

Summer 2020

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Recommended Citation

Michael Millemann, Elliott Rauh, and Robert Bowie Jr., *Teaching Professional Responsibility Through Theater*, 17 HASTINGS RACE & POVERTY L.J. 399 (2020).

Available at: https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol17/iss2/6

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Teaching Professional Responsibility Through Theater

MICHAEL MILLEMANN, ELLIOTT RAUH,
AND ROBERT BOWIE, JR.*

Abstract

This article is about ethics-focused, law school courses, co-taught with a theater director, in which students wrote, produced and performed in plays. The plays were about four men who, separately, were wrongfully convicted, spent decades in prison, and finally were released and exonerated, formally (two) or informally (two).

The common themes in these miscarriages of justice were that 1) unethical conduct of prosecutors (especially failures to disclose exculpatory evidence) and of defense counsel (especially incompetent representation) undermined the Rule of Law and produced wrongful convictions, and 2) conversely, that the ethical conduct of post-conviction lawyers and law students helped to partially vindicate the rights of those wrongfully convicted, but could not provide any real remedy for decades of wrongfully deprived freedom. In sharp contrast, the worst and best of the legal profession were on display.

We argue that reproducing these extraordinary stories as plays, with students playing the roles of prosecutors, defense counsel, defendants (with not only wrongful convictions but also decades of wrongful incarceration), family members, crime victims, and people in the affected communities, is a powerful way to teach both law students and public audiences about the direct connections between legal ethics rules and the Rule of Law. It teaches as well the ripple effects on many people and communities, not just the parties, of unethical lawyer behavior.

The students learned about legal ethics through in depth analysis of the actual case records, from pretrial motions through trial transcripts and appellate briefs (in the nature of ethics autopsies), and from the personal presentations in class by the exonerated men and their families. As important, the students learned about professional responsibility and irresponsibility, from their immersion in the roles of the lawyers and “secondary” characters, like the affected families of the four men and the

crime victims and their communities.

The students also learned about competence, including how to work collaboratively to develop and to tell stories, to appreciate cultural differences, to examine witnesses, and to deal with performance anxiety.

Because the men, all African Americans, were tried in 1968 (two), 1975, and 1983, the plays served as important points of comparison of criminal justice—criminal law and procedure—then and now. In this respect, the courses also were virtual laboratories in which to explore legal realism and critical legal theory, especially race theory; the true stories were powerful critiques of the romanticized, theoretical model of due process that underlies the formal criminal justice curricula.

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I. INTRODUCTION

We are a law professor,¹ a professional actor/theater director,² and a lawyer/playwright.³ Over the last decade, we developed and co-taught a series of law school courses in which students collaboratively wrote, produced, and performed in plays.⁴ They presented the plays at the University of Maryland Carey School of Law. The audiences included not only law school faculty, staff, and students, and the friends and family of the performing students, but also people from outside the school.⁵ The latter

* We thank Jennifer Elisa Chapman, Maryland Law School’s Ryan H. Easley Research Fellow, for her extraordinary help to us in writing this article—with research, edits, generally good advice, and endless patience. We also thank Eliza Steele, Shane Doyle, and George Smith, students at Maryland Law School, for their excellent research help.

1. Michael Millemann has taught a range of classroom and clinical courses at the University of Maryland Carey School of Law for forty-five years. He had limited roles in co-teaching the courses described in this article, doing more in the first two than the next four. In all, he helped to select the cases that would be the subjects of the plays, led the discussions with the students about them, and taught or co-taught about the ethical and legal issues they presented.

2. Elliott Rauh is a co-founding ensemble member of Single Carrot Theatre in Baltimore City, and was a professional actor and theatre director when he co-taught these courses. As an adjunct professor, he taught the students acting and playwriting, directed the plays, helped to structure and supervise the students’ work, and produced the plays. Rauh now teaches at the Vanguard Collegiate Middle School in Baltimore City.

3. Robert Bowie, Jr. was a founding partner of Bowie & Jensen LLC, a business law firm in Towson, Maryland that focuses on intellectual property, construction, trade secrets, and administrative law. He has written many of his own plays, several of which have been produced and presented in New York and Baltimore theaters. In these courses, as an adjunct professor, he helped teach about playwriting and the ethical and legal issues that the plays presented, helped to structure and supervise the students’ work, and helped to produce the plays.

4. This was a two-credit course called “Lawyers and Legal Systems and Their Social Context” that met in classes two hours a week, with some additional time devoted to rehearsals. We taught the course six times during the 2009-2014 period. We thoroughly enjoyed teaching these courses, but have been unable to teach it in recent years because of conflicts in our teaching and work schedules. We would like to teach this course again in the future, our work schedules permitting.

5. We invited high school students who were participating in a youth educational program called “Community Law in Action,” which grew out of one of our clinics, to attend the plays. They had special interests, often because of their personal experiences, with the

included groups of high school students, and usually the people upon whom the plays were based, as well as their friends, family members, and others involved in their life stories.

In this article, we describe the courses and what we believe our students learned from them. We rely heavily on our students' own assessments of what they learned, not ours, and quote extensively from them, thereby giving voices to our students.⁶

A creative colleague had the idea that the collaborative process of writing, producing, and performing in plays would be an interesting and innovative way to teach about professional responsibility to law students and audiences.⁷ We believe it has been.⁸

The plays we describe in this article were about four men, one play each, who were convicted of murder in Maryland and sentenced to life imprisonment.⁹ All are African American. All, in fact, were innocent and

criminal justice system, which, as we explain in this article, was the context for the plays.

6. We asked students at the ends of the semesters of the first two courses, offered in 2009 and 2010, to give us their detailed assessments of the courses. These assessments have been extraordinarily useful in identifying the themes in this article and in writing it. These two courses focused on the cases of Walter Arvinger (2009), *see* Part IV (B), and Mark Grant (2010), *see* Part IV (D). We quote extensively from these assessments and cite them as "Assessment of A.B.," with A.B. replaced by the initials of the actual student whom we quote. We wish we had done this in the four other courses as well because we have learned much from these self-reports about what the students learned. These assessments were separate from the standard end-of-semester student course and faculty evaluations. Generally, in these standard evaluations, students praised the courses in the qualitative portions and consistently gave quantitative evaluations of the faculty between 5 ("very good") and 6 ("superior"), with 6 being the highest ranking. (The evaluations of faculty were the only questions that called for numeric rankings.) Of the 62 evaluations, there was one stark exception. This student said about the course, without elaboration, "not appropriate for law school," and gave the faculty a "2" ("below average"). In the other 61 evaluations, the lowest score for the faculty was "4" ("good").

7. These courses were part of the Law School's Leadership, Ethics, and Democracy (LEAD) Initiative, which began in 2008, which Millemann directed, and which the Fetzer Institute generously supported. The courses were one of several ways in which we developed new ways to teach professional responsibility and legal ethics. Maryland Law Professor Diane Hoffman, then associate dean, was the school's leader in creating the Initiative and the creative source of the idea for the courses we describe. She based her idea on the East Carolina University Medical School's Readers' Theater Program in which medical students produce and perform short theatrical works that discuss ethical issues in medical practice, and after the plays, engage the audience in a discussion of the issues. *See* Readers' Theatre, DEP'T BIOETHICS & INTERDISC. STUDIES, BRODY SCHOOL OF MED., EAST. CAROLINA U., <http://www.ecu.edu/cs-dhs/bioethics/theater.cfm> (last visited Feb. 7, 2020).

8. *See* Parts IV, V.

9. In this article, we describe four of the six cases used in these four courses. The common theme in these four cases was that all of the men were innocent and wrongfully convicted. They all also were sentenced to life with the possibility of parole. After these men were convicted and sentenced, Maryland's governors either completely or largely stopped

were wrongly convicted. Courts ordered the releases of two, and subsequently they were pardoned or formally exonerated.¹⁰ Maryland governors commuted the life sentences of the other two men, resulting in their releases.¹¹ The governors acted in large part because of the compelling evidence of innocence in both cases.¹² Three of the men were released before their plays were performed; the fourth was released two years after his play.

We chose to tell these four men's stories for a number of reasons. First, these are powerful stories, the essential requirement of a good play. Innocent men spent, respectively, twenty-seven,¹³ twenty-nine,¹⁴ thirty-six,¹⁵ and thirty-eight years¹⁶ in prison for crimes they did not commit.

There were common legal and universal themes for the four, as well. The legal themes were related to how and why the innocent get convicted and the direct relationships between lawyers' ethical misconduct and wrongful convictions. The universal themes were about how people who are victims of unthinkable injustice confront despair and struggle to maintain hope, the importance of family in this struggle, and in the end, about the triumph of the human spirit.

We also chose these stories because Maryland Law School's clinical law program had strong relationships with all four men. It had represented the two whose sentences Maryland governors had commuted,¹⁷ and was working closely with the two who had been exonerated.¹⁸ This gave us direct access to both the full case records and the key people, including the four men themselves and their post-conviction lawyers.

approving the paroles of lifers. Michael Millemann et al., *Digging Them Out Alive*, 25 CLINICAL L. REV. 365, 425 (2019) ("In Maryland, the Parole Commission must recommend, and the governor must either approve, or fail to disapprove, parole before a life-sentenced prisoner can be released. In 1993, the average period served on a life with parole sentence was between twenty and twenty-one years. Prosecutors and defense lawyers negotiated pleas, and judges sentenced convicted defendants with this benchmark in mind. . . . In 1995, Governor Paris Glendening announced to great fanfare that 'life means life,' failing to point out that life with the possibility of parole always meant there was a real possibility of parole. [During Glendening's two terms,] [h]e rejected all of the recommendations by his Parole Commission that a lifer be paroled."). Maryland governors since 1995 largely have followed this no-parole policy for lifers, with limited exceptions. This issue figured prominently in the four cases. All four men had excellent prison records and should have been paroled well before they were released.

10. See Part IV(A) (Walter Lomax), Part IV(C) (Michael Austin).

11. See Part IV(B) (Walter Arvinger), Part IV(D) (Mark Grant).

12. See Part IV(B) (Walter Arvinger), Part IV(D) (Mark Grant).

13. See Part IV(C) (Michael Austin).

14. See Part IV(D) (Mark Grant).

15. See Part IV(B) (Walter Arvinger).

16. See Part IV(A) (Walter Lomax).

17. See Part IV(B) (Walter Arvinger), Part IV(D) (Mark Grant).

18. See Part IV(A) (Walter Lomax), Part IV(C) (Michael Austin).

With these relationships, we invited the men and their families into our courses. The three men who had been released before their plays made presentations to the classes and talked extensively with the students. These were emotional and pedagogical highpoints of these semesters. These classes personally connected the students to the men and to their stories, humanizing the men in ways case records, case books, and intellectual analysis of injustice cannot.

Most important, these cases provided excellent contexts in which to examine the professional responsibilities of lawyers, both in the breach and fulfillment. The unethical conduct of prosecutors and defense counsel directly contributed to the men's wrongful convictions. The good work of post-conviction investigators, lawyers, and law students, albeit decades later, helped to vindicate the men. The worst and best of the legal profession, in sharp contrast, were on display in these courses.

We believe these courses achieved other educational goals as well. The cases were windows into the history of criminal justice in Maryland, which, as a border state, was nationally representative in many ways. The men were tried in 1968 (two),¹⁹ 1975,²⁰ and 1983.²¹ The trials were unfair by any measure, and shockingly so by contemporary standards. In this respect, the plays served as important points of comparison of criminal justice then and now.²²

In addition, the plays were good vehicles to teach students about, and to help them begin to develop, cross-cultural competence.²³ The students' personal contacts with the men, their immersions in the men's stories, and their presentations of those stories, built important bridges between these men and their life experiences and the students and theirs. The stories were also powerful critiques of the romanticized, theoretical model of due process that underlies the formal criminal justice curricula.

The plays also were virtual laboratories in which to explore legal

19. See Part IV(A) (Walter Lomax), Part IV(B) (Walter Arvinger).

20. See Part IV(C) (Michael Austin).

21. See Part IV(D) (Mark Grant).

22. We believe this history is not just of academic interest. It is very likely that there are many older prisoners today who were convicted in the 1960s and 1970s in trials that were similar to those of the four men in our plays, which is to say trials that were summary and unfair. The public needs to understand that many of these convictions, especially of minorities, are simply not reliable measures of guilt. See, e.g., RACE, CRIME, AND JUSTICE: A READER 246 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (discussing historical homicide offending rates by race and citing many studies conducted on the matter during the time frame in question); Theodore R. Curry, *The Conditional Effects of Victim and Offender Ethnicity and Victim Gender on Sentences for Non-Capital Cases*, 12 PUNISHMENT & SOC'Y 438 (2010) (finding "sentences for homicide cases are substantially longer when either females or Whites are victimized."); Millemann et al., *supra* note 9.

23. See Part V(C).

realism²⁴ and critical legal theory, especially race theory.²⁵ As we explain in discussing the individual cases, race bias was pervasive in Maryland when these men were convicted and almost certainly affected the trials in three of the cases.²⁶ There were other arbitrary factors at play as well, including the poverty of the men (undermining their defenses), and an archaic jury instruction that, remarkable as it may seem today, invited the jurors in two of the cases to make up and apply their own legal rules.²⁷ In writing and presenting the plays, the students also learned about and applied basic lawyering skills, especially the skill of storytelling, which is a foundation of practice.²⁸

Finally, in coming to understand the cases and in writing the scripts, the students engaged with criminal law and procedure in ways they could not in the traditional law school courses.²⁹ The stories brought the criminal process to life. They also encapsulated that process, beginning prior to arrest and trial, and ending decades later at the very end of lengthy incarcerations. In between were trials, appeals, post-conviction proceedings, parole hearings, and decades of prison life. Within the plays were criminal law vignettes, for example, about the elasticity of accomplice liability and felony murder, the unreliability of eyewitness (especially cross-racial) identifications, and the cynical politics of parole.³⁰

Up to this point, we have talked about the substance of what students learned in the courses. What they learned in the *process* of writing, producing, and performing the plays was just as important. First, was the value, and often joy (by their accounts), of working in teams. These plays depended on extensive, student teamwork for their successes. These courses were based on the concept of Ensemble Theater, which provided students

24. See, e.g., Brian Leiter, *American Legal Realism*, THE BLACKWELL GUIDE TO THE PHIL. OF L. & LEGAL THEORY 50 (Blackwell Pub., 2005) (“By emphasizing the indeterminacy of law and legal reasoning, and the importance of nonlegal considerations in judicial decisions, the Realists cleared the way for judges and lawyers to talk openly about the political and economic considerations that in fact affect many decisions.”).

