University of Miami Law Review

Volume 67
Number 2 *Volume 67 Number 2 (Winter 2013)*
SYMPOSIUM The Future of the Death Penalty in America

Article 4

1-1-2013

Study, Support, and Save: Teaching Sensitivity in the Law School Death Penalty Clinic

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ARTICLES

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I. INTRODUCTION

Simon[1] stabbed his wife fifty times. He had already been found guilty for her death, and now the jury had to decide if he lived or died. Simon also shot his two stepchildren multiple times (without killing them). He raped both his wife and his stepchildren before he stabbed and shot them. All three victims were mentally disabled with very low IQs. The above is a fragment of the facts from the *Simon* case, taken out of context for the sake of shock value. Yet, these fragmented facts are typically the first thing heard on a death case, or any homicide case. Without the involvement of a death penalty clinic, these facts may be all that is ever heard. Simon was a client of the Miami Law Death Penalty Clinic, where students work to ensure that clients' complete stories are uncovered, that clients' lives are heard and understood, and where students labor to save lives.

This article will first discuss the goals and missions that guide many death penalty clinics. The Miami Law Death Penalty Clinic has several student oriented goals and two broader missions. The first mis-

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1. "Simon" is a pseudonym to protect his privacy. Nothing in this article should be interpreted to conclude anything about "Simon's" guilt or innocence. This article uses these facts to demonstrate how to articulate a sentencing phase. Some facts have also been altered for privacy reasons.

sion is to expose students to the world of the death penalty. Goals involved in achieving this mission include: (1) the study of death penalty litigation, which involves teaching students death penalty law, policy, and litigation, exposing students to clients and court, including students on a death penalty defense team, and (2) other goals such as teaching students to advocate zealously for their clients as their top priority, no matter what their personal feelings about the case or client may be.

The second mission is to improve capital lawyering by raising the bar on capital representation. To achieve this mission, the goal is to support capital community lawyers by putting the students' studies into action. The students provide the community lawyers with much needed assistance and support. Students work with attorneys in the community (termed their community supervisors) and use their new knowledge to help the community supervisor get the job done thoroughly. This often includes sharing their ideas regarding sensitivity, compassion, and creative mitigation with their community supervisors. Although the fact that clinic students help community supervisors save clients' lives implies a mission of abolition, the Miami Law Death Penalty Clinic does not overtly state such a position. Nonetheless, the clinic's position on the death penalty is meaningless in this regard because bettering capital lawyering is the first step toward abolition. In other words, the clinic will make a contribution to the eventual abolition of the death penalty by simply providing quality legal assistance on capital cases. Additionally, the clinic accepts pro-death penalty and anti-death penalty students if they meet the clinic's standards. With students working tirelessly to save lives, it would be disingenuous to state that saving lives is not a goal of the death penalty clinic.

This Article will examine how to create and operate a death penalty clinic that will achieve the goals and missions mentioned above. The Article will also address how to supervise and direct a death penalty clinic, including what to teach and how to grade the classroom component, how to select students, the prudence of accepting pro-death penalty students into the clinic, how to avoid potential problems with students working on death cases, and the advisability of students speaking in court on a death case.

This Article will also discuss the necessity and power of teaching sensitivity in a death penalty clinic. Sensitivity is essential for mitigation, and it is one of the most challenging and critical skills the death penalty clinic director can teach the clinic student. This Article addresses such questions as how the death penalty clinic director teaches her students to find value in a client such as Simon. How to articulate arguments for the client's life with sincerity are issues of great signifi-

cance that students must wrestle with in a death penalty clinic. By lawyering with sensitivity (among other things), clinic students do in fact learn to find virtue and grace and advocate for such clients with sincerity. Sensitivity provides the student advocate with the ability to understand a client's life and suffering, while keeping a therapeutic distance from the traumatic events. Can sensitivity be taught? "Raising student awareness" may be a more applicable expression than "teaching." This is because each student already carries the ability to care and to be sensitive but retains some fear, hesitation, or nervousness that prevents him from expressing it—especially when dealing with death penalty clients. Students have also been taught in other law school courses or legal jobs to repress this way of thinking. They require instruction as to when it is appropriate. This Article will walk through the process by which the seminar component addresses sensitivity and compassion and then will examine the way in which the students view their clients in a new light. A student who has been taught to advocate holistically and with sensitivity will be better able to find the good in his or her client, understand the victims, and also care for themselves when dealing with traumatic cases.

Death penalty clinic students are also encouraged to learn emotional balance. This is an area that law schools do not teach and that the law profession sometimes avoids. The lack of emotional sensitivity and awareness in the law is a detriment to clients and lawyers generally.[2] This Article will discuss how to help students achieve a healthy emotional balance—personally and professionally—when dealing with their clients and cases. Further, it is vital for the clinical director to stay aware of the students' emotional well-being at all times. Death penalty work can be emotionally trying for even the most seasoned attorney. This Article will consider how to manage the emotional issues involved with students working with death cases.

