

EXTEND THE GUIDING HAND: INCARCERATED YOUTH,  
LAW SCHOOL CLINICS, AND EXPANDING ACCESS TO COUNSEL

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*“The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”*<sup>1</sup>

Marco, a normally unflappable army captain and law student, sounded unnerved. A decade older than most of my students, with three tours of duty in Iraq and Afghanistan under his belt, he had never overstepped the sometimes murky boundaries of the clinician/student relationship. So when my cell phone rang late on a Saturday night, I knew that something was terribly wrong.

It was. Marco had received a call from Alice, the aunt and legal guardian of our sixteen-year-old client, Lance. Lance was incarcerated at a juvenile prison in New Jersey. Earlier in the evening, a facility administrator contacted Alice to tell her that Lance had been taken off-grounds for emergency surgery. Citing “security reasons,” the administrator refused to tell Alice the nature of the surgery, the name or location of the hospital, or anything about Lance’s condition. Although Lance was a minor, the administrator did not seek Alice’s consent to the surgery or even acknowledge that such consent might be necessary. Facing what was, for her, an insurmountable bureaucratic wall, a panicked Alice turned to Marco—and so, to the clinic that I teach at Rutgers School of Law–Newark for help.

The call from Alice was the *cri de coeur* of what swiftly became a pitched battle to compel the juvenile justice agency to afford Lance essential educational and therapeutic services and to ensure that Lance—consistent with his wishes—would receive appropriate medical care and be protected from further physical and emotional harm. Because Lance and other youth incarcerated in juvenile facilities generally do not have ready access to lawyers, these goals in all likelihood would not have been accomplished had our clinic not been involved.<sup>2</sup> Alice’s call also was the beginning of a rich educational experience for me, and I hope, for Marco.

This Article posits that juvenile post-dispositional, or post-sentence, advocacy clinics address a largely unmet legal need, and at the same time, create a uniquely fertile pedagogical environment. Because the United States Supreme Court has not yet found that the right to counsel for indigent youth charged with juvenile delinquency extends throughout any term of incarceration, post-dispositional clinics help close a yawning gap in the continuum of legal representation for children (or, at least, the small number of youth they are able to serve). In doing so, these clinics demonstrate the essential importance of access to counsel for all incarcerated

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<sup>1</sup> In re Gault, 387 U.S. 1, 36 (1967) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

<sup>2</sup> See N.J. STAT. ANN. § 2A:158A-24 (1968) (providing for legal representation when a juvenile faces institutional commitment, but not after he has been sentenced).

young people, thus making the case for institutional change. In short, post-dispositional clinics are like Peter, the little Dutch boy who held back the sea; by putting our collective fingers in the due process dike, we can stem the tide of unconstitutional, inhumane conditions of confinement until a stronger wall is built.<sup>3</sup>

Post-dispositional clinics also are ethical petri dishes. The representation of adolescents is one of the most ethically and morally complex areas of legal practice. Due to their developmental immaturity and past exposure to trauma, teenagers often do not make decisions like rational, competent adults. Their consequent vulnerability to physical and emotional harm can cause their lawyers to wish to protect rather than speak for them, thus threatening client autonomy. In particular, questions relating to the allocation of decisional authority, and the attendant duty to preserve client confidences, abound and are magnified when the client is in custody and cut off from her parents and other guiding adults. These dilemmas make for an emotionally draining but educationally invaluable clinical enterprise.

Finally, post-dispositional clinics offer an exceptional pedagogical platform. In taking on these matters, I have been forced to re-examine and reflect on my role, goals, and relationships with students and clients.

Part I of the Article delves into Lance's story in greater detail to highlight the conditions that confront many incarcerated young people and contextualize the larger discussion. Part II summarizes the scope of the unmet need for post-dispositional advocacy and the avenues of legal protection available to committed youth. Part III examines the role that law school clinics can play in filling this void, using the post-dispositional clinics at Rutgers as an example. Finally, Part IV considers some of the teaching challenges that I have confronted in this work, drawing from the writings of other clinical scholars as a framework. Ultimately, I hope to encourage other clinical programs to take up the standard of post-dispositional representation, and in doing so, lay the groundwork for universal access to counsel for children in custody.

## I. LANCE

By the time that Marco and I met Lance, he had already suffered several lifetimes' worth of trauma. Orphaned as a toddler, he was raised by his grandmother, who died of a heart attack when Lance was just eight years old. Lance found her in the morning when she failed to wake up. He then went to live with Alice, who was in her early twenties and already raising five children of her other siblings. Lance's full-scale IQ was in the mid-sixties (well below average), and he had been ill-served by the long line of sub-standard public schools he attended. By his early teens, he read only at a third-grade level, had a long history of clinical depression, and was an easy target for the gangs that plagued his neighborhood. Although he and Alice shared a particularly close relationship, she was overwhelmed by the demands of bringing up six children in poverty, and was unable to protect Lance from being swept up into gang life.

And swept up he was. By his twelfth birthday, Lance was immersed in every aspect of gang activity: turf protection, offensive and defensive violence, guns, and drugs. At fourteen, he was shot; the bullet remained lodged near his lung two years later. At fifteen, his closest friend died in his arms after a street shoot-out; at sixteen, he became a father. Multiple arrests and juvenile delinquency petitions soon followed, culminating in his two-year incarceration at the New Jersey State Training School for Boys at Jamesburg, the largest juvenile prison in the state.

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<sup>3</sup> See generally MARY MAPES DODGE, HANS BRINKER, OR THE SILVER SKATES (Scribners 1886) (popularizing the story of the little Dutch boy who plugs a dike with his finger).

His public defender referred him to our clinic, and we began working with him soon after he arrived at Jamesburg.<sup>4</sup>

The injury that resulted in Lance's surgery and hospitalization was inflicted by another youth in the prison. Lance, perhaps fearing gang reprisals, claimed not to have seen his attacker. According to Lance, he was in the Jamesburg gym playing basketball when someone grabbed him from behind and sliced his eyeball with a sharp object. Although a phalanx of guards was present, neither the perpetrator nor the weapon was ever identified.<sup>5</sup> The attack left Lance bleeding profusely. He had no vision in the injured eye, yet the guards—perhaps reluctant to reveal their lapse in supervision—escorted him back to his dormitory rather than to the infirmary. Residents of the facility refer to the dormitories as “shacks.” There, they gave him a towel to use as a compress. When this failed to stem the bleeding, the guards decided to seek medical attention. First, however, they forced him to wipe up the substantial amount of blood that had dripped to the floor.

When Lance finally arrived at the infirmary, approximately thirty minutes after the incident, the seriousness of his injury was evident. The nurse on duty immediately called for an ambulance, which took Lance to a local hospital. Doctors there quickly determined that they could not treat him, and Lance was transported to a trauma center hospital in Newark, approximately sixty miles away.

At the hospital, Lance—despite his young age, disabilities, and grievous physical condition—was treated as a prisoner. Handcuffed to his bed and in leg irons, he was kept under guard around the clock. Although Alice lived in Newark, juvenile justice administrators initially refused to allow her to visit Lance or speak to the doctors who were treating him. That evening, Lance underwent a three-hour surgery—the first of several that he eventually would endure—yet no one explained the procedure to Alice or sought her consent. All initial treatment decisions were made by state personnel, who were partly responsible for his injury. And, although the doctors repaired Lance's eyeball sufficiently to stem the bleeding, he would remain legally blind in that eye.

Lance remained in the hospital for one week. When he returned to Jamesburg, rather than being permitted to return to his “shack,” he was placed in the infirmary's medical isolation unit. The isolation unit is a small, locked, glassed-in room within the larger infirmary wing. Apart from brief periods each day when nurses and guards entered the room (and when Marco or another member of our clinical team visited him), Lance had no human contact, no recreation, and no vocational or rehabilitative programming. Despite his significant special needs and the substantial academic time he had lost while in the hospital, and contrary to his federally-mandated Individualized Educational Program (“IEP”), he was not permitted to attend school. Instead, a staff member slipped worksheets through a slot in his door each day, without providing any guidance, feedback, or teaching. We later learned that Lance's placement in medical isolation was not medically necessary to prevent infection but, instead, a self-protective measure by agency officials. At the very least, he could have remained in the general infirmary unit, where he would have been able to interact with other residents and to attend school with no real risks to his health.

When anyone, but especially an adolescent, experiences even a short period of solitary

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<sup>4</sup> The operations of the clinic are described in Part III, *infra*.

<sup>5</sup> See generally RICHARD MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011), available at [http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf) (last visited Sept. 18, 2014) (detailing the violence rampant in juvenile corrections facilities).

confinement, he or she is at risk of substantial psychological harm.<sup>6</sup> If isolation persists for an extended length of time, it can lead to what Stuart Grassian has termed “Segregated Housing Unit Syndrome” (“SHUS”).<sup>7</sup> Symptoms of SHUS include visual and auditory hallucinations, hypersensitivity to noise and touch, insomnia and paranoia, uncontrollable feelings of rage and fear, and increased risk of suicide.<sup>8</sup>

For a number of reasons, these harms are exacerbated for youth in custody. First, because the human brain continues to develop through one’s mid-twenties, teenagers are developmentally immature,<sup>9</sup> and so, more acutely affected by isolation.<sup>10</sup> In addition, the disruptions in school and rehabilitative programming that attend a stint in solitary inflict additional damage on youth in custody not suffered by their adult counterparts. Adolescence also is a critical time for social development, which is disrupted by separation from one’s peers.<sup>11</sup> Finally, like Lance, a disproportionate number of youth in custody have experienced trauma or suffer from mental illness, rendering them particularly vulnerable to the negative effects of isolation.<sup>12</sup>

Despite these well-known dangers, Lance’s sessions with the facility therapist were decreased, rather than augmented, while he was confined to the isolation unit. He desperately wanted to return to the general population, or at least to the congregate infirmary unit, where he could attend school and have visits from Alice and his infant daughter. Lance sank deeper into depression, at one point, becoming virtually non-communicative. He stopped taking the prescribed post-surgical antibiotics, causing his eye to become infected and further undermining his prognosis for recovering his vision.

Had our clinic not represented Lance, he no doubt would have remained in medical isolation throughout his remaining year in custody, with potentially devastating mental health consequences. Without the force of legal advocacy, he might not have received necessary follow-up medical care and subsequent surgeries. Although each of those later operations, like the first, posed substantial risks and led to long recovery periods, Alice would have continued to have been cut off from the doctors and excluded from Lance’s hospital room. Neither she nor Lance would have been included in the medical decision-making process. Lance would have returned to Jamesburg after each hospitalization further behind in school and even less engaged in whatever rehabilitative and therapeutic programs were available to him, rendering his re-entry to the community even more challenging than it ultimately was.

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<sup>6</sup> See Stuart Grassian, *Psychopathological Effect of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1453–54 (1983) (documenting the adverse psychological impact of solitary confinement on prisoners in general).

<sup>7</sup> Grassian initially called it “solitary confinement syndrome.” See *id.*; see also, e.g., Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California’s Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1128 (1996); Stuart Grassian, *The Psychiatric Effects of Solitary Confinement*, 22 J.L. & POL’Y 325 (2006) (documenting the effects of solitary confinement, which later became known as “SHU Syndrome”).

<sup>8</sup> *Id.* at 329–37.

<sup>9</sup> Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003).