25. See, e.g., Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleadings*, 11 HARV. BLACKLETTER L.J. 85, 85 (1994) (“Critical Race Theory (CRT) is a collection of critical stances against the existing legal order from a race-based point of view. Specifically, it focuses on the various ways in which the received tradition in law adversely affects people of color . . . [it] attempts to analyze law and legal traditions through the history, contemporary experiences, and racial sensibilities of racial minorities in this country.”).

26. See Part IV(A) (Walter Lomax), Part IV(B) (Walter Arvinger), Part IV(C) (Michael Austin).

27. See Part IV(A) (Walter Lomax), Part IV(C) (Michael Austin).

28. See Part V(D).

29. See Part V(E).

30. See Part IV (discussing the facts of the cases and the plays).

with unique experiences in working with each other.³¹ In their assessments, many students stressed the importance of teamwork and collaboration.³²

The students also had to deal with performance anxiety. They had to learn how to write effectively for the public and to communicate well in oral, physical, and symbolic forms, the latter through music and projected images. These experiences are directly related to lawyering skills and competencies or have clear analogues in practice.³³

Although we focus in this article on what *the students* learned, these plays presented issues of public importance and helped to educate many in *the audiences* as well. In this way, the plays reached outside the law school to educate diverse audiences about criminal justice problems and needs for reform.

We had a basic ground rule for the plays that enhanced their credibility: the core facts had to be true. The students began by reading the actual transcripts and case records, including the appellate opinions and post-conviction pleadings, and orders. They based the stories and significant parts of the dialogue in the plays on the facts in these records. That is, the truth.

At the same time, the students exercised dramatic license to fill in the gaps in the records. The students did this with creative, but fact-based, interpretations of the likely impacts of real contemporary, extra-record facts on the outcomes of the cases.³⁴

In way of a further roadmap, in Part II, we begin by describing the widespread student interest in these courses and their appeal to a significant percentage of law students. This means these courses also appeal to a significant pool of law school applicants, especially applicants looking for opportunities to collaborate and learn through an interdisciplinary process.

In Part III, we describe the classes in some of our courses. We focus on our first course, offered in 2009, because it was representative of the others. We describe how we organized the student work and what the students did to write, produce, and perform in the plays.

In Part IV, we describe the four cases and their corresponding plays.

In Part V, we examine the educational values of these courses; we say

31. See Part III (discussing the unique nature and importance of collaboration in ensemble theater).

32. See Parts III, V(A).

33. See, e.g., LAURA MATHIS, *ACTING SKILLS FOR LAWYERS* ix (2011) ("From daily communications with your clients to the big case in court, public speaking skills are acting skills, and they are absolutely necessary to survive and prosper."); Kathleen B. Havener, *Method Acting for Lawyers*, 31 *LITIG.* 48, 49 (2005) ("What actors and trial lawyers actually do is even more similar than the public perceives. To be effective, both must be commanding, persuasive, and credible. Both must win over their audiences. And both must accomplish these daunting tasks with the only tools available to them, their voices and their bodies.").

34. See Part IV.

more about what we believe the students learned, supported heavily by their own accounts.

In Part VI, the Conclusion, we argue that courses like these can diversify legal education in important ways, and help law students to learn in the variety of ways we describe in this article. We quote from student assessments in support of these points.

II. STUDENT INTEREST IN THE COURSES

There was an extraordinary student response to this new course when we announced it and asked interested students to apply for the eight positions in it.³⁵ Twenty-eight students applied.³⁶ We were surprised by the degree of interest and very impressed with the theatrical backgrounds of the applicants, although theater experience was not a course prerequisite. The application process informed us about a strong latent interest in theater and law among our students that we had not appreciated.

Appendix A includes excerpts from many of the applications we received.³⁷ These excerpts demonstrate the students' interest in this interdisciplinary and theatrical approach to legal education. One student succinctly captured the overall student enthusiasm for the new course, and its perceived value, in their application: "Finally! So much potential for creativity and education and collaboration!"³⁸

III. THE ORGANIZATION AND CONTENT OF THE CLASSES

In this part, we describe how we organized the courses, what we assigned, and how we used the cases to analyze the legal and ethical issues in the cases. We use the first course in 2009, which focused on the case of Walter Arvinger,³⁹ as a representative example, but talk about subsequent courses as well.

In the first class, we introduced the Arvinger case to the students through a case file.⁴⁰ This was the first experience many of the students had had in

35. Thereafter, we took all students who applied, thirteen the next year and on average about ten thereafter in the next four courses.

36. The course was open to second- and third-year day division students. At the time, in 2008, there were approximately 400 such students.

37. See Appendix A.

38. Excerpt from an application by a student to take the first offered course. This applicant added: "As for my own prior theatrical experiences, not a drama major but worked with former students to create skits and perform in plays."

39. See Part IV(B).

40. This included the trial transcript, appellate briefs and opinion, post-conviction

reading and dissecting a trial transcript. For some students, this was an experience that they would not otherwise have had. One said:

This class thrust me into the dreaded courtroom, and beyond. I read transcripts that I normally would never read . . . At first our class approached the court transcript like any lawyer would: what were the main arguments of the prosecutor and defense counsel? What did the judge rule? Were there any appeals? And where does the case stand now?⁴¹

In the Arvinger case, the transcript, by itself, trumpeted the injustice. This was a murder trial in which Mr. Arvinger could have been sentenced to death.⁴² The transcript was *ninety-three pages* long and recorded a *half-day* trial.⁴³ The students were shocked. One said: “[T]he transcript initially seemed entirely too short for a felony murder trial. The whole trial only took a few hours!! Traffic court takes a few hours, not a murder trial.”⁴⁴

The students’ reactions presented a series of wonderfully “disorienting [teaching] moment[s].”⁴⁵ They set the stage for semester-long discussions about injustice and professional irresponsibility (by the initial lawyers) and responsibility (by later law professors and law students who obtained Mr. Arvinger’s eventual release from prison thirty-six years later).

The course materials also included: excerpted ethics rules and selected ethics’ articles; the texts of Maryland’s post-conviction statute and rules; a short book on playwriting; and two exemplary plays.⁴⁶ Throughout the

pleadings and orders, and the memorandum in support of parole with appendices, which students in two law school courses had helped to develop. The memorandum was provided to the Maryland Parole Commission, which recommended to the governor that Mr. Arvinger be paroled. *See* Part IV(B); *supra* note 9.

41. Assessment of D.S. *supra* note 6.

42. *See* Part IV(B).

43. *See* Part IV(B).

44. Assessment of D.S., *supra* note 6.

45. Fran Quigley, *Seizing The Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 46 (1995) (“The learner’s clinical experience of representing victims of injustice often includes a ‘disorienting moment’ for the learner, in which her prior conceptions of social reality and justice are unable to explain the clients’ situations, thus providing what adult learning theory holds is the beginning stage of real perspective transformation.”).

46. The two plays were *Trifles*, a one-act play by Susan Glaspell, that she followed with a short story, *A Jury of Her Peers* (with the same characters and plot as *Trifles*), and the courtroom scene from *The Merchant of Venice*. SUSAN GLASPELL, *TRIFLES* (1916); WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act. IV. In a later course, we assigned *The Laramie Project*, a play based on the trial in Laramie, Wyoming of the men who killed Matthew Shepard because he was gay. This play helped the students see how a court transcript can be brought to life in a play. MOISES KAUFMAN, *THE LARAMIE PROJECT* (2001).

semester, students discussed these materials and the legal and ethical issues that arose from the case.

In all of the courses, there were several common steps in writing the plays. In the beginning, we focused heavily on team building, with Rauh leading the students in a number of ensemble-building activities.⁴⁷ The objective was to help the students break down the sense of insularity, and for some alienation, that traditional legal education had produced, and to appreciate the importance of collaboration in a creative process. The ensemble theater process is a collaborative process in which the “primary decision-making power rests in the hands of the artists.”⁴⁸ In this process, artists “commit[] to working together.”⁴⁹ We followed this basic principle by giving our students the “primary decision-making power” in the courses. The collaboration was virtually total. With our guidance, the students worked as a team in writing, producing, and performing the plays. In the process, they gained a richer understanding of the importance of working together.

In these initial classes, the students also began discussing the facts of the case and the related major events of the times, so they had the requisite bases of knowledge for the play. In subsequent classes, the students identified the major elements of the story, usually discussing a range of options, and eventually made selection decisions. As they tied down the elements of the story, they discussed and decided what the “arc” of the story would be,⁵⁰ as well as the content, the number of scenes, and the order of the scenes. This engaged students in thinking about—and collectively deciding on—the characters, plot, essential conflict in the story, and the resolution of the conflict.⁵¹

As the group went through this process, students—working in pairs or small groups—volunteered to write drafts of the scenes. They presented their drafts to the full class for discussion and suggestions. After rewrites, they presented them for final group decisions. These classes were part of the

47. These included a variety of games and nonverbal communication activities.

48. Manifesto, NET: NETWORK OF ENSEMBLE THEATERS, <https://www.ensembletheaters.net/about/manifesto> (last visited Feb. 7, 2020).

49. NET News & Happenings, NET: NETWORK OF ENSEMBLE THEATERS, <https://www.ensembletheaters.net/join-or-renew> (last visited Feb. 7, 2020).

50. The “arc” of a story, also called a “narrative arc,” “refers to the chronological construction of plot in a novel or story. Typically, a narrative arc looks something like a pyramid, made up of the following components: exposition, rising action, climax, falling action, and resolution.” Mark Flanagan, *How a Narrative Arc Structures a Story*, THOUGHTCO. (Aug. 8, 2019), <https://www.thoughtco.com/what-is-narrative-arc-in-literature-852484>. See also PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* (2014); JONATHAN SHAPIRO, *LAWYERS, LIARS, AND THE ART OF STORYTELLING* (2016).

51. Development of characters, plots, conflicts, and the resolution of conflicts are the conventional elements of a play and storytelling generally. MEYER, *supra* note 50, at 4–5.

“storyboard process,”⁵² in which the students worked together to construct the story and decide the best way in which to tell it.

This process mirrored the essential steps in the planning processes good lawyers use to represent clients, especially in litigation.⁵³ It was a dialectical process, in which students accepted responsibility for delegated tasks, worked with others, built a powerful story from the facts, and decided how to tell the story and who should tell it.

The plays presented the stories through recreated trial and other court proceedings (including examinations of witnesses and arguments), and scripted conversations, among other ways. The conversations were between and among key players, for example, between the lawyers and clients, or between and among lawyers (between prosecutors and defense counsel or among collaborating post-conviction clinical law students and lawyers). There were conversations between judges and their clerks, and between the convicted prisoner and the prisoner’s lawyers or family members. In the Arvinger play, there were conversations among the clinical law students who represented Mr. Arvinger and helped to get him out of prison.⁵⁴ In another play, with full artistic license, there were a series of conversations between the different personas of the same person, representing the immature and mature inmate. There also was scripted dialogue for a governor’s press conference, when he announced his decision to grant clemency, capturing exchanges between the governor and reporters.

The plays depicted the cultures of the times through music and projected background images. Some plays emphasized the main themes through group voices in the nature of a Greek Chorus.⁵⁵ In one play, the Chorus was comprised of all of the students to give voices to the community that knew the wrongfully convicted man was innocent.⁵⁶

For most students, constructing the script was an exciting process. One said:

The script development stage was one of the most instructive parts

52. See, e.g., VCU ALT Lab, *Script to Storyboard 101*, YOUTUBE (Feb. 12, 2016), <https://www.youtube.com/watch?v=YUttTsBoWIM> (explaining the process of storyboarding a script and “translating . . . words into pictures.”).

53. See Part V(D).

54. See Part IV(B).

55. A Greek Chorus refers to “a chorus in a classical Greek play typically serving to formulate, express, and comment on the moral issue that is raised by the dramatic action or to express an emotion appropriate to each stage of the dramatic conflict.” *Greek Chorus*, MERRIAM-WEBSTER DICT. (2019), <https://www.merriam-webster.com/dictionary/Greek%20chorus>.

56. Some of the theatrical refinements of the Chorus included having individuals talking by themselves, but to provide emphasis, having other Chorus members join in on some key lines, and having not only multiple same-time voices, but also echoes.

of the class. Through the use of our creativity, we were able to tell a legal story in a way that had not been shown to us before. I still remember the day I . . . started writing out my assigned portion of the script. I had reviewed . . . facts many times but until then, all I had ever done [in law school] with case facts was put them down in a brief. I had never tried to bring the facts to life. I felt the most creative I had ever felt in law school and began to write down ideas and lines for the play. Later, I would find it so unreal and so amusing to see my fellow law students saying out loud and acting out thoughts that I had had.⁵⁷

After developing draft scripts, Rauh cast the plays and the class began rehearsing the latest draft, making appropriate changes in the scripts. This led to the final script and a dress rehearsal (on a weekend), and culminated in the public performance.

The highpoints in the semester for us all were the in-person presentations by the real-life protagonists of the plays. These included the post-conviction lawyers and, in three plays, the ex-prisoners themselves.⁵⁸ The classes that the three former prisoners addressed were especially inspiring. The students uniformly expressed surprise at their lack of bitterness and profound respect for how they had managed to maintain hope in prison. The students also were struck by their remarkable personal growth in prison and their impressive post-prison accomplishments. They shared anger at the gross unfairness, and incalculable losses the men had suffered. It was the students' personal engagements with these men—through the plays and in meeting them—that gave such power to the courses. The students were able to engage with the law and professional responsibility, and their very real impacts on people's lives, in ways not offered by most traditional law school courses.

In a representative comment, one student in the Arvinger course said: "The transcripts did not truly convey Arvinger's voice or personality, but based on my own frustration with the case, I was shocked to meet Mr. Arvinger in person and to hear his message of forgiveness. The opportunity to meet with Mr. Arvinger was truly eye-opening."⁵⁹ Another student said:

[S]eeing [Mr. Arvinger] now [in class], I have [learned he is] patient, kind, respectful, enthusiastic for life, and forgiving. During the class conversation with [Mr. Arvinger], I just could not

57. Assessment of A.V., *supra* note 6.

58. The fourth, Mark Grant, was still incarcerated at the time of the play in 2010. He was released in 2012. *See* Part IV(D).