A well-developed and directed death penalty clinic can achieve many things through the students' hard work, some of which include changing the law, preventing an execution post-conviction, obtaining a life recommendation from a jury, obtaining a waiver of death from the prosecution, obtaining a plea of life or a term of years, and ultimately developing a reputation that would deter the prosecution from seeking the death penalty when the clinic is involved. The Miami Law Death Penalty Clinic hopes it has achieved such a reputation but knows it has achieved the other above accomplishments—some several times over. Therefore, the substance and structure of the clinic is working. These achievements benefit the client, the community, the criminal defense

2. SCOTT L. ROGERS, MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL 13 (2009).

bar, and the law school as a whole. The death penalty clinic provides unique benefits for the student as well. Students working with individuals who murdered others in particularly gruesome or disturbing ways often develop feelings that cause them to grapple with emotions and beliefs that they have not yet had to confront in their lives. Most death penalty clinic students find that their emotional responses change during their clinic work. Many students report that they learned to find the good in all people, no matter how small, and some even discover a new appreciation for their own lives. It is this inner reflection that makes death penalty clinic students sensitive lawyers of the highest caliber.[3]

> I feel like I have finally found a place in the law school where I am understood, supported, challenged, and invigorated to work for justice. My only disappointment is that this clinic was not created earlier! This clinic provides students with the opportunity to approach the law from a holistic and realistic standpoint. It acknowledges and validates that being a lawyer is not just about knowing the law but also involves real human emotions, battles with one's own moral beliefs, interaction with and understanding of different types of people, and awareness of the world around you. I would absolutely recommend this clinic to others (and I already have!).[4]

II. GOALS AND MISSION: THE THREE S' OF A DEATH PENALTY CLINIC

As the title suggests, the Miami Law Death Penalty Clinic has three primary goals: study, support, and save (in that order). At Miami Law, students: (1) study death penalty law and litigation; (2) support capital litigators (community supervisors) in the community to reduce the likelihood of a death sentence; and (3) assist the director of the clinic and lead counsel on the case to save their client's life. These goals serve to help the clinic achieve its tripartite mission of exposing students to the world of the death penalty, improving capital litigation generally, and exposing the lack of support for capital defense today. Pursuing these three goals, students will gain the academic knowledge needed to litigate a criminal case of any kind and understand the true nature of the ethical obligations of a criminal defense attorney, while at the same time furthering the abolitionist movement in a way that is powerful yet quiet.

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3. Students who graduate law school having completed any clinical experience will be well-equipped for the legal world. In fact, most clinical students in any sort of clinic will learn some similar skills (live-client) and begin their careers leagues ahead of most other lawyers. As with most clinics, the death penalty clinic leaves students with fundamental skills and preparation that can translate to any type of legal practice, from criminal defense to foreclosures. *See generally* Rebecca L. Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 57 (2009).

4. Shana Shoem, J.D. 2011, Miami Law Death Penalty Clinic.

All clinics must place the interests of the student first, which raises the question of the lawyer's duty to place the client's interest first at all times. Therein lies the answer: The student must learn to be a lawyer who puts his client's interests first. This is an important learning goal. Representing a client facing the death penalty, who committed a crime that is appalling to the student, will quickly teach the student the role of a defense attorney. Will the student be able to defend, to the outermost bounds of the law, an individual he may very well deplore? Only one student in the Miami Law Death Penalty Clinic ever continued to loathe his client after the initial interview; the rest bonded with their client and found value in their lives. The student working with a client, for whom he would have voted death had he been on the jury, learned a valuable lesson—that this is what criminal defense lawyers do all the time. Criminal defense lawyers represent clients that they know are most likely guilty most of the time.

The Miami Law Death Penalty Clinic is not an innocence project. In fact, the clinic prefers to take cases where innocence is not at issue. This is because it is preferable to maintain credibility in phase II (sentencing) if phase I (trial) is lost. This means if the students and lawyers argue in the trial that the client is completely innocent and was in Australia hunting dingo at the time of the murder but the jury does not believe it and finds him guilty, the attorney's credibility is lost for sentencing. In phase II, the attorneys must get up and say, "forget the dingo—here is why you should spare his life. He is sorry and he has a brain injury, etc." There are ways to deal with this situation, but they are somewhat advanced for law students.

In any event, the academic experience of the students is a top priority for the clinic director; however, since the students and the clinic director have clients, the best interest of the clients is also top priority. It is important that ethical obligations owed to students and ethical obligations owed to clients do not come into conflict. This conflict can be avoided by ensuring that anything the student does within the clinic is in the best interest of her client; therefore, the student will be garnering the intended academic experience. This is because a primary academic goal in any clinical setting is to teach the students client-centered lawyering. The two goals of providing the students with a superior clinical experience and providing the clinic clients with the best advocacy possible go hand and hand—without divergence.

There are several death penalty clinics at United States law schools. Although none of them take an overt political position on the death penalty by expressing anti-death penalty views or incorporating an aboli-

tionist stance into their mission statement,[5] many death penalty directors and staff feel that an implied position against the death penalty is expressed simply based on the nature of their work. Three clinics overtly present the mission of bettering the capital lawyering in their area.[6] This mission alone can make great strides toward abolition and may even be called an abolitionist mission. This premise relies on the assumption that as capital lawyering improves, the government will lose an increasing number of death penalty cases, which will eventually lead the government to seek the death penalty less often. If the government does not seek the death penalty with frequency, the laws and the mammoth mechanism the judiciary and legislature have set in place to implement death sentences may seem increasingly pointless to the prosecutors, legislators, and governors. Thus, the first step toward death penalty abolition is to reduce death sentences by good lawyering on capital cases. Accordingly, every death penalty clinic works toward abolition by providing quality legal assistance to capital attorneys. This Article focuses on how a death penalty clinic can strive to ensure that the student's legal assistance on death cases is of high quality and is supportive.

