how our justice system truly operates in practice; this understanding places them in a better position to improve that system later in their careers.¹² Finally, in contrast to the common understanding that lawyers cannot make a living representing ordinary people, new and emerging forms of practice suggest that new law graduates may well be able to develop successful practices focusing on the needs of ordinary people, including advocacy in poor people's courts.¹³

Thus, the article will present a number of suggestions for how clinicians may take on the task of preparing clinical law students for advocacy in poor people's courts.¹⁴ Among the strategies to be discussed are: (1) presenting students with readings that accurately present the realities in poor people's courts; (2) engaging in discussions that "unpack" students' preconceptions about courtroom advocacy; (3) observing actual proceedings in poor people's courts; (4) practicing particular strategies that are likely to be effective in poor people's courts; and (5) engaging in mock

9. Engler, *supra* note 2, at 40.

10. *See infra* Part V.

11. *See infra* Part V.A.

12. *See infra* Part V.B.

13. *See infra* Part V.C.

14. *See infra* Part VI.

hearings designed to accurately replicate the actual proceedings in poor people's courts.

II. LAW STUDENTS' PRE-LAW SCHOOL CONCEPTION OF COURTROOM ADVOCACY

Most students enter law school with little understanding of what courtroom advocacy actually looks like in practice. To be sure, some students enter law school after previous careers that will have brought them into frequent contact with courtroom practice. However, such students are the exception rather than the rule. For the years 2005–2009, more than 50 percent of law school applicants were under the age of twenty-four,¹⁵ thus rendering significant experience with the justice system prior to entering law school unlikely.

However, such students are likely to have had significant exposure to courtroom advocacy as portrayed through popular media, including television and movies.¹⁶ Indeed, the courtroom drama has been, and continues to be, a staple of the entertainment world.¹⁷ Yet the “reality” that future law students see depicted in television and film differs greatly from the reality of what happens in real courtrooms around the country every day.¹⁸ Even the trial itself—which is so prevalent in popular media—is somewhat misleading, as an increasingly small number of cases is resolved through trial each year.¹⁹ Further, courtroom dramas are made with an emphasis on “drama,” as that is what generates viewers and prof-

15. KIMBERLY DUSTMAN & PHIL HANDWERK, ANALYSIS OF LAW SCHOOL APPLICANTS BY AGE GROUP: ABA APPLICANTS 2005–2009 2 (LSAC 2010), available at <http://www.lsac.org/LSACResources/Data/PDFs/Analysis-Applicants-by-Age-Group.pdf>.

16. See, e.g., Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 531, 552 (2000); Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias our Juror Citizenry*, 39 AM. BUS. L.J. 1, 5–6 (2001).

17. See generally Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653 (2007); James E. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745, 746 (2007); David Rae Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 472 (1999).

18. Elkins, *supra* note 17, at 749; Papke, *supra* note 17, at 487; Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror "Truth,"* 14 WIDENER L. REV. 479, 490–91 (2009).

19. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); David Ray Papke, *The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice*, 40 S. TEX. L. REV. 919, 926 (1999).

its for the entities that produce such entertainment vehicles.²⁰ Creating drama often depends on intense one-on-one confrontations between attorneys and witnesses, attorneys and judges, or between two attorneys,²¹ or on extended courtroom speeches, whether in opening or closing statements or randomly inserted throughout the trial.²²

Other distinctions between courtrooms in popular culture and those in actual poor people's courts abound. Some such distinctions are physical. Thus, fictional courtrooms are often large and ornate—"wood paneled and well-upholstered"—as opposed to the "peeling paint and hard plastic chairs found in many urban courtrooms."²³

Ironically, syndi-courtroom²⁴ shows such as *Judge Judy* or *Judge Joe* may approximate the reality in poor people's courts more closely than other television and cinematic courtroom portrayals do. The proceedings in such "courtrooms" are largely based upon the small claims court model.²⁵ Indeed, the "cases" in syndi-courtrooms are usually drawn from real small claims court cases.²⁶ The parties provide written submissions to the "judge" relating to their case and then answer questions from the court during the hearing.²⁷ The parties appear without lawyers, the rules of evidence do not apply, and documentary and other forms of physical evidence are kept to a minimum.²⁸ Absent are the lengthy and dramatic opening and closing statements, the confrontational direct and cross-examinations, and the jury verdicts that are the hallmarks of fictionalized courtroom dramas and their live trial counterparts, televised on Court TV and other, similar channels.

On the other hand, even syndi-courtroom shows differ in many respects from proceedings in poor people's courts. For example, judges in syndi-court tend to be more active than are real-world judges. Syndi-court judges are "aggressive, impatient, and opinionated,"²⁹ tending towards lengthy, often sarcastic tirades against litigants.³⁰ This should not be

20. Podlas, *supra* note 18.

21. PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES xvii (2d ed. 2006).

22. *Id.* at xix.

23. Papke, *supra* note 17, at 479; see also Victoria S. Salzman & Philip T. Dunwoody, *Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think About the Legal Profession?*, 58 SMU L. REV. 411, 412, 427 (2005).

24. I borrow this term from Kimberlianne Podlas. See Podlas, *supra* note 16, at 7.

25. *Id.* at 6, n.31.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 15.

30. *Id.* at 16.

surprising. After all, the judges are the stars of these shows, and they must cultivate television personas that will attract viewers to return to their shows day after day. By contrast, the crushingly large caseloads in poor people's courts frequently cause real-world judges to be unfamiliar with the facts and circumstances of individual cases, reducing them to a more passive role in which they rely on the litigants wherever possible to provide the court with information and generally control the content of the proceedings.

III. LAW STUDENTS' EXPOSURE TO "REAL WORLD" ADVOCACY PRIOR TO THEIR CLINICAL EXPERIENCES

Legal education has long been criticized for failing to do enough to expose students to the realities of practicing law or to prepare them for such real world practice.³¹ And although clinical and other practice-oriented teaching methodologies have expanded greatly over the last century,³² critics still maintain that more needs to be done to prepare students for the practice of law.³³ Indeed, recent thorough and well-respected studies of American legal education have reached similar conclusions.³⁴

Despite the great increase in practice-oriented legal education over the past century, it remains the case that most law students' first introduction to courtroom advocacy in law school comes in the form of the traditional moot court competition. Of course, the moot court exercise is an

31. See, e.g., ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW 276 (1921); *Legal Education and Professional Development – An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 5 [hereinafter, MacCrate Report]; *Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 14–16; *Final Report and Recommendations*, 1983 TASK FORCE ON PROF'L COMPETENCE 11–13; John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252 (1929); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 913 (1933); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 511 (1917); David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1, available at <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

32. See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education For This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000); Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 212 (2011–12).

33. See, e.g., Lauren Carasik, *Renaissance or Retrenchment: Legal Education at the Crossroads*, 44 IND. L. REV. 735 (2011); Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 595–97 (2008); Segal, *supra* note 31.

34. See STUCKEY ET AL., *supra* note 8; SULLIVAN ET AL., *supra* note 8.

experience in appellate advocacy,³⁵ not in trial advocacy, and even less so in advocacy for indigent clients or in areas related to poverty law.

It is true that with the recent turn toward practice-oriented legal education,³⁶ more and more schools are supplementing the traditional moot court experience with other practice-oriented courses, such as motion practice or pre-trial practice. Nonetheless, such courses are also likely to provide only limited preparation for law students in the type of advocacy they will be called upon to provide in poor people's courts. For example, most pre-trial practice courses, even particularly innovative ones, take place in federal rather than state courts, where poor people's courts are housed.³⁷ Perhaps this should not be surprising, given the fact that to the extent that law professors have had much in the way of legal practice experience at all,³⁸ it is likely to have taken place in the more elite setting of the federal courthouse than in poor people's courts.

In any event, motion practice in elite settings, and therefore law school pre-trial practice courses based upon it, differs significantly from the hearings that take place in poor people's courts. In elite motion practice, hearings generally take place at the time they are scheduled. Both parties will have had ample time to present their arguments. There is likely to be a clearly defined order of presentation, with each side making its case without interruption, knowing that it will have adequate opportunity to respond to arguments made by the opposing party. The judge is likely to be well prepared for the hearing, having taken the time to read through the written submissions that will have preceded the hearing. Following the hearing, cases are taken under advisement, with a written decision on the motion issued some time into the future. However, none of these practices is likely to be followed in poor people's courts.