<sup>10</sup> Kim Brooks Tandy, *Do No Harm: The Enhanced Application of Legal and Professional Standards for Protecting Youth from the Harm of Isolation in Youth Correctional Facilities*, 34 CHILD. LEGAL RTS. J. 141, 146–56 (2014).

<sup>11</sup> See generally Dustin Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114, 115–16 (2013).

<sup>12</sup> Grassian, *supra* note 7, at 348; Tandy, *supra* note 10, at 152–56.

Instead, our clinical team obtained critical information in the immediate aftermath of the attack about Lance's whereabouts and condition. Consistent with Lance's wishes, we advocated successfully for Alice to be permitted to visit Lance in the hospital. We assisted Lance and Alice in their interactions with medical personnel to ensure that they understood the medical terminology and the decisions they were being asked to make regarding his initial and subsequent surgeries. Once Lance returned to Jamesburg, we advocated for his transfer from the medical isolation unit to the general infirmary wing. As a result of this advocacy, the Executive Director of the juvenile justice agency personally visited Lance, and in the wake of her visit, ordered the transfer to the general infirmary. We advocated, with some degree of success, for the agency to comply with Lance's educational needs pursuant to his IEP. We counseled Lance about the importance of taking his medication and actively participating in the educational program offered to him. Perhaps in response to these efforts, his wound began to heal, and he became re-engaged in school. Finally, when Lance eventually was released, we attempted to help him enroll in a vocational training program and to obtain Supplemental Security Income benefits for his disability.

We could not eliminate the personal tragedies and systemic inequities that defined (and continue to define) so much of Lance's life, but we did compel the agency to treat him more humanely and to become more compliant with its own legal mandates. In the process, Lance gained a voice in fundamental decisions about his health, safety, and education, and my students learned essential lessons about the centrality of the client and the power of advocacy.

## II. THE CASE FOR POST-DISPOSITIONAL REPRESENTATION

### A. *Needs and Characteristics of Incarcerated Youth*

Tragically, Lance's story is far from unique among incarcerated youth. More than two million youths are arrested every year in the United States, among whom approximately 500,000 are detained pre-trial, and 70,000 are placed in secure long-term residential juvenile correctional facilities like Jamesburg.<sup>13</sup> Despite having only a marginally higher juvenile crime rate than other developed nations, the United States incarcerates exponentially more children per capita than any other country: 336 per 100,000 in 2002.<sup>14</sup> That is almost five times as many as its closest competitor, South Africa.<sup>15</sup> Nearly two-thirds of youth in long-term custody are committed due to non-violent offenses, including drug and property crimes, technical violations of probation, offenses against the public order such as disorderly conduct and public intoxication, and most disturbingly, status offenses: activity that is actionable only due to the young person's minor status, such as truancy.<sup>16</sup>

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<sup>13</sup> BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 3 (2006), available at [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf); SARAH HOCKENBERRY, U.S. DEP'T OF JUSTICE, JUVENILES IN RESIDENTIAL PLACEMENT, 2011, 3 (2014), available at <http://www.ojjdp.gov/pubs/246826.pdf>.

<sup>14</sup> NEAL HAZEL, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE, YOUTH JUSTICE BD. 59 (2008), [http://www.academia.edu/1621782/Cross-national\\_comparison\\_of\\_youth\\_justice](http://www.academia.edu/1621782/Cross-national_comparison_of_youth_justice).

<sup>15</sup> *Id.*

<sup>16</sup> NAT'L CTR. FOR JUVENILE JUSTICE, *Offense Profile of Committed Residents by Sex and Race / Ethnicity for U.S., 2011*, in EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT (2013), available at [http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense\\_Committed.asp](http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense_Committed.asp).

These young people are overwhelmingly members of minority groups: black youth are 4.6 times as likely to be incarcerated as Caucasian youth; Native Americans, 3.2 times as likely; and Latinos, 1.8 times as likely.<sup>17</sup> Like Lance, many have experienced substantial trauma in their short lives. According to the National Council of Juvenile and Family Court Judges:

The majority of youth who develop a pattern of delinquent behaviors and experience subsequent juvenile court involvement have faced both serious adversities and traumatic experiences. Research continues to show that most youth who are detained in juvenile detention centers have been exposed to both community and family violence and many have been threatened with, or been the direct target of, such violence.<sup>18</sup>

One recent study of the Cook County, Illinois, juvenile detention center population established that 93% had been exposed to one or more traumatic experiences prior to being interviewed by researchers, and 11% presented with the diagnostic criteria for post-traumatic stress disorder within a year prior to the survey.<sup>19</sup>

Children with disabilities are also grossly over-represented in this population. One national study, which surveyed fifty-two state juvenile corrections agencies, determined that 33.4% of incarcerated youth have a diagnosed special education disability, compared to approximately 10% of the general population.<sup>20</sup> Of this group, 47.7% have emotional disturbance, 38.6% have specific learning disabilities, and 9.7% have mental retardation.<sup>21</sup> Strikingly, the same study posited that the actual prevalence of disabilities among children in custody is substantially higher, but that juvenile corrections officials under-identify special needs for fiscal and other reasons.<sup>22</sup> In addition, according to a multi-state study performed by the National Center for Mental Health and Juvenile Justice, approximately 70% of young people in the juvenile justice system suffer from mental illness, with 27% of these cases deemed severe.<sup>23</sup> Sixty percent of

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<sup>17</sup> *Mapping the Youth Incarceration Problem*, W. HAYWOOD BURNS INST. FOR JUVENILE JUSTICE FAIRNESS & EQUITY (Apr. 16, 2014), <http://www.burnsinstitute.org/blog/our-new-data-map-is-live/>. Cf. NAT'L CTR. FOR JUVENILE JUSTICE, *Offense Profile of Detained Residents by Sex and Race / Ethnicity for U.S., 2011*, in EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT (2013), available at [http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense\\_Detained.asp](http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense_Detained.asp); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 661 (2013) (noting that "[a]n African American boy is nine times more likely to be detained for a drug offense as a white boy charged with the exact same offense" (citations omitted)); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 409 (2013).

<sup>18</sup> KRISTINE BUFFINGTON ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY CT. JUDGES, *TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY* 2 (2010), [http://www.ncjfcj.org/sites/default/files/trauma%20bulletin\\_0.pdf](http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_0.pdf) (internal citations omitted).

<sup>19</sup> LINDA A. TEPLIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *THE NORTHWESTERN JUVENILE PROJECT: OVERVIEW* 10 (2013).

<sup>20</sup> Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILDREN 339, 342 (2005).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE,

incarcerated young people, meanwhile, have co-occurring substance abuse.<sup>24</sup>

### B. Institutional Conditions

Unfortunately, the juvenile justice system does not offer a safe haven for many of these youths. Although juvenile institutions bear euphemistic titles—“training school,” “cottage,” and “residential center” are among the favorites—many look and function like adult prisons. They are large, housing several hundred young people in either cell blocks or multiple-bed congregate units. The institutions are surrounded by perimeter security devices like razor wire and electrified fences. Interior doors are locked and inmate movements are strictly controlled. Many facilities continue to impose solitary confinement as a disciplinary measure, despite a groundswell of opposition to the practice.<sup>25</sup>

Notwithstanding the punitive nature of these institutions, rehabilitation continues to be a central purpose of the juvenile court in most states (as well as its essential distinction from the adult criminal justice system<sup>26</sup>), and states have an obligation to provide educational, health, mental health, and other services to committed youth.<sup>27</sup> However, this obligation frequently goes unmet. Although mental health screening is far more prevalent in juvenile institutions now than it was two decades ago, only half of incarcerated youth recently surveyed by the U.S. Department of Justice reported having met with a mental health counselor or therapist in their facilities.<sup>28</sup> Moreover, “youth are equally likely to receive counseling in their current facility regardless of

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RESEARCH AND PROGRAM BRIEF: YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 2-4 (2006), [http://www.unicef.org/tdad/usmentalhealthprevalence06\(3\).pdf](http://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf).

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., AM. CIVIL LIBERTIES UNION, *Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement*, [https://www.aclu.org/files/assets/ACLU\\_Submission\\_to\\_HRC\\_16th\\_Session\\_on\\_Solitary\\_Confinement.pdf](https://www.aclu.org/files/assets/ACLU_Submission_to_HRC_16th_Session_on_Solitary_Confinement.pdf) (last visited Sept. 18, 2014); Editorial, *State Should Ban Solitary Confinement for Juvenile Offenders*, STAR-LEDGER, [http://blog.nj.com/njv\\_editorial\\_page/2013/07/state\\_should\\_ban\\_solitary\\_conf.html](http://blog.nj.com/njv_editorial_page/2013/07/state_should_ban_solitary_conf.html) (last updated July 18, 2013, 6:02 AM); Lee Romney, *Bay Area Juvenile Hall Mistreats Youths with Disabilities, Suit Says*, L.A. TIMES (Apr. 8, 2013), <http://articles.latimes.com/2013/aug/08/local/la-me-contra-costa-juvies-20130809>; ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE (2012), <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

<sup>26</sup> See, e.g., *In re R.*, 323 N.Y.S.2d 909, 911 (N.Y. Fam. Ct. 1971) (“[T]he Family Court is not a Criminal Court with punitive objectives. The purpose of th[e] Court is to rehabilitate children and to make services available to them, not to vindicate private wrongs.”); N.J. STAT. ANN. § 2A:4A-21(b) (West 1982) (“Consistent with the protection of the public interest, [one purpose of this act is] to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation . . .”).

<sup>27</sup> See, e.g., N.Y. FAM. CT. ACT § 352.1 (McKinney 1982) (requiring court to determine whether a juvenile needs “supervision, treatment, or confinement,” and if so, to order “an appropriate disposition”). Pursuant to the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. § 1997a-j (1996), the Civil Rights Division of the U.S. Department of Justice also has authority to sue juvenile justice agencies to compel provision of these services. See *infra* note 40 and accompanying text.

<sup>28</sup> ANDREA J. SEDLAK & KARLA S. MCPHERSON, U.S. DEP’T OF JUSTICE, YOUTH’S NEEDS AND SERVICES: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 2 (2010), [https://sypr.org/images/Youth\\_Needs\\_and\\_Services.pdf](https://sypr.org/images/Youth_Needs_and_Services.pdf).

their answers about their recent mental and emotional problems or previous traumatic experiences.”<sup>29</sup> With regard to substance abuse, 19% of confined young people are in facilities that do not screen for drug or alcohol problems, and 17% are in facilities that screen some, but not all, residents.<sup>30</sup> Among those youth who reported having four or more “recent substance-related problems,” only about 60% had received treatment at their current facilities, and the treatment offered often did not comport with generally accepted standards for effectiveness.<sup>31</sup>

Youth in custody also have a right to a free and appropriate general education,<sup>32</sup> and, when needed, a right to special education services that is co-extensive with their non-incarcerated peers.<sup>33</sup> Like mental health services and substance abuse treatment services, however, educational programs in facilities are sorely lacking. Although the typical public school day in the United States is six or seven hours long, only 45% of incarcerated young people spend at least six hours per day in school.<sup>34</sup> And despite the high percentage of incarcerated youth with learning disabilities, less than half of these are enrolled in a special education program.<sup>35</sup> Beyond this, little information is known about the curricula taught in facilities around the country, the educational resources available within those facilities, the quality and detail of facility IEPs, or the level of compliance with IEPs among children who receive special education services.<sup>36</sup>

Violence reigns in juvenile facilities. Nationally, since 1970, fifty-two lawsuits alleging unconstitutional levels of physical violence, physical abuse, sexual abuse, or excessive use of solitary confinement have resulted in court-ordered systemic remedies.<sup>37</sup> A 2010 national study by the U.S. Department of Justice’s Bureau of Justice Statistics further determined that 12% of youth confined in large correctional settings reported having been sexually victimized by staff or other residents; in twelve facilities, fully 20% of youth reported having been abused.<sup>38</sup>

Compounding these problems is the lack of transparency and oversight of juvenile corrections systems in most states.<sup>39</sup> The general public is not permitted into juvenile facilities,

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<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 4–5.

