Teaching Ethics in Criminal Justice to First Year Law Students: Or Efforts to Dislodge the CSI Effect

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ABSTRACT

This article discusses the implementation of an innovative first year course at Golden Gate University School of Law entitled “Lawyering Skills: Ethics in Criminal Justice.” The course, offered for the first time in the spring of 2011, was the product of curricular reform set in motion by the 2007 Carnegie Foundation Report, Educating Lawyers: Preparation for the Profession of Law. Golden Gate University has had a longtime focus both on practical legal education and ethical training. We devote a substantial portion of our resources to clinical programs and simulation courses. These opportunities, however, are generally only available to students in their second or third years. In assessing the import of the Carnegie Report, our faculty focused on the Report’s critique of the traditional first year. In particular, we sought a “counterbalance” to help students bridge the gap between theory and practice early in their legal education. Thus the creation of a seminar style Lawyering elective, required in the first year. My course, Ethics in Criminal Justice, was one of twelve offered.

These courses were designed with several overarching goals: an emphasis on skills and values, and the integration of ethics and professionalism. Beyond these general principles, I had personal goals of my own. As a longtime public defender, and former director of a law school innocence project, I wanted to dispel the myths and stereotypes about criminal practice generated by popular culture. Further, I wanted students considering a career in criminal justice to understand the complexities of the practice; to recognize the necessity of cultural literacy; and to comprehend the risk of miscarriages of justice inherent when prosecutors or defense attorneys make even “minor” compromises to their ethical obligations. In the end, although my goals of inspiring “best practices” of prosecutors and defense attorneys proved difficult to measure, I write this article to share aspects which were effective and the lessons I learned in how to make such a course more successful.

This article begins with the process that led the law school to provide an elective for first year students and the faculty collaboration in developing the menu of elective courses. In the second section, I discuss my background in the criminal justice system and the goals which drove the design of this simulation based lawyering course with a focus on ethical criminal practice. Next the article examines how I implemented the course, and the challenges I encountered teaching the elective for the first time. Finally, the article concludes with lessons I learned from this experience as I prepare to teach the course for a second time.

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Teaching Ethics in Criminal Justice to First Year Law Students:  
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Introduction

In this article I discuss a recent reform of the first year curriculum at Golden Gate Law School: the institution of a menu of twelve Lawyering electives for first year students taught for the first time in the spring of 2011. The article focuses specifically on one of these new options: “Lawyering: Ethics in Criminal Justice” which I taught, and draws conclusions from the experience. As a law professor with 15 years of criminal defense practice experience, my goal in creating this class was simply, and perhaps naively, to improve the profession. There is great need to teach criminal justice minded students to become ethical practitioners. Over the last two decades there have been 289 exonerations of wrongly convicted individuals. When the causes of those miscarriages of justice are examined, unethical behavior by lawyers on both sides is a serious contributing factor.

The experience of teaching the class proved equal parts exhilarating and challenging. The exhilaration came from exposure to a small group of first year law students eager to learn what they perceived as the “secret handshakes” of the profession. The challenge came largely from the very strong opinions about criminal justice that students brought with them into the classroom. And from the fact that most of my students’ opinions about “law and order” were based not on their own lived experience, or even on books read or courses taken during their pre-law education, but rather on the steady doses of criminal justice television shows ingested during their formative years. “Law and Order” and “CSI Effect” and their seemingly infinite spin-offs

1 © Susan Rutberg 2012

2 Professor of Law; Director of Externship Clinical Programs; Academic Director of Honors Lawyering Program, Golden Gate University School of Law. Thank you to Sarah Einhorn (GGULS 2012) who served as both teaching assistant for Lawyering: Ethics in Criminal Justice in spring 2011, and research assistant for this article.

3 Since the inception of the Innocence Project at Cardozo School of Law in 1989, 289 people have been exonerated and freed from wrongful incarceration. INNOCENCE PROJECT, http://www.innocenceproject.org/(visited on Feb. 16, 2012)
have become firmly entrenched in our culture making it more difficult for law professors to transmit nuanced notions of how ethical criminal lawyers should behave in practice.  

Others have referred to this phenomenon as the CSI effect.  

Clearly there is a disconnect between the practice of criminal law and its portrayal on television. The trick is how to dislodge students’ strongly held television-induced preconceptions. I write this article to discuss my efforts and the lessons learned.

In the first section I explain the process that led the Law School to provide a Lawyering elective for first year students and the faculty collaboration in developing the menu of courses. In the second section I discuss my own background as criminal defense lawyer and clinical teacher and my goals for this project. The third section discusses how I taught the course and the challenges I encountered. The article concludes with the lessons learned from this experience as I prepare to teach the course for the second time.

I. Golden Gate Law School’s Curricular Reform Process, 2008-2010

The creation of the Lawyering electives was the result of Law School curricular reform spearheaded by my colleague, Associate Dean Rachel Van Cleave, and about which she has written.  This reform was set in motion by the 2007 publication of two much-discussed critiques

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4 Notes on file with author: Many students said that interest in a career in criminal law motivated them to take the class. Some expressed strong interest in becoming prosecutors or defenders. Several were undecided about criminal law altogether or, although interested, hadn’t yet chosen a side. One thought that the title “Ethics in Criminal Justice” was a very funny oxymoron and was thus intrigued to take the class.