35. See, e.g., Darby Dickerson, *In Re Moot Court*, 29 STETSON L. REV. 1217 (2000).

36. See *supra* notes 31–33, and accompanying text.

37. See, e.g., Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider to be Worthless?*, 70 MD. L. REV. 499, 508 (2011) (discussing the University of New Hampshire Law School's innovative Webster Scholars Program).

38. See, e.g., Hoffman, *supra* note 32, at 221; Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation With Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 127–28 (2010); Lawrence Rosenthal, *Those Who Can't, Teach: What the Legal Career of John Yoo Tells Us About Who Should be Teaching Law*, 80 MISS. L.J. 1563, 1612 (2011).

Trial practice courses have also been a staple of the law school curriculum³⁹ and many students will have taken such courses prior to their first clinical experiences. However, trial practice courses also differ significantly from what students will experience in poor people's courts. Trial practice courses rightly focus on the various aspects of a typical jury trial.⁴⁰ A typical trial practice course might cover voir dire and jury selection, opening statements, the presentation of witness testimony through cross and direct examination, and closing arguments.⁴¹ However, few if any of these events will take place during a hearing in a poor people's court.

First, jury trials are extremely rare in poor people's courts.⁴² Second, the high volume of cases means that parties or their lawyers are almost never afforded the time to make an opening statement prior to a hearing or closing arguments after. And while evidence is often taken during hearings, it is rarely presented in the way it is in a trial practice class—with a party or a witness sitting on the witness stand, responding to questions posed by the lawyers in the case.⁴³ Particularly given the high incidence of self-representation in poor people's courts, testimony is often presented in a manner that is difficult to distinguish from the arguments being offered by the parties. Usually, self-represented parties, once sworn by the court, present their cases in a mixture of testimony and argument, with lots of inadmissible material thrown into the mix.

IV. WHAT LAW STUDENTS ARE LIKELY TO EXPERIENCE IN POOR PEOPLE'S COURTS

Much has been written about the poor conditions that prevail in poor people's courts, including those to be found in housing,⁴⁴ family,⁴⁵

39. See, e.g., Hon. Malachy E. Mannion, *Objections Overruled: The Trial Advocacy Course Should Be Mandatory*, 30 PACE L. REV. 1195, 1200 (2010).

40. See, e.g., Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 3 (1993).

41. *Id.*

42. See, e.g., Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–82 (2011) (noting dearth of jury trials in misdemeanor courts).

43. See, e.g., Kearney, *supra* note 6, at 181.

44. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Engler, *supra* note 5, at 104; Steven Lubet, *Professionalism Revisited*, 42 EMORY L.J. 197 (1993).

45. See, e.g., Engler, *supra* note 5, at 122; Kearney, *supra* note 6, at 180.

consumer,⁴⁶ and criminal courts.⁴⁷ While the situation has improved in many jurisdictions since some of these articles were written, the core differences between practice in poor people's courts and the courts where entity clients and other, better-resourced parties litigate remain strong. A short list of such differences includes:

A. Cacophony: Poor people's courts are often highly crowded, with insufficient room for all interested persons to obtain seating.⁴⁸ The frequent comings and goings result in a sense of motion and a level of sound that would not be acceptable in a more sedate courtroom setting.⁴⁹

B. High Volume/Crowded Dockets: It is not uncommon for dozens of matters to be scheduled for hearing at the same time.⁵⁰ Thus, parties may often wait for extended periods for their cases to be called.⁵¹

C. Short Hearings: Given the heavy volume of cases handled in poor people's courts, it should not be surprising that relatively little time is allocated to adjudicating any particular case.⁵² It is not uncommon for such hearings to take no more than a minute or two, and it is rare for such hearings to take more than five or ten minutes total.⁵³ Moreover, the allotted amount of time may not be divided equally. Indeed, after the first party has spoken, the court may conclude that it has already devoted as much time to the matter as it is willing and may allow little or no time for the opposing party to respond.

D. Self-Representation: Because the litigants in poor people's courts are overwhelmingly people of limited means, they can seldom afford to hire attorneys to represent them in the proceedings.⁵⁴ Moreover, free legal assistance, in the form of legal aid representation, has grown increas-

46. See, e.g., Engler, *supra* note 5, at 118–19; Lubet, *supra* note 44, at 197; Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257 (2011).

47. See, e.g., Roberts, *supra* note 42, at 277–78.

48. See Engler, *supra* note 5, at 104–05; Kearney, *supra* note 6, at 180.

49. See Engler, *supra* note 5, at 104–05; Lubet, *supra* note 44, at 205 (describing Chicago's housing and collection courts in terms of "continual bedlam").

50. Bezdek, *supra* note 44, at 535. At the time of Bezdek's groundbreaking article, Baltimore's housing court handled 2,500 matters per day. *Id.*; see also Engler, *supra* note 5, at 105; Kearney, *supra* note 6, at 180–81.

51. Kearney, *supra* note 6, at 181.

52. Engler, *supra* note 5, at 105–06; Lubet, *supra* note 44, at 205.

53. See Bezdek, *supra* note 44, at 566 (describing the typical case in Baltimore's rent court, where both parties appear, as lasting no more than two minutes); Engler, *supra* note 5, at 106.

54. Bezdek, *supra* note 44, at 535, 538; Engler, *supra* note 5, at 107; Kearney, *supra* note 6, at 181; Lubet, *supra* note 44, at 205.

ingly scarce,⁵⁵ and only a very small number of litigants will appear with legal aid or pro bono lawyers. To the extent that lawyers do appear in poor people's courts, they represent institutional parties, such as landlords in housing court⁵⁶ or creditors in consumer court,⁵⁷ more commonly than individual litigants.

E. Weak Adherence to Formal Rules: Formal rules of procedure and evidence are often observed in the breach, if at all, in poor people's courts.⁵⁸ For example, even something as simple as who gets to speak first may be ambiguous in a poor people's court.

V. IS IT WORTH TRAINING LAW STUDENTS IN POOR PEOPLE'S COURTS?

Given all of the challenges involved in training law students to advocate successfully in poor people's courts, a question arises as to whether it is worthwhile to engage in this endeavor at all. After all, as pointed out above,⁵⁹ very few practicing lawyers actually appear in poor people's courts. Thus, even to the extent that one embraces the view that it is within law schools' mission to prepare students to practice law effectively, wouldn't that mission be better served by training students more directly in the areas of law in which they are most likely to work following graduation from law school? Further, the types of "case-centered" clinics that focus on the representation of individual clients in poor people's courts⁶⁰ have been criticized for failing to satisfy clinical legal education's twin core objectives of training law students to practice law effectively

55. See, e.g., Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 MCGEORGE L. REV. 603, 608–09 (2007); Ruth Bader Ginsberg, *In Pursuit of the Public Good: Access To Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 3 & n.7 (2001).

56. Engler, *supra* note 5, at 107; Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL'Y 87, 93 (2010).

57. Engler, *supra* note 5, at 118; Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707 (2008); Spector, *supra* note 46, at 269, n.70, 289 (almost all debt collectors are represented in litigation by attorneys, whereas only 8 percent of debtors in this study were represented by counsel).

58. Kearney, *supra* note 6, at 181.

59. See *supra* notes 54–57.

60. See David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 194 (2003) (describing "case-centered" approach to clinical legal education); see also Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 368 (2008); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 335 (2009).

(pedagogy) and “ameliorating . . . pervasive inequities” in access to the legal system and to social and economic resources, including social justice, more generally.⁶¹ More particularly, case-centered clinics have been criticized for failing to do a good job training law students in fundamental skills that they will need to practice law effectively.⁶² Also, such case-centered clinics have been criticized for failing to serve adequately the social justice mission of law school clinics.⁶³

This section of the article addresses each of these criticisms. First, it argues that the skills developed by law students through their work on behalf of clients in poor people's courts will transfer well to whatever type of practice the students later engage in throughout their careers as lawyers.⁶⁴ Second, it asserts that while it is true that case-centered legal clinics have failed to bring about radical social transformation, such clinics have provided a great deal of valuable legal services to needy clients.⁶⁵ Further, such clinics serve legal education's overall mission of educating law students with regard to broader principles of legal justice, while at the same time imbuing in many students the skills and values necessary to engage in legal and social-reform work throughout their careers as lawyers.⁶⁶ Finally, it shows that new and emerging forms of practice suggest that there may be opportunities for lawyers to work and earn a living practicing in areas of law serviced by poor people's courts and to contribute to closing the “justice gap” in America in ways that have not been exploited previously.⁶⁷ Students' experience in traditional anti-poverty law clinics will help them in developing practices of this sort.⁶⁸

61. Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism With a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23, 24–25 (2006); see also Binder & Bergman, *supra* note 60, at 193 (discussing two overall goals of clinical legal education); Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 950 (1997); Brodie, *supra* note 60, at 334, n.2; Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999 (2004); Steven Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001).