59. Assessment of E.M., *supra* note 6.

help to think how he must have felt when he first went to prison for a crime of which he was innocent: in shock, betrayed, frustrated, hopeless and angry The mere fact that [he] kept his composure and faith is nothing short of a miracle to me.⁶⁰

The Arvinger course had an additional class visitor: former-Governor Robert Ehrlich, Jr., who had commuted Mr. Arvinger's life sentence when he was governor. He explained how he reviewed parole and commutation applications, calling his role "the court of last resort."⁶¹

We presented the plays in a large moot court room in the law school, which had been temporarily converted (as best possible) into a theater. Students were involved in creating and changing the sets for the scenes, and choosing the background music and projected images for the backdrops of the plays. The school's Media Services Department provided the necessary sound and projection support.

The education for the students and audiences did not end with the plays. There were important post-play discussions among the audience, cast, and the released men and their families. One student said that this "drama works as a teaching tool, [because] the audience teaches you as well."⁶²

IV. THE CASES AND PLAYS

We present the cases in their chronological order—1968 (two), 1975, and 1983—and describe the plays that were based on them. For each, we present the basic facts of the case and how the students used these facts to create the play.

A. Walter Lomax

1. The Facts

In September of 1968, Walter Lomax was wrongly convicted of murder. He spent thirty-eight years in prison on a life sentence until 2006, when a court ordered his release.⁶³ He was formally exonerated in 2014 when the Baltimore City State's Attorney's Office conducted its own investigation,

60. Assessment of D.S., *supra* note 6. These presentations by the released men, and the students' extensive discussions with them, were important steps in teaching about, and the students developing, the cross-cultural competence we discuss in Part V(C).

61. Observation of Millemann.

62. Assessment of S.J., *supra* note 6.

63. Julie Bykowitz, *Man is Set Free After 39 Years Behind Bars*, BALT. SUN (Dec. 14, 2006), <https://www.baltimoresun.com/news/bs-xpm-2006-12-14-0612140064-story.html>.

discovered extensive evidence of innocence that had never been provided to the defense, and consented to the entry of an Order of Actual Innocence.⁶⁴ On October 31, 2019, the State of Maryland awarded Mr. Lomax “about \$3 million, which is the largest such payment to an exoneree ever made by the state,” calculated at “\$78,916 per year” for his thirty-eight years of wrongful incarceration.⁶⁵ Mr. Lomax was one of five Maryland men on that day to whom the State gave financial awards for their wrongful convictions and decades of wrongful imprisonment.⁶⁶

Mr. Lomax was convicted of a robbery murder during a crime wave in Baltimore—a time of widespread public anger and fear.⁶⁷ The police predetermined that Mr. Lomax was guilty, supported that erroneous conclusion with suggestive cross-racial eyewitness identifications obtained in outrageous “en masse” line-ups, and concealed the extensive evidence of his innocence.⁶⁸ Mr. Lomax’s court-appointed lawyer, who later was disbarred, mishandled the presentation of evidence that would have proven Mr. Lomax was physically incapable of committing the crime.⁶⁹

64. The Conviction Integrity Unit of the Baltimore City State’s Attorney’s Office conducted this investigation. See Order of Judge Charles Peters granting Petition for Writ of Actual Innocence, *Lomax v. State*, No. 1754-56 (1968 Docket) (Md. Cir. Ct. Apr. 2, 2014), and Maryland State’s Answer to that Petition, *Lomax v. State*, No. 1754-56 (1968 Docket) (Md. Cir. Ct. Apr. 2, 2014).

65. Luke Broadwater, *Wrongfully Imprisoned Tell of Scars Millions in Payouts from Md. Can’t Replace Time Lost*, *BALT. SUN* (Oct. 31, 2019), at A1.

66. *Id.*

67. Petition for Writ of Actual Innocence at 1, *Lomax v. State*, Nos. 1754 to 1756 (Balt. City Cir. Ct. Feb. 26, 2014) [*hereinafter* Petition for Writ of Actual Innocence]. See, e.g., Jewell Chambers, *Fearful Residents Talk About City Crime*, *BALT. AFRO. AM.* (Jan. 27, 1968), at 1; *Merchants Ask City Crime War: Request That Mayor Give Problem Top Priority*, *BALT. SUN* (Jan. 26, 1968), at C11; *Police Hunt for Slayers of Grocer and Bartender*, *BALT. SUN*, Dec. 3, 1967, at 36; *Yokings, Purse Snatchings Continue to Rise in City*, *BALT. SUN* (Nov. 15, 1967), at C24 (yokings are muggings).

68. The line-ups, conducted in response to the crime wave, were described as “en masse” line-ups. See Petition for Writ of Actual Innocence, *supra* note 67, at 16; *86 Witnesses View Line-Up: 2 Suspects Picked out to Face Robbery Charges*, *BALT. SUN* (Dec. 11, 1967), at C11; *Line-Up Set in Robberies: ‘At Least 100’ to View Two Teen-Aged Suspects*, *BALT. SUN* (Dec. 10, 1967), at 32. The line-ups were conducted seriatim for a number of crimes. The police advertised the line-ups in the local newspaper in advance and invited anyone who was an eyewitness to any of the crimes to come to police headquarters and view arrays of suspects. The police put Mr. Lomax into several of these line-ups. This was before the U.S. Supreme Court held that a suspect was entitled to have a lawyer at a line-up. *U.S. v. Wade*, 388 U.S. 218 (1967). After the line-ups, the prosecution did not provide any information about them to Mr. Lomax’s lawyer. Petition for Writ of Actual Innocence, *supra* note 67, at 21.

69. Petition for Writ of Actual Innocence, *supra* note 67, at 26–28. Shortly before the crimes that the State asserted Mr. Lomax had committed, he was assaulted by a group of youth, and suffered multiple injuries, including serious stab wounds to his right hand that fractured a bone and partially severed muscles. (Mr. Lomax is right-handed.) His hand swelled to the size of “a boxing glove,” and his treating physician wrapped it in heavy gauze and a “forearm

There is no record of the race of the Lomax trial jurors, but Mr. Lomax's sister, who was present throughout the trial, recalled that they were all white.⁷⁰ Her observation is consistent with the racial makeup of most juries during this period. At the time of Mr. Lomax's arrest, there was pervasive race discrimination in Baltimore City and throughout Maryland, including in the selection of jurors.⁷¹

One general measure of race bias in Maryland, including Baltimore City, was provided by the 1964 presidential primary. George Wallace, famous for his "segregation now, segregation tomorrow, segregation forever" pledge as governor of Alabama, won 43% of the vote and carried the majority-white precincts in Maryland.⁷² Wallace's "campaign to arouse white voters against the civil rights bill" resulted in the majority of white voters in Maryland voting for him.⁷³ Many of these same voters constituted the majorities of juries in Maryland due to the prevalent exclusion of African

length plaster of Paris splint." *Id.* At the time of the crimes, his hand was immobilized and he was having trouble walking. *Id.* Defense counsel called no expert on the physical impossibility issue, but instead called a medical intern who had not been licensed and even failed to ask the medical intern whether Mr. Lomax was physically capable of committing the crimes. This was the only defense witness. A post-conviction investigator interviewed the intern years later, and he said he would have testified that he seriously doubted Mr. Lomax could have grasped a pistol at the time and could not have performed the other physical acts that the actual perpetrator performed (including running). *Id.*

70. Interview with Walter Lomax, in Balt., Md. (May 1, 2019).

71. It then was the practice of several judges in Baltimore City to use their own "key men" to recruit potential jurors. African Americans were significantly underrepresented on venire panels, and prosecutors regularly used peremptory challenges to disqualify minority jurors who made it on to these panels when the defendants were African Americans. This practice was described and challenged in *Zimmerman v. St.*, 191 Md. 7, 11 (1948). The ACLU also filed suit against the city for this practice in 1967. Theodore Hendricks, *Jury-Picking Suit Assailed*, BALT. SUN (Oct. 6, 1967), at C8. The jury selection process was ultimately revised by state statute in the 1969 legislative session. *Random-Picked Baltimore Jury is State's First*, BALT. SUN (Aug. 28, 1969), at C5. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 114–15 n.562 (1990) ("In 1969, Baltimore revised its jury selection procedures, and selected registered voters to serve as jurors instead of personally selecting 'key-men.' The difference increased black jury representation from 30% to 46.7% in the years 1969 to 1974." (citing JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 33–34 (1977))).

72. Millemann et al., *supra* note 9, at 423; See also Charles Whiteford, *Brewster Defeats Wallace; Alabamian Gets 42% of Vote; Tydings Beats Goldstein; 7 Incumbent Congressmen Renominated; GOP Selects Beall*, BALT. SUN (May 20, 1964), at EB1. Wallace took 42.73% of the Democratic vote and won sixteen of the twenty-three Maryland counties. Wallace's narrow defeat was primarily attributable to voters in Montgomery County (the wealthy suburb of Washington, D.C.) and Baltimore City (though Wallace took two out of six city legislative districts with 62,502 votes, or 37% of the city's total). *Id.*

73. Ben A. Franklin, *Rivals in Maryland Primary Election*, N.Y. TIMES (May 20, 1964), at 1.

Americans from juries.⁷⁴

Two landmark events around the time of Mr. Lomax's trial enhanced this racial prejudice and public anger about crime. The trial was five months after the Baltimore City riots that followed the assassination of Dr. Martin Luther King, Jr.⁷⁵ This fueled the public's fear of, and anger against, Blacks generally.⁷⁶ The trial also was at the height of the inflammatory Nixon-Agnew "Law and Order" campaign.⁷⁷

If this were not enough to undermine Mr. Lomax's right to a fair trial, there was another fact that made his trial fundamentally lawless. As incredible as it may seem today, the trial judge instructed the jury, as all judges in criminal cases in Maryland did at the time, that they—the jurors—were the judges of the law, as well as of the facts, and the court's instructions on the law were advisory only.⁷⁸ Thereby, the judge invited the all-white jury, already inflamed by racial tensions and politically cultivated fear, to make up and apply its own legal rules. These might have included the jury's lesser substitutes for the fundamental requirements that juries must presume defendants are innocent and can only convict if the State establishes the defendant's guilt beyond a reasonable doubt.⁷⁹

74. See *supra* text accompanying note 71.

75. Martin Luther King, Jr. was assassinated on April 4, 1968 in Memphis, Tennessee. His death set off riots in Baltimore and across the country. In Baltimore six people died and looting and fires caused \$12 million in property damage. Lori Sears, *50 Years Ago: The Sun's Coverage of Martin Luther King Jr.'s Assassination and the Baltimore Riots*, BALT. SUN (Apr. 4, 2018), <https://www.baltimoresun.com/features/retro-baltimore/bs-fe-retro-mlk-baltimore-riots-front-pages-pictures-20180403-story.html>; Michael Yockel, *100 Years: The Riots of 1968*, BALT. MAG. (2007), <https://www.baltimoremagazine.com/2007/5/1/100-years-the-riots-of-1968>.

76. Yockel, *supra* note 75.

77. See, e.g., Lonnie T. Brown, *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. L. REV. 305 (2017) ("[T]he centerpiece of future President Nixon's successful campaign was the exploitation of the white majority's fears regarding black militants, rioting, and urban crime in general."); Ernest B. Furgurson, *Nixon Picks Maryland's Agnew As Running Mate; Surprise Choice Applauded by Dixie Republicans*, BALT. SUN (Aug. 9, 1968), at A1 (discussing Nixon choosing Agnew as a running mate "at least partly because of his recently tough stand on 'law and order' and the associated issues of civil rights"); *Leaders Issue Bitter Manifesto on Agnew*, BALT. AFRO-AM. (Aug. 17, 1968), at 3 (reprinting a statement by an Ad Hoc Committee for Good Governance criticizing Agnew's "intemperate and insidious remarks couched in terms of the law and order cliché which flout [sic] any notions of justice and encourage police brutality and a further estrangement of the races."); Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 331-37 (2012) ("Under the banner of law and order, Nixon succeeded in tapping discontent among white voters . . .").

78. For background on Maryland's advisory-only jury instruction, See Millemann et al., *supra* note 9.

79. See *Coffin v. U.S.*, 156 U.S. 432 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *In re Winship*,

2. The Play

The play based on Walter Lomax's case presented this compelling background story of race bias and fear, drawing on the events and practices of the times. It focused on the very suggestive and prejudicial eyewitness identifications and the failure of defense counsel to effectively present the physical-impossibility defense.

In early scenes, the students recreated the en masse line-ups, and presented the ethical violations of the prosecutor and defense counsel through narration and dialogue. This dialogue was largely based on excerpts of trial testimony from the direct and cross-examinations of the key eyewitness, and on legal arguments.

The play also chronicled Mr. Lomax's extraordinary personal growth in prison and his refusal to relinquish hope despite the policy and practice of Maryland governors' after 1995 of disapproving parole for virtually all lifers.⁸⁰

The heroes of the play, besides Mr. Lomax, were Centurion Ministries and Mr. Lomax's post-conviction lawyers.⁸¹ In the last scenes, the students depicted the post-conviction hearing at which counsel marshalled the compelling facts and arguments in support of Mr. Lomax's innocence and the court ordered him freed.

To the students' and audience's delight, Mr. Lomax was present and led the post-play discussion. The judge who ordered Lomax's release also attended and participated in this discussion.⁸²

397 U.S. 358 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

80. Maryland governors rejected four recommendations by the Maryland Parole Commission that Mr. Lomax be paroled based on his extraordinary record of accomplishments in prison. Ivan Penn, *After Remaking His Life in Jail, Inmate Clings to Hope of Freedom; Glendenning Policy Keeps Lifer, Now 55, Behind Bars*, BALT. SUN (Jan. 5, 2003), at 1A.

81. Mr. Lomax's post-conviction attorneys were Larry Nathans and Booth Ripke of Nathans & Biddle LLP. NATHANS & BIDDLE LLP, <https://www.nathanslaw.com/> (last visited Nov. 14, 2019). Centurion Ministries—now known simply as Centurion—is a nonprofit organization that investigates wrongful conviction cases and assists wrongly convicted individuals. CENTURION, <https://centurion.org/> (last visited Nov. 14, 2019).