A few had pre-law school work experiences or internships with prosecutors, defenders or courts; a few others had parents or other relatives who worked in the field and had grown up immersed in stories about the inner workings of the criminal justice system. Most, however, freely confessed to the influence of television and other media on the formation of their opinions about crime and the American system of criminal justice.


of traditional legal education: the Carnegie Foundation Report, Educating Lawyers: Preparation for the Profession of Law\textsuperscript{7} and Professor Roy Stuckey’s compilation of Best Practices for Legal Education\textsuperscript{8}. The Report’s criticism, that traditional law school curricula fail to prepare students for the actual practice of law, has prompted much soul-searching and innovative ideas among law school faculties. Embedded in the Report’s critique was a particular stress on the failure of the traditional approach to legal education to instill in students the moral and ethical responsibilities of the profession.\textsuperscript{9}

Unlike many more traditional law schools, Golden Gate University has a long history of an explicit focus on practical legal education and ethical training. Our mission statement makes this clear: “the primary mission of Golden Gate University School of Law is to provide our students with the intellectual and moral foundation which will enable them to become ethical, competent, and socially responsible professionals in a complex and interrelated legal world. The ethic we share is that lawyering is an honorable and valuable profession worthy of the public trust.”\textsuperscript{10}

Consistent with the Law School mission to prepare our students for the practice of law, a substantial portion of the School’s resources is devoted to clinical programs\textsuperscript{11} and simulation courses.\textsuperscript{12} All law faculty are encouraged to incorporate skills components in their teaching, even in traditional courses.\textsuperscript{13} The apprenticeship-based Honors Lawyering Program (HLP) is designed to make practice and professionalism an integral part of legal education. Honors students are trained to represent clients—and do so under supervision—in the summer after their

\textsuperscript{7} \textsc{William M. Sullivan, et al., Carnegie Foundation For the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law} (2007) [hereinafter Carnegie Report].


\textsuperscript{9} \textit{Carnegie Report}, supra n. 4, at 24

\textsuperscript{10} The primary mission of Golden Gate University School of Law is to provide our students with the intellectual and moral foundation which will enable them to become ethical, competent, and socially responsible professionals in a complex and interrelated legal world. The ethic we share is that lawyering is an honorable and valuable profession worthy of the public trust. \textsc{Golden Gate University School of Law, Mission Statement}, www.ggu.edu/school_of_law/about_ggu_law/mission_statement. This does not exist anymore, cannot find mission statement on the website

\textsuperscript{11} Environmental Law & Justice Clinic; Advanced Legal Clinic; Capital Post Conviction Defense; Civil Field Placement; Consumer Rights; Criminal Litigation; Environmental Law; Family Law; Homeless Advocacy; Judicial; Real Estate; Youth Law; Pro Bono Tax Clinic; Street Law; Women Employment Rights Clinic.

\textsuperscript{12} Alternative Dispute Resolution; Trial Advocacy, Advanced Trial Advocacy, Criminal Litigation.

\textsuperscript{13} Golden Gate Professor Myron Moskovitz, an early proponent of the problem method in teaching substantive law classes, has published several text books incorporating problems into the study of law. See e.g., \textit{From Case Method to Problem Method: The Evolution of A Teacher}, 48 \textsc{St. Louis U.L.J.} 1205 (2004); \textsc{Cases and Problems in Criminal Procedure: The Police} (5th ed., Lexis 2004); \textsc{Cases and Problems in Criminal Procedure: The Courtroom} (5th ed., Lexis 2004); \textsc{Cases and Problems in Criminal Law} (3rd ed., Anderson, 1995 and 4th ed., Lexis 2004).
In a course called “Law Firm” these students learn substantive landlord tenant law and engage in simulation interviewing, counseling, and negotiation skills. Under supervision of practitioners from local non-profit organizations, they then represent clients facing eviction. The intensive summer semester also includes Appellate Advocacy, Constitutional Law, and Evidence, for a full semester’s worth of credit. At summer’s end these students have acquired impressive lawyering skills, which they then bring with them into the legal community. Honors students spend the fall of their second year apprenticing with lawyers or judges full-time in lieu of attending classes.\(^{14}\) Two of these legal apprenticeships must be completed before graduation. Students often choose to do their second apprenticeship through one of our clinical programs. Even among those not a part of the Honors Lawyering Program, participating in a clinic or externship clinic has long been the norm.\(^{15}\)

In response to the Carnegie critique, Associate Dean Van Cleave engaged the entire faculty in a thorough review of Golden Gate Law School’s curriculum. A Faculty retreat was convened for the purpose of discussing a variety of innovative ideas put forward by faculty members. The result was a decision by the faculty to implement significant changes.

The faculty reviewed the upper division course offerings and decided to make commitment to experiential learning more explicit. At the time of our reform process, only Honors students were required to complete professional apprenticeships before graduation. Further, Golden Gate had not previously required that the rest of our upper division students engage in some form of “experiential learning.” The Faculty concluded that instituting such a requirement would help underscore the Law School’s commitment to assisting our students in shaping their professional identities while still in school. A decision was made, therefore, to require that every graduating student take at least one course from a menu of “experiential learning” clinics, externship clinics and simulation courses.\(^{16}\)

The Faculty then focused on the Carnegie Report’s critique of the traditional first year curriculum. As has been widely discussed in the legal academy, the Report concludes that, in large part due to the first-year focus on the Socratic case-dialogue method, “the first year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales…away from cultivating the humanity of the student and toward the student’s re-engineering into a ‘legal machine.’”\(^{17}\)

Through a Carnegie Report-enhanced lens, the Golden Gate faculty viewed the Law School’s first year curriculum critically. In an effort to provide first year students with a

\(^{14}\) HONORS LAWYERING PROGRAM AT GOLDEN GATE UNIVERSITY SCHOOL OF LAW, http://www.ggu.edu/school_of_law/academic_law_programs/jd_program/honors_lawyering_program

\(^{15}\) Prior to the curricular reforms of 2009, approximately 74% of the graduating class participated in a some form of clinical experience, through HLP Apprenticeships or one of the in-house law school clinics or one or more of our externship clinics.

\(^{16}\) Supra, notes 11 and 12.

\(^{17}\) Carnegie Report, supra n. 4 at 84
“counterbalance” to the skewed focus on theory so decried by the Report, the faculty investigated a number of alternatives before settling on revamping of the first year Legal Research and Writing Program\textsuperscript{18} and the creation of a seminar style Lawyering Elective for each student.

The Lawyering elective would provide each first year student with a simulation-intense small group setting in which to learn the practice skills, ethical rules, and fundamental values involved in a particular practice area. The assumption underlying this plan was that exposure to simulated lawyering experiences in a relatively narrow area of substantive focus, would not only assist students in combining theory and practice, but would also help them remain engaged in their legal education. A hoped for byproduct was to assist students in initiating an early focus on their own professional identities.