62. Binder & Bergman, *supra* note 60, at 191; Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLINICAL L. REV. 545 (1996).

63. Ashar, *supra* note 60, at 375–76.

64. See *infra* Part V.A.

65. See *infra* Part V.B.

66. *Id.*

67. See *infra* Part V.C.

68. *Id.*

A. Advocacy in Poor People's Courts Will Help Students Develop Skills That Will Serve Them Well in Any Future Area of Practice

In a well-known law review article, clinical law professor Paul Reingold argues that law clinics should favor "hard" cases over "easy" ones.⁶⁹ By Reingold's definition, hard cases are those that:

(1) pose[] the risk of taxing the [clinical] program's resources; (2) may be controversial either in the public eye or to some constituent group of the law school; (3) [are] likely to outlive (figuratively if not literally) the students assigned to [them]; and (4) present[] legal issues of a scope, scale, character, or complexity not ordinarily handled by the program.⁷⁰

By contrast, easy cases are those cases that can be completed, in many instances, within the time that the students will be enrolled in the clinic and that do not involve "unduly complex issues or sophisticated practice."⁷¹ The types of cases that involve appearances in poor people's courts generally fit within Reingold's definition of easy cases.

According to Reingold, hard cases are preferable for law clinics because easy cases become monotonous and boring for law students and clinical teachers alike.⁷² In the case of students, they will be less motivated to engage in public interest legal work in the future if they find their clinical experiences to be tiresome and uninspiring.⁷³ In the case of clinical faculty, creative thinking is dulled by the repetitiveness of easy cases.⁷⁴ Clinical faculty are less likely to be satisfied professionally with careers as clinical law teachers if they do not find the cases that they work on to be challenging and a source of professional growth.⁷⁵ Further, easy cases often fail to present students with competent opposing counsel, and an important learning opportunity is thus foregone.⁷⁶

While some extraordinary law students are so talented that they quickly master all of the skills necessary to litigate effectively routine legal matters, exhausting all of the professional, ethical, and philosophical issues embedded in such cases, for most second- and third-year law students, there simply is no such thing as an "easy" case. For reasons dis-

69. Reingold, *supra* note 62, at 545.

70. *Id.* at 546-47.

71. *Id.* at 548-49.

72. *Id.* at 553.

73. *Id.* at 554.

74. *Id.* at 553.

75. *Id.* at 552-53.

76. *Id.* at 553-54.

cussed above,⁷⁷ virtually every activity required of law students in representing clients in cases in poor people's courts is brand new to the student. The idea that students will become masters of these numerous, diverse, and complicated activities over the course of a single semester or even a full year is fanciful, as even competent lawyers struggle over the course of their entire careers to become experts with regard to the various tasks required by even the most routine legal matter.

Handling cases in poor people's courts will introduce law students to many of the fundamental skills that they will need to master in order to be effective legal practitioners. These skills include interviewing and counseling clients; case analysis and planning; conducting legal and factual research; drafting pleadings, declarations, legal memoranda, and other court documents; negotiation and other alternative dispute resolution skills; and courtroom advocacy skills, including oral advocacy and direct and cross-examination of witnesses.⁷⁸ Moreover, many of the skills that students develop working on cases in poor people's courts will transfer well even for those who work in very different areas of the law following graduation from law school.⁷⁹ For example, the legal research and writing skills developed in drafting legal memoranda for filing in court will help students in researching the law and drafting relevant documents should they engage in a transactional legal practice.

The highly respected 2007 Carnegie Foundation study of legal education⁸⁰ relied on education theory to describe the process by which novice law students can progress to the status of expert legal practitioners.⁸¹ It describes a "scaffolding," or building, process, by which novice practitioners move from struggling "to achieve a basic acquaintance with the common techniques of the lawyer's craft[.]" to a point where they are able to apply those techniques in complicated contexts that provide a wide array of situational elements that would overwhelm the ability of the novice practitioner to function effectively in context.⁸² This end point is reached by guiding the learner through increasingly complex applica-

77. See *supra* Parts II and III.

78. Of course, these are among the "Fundamental Lawyering Skills" identified by the MacCrate Commission nearly two decades ago. See MacCrate Report, *supra* note 31, at 138-40.

79. David A. Binder, Albert J. Moore & Paul Bergman, *A Depositions Course: Tackling the Challenge of Professional Skills Transfer*, 13 CLIN. L. REV. 871, 882-83 (2007) (discussing concept of skills transfer); Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 52 (2010).

80. SULLIVAN ET AL., *supra* note 8.

81. *Id.* at 116 (discussing the work of Hubert and Stuart Dreyfus).

82. *Id.* at 117; accord Binder & Bergman, *supra* note 60, at 201; Kowalski, *supra* note 79, at 74.

tions of the techniques in increasingly complex contexts over time.⁸³ The best lawyers will continue this learning process over the length of what may be thirty- or forty-year careers, rather than merely over the relatively short time that they will spend in law school. Starting out with relatively easy cases in law school clinical programs seems to fit well within this scaffolding process. Moving too quickly to cases of too great complexity for novice practitioners seems likely to short-circuit this learning process, resulting in what the Carnegie drafters refer to as “situational overload.”⁸⁴

Further, for “reflective practitioners,”⁸⁵ which most clinical law professors strive to become, there is also no such thing as an easy case. Every case is different from every other one in a variety of particularities.⁸⁶ This is especially true where one practices client-centered representation,⁸⁷ and every case is distinguished by the unique human and personal characteristics of each individual client.⁸⁸ Thus, every case presents an endless palette of teachable moments for the clinical professor to address with the student.⁸⁹ Indeed, this is the great virtue of clinical teaching methodology.⁹⁰ Teachers who become bored within this process have perhaps chosen the wrong line of work. To paraphrase a popular

83. SULLIVAN ET AL., *supra* note 8, at 117; Binder & Bergman, *supra* note 60, at 201; Kowalski, *supra* note 79, at 74.

84. SULLIVAN ET AL., *supra* note 8, at 117.

85. See, e.g., DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 1–2* (2002); Richard K. Neumann, Jr. & Donald Schon, *The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 *CLINICAL L. REV.* 401 (2000); Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 *CLINICAL L. REV.* 231 (1995).

86. Schon, *supra* note 85, at 239–40.

87. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004); CHAVKIN, *supra* note 85, at 51; Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369, 369–71 (2006).

88. CHAVKIN, *supra* note 85, at 53; Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 127–28 (2008) (criticizing legal ethics scholarship for failing to account for the “three-dimensionality” of clients that is the hallmark of the theory of client-centered representation).