There are few fully equipped and adequately supported capital defense lawyers.[7] The Miami Law Death Penalty Clinic helps to expose the problems with the condition of capital lawyering today. As one scholar observed, attorneys in capital cases are "often shockingly unqualified, unprepared, and unsupported."[8] The problem is pervasive. The courts do not provide nearly enough funding to investigate and litigate a capital case thoroughly, and the capital attorneys are inadequately trained and overworked.

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5. *See e.g., About the Virginia Capital Case Clearinghouse*, WASH. & LEE SCH. L., http://www.vc3.org/about/ (last visited Sep. 18, 2012) ("The Clearinghouse is a nonprofit, nonpartisan organization that does not embrace a political stance either for or against the death penalty."); *About the Death Penalty Project*, CORNELL U. L. SCH., http://www.lawschool.cornell.edu/research/death-penalty-project/about.cfm (last visited Sep. 18, 2012) ("The Cornell Death Penalty Project takes no official position on the wisdom or desirability of the death penalty . . . there is no litmus test for students who work on the Project's cases or research projects.").

6. *About the Clinic*, BERKELEY L., http://www.law.berkeley.edu/6107.htm (last visited Sep. 18, 2012); *About the Virginia Capital Case Clearinghouse supra* note 5; *Death Penalty Clinic*, U. MIAMI SCH. L., http://www.law.miami.edu/clinics/capital_defense_project.php (last visited Sep. 18, 2012).

7. *See* Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS. U. PUB. L. REV. 351, 361–62 (2009). There are many reasons for this, not the least of which is the stress and lack of adequate funds to compensate a capital lawyer for taking on the responsibility for saving a human life and the attendant emotional costs on the attorney and his or her family when losses inevitably come. The University of Miami Death Penalty Clinic has been privileged to work with some of the best capital litigators in the world and the clinic is grateful for their mentorship and support.

8. *Id.* at 363 (quoting Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 249 (1997)).

> Numerous reports have documented widespread inadequacies in representation at trial and sentencing. One indicator of the pervasive nature of the problem of inadequate representation has been the fact that these shortcomings have been pronounced in capital cases, the very cases in which one might expect better representation because of the stakes involved. For example, the *National Law Journal* conducted an extensive study of capital cases in six Southern states that account for the vast majority of executions and found that capital trials are "more like a random flip of the coin than a delicate balancing of the scales" because defense counsel are too often "ill trained, unprepared . . . [and] grossly underpaid." The study found that "capital trials often were completed in one to two days . . . [and] [t]he penalty phase, a capital trial's most important part, usually started immediately after a guilty verdict and lasted only several hours and, in at least one case, just fifteen minutes."[9]

All death penalty clinics appear to share the common goal of teaching students about death cases. This includes how to litigate death issues, how the death penalty is different from other sentences, and how to represent individuals who may have committed horrific crimes. The death penalty clinics make this mission clear and overt, in contrast to any abolitionist aspirations or ambitions. Each clinic achieves its goals in various ways. Some death penalty clinics have students remain at the law school, mostly working on specific issues within the death case with the clinical director.[10] Other death penalty clinics work in a purely externship fashion, in which students are placed in the capital unit at the local public defender's office to work on capital cases with the public defender. In such clinics, the death penalty clinic director is not substantively part of the case but oversees that the student is performing to the public defender's satisfaction and meeting her hours.[11]

Death penalty clinic students are typically highly committed and motivated to work on death penalty cases. Death penalty representation requires a great deal of work. It is not a surprise that capital attorneys find it difficult to do a thorough job. They are underpaid, overworked, and undervalued by the community. By providing capital defense attorneys with top-quality legal assistance through death penalty defense clinics, clinical students can help capital defense lawyers reach a higher level of representation, expose the poor condition of capital defense, and assist capital defense attorneys in meeting their ethical obligations when defending a client whose life is at stake.

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9. *Id.* at 362–63 (footnotes omitted).

10. *See, e.g.*, *About the Virginia Capital Case Clearinghouse*, *supra* note 5.

11. *See, e.g.*, *Capital Punishment Clinic*, TEX. TECH U. SCH. L., http://www.law.ttu.edu/acp/programs/clinical/cp/ (last visited Sept. 18, 2012).

III. STRUCTURE: HOW TO BUILD A DEATH PENALTY CLINIC

Death penalty clinics vary in structure. To meet the clinic's goals, a three-tiered, triangle-type structure works well. Such a structure results in a hybrid clinic—part in-house and part externship. However, nothing the student does is ever entirely external as students are supervised at all times and the clinical director is a part of every case the students work on. Students are placed with a supervising attorney in the community who is currently litigating a capital case. The case could be a new case that is in its pre-trial stage, an older case that is post-trial but pre-sentencing, or occasionally a post-conviction case. The death penalty clinic director will either act as co-counsel or as a consultant on the case. Therefore, the director (co-counsel or consultant from the law school directing the clinic), the clinic student, and the community supervisor (lead counsel) form the three-tiered relationship and all work on the capital case together.