<sup>32</sup> *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954); Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–04 (2012).

<sup>33</sup> *See* Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400–01 (“Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy . . .”); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012); *Green v. Johnson*, 513 F.Supp. 965, 976 (D. Mass 1981) (holding that incarcerated youths are “entitled to a free and appropriate special education [and] are harmed by not receiving services to which they are entitled”).

<sup>34</sup> *SEDLAK & MCPHERSON, supra* note 28, at 6.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 9.

<sup>37</sup> *MENDEL, supra* note 5, at 5.

<sup>38</sup> ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2008–09 at 8 (2010), <http://www.bjs.gov/content/pub/pdf/svjfry09.pdf> (last visited Sept. 18, 2014).

<sup>39</sup> *See generally* PATRICIA PURITZ & MARY ANN SCALI, U.S. DEP’T OF JUSTICE, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY (1998).



and because many are located in remote areas, few defense attorneys or judges visit them.<sup>40</sup> State juvenile corrections agencies hide behind confidentiality laws, which originally were enacted to protect youth from the stigma of court involvement but have the contradictory effect of shielding institutions, rather than children, from public view and oversight.<sup>41</sup> Unlike many public officials, furthermore, many juvenile justice administrators do not make aggregate data about their programming, security, levels of violence, or day-to-day operations available to the public.<sup>42</sup> Few state statutes require regular judicial review of the status of youth in custody; thus, concerns about conditions are rarely brought to the attention of juvenile court judges.<sup>43</sup>

### C. Legal Protections

The federal Constitution and some state constitutions, as well as federal and state statutes, afford incarcerated youth a measure of protection from a myriad of harms.<sup>44</sup> Enforcing those rights, however, is procedurally complex and virtually impossible for young people who lack legal representation.

Although the U.S. Department of Justice pursues an active docket of juvenile conditions cases pursuant to its authority under the Civil Rights of Institutionalized Persons Act (“CRIPA”)<sup>45</sup> and the Violent Crime Control and Law Enforcement Act of 1994,<sup>46</sup> neither of these statutes gives rise to individual claims,<sup>47</sup> and neither can be enforced privately. Young people may bring federal

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<sup>40</sup> Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Post-Dispositional Advocacy Increases the Risk of Recidivism and Institutional Abuse*, 60 RUTGERS L. REV. 207, 216–18 (2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Two notable exceptions are Pennsylvania, 42 PA. CONS. STAT. ANN. § 6353 (1976), and New York, N.Y. FAM. CT. ACT §§ 355.3 (McKinney 1982) and 355.5 (McKinney 1999).

<sup>44</sup> A full discussion of these legal protections is beyond the scope of this article. Briefly, however, constitutional sources of protection include the Eighth and Fourteenth Amendments. *See, e.g.*, *Morales v. Turman*, 535 F.2d 864, 867–68 (5th Cir. 1976); *Morgan v. Sproat*, 432 F. Supp. 1130, 1131 (S.D. Miss. 1977); *Inmates of Boys’ Training School v. Affleck*, 346 F. Supp. 1354, 1365–66 (D.R.I. 1972); *John L. v. Adams*, 969 F.2d 228, 231 (6th Cir. 1992), *Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F. Supp. 473, 475 (S.D.N.Y. 1970). State constitutions sometimes convey substantive rights to youth; *see, e.g.*, N.J. CONST. art. VIII, § 4 (guaranteeing a “thorough and efficient system of free public schools” to all children in the state). Federal statutes include the Prison Rape Elimination Act (“PREA”), 42 U.S.C. §§ 15601–09 (2012), the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400–1450 (2012), the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213 (2012), and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012). State juvenile court purpose clauses and dispositional or treatment provisions often articulate rights to particular protections or services. *See, e.g.*, N.Y. FAM. CT. ACT § 301.1 (“In any proceeding under this article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community.”) (McKinney 1982). Finally, state regulations governing juvenile justice agencies tend to convey specific rights to legal access, medical care and mental health treatment, education, family visits and phone calls, clothing, and other necessities of daily life. *See, e.g.*, N.J. ADMIN. CODE §§ 13:95-1.1 to 21.14 (2006).

<sup>45</sup> 42 U.S.C. §§ 1997a–j (2012). For a current list of pending cases and investigations challenging conditions in juvenile facilities, *see* U.S. DEP’T OF JUSTICE, SPECIAL LITIGATION SECTION CASES AND MATTERS, JUVENILE JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#juv> (last visited Sept. 18, 2014).

<sup>46</sup> Pub. L. No. 103-322, 108 Stat. 1796 (1994) (current version at 42 U.S.C. § 14141 (2012)).

<sup>47</sup> *Id.*; *see* 42 U.S.C. § 1997a–b (2012).

individual and class actions challenging conditions of confinement under 42 U.S.C. § 1983, but the onerous exhaustion, “federal violation,” and physical injury requirements of the Prison Litigation Reform Act of 1995 (“PLRA”)<sup>48</sup> have sharply curtailed the availability and effectiveness of this avenue of relief, even for those youth fortunate enough to have lawyers.<sup>49</sup> The IDEA,<sup>50</sup> the Americans with Disabilities Act,<sup>51</sup> and § 504 of the Rehabilitation Act of 1973<sup>52</sup> afford young people with disabilities essential protections, but these are difficult if not impossible for adults to enforce *pro se*, let alone incarcerated adolescents with special needs.

State juvenile justice statutes vary widely, but some do create vehicles for legal action on behalf of youth in custody. Juvenile code purpose clauses that identify rehabilitation as a goal of juvenile court involvement arguably carve out a right to rehabilitative services for committed youth, as well as the right to be free from abuse and neglect in state care.<sup>53</sup> Some states have enacted “bills of rights” for young people in long-term placement,<sup>54</sup> while the disposition sections of numerous state juvenile codes grant the court authority to order placement agencies to provide specific services or assistance to committed youth.<sup>55</sup> Other codes create even broader mandamus authority.<sup>56</sup> Once again, however, pursuing these remedies requires court intervention, a near-impossibility for any young person without counsel, let alone one with special needs.

Finally, state-run juvenile facilities operate within a regulatory structure, and governing regulations often articulate substantive rights to things like safety, health care, mental health and substance abuse treatment, education, recreation, hygiene, legal access, family contact and outside communication, as well as limitations on the use of isolation, restraints, and force.<sup>57</sup> These

<sup>48</sup> See generally 18 U.S.C. § 3626 (2012).

<sup>49</sup> See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 tbl. I.A. (2003) (detailing reductions in inmate filings); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Prisons: The Case for Amending the Prison Litigation Reform Act*, AM. CONST. SOC’Y FOR LAW & POL’Y 2 (Mar. 2007), <http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf> (“[C]onstitutionally meritorious cases are now faced with new and often insurmountable obstacles.”).

<sup>50</sup> 20 U.S.C. §§ 1400–50 (2012).

<sup>51</sup> 42 U.S.C. §§ 12101–213 (2012).

<sup>52</sup> 29 U.S.C. § 794 (2012). Children with special needs also fall within the purview of the federal “protection and advocacy” (“P&A”) system, which provides advocacy services for people with disabilities in each of the fifty states. According to the U.S. Office of Juvenile Justice and Delinquency Prevention, P&As are an “underutilized resource for improving the services received by disabled youth in detention and correctional facilities.” PURITZ & SCALI, *supra* note 39, at 27. Unfortunately, the P&A system is significantly underfunded and provides legal representation to only a small percentage of incarcerated youth. *Id.*

<sup>53</sup> See, e.g., 42 PA. CONS. STAT. ANN. § 6353 (West 1976), N.J. STAT. ANN. § 2A:4A-21(b) (West 1982); see also Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175 (2007).

<sup>54</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, §§ 171-1.1 to 171-1.7 (1998); N.J. ADMIN. CODE § 13:101-3.1 (2013).

<sup>55</sup> Some state constitutions also give rise to protections, like New Jersey’s constitutional guarantee to a “thorough and efficient system of free public schools” to all children in the state. N.J. CONST. art. VIII, § 4.

<sup>56</sup> See, e.g., N.Y. FAM. CT. ACT § 1015-a (1987). State tort laws may also create another vehicle for compensation, but do not offer immediate relief from harmful or unconstitutional conditions.

<sup>57</sup> See, e.g., CAL. CODE REGS. tit. 15, §§ 1300–1511 (1997); N.J. ADMIN. CODE §§ 13:95-1.1 to -21.14 (2006); N.Y. COMP. CODES R. & REGS. tit. 9, §§ 168.1 to .8, 171-1.1 to -1.9 (1972).

regulatory schemes, however, generally set forth a grievance apparatus that youth must utilize in order to challenge an administrative decision or failure to comply with the regulations,<sup>58</sup> and institutional grievance processes are often an onerous exercise in futility.

In New Jersey, for example, grievance procedures are not set forth in statute or promulgated in regulations but, instead, determined by agency staff and conveyed to youth in a “handbook on discipline.”<sup>59</sup> A young person who wishes to pursue a grievance first must request a grievance form from a corrections officer. Since actions by correctional staff are the bases of most complaints, even this first step can pose an insurmountable barrier to pursuing legal remedies; clients fear reprisal if they even request the form, and officers frequently refuse to provide it. Obviously, in an environment defined by violence and a culture of retaliation, a substantial amount of courage is necessary to pursue these remedies. If the young person succeeds in obtaining the form, he or she must complete it and either place it in a grievance box or, depending on the institution, hand it to a staff member. Numerous clients have reported that correctional officers have crumpled up grievance forms and thrown them away as the client watched. Particularly in light of their developmental status, which is characterized by a lack of future orientation, impulsivity, and differential risk assessment, it is no surprise that many young people simply refuse even to attempt to file grievances.<sup>60</sup>

When clients do succeed in submitting a complaint, they report that they rarely receive any response at all, and when they do, it is almost always negative. At this point, a young person has exhausted her administrative remedies and is permitted to file an appeal to New Jersey’s intermediate appellate court.<sup>61</sup> Yet the procedural obstacles to adolescents prosecuting such appeals are legion and self-evident; suffice it to say that, unlike frequent appeals from grievance denials by adult prison inmates, there is not a single reported decision in New Jersey addressing a *pro se* grievance appeal by a juvenile.

Confined youth, then, do have legal rights, but it is nearly impossible for them to enforce these rights *pro se*. They need lawyers if these protections are to be anything but meaningless, and there is much for lawyers to do.