89. See, e.g., Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 *CLINICAL L. REV.* 37, 39–44 (1995).

90. Vanessa Merton, *What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” If You Are Trying to Put That Lawyer’s Client in Jail?*, 69 *FORDHAM L. REV.* 997, 1015 (2000) (“[T]he essence of clinical teaching is seizing the teachable moment . . .”).

aphorism used in relation to acting, there are no small cases, only small clinical teachers.⁹¹

There is also reason to doubt Reingold's contention that law students will become bored with easy cases and therefore will sour upon public interest representation.⁹² Though there is a wide diversity among the types of clinical offerings available to law students today,⁹³ there is reason to believe that representation in the types of easy cases that appear in poor people's courts remains the most prevalent form of clinical representation available to current law students.⁹⁴ Yet, despite Reingold's concerns, there is evidence that law students are quite satisfied with their law school clinical experiences. The well-known "After the J.D." study found that young lawyers rated law clinics third among the legal education experiences most helpful to them in making the transition from law school to law practice.⁹⁵

It is true that there will be no opposing counsel in some of the cases handled by students in poor people's courts. On the other hand, certain types of cases, such as criminal law cases and many landlord-tenant and consumer law cases, will involve opposing counsel.⁹⁶ Moreover, just because the opposing party is not represented by counsel does not mean that there will be no opposition in the case. Learning to deal with self-represented opposing parties can present a great challenge and is an important skill for law students to begin to develop.⁹⁷ Further, with administrative law matters such as Supplemental Security Income (SSI) cases and Veterans Affairs (VA) disability cases, even though the government party may not be represented by counsel at the early stages of the administrative process, the government's position is effectively represented by other agency representatives.⁹⁸ These representatives are "repeat players"

91. The original phrase: "There are no small parts, only small actors," is generally attributed to Russian actor and director Constantin Stanislavsky. *See, e.g.,* SHARON MARIE CARNKICKE, *STANISLAVSKY IN FOCUS: AN ACTING MASTER FOR THE TWENTY-FIRST CENTURY* 138 (2d ed. 2009).

92. *See* Reingold, *supra* note 62.

93. *See generally* Barry, Dubin & Joy, *supra* note 32, at 2-3; Brodie, *supra* note 60, at 335-36.

94. Ashar, *supra* note 60, at 368 (describing these as "case-centered" clinics); Brodie, *supra* note 60, at 335-36.

95. *See* Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 *CLINICAL L. REV.* 57, 85 (2009) (reprinting survey results).

96. *See supra* notes 56-57 and accompanying text.

97. *See generally* Jona Goldschmidt, *Strategies for Dealing with Self-Represented Litigants*, 30 *N.C. CENT. L. REV.* 130 (2008).

98. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97 (1974).

within the particular administrative scheme and are extremely capable opponents for the student lawyer. Students stand to learn a tremendous amount from these types of cases, as well as from the family, criminal, and other types of cases they will engage in that will give them the opportunity to interact with opposing counsel.

None of this is to say that clinics should never handle hard cases, as defined by Reingold. Indeed, most commentators agree that there is great benefit to students in working on both types of cases over the course of their law school careers and to law clinics in handling both types of cases, whether within the same individual clinics or across a law school's entire clinical program.⁹⁹

If Reingold criticizes case-centered clinics for being under-ambitious, the University of California, Los Angeles law professors David Binder and Paul Bergman offer precisely the opposite criticism, that case-centered clinics are overly ambitious. More particularly, Binder and Bergman contend that students' limited exposure to each of the various lawyering skills that may be involved in easy case representation greatly reduces the likelihood that students will be able to transfer these skills successfully to their future practices.¹⁰⁰ Thus, they argue that greater exposure to a more limited range of skills would be more effective pedagogy than the approach advocated here in terms of advocacy in poor people's courts. For example, Binder and Bergman have written about clinics that have focused exclusively on a single lawyering skill, such as taking depositions or interviewing and counseling clients.¹⁰¹

It is true that students are not likely to engage in every one of the important skills mentioned previously¹⁰² in every one of their clinical cases or in the course of their semester or two in the clinic. Nonetheless, it is not clear to me that more extensive instruction in a small subset of the broad range of skills required for effective legal practice more responsibly serves legal education's obligation to train students to be effective legal practitioners than introducing a broader range of lawyering skills. Even a limited introduction to such skills can form the building blocks for the scaffolding process that both Binder and Bergman and the drafters of

99. See, e.g., James C. May, *Hard Cases From Easy Cases Grow: In Defense of the Fact- and Law-Intensive Administrative Law Case*, 32 J. MARSHALL L. REV. 87, 91 (1998).

100. See, e.g., Binder & Bergman, *supra* note 60, at 202-03.

101. See Binder, Moore & Bergman, *supra* note 80, at 871 (depositions course); see also Paul Bergman & David Binder, *Taking Interviewing and Counseling Skills Seriously*, 8 T.M. COOLEY J. PRAC. & CLINICAL L. 325 (2005).

102. See *supra* note 78 and accompanying text.

the Carnegie Report identify as key to moving from novice to expert in professional practice.¹⁰³

Perhaps even more importantly, introducing students to a broad range of legal skills in their clinical experience can help to alert them to just how much they need to learn in order to be effective practitioners. Indeed, Binder and Bergman praise clinical legal educators for "help[ing] to establish lawyering tasks such as interviewing, counseling, and negotiation as complex and worthy of study in their own right."¹⁰⁴ Perhaps the highest aim for clinics in relation to their skills training mission should be to give students the tools they need to be able to learn from their own practice experiences in the future and to encourage them to become reflective practitioners.¹⁰⁵ I believe that case-centered clinics in poor people's courts will help students to achieve this goal more effectively than clinics that focus on a particular lawyering skill, which may lull students into a false sense that expertise in legal practice can be achieved relatively easily and in a short time.

I also do not mean to suggest that a semester or two in a case-centered legal clinic should exhaust law students' training in fundamental lawyering skills during the course of their law school careers. Like Binder and Bergman, I see great value in supplementing the limited range of live client experiences that students will have in their clinical courses with simulations that can greatly expand both the number and range of students' experiences so as to greater facilitate the transfer of those skills to the students' future law practices.¹⁰⁶ However, such simulations need not come at the expense of the live client experiences that are the core of case-centered clinics. Rather, in response to the practice-oriented turn in legal education that was discussed above,¹⁰⁷ schools throughout the country are greatly expanding their training in practice skills, including through the use of simulation courses and exercises. Such simulations should be considered an addition, rather than an alternative, to the skills training that is accomplished in case-centered clinics. This type of repetition is a critical component of the conditions Binder and Bergman identify as necessary to the transfer of skills from students' educational to their practice contexts.¹⁰⁸

103. See *supra* notes 80–83 and accompanying text; see also Binder & Bergman, *supra* note 60, at 212.

104. Binder & Bergman, *supra* note 60, at 191.

105. See *supra* note 85 and accompanying text; see also Brodie, *supra* note 60, at 353.

106. See Binder & Bergman, *supra* note 60, at 202, 210, 215.

107. See *supra* notes 32–34 and accompanying text.

108. Binder & Bergman, *supra* note 60, at 202.

Binder and Bergman also criticize case-centered clinics for training law students in what they describe as simple and repetitive tasks, such as service of process, filing of cases, and exchange of documents with opposing counsel.¹⁰⁹ They contend that these simple tasks are easily learned in practice and that clinics should spend more time focusing on more complex lawyering skills, such as taking depositions and conducting negotiations.¹¹⁰ However, Binder and Bergman seriously underestimate the importance and complexity of the practice skills they denigrate. I cannot count the number of cases that we have handled in our case-centered clinic over the last seven years in which the outcome turned on difficult service of process issues. Binder and Bergman acknowledge there is relatively little skill training offered to lawyers once they enter law practice.¹¹¹ This problem has only been exacerbated by the recent economic crisis and its impact on the legal profession¹¹² and is particularly acute for the large number of law students who enter solo or small-firm practice following graduation.¹¹³ Case-centered clinics may also introduce students to certain law practice management skills, including the use of case and practice management software, which will be essential to their success as practitioners.¹¹⁴ In short, case-centered clinics introduce and train students in and to a wide range of essential legal practice skills that are not easily simulated or considered appropriate for a simulation course by educators such as Binder and Bergman.

109. *Id.* at 204.

110. *Id.*

111. *Id.* at 206-07.

112. See generally William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 381 (2011) (discussing how changes in the economics of large law firm practice have reduced the incentive for firms to provide training for new lawyers); Robert Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 324-25 (2011) (same); David B. Wilkins, *Team of Rivals: A New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2108 (2010) (same).

113. A number which appears to be increasing. See, e.g., Anika Anand, *Law Grads Going Solo and Loving It*, MSNBC (June 20, 2011), http://www.nbcnews.com/id/43442917/ns/business-personal_finance/ (citing National Association of Law Placement statistics, indicating that the percentage of recent law graduates going into solo practice increased from 3.5 percent in 2008 to 5.7 percent in 2010).

114. See Hoffman, *supra* note 32, at 217 (describing increased use of case management software as one of the recent changes in law practice that law schools have inadequately prepared students to address).