“Lawyering: Ethics in Criminal Justice” was one of a menu of twelve two-unit “Lawyering” electives offered to first year students in the spring of 2011.\textsuperscript{19} The classes met once a week and each was limited to no more than 24 students. Each of the Lawyering courses was designed and taught by an enthusiastic and experienced professor/practitioner in the particular field of law. Before the semester began, the lawyering faculty met regularly to discuss learning objectives, and to plan the course syllabi. We continued to meet throughout the semester to share ideas about teaching this elective, to develop assessment tools, and, at the end, to evaluate the effectiveness of our classes.

Although each elective was different each was designed to meet the same general goals. First, starting from a focus on a relatively narrow area of substantive law, each lawyering course was to emphasize skills and values specific to the particular area of law. An additional goal was to integrate ethics and professionalism to the extent possible, and thirdly, to provide students with some opportunity to reflect on the role of the lawyer. All of the Lawyering courses were to include the use of simulation exercises in which students assumed the roles of various actors in the field of law under examination.

II. Background and Motivations

\textsuperscript{18} Simultaneously the faculty made significant changes in the first year writing courses. Previously, the first year writing and research curriculum involved a two-unit course in the fall and a one-unit course in the spring semester. In 2010, the first year program increased to five units, with two units offered in fall and three units offered in the spring semester. This was implemented in order to go into more depth by incorporating more research, more discussions regarding ethical writing practices, more opportunities for feedback from professors and, of course, more writing. Where previously students in the spring semester would write one predicative memo, now students in the spring semester of their first year will write three major papers, including a trial brief, and have the opportunity to exercise speaking skills in an oral component to the course. As all law students are also required to take a two-unit upper-division writing course called Appellate Advocacy, as of 2010 Golden Gate University requires seven units of writing and research for graduation.

\textsuperscript{19} Lawyering electives offered to first year students in Spring 2011 in addition to Ethics in Criminal Justice were: Asylum Law; Hot Topics in Business Bankruptcy Practice; International Alternative Dispute Resolution; Legal & Technical Skills Need for New Technology Issues; Private Enforcement of Environmental Laws; Securities Enforcement & Government Regulations; Strategies & Execution of Discovery in a Personal Injury Action; Tax Issues Confronting Individuals & Businesses; Using the Law for Social Change while Challenging Imprisonment; White Collar Crime in Practice; Youth Law.
My personal goals were more specific. I viewed this elective as an opportunity to introduce first year students to the complexities of the practice of criminal law. I am a former criminal defense attorney and a longtime law school clinical professor. My work with indigent criminal defendants has transformed my understanding of race and poverty. As the director of Golden Gate Law School’s Innocence Project from 2001-2005, I became familiar with the web of factors that lead to the incarceration of innocent people. As a result of these experiences, I aspired to train my students for the ideal: to teach future prosecutors to focus on justice, never to overreach, nor withhold exculpatory evidence. In the same vein, I wanted to find a way to teach students who choose to become criminal defense attorneys to listen to their clients, to be zealous, culturally literate, and holistic defenders. Easier said than done, you’re saying. Yes, so I learned!

The lessons I hoped to transmit were ones I had learned myself from early exposure to criminal defense and civil rights cases, not from law school. Coming of age in the late 1960s, and propelled by the civil rights movements of the time, I moved from college anti-war protester to National Lawyers’ Guild law student/lawyer. My most transformative experience came in the fall of 1975, while awaiting Bar results. Under the auspices of the San Francisco chapter of the National Lawyer’s Guild, I went to Chicago to help lawyers and students from the People’s Law Office comb through mountains of documents in a civil rights case involving slain Black Panther leaders Fred Hampton and Mark Clark.

The case, *Hampton v Hanrahan*, was a wrongful death suit filed on behalf of the families of Hampton and Clark. On December 4th, 1969, at four in the morning, Chicago Police and agents of the FBI fired a fusillade of bullets into a house on Chicago’s south side where members of the Black Panther Party slept. Fred Hampton, the 21 year-old leader of the Illinois Black Panthers, was shot to death in his bed. Mark Clark, another young member of the Panthers was also killed. As a not yet licensed lawyer, my role in the civil rights case was very minimal, but the experience affected me deeply. Reading through heavily redacted memos from the highest levels of the FBI, sent to agents in its local field offices, I couldn’t believe my eyes. The FBI boldly declaimed the need to “neutralize” those it deemed “messianic” leaders in the Black community. And shortly thereafter, FBI agents and Chicago police raided the Panther headquarters in the middle of the night and killed the charismatic young leader, Fred Hampton.

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21 A small army of lawyers and law student volunteers at the People’s Law Office carefully reviewed a mountain of documents that, only after much resistance, had been turned over by the government, mid-trial. What we found would turn out to be the “smoking gun” in the wrongful death case: evidence that proved collusion between the FBI and the local law enforcement in a plot to murder Fred Hampton. In the boxes of documents People’s Law Office researchers found memos revealing that the FBI paid an informant to infiltrate the Black Panther Party. Included among these documents was proof that, just days before the pre-dawn raid, the informant provided a crudely drawn map of the Panthers’ apartment, pinpointing Hampton’s room and his
With such concrete evidence of government-sponsored murder, my faith in the law was shaken. After that experience, the only stance I could imagine taking as a lawyer was one that put me firmly against the government.

For the next fourteen years, I worked as a criminal defense attorney serving indigent people in a variety of settings. As a law student I had volunteered at the office of the Bayview Hunters’ Point Community Defender located in one of San Francisco’s poorest neighborhoods.22 When I became a lawyer in 1976, my first real job was as a staff attorney with the Community Defender. Later I served as a deputy public defender in two different Bay Area counties. All told, I spent 14 years representing indigent defendants23 before becoming a full-time law professor.

The informant cum cartographer was Louis O’ Neal, an FBI mole in the Panthers, and one who, incredibly, was serving as Hampton’s bodyguard on the night he was killed. JEFFERY HAAS, THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND CHICAGO POLICE MURDERED A BLACK PANther 189-90 (Lawrence Hill Books, 2010).