Once placed, students have the opportunity to participate in the litigation of a capital case with a focus on mitigation. Students should have sufficient opportunities for client contact and communication, and they should become immersed in their capital case. The number of students in the clinic is carefully limited depending on the number of capital defense supervisors and the availability of the clinic director to fully supervise each student. Students must demonstrate the emotional maturity to cope with exposure to potentially disturbing or gruesome factual situations and depictions. Students are also required to exhibit strong research and writing abilities, a solid work ethic, a flexible time schedule, an enthusiasm to work in the area of criminal law and death penalty work, and a genuine interest in defending the rights of the accused. Students will be required to attend a weekly seminar class, which focuses on substantive death penalty topics. Students also have the opportunity for reflection and case staffing (discussing issues regarding their cases) during seminar class time.

Space in the clinic is limited and students are selected through personal interviews with the clinic director. Special attention is given to the students' grades in their writing class and criminal courses, as well as their overall law school GPA. The most weight, however, is generally given to the applicant's emotional maturity and commitment to do death work.

The clinic avoids post-conviction work for a number of reasons: (1) The clinic's goals are more difficult to attain; (2) the substance of the seminar class is focused on first and second phase work so students are not as prepared to work on post-conviction cases; and (3) clients are more difficult to save and closer to execution at the post-conviction

level, putting the student's emotional well-being in potential jeopardy. Nonetheless, with the right case and the right student, post-conviction work can play a very important role in a death penalty clinic.

Recently, a clinic student[12] worked closely on the pending execution of a client whose execution date had been set. The client had been on death row for thirty-three years. The student did extensive research and writing, arguing that it would be cruel and unusual to go forth with the execution when the client had already spent so many years in inhumane death row conditions. She claimed that these years on death row were cruel and unusual punishment itself and violated the Eighth Amendment.[13] Although the client was executed, Justice Breyer on the Supreme Court of the United States was compelled by the student's argument and wrote an important dissent—a dissent that could save future lives.[14] Justice Breyer noted that "[r]ecent studies and law suits document both the barbaric conditions pervading death rows and the debilitating and life-negating effects of these conditions."[15] In concluding that thirty-three years on death row under the threat of execution is cruel, Justice Breyer noted that "[i]n the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."[16] Justice Breyer ultimately concluded, as did the clinic student, that the justifications that support the death penalty no longer existed—they had become moot after thirty-three years on death row.[17] There could be little addition to the deterrent value as well as very little to add to the community's sense of retribution after the client had already been subject to inhumane conditions for thirty-three years.[18] Given that this client was very close to execution, the student was not permitted to meet him in order to protect her well-being. The student was subsequently hired by the Capital Collateral Relief Center to handle death penalty cases post-conviction directly upon her graduation from law school.

Each student must also sign a confidentiality agreement and a guarantee of commitment before they will be accepted into the clinic. They must also discuss the guarantee of commitment with the clinic director

12. Jessica Houston, J.D. 2012.

13. *See* Initial Brief of Appellant at 64–65, 67, Valle v. Florida, 132 S. Ct. 1 (2011) (No. SC11-1387); *see also* Lackey v. Texas, 514 U.S. 1045, 1045 (1995)

14. Valle v. Florida, 132 S. Ct. 1 (2011) (Breyer, J., dissenting); *see also* Valle v. State, 705 So. 2d 1331 (Fla. 1997) (per curiam).

15. *Valle*, 132 S. Ct. at 1 (Breyer, J., dissenting) (quoting G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 869–71 (1983)).

16. *Id.* (quoting Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting)).

17. *Id.* at 2.

18. *Id.*

before they are assigned to a case. This document has language similar to the following:

> I further understand that participation in the Death Penalty Clinic, in most cases, will involve my exposure to possibly disturbing information, including but not limited to, depictions of brutal homicides in the form of written reports, crime scene photos, medical examiner photographs, drawings, and testimony. Often such depictions may involve children. I understand that viewing such depictions or reading materials may be upsetting for me. As a participant in the Death Penalty Clinic, I will be required to have client contact. I am aware that my clients will be charged with particularly gruesome or troubling crimes which may include the murder and rape of small children. I understand that this is not a litigation project and my primary focus will be on saving my client from the death penalty. It is my opinion that I possess the maturity and emotional stamina to work on such cases. I am confident that I will provide my clients the best representation that I am able regardless of the nature of their crimes. By signing below I acknowledge that I wish to continue my involvement in the Clinic and have been fully informed of my duties and have had the opportunity to ask any questions that I have.

The Miami Death Penalty Clinic has never had a student decline to participate after reading the above. In fact, most students seem more excited to participate in the clinic after signing the form. This is of some concern to the clinic director as it raises questions as to the internal reasons a student may be signing up for this work. Certainly the excitement of the mystery, the murder, and the violence in the abstract is compelling, just like a horror movie. Prior to engaging in clinic work, a young student has not accepted any of it as real—yet. To them it is *Saw VII* or Universal Studio's Halloween Horror Nights. It is the clinic director's job to snap the student out of that and let the student see and recognize the true suffering, quickly. Everyone in this field will feel a bit of the *CSI* in it, but those who do capital defense long-term, and do it well, do not lose sight of the reality of the suffering of all involved—the victims, the families, and the clients. It is astonishing how quickly after joining the clinic students embrace the reality of their client's lives, the pain of all involved, and the gravity of the challenge of what lies before them. In all likelihood, this is attributed to their immediate acceptance and participation in the defense team, the amount of real life information thrown at them so quickly, and the simple shock that this is not television.