B. Advocacy in Poor People's Courts Serve Law Schools' Mission to Educate Students in Principles of Justice and Core Values of the Legal Profession

Critics contend that case-centered clinics fail to meet clinical legal education's other core commitment, increasing social justice.¹¹⁵ This criticism dates back to the beginning of the second wave of law school clinics, which emerged out of the anti-poverty lawyering movement in the 1960s.¹¹⁶ At that time, the debate was between two types of clinic cases. Individual service cases, which focus on routine legal matters handled on behalf of individual clients, had been the bread and butter of both law school clinics and neighborhood legal aid offices.¹¹⁷ Impact cases, on the other hand, might bring about law reform or otherwise affect large numbers of people through a single case.¹¹⁸ Critics of service cases suggested that they were simply too small scale to achieve social justice to an acceptable degree.¹¹⁹

In the intervening decades, many scholars and other anti-poverty advocates have soured on ability of impact litigation to achieve social justice objectives in a measurable and lasting way.¹²⁰ Thus, more recently the critics of service representation have turned to community or collective representation as offering greater promise of achieving clinical legal education's social change objectives.¹²¹

As its critics contend, individual case representation has failed to achieve the type of social transformation for which its early advocates had hoped. On the other hand, law school clinics have provided tremen-

115. See *supra* note 61 and accompanying text.

116. See Barry et al., *supra* note 32, at 12; see also Carasik, *supra* note 61, at 29; Weizner & Aiken, *supra* note 61, at 998.

117. See Ashar, *supra* note 60, at 368; Berenson, *supra* note 55, at 607; Brodie, *supra* note 60, at 335-36.

118. See Ashar, *supra* note 60, at 373; Berenson, *supra* note 55, at 607; Brodie, *supra* note 60, at 336, n.9.

119. See Berenson, *supra* note 55, at 607.

120. See, e.g., JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 18-22 (1978); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 3-10 (1974); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 606 (2009).

121. See Ashar, *supra* note 60, at 356; Brodie, *supra* note 60, at 337; Carasik, *supra* note 61, at 48; Cummings & Rhode, *supra* note 120, at 615; Robin S. Golden, *Collaborative as Client: Lawyering for Effective Change*, 56 N.Y.L. SCH. L. REV. 393 (2011-12); Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173 (2001).

dous assistance to hundreds of thousands of struggling clients over the years, an achievement that should not be discounted. Further, as of yet, community or collective representation has also failed to achieve the full promise to which its advocates aspire.

Additionally, the presence of law students in poor people's courts may influence such courts in the direction of better practices. In his article describing the deplorable conditions in Chicago's housing and consumer courts, Steven Lubet describes one occasion in which legendary Chicago lawyer Albert Jenner appeared unexpectedly in one of these courtrooms.¹²² For that day, even after Jenner had long left the courtroom, the court functioned more like the law school ideal of a court than the reality of a poor people's court.¹²³ Lubet dubbed Jenner's effect on the court the "Eleventh Floor Principle," after the floor of the Chicago courthouse on which these courtrooms appeared.¹²⁴ Although law students may not hold the same sway over courtrooms that Jenner did, it is possible that the presence of energetic and idealistic students may encourage judges and other court personnel to do more to transform their courtrooms to more closely resemble the ideal law school courtrooms of their own academic memories.

Further, there are other ways to measure law school clinics' achievement of their social justice objectives than improvement in the material conditions of their clients and their communities. Certainly, one aspect of law clinics' social justice mission is to develop in students a desire to devote some or all of their professional lives to legal and social reform.¹²⁵ Even the brief introduction to practice on behalf of poor clients provided in case-centered clinics increases the likelihood that students will engage in pro bono legal representation on behalf of poor clients during the course of their careers, even if they do not focus exclusively or even primarily on representing poor people in their practices more generally.¹²⁶ These practitioners will feel more comfortable in taking on such cases, given their prior clinical experience, than even highly skilled practitioners in other areas of the law who lack this experience.¹²⁷ Further, students'

122. Lubet, *supra* note 44, at 206.

123. *Id.*

124. *Id.* at 204.

125. Binder & Bergman, *supra* note 60, at 194; Carasik, *supra* note 61, at 39; Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1476 (1998).

126. See Douglas L. Colbert, *Clinical Law Professors' Professional Responsibility: Preparing Law Students to Embrace Pro Bono*, 18 GEO. J. ON POVERTY L. & POL'Y 309 (2010–11).

127. See Carasik, *supra* note 61, at 39; Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2431

firsthand exposure to the manner in which poor individuals encounter our justice system may inform their broader involvement in law reform activities in the future, even if they do not provide direct representation to individual poor clients.¹²⁸

Additionally, though this may not have been the case in the past regarding American legal education,¹²⁹ it seems quite clear now that law schools have an obligation to educate law students in broad principles of justice.¹³⁰ After all, there is little disagreement that one of the primary goals, if not the primary goal of legal education generally, is to prepare law students to become effective practicing lawyers.¹³¹ The legal profession has recognized that part of what it means to be an effective practitioner is to work to advance broader principles of justice. Indeed, the Preamble to the American Bar Association's Model Rules of Professional Conduct, which has been adopted in whole or in part by forty-nine of the fifty states, begins: "A lawyer, as a member of the legal profession, is a . . . public citizen having special responsibility for the quality of justice."¹³²

Naturally, there will be significant disagreement as to the meaning of the term "justice."¹³³ But while an overarching definition of justice may

(1998–99) (describing a common complaint that corporate lawyers will not, or should not, engage in pro bono representation on behalf of poor clients due to unfamiliarity with the types of cases with which poor clients need assistance).

128. Unfortunately, the little relevant empirical research that exists fails to corroborate the intuitive claim that students who work on cases on behalf of poor clients during law school are more likely to engage in pro bono work following graduation. See Sandefur & Selbin, *supra* note 95, at 90–94.

129. See, e.g., David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285, 286 (1992) ("Most faculty in American law schools would deny the appropriateness of any mission that requires them to either understand or advance justice.").

130. See, e.g., MacCrate Report, *supra* note 31, at 333 ("Law school deans, professors, administrators and staff should be concerned to convey to students that the professional value of the need to 'promote justice, fairness and morality' is an essential ingredient of the legal profession . . ."); see also Margaret Martin Barry, Martin Geer, Catherine F. Klein & Ved Kumari, *Justice Education and the Evaluation Process: Crossing Borders*, 28 WASH. U. J.L. & POL'Y 195, 200 (2008); Robert Hornstein, *Teaching Law Students to Comfort the Troubled and to Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057, 1066, n.44 (2009).

131. Hoffman, *supra* note 32, at 222; see generally SULLIVAN ET AL., *supra* note 8.

132. MODEL RULES OF PROF'L CONDUCT Preamble, ¶ 1 (2002); see Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 HOW. L.J. 677, 688–703 (2007–08) (discussing evolution of the above-quoted language from the Model Rules' Preamble).

133. See, e.g., *Justice: What's the Right Thing to Do?: A Public Lecture and Symposium on Michael J. Sandel's Recent Book*, 91 B.U. L. REV. 1301 (2011); see also Barnhizer, *supra* note 129, at 310.

elude us, most of us can easily begin to identify some of the core components of what it means in the context of the practice of law. Core components include procedural due process concepts of notice of the subject matter of legal proceedings and a genuine opportunity to participate and be heard on one's own behalf,¹³⁴ as well as substantive due process concepts such as fair outcomes based upon admissible evidence and across similar cases.¹³⁵ Of course, such components are at the heart of modern treatment of the traditional law school curriculum. Yet, the gulf between the way these concepts appear in the materials considered in the law school classroom, including judicial opinions and writings from inside the legal profession, and the way that they often play out in poor people's courts is stunning.¹³⁶ There can hardly be a more effective means of teaching these core components of justice than by exposing students to, and indeed involving them deeply in, the reality of this gulf.¹³⁷ As University of Maryland law professor Michael Pinard has stated, "Every law student . . . should visit a criminal court I guarantee you that if you leave that court and you are not upset and sad, then this profession is not for you."¹³⁸ While I certainly do not contend that student practice in poor people's courts adequately dispenses the law schools' justice education mission,¹³⁹ it does represent one particularly effective step that law schools can employ in discharging their broader mission.