82. An important part of the students' education was learning about Mr. Lomax's extraordinary achievements in prison and after his release. One client of Millemann's, who was incarcerated for several decades, much of the time with Mr. Lomax, said simply: "He was a legend in prison and out." Comments of Karriem El-Amin to Michael Millemann. (Mr. El-Amin was released from prison in 2013.) Mr. Lomax now is the Executive Director of the Maryland Restorative Justice Initiative and a leader in the Unger Project that has resulted in the release of over 190 lifer-sentenced prisoners in Maryland since 2013. See Millemann et al., *supra* note 9. A recent article described Mr. Lomax's leadership roles in prison and out.

B. Walter Arvinger

1. The Facts⁸³

A November 30, 2004 headline of a *Washington Post* editorial read: “A Stain on Maryland - Walter Arvinger Spent 36 Years in Prison for a Crime he did not Commit.”⁸⁴ The editorial said, in part:

Walter Arvinger walked out of prison yesterday, a free man for the first time in 36 years. Locked up in 1968 for a murder he didn’t commit, he was released by order of Gov. Robert L. Ehrlich Jr., who commuted his sentence last Friday . . . [An] honest epilogue to Arvinger’s case would be: “His conviction was a travesty of justice, and his incarceration for more than three decades was a scandal. His case represents a stain on Maryland’s criminal justice system.”⁸⁵

University of Maryland Law School students in two courses—a clinic and an appellate advocacy course—and faculty at Maryland Law School represented Mr. Arvinger in the commutation process.⁸⁶

Mr. Arvinger was charged with capital murder in 1968 when he was nineteen years old. He was convicted of felony murder after a bench trial that

He “chaired the Unger Project Advisory Committee, . . . He was a leader in prison and knew many [of the released prisoners] in prison and their families. He has been a Project leader, including as a teacher, mentor, counselor, friend and occasional ‘Dutch uncle’ to those released.” *Id.* at 382.

83. For a detailed description of Mr. Arvinger’s case, *See* Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education Into the First Year*, 12 CLINICAL L. REV. 441 (2006). In writing this 2006 article, Millemann and Schwinn used fictitious names for the main characters; Mr. Arvinger is referred to as “Anthony”. On reflection, this was unnecessary, especially since we asked for and received Mr. Arvinger’s consent to use the real names. Millemann and Schwinn taught an appellate advocacy course in which they drew the course assignments from the actual Arvinger case, briefing the legal issues in that case. The students in that course, working with clinic students, helped to persuade Governor Robert Ehrlich, Jr. to release Mr. Arvinger. *Id.*

84. Lee Hockstader, *Editorial, A Stain on Maryland*, WASH. POST (Nov. 30, 2004), <https://www.washingtonpost.com/archive/opinions/2004/11/30/a-stain-on-maryland/cc2d95ba-d2c3-4619-ae33-4bce871ab539/>.

85. *Id.*

86. In 2002, Mr. Arvinger requested assistance from Millemann, who was shocked by the miscarriage of justice on the face of the transcript. He created a post-conviction clinic, in major part to represent Mr. Arvinger, and worked with Professor Steven Schwinn to develop and co-teach the appellate advocacy course described in Millemann & Schwinn, *supra* note 83.

lasted about *half a day* and sentenced to life imprisonment.⁸⁷ The trial transcript was a *total of ninety-three pages*. Mr. Arvinger had never been arrested before, as a juvenile or adult.⁸⁸ At the time, he was working to support his mother and living at home.⁸⁹

A teenager—intoxicated on drugs and alcohol—murdered a randomly selected pedestrian with a baseball bat during a robbery. Three other youths were involved. Mr. Arvinger was convicted because he knew all four, was with them at points before and after the robbery, and came to the crime scene near the end of the crime.⁹⁰

The State's main witness, Paul Gillis, was one of the four youths. He was thirteen years old at the time of the crime. He testified that Mr. Arvinger had nothing to do with the robbery.⁹¹ Mr. Arvinger's "guilt by association" and presence at the crime scene, however, were enough for the judge, who ignored or misapplied the requirement that the state prove guilt beyond a reasonable doubt.⁹²

Mr. Arvinger's mother paid \$300 to a high-volume lawyer to represent her son.⁹³ This lawyer would later place himself on the roster of inactive attorneys "[i]n the face of disciplinary action . . . possibly even disbarment."⁹⁴ In a patent conflict of interest, this lawyer also represented

87. *Id.* at 462.

88. *Id.*

89. A psychologist who evaluated Mr. Arvinger in 2003, concluded that "he was chronologically 19 years old at the time of the instant offense, but intellectually and academically he was functioning at most as a twelve year old." Memorandum In Support of Parole of Walter H. Arvinger, submitted by the Clinical Law Program, University of Maryland School of Law to the Maryland Parole Commission in support of parole, at 16. The probation officer who did the pre-sentence investigation in Mr. Arvinger's case said that his alleged involvement in the homicide "is an isolated incident in defendant's life and appears completely out of character." *Id.* at 18. He said that Mr. Arvinger "has been a generally stable individual (from a stable family) throughout his life," and that he "found no prior juvenile nor adult arrest record nor any evidence of disciplinary problems in school." *Id.* He added: "Since he left school (in 1967 after completing the 10th grade), he has been employed steadily." *Id.*

90. Millemann & Schwinn, *supra* note 83, at 462

91. *Id.* at 462–63. The *Washington Post* editorial said: "Arvinger played no more than a cameo role in the murder. The state's chief witness. . . named Paul Gillis, testified that Arvinger had walked out of the house before or just after the talk about [mugging someone] began, and took no part in the conversation. Arvinger went up the street to a store and bought some cake. A few minutes later, when the other youths raced out of the house and attacked [the victim], Arvinger spotted them and ran after them. Afterward, when the boys divvied up the man's pocket change, Arvinger may have received a few cents, although he denied it." Hockstader, *supra* note 84.

92. Hockstader, *supra* note 84; C. Fraser Smith, Opinion, *Justice Denied Should Lead to Broad Reform*, BALT. SUN (Feb. 20, 2005), at 5F.

93. Millemann & Schwinn, *supra* note 83, at 463.

94. Tom Keyser, *One of a Kind Lawyer Kaplan Slows Down Just a Bit at 83*, BALT. SUN (Oct. 11, 1992), at 1C. Mr. Arvinger's lawyer regularly celebrated his lack of preparation,

one of the co-defendants.⁹⁵ The lawyer instructed Mr. Arvinger to “waive” a jury trial without explaining what it was, why it might be important, or giving him a choice.⁹⁶

Mr. Arvinger’s lawyer called no witnesses, other than Mr. Arvinger, although there were several, including the lawyer’s other client, who would have given exculpatory testimony.⁹⁷ After convicting Mr. Arvinger of felony murder,⁹⁸ the court sentenced him to life imprisonment in a proceeding that lasted less than ten minutes. The judge wrongly stated, without an objection from defense counsel, that he had no other sentencing option.⁹⁹

2. The Play

The play focused on the unethical performances of the prosecutor and defense lawyer. It also emphasized that Mr. Arvinger’s trial, like Mr. Lomax’s trial, was a few months after the Baltimore City riots following

“boast[ing] that he carried no more documentation to court than he could fit in his coat pocket.” Hockstader, *supra* note 84.

95. Millemann & Schwinn, *supra* note 83, at 463.

96. *Id.* at 463 n. 86. We believe the lawyer did this because a jury trial would have taken much longer than he thought his \$300 fee justified, or because he believed Mr. Arvinger was so clearly innocent that any judge would quickly acquit him.

97. *Id.* at 463. The *Washington Post* editorial said: “Although [defense counsel] had managed to win an acquittal on murder charges for one of Arvinger’s co-defendants in a separate trial, he did not permit him to testify on Arvinger’s behalf—possibly for fear that the other boy could expose himself to robbery charges.” Hockstader, *supra* note 84.

98. The *Washington Post* editorial said: “Inexplicably, the judge found Arvinger guilty of first-degree murder, inferring that he may have stood ready to help in the crime, or acted as a lookout. He reached his verdict despite the absence of testimony that Arvinger helped in any way or was a lookout, and despite the fact that Arvinger had at first walked away from the scene of the crime, which [Arvinger’s lawyer] failed to point out at the trial.” Hockstader, *supra* note 84.

99. Millemann & Schwinn, *supra* note 83, at 464. Unsurprisingly, Mr. Arvinger became a model prisoner, and by the early 1990s he was living in a minimum security prison, working outside the prison on work release, living at home with his mother on weekends, and on his way to parole. In 1993, however, in response to a murder by another work-release inmate, the governor of Maryland revoked the minimum security status of all life-sentenced murderers, and Arvinger was returned to prison, where he would remain until 2004. *Id.* The *Washington Post* editorial described this series of events: “In 1993 even that measure of compassion [work release] was yanked away when another Maryland lifer on work release, Rodney Stokes, shot his ex-girlfriend and then himself. In a dyspeptic response, Gov. Parris N. Glendening ordered all 134 lifers on work release, including Arvinger, rounded up and returned to prison. And two years later Glendening declared that as far as he was concerned, everyone serving a life sentence in the Free State could rot behind bars. ‘If you want to term this more as retribution . . . it’s exactly that,’ the governor said. When the state parole commission voted unanimously in 1998 to release Arvinger, Glendening ignored the recommendation.” Hockstader, *supra* note 84.

the assassination of Dr. Martin Luther King, Jr.¹⁰⁰ and in the midst of the Nixon-Agnew “Law and Order” political campaign.¹⁰¹ The play presented the likely impacts of these events on both the prosecutor’s decision to charge Mr. Arvinger with murder and the judge’s decision to convict this innocent man.¹⁰²

The students presented the story through recreated interviews of Mr. Arvinger by his trial lawyer and dialogue based on excerpts from the examinations of the State’s main witness (direct, cross, and redirect examinations). In doing so, the students highlighted the absence of evidence that Mr. Arvinger knew about the robbery in advance or supported it in any way.

The theater-course students recreated the planning sessions of the clinic students to communicate how extraordinarily difficult it is to get a wrongfully convicted person out of prison.¹⁰³ In those depicted sessions, the clinic students discussed defense counsel’s conflict of interest, complete lack of preparation, misrepresentation about why Mr. Arvinger should relinquish his jury trial right, incompetent trial work, and decision to handle Mr. Arvinger’s direct appeal (doubling down on the ineffective assistance of counsel).

There were two important scenes about other ethical issues. First, two prosecutors discuss the need for a plea agreement with one of the youths, but decide not to offer Mr. Arvinger a deal because Mr. Arvinger was not present during the pre-robbery conversation and arrived at the crime scene late, and thus had nothing to bargain with. Paradoxically, they still decided to charge him. Second, defense counsel for Paul Gillis, the State’s main witness, and the prosecutor trying Mr. Arvinger’s case negotiate a plea deal, but agree not to “formally agree” so—they wrongly convince themselves—the prosecutor will not have to disclose the deal before or at trial.

The play culminates with the clinic students deciding to recommend to Mr. Arvinger that he file a “Hail Mary” clemency petition, followed by the press conference of Governor Robert Ehrlich, Jr., at which he announces that

100. See *supra* note 75 and accompanying text.

101. See *supra* note 77 and accompanying text.

102. One student later said: “The chaos felt in Baltimore City undoubtedly had many people scared and wanting a legal system that would bring swift effective justice to those that would threaten [social order].” He added that “[t]his undoubtedly created pressure . . . to crack down on crime in Baltimore City, which was in a state of flux even before King’s assassination, as Bethlehem Steel’s withdrawal from the city along with many other formerly key industries drove the economy of the city downward, white flight began in earnest, and crime was on the rise.” See Assessment of J.I., *supra* note 6.

103. The theater-course students, role playing as clinic students, concluded that they likely would not prevail on post-conviction because Mr. Arvinger’s “jailhouse lawyers”—fellow inmates—had waived all of his key arguments in preparing post-conviction pleadings for him. (No lawyer other than his trial lawyer had represented Mr. Arvinger until the clinic began representing him.) Millemann & Schwinn, *supra* note 83, at 464. These accurate facts revealed the inadequacies of Maryland’s post-conviction process in the 1970s and 1980s.

he is granting clemency to Mr. Arvinger. As discussed in Part III, Governor Ehrlich spoke to the class, which gave the students insight into the thought processes and considerations a governor examines when deciding whether or not to grant clemency.

Mr. Arvinger and his family attended the play and joined in the post-play discussions.

C. Michael Austin

1. The Facts

The website of Centurion Ministries states: “Michael Austin spent 27 years in prison, falsely convicted of killing Roy Kellam in a Baltimore City grocery store robbery on April 29, 1974. Michael had nothing to do with the murder or the robbery.”¹⁰⁴ A judge granted Mr. Austin a new trial in 2001, and he was freed on December 28, 2001. In 2003, Governor Robert Ehrlich, Jr. granted Mr. Austin a pardon.¹⁰⁵ On November 18, 2004, an article in the *Baltimore Sun* said:

With a public apology from the governor, the state agreed yesterday to pay Michael Austin \$1.4 million for the 27 years he spent in prison for a murder he did not commit.

Along with the payments, which will be spread out over 10 years, the Board of Public Works approved money for Austin to seek financial counseling. The award was the largest the state has ever made to an exonerated prisoner.¹⁰⁶

Mr. Austin’s conviction was marked by a litany of legal and ethical violations. On April 29, 1974, two African American men robbed a food store in Baltimore and killed a private security guard. Mr. Austin was convicted of being the shooter based largely on a single eyewitness identification by a store clerk named Jackie Robinson. That identification was fantastic on its face. Mr. Austin is a dark skinned, African American who is six-feet-five-inches tall. He weighed 200 pounds at the time of the crime. Mr. Robinson and four other eyewitnesses described the shooter as light skinned, five-feet-

104. *Michael Austin*, CENTURIAN, <https://centurion.org/cases/austin-michael/> (last visited Mar. 27, 2020).

105. Dan Fesperman & David Nitkin, *Maryland Officials Faced with Setting Value of Freedom; Ehrlich Pardons Man Wrongly Held for 27 Years*, BALT. SUN (Nov. 1, 2003), at 1A.