22 The Bayview Hunters’ Point Community Defender was the legal arm of the Bayview Hunters’ Point Foundation for Community Improvement, Inc., a non-profit community based human services agency founded in 1971. The Foundation was started by Bayview resident and community organizer, Ernest Mitchell. It was part of President Lyndon Johnson’s federal anti-poverty campaign known as the “Great Society.” The Community Defender provided free criminal defense to indigent community residents. BAYVIEW HUNTERS POINT FOUNDATION FOR COMMUNITY IMPROVEMENT, OUR HISTORY, www.bayviewci.org/our-history (last visited September 22, 2011).

23 In 1985-86, while on leave from the Public Defender’s office in San Francisco, I served as co-counsel in the six month long trial of attorney Stephen Bingham, who was accused of murder and conspiracy in the 1971 San Quentin prison escape attempt of Black Panther leader George Jackson. Bingham had been a fugitive until 1984 when he returned voluntarily to face trial. The charges against him stemmed from events that took place immediately following his August 1971 attorney client prison visit with George Jackson. At the time of the visit, Jackson was two days from the start of trial on charges that he and two other prisoners had murdered a prison guard at Soledad State Prison the year before. The three were known as the “Soledad Brothers” and their protestations of innocence earned them a large number of supporters in the free world. Inside the prison, however, corrections staff were convinced that Jackson and his co-defendants were guilty and the three were openly reviled. Following his visit with Bingham, Jackson was searched, shackled and escorted back to the maximum security housing unit known as the Adjustment Center (AC). Inside the AC, after Jackson was unchained, guards claimed he pulled a gun from his Afro styled hair, and ordered them to unlock all the cells. Four guards and two prisoners were killed in the ensuing melee. George Jackson himself was shot and killed by a correctional officer as he ran, armed with a 9 millimeter pistol, into the yard. A Marin County grand jury indicted Bingham and six prisoners, charging them with conspiring with Jackson to plan his escape and with the murders of the six people killed that day. Bingham fled and remained a fugitive until his self-surrender in 1984. In Bingham’s absence, the “San Quentin Six” as the prisoners were known, stood trial in 1975-76. The government’s theory of the conspiracy charge was the supposition that Jackson acquired the gun during his visit with lawyer Stephen Bingham. After a trial that lasted 18 months, one of the six prisoners, Johnny Spain, was convicted on that theory. The other five were either acquitted of all charges or convicted of minor assaults. Ten years later, at Bingham’s 1986 trial, the defense team successfully argued that a more likely scenario involved Jackson gaining possession of a gun by disarming a guard. Bingham was acquitted of all charges in 1986. Johnny Spain’s convictions were overturned two years later. (Trial transcripts on file with the author.)
Listening to my criminal defense clients, I heard the same story over and over: young men who lived in areas with a high concentration of poverty and under-resourced schools often had limited educations and limited legitimate job prospects. They did have, however, easy access to using and selling drugs, and consequently, spent a lot of time hanging on corners for lack of a more private place to ply their trade. The police were omnipresent, “out here in minimum security” as my clients referred to their neighborhood. Many of these young clients told me that, even if they weren’t actually arrested or charged, the police would sometimes rough them up and take money and/or drugs from them. Young women clients told different stories. Stories of neglect and sexual abuse, exposure to random or targeted violence, leading them to runaway and act out in ways that resulted in their incarceration.

These were not the kinds of things that happened in my neighborhood, nor in the neighborhoods where other lawyers and judges lived, nor in those communities inhabited by most of the people who served as jurors. I began to see my role as lawyer as a kind of interpreter. To represent clients from poor communities, one needed to re-present them, to introduce them to the legal decision makers in a way that their humanity could be seen. This is my clients’ reality. This is what it’s like to be this person. Before you judge him, first take a walk in his shoes or a ride in his car. And see how far you get before being stopped by the police.

My experiences as a defender became so much a part of how I see the world, that whatever ostensible subject I have taught since, the subtext is the same: I strive to teach my students about the opportunities a life as a lawyer offers to crack the code of privilege (of whiteness, of heterosexuality, and of all kinds of privilege) and to fight for equal treatment for the poor and racial minorities. To borrow a phrase and a concept from Professor Jane Aiken, I hope to help my students find the tools they will need to be “provocateurs for justice.”

III. Implementation

I saw this new Lawyering course as an opportunity to acquaint first year students with the real world challenges of criminal justice. The syllabus for the course percolated for many months. Over the last 30 years I have taught many different courses about the subject of criminal justice. Apart from a brief stint teaching Criminal Law and Evidence, those courses have always been clinics or simulation based advocacy training.


25 My “live client” clinical experience dates back to 1978-80 when I co-taught a Criminal Defense clinic through the University of San Francisco Law School, in association with the Marin County Public Defender’s office and later, the San Francisco Public Defender’s office. In 1989-90 I returned to clinical teaching from practice and co-taught the Defender Clinic at the City University of New York Law School (CUNY) with its founder, the late Professor Shanara A. Gilbert. From 1990-1991 I co-directed the Criminal Defense Clinic at the Santa Clara University School of Law. Since 1991, I have been teaching at Golden Gate University School of Law. In a partnership with the Northern California Innocence Project at Santa Clara, I directed Golden Gate’s Innocence Project from 2001 to 2006. In addition to teaching externship clinical courses, I am Director of Externship Clinical Programs.
There was no single text that would work for my purposes. Ultimately I chose two excellent books, *Essential Lawyering Skills*[^26] and *Do No Wrong: Ethics for Prosecutors and Defenders*[^27] and assigned readings from both. The Krieger and Newmann book provides students with a foundation for working with clients, witnesses and opposing counsel in a way that is relevant for students across all fields of law. Concepts of cross-cultural communication are presented well. The Joy and McMunigal book is a collection of provocative short essays written for the ABA Criminal Justice section magazine analyzing a variety of thorny legal and ethical issues with which prosecutors and defense attorneys struggle. These assignments were supplemented by topical material posted on the course web site.

a. Structuring the Course

1. Defining Ethics in Criminal Justice

I defined ethics broadly, conflating the concepts of ethical behavior and competent lawyering. The ethical prosecutor is one who seeks justice, which, as explained well by Joy and McMunigal, is not always the same as seeking convictions[^28]. An ethical defense attorney is one who puts his or her client’s interests above all others. Prosecutors or defenders who are not ethical actors in their respective roles in the criminal justice system cannot be viewed as competent practitioners.