Students have the opportunity to participate in a capital case through client and witness interviews, depositions, plea negotiations, legal research, motion writing, motion hearings, fact-finding, pre-trial investigation, mitigation reports, pre-trial negotiations, mental health

evaluations, social services workups, motions for new trial, sentencing preparation, and sentencing hearings. All of this work must be supervised by the law school director or the community supervisor. The student and the clinical director must be accepted as full members of the defense team. If the supervisor (lead counsel) will not agree to this, a student will not be placed with him or her.

The Miami Law Death Penalty Clinic students are a full and integral part of the death defense team on any death case to which they are assigned. This is a prerequisite for placement on any case. Students are included in almost all attorney meetings, meetings with the client, staffings, and court appearances. The Miami Law Death Penalty Clinic expects the student to remain informed. If the students are certified[19] and may actually speak in court, whether they will is a decision made by the law school director, the lead counsel, the client, and all others on the team. If the student is a court observer, she will be there to take notes and keep the client informed. Making sure that the student and law school clinic director are included in all aspects of the case ensures that the "support" part of the process can be accomplished. For example, if a student is asked to write a motion to suppress, the student should be aware of all of the facts of the case in order to write a persuasive and winning motion. The material that comes with death cases can fill several boxes. The student will need to be familiar with all of it. This is why students are required to only work on one case so that the student can become completely familiar with that case and the client. Also, the student will have other law school classes and might not have enough time to become familiar with more than one clinic case.

Capital defense attorneys are inundated with work (as most attorneys are) and are in dire need of help on all of their cases, so they often give the students some work on another murder case even if it is not death. The students, in turn, may feel uncomfortable rejecting the work because they, more often than not, have aspirations of working with their supervisor after law school.[20] However, if the capital attorney supervisor is giving the student several cases, rather than just one, such that the student is unable to become completely familiar with at least one

19. A Certified Legal Intern is a law student who is certified in the State in which he or she is working in a law clinic to speak on behalf of clients under the supervision of an attorney. Each state has different rules and regulations for a student to become certified to speak in court. It is wise for students to find out these rules their first year of law school because many states have rigorous and extended regulations that can take many months, even years, to complete. Usually, a student must be a third-year student to be certified or sometimes a second-semester second-year. Often a letter from the Dean is required, or even a background check. *See, e.g.*, R. REGULATING FLA. BAR 11-1.2.

20. In May 2012, three students obtained post-graduation jobs doing death work as a result of their work in the death penalty clinic. This is not uncommon.

particular case and client, the clinic director may speak to the supervisor about refocusing the student's attention to primarily one capital case. It is also challenging for the clinic director to speak to the supervisor to suggest that the supervisor is not following the clinic parameters for the students' learning; it is not always easy to convince capital attorneys to take on law students in the first place[21] and the clinic director will understandably be hesitant to make the attorney defensive.[22] The death penalty clinic director and the students must be accepted as part of the defense team and part of the "circle of trust"[23] in order to give such suggestions or advice.

Grading a hybrid clinic is a challenge. Although the clinic director will be overseeing the work, students will spend many hours with lead-counsel (supervisor) where the clinic director may or may not be present. Grading the work that the director does not see is difficult and even unfair. To illustrate, if the clinic director has eight students and therefore eight death penalty cases at one time, the director can only be co-counsel on two to four cases, depending on the stage of the case. She will be a consultant on the other four. With each student working between ten and twenty hours a week on their case, the clinic director will be unable to be present for every student's work each week. The clinic director must rely on the supervisor's review of the student to some small degree. Necessarily, the greater weight of the students' grades comes from the director's personal observations and seminar class work even though they have spent most of their clinic time working on a case with the community supervisor. Therefore, the clinic director must make efforts to be present at several different law offices and work on several different death cases with all of the students. Students are also required to provide the clinic director with several samples of work product from their case, such as written motions, outlines, transcripts, memoranda from interviews, etc. The grading rubric is as follows:

(1) Conduct a client-centered empathetic interview that accurately identifies client goals and needs.
(2) Conduct a fact-focused witness interview that reflects active listening and the ability to obtain the necessary information in an appropriate, respectful, and ethical manner.

21. Some attorneys shy from allowing students to work on death cases as they question their training, maturity, and trustworthiness.

22. The Miami Law Death Penalty Clinic is very fortunate that our supervisors are already excellent capital defense attorneys and do not need guidance or advice from Miami Law. They do, however, need the help as they are overworked, like most capital defense attorneys are. All of them have been delightfully receptive and grateful for the clinic students' ideas and suggestions.

23. MEET THE PARENTS (Universal Pictures & DreamWorks, LLC 2000).

(3) Ability to thoroughly investigate each case by obtaining and organizing the relevant facts for zealous representation.
(4) Ability to conduct thorough, necessary, and accurate legal research.
(5) Ability to memorialize appropriately any work done on clients' cases. This means proper and clear documentation of all work done for every case and client. The understanding that the clinic is a law firm.
(6) A clear understanding that the clinic's work is the representation of incarcerated individuals, not a mere academic exercise. A reflection of the devotion the legal profession expects in such circumstances.
(7) The ability and willingness to work as a part of a team without conflict or when conflict arises to manage the issues with integrity and maturity while always keeping the interests of your client first.
(8) Organizational skills, ability to prioritize and seek assistance when necessary, never taking on too much work to be an effective attorney. Asking any question necessary to do an exemplary job.
(9) Demonstrated respect toward everyone within the profession including your adversaries (judges, prosecutors, staff, clients, etc.) Sensitivity to race, cultural diversity, disability, or issues that may offend or upset you.
(10) Punctuality and timeliness whether to court, to class, or for a due date for an assignment.
(11) Reflection, thought, skill, and effort put into written assignments. This includes writing for the court and for the professor.
(12) Personal Reflection. You are expected to be a reflective practitioner in all that you do.
(13) In every case you worked on did you develop a case theory? Did you develop a plan of action?
(14) If you spoke in court, how thorough was your preparation? How did you cope with the unexpected?
(15) How would your overall commitment and integrity be characterized? Your enthusiasm and professionalism?