Those few lawyers who represent incarcerated youth play a critical role in keeping their clients safe: (1) ensuring that they receive the educational, mental health, medical, substance abuse treatment, and re-entry services they often desperately need and to which they are entitled, (2) shedding light on the workings of and conditions within juvenile prisons, (3) helping clients navigate institutional disciplinary and grievance processes, (4) preparing clients for re-entry and addressing post-release supervision violation petitions, (5) and righting unconstitutional conditions when necessary. For this reason, national juvenile defense standards require that children charged with delinquency be represented by counsel with specialized expertise

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<sup>58</sup> See, e.g., N.J. ADMIN. CODE § 13:92-7.2 (1995). Exhaustion of these administrative remedies is the condition precedent to pursuing a federal court action pursuant to the Prison Litigation Reform Act. 42 U.S.C. § 1997e(a) (2012).

<sup>59</sup> See N.J. ADMIN. CODE § 13:95-1.3 (2006) (defining the handbook as containing “a juvenile’s rights and responsibilities, the acts and activities which are prohibited and the disciplinary procedures and sanctions imposed”). A copy of the handbook is on file with the author.

<sup>60</sup> Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in YOUTH ON TRIAL 325–33 (Thomas Grisso & Robert G. Schwartz, eds., 2003).

<sup>61</sup> N.J. Court R. 2:2-3(a)(2) (1972).

throughout the length of any dispositional order.<sup>62</sup>

Although the right to counsel during the adjudicatory process has been firmly embedded in federal and state law since the Supreme Court's 1967 decision in *In re Gault*,<sup>63</sup> the Court has never explicitly held it to extend to the post-disposition stage of juvenile cases.<sup>64</sup> Thus, only a handful of states currently provide counsel for children in custody for purposes other than direct appeals from their delinquency adjudications.<sup>65</sup>

### III. CLOSING THE GAP: LAW SCHOOL CLINICS

Obviously, law school clinics alone cannot close this gap in the continuum of legal representation for youths. Although my clinic and that of my Rutgers-Camden colleague, Sandra Simkins, have provided counsel to approximately two hundred and forty incarcerated young people since the launch of our MacArthur Foundation-funded Juvenile Indigent Defense Action Network ("JIDAN") in 2009, our clients made up less than 10% of the state juvenile justice

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<sup>62</sup> NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS 120–27 (2012), <http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf> [hereinafter NJDC STANDARDS]; NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES 169 (2005), [http://www.ncjfcj.org/sites/default/files/09chapter\\_0.pdf](http://www.ncjfcj.org/sites/default/files/09chapter_0.pdf).

<sup>63</sup> 387 U.S. 1 (1967).

<sup>64</sup> Determining that the rehabilitative ends of delinquency proceedings distinguished them from adult criminal matters, the Court located the juvenile right to counsel in the due process clause of the Fourteenth Amendment rather than in the Sixth Amendment. Arguably, the same reasoning supports extension of that right throughout a young person's placement term, but neither the Supreme Court nor any federal appellate courts have yet reached this conclusion.

Another line of cases, which deals with incarcerated people's right to legal access, offers additional support for the provision of counsel to youth in custody. In *John L.*, 969 F.2d at 237, the Sixth Circuit held that the usual reliance on law libraries and inmate paralegals as a vehicle for ensuring the constitutionally-guaranteed right of access to courts was inadequate as applied to juveniles, due to their age and lack of experience with the criminal system. Instead, the court affirmed the district court's remedial order requiring that counsel be provided for youth in custody, although it limited that obligation to matters arising under federal law and expressly refused to extend it to state law-based educational and treatment claims. *Id.* at 233–36. See also *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977). For a detailed discussion of *John L.* and its potential expansion beyond the relatively small universe of federal claims, see generally Karen B. Swenson, *John L. v. Betty Adams: Taking Bounds in the Right Direction for Incarcerated Juveniles*, 24 MEM. ST. U. L. REV. 429 (1994).

The question of whether *John L.* survived the Supreme Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), which imposed an "actual injury" limitation on legal access claims, is explored and answered in the affirmative in Marsha Levick and Neha Desai's *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, *supra* note 53, at 194–204. See also *J.P. v. Taft*, 439 F.Supp.2d 793 (S.D. Ohio 2006) (determining that meaningful access to courts for juveniles incarcerated in Ohio requires access to counsel).

<sup>65</sup> See Levick and Desai, *supra* note 53, at 189; Tary J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Juvenile Codes*, 23 AM. J. CRIM. LAW 611, 628 (1996) (determining that nineteen states provide a right to counsel for children at "all critical stages" of delinquency proceedings, but do not expressly define post-disposition as a "critical stage"). Marsha Levick and Neha Desai argue convincingly that post-disposition is a critical stage, requiring access to counsel. Levick and Desai, *supra* note 53, at 178. Numerous other commentators have called for universal provision of counsel to incarcerated youth. See generally Simkins, *supra* note 40, at 207; Swenson, *supra* note 64; Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudication Juvenile Defenders*, 19 GEO. J. ON POVERTY L. & POL'Y 351 (2012).

agency's population during that time.<sup>66</sup> Furthermore, we are two of only a handful of law school clinical programs nationwide to focus on this specific subset of the client population.<sup>67</sup> These limited resources do not come close to meeting the needs of the tens of thousands of youth in custody. System-wide juvenile indigent defense reform is essential, and long overdue.

Nevertheless, clinics can help narrow this gap in the representational continuum, and in so doing, can play a critical role in the change process. Despite young people's incontrovertible right of legal access during their terms of incarceration,<sup>68</sup> few—if any—lawyers for children had ever set foot in New Jersey's three secure long-term youth facilities prior to the founding of JIDAN. During our early institutional visits, correctional staff sometimes refused to produce clients for meetings, and when they did, repeatedly interrupted our interviews, and labeled young people "snitches" (with all the attendant consequences of that moniker) for speaking with us. When we successfully conducted our first parole revocation hearing on behalf of a client, the hearing officer with twenty years' tenure told us he could not recall the last time a juvenile challenged a violation petition.

Due to the lack of publicly accessible data and transparency described above, no one (other than agency staff and the youth themselves) knew much about safety, the use of isolation and restraints, education, treatment services, or rehabilitative programming within the facilities. Citing futility and fears of retaliation, youth refused to utilize the institutional grievance process, and no one had ever challenged conditions of confinement in court. Despite the Juvenile Court's clear authority to reduce a term of incarceration if a young person has demonstrated readiness for release, these motions rarely were brought.<sup>69</sup> Perhaps most disturbingly, incarcerated youth, many of whom did not see a family member throughout a multi-year placement term and none of whom was brought back to court for regular review hearings, felt that they had fallen into a black hole. In many ways, they had.

Over the last four years, we have managed to shine some light into this void. Our students and post-graduate fellows are now expected and sometimes welcome at the facilities. Many young people, having heard about the clinics from other youth in their institutions, have called or written to request representation. We help clients prepare for parole hearings, appeal from denials of parole, and challenge subsequent revocations. We teach clients the importance of utilizing the institutional grievance process, and therefore make judicial relief possible. We navigate the college application and financial aid processes for clients who have been released, and help others re-enroll in high school. We obtain early release for some clients. We negotiate with agency personnel to secure mental health, medical, and education services for clients and

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<sup>66</sup> New Jersey was one of four states selected to participate in the MacArthur Foundation's national JIDAN, the goal of which is to improve access to counsel and the quality of legal representation afforded to children in the juvenile justice system. JIDAN is one component of the Foundation's national, multi-year "Models for Change" juvenile justice reform initiative. *See generally* MODELS FOR CHANGE: SYSTEMS REFORM IN JUVENILE JUSTICE, <http://www.modelsforchange.net> (last visited Sept. 18, 2014).

<sup>67</sup> Although many law schools have stellar juvenile defense clinics, most direct their resources towards the adjudicatory and dispositional phases of delinquency proceedings. One notable exception is the Children and Family Justice Center, part of the Bluhm Legal Clinic at Northwestern University School of Law, which represents youth in parole revocation and expungement proceedings. *See* NORTHWESTERN LAW: CHILDREN AND FAMILY JUSTICE CENTER AT BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/legalclinic/cfjc/> (last visited Sept. 18, 2014).

<sup>68</sup> *See, e.g.*, N.J. ADMIN. CODE §§ 13:95-15.1 to 15.8 (2011); *Bounds v. Smith*, 430 U.S. 817 (1977), *John L.*, 969 F.2d at 237; *cf. Lewis v. Casey*, 518 U.S. 343 (1996).

<sup>69</sup> N.J. STAT. ANN. § 2A:4A-45 (West 1982).

have retained independent experts, when necessary, to convince administrators of the need for such services. Our representational model is both holistic and inter-disciplinary, as any representation of children should be; we work with our clients, their families, and professionals from other disciplines to further the clients' goals, attempt to keep them safe while in custody, and afford them the best chance of returning home physically and emotionally intact.

In addition to these successes on behalf of individual youth, our observations and client interactions have served as the basis for system reform efforts. The first federal lawsuit challenging conditions in New Jersey juvenile institutions arose out of two clinic cases,<sup>70</sup> as did a recent appeal that led to the invalidation of a regulation permitting discretionary transfer of youth from the juvenile to the adult correctional system.<sup>71</sup> Most recently, we brought together a coalition of advocates who filed a petition for rulemaking to ban the use of solitary confinement for disciplinary purposes in juvenile facilities.<sup>72</sup> Given the mantle of secrecy that cloaks juvenile prisons, none of these actions would have been possible without the presence of lawyers and students on the ground to gather empirical evidence and share clients' stories.<sup>73</sup>

We also have suffered some heartbreaking failures. Although we go to great lengths to help our clients through the re-entry period, many—even those whom we succeed in extricating from the system prior to the expiration of their placement terms—re-offend soon after release.<sup>74</sup> Despite our successful efforts to reduce the use of solitary confinement and our constant presence on the ground, too many clients continue to do time in “the box.” In other instances, we have not been able to accomplish central goals of the representation. Although we have managed to improve the lot of many of our clients, the educational and mental health systems within the facilities continue to be woefully inadequate and the level of violence remains unacceptably high.

These frustrations aside, a fundamental need exists for post-dispositional representation for incarcerated youth and law school clinics can help fill the gap. But clinics are first and foremost an educational enterprise. Does a post-dispositional clinic pass pedagogical muster?

#### IV. THE PEDAGOGICAL VALUE OF A POST-DISPOSITION CLINIC

Like other “small case” clinics, post-dispositional clinics afford students the opportunity to hone essential lawyering skills: client interviewing and counseling, and other formal and informal skills.<sup>75</sup> The ages, developmental status, and special needs of the young people that we represent further require students to develop specialized approaches to client interviewing and

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<sup>70</sup> Troy D. v. Mickens, 806 F.Supp.2d 758 (D.N.J. 2011).

<sup>71</sup> State *ex rel.* J.J., 427 N.J. Super. 541 (N.J. App. Div. 2012).

<sup>72</sup> Ryan Hutchins, *ACLU Calling on State to Ban ‘Damaging’ Solitary Confinement for Juvenile Offenders*, STAR-LEDGER, July 15, 2013, at 1.

<sup>73</sup> For an insightful discussion of the tension between confidentiality obligations and the need for client narrative to effect system change, see Abbe Smith, *Telling Stories and Keeping Secrets*, 8 U.D.C. L. REV. 255 (2004).