To heighten student sensitivity to what it means to be ethical practitioner, they were required to participate in video-taped simulation exercises involving ethical dilemmas, and to submit writings that set out their research and preparation for each exercise. Points were assigned to each of these assignments. Extra points were available for class participation. Student assignments were returned with comments and point scores. After the initial introductory class, subsequent classes alternated between mini-lectures and discussion focused on the readings, small group simulations and sessions devoted to debriefing the simulation exercises. We held general debriefing sessions in class and I held individual meetings with students as well. Additionally, three classes were organized around presentations by guest speakers: a recently exonerated man and his post-conviction lawyer; an Assistant District Attorney and a Deputy Public Defender on opposite sides of a dispute over discovery of potentially exculpatory evidence; and the Executive Director and Chief Counsel for the California Commission on Judicial Performance to discuss ethical lapses from the bench.

2. The CSI Effect


[^27]: Peter A. Joy and Kevin C. McMunigal, *Do No Wrong: Ethics for Prosecutors and Defenders* (2009).

[^28]: Joy, supra., at 3-11.
The term “CSI Effect” mentioned in the introduction to this article refers to a cultural phenomenon affecting the general public’s expectations of the criminal justice system. This phenomenon stems from the emphasis on the seemingly infallible crime solving properties of scientific evidence that is the subject of the immensely popular television show “CSI: Crime Scene Investigation,” its progeny and related criminal justice system-focused entertainment.

While scholars point out that the alleged “CSI Effect” can cut both for and against either side in a criminal prosecution, the term is more commonly used by prosecutors as shorthand to express a perceived bias against the government. When prosecutors refer to the “CSI Effect” they refer to the fear that prospective jurors who are regular viewers of these programs develop unrealistic expectations of the government and hold the state to an unreasonable standard of proof. On television, CSI and its progeny present a world in which the prosecution has access to conclusive scientific evidence establishing guilt beyond a shadow of doubt. In the real world, of course, meeting these expectations is impossible. Prosecutors therefore fear that CSI infected jurors will return unjustified acquittals.

Defense attorneys, on the other hand, are troubled by the potential for a “Reverse CSI Effect.” In light of the likelihood that most jurors are familiar with CSI and other shows like it, defense attorneys feel they must labor to correct the unjustified assumption that “scientific” evidence or any evidence presented as “scientific” is infallible.

One writer on this topic, The Hon. Donald E. Shelton, a Michigan trial judge, reported on empirical studies he and colleagues from the Eastern University of Michigan conducted amongst prospective jurors in two counties. They polled individuals who had been summoned to felony jury duty, seeking answers to questions about their television watching habits and their expectations regarding scientific evidence. The survey confirmed that a majority of prospective jurors exposed to CSI and similar programming had increased expectations of scientific evidence in the courtroom. Although the results did not prove that there was (yet) a correlation between those expectations that scientific evidence would be produced and acquittals in cases where those


30 Hon. Donald E. Shelton CSI Effect: Juror Expectations For Scientific Evidence In Criminal Cases: Perceptions and Reality About the “CSI Effect” Myth, 27 T.M. COOLEY L. REV. 1, 2 (2010). Shelton cites Nielsen ratings in support of his description of CSI as “the most popular television show in the world” and his claim that CSI and similar shows dominate traditional television ratings.

31 Id. at 3

32 Lynn M. Goedecke, Can Federal Oversight of Forensic Science Reduce the Incidence of Wrongful Conviction? 45 NO. 5 CRIM. LAW BULLETIN ART 7 p.1 (stating that “while some scholars and commentators argue that the CSI Effect may make juries more demanding of the prosecutors and the police, there is also evidence of a ‘Reverse CSI Effect’ that raises the perceived probative value of the evidence, thereby increasing the likelihood of conviction”).
expectations were not met. Judge Shelton concludes that jurors’ heightened demand for scientific evidence is a significant phenomenon in itself.

Judge Shelton warns that the real “CSI Effect” is the need for the criminal justice system to adapt to the prevalence of popular misconceptions about scientific evidence. He urges prosecutors and defense lawyers to work harder to meet jurors’ expectations that the best possible evidence is produced and that the system operates fairly and consistently.  

The CSI Effect on law students is one that has not been studied, but it seems safe to hypothesize that some significant percentage of the general public drawn to CSI and similar crime dramas are the same people who end up in law school. Certainly one can conclude, even without empirical evidence that law students have no special immunity to popular misconceptions about forensic evidence portrayed in fictionalized accounts of the criminal justice system.

I hoped to encourage these first year law students to recognize their vulnerability to media induced preconceptions, and to work to overcome any “CSI effect” they may have brought with them to the law school classroom. In agreement with Judge Shelton’s conclusion that the actors in the criminal justice system can do a much better job, I hoped that students would leave this class inspired to become lawyers who will withstand the pressures of media induced expectations and transform the criminal justice system by infusing it with actors who behave with integrity.

4. Preparing Students for Acting in Role

To set the stage for the simulations, since none of the students had yet taken criminal procedure, I presented a mini lecture on how a case moves through the system and the rules of criminal procedure. Questions were welcomed as we talked about each stage. We covered the kinds of events that lead to an arrest, the distinction between arrests with and without warrants, prosecutorial power and discretion in charging and discovery, arraignments, preliminary hearings, fact investigation, common pre-trial motions, evidentiary concerns, plea-bargaining, the trial process, sentencing, appeal, and habeas proceedings.

Next, I wanted to alert students to the pervasive nature of bias and how it plays out in our legal system. To do this I used a video created by the San Francisco Public Defender’s office called “Innocent Until Proven Guilty.” In the clip the viewer sees a young black man running through city streets. The camera focuses on the faces of a variety of people in the street who watch him as he runs. Their facial expressions range from concern to fear. As the runner reaches his destination, viewers see that the unconscious assumption that a young black male running is suspicious of wrongdoing is unjustified. The runner meets up with an African-American woman and young girl who appear to have been waiting for him. As he hugs the little girl, police sirens

33 Hon. Donald E. Shelton, 27 T.M. COOLEY LAW REV. 1 at 8

34 Id. at 33-34.

blare and off camera, a voice is heard ordering the young man to put his hands up.