C. New and Emerging Forms of Practice Will Allow Current Law Students to Earn a Living While Practicing within America's Current Justice Gap

Given the prevalence of self-representation in poor people's courts, it is fair to ask whether it is worthwhile to train students for a type of

134. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971).

135. See generally H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624 (1957) ("[O]ne essential element of the concept of justice is the principle of treating like cases alike.") (emphasis in original).

136. See, e.g., Katherine R. Kruse, *Getting Real About Legal Realism, New Legal Realism, and Clinical Legal Education*, 56 N.Y.L. SCH. L. REV. 659, 660 (2011-12) (discussing Legal Realists' distinction between the "law in books" and the "law in action").

137. See, e.g., Carasik, *supra* note 61, at 39; Dubin, *supra* note 125, at 1477.

138. Whitehouse, *Champions of Change: Closing the Justice Gap in America*, YOUTUBE (Oct. 13, 2011), <http://www.youtube.com/watch?v=0vnKy9RH1wg>. For more information on the White House's Champions of Change program, see www.whitehouse.gov/champions (last visited June 1, 2013).

139. For other suggestions on how to infuse the entire law school experience with justice education experiences, see, for example, Linda F. Smith, *Fostering Justice Throughout the Curriculum*, 18 GEO. J. ON POVERTY & POL'Y 427 (2011).

legal work that they are unlikely to engage in for a living. On the other hand, we should not overstate the lack of attorney involvement in poor people's courts. Ever since the U.S. Supreme Court's decision in *Gideon v. Wainwright*,¹⁴⁰ governments have had an obligation to provide counsel to indigent defendants in most criminal cases. Of course, budget constraints have put tremendous strain on public defender offices' ability to fill even existing positions, let alone to expand the number of positions available. On the other hand, increasing attention has been drawn to the harms that overburdened and under-resourced public defender offices cause to our overall system of indigent criminal defense,¹⁴¹ so perhaps more resources will be devoted to creating and supporting such systems in the future. Similarly, funding for and positions in civil legal aid programs decreased dramatically over the past three decades.¹⁴² And while the "Civil Gideon"¹⁴³ movement may have suffered a setback with the

140. 372 U.S. 335 (1963).

141. See, e.g., AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; COMM'N ON THE FUTURE OF INDIGENT CRIM. DEF. SERVS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), available at http://courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf (concluding that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of The United States"); U.S. DEPT. OF JUSTICE, EXPERT WORKING GROUP REPORT: INTERNATIONAL PERSPECTIVES ON INDIGENT DEFENSE 5 (2011), available at <https://ncjrs.gov/pdffiles1/nij/236022.pdf>; Monica Davey, *In Missouri, State Budget Woes Take Toll on Lawyers for the Indigent*, N.Y. TIMES, Sept. 10, 2010, at A15; Andrea Estes, *Call for Public Defender Overhaul*, THE BOSTON GLOBE, Jan. 24, 2011, available at http://www.boston.com/news/politics/articles/2011/01/24/patrick_wants_to_end_use_of_private_attorneys_for_public_defense; William Glaberson, *Are Lawyers for the Poor Inadequate?*, N.Y. TIMES, Mar. 16, 2010, at A18 (discussing class-action lawsuit challenging the adequacy of indigent criminal defense system in New York City); Jonathon A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331 (2009–10).

142. See, e.g., Steven K. Berenson, *Legal Services for Struggling Veterans—Then and Now*, 31 HAMLIN J. PUB. L. & POL'Y 101, 112 (2009–10); Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11, 29–30 (2003–04); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 1212 (2005), available at http://www.americanbar.org/content/dam/aba/migrated/media/is-civies/civiljustice/civiljustice_lscreport.authcheckdam.pdf.

143. "Civil Gideon" is the name that has been given to the idea of extending the right of appointed counsel that was granted to indigent criminal defendants in *Gideon v. Wainwright* to indigent civil litigants. See, e.g., Benjamin H. Barton, *Against Civil*

U.S. Supreme Court's decision in *Turner v. Rogers*,¹⁴⁴ isolated efforts to provide more funding for civil legal assistance have still been initiated around the country.¹⁴⁵ In any event, it will likely always be the case that at least some publicly funded jobs will be available for graduates of law school clinical programs who wish to continue the work that they have begun in representing clients in poor people's courts.

Critically, lawyers and legal scholars have begun to explore new and innovative ways to bring legal services into what has been described as the "justice gap." The justice gap is a term that refers to the gulf that exists between the need for civil legal assistance on the part of low- and moderate-income people in America and the legal resources available to provide that assistance. The last comprehensive survey of the civil justice needs of low- and moderate-income Americans was conducted by the American Bar Association in 1992.¹⁴⁶ It concluded that nearly three quarters (71 percent) of the situations faced by low-income households that could be addressed by the civil justice system were not, and nearly two-thirds (61 percent) of the situations faced by moderate income households that could be addressed by the civil justice system were not.¹⁴⁷ Low-income respondents reported that the main reasons they did not seek legal assistance were cost and a sense that legal assistance would not help with their problem.¹⁴⁸ Moderate-income respondents reported that

Gideon (And For Pro Se Court Reform), 62 FLA. L. REV. 1227, 1227 (2010); Engler, *supra* note 2, at 43.

144. 131 S.Ct. 2507, 2520 (2011) (finding no constitutional right to appointed counsel in a civil contempt case where defendant could be incarcerated for up to a year for non-payment of child support).

145. For example, in 2009, California enacted the Sargent Shriver Civil Counsel Act, which provides for pilot programs to test the effects and efficacy of expanding the right to counsel in civil cases. *See, e.g.*, Brian Brophy, Note, *A Civil Right to Counsel Through the States: Using California's Efficiency Project as a Model Toward Civil Gideon*, 8 HASTINGS RACE & POVERTY L.J. 39, 39 (2011). Following on the heels of the California legislation, the ABA drafted a model act designed to assist states in adopting civil right to counsel legislation. *See* Marc C. Brown, Comment, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 895 (2010–2011).

146. *See* CONSORTIUM ON LEGAL SERVS. AND THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>. The survey counted households as low income if they earned no more than 125 percent of the then-current poverty level. *Id.* Moderate-income households were those earning between 125 percent of the poverty level and \$60,000 per year, which excluded the top 20 percent of households based upon income from the survey. *Id.*

147. *Id.*

148. *Id.*

“the situation was not really a problem, that they could handle it on their own, and that a lawyer’s involvement would not help.”¹⁴⁹ Legal scholar Rebecca Sandefur, who studies access to justice issues, points out that the 1992 survey probably understated the civil legal needs of Americans,¹⁵⁰ and if anything, those needs have likely increased disproportionately since the economic crisis of 2008.¹⁵¹

The Legal Services Corporation (LSC) has also conducted studies relating to the justice gap.¹⁵² It has more narrowly defined the term as the gap between the legal needs of low-income Americans (those earning no more than 125 percent of the poverty level) and available legal resources through America’s civil legal aid program.¹⁵³ According to various measures employed, the justice gap remains wide. In 2008, LSC-funded programs were only able to serve approximately half of the eligible potential clients who sought legal services.¹⁵⁴ Seven legal needs studies conducted at the state level between 2006 and 2009 concluded “only a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer.”¹⁵⁵ The LSC found that more than ten times the number of private attorneys is available to serve the general population than there are legal aid attorneys to serve the low-income population.¹⁵⁶

The LSC report also documented what has come to be widely accepted as a vast recent increase in the numbers of litigants who appear without counsel in civil cases in our courts.¹⁵⁷ It is true, as the report points out, that for low-income litigants, lack of resources make hiring a

149. *Id.*

150. Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 56 (2010) (pointing out that the survey did not include the top 20 percent of families based upon income).

151. *Id.* at 57.

152. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. This represents an update of the 2005 study of the same name released by the LSC. *Id.*

153. *Id.* at 1.

154. *Id.* at 12.

155. *Id.* at 17–18 (emphasis omitted).