<sup>74</sup> Tragically, this is the norm. According to one recent national study, 70 to 80% of youth released from residential placements are re-arrested within two to three years of release, and 45 to 72%, depending on the state, are convicted of a new offense within three years. See MENDEL, *supra* note 5, at 10.

<sup>75</sup> See, e.g., Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 370–84 (2009); Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic*, 13 CLINICAL L. REV. 573 (2006); DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (2001).

counseling that are rooted in the still-emerging science of adolescent development.<sup>76</sup> The gulf of difference that separates many law students from their clients—differences of race, gender, age, ethnicity, socio-economic strata, education, exposure to violence, and custodial status—compels them to acquire (and me to teach) an understanding of the impact of those differences on their relationships with clients and strategies for cross-cultural lawyering.<sup>77</sup> Effective representation of these clients also requires students to collaborate with mental health, educational, medical, and other professionals, and in doing so, expand what often begins as a parochial view of the lawyer's role. The work is intellectually challenging, emotionally draining, endlessly interesting, and deeply rooted in a social justice ethos: in short, the perfect vehicle for a law school clinic.

Post-dispositional cases also raise a number of theoretical questions that run through clinical scholarship.<sup>78</sup> These have at times caused me great consternation, but also have affirmed the pedagogical value of the enterprise. In particular, I find myself repeatedly grappling with issues that fall into three distinct categories: (1) the roles of student and supervisor; (2) ethical dilemmas, specifically the allocation of decisional authority and confidentiality; and (3) dealing with failure. Perhaps it is the clients' youthfulness, the dire nature of their circumstances, the fury wrought by inhumane prison conditions, or the despair engendered by defeat, but these cases cast quintessential clinical themes into sharp relief, inviting re-examination and fresh evaluation with successive generations of students.

#### A. *Encouraging Independence: Roles of Student and Supervisor*

A substantial body of literature explores the proper role of the clinical supervisor in client relationships.<sup>79</sup> A central theme in this work is whether, and how, clinical teachers should intervene in client representation. In other words, does effective experiential learning compel the clinician to remain in the background, trusting the supervision process to ensure competent representation, or is there a place for modeling and other forms of participatory supervision that

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<sup>76</sup> See generally Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357 (2006).

<sup>77</sup> A helpful piece on cross-cultural lawyering is Susan Bryant's article, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001). For a useful discussion of strategies for teaching cross-cultural lawyering within clinical settings, see Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131 (2006). Tamar Birkhead has written persuasively about the importance of cross-cultural lawyering in juvenile defense practice and as a strategy for preventing juvenile wrongful convictions. See Tamar R. Birkhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959 (2010).

<sup>78</sup> See generally Simkins, *supra* note 40.

<sup>79</sup> See, e.g., David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993); Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLINICAL L. REV. 137 (1995); Peter Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815 (2004); George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1990–1991); Jennifer Grundlach, *"This is a Courtroom, Not a Classroom": So What is the Role of the Clinical Supervisor?* 13 CLINICAL L. REV. 279 (2008); Carolyn Grose, *Flies on the Wall or in the Ointment? Some Thoughts on the Role of Clinical Supervisors at Initial Client Interviews*, 14 CLINICAL L. REV. 415 (2008); Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1 (1999).

do not undermine the student-client relationship?<sup>80</sup> Professor George Critchlow, in an early essay on the subject, identified two competing camps: the “irreparable harm” group, and the interventionist group. The “irreparable harm” group believes in “learning from mistakes and self-discovery” and will “sacrifice efficiency and control for the perceived educational benefits derived from student autonomy so long as malpractice is avoided and the Rules of Professional Conduct are not violated.”<sup>81</sup> The interventionist group, by contrast, “represents the view that the client’s interests are generally superior to the student’s educational needs and desires . . . [and] that clients should not be used as guinea pigs in the effort to train law students.”<sup>82</sup> Simply put, who comes first: student or client?

In a compelling argument for the non-interventionist philosophy of clinical supervision, Professor David Chavkin also sounds a note of caution for the heavy responsibility that this approach places on the clinical supervisor:

I emphasize the importance of minimizing the opportunity for intervention in the student attorney-client relationships for two reasons. . . . First, to the extent that the client becomes aware that a “real” attorney as well as a student attorney are representing her, she will tend to look to the “real” attorney, the supervising attorney, for definitive information. That can be a substantial impediment for the student attorney in developing a lawyering identity and an appropriate lawyer-client relationship. As problematic as this first factor can be, it pales in significance before the second reason. So long as the student attorney knows that the supervising attorney is in the case, the student’s responsibility for representation is necessarily diffused and impaired. This is not simply a product of the number and quality of interventions by the lawyer. It is a product of the potential that the supervisor might intervene that dilutes ethical responsibilities and role definition.

To the extent that the clinician decides to not create an attorney-client relationship with the clinic client, *this approach also requires a different calculus of supervision. At each opportunity for intervention along the way, the supervising attorney is required to make an evaluation not whether s/he would do it better (because if it is merely different it would not justify intervention), but whether there is a pedagogical value for intervening in a way visible to the client and/or others that outweighs the negative aspects that will result.*<sup>83</sup>

In other areas of my clinical practice, which includes minor criminal matters and post-conviction relief work on behalf of adult clients convicted of serious offenses as juveniles, I subscribe to Chavkin’s adage that “every intervention is a failure of supervision.”<sup>84</sup> My goal, as I tell my students at the beginning of each semester, is to make myself superfluous. During meetings with students, I attempt to help them identify every potential path a case might take and

<sup>80</sup> See Grose, *supra* note 79, at 415–16.

<sup>81</sup> Critchlow, *supra* note 79, at 427–29.

<sup>82</sup> *Id.*

<sup>83</sup> Chavkin, *supra* note 79, at 1539–40 (emphasis added).

<sup>84</sup> *Id.* at 1542.



discuss or moot every activity, including client interviews and counseling sessions, plea negotiations, and hearings, in advance. This can be an arduous process, but is time well spent; if done correctly, it allows me to fade into the background and the student truly to “assume” the role of the lawyer.<sup>85</sup>

In Lance’s case, however, as in many other juvenile matters, I was instinctively more interventionist, for reasons both structural and theoretical, legitimate and (perhaps) not. First, despite his years of navigating the military chain of command, Marco needed guidance. He also needed gravitas; prison officials, even more than other bureaucrats, either fail or are slow to respond to student requests or demands. Due to the emergent nature of Lance’s medical condition, we did not have the luxury of time that good clinical pedagogy demands. We needed answers, immediately. So, I picked up the phone and called contacts in the upper echelons of the juvenile justice agency, when normally I would have brainstormed about the call with Marco before he made it and then debriefed it with him afterwards.

More generally, the physical barriers that make it difficult for incarcerated clients to interact with their lawyers are even more extreme when the client is a teenager and the lawyer, a student. Youth facilities, like adult prisons, are often inaccessible, both because they tend to be located in rural areas and because of stringent visitation rules. New Jersey’s nearest youth prison is at least a one-hour drive from Newark, where Rutgers is located, and others are nearly two hours away. Given the distance, if we are going to visit a client, it often makes sense to do so together, especially because some students do not have cars. (The MacArthur grant afforded us the luxury of hiring post-graduate clinical fellows, all of whom have been recent Rutgers graduates. They have worked with a large percentage of the clients directly, with much less direct supervisory intervention than I employ with students.) Once I am in the room, of course, I am the elephant; neither the client nor the students can ignore me. My younger students, at least, are only a few years older than the clients, whereas I am not. Even if we plan in advance for the student to lead the discussion, clients tend to direct questions towards me. It is more difficult for me to deflect these questions to students than it is in other representational contexts, and students are unlikely to disagree with my answers.

Inaccessibility hampers student autonomy in other ways, as well. Youth in custody do not have e-mail and have limited access to telephones; in New Jersey, they have to make every call from a social worker’s office. Because young people are much less likely to write letters to their lawyers than adult inmates, telephonic communication is critical to the attorney-client relationship. For example, I am more likely to be at my desk than students, so clients often call me rather than the students. When a client who is not incarcerated calls me directly, I either ask the student involved to return the call, or alternatively, speak with the client briefly and then engage the student in further conversation and follow-up. When an incarcerated client calls, however, especially a teenager, I feel compelled to have the conversation regardless of whether the student is present.<sup>86</sup>

In other client relationships, even if the clinician remains in the background, the client is aware of her physical presence and the safety net she provides for the students and the representation; the client sees the team at work in court, in administrative hearings, and at

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<sup>85</sup> See generally Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989). In the same piece, Kotkin posits that not all students benefit from pure experiential learning and suggests that, for those students, “modeling” is a more useful teaching tool.

<sup>86</sup> Cf. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2013) (requiring “diligence” and “promptness” in representation); MODEL RULES OF PROF’L CONDUCT R. 1.4 (2013) (requiring regular communication with clients).

meetings with adversaries. With incarcerated clients—particularly adolescents, who are still developing abstract thinking abilities and demand concrete evidence of what they consider to be untrustworthy assertions<sup>87</sup>—this visual re-assurance is impossible, as almost all of the “action” in a case (even most court appearances) occurs outside the client’s presence. I thus tend to compensate by providing that reassurance orally, perhaps further undermining student autonomy but offering the client, I hope, some level of comfort and confidence.

The lack of student continuity endemic to law school clinics engenders the same need. Our typical juvenile client is serving a three- to four-year sentence, but students are in the clinic for at most two semesters. I am the only constant in the representation, and in light of the history of abandonment that many clients have suffered, we need to make clear that I am with them for the long haul. When a post-graduate fellow is involved in the representation, he or she generally plays this role. I am not sure that this makes much of a difference from the student’s perspective, except as a matter of degree; a more experienced lawyer has supplanted the student’s primacy in the attorney-client relationship.

Yet another force at work in post-dispositional cases is the client’s unusual degree of personal isolation. As noted above, for reasons of geography and family history, many youths in custody have few, if any, visitors during their incarceration terms. Thus, my students, the post-graduate fellow, and I are the only regular physical contacts that many of our clients have with the outside world. Even when family members are involved, it is easier for us to see and speak with the client due to rules governing legal access for the incarcerated.<sup>88</sup> As a result, clients sometimes seek out a level of interaction with me that exceeds what is essential to the legal work in their cases. Rather than discouraging this, as I might with other clients, their overwhelming loneliness, and the sympathy it engenders, leads me to encourage the communication, thereby placing myself between the clients and my students.

These structural barriers to student autonomy arguably offer legitimate reasons for interventionist supervision strategies. Less legitimate, but equally powerful, are reasons having to do with the clinician’s own identification with the client, ego and insecurities. At the time our clinic was representing Lance, my son was two years younger than he. Lance’s story pushed all of the lurking dangers of adolescence into the forefront and my maternal protective instincts kicked in, threatening my commitment to client autonomy and “expressed interests” advocacy.<sup>89</sup> And although I try to teach students to be zealous and holistic advocates for every client, regardless of the nature of the case, the stakes can be particularly high in post-disposition work. Knowing that failure might mean the permanent loss of Lance’s vision, for example, or his continued descent

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<sup>87</sup> See Dustin Albert & Laurence Steinberg, *Judgment and Decision-Making in Adolescence*, 21 J. RESEARCH ON ADOLESCENCE 211, 215 (2011).

<sup>88</sup> See, e.g., N.J. ADMIN. CODE § 13:95-20.8 (2013).