Students broke into small groups to discuss their individual reactions to the clip and then reported back to the class. They raised questions about how assumptions about race, gender and age can affect the presumption of innocence. Some white students expressed dismay that they had found themselves thinking the young man was up to no good, only to arrive at the unsettling realization that their thought processes had been affected by unwarranted assumptions. Students of color had different reactions, some sharing their own experiences of being “suspicions” just by being themselves.  

By the end of class there was consensus that uncovering and acknowledging one’s own unconscious biases was a part of being an effective lawyer. In order to protect a client from being judged on the basis of negative stereotypes, one student said, a lawyer has to be aware that all of us in American society are susceptible to unconscious negative assumptions about ethnic groups. I urged the students to think about ways they could use their heightened consciousness of the dangers of bias to develop a culturally sensitive interviewing persona when meeting with clients or witnesses.

b. The Simulations

Armed with this basic language of the criminal justice system and charged with taking inventory of their assumptions, the students embarked on the simulated interviews, counseling sessions and negotiation simulations. In keeping with the broad definition of ethics as an integral component of attorney competency, our five simulations involved typical challenging situations that working prosecutors and defenders confront on a daily basis.

The first simulation raised discovery and disclosure issues for students assigned to act as the prosecutor and attorney client confidentiality issues for those on the defense. Those students assigned to act as the judge experienced the challenge of absorbing information presented by advocates and arriving at a “just” result.

The second simulation required students to practice ways to overcome barriers to communication during an initial in-custody interview with a client. Students took turns playing one of two clients—a monolingual Spanish speaking person arrested for resisting arrest after having a seizure and a traumatized teenager charged with murder of his brother. In order to establish trust and elicit relevant information, students had to employ active listening, project empathy, and navigate new cultural terrain with sensitivity. They also had to deal with the inherent tensions in representing a client who may not be able to make decisions for himself due to some incapacity, and they were forced to confront the limits of their own expertise. Students relished the challenges although many seemed surprised to find, as one student put it, that there is so much “humanity” involved in practicing law.

36 In this class of 24 students there were none who identified as African-American. Seven students identified as “of color.” That group included two Latina students; 1 woman of East Indian descent; a Chinese born man; an American born woman of Vietnamese descent; and a man with one Asian parent and one Caucasian.

37 Student comments during last class on file with author
Based on the same fact pattern, the third simulation required students to conduct an interview of a witness. In the murder case, the witness was an elderly neighbor who heard the gunshots but didn’t see the shooting. Her value to the case was her longtime knowledge of the brothers and their relationship. The other witness was the store owner who made the call to 911 when a customer fell to the floor apparently due to a medical emergency. Half the class played the role of prosecutors and the other defenders. The students playing the witnesses were instructed to seek a quid pro quo from the lawyer/interviewer. One witness was told to refuse to answer any questions unless the lawyer agreed to pay him; the other witness was directed to ask the lawyer for free representation for a relative charged with a crime in exchange for favorable testimony. The students grappled with the challenges inherent in communicating with an unrepresented third party and convincing a disinterested witness to provide information when no clear benefit to the witness exists.

Following readings and class discussion of a lawyer’s role in client centered counseling and some interdisciplinary reading on domestic violence and substance abuse\textsuperscript{39}, the fourth simulation was a domestic violence case with an alcoholic defendant and a victim afraid to testify. Half the students interviewed and counseled the defendant and the others interviewed and counseled the complaining witness. Challenges presented in this simulation included communicating with a client “under the influence” and for the prosecutors, navigating the role of counseling a witness who is not your client.

The fifth and sixth simulations were plea bargaining sessions. Since the vast majority of criminal cases are resolved before trial, students planning on entering the practice of criminal law need the skills of an effective negotiator.\textsuperscript{40} More than just skills, however, effective plea bargainers must have backbone: they must have the ability to resist the many systemic pressures that push both defense lawyers and prosecutors to settle rather than try cases. The reason that lawyers on both sides need to resist pressures to plead may seem obvious, but with my students in mind I found it nonetheless worth articulating: lawyers should strive to achieve a just result. On the defense side, some of the factors which interfere with achieving just results in all cases include limited resources, time and money pressures that make it challenging to fully investigate or defend. Sometimes the source of the pressure to plead guilty before considering all the options comes from an incarcerated client. Clients in custody may fear harsher consequences at trial and/or may be motivated by a strong desire for release from confinement.\textsuperscript{41} Many prosecutors’ offices are similarly affected by lack of resources; other pressures on prosecutors come from the hierarchy within their offices, from the police agencies with which they partner or, since prosecutors are elected officials, stem from political pressures in the community.\textsuperscript{42}

In preparation for the mock plea-bargaining sessions, students read chapters on


\textsuperscript{40}Id. at 81.

\textsuperscript{41}Id. at 81.

\textsuperscript{42}Id. at 88.
defense lawyers’ obligations to fully investigate the facts and law and on prosecutorial ethics in plea negotiations. In class we discussed the institutional pressures affecting lawyers on both sides and watched part of “The Plea,” a Frontline documentary.\textsuperscript{43}

The students were also instructed that preparation for plea bargaining includes understanding the elements of the charges, potential defenses, the minimum and maximum penalties, and alternative sentencing options, before sitting down to negotiate with each other. The first of these two sessions relied on the same facts developed by the students in the domestic violence case when they interviewed and counseled either the defendant or the complaining witness.