106. Andrew A. Green, *Payback for Ex-Prisoner*, BALT. SUN (Nov. 18, 2004), at 1B. In October 2019, the State awarded Mr. Lomax “about \$3 million,” now considered the largest amount awarded to a wrongly convicted person in Maryland. Broadwater, *supra* note 65.

eight- to five-foot-ten-inches tall, and weighing 150 to 160 pounds.¹⁰⁷

In fact, it was likely that Mr. Robinson was working with the police as an informant at the time of the crime.¹⁰⁸ Before Mr. Robinson died of a heroin overdose in 1997, he told his family that he had sent the wrong man to jail for the murder – referring to Mr. Austin – and that they do not “want to know” who the actual shooter was, indicating he was still a dangerous person in their community.¹⁰⁹

The State falsely presented Mr. Robinson as a clean-cut college student when they knew he had dropped out of school and was a heavy drug user and seller.¹¹⁰ The police failed to disclose to the defense other significant exculpatory evidence, including that the other clerk from the store, who had the best view of the shooter, refused to identify Mr. Austin as the shooter.¹¹¹

The State argued that the second man in the robbery was a man named Horace Herbert. They alleged that Mr. Austin had Mr. Herbert’s business card when he was arrested. Their trials were severed, and Mr. Austin was tried first. After Mr. Austin’s conviction, the prosecutor dismissed the charges against Mr. Herbert, admitting not only that the State could not prove its case, but that he believed Mr. Herbert was not guilty. The State never informed Mr. Austin or his lawyer of this.¹¹²

Mr. Austin’s defense lawyer was woefully inadequate. When he arrived at court the morning of trial, the lawyer did not know which case was to be tried.¹¹³ Further, Mr. Austin was at work shortly before the crime and physically could not have gotten to the crime scene by the time of the crime. Defense counsel, however, failed to subpoena the best witnesses from Mr. Austin’s job to prove this or even to obtain the original time card, or a legible photocopy, that proved this.¹¹⁴

107. Austin’s Motion to Reopen Post Conviction Case, *Austin v. ST.*, Nos. 17401280-82 (2001), at 2.

108. *Id.* at 22–23.

109. *Id.* at app. 7.

110. *Id.*

111. *Id.* at 22–23.

112. *Id.* at 3.

113. *Id.* at 37.

114. *Id.* at 37. The process for selecting jurors was racially discriminatory in Mr. Austin’s case, and the jury that tried him was all white or disproportionately white. *See supra* note 71 and accompanying text. The judge in Mr. Austin’s case gave the same “jury-decides-the-law” instruction as the judge did in Mr. Lomax’s trial, instructing the jury they “were the judges of the law, as well as of the facts,” and the court’s instructions on the law were “advisory only.” Transcript in *Austin v. State*, Baltimore City Cir. Ct., Nos. 17401280-82 (1975), at 414.

2. The Play

The students used these facts to convey Mr. Austin's story. They presented many of these facts to the audience through dialogue based on excerpts of testimony from the trial, depictions of conversations between Mr. Austin and his trial lawyer, and narration. The play captured Mr. Austin's initial responses to his conviction and incarceration—disbelief, anguish, and despair—and his maturation and impressive personal growth over the next two-and-one-half decades. His source of hope was music. He is a self-taught jazz musician and singer; he developed that talent in prison.¹¹⁵ The play measured the passage of time through projected visual images on a big background screen, including images of the physical changes in Baltimore City over the years, the Ali-Forman fight,¹¹⁶ the inauguration of Ronald Reagan,¹¹⁷ the departure of the professional football team—the Baltimore Colts—from the city,¹¹⁸ the fall of the Soviet Union,¹¹⁹ and the first Iraq war.¹²⁰

From our meetings with Mr. Austin, and his presentation in class, it was clear that his music was (and is) a central part of his life and his life story. Some musically talented students in the class worked directly with him to compose a score for the play. He and the students provided live music during the performance, culminating in a jazz trumpet solo by Mr. Austin.

During the play, the audience did not know that Michael Austin—the

115. Mr. Austin released an album in 2012, with songs written while he was incarcerated. MICHAEL AUSTIN, *I JUST WANT TO LOVE YOU* (Thombora Entertainment 2012); Talking Smooth Jazz, *Interview with Singer Michael Austin*, BLOGTALKRADIO (Mar 17, 2013), <https://www.blogtalkradio.com/talking-smoothjazz/2013/03/17/interview-with-singer-michael-austin>.

116. Muhammad Ali and George Foreman's heavyweight championship fight, known as the "Rumble in the Jungle," took place October 30, 1974. Jonathan Snowden, *Muhammad Ali's Greatest Fight: George Foreman and the Rumble in the Jungle*, BLEACHER REP. (June 4, 2016), <https://bleacherreport.com/articles/1919959-muhammad-alis-greatest-fight-george-foreman-and-the-rumble-in-the-jungle>.

117. President Ronald Reagan's first inauguration was held January 20, 1981. *Inauguration Facts*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.reaganlibrary.gov/reference/inaugurations> (last visited Mar. 27, 2020).

118. The Colts left Baltimore for Indianapolis on March 28, 1984. *Team History: Indianapolis Colts*, PRO FOOTBALL HALL FAME, <https://www.profootballhof.com/teams/indianapolis-colts/team-history/> (last visited Mar. 27, 2020).

119. The Soviet Union officially dissolved in December 1991. *Soviet Union*, HISTORY.COM (Sept. 1, 2017), <https://www.history.com/topics/history-of-the-soviet-union>; Serge Schmemmann, *The Soviet State, Born of a Dream, Dies*, N.Y. TIMES, Dec. 26, 1991, at A1.

120. The first Iraq War, known as Operation Desert Storm, began in January 1991. Shannon Collins, *Desert Storm: A Look Back*, U.S. DEP'T OF DEF. (Jan. 11, 2019), <https://www.defense.gov/Explore/Features/story/Article/1728715/desert-storm-a-look-back/>.

protagonist of the play—was the talented musician in the corner playing the live background music and singing. After the play, he took center stage and introduced himself. There was a sustained standing ovation.

The stars of the show, besides Mr. Austin, were the Centurion Ministries' investigator and the two lawyers who proved his innocence through relentless, "leave no stone unturned" investigations and advocacy.¹²¹ One of these lawyers and Mr. Austin led a post-play discussion.

D. Mark Grant

1. The Facts

Mark Grant was fourteen years old and in middle school in 1983. On January 4th of that year, two boys confronted a sixteen-year-old boy in a Baltimore City neighborhood and demanded that he give up his leather jacket. When he refused, one of the boys, Shane White, shot and killed him. Mr. Grant was in the neighborhood at the time, heard the gunshot, and when the boys ran by him, knew there was trouble and also ran away. There was no physical evidence against Mr. Grant and the police never found the murder weapon.¹²²

Mr. Grant was arrested and convicted of murder, chiefly on the eyewitness testimony of Mardell Brawner, a friend of the victim. Mr. White, as part of a plea agreement, also testified that Mr. Grant was the killer.

Convinced of Mr. Grant's innocence, Maryland Law Professor Renée McDonald Hutchins,¹²³ and her appellate and post-conviction advocacy clinic students, took on Mr. Grant's case in 2004. He had been in prison for over two decades. They discovered, as later reported in the *Baltimore Sun*, that Mr. Brawner, the State's key witness, had admitted that he had falsely accused Mr. Grant "because relatives of the actual killer [White] took him to [a Baltimore] Park, held a gun to his head and vowed to kill him unless he identified Grant as the gunman."¹²⁴ The clinic also discovered that Mr. White,

121. These lawyers were Larry Nathans and Booth Ripke, the same lawyers who represented Walter Lomax. NATHANS & BIDDLE LLP, *supra* note 81.

122. Clemency Petition of Mark Farley Grant, submitted by the Clinical L. Program, U. of Md. Sch. of L. to the Md. Parole Comm'n in support of clemency [hereafter *Clemency Petition*].

123. Renée McDonald Hutchins is now Dean of the University of the District of Columbia David A. Clarke School of Law.

124. Dan Rodricks, *Ex-inmate Mark Farley Grant: 'I Grew Up in Prison, You Know'*, BALT. SUN (June 24, 2017), <https://www.baltimoresun.com/opinion/columnists/dan-rodriks/bs-md-rodriks-0625-20170624-story.html> ("The prosecutor in the case has since said he never would have gone to trial had he known of the threat against his key witness."). *Baltimore Sun* reporter, Dan Rodricks, became convinced by the evidence of innocence that Mr. Grant should be released from prison, and over three years, wrote a number of articles describing

who “pleaded guilty to attempted robbery and accepted a ten-year prison sentence in exchange for his testimony against Grant,” had “failed a polygraph test prior to the trial, a fact never revealed to the defense.”¹²⁵ The State also should have disclosed, but did not, that Mr. White initially told the police that Mr. Grant was not at the crime scene at the time of the crime.¹²⁶

In 2012, the clinic persuaded Governor Martin O’Malley to accept the Maryland Parole Commission’s clemency recommendation and to release Mr. Grant from prison. In 2016, WBALTV11 reported that Mark Grant, then forty-eight, had “spent more than a quarter century in prison for a murder that nearly all the original parties now agree he did not commit.”¹²⁷

2. The Play

The play was performed in 2010, two years before Mr. Grant was released from prison. It began with the “waiver” hearing, at which the judge ordered that this young and physically small, fifteen-year-old boy be tried as an adult, not in juvenile court.¹²⁸ This, even though the judge knew that Mr. Grant would be housed with adults, including predatory adults, before trial and if convicted.¹²⁹

There was widespread knowledge in Mr. Grant’s community that he was innocent. The play emphasized this difference between the community’s knowledge of the truth and the false “truth” the trial produced. The themes

this miscarriage of justice and advocating Mr. Grant’s release. Rodricks continues to write about Mr. Grant’s case. *See, e.g.,* Dan Rodricks, Opinion, *Justice Unfinished: This Maryland Man is Free, but he Still Yearns for a Declaration of Innocence*, BALT. SUN (Sept. 27, 2019), <https://www.baltimoresun.com/opinion/columnists/dan-rodricks/bs-md-rodricks-mark-grant-20190927-ey72wosptvbrjh677e7kwegg64-story.html>.

125. Rodricks, *Ex-inmate Mark Farley Grant*, *supra* note 124. The clinic’s proof of innocence included: that Mr. White told several people, including Mr. Grant, that he had shot the victim; Mr. Brawner repeatedly told others, including his pastor, that he had lied about Mr. Grant being involved; the White family had intimidated another witness, who would have wholly exculpated Mr. Grant, but did not come to court and testify; and the victim’s family did not believe Mr. Grant was the killer (based on what many in the community told them). *See* Clemency Petition, *supra* note 122.

126. Clemency Petition, *supra* note 122, at 2.

127. Deborah Weiner, *Man’s Life Renewed After Law Clinic Frees him from Prison*, WBALTV11 (Nov. 3, 2016), <https://www.wbalTV.com/article/mans-life-renewed-after-law-clinic-frees-him-from-prison/8101071>. Part of Mr. Grant’s story, like those of the other four prisoners, was his extraordinary accomplishments in prison. He “earned his GED behind bars and learned a skill as a meat cutter, following his mother’s parting words of advice. ‘Not tomorrow, right now, right now, you’ve got to grow up,’ Grant said. ‘As time went on, I really understood the magnitude of what I was dealing with.’” *Id.*

128. When Grant entered prison he was “no more than 5-foot-2.” Rodricks, *Justice Unfinished*, *supra* note 124.

129. *Id.*

were that witness intimidation and failure of police to protect witnesses—reinforced by a “stop snitching” ethos—were serious criminal justice problems then, as they are now.¹³⁰

We used a Greek Chorus as a theatrical device to speak for Mr. Grant’s family and the community in telling his story. This allowed students to bring to life characters that were mothers, grandmothers, friends, neighbors, and concerned citizens.

The play also presented the failures of the lawyers and court that helped to produce this miscarriage of justice. The prosecutor failed to disclose the exculpatory evidence (including the results of the failed polygraph test) and to investigate what the community knew about Mr. White and his family. Defense counsel failed to effectively subpoena a key defense witness (who knew and would have testified to the truth), and the judge refused to continue the trial to bring that witness to court.¹³¹ The student actors made these points through excerpts from trial testimony and narration.

The dramatic highpoint of the play, as it was in real life, was a scene in a church in 2006. Mr. Grant’s sister and aunt, and Mr. Brawner, were present. After a sermon in which the pastor criticized the high rate of violent crime and the “stop snitching” response to it, she invited anyone in the congregation who had “wronged another” and regretted it to come to the pulpit and be forgiven. While Mr. Grant’s sister and aunt watched in shock, Mr. Brawner came forward. He later would say that he did so to seek forgiveness for wrongly putting Mark Grant in prison.¹³²

In assessing the play, one student said this was a “communal. . .tragedy;” reflecting that “Mark Grant went to jail because his community was stifled by fear and the people who should have been his supporting actors lost their lines or fled the set. . .When the voices of the community are lost, we lose the narrative that is central to justice.”¹³³ Another student described the sense of responsibility she felt to get the story right:

Participating in this play was not the first time that I have been involved in a theatrical production; however, it was the first instance in which my performance was intrinsically linked to the . . . freedom of an innocent man. We saw it as our professional responsibility to tell Mark Grant’s story and give him the voice

130. For a discussion of Baltimore’s long history with the “stop snitching” culture, See Kevin Rector, *Part of Pugh’s Plea Deal Remains Sealed. That’s Partly Due to Baltimore’s Stop Snitching Culture*, BALT. SUN (Nov. 26, 2019), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-pugh-sealed-supplement-20191126ly2igqjdcdba3mgqvnb2whbve-story.html>.

131. Rodricks, *supra* note 124.

132. Interview with Renée McDonald Hutchins, counsel for Mr. Grant (Jan. 5, 2020) (transcript on file with author).

133. Assessment of D.R., *supra* note 6.

that the criminal justice system has continuously and systematically denied him. By creating, acting in, and promoting this production, my classmates and I took on the professional responsibility that we share as members of both the legal and Baltimore Communities to educate the community about Mark Grant's life, so that we may be able to play a role in getting him freed from jail after serving a substantial portion of a life sentence for a crime that he did not commit.¹³⁴

Mark Grant was released from prison in June of 2012, about two years after the play.¹³⁵

V. THE EDUCATIONAL VALUES OF THE COURSES

In this part, we discuss what we believe the students learned through these courses. We quote from the students' own assessments and accounts of what they learned.