<sup>89</sup> Kristin Henning and others have written powerfully about the pitfalls of counseling and making decisions with adolescent clients. See, e.g., Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005). Other scholars have explored the positive and negative effects of identification on the attorney-client, and student-client relationship. See, e.g., Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135 (2003). There is an obvious connection between the phenomenon of identification and that of counter-transference. See, e.g., Jeffrey M. Lipshaw, *What’s Going On? The Psychoanalysis Metaphor for Educating Lawyer-Counselors*, 45 CONN. L. REV. 1355, 1371 (2013) (“When I say ‘understand their own psychology,’ what I mean is dealing with the possibility that lawyers’ resistances and counter-transferences get in the way of understanding clients’ meanings.”)

into the depths of depression, led to a crisis of role definition for me. I wanted him to know from the beginning that we took our representational obligations seriously, that he was in good hands, and (although I would not have admitted this at the time) that a “real” lawyer was minding the store.

This attitude, of course, defies the very foundations of clinical legal education and clinical pedagogy.<sup>90</sup> It takes control away from the student, and so, threatens to undermine student self-confidence, disengage students from client and case, and subvert the experiential learning process. Yet I suspect (although clinicians may not be willing to admit it) that it is not uncommon among clinicians, who tend to be as deeply committed to their clients and social justice goals as they are to their students. The challenge, then, is to recognize these forces at work and develop strategies to keep them in check, encourage student autonomy, and at the same time, ensure the client’s direction of, and confidence in, his legal representation.

The clinical theory literature sets forth a number of helpful insights in this regard. Particularly resonant is the conscious teaching of empathy, both as a tool for and an overarching value of legal representation. Empathetic, “active” listening, through which the lawyer identifies the client’s emotions, and in doing so, furthers the flow of communication and client autonomy, is a cornerstone of the “client-centered” approach to lawyering first developed by Professors David A. Binder and Susan C. Price in the 1970s.<sup>91</sup> Equally important in cases like Lance’s, however, is the integration into student supervision of what Professor Stephen Ellmann has called the “ethic of care”:

I have already suggested that building a personal relationship will enable the lawyer to understand her client better. Achieving such understanding should itself be a salient goal of care lawyering . . . . Caring lawyers should take this responsibility very seriously, for better understanding will allow the lawyer to provide better services to the client, and—except in those cases where familiarity breed[s] contempt—enable the lawyer to care better as well.

In the process, caring lawyers will naturally seek more than an abstract picture of their client. . . . [S]cholars have suggested that empathy is actually an emotional as well as a cognitive response, and that it involves the lawyer’s feeling what it might be like to stand in the client’s shoes. The caring lawyer will not wish to sacrifice her capacity for cool-headed judgment, but neither will she be eager to approach her client with her emotions disengaged. Her task is to

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<sup>90</sup> See, e.g., Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); GARY BELLOW & BEATRICE MOULTON, *THE LAWYERING PROCESS: ETHICS AND PROFESSIONALISM RESPONSIBILITY* (1981); Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 6 (2000); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982).

<sup>91</sup> See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). To trace the evolution of the client-centered approach, see DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* (2d ed. 2003); Chavkin, *supra* note 79; STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* (2009).

enter her client's world without leaving her own, to seek a depth of understanding that engages her heart as well as her head.<sup>92</sup>

If, as Ellmann suggests, emotional engagement can lead to a deeper understanding of the client's needs and goals (and thus, a more "caring" approach to legal representation), then student supervision should recognize, validate, and explore the opportunities, tensions and conflicts such engagement can create. Similarly, if the clinician is willing to discuss with her students her own emotional engagement with a client, and to explore client interactions through the lens of the ethic of care, it may put her interventions into context, thereby alleviating the negative effects that interventionist supervision often engenders.

This self-reflective approach to supervision is closely connected to what the clinical literature calls "modeling." Modeling (or, in other words, teaching through demonstration) is most frequently used to teach specific skills like cross-examination. Professor Minna Kotkin, however, has called for clinical programs to "utilize modeling in a more honest, rigorous, and analytical manner" in which the supervisor not only assumes responsibility for particular tasks but also

remove[s] herself from the task at hand and consider[s] her choice of actions, reflecting on its effectiveness and conformity to normative models and previously-defined goals. She must engage the student in the effort, opening herself to the same kind of critical examination that the student is expected to develop from his own performance in traditional clinical experiences.<sup>93</sup>

What this suggests is that, in a case like Lance's, where circumstances pose a direct challenge to student autonomy, the clinician might "model" not only representational tasks, but the lawyer-client relationship itself. If carefully undertaken, this strategy affords the student the benefit of in-depth conversations about issues that usually receive short shrift in the law school curriculum, and in practice, fosters a healthy bit of role-reversal for student and teacher as they engage in mutual critique of the clinician's performance—and again, compensates for the negative effects of interventionist supervision.

Finally, ongoing, focused discussions of student/clinician roles are enormously useful with both students and clients. After the initial retainer process is completed, these questions rarely are addressed with clients. Revisiting them, particularly when there is a change in student assignment, can encourage the client to interact directly with the student whenever possible without discouraging the client directly from reaching out to the clinician. Similar conversations with students can help put into context what otherwise might seem to be unduly critical supervisory interventions.

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<sup>92</sup> Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2698–2700 (1993) (citations omitted). Ellmann takes the term "ethic of care" from Carol Gilligan's classic work of moral psychology, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982), and considers, among other things, whether the "ethic of care" and ethical lawyering are mutually exclusive. Ellmann, *The Ethic of Care*, at 2665.

<sup>93</sup> Kotkin, *supra* note 85, at 200–01. Despite her persuasive advocacy for this approach, Kotkin also recognizes that the imbalance of power in the student/clinician relationship and the perception of the student by clients, adversaries, and courts may prevent the student from ever fully assuming the lawyer's role. *Id.*

### B. Ethical Dilemmas

As Professor Wallace Mlyniec has noted, “[m]ost law teachers believe that clinical courses are ideal venues for teaching ethics to J.D. students. Unlike traditional ethics courses, clinics challenge students with issues concerning the Rules of Professional Responsibility in the context of client claims, uncertainty, and human behavior.”<sup>94</sup> This is perhaps nowhere truer than in a juvenile defense clinic, for the legal representation of adolescents is a veritable laboratory for the teaching of ethics. In particular, questions relating to decision-making abound, for there are few other contexts in which teenagers are accorded complete authority to make potentially life-altering decisions.<sup>95</sup>

A rich body of scholarship explores the allocation of decisional authority between lawyers and their juvenile clients.<sup>96</sup> These writings most often address the tension between the core mandate to engage in client-directed, “expressed interests” advocacy as articulated by Rule 1.2 of Model Rules of Professional Conduct<sup>97</sup> and the understandable, but ethically (and sometimes morally) suspect desire to protect vulnerable clients from harm.<sup>98</sup>

Over the last decade, much of this work has been fueled by unprecedented advances in our understanding of adolescent development. Researchers have identified numerous differences in how adults and adolescents obtain and process information and make decisions.<sup>99</sup> Adolescents are less able than adults to engage in abstract reasoning. They lack the temporal perspective that allows adults to identify and evaluate both short- and long-term consequences of their decisions.<sup>100</sup> They are more impulsive and less measured than adults and tend to underestimate

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<sup>94</sup> Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 547 (2012).

<sup>95</sup> For example, despite ample evidence of the detrimental effects of parental consent laws, thirty-nine states now require some degree of parental involvement before a minor can obtain an abortion, not including six additional states whose parental involvement laws are temporarily or permanently enjoined. See *An Overview of Minors’ Consent Laws*, GUTTMACHER INST., [http://www.guttmacher.org/statecenter/spibs/spib\\_OMCL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf) (last updated Sept. 1, 2014). Similarly, minors are not permitted to enter into contracts, drop out of school, or participate in many extracurricular activities without parental consent.

<sup>96</sup> See, e.g., Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1421–24 (1996); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 290–95 (2003); Henning, *supra* note 89, at 246–47; Cohen & Mandelbaum, *supra* note 76, at 358–61; Abbe Smith, “*I Ain’t Takin’ No Plea*”: *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 11–13 (2007).

<sup>97</sup> “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.” MODEL RULES OF PROF’L CONDUCT R. 1.2 (2013).

<sup>98</sup> See Guggenheim, *supra* note 96; see generally Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984).

<sup>99</sup> See Scott & Steinberg, *supra* note 9.

<sup>100</sup> See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012, 1014 (2003).

risks and overestimate potential rewards.<sup>101</sup> And they are far more susceptible to peer influence, and so are less able to exercise independent judgment than adults faced with similar situations.<sup>102</sup> Based in large part on this research, the Supreme Court has issued a remarkable quartet of decisions since 2005, which carve out special protections for youth in sentencing<sup>103</sup> and custodial interrogations<sup>104</sup> due to their developmental immaturity, and resultant “impaired,” or differential, judgment.

If adolescents in fact are less competent decision-makers than adults, why should they be accorded concomitant decisional authority in their legal representation?<sup>105</sup> First and foremost, because the right to counsel in juvenile delinquency proceedings is rooted in the due process clause and is a condition precedent to securing and protecting other due process rights, such as the rights to cross-examination and confrontation. And, as Martin Guggenheim has pointed out, the conferring of due process rights carries with it a tacit acknowledgement of the child’s autonomy in the proceedings, for procedural protections imply the right to resist government interference in her liberty. Thus,

[u]nless children are allowed by lawyers to set the objectives in their cases, they would not only be effectively deprived of a number of constitutional rights, they would be denied procedures that are fundamental to the rule of law. The lawyer, not the child, would decide whether the child should forgo his or her right to

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*; see also Cauffman & Steinberg, *supra* note 60, at 331 (proposing psychological factors that “follow a developmental progression between adolescence and adulthood,” and that bear on the question of adolescent culpability). These differences are in part explained by the ongoing maturation of the brain, which researchers now believe does not peak until one’s mid-twenties. Scott & Steinberg, *supra* note 9 (noting that the areas of the brain controlling “long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward” continue to develop throughout adolescence).

<sup>103</sup> See *Roper v. Simmons*, 543 U.S. 551, 574–75, 578 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2033–34 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2475 (2012).

<sup>104</sup> See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398–99, 2408 (2011).

<sup>105</sup> Complicating this question is the remarkably unhelpful Rule 1.14(a), which identifies “minority” as a disabling condition that might permit a more paternalistic, “best interests” approach to representation: “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2013). The Rule offers no guidance as to who should determine whether in fact the client suffers from diminished capacity, whether that determination encompasses every decision that a client might be called upon to make in the course of representation, or what a “normal client-lawyer relationship” might be. It is “reasonably possible,” for example, for almost all of our juvenile clients to formulate and express an opinion about virtually any question that is asked of them. But those decisions, consistent with the client’s developmental status, often are based on short-term rather than long-term considerations, or are made in a flash of frustration or anger, and almost always change over time. Should this permit wholesale substitution of the attorney’s judgment for the client’s? For reasons discussed above, unless a client suffers a significant cognitive impairment in addition to her age, national standards and most scholars reject Rule 1.14’s escape hatch from client-driven representation.

remain silent. The lawyer, not the trier of fact, would effectively decide what outcome is in the child's best interests.<sup>106</sup>

Other scholars and professional standards for juvenile defense embrace this articulation of the attorney's role with virtual unanimity.<sup>107</sup> The National Juvenile Defense Standards recently promulgated by the National Juvenile Defender Center, for example, offer a pristine articulation of the lawyer's role:

#### 1.2 Elicit and Represent Client's Stated Interests

Counsel's primary and fundamental responsibility is to advocate for the client's expressed interests.