The last simulation was based on a new fact pattern: a homeless defendant with mental health issues accused of a robbery. The crime victim had identified the defendant after a somewhat suggestive police procedure. The defendant maintained his innocence and had an alibi that was partially corroborated. Students had extra time to prepare and this exercise was weighted more heavily than the others, in lieu of a final exam.

c. Lessons from the First and Last Simulations

1. The First

To prepare for the first simulation, in addition to the mini-lecture on criminal procedure, students were assigned readings concentrated on the role of the prosecutor in the criminal justice system. These readings included: excerpts from the Model Rules of Professional Conduct, \textit{Brady v. Maryland}, and chapters from “Do No Wrong,” contrasting the “ideal”, always ethical, Brady-compliant prosecutor, with the tensions inherent in being a prosecutor in the real world: where promotions may be based on wins or statistics, or politics, rather than an ethic of doing justice.\textsuperscript{44}

Students also read the Model Rules of Professional Conduct relating to the defense function and chapters from “Do No Wrong” on the ineffective assistance of defense counsel.\textsuperscript{45} In class we discussed the defense obligation to represent a client “zealously within the bounds of the law” in contrast to the prosecutor’s role as an officer of the court with an obligation to see that justice is done.

In addition to these readings, the San Francisco criminal justice system provided great fodder for “ripped from the headlines” class hypotheticals. A San Francisco crime lab employee, who regularly testified for the prosecution as an expert witness, turned out to be subjecting


\textsuperscript{44} See \textit{Brady v. Maryland}, 373 U.S. 83 (1963); ABA Model Rules of Professional Conduct, Rule 3.8 Special Responsibilities of Prosecutors; \textsc{Peter A. Joy and Kevin C. McMunigal}, \textit{Do No Wrong: Ethics for Prosecutors and Defenders} (2009).

\textsuperscript{45} \textsc{Peter A. Joy and Kevin C. McMunigal}, \textit{Do No Wrong: Ethics for Prosecutors and Defenders} 27-34 (2009).
suspected narcotics to the litmus test of personal consumption. Speculation about criminalist Deborah Madden’s behavior, on and off duty, was the subject of internal memoranda in the District Attorneys office, but not disclosed to the defense bar for many months. Eventually, defense lawyers learned that not only had Ms. Madden been suspended from the San Francisco crime lab for irregularities in narcotics testing, but she had also been convicted of a misdemeanor domestic violence charge in another county. A Superior Court judge found the District Attorney guilty of Brady violations for failure to disclose this information before it became the subject of news reports. As a result, hundreds of narcotics cases were dismissed.  

The first simulation materials provided to the students included news stories about the Madden scandal. The fact pattern informed students they were to assume that on the morning of the day scheduled for a preliminary hearing in a narcotics case, both defense and prosecution learned from news stories of improprieties by a city employee in the crime lab. The allegations concerned a criminalist that the prosecutor had planned to call as a witness against the defendant in the case set for hearing. The students playing the role of prosecutor were told that they had some prior knowledge of the criminalist’s misconduct from internal memos and office rumors, but had not investigated those rumors.

Students playing defense attorneys were told that their client, charged with drug possession in the case before the court, has an out of state felony conviction that does not appear in the “rap sheet” provided by the prosecution. Defense students learned of this felony conviction from the client, and the defense students are told that, as far as they know, the prosecutor is unaware of it.

The question for the prosecution students was whether and what to disclose. The question for the defense attorney was twofold: how to respond to the media reports concerning information about the prosecution witness, and what their obligations are with regard to disclosing the client’s conviction. The question for the students playing the role of judge was how to both assimilate and respond to the positions expressed by both parties.

Watching the taped exercises before the class debriefing, I realized that many students experienced difficulties fully engaging in role as prosecutors, defense attorneys, or judges. Several seemed to fall back on their previous knowledge base rather than relying on the materials from the readings and our class discussions to analyze their ethical obligations in role. Was this the lingering power of the CSI effect?

The simulation was explicit: under the rules of professional responsibility, the “right” action for the prosecutors to take was to disclose what they knew to be official misconduct on the part of their witness. In the scenario presented to students, reasonable prosecutors might differ as to exactly what disclosures were required, but the issue of disclosure had to be addressed. I realized that for many students more explaining was required: there was disconnect between the meaning of the Brady Court’s formulation: “potentially exculpatory evidence” and the information they had been given regarding a prosecution witness’ alleged misconduct and prior

misdemeanor domestic violence conviction. Similarly the way the simulation was written, the “right” action for the defense attorneys to take was to press for disclosure of any information known to the prosecutor that might impeach the witness’ credibility, and to move for dismissal if disclosure wasn’t forthcoming. For many students on both sides, however, unless the information in the prosecutor’s possession provided a direct defense to possession of drugs, they didn’t see disclosure as warranted.

As we de-briefed the exercises, I began to think that the “CSI effect” was shorthand for a disturbing truth about our media skewed perceptions of reality in general. After exposure to so many strong portrayals of fictional criminal justice systems, students seemed to feel the pressure to react in ways that their imaginary television counterparts might: to do whatever it took to win using a “by any means necessary” strategy.

This held true for students playing the role of the judge as well. During the debriefing, these students clamored for clearer instructions regarding a judge’s obligation to rule based on his or her understanding of the law and the facts. Without that clarity, most of the student-judges sought a compromise or ruled for the side with which they felt the most sympathy. A teachable moment! Had we inadvertently stumbled upon a judicial occupational hazard? Could it be said that the difficulties students experienced simply mirrored reality? When handed a set of facts, some legal research, and given the vague directive to “be objective” perhaps all judges experience discomfort and wish for more clarity. Students’ objectivity was affected by the same challenges that real judges face: a partial or skewed understanding of the law, perhaps; a pre-existing relationship with counsel for one side or the other, and, sometimes, a desire to achieve a certain result.  

2. The Last Simulation

The final simulation of the semester was a plea-bargaining exercise in an assault case. The defendant was described as a homeless man with mental health problems who had been identified as the perpetrator of an assault. The identification took place after a police officer pointed the suspect out to the victim. The defendant maintained his innocence and proffered an alibi—he said he had been at the homeless shelter—and his statement was partially corroborated.

The twenty-four students were divided into two groups of twelve, half defense lawyers and prosecutors, for this final simulation. Both sides had been instructed to research the charges and the “facts” thoroughly. Defense students had been told that they should never assume a client’s guilt or start from the position that a plea bargain is necessarily the best way to resolve a

Prosecutors had been provided with some negative information about their witnesses and advised that disclosure was up to them. Of course they were aware they were being graded in part on whether or not they behaved ethically.