156. *Id.* at 19. This measure focused on all legal aid lawyers in America, not only those who worked for LSC funded programs. *Id.*

157. *Id.* at 23; see also Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIMONIAL LAW. 193, 194 (2008); Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009); Drew A. Swank, Note and Comment, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 (2005).

private attorney impossible when access to a publicly funded or pro bono attorney is unavailable.¹⁵⁸ On the other hand, many moderate-income litigants, who might be able to afford to hire an attorney, choose not to do so, largely because they believe that the outcome of their cases will not be sufficiently improved by legal representation to justify the costs incurred in hiring a lawyer.¹⁵⁹

Correspondingly, there appears to be an oversupply of lawyers who seek to represent individual clients in many of the kinds of cases that appear in poor people's courts. Studies have documented that for nearly four decades, the incomes of lawyers who serve individuals, as opposed to entity clients, have decreased dramatically.¹⁶⁰ The number of individual, paying clients has not kept pace with the number of attorneys available to serve them.¹⁶¹ This situation has only been exacerbated by the economic crisis that began in 2008.¹⁶²

The combination of a large number of self-represented litigants and a large number of attorneys looking for work on behalf of such clients would seem to provide a ripe setting from which to address the justice gap.¹⁶³ And indeed, a number of lawyers have begun to explore new and creative approaches that are intended to provide legal services to those who have previously gone without.¹⁶⁴ Such approaches are called "low bono," as opposed to pro bono, representation: legal services at reduced cost to consumers who might previously have thought that pro bono representation was their only option.¹⁶⁵ Some of the more promising efforts to provide low bono services to clients include discreet task representation or unbundled legal services,¹⁶⁶ virtual law offices and other innova-

158. LEGAL SERVS. CORP., *supra* note 152, at 24–25.

159. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation*, 54 AM. U. L. REV. 1537, 1573 (2005).

160. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 163 (2005).

161. *Id.* at 164.

162. See generally Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051 (2010); Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 2–3 (2009).

163. See generally Marsha M. Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context*, 56 N.Y.L. SCH. L. REV. 367 (2011–12).

164. *Id.*

165. Herrera, *supra* note 162, at 39.

166. Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1036 (2009); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 898 (2009). Discreet task representation allows clients to pay for some, but not all of the services traditionally included in "full service" legal

tive uses of technology,¹⁶⁷ and collaborative law or other techniques to resolve disputes cooperatively, more quickly, and less expensively than through protracted litigation.¹⁶⁸

The growth of the low bono sector, along with traditional opportunities to provide legal services to low-income clients, means that many students in legal clinics that work in poor people's courts should have the opportunity to continue such service after graduation.

In their study of the delivery of legal services to "ordinary people" in this new context, law professors Marsha Mansfield and Louise Trubek point out that lawyers will need to assume new roles in order to succeed.¹⁶⁹ The roles that they focus on are those of collaborator, evaluator, and facilitator.¹⁷⁰ Of course, traditional legal education has not been geared toward training students in these roles.¹⁷¹ While reform throughout the curriculum is needed in order to provide necessary training for lawyers to assume these often unfamiliar roles,¹⁷² legal clinics, including those focusing on cases in poor people's courts, can be excellent settings for introducing these new roles to law students and helping them to develop the skills needed to assume these roles successfully as they move into their careers as lawyers.¹⁷³

VI. TECHNIQUES FOR TRAINING LAW STUDENTS TO BE EFFECTIVE ADVOCATES IN POOR PEOPLE'S COURTS

In her groundbreaking study of advocacy in Baltimore's Rent Court, Professor Barbara Bezdek analyzed the many factors that inhibit tenants from effectively asserting available defenses in eviction actions.¹⁷⁴ These factors ranged from legal culture¹⁷⁵ to race, class, and gender.¹⁷⁶ While

representation. Charn, *supra*. Thus, a lawyer might assist a client in drafting court documents, but not otherwise appear in the case. Or, a lawyer might make a court appearance on behalf of a client with regard to a particularly important motion, but not with regard to the other aspects of the case. Naturally, limiting the scope of services reduces the cost to the client of obtaining such services.

167. Charn, *supra* note 166, at 1035–36; Rhode, *supra* note 166, at 898.

168. Charn, *supra* note 166, at 1036–37; Rhode, *supra* note 166, at 898.

169. See Mansfield & Trubek, *supra* note 163, at 372.

170. *Id.*

171. See *id.* at 384.

172. See *id.* at 388.

173. See *id.* at 379, 386 (discussing the University of Wisconsin School of Law's Family Court Assistance Project, which provides limited assistance and full representation to self-represented litigants in family law cases).

174. Bezdek, *supra* note 44, at 533.

175. *Id.* at 568.

176. *Id.* at 583, 592.

these precise factors may not inhibit law students from effectively participating in hearings in poor people's courts, other, less-intractable barriers nonetheless exist.

Law students may be overwhelmed and intimidated by the sheer volume of activity that they will encounter in poor people's courts, as well as their unfamiliarity with the unwritten rules and other norms that govern practice within such courts. In order to overcome their inhibitions and serve as effective advocates for their clients in these forums, students and their teachers can undertake a number of specific steps to increase the likelihood of effective advocacy.

A. *Unpack Students' Preconceptions of What a Court Is*

Students need to adjust their above-described¹⁷⁷ preconceived notions of what a court is to correspond more directly to the reality that they will encounter in poor people's courts. Two ways to help them make this adjustment are to provide readings that portray a more realistic view of what students will encounter in the courtroom and to have students visit poor people's courts and reflect, with the guidance of faculty, upon what they have observed.

1. Read and Discuss

As background, students should read excerpts from some of the seminal works discussed above that vividly recount the ways that practice in poor people's courts differs from students' *ex ante* notions of what court practice should look like.¹⁷⁸ Professors should then lead students in a discussion of the conflict between those materials and the students' preconceptions regarding courtroom practice.

2. Guided Observation

Students should be assigned to visit a poor people's court and observe the proceedings. Some of the things the students should be asked to reflect upon include how the courtroom practices and procedures differed from what they expected.¹⁷⁹ The idea is essentially to situate the student as a cultural anthropologist, observing behavior within the unique culture that a poor people's court provides. Students should then share their reflections in class and in a written memorandum so the observations of

177. See *supra* Parts II and III.

178. See *supra* notes 44–47.

179. See Andrew Schepard & J. Herbie DiFonzo, *Hofstra's Family Law with Skills Course: Implementing FLER (The Family Law Education Reform Project)*, 49 FAM. CT. REV. 685, 691 (2011).

each individual can be multiplied and shared throughout the class as a whole. Students should reflect upon the roles played by judges, litigants, lawyers, and other court personnel.¹⁸⁰

Students should observe what happens outside of the courtroom, as well as in it. As stated above,¹⁸¹ sometimes the most important work done in poor people's courts occurs in the hallways and corridors, as opposed to inside the courtroom itself. Students should also seek to observe whether particular lawyers appear to be more effective than are others within that milieu and why. By the same token, students should observe what lawyers who do not appear to be successful do and try to avoid similar actions.

Of course, there is no reason to limit students to a single courtroom visit as part of the preparation leading up to their own first court appearances. It may be the case that multiple court visits are necessary for students to begin to feel comfortable in the poor people's court setting and truly to understand what is going on inside such courtrooms. Indeed, it would be even better if students began to visit actual courtrooms in conjunction with their doctrinal courses, prior to their clinical experiences. Such visits can provide important context for the discussion of substantive law issues, in addition to preparing students for their clinical experiences. Thus, I have begun to require students in my traditional family law class to visit a family court in conjunction with that course. A copy of the assignment relating to that court visit is attached as Appendix A. It is modeled on a similar assignment created by the Family Law Education Reform Project.¹⁸²

B. Moot Courts

Though moot courts are a familiar way to prepare law students for future advocacy, moot courts to prepare them for advocacy in poor people's courts would be created to approximate as closely as possible the conditions the students will encounter in their actual courtroom proceedings. Though it may be impossible to simulate the cacophony that is present in poor people's courts, other aspects of the experience in such courts can be simulated. For example, it may be possible to bring in actual judges from poor people's courts. In lieu of that, students, teachers, or other actors should base their approach on the actual behavior of real judges in such courts. Other "players" within the court system should also

180. *Id.*

181. *See supra* note 5 and accompanying text.

182. *See supra* note 177. Thanks to Bob Seibel for encouraging me to think harder about the many ways in which courtroom visits can benefit law students.

be cast with an eye toward achieving as realistic an approximation of conditions in poor people's courts as is possible. Faculty can provide expert demonstrations as well.¹⁸³

Moot courts should make sure that someone portrays the client as well as the other players in the courtroom proceeding. One thing that is particularly disconcerting to students is having a client asking questions or seeking to intervene while the student is attempting to juggle all of the other moving parts in the courtroom proceedings. Hallway negotiations can also be mooted. Students' prior law school experiences may have prepared them even less well for these types of impromptu negotiations than for the hearings themselves.