A. Learning to Work Collaboratively

Law firms and law schools now recognize the importance of the ability to work effectively in teams.¹³⁶ Being part of a team also can be a great antidote to the alienation that some, perhaps many, law students and lawyers feel.¹³⁷ In our courses, the students worked together in making the basic decisions, for example, about the story, its arc, the characters, the sets, the music, and visual images. The students also worked together in selecting and

134. Assessment of T.S., *supra* note 6.

135. Rodricks, *supra* note 124.

136. See, e.g., Jay Gray Finkelstein, *Practicing in the Academy: Creating "Practice Aware" Law Graduates*, 64 J. LEGAL EDUC. 622 (2015) (promoting "expand[ing] the use of pedagogy that replicates the practice of law and enhances the learning experience through collaborative exercises."); Heidi K. Gardner, *Collaboration in Law Firms*, THE PRAC.: TEAMWORK & COLLABORATION (2015), <https://thepractice.law.harvard.edu/article/collaboration-in-law-firms/> ("Together these two trends—increased specialization and a growing complexity in client issues—create a demand for lawyers who are not only technical experts in their own particular domain but also lawyers who can collaborate with others throughout the firm, and often around the world, to solve multifaceted problems.").

137. See, e.g., NAT'L TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGES (2017), <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf> (documenting high levels of stress, depression, and feelings of isolation among lawyers and law students); Jeena Cho, *Lawyer Loneliness: Facing and Fighting 'No. 1 Public Health Issue'*, ABA J. (July 1, 2018), http://www.abajournal.com/magazine/article/lawyer_loneliness_public_health (describing why law students and lawyers often feel isolated).

editing the scenes and determining their order, and in rehearsing and presenting the plays.¹³⁸

The successes of the plays depended upon these forms of collaborative innovation and problem-solving.¹³⁹ One student said: “The opportunity to work as a collaborative group on a project was very exciting for me. I have always enjoyed group problem solving exercises. . . [T]he collaboration we were able to engage in on this Legal Professionalism play project was unparalleled.”¹⁴⁰

This also was a good way to retain the core lessons of the courses. Studies demonstrate that collaborative, arts-integrated curricula increase long-term memory of content¹⁴¹ and “[s]tudents learn better when they are actively engaged in the learning process.”¹⁴² Additionally, collaboration promotes “social interaction as a method of learning” and is endorsed as a principle in “creat[ing] and maintain[ing] effective and healthy teaching and learning environments” in law schools.¹⁴³ These studies indicate that the process of creating a play and performing it to explore professional responsibility and other legal issues will have lasting impacts. A number of our students said this in their assessments.¹⁴⁴

By the end of the semester, the students identified as a team and celebrated the work of one another. One student captured this comradery in her comments:

I also enjoyed this class because of its collaborative nature. Most law school classes pit students . . . against one another. In this class, no one was successful unless everyone pitched in and did their parts. Like associates in a public interest firm, we sat around and debated why things happened the way they did and what it could teach us. As we began writing our scenes and during the performances, we cheered on and supported one another. I never worried about my grade or the curve, I just worried about

138. See Part III.

139. See generally, DANIEL H. PINK, *A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE* (2006) (describing six aptitudes—design, story, symphony, empathy, play, and meaning—that individuals should cultivate for professional and personal success).

140. Assessment of E.M., *supra* note 6.

141. MARIALE HARDIMAN, *THE BRAIN-TARGETED TEACHING MODEL FOR 21ST-CENTURY SCHOOLS* (2012).

142. Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 102 (2002).

143. Roy Stuckey et al., *BEST PRACTICES FOR LEGAL EDUCATION* 80, 88 (2007); Cristina D. Lockwood, *Improving Learning in the Law School Classroom by Encouraging Students to Form Communities of Practice*, 20 CLINICAL L. REV. 95, 98 (2013).

144. See Part VI.

supporting our team.¹⁴⁵

Another student described the exciting, creative process the teamwork produced:

Once we had gone through the entire record, we were tasked with creating the story that would ultimately become the script. This phase involved a lot of class discussion and was so wonderfully unique [compared] to other classroom discussions about cases. In these discussions, we were all trying to not only understand but to create, to tell a story and to portray facts and law with emotion and color. This added such a spark to the class and everyone became more involved each session. As the students came into class, they were filled with an excitement that I had not seen before in a law school course. Everyone wanted to participate and share their thoughts.¹⁴⁶

Another student drew an analogy between the teamwork necessary to write the play and that needed to effectively operate the criminal justice system:

The class was truly a breath of fresh air, and made me realize, as individualized as legal work can be, it takes every person to make the process work. Just as it took every person in the class to pull off the show, the legal process needs every prosecutorial, every defense and every judicial player to carry out each and every step thoroughly, or the system will be flawed, the machine will break down, and the show cannot go on.¹⁴⁷

One student said simply: “All the students walked away after the play performance feeling like they had learned something, felt something and accomplished something.”¹⁴⁸

B. Learning Professional Responsibility

These courses helped students learn the many nuances of professional responsibility in a unique way that engaged students with the cases and the good and bad examples of lawyers and the criminal justice system. Students

145. Assessment of O.S., *supra* note 6.

146. Assessment of A.V., *supra* note 6.

147. Assessment of J.T., *supra* note 6.

148. Assessment of A.V., *supra* note 6.

also learned the significant impact professional responsibility has on their clients, as well as their clients' families and friends and the larger community. Finally, through case analysis and the creative process of writing, producing, and performing the plays, students learned that challenging injustice – righting wrongful convictions of innocent individuals – is a significant part of professional responsibility

1. Teaching Professional Responsibility, in Part, with Case Studies

In the first instance, the discussions about professional responsibility were based on the case studies. As we have described, the students initially mastered the files in the cases and relevant contemporary events, and in three semesters met with the released prisoners.¹⁴⁹ Case studies can enhance legal education,¹⁵⁰ and it certainly did in our courses.

The four cases presented the array of ethical issues, in varying degrees that often arise in criminal cases. They included: the prosecutor's duty to have reasonable grounds for charging decisions; the prosecutor's duty to disclose exculpatory evidence; and defense counsel's duty to provide effective assistance of counsel.

a. The Prosecutor's Duty to Have Reasonable Grounds for Charging Decisions

Rule 3.8 of the ABA's Model Rules of Professional Conduct, and its Maryland counterpart, require that criminal charges be based on "probable cause."¹⁵¹ This duty generated common questions in our courses: Was there probable cause to support the charges in these cases? In making charging decisions, what weight should the prosecutor have given to the police charges and accounts? In light of the fallibility of jurors and judges, should the prosecutors have used a higher charging standard?

149. See Part III.

150. Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007); Jackie Kim & Lisa Brem, *Why and How: Using the Case Study Method in the Law Classroom*, *Case Studies Blog*: HARV. L. SCH. (Mar. 16, 2017), <https://blogs.harvard.edu/hlscasestudies/2017/03/16/using-case-study-method-law/>.

151. MODEL RULES OF PROF'L CONDUCT R. 3.8 CMT. 1 (AM. BAR ASS'N 2016); MD. RULE 19-303.8 (SPECIAL RESPONSIBILITIES OF A PROSECUTOR).

b. The Prosecutor's Duty to Disclose Exculpatory Evidence

Prosecutors in all four cases either clearly or likely breached their duty to disclose exculpatory evidence.¹⁵² There were three sources of this duty: (1) the due process clause of the Fourteenth Amendment to the United States Constitution, as applied in *Brady v. Maryland*;¹⁵³ (2) the State's version of Rule 3.8 of the ABA's Model Rules of Professional Conduct;¹⁵⁴ and (3) the Maryland rule governing discovery in criminal cases.¹⁵⁵

In *Strickler v. Greene*, the U.S. Supreme Court described the quasi-judicial conception of the role of a prosecutor that underlies the disclosure duty:

[The duty derives from] the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."¹⁵⁶

152. See Part IV. There is extensive evidence that many prosecutors violate these duties. See, e.g., Steve Weinburg, *Breaking the Rules, Ctr. for Public Integrity* (May 19, 2014), <https://publicintegrity.org/politics/state-politics/harmful-error/breaking-the-rules> ("Local prosecutors in many of the 2,341 jurisdictions across the nation have stretched, bent or broken rules while convicting defendants . . . Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 cases.").

153. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Strickler v. Greene*, the Supreme Court summarized *Brady* and its post-*Brady* decisions. 527 U.S. 263, 280, 281 (1999) ("In *Brady* this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence. Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Moreover, the [disclosure] rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" (internal citations omitted).

154. MD. RULE 19-303.8(d) (Special Responsibilities of a Prosecutor).

155. MD. RULE 4-263 (Discovery in Circuit Court).

156. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (internal citations omitted). The *Strickler* Court identified the "three components of a true *Brady* violation." *Id.* at 281-82 ("The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either

This conception is embodied in Rule 3.8 of the ABA's Model Rules of Professional Conduct, which says: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."¹⁵⁷ For the charged offense, Rule 3.8 requires prosecutors to:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, [the prosecutor must] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.¹⁵⁸

The duty is to disclose information (not just evidence) that "tends to negate the guilt of the accused, [. . .] mitigates the offense", or mitigates the sentence.¹⁵⁹ As discussed in Part IV, in all four of the cases, the State (police and/or prosecutors) ignored and failed to disclose exculpatory evidence some that established the defendants' innocence.

willfully or inadvertently; and prejudice must have ensued."). Because of the third, "prejudice" requirement, before the disclosure obligation is triggered, the prosecutor must conclude that there is a reasonable probability the exculpatory or mitigating evidence the state has will affect the result in the case. *Id.*

157. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016).

158. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2016).

159. *Id.* By comparison to the *Brady/Strickler* rule, Rule 3.8(d) and its Maryland counterpart has no "likely prejudice" requirement. The United States Supreme Court, the ABA, and many lower courts all have concluded, from the plain meaning of Rule 3.8, that it imposes significantly broader disclosure requirements on the state than does *Brady*. See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995); *In re Kline*, 113 A.3d 202 (D.C. Cir. 2015); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009). Some courts disagree. See, e.g., *In re Rick*, 834 N.W.2d 384 (Wis. 2013). The Maryland Rule governing discovery in criminal cases has a broad disclosure requirement as well. Rule 4-263(d) requires the State's Attorney, "[w]ithout the necessity of a request," to disclose "to the defense . . . [a]ll material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged [and] [a]ll material or information in any form, whether or not admissible, that tends to impeach a State's witness." MD. RULE 4-263 (Discovery in Circuit Court). This includes ". . . a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness; (C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness. . . ; (D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness; . . . [and] (F) the fact that the witness has taken but did not pass a polygraph examination." *Id.*

One of the pedagogical challenges, and opportunities, was that the four cases were decided under different sets of ethical rules than apply today,¹⁶⁰ although all four were decided after the U.S. Supreme Court decided *Brady v. Maryland*. This invited comparison between the ethical disclosure canon and rule that applied to that old case to today's Model Rule 3.8, and to discuss this evolution.

c. Defense Counsel's Duty to Provide Effective Assistance of Counsel

The premise of the adversary system is that both sides have effective lawyers, and the Sixth Amendment right to a fair trial depends on this premise being true. In *Strickland v. Washington*,¹⁶¹ the U.S. Supreme Court adopted a two-prong test for determining whether defense counsel's performance was so deficient that it denied the defendant's Sixth Amendment right to counsel. The defendant must prove both: 1) that counsel's performance "fell below an objective standard of reasonableness,"¹⁶² and 2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁶³ In determining whether the first prong is satisfied, a court asks whether the "attorney performance" was reasonable "under prevailing professional norms."¹⁶⁴

160. Two cases, the *Lomax* and *Arvinger* cases, were decided when Maryland's lawyers were guided by the Canons of Ethics, adopted by the American Bar Association in 1908. Canon 5 provided: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." THE CANONS OF ETHICS FOR LAWYERS CANON 5 (AM. BAR ASS'N 1908). The other two cases, the *Austin* and *Grant* cases, were decided under Maryland's version of the ABA-approved Code of Professional Responsibility, Disciplinary Rule 7-103(B), which provides: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (AM. BAR ASS'N 1980).

161. *Strickland v. Washington*, 466 U.S. 668 (1984).

162. *Id.* at 688.

163. *Id.* at 694.

164. *Id.* at 688. The *Strickland* Court offered a "benchmark" for deciding ineffective assistance of counsel claims: "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In making this determination, a court must give deference to an attorney's performance, presuming that it "falls within the wide range of reasonable professional assistance," and not second-guessing the lawyer's "trial strategy" if it is at all plausible. *Id.* at 689. In *Bowers v. State*, 320 Md. 416 (1990), Maryland's highest court gave further meaning to the second prong of the test, i.e., whether the lawyer's deficient performance was prejudicial. It held this second prong is satisfied if there is a "substantial

The Arvinger and Lomax trials occurred before the creation of the Maryland Public Defender system.¹⁶⁵ Many of the private lawyers who represented indigent defendants set fees low, handled high volumes of serious felony cases, and provided inadequate representation. The plays conveyed these practices.

In three of the cases—Arvinger, Austin, and Lomax—the defense lawyers’ performances were abysmal; in retrospect, perhaps this was not surprising. The lawyers for Mr. Arvinger and Mr. Lomax eventually were disbarred or left practice out of fear of being disbarred, and Mr. Austin’s lawyer was killed several years after Mr. Austin’s trial under suspicious circumstances.¹⁶⁶

2. Learning Professional Responsibility Through Immersion in the Roles of Lawyers and Judges

The second level of the students’ ethics education was in their immersion in the roles of the lawyers and judges. One student who participated in the Walter Arvinger play described this process and what he learned from it:

First, I got involved by *observing* the characters; then I became involved by *becoming* the characters. I believe the act of becoming the character really brought the [ethical] rules alive for me. I became the junior prosecutor—an aspiring attorney, with visions of bringing law and justice to a city torn apart. I became the judge—the first African American judge in Baltimore City, walking a fine line between sparing young blacks from unjust punishment and not adhering to any form of “race loyalty.” By taking on the characters, I gained a relatively rich understanding of what they may have been going through, and why they would have done some of the things they did.¹⁶⁷

This student added:

possibility” that but for the lawyer’s deficient performance, the result would have been different. *Id.* at 427.

165. The Maryland Office of the Public Defender was created by the Maryland General Assembly in 1971 and opened as an independent state agency in 1972. *About Us*, MD. OFF. PUB. DEFENDER, <http://www.opd.state.md.us/about-us> (last visited Feb. 14, 2020).

166. See Parts IV(A), (B), (C). Lonnae O’Neal Parker, *Soul Survivor*, WASH. POST (Jan. 22, 2004), <https://www.washingtonpost.com/archive/lifestyle/2004/01/22/soul-survivor/f731a513-4864-426d-98d3-005c485922f7/>.