- a. Counsel may not substitute his or her own view of the client's best interests for those expressed by the client;
- b. Counsel may not substitute a parent's interests or view of the client's best interests for those expressed by the client;
- c. Where counsel believes that the client's directions will not achieve the best long-term outcome for the client, counsel must provide the client with additional information to help the client understand the potential outcomes and offer an opportunity to reconsider; and
- d. If the client is not persuaded, counsel must continue to act in accordance with the client's expressed interests throughout the course of the case.<sup>108</sup>

The standard prohibits the lawyer from leaning on the crutch of Rule 1.14, even when she believes that the client is making a potentially disastrous or dangerous decision.<sup>109</sup>

This is not to suggest, of course, that client decision-making occurs in a vacuum. No client, adult or juvenile, should be asked to make decisions without the benefit of skilled, patient, unhurried counseling. When the client is young, however, this obligation is paramount, for specialized, developmentally-aware and age-appropriate counseling can compensate for the

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<sup>106</sup> Guggenheim, *supra* note 96, at 1424.

<sup>107</sup> See INST. OF JUDICIAL ADMIN., AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 8, [http://www.njdc.info/pdf/ija\\_aba\\_jjstandards.pdf](http://www.njdc.info/pdf/ija_aba_jjstandards.pdf) (last visited Sept. 18, 2014); ELIZABETH CALVIN ET AL., NAT'L JUVENILE DEFENDER CTR., JUVENILE DEFENDER DELINQUENCY NOTEBOOK (2006), [http://www.njdc.info/pdf/delinquency\\_notebook.pdf](http://www.njdc.info/pdf/delinquency_notebook.pdf) (last visited Sept. 18, 2014); *NJDC Standards*, *supra* note 62, at 19–20; Henning, *supra* note 89, at 288–90; Marrus, *supra* note 96, at 356; Cohen & Mandelbaum, *supra* note 76, at 371–76.

<sup>108</sup> *NJDC Standards*, *supra* note 62, at 19–20.

<sup>109</sup> The standard assumes, however, that the client is a competent juvenile client, or an adolescent who does not suffer from disabilities (beyond immaturity) that may render him incompetent to stand trial. In those instances, Standard 1.7 requires counsel to consider, initiate and actively litigate competency proceedings, even, presumably, if the client objected. *Id.* at 29.

impaired judgment that is endemic to adolescence.<sup>110</sup> Thus, much of the scholarship focuses on effective counseling paradigms. Kristin Henning, for example, embraces what she terms the “collaborative” representational model, in which the lawyer, consistent with the client’s age and developmental status, is an active participant in the decision-making process but does not make decisions for the client.<sup>111</sup> Abbe Smith, on the other hand, proposes a more aggressive and interventionist approach, at least when young clients facing serious charges are on the verge of making potentially disastrous decisions.<sup>112</sup>

Even those students who intuitively grasp, and in the abstract, embrace the value of client autonomy often struggle when a client makes what they consider to be a “bad”—or, worse, dangerous—decision. T.J., for example, earned the highest score in the history of the local pre-trial detention center on the General Educational Development (“G.E.D.”) examination. Each year, my students and I offer a mock trial program within the facility, and T.J., who played a prosecutor, was a star: bright, curious, enthusiastic, and well-versed in the law. He told us that he wanted to go to college, and eventually, become a lawyer. Enthused and perhaps overly invested in the possibility of redemption, Sara, the student assigned to work with T.J., encouraged these aspirations; she gave him information about the college admissions process, encouraged him to take the SAT, and at T.J.’s request, spoke with his mother about the availability of financial aid.<sup>113</sup>

T.J. had committed a carjacking and was sentenced to a three-year term at Jamesburg soon after completing the G.E.D. With credit for time served, he would spend “only” a year in state custody before being discharged to parole. When he arrived at Jamesburg, T.J. learned that, because he had received his G.E.D. while in detention, he would not be permitted to attend school. Instead, he was deemed an “all-day worker” and assigned initially to a custodial job, and then to the barbershop within the facility. In short, he was being punished for his prior academic

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<sup>110</sup> Consider, for example, the *NJDC Standards*’ articulation of the counseling function:

Counsel must facilitate the client’s meaningful participation in his or her own defense by using language that is understandable to the client. Counsel must provide an opportunity for the client to consider, question, and discuss his or her understanding of the relationship with counsel. Counsel must explain that he or she represents only the client’s expressed interests, not the interests of the court, the parent, or counsel. Counsel must articulate the nature of attorney-client privilege and that what the client tells counsel will remain confidential, unless the client gives permission to disclose. Counsel must assist the client with making all substantive decisions regarding the investigation of the case, whether to accept a plea, whether to testify in his or her own defense, and whether to accept specific disposition recommendations. Where the choice exists, counsel must assist in making the decision as to whether to request a bench or jury trial. Counsel must discuss and clarify with the client strategic decisions regarding the method and manner of conducting the defense. Counsel must disclose to the client the factors considered in making decisions, choosing particular legal strategies, what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Counsel should engage the client in these decisions and seek the client’s guidance in identifying and pursuing investigative leads. When the client expresses reluctance or concern about a decision (*e.g.*, calling a particular witness), counsel should explain the risks and benefits of taking, or declining to take, a specific action.

*Id.* at 38.

<sup>111</sup> Henning, *supra* note 89, at 315–20.

<sup>112</sup> Smith, *supra* note 96, at 23–28.

<sup>113</sup> Martin Guggenheim and others have explored this understandable but ultimately counter-productive “child-saving” instinct, and the threat it poses to client autonomy. *See, e.g.*, Guggenheim, *supra* note 96, at 82, 154–55.



achievements.

Outraged, the student went up the institutional chain of command. She found out that the facility offered one college course per semester, for which T.J. would have qualified. Because T.J. arrived at Jamesburg a month after the course began, however, he was not permitted to enroll. By the time the next semester began, T.J. had turned eighteen and was transferred to a “halfway house” for adults.<sup>114</sup> No academic programs were available in this facility, but T.J. may have been able to pursue a grievance that would have permitted him to take a distance-learning course. Courts consistently have deemed classification and institutional assignments to fall within administrative discretion and have refused to reverse them. Consequently, our efforts to have T.J. transferred to a more appropriate facility were fruitless. By this point, however, T.J.’s enthusiasm for pursuing higher education had waned, and he told Sara that he simply wanted to “do his time” and return home.

Sara was heartbroken for T.J., but she also viewed his decision as a personal defeat. She desperately wanted to pull him back onto what she believed to be the “right” path, and frequently voiced her frustration at being unable to force him to continue in school. We devoted much of our weekly supervision sessions during this period to the counseling and decision-making process, planning for and then de-briefing Sara’s meetings with T.J. and also examining her motivations for wanting him to change his mind.

Had Sara embraced a “best interests” rather than “expressed interests” approach to client decision-making, she could have filed the grievance on T.J.’s behalf, or alternatively, called the facility administrator over his objection to advocate for T.J. to be required to participate in distance-learning. Instead, she adopted a “collaborative” counseling strategy. She spent many hours working with him to identify the “pros” of going to college and deconstructing what he viewed as the “cons.” She also enlisted his mother as an ally, who in turn encouraged T.J. to enroll. Ultimately, these efforts were fruitless; T.J. was discharged from the facility without participating in any further educational programs. Sara was deeply disappointed but gained a nuanced appreciation of her ethical obligations—and the difficulties inherent in fulfilling them—that she could not have achieved in a non-clinical ethics course.

Sometimes, of course, the consequences of adolescent clients’ decisions are graver or even life-threatening, forcing us to explore the boundaries of client autonomy. On occasion, our clients have revealed suicidal thoughts to my students, as well as threats to the safety of other youth or facility staff. These situations are complex, emotionally charged, and leave no room for error, but they also compel students to engage in “real world” analyses of their duties of client autonomy and confidentiality, and the boundaries of those obligations.<sup>115</sup>

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<sup>114</sup> Although federal and state law require “sight and sound separation” between juvenile justice system-involved youth and adults, these protections apply only to those under the age of eighteen. *See* Juvenile Justice and Delinquency Prevention Act Amendments of 1992, Pub. L. No. 102-586, 106 Stat. 4982 (codified as amended in scattered sections of 18 and 42 U.S.C.), § 1. Thus, as noted above, New Jersey law permits the transfer of youth in juvenile custody to adult prisons after their eighteenth birthdays. *Cf.* *State in re J.J.*, 427 N.J. Super. 541, 555–58 (N.J. App. Div. 2012) (invalidating transfer regulation on due process grounds). In addition, the New Jersey Parole Board, which has jurisdiction over juveniles under post-incarceration supervision as well as adults, routinely places young people who have turned eighteen while in juvenile custody in community-based treatment and transitional facilities intended for adult inmates. This practice has obvious and devastating consequences for the re-entry prognosis for youth returning to their communities.

<sup>115</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013).

### C. *Dealing with Defeat*

Many of my students are heroes-in-waiting. They enroll in the clinic for a variety of reasons, all legitimate: a passion for working with youth, public defense ambitions, or a more general commitment to social justice lawyering. Interestingly, even those students who plan to become prosecutors (and there have been many) experience an awakening of sorts when they represent young clients in custody. Confronted for the first time with the actual failings and human costs of incarceration, as well as the unremitting deprivation and loss that define their clients' lives, they are forced to re-evaluate their intuitive and strongly held beliefs about crime, punishment, and the prosecutorial function. These students often become the most vigorous advocates for their clients and for systemic reform. The clinical experience does not deter most from their career goals, but I hope and believe that it makes them exercise their prosecutorial discretion more compassionately and thoughtfully.

Regardless of their reasons for being in clinic, however, they share a singular desire to push back against a system that they understand to be fundamentally unjust, dangerous, and harmful. And, once they have met and developed a relationship with their young clients, all of whom, by virtue of their age and custodial status, are extraordinarily vulnerable, that determination to *win*, to strike a victory for the oppressed, increases exponentially.

Defining victory in post-dispositional work, however, is much murkier than in the traditional defense paradigm. There are moments of formal advocacy, to be sure—parole revocation hearings, grievance appeals, and motions for change of sentence, for example—but much of what must be done on behalf of incarcerated youth occurs in the fluid day-to-day of prison life and not within the four corners of a complaint. In addition, even our most obvious victories can and often do disintegrate into defeat; witness the appalling recidivism statistics for youth released from long-term custody.<sup>116</sup>

Failure, in fact, is perhaps the most common outcome of post-dispositional representation. By most traditional markers of success, we fail all the time. Most young people leave the system more traumatized and more damaged than they were when they entered. At the same time, many of them continue to engage in wrong-doing, major and minor, throughout their terms of incarceration. Although we have made inroads, we cannot yet shield all of our clients from the injuries, both physical and psychological, that they routinely suffer in custody or from the harms of isolation. And we have not yet compelled the juvenile justice agency to fix all that is wrong with its schools.