C. *Specific Techniques*

There are a number of techniques that will be useful to students in their advocacy in poor people's courts that they may not be familiar with prior to their clinical experiences. These techniques can be taught and practiced as part of students' preparations for their clients' hearings.

1. Multiple Versions

A student may need to prepare multiple versions of her presentations in anticipation of multiple in-court scenarios, including whether or not the court has read the pre-hearing filings and how much time will be allowed for the hearing. It may be impossible to know for sure how things will go during a hearing in a poor people's court, but it is possible to anticipate a number of directions in which things might go, and to be prepared in advance should any of them come to pass.¹⁸⁴

2. The Three-Sentence Version

I have heard it said that if a lawyer can't explain what she wants from the court and why she should get it in three sentences or less, then the lawyer doesn't deserve to win. This is particularly true in poor people's courts, where the press of crowded dockets leaves courts with little time to spare. Ironically, this technique may serve lawyers well at even the opposite end of the courtroom advocacy spectrum. Many years ago, I had the privilege of second-chairing the Commonwealth of Massachusetts' challenge to the results of the 1990 U.S. Census.¹⁸⁵ While preparing

183. See Christine N. Coughlin, Lisa T. McElroy & Sandy C. Patrick, *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Classroom*, 26 GA. ST. U. L. REV. 361, 379 (2010).

184. Bob Seibel also reminded me that much of the work of a good lawyer lies in preparing for things that will never actually happen.

185. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

for oral argument before the U.S. Supreme Court, our legal team consulted with former U.S. Solicitor General Charles Fried. He too pointed out that the commonwealth's attorney would have two or three sentences to make his argument before the Court started peppering him with questions. After that, the argument would be like "trying to catch javelins." The message was that a good advocate had better be able to make clear to the court quickly and succinctly why his side deserves to win.

3. Have a Conversation with the Judge in Plain English

Not surprisingly, law students are excessively focused on the law. But the law rarely is an issue in a poor people's court, either because it is so well-established that it has become part of the scenery or because no one is paying attention to it anyway. Rather, cases are decided based upon determinations of disputed facts. Good lawyers figure out their best argument based on those facts and then find the law to support it. Of course, they do this in light of a deeply ingrained understanding of the law,¹⁸⁶ but they are not excessively driven by particular statutes or cases unless there is clearly governing authority directly on point.

I learned this lesson early on in my practice career from another great lawyer I had an opportunity to work with while I was an assistant Massachusetts attorney general. The attorney was writing a brief in opposition to a request for a preliminary injunction against an extremely complicated piece of welfare reform legislation. The plaintiff class's arguments as to why the legislation should be enjoined were numerous and complex. Yet, as I passed by my colleague's office, I realized that he was pounding out his brief in opposition without a single law book around him. As a novice lawyer at the time, I couldn't write a single sentence of a brief without stacks and stacks of case reporters piled up around me. I asked him incredulously how he could write a brief without any law. His response was along the following lines:

I have to make an argument that's going to persuade the court. I know what the law is. I'll find the cites later. If I can't make an argument that will persuade the court, all the law in the world won't help me.

He was right, and I learned a valuable lesson to pass on to my future clinical law students. They must convince the judge that their clients should win based on the relevant facts, without explicit reference to case

186. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

or statute (although certainly support from one or the other—at least in the background—increases the likelihood of a successful outcome).

4. Interrupt, but Don't Be Impolite

Students often worry over when to speak and when not to speak in court. As mentioned above, the order of presentation is often fluid in poor people's courts, and it is hard for novice lawyers to know when it is their turn unless the judge expressly invites them to speak, which often does not happen. Students who are overly anxious to make their points often risk raising the ire of the court by speaking too soon. But given the brevity of most hearings, waiting too long to speak may result in orders being entered before the law student has even made his case.

Unfortunately, I cannot offer a shortcut for students other than preparation and practice. The more simulations students participate in and the more hearings in poor people's courts they observe, the more likely they are to get a sense of when it is or is not acceptable to speak. Here too, observing the actions of good, experienced lawyers can be invaluable. In any event, since the potential negative consequences of silence seem greater to me than the consequences of speaking out of turn, I would encourage students to err on the side of making the points that need to be made, even at the risk of appearing to be overly aggressive.

VII. CONCLUSION

The foregoing article is a defense of "easy case" or individual service representation in law school clinics. Despite the contentions of critics of this form of legal clinic, small-case representation will allow students to acquire a foundation of skills that they then can build upon as they develop into expert legal practitioners over the course of their careers. Though such clinics are unlikely to lead to a broad social transformation of the conditions affecting poor people, they do provide essential legal services to many needy clients, while at the same time increasing the likelihood that clinical law students will engage in individual representation and law reform activities on behalf of poor people in the students' future careers. Such clinics also help law schools teach students about the vast gulf between legal justice as it appears in their casebooks and how it appears (or fails to appear) in the real world. Finally, some students will be able to build on their experience in such clinics to develop careers as lawyers practicing within America's existing justice gap.

Given that it is worthwhile to continue to offer law school clinics that focus on representing individual clients in poor people's courts, legal educators should direct attention to how to prepare students for such rep-

resentation. Many gaps currently exist in students' pre- and early law school experiences in terms of preparing them for this practice. The foregoing article offers a number of suggested techniques for helping to prepare law students for advocacy in poor people's courts. It is hoped that this article will begin a dialogue in which other clinical law teachers will also share their successful techniques for preparing their students for such representation.

Appendix A

Courtroom Observation Assignment

I. Goals of the Assignment

- A. To enhance your understanding of the substantive law and procedural rules governing the resolution of family law disputes in California.
- B. To foster the development of a critical perspective about the operation of courts, including an ability to differentiate between "law in the books" and "law in operation."

II. Assignment

A. Court Observation

You are required to observe proceedings in a family law court for at least an hour on one occasion. The various family law courtrooms in San Diego County are listed in Part III of this memo. You may, however, observe proceedings in another family court in California or in another state, if it is more convenient for you. Whatever court you choose, please dress appropriately for court; introduce yourself to the judge or commissioner, if possible; and, of course, treat all court personnel and litigants with courtesy and respect.

B. Written Narrative

After your observation, prepare a three- to five-page, typed, double-spaced description and analysis of what you observed. The narrative should include: (1) Date and time of your observation; name of court and judge you observed. (2) Type of hearing(s) observed: divorce, child support, custody, contempt, etc.; pendente lite vs. merits; domestic violence (ex parte vs. protective order). (3) Describe the content of the hearing(s): the evidence and arguments presented at the hearing; whether the parties were represented by counsel or appeared pro se. (4) How did the family court that you observed differ from what you expected? What was the same? (5) What did you observe about the clients, their lawyers, the judges, and court personnel, both positive and negative? (6) Based on your observations and the course material, what proposals would you make to change family court operations or procedures? Why?

C. Deadlines

1. Your written narrative is due on April 16, 2012. Please feel free to turn it in earlier, and keep a copy of your narrative for use in class discussion. Please place only your exam number on the copy you turn in.
2. Be careful not to leave your court observation to the last minute. It may turn out that you see relatively little on the particular day you choose to visit the court, and may need to return a second time in order to complete the assignment.

III. *Options for Court Observation*

Go to the San Diego Superior Court's website (www.sdcourt.ca.gov) and click on the court calendar link to determine what is scheduled for the particular date you wish to attend court. Focus on the domestic calendar only. Most courtrooms (or departments) have a morning calendar that starts between 8:00 a.m. and 9:00 a.m., and an afternoon calendar that starts between 1:30 p.m. and 2:00 p.m. It is best to arrive at the beginning of the particular calendar session you wish to observe. Many matters will be resolved quickly, and if you go long after the start of a session, it may be over before you arrive. Try to pick a date, time, and courtroom that offer a fairly lengthy calendar to observe. Many cases will settle or be continued prior to hearing. Generally, out of every ten matters scheduled for hearing, only a couple will result in a significant hearing that will provide you with much to observe.