167. Assessment of J.S., *supra* note 6.

Drafting a scene and the acting process [were part of] an enlightening, transformative experience. Reading the case; learning the history and what was going on at the time; delving into the minds of the characters—imagining what they were thinking, what pressures they were under. These thought processes brought the ethical problems lawyers face to the forefront. Simply reading ethical rules and (sometimes) applying these rules to shallow, hypothetical situations can be dry and dull. People like stories, and people get involved in the story and in the characters.¹⁶⁸

In these cases, there were many models of lawyers – good and bad – for the law students to write lines for and depict, from the trial lawyers through post-conviction counsel. There was much to understand, criticize, applaud, and in the end, learn from these lawyers’ performances and the characters based on them that the students recreated and depicted.

In the plays, the roles always included a prosecutor (or prosecutors) and a defense lawyer, and the lawyers and law students who represented the men in the successful post-conviction phases of their litigation and/or in the commutation processes

Although, in this article, we have described the failures of the lawyers in stark terms, in taking on these roles the students had to try to understand the *reasons behind the failures*. For the defendants, this initially included the State’s failure to provide trained and committed lawyers to represent them, and the private lawyers’ excessive caseloads and consequential lack of preparation.¹⁶⁹ For the prosecutors, it was an “end justifies the means approach,”¹⁷⁰ failure to appreciate the ethical (and moral) complexity of their role,¹⁷¹ and deference to the public passions of the times.¹⁷² The lawyers’ performances in these cases all were cautionary tales.

The overarching professional responsibility lesson the students took from the courses was simple but fundamental: lawyers must act ethically, not only because the rules require it, but more importantly, because the lives and liberty of people depend on it. The failure to act ethically can have awful consequences. The students learned what not to do, as well as what to do, in the various lawyer roles.¹⁷³

168. Assessment of J.S., *supra* note 6.

169. See Part IV(B) (discussing the high volume practice and lack of preparation of Mr. Arvinger’s lawyer).

170. See Parts IV(A), (C) (discussing the prosecutions of Mr. Lomax and Mr. Austin).

171. Especially the quasi-judicial role of prosecutors.

172. See Parts IV(A), (B), (C) (discussing the potential influence of local and national events on these cases).

173. One student said: “My study of the role of [defense lawyer] in the Arvinger case

The students found these lessons in the records of the cases and in the lives of the four men and their families. They embodied these lessons in their plays. They experienced these lessons in their performances. One student spoke for many: “I really understand now that when a client comes to me, that client is entrusting his or her life, future, and finances in my hands and in my care;” he predicted that “this experience [in the course] will awaken in my classmate[s] as it has in me the need to hold ourselves to the highest ethical standards, because if we make a mistake there’s no guarantee that someone else is going to make up for it by doing the right thing.”¹⁷⁴ Another student said:

This class was unlike any other I’ve taken in law school. It was not different because I had so much fun learning or because I actually looked forward to coming to class each time. The difference was the real life, up close and personal example of the personal ramifications to the lives of clients when lawyers fail to uphold their ethical obligations. I will employ the lessons learned from this class for the rest of my career.¹⁷⁵

3. Learning Professional Responsibility Through the Vantage Points of Clients, Client Families, and Communities

Clients are largely invisible in traditional classroom courses;¹⁷⁶ so are their families, crime victims and their families, and the communities in which crimes are committed. In the courses, students explored the professional responsibilities of lawyers, as well as the criminal justice system, from these different vantage points. Through these perspectives, students learned about, and felt, the ripple effects of a lawyer’s work. The plays helped students understand the impacts of lawyers’ work on what one student called “these

provided a roadmap of mistakes not to make in representing a client . . . In this case, [his] brief was a hastily constructed, shoddy bit of drafting that ultimately proved ineffective at convincing [the judge] that there were reasonable doubts of Arvinger’s guilt.” Assessment of J.I., *supra* note 6.

174. Assessment of S.J., *supra* note 6. The students also learned the central importance of preparation in acting responsibly. This was a representative comment: “I started to learn what the role of a lawyer truly meant; the level of attention to detail, responsibilities, and preparedness that are all required of the lawyer. As we had to rehearse for our play production, so too does the lawyer rehearse for his/her courtroom performance.” Assessment of D.S. *See supra* note 6.

175. Assessment of O.S., *supra* note 6.

176. Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731 (1993). (“The clients who are missing from legal education are clients with particular identities who are situated in distinctive ways within the social world, facing often critical choices about their participation in the legal world.”).

secondary characters.”¹⁷⁷ One said:

In the actual practice of law, and perhaps even more frequently in purely academic study, these secondary characters are often swept under the rug. So reduced, the legal story is still a drama, but it is a drama about lawyers and clients, rules and rulings. Yet that act of culling—even if necessary for establishing a manageable narrative—casts aside much of what the law actually means to society.¹⁷⁸

Another student offered an example of the importance of adopting an outsider vantage point:

This class employed a unique and creative way to teach ethics. Though I had taken a three-credit professional responsibility course and did very well on the Multistate Professional Responsibility Examination . . . , the rules and their importance [in this course] made an impression and “stayed” with me in a way that they had not in other courses. In this course, I was not reading a case and looking for the black letter law and reasoning as explained by the court. I was not being tested on hypothetical situations concerning the conduct of lawyers. Rather, *I was the mother of a wrongfully accused son*. In the role of that mother, I examined the actions of the prosecutor, defense counsel and judge and compared it to their ethical obligations.¹⁷⁹

In the criminal justice system especially, the decisions of lawyers—prosecutors, defense counsel, and appellate lawyers—and judges and juries have profound ripple effects on many people and communities. Our students thought about and felt these effects in scripting and acting in a variety of “secondary” roles.

4. Learning that Challenging Injustice is a Part of Professional Responsibility

These plays, in effect, were case autopsies in which the students examined the arbitrary—sometimes extralegal—factors that produced the wrongful convictions, and then presented them to the audiences in their plays. These factors included not only the unethical conduct of prosecutors and

177. Assessment of D.R., *supra* note 6.

178. *Id.*

179. Assessment of O.S., *supra* note 6.

defense counsel, but also racial prejudice, public anger and fear, witness intimidation, perjury, and the disregard of law by officers of the state.¹⁸⁰

Thus, justice, injustice, and how to remedy injustice, were themes at the hearts of the courses. This is as it should be. The legal profession—in large doses of rhetoric, but also in important traditions—encourages lawyers to defend justice.¹⁸¹ As part of these traditions, there are heroes and heroines of the legal profession—wonderful models—who have dedicated careers to the pursuit of justice. Lawyers’ ethical codes, albeit largely through aspirations not rules, encourage lawyers to seek justice.¹⁸²

Justice should be an important part of legal education as well. A major 1992 ABA report on legal education lists as one of the four basic values of the legal profession: “striving to promote justice, fairness and morality.”¹⁸³ Some legal educators seek to “evoke from students an emotional and moral response to justice issues in both the law and in legal practice.”¹⁸⁴ The most recent major assessment of legal education recommends that educators do more, by teaching with “the rich complexity of actual situations that involve full-dimensional people,” “thinking through the social consequences or ethical aspects of” cases, and responding to students’ “desire for justice . . . moral concerns [and] compassion.”¹⁸⁵ Legal education should have moments that inspire, although inspiration is in short supply in most of the non-clinical curriculum.¹⁸⁶

180. See Part IV.

181. Robert Grey, Jr., *There is no Justice as Long as Millions Lack Meaningful Access to it*, ABA J.: DEFENDING JUST. (Aug. 30, 2018), <http://www.abajournal.com/news/article/there-is-no-justice-as-long-as-millions-lack-meaningful-access-to-it>. (“The LSC, the ABA, and other stakeholders in the legal community are doing their best to narrow this justice gap by developing innovative technology, encouraging and supporting pro bono participation by the private bar, and undertaking other initiatives.”).

182. The ABA’s Model Rules of Professional Conduct state that lawyers have “special responsibility for the quality of justice” and “should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.” MODEL RULES OF PROF’L CONDUCT PREAMBLE & SCOPE (AM. BAR ASS’N 2000).

183. ABA SEC. OF LEGAL EDUC. & ADMIN. TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 213 (1992).

184. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 71 (2003). For additional faculty engaging students in and writing about promoting justice, see, e.g., Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 38 (Austin Sarat & Stuart Scheingold eds., 1998); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998); Quigley, *supra* note 45.

185. William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 187 (Carnegie Foundation for the Advancement of Teaching, 2007).

186. See generally Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649 (2018); Shalleck, *supra* note 176.

There were many sources of inspiration in our plays. First and foremost were the men, each of whom had triumphed in the face of grossly unfair and extraordinary adversity. There were, in addition: the post-conviction lawyers and law students who did the hard work to get wrongfully convicted people out of prison; the judges and governors who ordered their releases; and the family members who stood by them over the decades. All of the plays presented models of the extraordinary legal work—marked by creativity, years of commitment, and sometimes good luck—it takes to get a long-incarcerated, wrongfully convicted person out of prison, with the realization that inevitably many more like them remain confined today.¹⁸⁷

C. Developing Cross-Cultural Competence

The students had to think about, understand, and depict those who—for most of our students—were different than they were by race, culture, class, and life experiences.¹⁸⁸ In these ways, the courses were good introductions to the cross-cultural competence that is important in law practice.¹⁸⁹ In these courses, students empathized with, wrote about, and depicted older African American men who had spent decades in prison and their mothers, sisters, and friends (including other prisoners). They did the same with victims of crime and surviving relatives of murdered family members and members of their communities, including people too scared of violent retaliation to testify. They saw, and vicariously participated in the lives of these people and communities. Students understood a little better the formidable challenges all these individuals faced and how they responded to them, often with courage and dignity.

The connections were emotional as well as intellectual. One student said:

Engaging in this creative process forced me to emotionally understand and connect with the characters. I found the emotional understanding very valuable because law school trains students to think rationally and logically and often the emotional component—that is inseparable from actual human experience—is cast to the wayside.¹⁹⁰

187. KELLY WALSH ET AL., ESTIMATING THE PREVALENCE OF WRONGFUL CONVICTION (2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf>.

188. All the men, and their families were African Americans, and the communities were primarily poor, African American communities. The majority of students—like most law students—were white and from middle to upper classes.

189. Susan Bryant, *The Five Habits: Building Cross-Culture Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

190. Assessment of J.S., *supra* note 6.

These real-world experiences of others, which the students had to reconstruct and present, appropriately forced some of the students to challenge long-held beliefs and assumptions. These included: that police fairly investigate, and prosecutors fairly prosecute crimes; that defense counsel protects the rights of the accused; that our laws and constitutionally mandated criminal procedures prevent convictions of the innocent; and that race and poverty have little to no effect on the administration of justice. Much of legal education, at least implicitly, reinforce these often-mistaken beliefs and assumptions. The courses forced students at times, and invited them at others, to see the world as it is and to understand their roles as lawyers in seeing that justice is done.

Most students were shocked by what they learned in the courses. One student said, expressing her shock (and acknowledging her prior lack of empathy):

I was shocked to see how this one man, who had done no wrong, who had hired an attorney to assist him, could have remained in prison for over thirty years for a crime he did not commit. In truth, I have always been more callous than emotive regarding the plights of others, but, this time around, I could not escape the reality that Walter Arvinger did everything he was supposed to do.¹⁹¹

D. Developing Lawyer Skills, Including that of Applied Legal Storytelling

Applied legal storytelling was the centerpiece of the skills education in our courses. Applied legal storytelling “examine[s] the use of stories—and of storytelling or narrative elements—in law practice, in law-school pedagogy, and within the law generally.”¹⁹² Many argue that this is an important law practice skill.¹⁹³ There are many reasons that we believe it is, especially because: “storytelling is the backbone of the all-important theory of the case, which is the essence of all good lawyering.”¹⁹⁴ A good theory of the case is based on a good story.¹⁹⁵

191. Assessment of J.T., *supra* note 6.

192. J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 *LEGAL COMM. & RHETORIC: JALWD* 248 (2015).

193. *Id.* at 255–262 (listing an extensive bibliography about legal storytelling).

194. Ruth A. Robbins, *An Introduction to Applied Legal Storytelling and to This Symposium*, 14 *J. LEGAL WRITING INST.* 3 (2008).

195. *Id.* For similarities between storytelling and trial practice, see e.g., MEYER, *supra* note 50, at 2 (“Make no mistake about it—lawyers are storytellers.”); SHAPIRO, *supra* note 50,

In the courses, students identified and applied theories of the case in traditional legal ways. In conceiving, writing, and performing the plays, students identified the best legal theories of the cases—often developed with post-trial evidence—as the foundations of the stories. In doing this, they did what good lawyers do: identify the key points; construct them into a coherent story; and present that story as dramatically and persuasively as possible. One student described this method:

[We began with] the importance of reviewing the record carefully and understanding the facts. Because we were working on a play, the approach we took to the facts was much different than what we were used to in other courses. We looked at the facts as though we were reading a novel. As though we were the Hollywood producers trying to turn the transcript into a blockbuster. We didn't look at the transcript as a long boring and drawn out document, meant only to help us write our brief. The transcript in this class was our screenplay and we were developing the script.¹⁹⁶

All lawyers share this goal of turning their client's story into a "blockbuster," acclaimed by a legal audience, whether in litigation or non-litigation representation. Developing this vantage point and ability to do it are important practice skills.

One student explained the tasks in the course in ways that largely apply to constructing a theory of the case:

[This] course has improved my ability to tell a story. If I practice law, I will likely be a trial attorney, and storytelling is an important skill for effective trial attorneys. I improved my storytelling ability through reading the class text (*The Art of Playwriting*) and applying the information to the writing and acting processes . . . Part of what made the storytelling process interesting was the need to create scenes that were not part of the official record. We knew some of what happened, but not all. And we didn't know exactly why certain things happened. Because we did not know certain things, we had to invent. We had to create a backstory, and filler for the parts of the story that were missing. And for the story to

at 7 ("The practice of law is the business of persuasion. Storytelling is the most effective means of persuasion. No other skill so elegantly or completely combines a lawyer's ability to think, organize, write, and speak."). One student said simply: "I learned that the courtroom was very similar to theater; both have a script, a stage and an audience." Assessment of D.S., *supra* note 6.