Given the facts provided to the class, which revealed a very weak prosecution case, I was surprised at how many “defense attorneys” nonetheless urged their client who maintained his innocence to accept a plea bargain. All the students had been instructed that in a plea bargaining session the first issue is the strength of the prosecution’s case. As the ABA Standards for Criminal Justice require, lawyers must investigate the merits of the case before even considering a plea bargain. In discussing the exercise with students afterward, however, it became clear that because the client was described as mentally ill and lived in a homeless shelter, many of the defense students were personally uncomfortable seeking dismissal, and/or reluctant to assert his claim of innocence. Instead they saw the plea bargaining session as an opportunity to seek services for a needy client. At the same time, prosecutor students leapt at the chance to obtain a guilty plea in a situation where their proof was very shaky.

IV. Conclusions

a. Introducing Real Stories into Preparation for Simulations

Several weeks into the semester I invited Caramad Conley, a recently exonerated San Francisco man, and his post-conviction lawyer to address the class as an illustration of a wrongful conviction based on withheld evidence. The students were powerfully affected by hearing Mr. Conley’s story and I vowed that next time I teach this class I will do this much earlier in the curriculum.

Caramad Conley had been released from prison just weeks before our semester began. He had served 18 years in state prison on a murder conviction that was based on false testimony supplied by another young man from his community. That witness, a former family friend, had received monetary and other benefits from law enforcement officers in exchange for his testimony. Despite repeated requests by Mr. Conley’s trial attorney for discovery of any inducements offered to the witness, that evidence had not been turned over by the prosecution.

Caramad Conley’s brother, Careem, also spoke, sharing the devastating effect his brother’s unjust incarceration had on the Conley family and the struggle the family went through trying to find counsel to represent him. Careem Conley told the class that many law firms rejected his request to investigate his brother’s case and much money was spent before the family was lucky enough to find a receptive ear at the firm of Keker and Van Nest.

Post-conviction defense attorney, Dan Purcell, described the complicated legal odyssey that resulted in Mr. Conley’s release from prison. He told the students that it was the memorable nature of Mr. Conley’s first name that led to the firm’s eventual decision to take on the case.

48 Uphoff, supra at 9

49 ABA Standards for Criminal Justice 4-4.1(a) Duty to Investigate.
Dan Purcell was among the lawyers at his firm who reviewed the Conley case in late 2005. Years later he was researching government misconduct in another case handled by the firm, and came across Caramad Conley’s name. The one-of-a-kind nature of the first name jogged Purcell’s memory and he realized that the same police detectives were involved in the two cases and that each defendant told a similar story of police misconduct. Purcell then convinced his firm to represent Mr. Conley as well. Ultimately the defense proved that the main witness against Caramad Conley had a very close relationship with one of the detectives and that the detective had paid the witness for his testimony. The witness’ multiple health and family problems made him especially vulnerable to police pressure. The information about his relationship with the detective and the fact that he had been paid for his testimony had not been disclosed the defense, despite the best efforts of Mr. Conley’s trial attorney who repeatedly demanded the discovery of any such potentially impeaching information.

The students listened intently to this story of a wrongful conviction. They were visibly moved as Mr. Conley described what it was like to spend nearly two decades of his life as a prisoner in one of California’s most notorious maximum-security prisons. Despite the horrors he had endured, Caramad Conley seemed remarkably free from bitterness. Students marveled at his forgiving attitude toward a justice system that sent him to prison for 18 years on the basis of perjured testimony. In response to the students who asked why he wasn’t angry at the witness, he explained that in his view the witness who had testified falsely in response to police pressure was just as much a victim of police misconduct as he himself had been.

Subsequent class discussions and comments posted on the class web site showed that the students had been deeply affected by Mr. Conley’s story. Perhaps students need to hear this story or others like it and have a chance to articulate and internalize the lessons to be drawn from the experience of a wrongly convicted human being before being asked to take on the roles of defenders and prosecutors.

2. The Value of Debriefing

Although preparing for and doing the exercises was a helpful way to test students’ substantive knowledge and skills, it was during the debriefing sessions that the real learning took place. Watching themselves on tape, students engaged in a self-critique. They were asked to identify one thing they did well and one area for improvement. With the benefit of some professorial prompting, students noticed missed opportunities, places when follow-up questions

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50 Caramad Conley wrote to Golden Gate Law School’s Innocence Project in 2005 seeking representation. GGU law students initiated an investigation. Our Project which was a partnership with the Northern California Innocence Project at Santa Clara closed at the end of that year for lack of funds. We tried unsuccessfully to find pro bono representation for Mr. Conley at local private firms, including the firm of Keker and Van Nest.

might have elicited important information, for example, or moments when encouraging words and body language may have helped work through an awkward moment. Knowing the applicable rule is a necessary but not a sufficient condition for effective lawyering. In preparing for and acting out interviewing, counseling and negotiation skills, students learned a great deal, but it was only when they were asked to reflect on their own performances, and guided in that reflection, that they realized how much more there is to learn. Next time I teach this class I will build in more time for debriefing. Students will conduct exercises in small groups with some students observing and taking notes utilizing a rubric for guided peer review. Each group will build on the lessons learned from the previous group. I will also meet with students one on one to discuss their individual performances twice during the semester.

I had naively hoped that after one semester my students would understand that to be a competent criminal lawyer one must have a thorough understanding of the substantive law and procedural rules and one must advocate in the shadow of the rules of professional conduct and of notions of morality and justice. Reaching this goal was obviously a little harder than I had initially imagined. Teaching students to be honorable actors in the criminal justice system is a complicated process, especially when so many of those students enter law school burdened by media-shaped views of criminal justice. I will work harder next time to make students aware of their preconceptions. And I will work harder to dislodge those preconceptions by bringing more reality into my classroom. I will also spend more time on helping students prepare for their simulated role-plays and on debriefing them together. My goals will perhaps be a tad more realistic the second time around: for students to come away from this class realizing that, as Gandhi teaches: “There is a higher court than courts of justice and that is the court of conscience. It supercedes all other courts.”

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