The same rubric is filled out by the student half-way through the semester as a mid-term assessment. If the student's assesment of himself or herself is not reasonably accurate, then a conference is scheduled to discuss where the student is missing the point or where the student needs to improve. This should ensure that there will be no surprises at grade time. At the end of the semester, students fill out the form again to see if they improved. Students also create a learning plan at the beginning of the semester which details what they hope to gain personally and professionally by participating in the death penalty clinic. At the end of the

semester, students complete a final evaluation of the learning plan where they assess whether they have met their goals. All of these assignments help the student reflect upon what sort of lawyer the student hopes to be and how the student intends to go about doing it when coping with death penalty cases, or any case for that matter. Invariably, with each subsequent form and written reflection, students discover that they are struggling to find the proper equilibrium between compassion and detachment. Students also routinely find their excitement mounts as the semester progresses. Most of the students choose to re-enroll in the clinic, which is permitted for up to three semesters depending on the quality of the student's work.

The supervisors are also asked to fill out several forms. The client must sign a form agreeing to have a clinic student work on his case, and the supervisor must sign a similar form. Mid-semester, the supervisor fills out a brief questionairre with the following questions:

> Has your intern met the client? Has your intern had opportunities to come to court on hearings on the client's case and watch or assist? Does your intern feel a part of the defense "team"? Is your intern consulted regarding trial and/or mitigation strategy? Is your intern encouraged and allowed opportunities to foster connections and relationships with other members of the defense team? Do you provide your intern with meaningful feedback regarding your intern's work product? Does your intern have opportunities to understand the case holistically and work with both aggravators and mitigators? Is your intern encouraged to ask you questions whenever needed? Have you been keeping Professor Mourer occasionally updated about your intern's progress, performance and case?

This form is primarily for documentation purposes because the law school clinic director should have been in routine contact with all of the supervisors and (hopefully) already knows the answers to these questions. The form is also a means of self reflection for the supervisor, a reminder of sorts. At the end of the semester, supervisors fill out a review of the student and a timesheet. Students are also responsible for providing their supervisors with the Reprieve Foreign National Questionaire.[24] This form is intended to ascertain whether the client has foreign ties. If so, the organization Reprieve has funding to provide assistance in the client's defense. The criteria for "foreign ties" is quite technical and can be ascertained by Reprieve officials. The foreign ties could be through marriage and extend beyond what attorney interviews have exposed.[25] This could be a wonderful opportunity for a client.

24. *See The EC Project: Foreign Nationals Facing the Death Penalty in the USA*, REPRIEVE, http://www.reprieve.org.uk/investigations/ecproject (last visited Oct. 19, 2012).

25. *See id.*

Although both supervisors and students must fill out several forms, these forms are central to the student's learning and to the client's case.

IV. SUPERVISION AND DIRECTION OF A DEATH PENALTY CLINIC

The key to allowing students to be active members on the defense team is proper, full-time guidance and supervision and clear and complete teaching. First, highly qualified and committed students must be selected. The application process must be rigorous as students will be placed in situations requiring not only exemplary legal skills but heightened responsibility and maturity. Each student must fill out an online application, including a written essay as to why the student wishes to participate in the clinic.[26] Although students are put in the difficult position of having only one application and only one essay for all of the clinics available, the death penalty clinic rarely accepts a student who does not write a statement of interest focused on the death penalty clinic and rank it as his number one choice. This is because the death penalty clinic requires the student to be willing to grapple with issues that the student may not have predicted or may find upsetting. The student may not like his or her client but must be committed to saving the client's life.[27] There are exceptions, of course. Occasionally, students will join the clinic when it was not ranked as their first choice. This usually happens when the death penalty clinic director is familiar with the student from previous contact or when the student adequately explains the situation in the interview portion of the application process.

Every student is interviewed before being accepted into the death penalty clinic. It is in the interview where qualities like maturity and responsibility are better assessed. Often, these traits can best be measured by taking time to have a conversation with the student. The conversation should not feel like an interview to the student; it should last long enough to allow the student to relax and talk about himself or herself naturally, without feeling self-conscious.[28] At the end of the interview, it should become reasonably evident whether the student has the maturity, stamina and commitment for death penalty work.

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26. At the University of Miami School of Law, all of the clinics (twelve now) share the same application. The student then ranks the clinics in order of his or her preference. What often happens is that the student will write a generic essay that will apply to clinical work generally and not the specific type of work the individual clinic does. This is understandable given the competitive nature of the clinic application process. If the student tailors the essay to one type of clinic and is not accepted, there is the risk no other clinic will accept that student under the belief that student only wanted to do the clinic described in the essay.