Faced with repeated defeats, even the most talented and dedicated lawyers can become disillusioned or even despondent; for students, the impact is even more devastating. Take, for example, Stephen, a recent clinic client. An exceptional athlete, Stephen was one of the top-ranked basketball players in the country during his first two years of high school and expected to be heavily recruited by Division I colleges. Unfortunately, at the same time he was garnering kudos on the court, he also was a rising star in his gang. By the time he was sixteen, he had been arrested for numerous robberies, and his basketball glories—and the potential they presented for him to escape the gang life—ceased to impress the juvenile court judge. He sentenced Stephen to a three-year term at Jamesburg.

The clinical fellow who represented Stephen has social work as well as legal training, and she is a skilled counselor and tenacious advocate. During Stephen's first year in custody, he was frequently defiant, refused to participate in programming, and often in solitary confinement.

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<sup>116</sup> See *supra* note 74, and accompanying text.

The fellow spent much of that year counseling him to focus on his long-term goal of going to college and playing professional basketball. His behavior improved substantially, and she went to work, identifying boarding schools with good “feeder” basketball programs that were willing to accept and work with boys like Stephen, navigating the application process with him, and securing a scholarship. When he ultimately was accepted to one of the schools, which was located in the Catskill Mountains (approximately a two-hour drive from Newark), she filed a motion for early release in the Juvenile Court. Impressed with Stephen’s progress, as well as with the multi-faceted release plan, the judge discharged Stephen from custody, with the proviso that he immediately enroll in the school.

Stephen did enroll, but stayed for less than a month. He left without permission, returned to Newark, and was promptly arrested and charged with robbery. Because he was now eighteen, he was charged as an adult. When the fellow went to visit him in the jail, he expressed no remorse for his actions, or regret for the opportunity he had spurned.

The primary goal of my clinic is not to recruit juvenile defense attorneys (although this is a beneficial by-product of the enterprise). Its real *raison d’être* is educational, and as is the case with any clinical program, the casework is both an end in itself and a pedagogical foundation for helping students to become lawyers, regardless of the arena in which they eventually might practice. Consistent with the social justice mission of clinical legal education, however, I do want to encourage those students who wish to become defenders to pursue that ambition, and to give them the tools they need to accomplish it.<sup>117</sup> Preventing burn-out is one of those tools, and failure, real or perceived, is one of the primary causes of burn-out.<sup>118</sup>

How does one teach around failure, particularly when the client is young and her liberty is at stake? In a pair of thoughtful articles, Professors Charles Ogletree and Abbe Smith explore the motivations of public defenders, and in doing so, offer insight into what sustains them.<sup>119</sup> Ogletree rejects the traditional, client-centered (i.e., based on the inherent good of client autonomy) and systemic (i.e., the moral imperative to equalize the imbalance of resources and racial disparities of the criminal justice system) justifications for public defense work.<sup>120</sup> Instead, he posits that zealous, effective public defenders share two principal motivations: empathy, which he defines as friendship with the client (and the complete connection, dedication, and care that true friendship entails), and heroism, defined as an unrelenting desire to win.<sup>121</sup>

Professor Smith, by contrast, largely rejects this construct. While acknowledging the importance of a less expansive form of empathy in the attorney-client relationship, she writes that the enormity of the defender’s task requires a degree of detachment that distinguishes it from friendship:

It is not an easy thing to believe in a client, to care about a client’s plight, to fight hard for that client—and eventually walk away. But defenders have to

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<sup>117</sup> See generally Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998) (discussing the importance of social justice concerns in the development of clinical legal education).

<sup>118</sup> See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1207, 1210–12 (2004).

<sup>119</sup> See generally Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARVARD L. REV. 1239 (1993); Smith, *supra* note 118.

<sup>120</sup> Ogletree, *supra* note 119, at 1250–60.

<sup>121</sup> *Id.* at 1268.

learn how to do this. They have to figure out how to give all they have in the moment, but be able to let go when it's over. They have to recognize that life isn't fair, the criminal justice system isn't fair, and some people never get a fair shake—but there is only so much we can do about it. Defenders must be able to connect *and* separate.<sup>122</sup>

Similarly, Smith spurns the notion of lawyer as hero for two reasons. The first is political:

[T]here is something disturbing—and presumptuous—about thinking of oneself as a hero. This may be especially so when a white, middle-class defender considers himself or herself a hero to the oppressed, black masses. What makes these defenders think they are their clients' heroes? And why is providing counsel to the poor accused a “heroic” thing, rather than merely the client's due under the Constitution? Isn't it a lawyer's professional and moral duty to represent the poor accused?<sup>123</sup>

The second reason, more germane to this discussion, is practical. Ogletree defines heroism as winning an acquittal, and public defenders lose—frequently. To begin with, researchers estimate that 90 to 95% of filed criminal cases are resolved by guilty pleas.<sup>124</sup> Even if a plea is favorable to a defendant, many dedicated, skilled public defenders have eloquently described the sense of futility and loss that attends it. In addition, although statistics vary across jurisdictions, the majority of jury trials end in convictions.<sup>125</sup> Thus, if a lawyer's primary motivation for public defense work is, as Smith writes, “saving people,” he or she will soon lose heart.<sup>126</sup>

In lieu of Ogletree's twin tenets of empathy and heroism, Smith offers an alternative set of sustainable motivators for long-term public defenders. The first is respect. Unlike friendship, which must develop over time and requires intense, ongoing emotional engagement, respect can be offered from a distance and in the moment: “Giving your heart away every time will be the end of you. We honor our clients and ourselves, and we endure, when we act out of respect.”<sup>127</sup>

The second motivation is what Smith dubs the “craft” of lawyering. Lawyers can derive great satisfaction from the level of skill, passion, and creativity they bring to all aspects of their client representation, not just courtroom theatrics. Effective client counseling that enables clients to make better decisions, persuasive plea negotiations, handling a high caseload without sinking under its weight, and successful, out-of-court sentencing advocacy with prosecutors and probation

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<sup>122</sup> Smith, *supra* note 118, at 1250–51.

<sup>123</sup> *Id.* at 1237 (citations omitted).

<sup>124</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY I (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (last visited Sept. 18, 2014).

<sup>125</sup> See, e.g., Jason Trahan, “Not Guilty” Remains a Rarity in Federal and State Courts, DALLAS MORNING NEWS, Jan. 29, 2012, available at <http://www.dallasnews.com/news/local-news/20120129-not-guilty-remains-a-rarity-in-federal-and-state-courts.ece> (estimating that 90% of federal jury trials result in convictions).

<sup>126</sup> Smith, *supra* note 118, at 1238.

<sup>127</sup> *Id.* at 1251.

officers all lead to better outcomes for clients, and in doing so, can and should motivate defenders.<sup>128</sup>

Finally, outrage motivates: not merely anger or indignation at the injustices that control every criminal courtroom in this country, but, as Smith writes, “moral outrage . . . a kind of principled resistance.”<sup>129</sup> When fueled by this directed outrage, defenders define themselves as much by the moral battle in which they are engaged as by its various outcomes, and are sustained by the larger cause.

Because adolescent clients are more vulnerable than adults and because they have greater potential for change, the motivations identified by Ogletree are particularly forceful for my students. When they first enter the clinic, they strongly identify with their clients and are determined to “save” them. Many attempt to befriend their clients, only to realize later that blurring the boundaries of the attorney-client relationship can create unrealistic expectations on the part of any teenager, especially one in custody; leads clients to ask the students to do things that fall outside those boundaries (and ultimately, be disappointed by the students’ refusals); and compromises the objectivity that is essential to effective counseling. Similarly, given the frequency of failure, heroism inevitably leads to disappointment.

For these reasons, in supervision and case rounds, I urge students to find sustenance in Smith’s motivational factors. Approaching adolescent clients from a distance, but with great respect, heads off misunderstandings about the nature of the relationship, creates the necessary boundaries that allow the relationship to flourish in the long term, and has the added benefit of teaching teenagers, many of whom have not had positive interactions with adults, how to respect, navigate, and gain from a professional relationship. It also helps the student avoid the phenomenon of counter-transference, or emotional projection, which is a common occurrence among lawyers for children and other vulnerable clients, and which is itself a cause of burn-out.<sup>130</sup>

I also encourage them to identify and take heart from small victories. These are usually the result of what Smith dubs “professional craft”: the normally recalcitrant client who finally opens up; the client who, after much encouragement, finally agrees to file an institutional grievance and obtains relief, however slight; or, as in Lance’s case, the transfer of a client from isolation back to the general population. The fellow who represented Stephen could, and did, derive satisfaction from her extraordinarily effective advocacy, even if the client did not make use of the opportunity it created for him. Even the act of visiting a client who sees no one else from the outside is a success, particularly in light of the barriers that juvenile justice agency administrators initially erected to impede access. In this process, the students and I critique and self-critique the actions they took to accomplish their goals, which allows them to “own” not only the outcome, but also the specific skills required to achieve it.

Finally, I try to give students space and time to express outrage. This is not difficult. After their first visits to a facility, it spews from them like volcanic ash. But by locating these responses at the center of our representation, I hope to help them view their work on behalf of individual clients in the context of our larger institutional reform efforts and understand how outrage fuels that work, as well. When they participate in system reform projects, furthermore, they see how even their failures (or especially those failures) are critical factors in the fight for lasting change.

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<sup>128</sup> See *id.* at 1251–58.

<sup>129</sup> *Id.* at 1259.

<sup>130</sup> *Id.* at 1205.

## V. CONCLUSION

Last year, Amy, one of my clinic students, wrote of a sixteen-year-old client in her weekly journal:

Last week I met with Javier. I came into this semester not sure what my role would be as his advocate. I thought I would check in with him once a month and that would be it. [But] on my visit last week, I found out that Javier has not been performing well in school, and he has been suspended again. He is like an onion—once the layers were peeled back, he revealed a deep sadness [because] he wasn't with his family. At one point during our conversation, he told me he thought his life was a waste. That made me feel very sad, because when I look at [him], I see mounds of potential . . . . Too often we see that when our clients are released . . . they get right back into the same trouble that put them in our path in the first place. Javier really seems to want to get as far away from that trouble as possible, with his aunt's family in Connecticut. Throughout our conversation, I could tell that his most positive memories from his childhood are connected to the time he spent there.

So now my mission for this semester is to get Javier back to Connecticut. I'd also like to get him to see that his life isn't a waste, and he can accomplish his goals if he puts in the work.<sup>131</sup>

Javier desperately needed someone to peel away those protective layers, to help him identify and articulate his goals, and to advocate for him within and outside of the institution. He needed someone to plan for his eventual return to the community. In short, he needed a lawyer.

Amy, of course, gained as much from the relationship as Javier. She learned how to listen to her client, how to dig beneath the surface, how to encourage him to open up to her. She learned how to counsel Javier to help him make better decisions than he might have without her aid. She learned how to develop an advocacy strategy for achieving her client's goals, and how to pursue those goals within an institutional bureaucracy that is deeply resistant to intervention or change. And she learned how to channel her outrage when that bureaucracy seemed immovable.

Every day, tens of thousands of young people like Javier are hidden from view in this country's juvenile institutions. They, too, desperately need the advice, assistance, and advocacy that only skilled lawyers can provide. Law school clinics have an essential role to play in extending the guiding hand of counsel past prison doors, and their students have much to gain from the effort.

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<sup>131</sup> Excerpt from student journal, on file with the author.