196. Assessment of A.V., *supra* note 6.

be good, everything we invented had to be believable. Telling a believable story required research, critical thinking, and creativity. The zenith of creating the story was performing the story. Chances to perform in law school are few, far between, and usually involve playing a lawyer, playing a witness, or counseling/negotiation/mediation role-plays. This class allowed students to portray a wide range of characters. This was fun, and allowed me to understand the law in a more realistic, real-world context.¹⁹⁷

The students, like lawyers, came to appreciate that the key to a good performance, and in implementing a theory of the case, is preparation, but with the flexibility to adjust to changing circumstances. One said:

[T]he success of the play or trial is directly affected by the amount of work you put into it. In both cases you start out with . . . information [and] a vague idea of where you want to take it. . . . [Both] a play and case preparation are . . . living ideas. While creating a performance or coming up with case theories, it is important not to pigeonhole your vision. . . . We started out with multiple visions and somehow successfully converted it to one. The whole class was flexible to the very end. We changed things about how we ended the play just a few days before our performance. By remaining flexible, with an open mind, we were able to successfully implement these changes. The end product was much better because of it.¹⁹⁸

The ability to implement the theory of a case and have the flexibility to adapt to changing circumstances is similar to the skills an actor needs. Specifically, an actor must know the role they are playing—including the context and the dialogue—while remaining flexible in order to adjust and overcome any obstacles. The basic concepts underlying good acting are expressed in the acronym GOTE (goal, obstacle, tactic, and expectation).¹⁹⁹ When we taught the students about GOTE, they quickly realized that it easily transferred to trial work. Lawyers need to have specific goals, to identify the obstacles they face in achieving these goals, to develop tactics to overcome these obstacles, and to have confidence (reasonable expectations) that they

197. Assessment of J.S., *supra* note 6. We do not mean to overstate this argument: there are obviously differences between real-world development of legal theories of the case, and what the students were doing, including that the former is more fact-bound and limited by the nature of the audience, such as an appellate court or a jury. But the basic principles are very similar.

198. Assessment of E.L., *supra* note 6.

199. ROBERT COHEN, *ACTING ONE* 61 (4th ed. 2002).

will succeed.

As in practice, the students had to succinctly tell their stories in condensed ways that synthesized hours of hard work. One student observed:

. . . even though our play lasted only 20 minutes, those few minutes were all we needed to tell Mark [Grant's] story. 20 minutes, along with an entire semester of reading, writing, editing, and practicing, was enough to teach me the importance of professional responsibility, the unique relationship between theatre and the practice of law, and [about] the criminal justice system.²⁰⁰

The courses also provided students with experiences in other law practice skills. Within the lawyer roles were discrete trial practice exercises, for example, conducting a direct or cross-examination. One student said: “This class has had a tremendous affect [sic] on my decisions about how I am to treat a client, the dynamics of the courtroom, and all of the other little nuances that come with the [t]rial process before, during and after.”²⁰¹

The students also honed oral and writing skills, including the skill of writing succinctly for a public audience. In the former respect, Rauh was surprised that the majority of the second- and third-year law students had had little to no public speaking training. He taught them simple vocal warm ups²⁰² and focus exercises,²⁰³ along with ways to use their breathing to relax.

We also introduced students to the importance of nonverbal communication—through posture, body language, and other physical communication exercises. Nonverbal communications can subtly and profoundly impact how—and if—an audience listens and pays attention. Although it is important, many law students do not receive adequate instruction in how to use nonverbal communication to make their stories and cases stronger. The courses provided opportunities for students to learn about nonverbal communications and the related concept of stage presence—the “ability to command the audience’s attention through projection, focus, attention, expression, and confidence.”²⁰⁴

With repeated daily practices, students began to feel more confident in speaking in front of small and large audiences. The goal was to make sure

200. Assessment of S.A., *supra* note 6.

201. Assessment of D.S., *supra* note 6.

202. MATHIS, *supra* note 33, at 22–27 (providing vocal exercises to open the throat and warm up the voice).

203. For an example of a focus exercise, See Drama Menu, *Theatre Game #7 – Heads Up, Heads Down*, YOUTUBE (Oct. 2, 2017), <https://www.youtube.com/watch?v=pGE2PZPqkyU>.

204. MATHIS, *supra* note 33, at 1.

the students left the courses fully armed with a wide range of tools to aid in their ability to confidently tell a story to a small or large audience, whether they are arguing a case in court, testifying to the legislature, or giving a presentation. In these ways, students also learned how to overcome performance anxiety. One student said:

As we began to learn how to drop our stage fright and shyness and explore the inner actor we never knew we had, we began to see the script come to life. I think as law students, we had taken for granted the value that acting has for a lawyer, especially a trial lawyer. Shedding our stage fright and learning how to tell a story with our volume, body language and demeanor was not only instructive for becoming an actor but also instructive for practicing law.²⁰⁵

The ultimate law practice lessons were larger, however, as one student pointed out:

The experience of writing and performing a play was not just fun, but instructive because of the parallels between trial and theater: there are players, a plot, and conflict in both. Professional responsibility for lawyers means utilizing the common elements of theater and trying a case to our advantage, but always understanding that mistakes made in the former only result in bad reviews, but mistakes in the latter may send an innocent man to prison for life, or take it from him.²⁰⁶

E. Applying Criminal Law and Procedure

The case studies, by themselves, engaged students in reviewing basic principles in criminal law and procedure, for example, those for accomplice liability,²⁰⁷ the felony murder rule,²⁰⁸ and pretrial identifications.²⁰⁹ By reading trial transcripts, appellate briefs, and post-conviction pleadings and orders, students also obtained an overview of the criminal process and insight into the practice issues that arise in criminal cases. One student praised this aspect of the course, saying: “Through this class, I was able to see a criminal

205. Assessment of AV., *supra* note 6.

206. Assessment of J.I., *supra* note 6.

207. *Mumford v. State*, 313 A.2d 563 (Md. Ct. Spec. App. 1974).

208. Lila Meadows, *Abolish Felony Murder in Maryland*, BALTIMORE SUN (June 7, 2019), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0610-felony-murder-20190607-story.html>.

209. *Small v. ST.*, 180 A.3d 163 (Md. Ct. Spec. App. 2018).

law case from start to finish.”²¹⁰ The students applied this knowledge in writing and acting in the plays. Another student said:

I have never before had the opportunity to perform in a play. Honestly, I cannot say that I would have signed up for the class if I had known that acting was a necessary component . . . To say the least, I was shocked when I learned what the class would actually entail, and even considered dropping it for a more “classically structured” class. My major concern was that I wouldn’t learn anything about the law by writing a script and performing in a play. However, after much deliberation, I decided to stay. In retrospect I must confess that I have learned more about the law by writing a script and performing in a play, than I have in any “classically structured” class. Specifically, theatre is an entertaining way to learn about the criminal process. Our play walked the audience through the initial trial, sentencing, and even exposed the audience to common problems experienced by attorneys in the criminal justice system.²¹¹

VI. CONCLUSION

In an introduction to one of the courses, we said:

Think about a lawyer’s life as a still pond. Throw a heavy rock in it. Watch the ripples. The first ripple reflects competency, whether or not a lawyer is minimally effective at what she does. The second ripple reflects the impact of the lawyer’s craft on her clients, and the third ripple, her impact on the families, friends and communities of her clients. The fourth ripple reflects the lawyer’s impact on the families, friends and communities of non-clients, including victims. The fifth and final ripple is the impact of the lawyer’s work on herself: what law practice will do to our self-image and sense of self-worth, for better or not.²¹²

We think courses like this are good ways to explore all five ripples. We believe the courses challenged some law students to think about why they had come to law school, and reinforced the reasons of others. The courses explored the ripple effects of the work of lawyers, and invited the students to

210. Assessment of A.V., *supra* note 6.

211. Assessment of S.A., *supra* note 6.

212. Michael Millemann, Elliot Rauh & Robert Bowie, Jr., Teaching Notes for “Lawyers and Legal Systems and Their Social Context” (on file with authors).

think about the role of law practice in their lives.

Through the plays, the students learned about and presented the ways in which irresponsible and responsible performances of lawyers have profound impacts on the lives and liberty of people; not just clients, but also on their families and communities. The plays highlighted injustices in our criminal justice system and presented the needs for legal and social reforms.

Courses like the ones we describe in this article diversify legal education. They provide new pedagogies for law students who learn especially well in creative, interdisciplinary classes.²¹³ As one student summed up: “For students who enjoy theater, acting, and performing arts this class is a godsend in the comparatively dull landscape of law school curriculum.”²¹⁴

Other students also benefited from and celebrated this way of learning. One said:

I will remember this experience forever. [I was an] outgoing third-year student, more than uninspired, and more than skeptical [about] the class. How could such a course ever prompt me to learn anything, let alone delve into the topic of professional ethics? [This, however, was a] new type of course ... [a] whole different story.... From the outset of the course, I was forced to think from a different perspective than I ever have. The class was truly a breath of fresh air. [It] brought my last semester of law school to life. [It] took a burn[ed]-out third year and.... injected in her a new desire to fight for what the legal system stands for.²¹⁵

Another student reflected:

The two core elements of this class that differentiate it from other law classes are Creativity and Emotion. I learned in more enriching and captivating ways than I have in previous classes. This class forced me to access creative parts of my brain that have stagnated since I began law school. These thought processes not only energized me to work and learn, they brought the ethical problems lawyers face to the forefront.²¹⁶

213. See *supra* notes 136, 137, 139, 141 and accompanying text.

214. Assessment of J.S., *supra* note 6.

215. Assessment of J.T., *supra* note 6.

216. Assessment of J.S., *supra* note 6.

Another said:

Ten years from now, I am certain that when I am asked to share my most memorable and eye-opening class in law school, I will mention this class. [It] has been a learning experience that no other law school class that I have taken can come close [to] in comparison.²¹⁷

These were courses that challenged the old common account—hopefully apocryphal today—of a law school dean during first year orientation saying “look to your left, look to your right, one (or two) of you will not graduate.” On the first day of class, we said “look to your left, look to your right, these are the people who are going to help you succeed in this course.”

In each semester, in thirteen two-hour classes and one major performance, groups of law students who often did not know each other’s names when they began, wrote, produced, and performed in plays. The plays told the compelling stories of four wrongly convicted men, the ethical lapses that led to their incarceration, and the admiral efforts of lawyers and law students to partially right these wrongs. The students learned many things in the process, especially what it means to be a good lawyer and how much can be accomplished by working together.

We have been lucky to have participated in these courses.

APPENDIX A

What follows are excerpts from the emails of many of the students who were responding to the course announcement, which we announced as part of the LEAD project, *see supra* note 7, hence the students’ expressed interest in the new “project.” We provide these excerpts to show the variety of theatrical talents, experiences and interests students bring to law school and the deep student interest in such courses.

- 1) “I am very interested. I love film, drama, and theater. I took intro to acting in college:”
- 2) “This is right up my alley! I did theatre in high school and loved it! I would love to be part of this class/project!”
- 3) “I am very much interested in this class. I was in talented theater and music from the sixth grade throughout high school; which means, the county I lived in paid for special music and theater instructors. I have starred in musicals and plays throughout high

217. Assessment of C.N., *supra* note 6.

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- school and did some choral stuff in college. I think if I were brave enough, I would have been an actress;”
- 4) “I was an avid theater participant in High School and College as an actor, stage manager, and writer;”
 - 5) “I think this is a great idea! I’d love to participate. My theatrical experience is as an actor. I played the Scarecrow in my high school’s rendition of Wizard of Oz in 2000;”
 - 6) “I have been involved in theater for the last 10 years, from middle school to high school to college and beyond. I have acted in a dozen shows, directed a few, and been involved in the production of several;”
 - 7) “I’m personally interested in the justice and ethics issues raised in the practice of law, especially as they relate to my faith, and also in the outside world’s perceptions of the profession. In terms of theater experience, I was in a number of plays and musicals in high school and college;”
 - 8) “I am interested in this project. I don’t have any performing experience, but I do have a Masters in Creative Writing;”
 - 9) “I am very interested in taking part in this project. As far as my theatrical experience, I grew up acting in church plays and participated in my high school theater production of Shakespeare’s *The Taming of the Shrew*, in which I played Patricio;”
 - 10) “I would definitely be interested in learning more about this course. As far as my theater experience goes: I’ve been acting and doing behind-the-scenes work for about 15 years;”
 - 11) “I am interested in the Professionalism Project. Experiences: I completed entry-level theater and acting courses during my senior year at College Park;”
 - 12) “I would be very interested in this project. I am an avid theater fan (I usually go to see more plays in a year than movies as I love the interaction and chemistry between audience and thespian);”
 - 13) “I am interested in the project, perhaps in a writing role. I am a writer and have written various poems and a novel (none of which I have actually opted to publish, assuming of course that I could);”
 - 14) “I am very interested in this project. A brief background: I have an undergrad degree in Theatre Arts and was nominated for the Irene Ryan National Collegiate acting award twice;”
 - 15) “I would be interested in a law theater class if it works with my schedule. My theatrical experiences are limited to high school. I played a baron in the *Madwoman of Chaillot* and Cordelia in

- King Lear;”
- 16) “I would like to participate in the new drama and professionalism project to help solidify and strengthen my understanding of the law. [In my job,] I often address audiences of 100+ individuals ranging from lay people to clinicians. I am also tasked with preparing talking points for agency leadership, which is akin to scripting a dialogue for a play;”
 - 17) “I am interested in taking the class and working on the project. I participated in drama club and musicals (including stage crew) all throughout school;”
 - 18) “I am very interested in the issues of ethics and would love to participate in the project. I used to work for an attorney who was ultimately disbarred for very serious ethical violations. That experience was a big shock and disappointment to me both on a personal and professional level. I did some acting as part of a drama club at the secondary school and university in Russia;”
 - 19) “I am really interested in being a part of your drama project. I have some experience writing plays for stage and screen and generally like the theater;”
 - 20) “I am a third-year evening student and full-time teacher with Baltimore County Public Schools. Although I have no personal acting experience, I have studied, taught, and reviewed many dramatic writings and performances. I am a lover of literature and drama. A project such as you describe sounds very intriguing;”
 - 21) “I am interested in learning more about this project. I did all of my school plays in high school and sang in the high school and college choirs!”
 - 22) “I would love to speak with you about the course you described—it seems like a great opportunity! For about a month I have been working on ideas for a small set of musical pieces based on the text from the Universal Declaration of Human Rights.”