27. Almost invariably, the student comes to care for his or her client even if the student felt negative at first.

28. What is being done to them is what will be taught to them to do to witnesses and clients.

An important question that commonly arises is whether a pro-death penalty student can be as committed to meeting the ethical standards required to participate in a death penalty clinic as an anti-death penalty student. Not one of the death penalty clinics consulted in the writing of this paper closed their death penalty clinic to pro-death students. Many death penalty clinics do not ask students to identify their political stance on the death penalty. Miami Law accepts pro-death penalty students. Although Miami Law also does not ask students their political standpoint, during class discussions students' political points of view become apparent. Having at least one pro-death student in class enriches the classroom discussion and encourages students on both sides of the issue to consider their positions more carefully. This in turn makes them better practitioners and more reflective in their lawyering. All but one of the death penalty clinic students changed their position to anti-death penalty by the end their term in the clinic.[29] The student that did not change his mind agreed with the principle of the death penalty but did not feel that it was being applied fairly.

Although, pro-death penalty students enrich the classroom setting, their beliefs may make their experience in the clinic rather challenging. All criminal defense attorneys must defend their client's rights with dedication and to the extent that the law allows. This is considerably easier when one's client is a car burglar rather than a baby killer. Although a criminal defense attorney may be disappointed to lose a presumably guilty client's car theft case, many if not most criminal defense attorneys believe six months of probation or sixty days in jail for stealing a car is acceptable, if the client has a prior record of car theft. In such cases, the attorney is not likely to spend too much time complaining about the client's sentence or believing that the sentence is morally wrong.

The viewpoints on the punishment of death for the baby killer are controversial. If a student's sole job is to save the baby killer from execution, the student who believes baby killers deserve execution faces a more difficult challenge than the anti-death penalty student who believes even the lives of baby killers should be spared. The death penalty clinic director must have an open and positive relationship with all of her students. This ensures that any students who feel at any time that they cannot defend their client to the best of their ability, whether pro-death penalty or anti-death penalty, can comfortably inform the clinic director and be taken off the case. In such a case, it is important that the student

29. One of the Miami Law Death Penalty Clinic students who began as pro-death penalty began to care very deeply for the life of one of her clients. She remained in the clinic for two years. Her view on the death penalty changed completely, and she was hired straight out of law school to do death penalty defense.

does not feel embarrassed or as though he or she has failed. Students who approach these cases with complete devotion deserve praise. Again, the clinic director must protect the interests of the client while safeguarding the students' academic experience.

The death penalty clinic director must also be very careful in selecting the community supervisors who will act as lead counsel. The clinic director selects supervisors who are already very good at capital litigation but still open to suggestions and assistance. In order to spearhead the foundation of a new death penalty clinic at a law school, an existing relationship with the capital defense community is of enormous help. This is because a supervisor will be asked to do a variety of things for the clinic. A supervisor for a death penalty clinic must act as lead counsel on a death case, allow the clinic director to be co-counsel (or at least a consultant), and allow the students to be active in all aspects of the case. This is an important job the clinic is asking of the community supervisor. The clinic director has likely been in the world of academics for many years. How will the death penalty clinic director know who to approach? Unless a death penalty director is hired straight from the capital defense community or litigated in that community for many years, a partnership with a capital litigation organization or even a well-known capital defense attorney can be hugely beneficial. Miami Law partnered with Florida Capital Resource Center[30] ("The Center") in building the death penalty clinic. Miami Law's collaboration with The Center and its executive director and founder, Terence Lenamon, facilitated the local capital defense attorneys' willingness to work with the clinic the first time. Now the clinic has the community capital defense attorneys clamoring for students from the clinic.

The community supervisor must also be an active and attentive mentor for the student. She must allow the student to interview the client, and if the student is certified, the supervisor must be open to the idea of the student acting as third chair in the trial or sentencing. Much of this depends on the student's performance during the semester and the student's relationship with the client, among other factors. The clinic director should also attempt to select community supervisors who have active death cases that will go to court while the student is still in the clinic; however, this may require some juggling and crystal ball reading. In return for mentoring and giving the student an active role, the supervisor obtains first-rate help and advice on a serious case, free of charge.

Many parties must agree before a student may speak in court on behalf of a death client. A student may not speak in court without the

30. FLA. CAPITAL RES. CTR., http://floridacapitalresourcecenter.org/ (last visited Oct. 19, 2012).

approval of lead-counsel (community supervisor), co-counsel (clinic director), the client, and the judge. Each of these individuals must sign forms of full disclosure and informed consent. Typically, the student will argue to the judge, not the jury.

Two of the eleven death penalty clinics permit students to speak on the record in certain circumstances.[31] The Miami Law Death Penalty Clinic determined that allowing students to speak in court was not only advisable but also necessary to meet its goals.[32] Students do significant amounts of reading and writing to become familiar with a death case. In time, students also form close but measured professional relationships with the client. At times, it may be the student who is best suited to argue an issue. This was true in Simon's case. Although he stabbed his wife fifty times, she died after the fourth stab. The student working with Simon is credited for noticing this fact.[33] The aggravator, "heinous atrocious and cruel"[34] is intended to be determined from the perspective of the victim.[35] Therefore, there was a good argument to be made that this aggravator was not applicable because the victim did not feel pain after the fourth stab (which would be seconds after the first stab). Although the judge did give the "heinous atrocious and cruel" instruction to the jury, the clinic student did not give up. He then argued for a defense "special jury instruction" that stated that the jury could not take into consideration any stabs that occurred after the victim's death.[36] The judge allowed this special instruction. There is little doubt that the jury

31. The Miami Law Death Penalty Clinic, in appropriate circumstances, may allow a student to speak in court on behalf of a client if both the clinic director (co-counsel), lead-counsel, and the client are in agreement. The research for this article found that Texas Tech's purely externship model places their students in the death penalty unit at the local Public Defender's Office, which may provide them the opportunity to speak in court on a death case in their discretion. *See Capital Punishment Clinic*, *supra* note 11. The research did not locate any other death penalty clinics that permit students to speak on the record.

32. Students have not spoken in front of a jury.

33. The student, Keon Hardemon, is now a successful attorney.

34. "Heinous" means extremely wicked or shockingly evil; "Atrocious" means outrageously wicked and vile; "Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. *See, e.g.*, State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

35. *See, e.g.*, Lynch v. State, 841 So. 2d 362, 369 (Fla. 2003) ("In determining whether the [heinous, atrocious, or cruel] factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator."). For example, if a person stumbles across a corpse and chops its head off, this is not "heinous, atrocious, and cruel" because the victim was already dead; thus, it felt nothing. As in Simon's case, the victim was dead after the fourth stab, so the subsequent stabs should be irrelevant.

36. The special jury instruction stated: "You are instructed that actions of the defendant, which were taken after the victim was rendered unconscious or dead, are not relevant and should not be considered in determining whether the murder was especially heinous, atrocious or cruel."

took this instruction seriously and that it was an important consideration to them in returning a life recommendation for Simon.[37]

For the student to make these arguments properly, he must have extensive knowledge of the "heinous, atrocious, or cruel" aggravator. The death penalty seminar class taught by the death penalty clinic director educates students on how to litigate a death penalty case properly. This includes a comprehensive overview of all aggravators and mitigators. The class has a focus on mitigation, as does the student's work on his client's case. Topics discussed and accompanying assignments cover, among other concepts, (1) all the aggravators and mitigators; (2) victim impact; (3) mental health mitigation; (4) head injury and/or brain damage; (5) chronic emotional trauma; (6) attorney stress; (7) volunteers and interviewing; (8) victim vindication (closure); (9) how to write a mitigation packet; and (10) investigation. The importance of mitigation is emphasized. Students are taught that mitigation is ongoing and should begin the day the case hits the attorney's desk. The largest assignment in the death penalty seminar class is the mitigation packet or letter in which the class is given a sample factual situation (loosely based on Simon's case) and must write a mitigation letter to the prosecutor asking for a waiver. Before writing the letter, students are given time to brainstorm with the rest of the class and the director. The clients with whom the students are working have all signed confidentiality waivers allowing the class to speak about their cases. This process benefits the clients a great deal; members of the class collectively come up with creative ideas to help the clients. Some students have obtained waivers as a direct result of their mitigation letter.

Students in the death penalty clinic are prepared to start working on death penalty cases through the combination of class substance and discussion and by working closely with the clinic director and supervising attorney on the death case. By the time any student would be permitted to speak in court, the student would have been working on that case for at least six months to a year, under the close supervision of the clinic director, while studying the intricacies of death penalty litigation in the classroom. Students are never permitted to speak in court without the clinic director present in court with them. When students do speak they are usually highly successful and make an excellent impression on the court.

37. There were many other mitigating factors that certainly influenced the jury, including brain damage that was detected with new technology called a QEEG, as well as extensive childhood trauma.

V. MITIGATION AND MERCY: STUDENTS SAVING SIMON WITH SENSITIVITY

Using the case against Simon, this section will examine the topics that are discussed with students in the death penalty seminar class and why. It will also explain how students can use their newly acquired knowledge to save lives like Simon's. Students in the clinic learn substantive death penalty topics in concurrent weekly classroom sessions. The classroom is essentially the study component of the goals. The following sections explain how one gets from the study of the death penalty to saving a client's life, with an examination of how death penalty clinic students were able to save Simon's life.

The first things students learn in the death penalty clinic are aggravators and mitigators.[38] Aggravators are circumstances that increase the client's moral culpability. There are only statutory aggravators,[39] and they must be proven beyond a reasonable doubt by the government.[40] The jury may not recommend death unless at least one aggravator is proven beyond a reasonable doubt.[41] Some examples of the aggravators in Florida include situations where the client was previously convicted of a capital felony or a felony involving the use or threat of violence; was currently under a sentence of imprisonment when the crime was committed; created great risk to many; committed acts that were especially heinous, atrocious, or cruel ("EHAC"); committed acts that were cold, calculated and premeditated ("CCP"); committed acts against a victim under age twelve; and committed acts where the victim was particularly vulnerable due to age, disability, or familial authority.[42] There are several other statutory aggravators. Federal courts and some states have the aggravator of future dangerousness.[43] This is a particularly difficult aggravator to wrestle with. Typically, the defense

38. For those reading this article not familiar with death penalty litigation, some basics will be explained. It is also useful to write a few of these details out to demonstrate to the reader what topics the students learn and discuss what students did with their knowledge.

39. *See* FLA. STAT. ANN. § 921.141(5) (2012).

40. *See e.g.*, Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983) ("The requirement that the existence of aggravating circumstances be proved beyond a reasonable doubt is . . . a settled principle of Florida law.").

41. State v. Steele, 921 So. 2d 538, 540 (Fla. 2005) ("In Florida, to recommend a sentence of death . . . a majority of the jury must find that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance listed in the capital sentencing statute.").

42. FLA. STAT. ANN. § 921.141(5).

43. Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions it Supports*, 35 AM. J. CRIM. L. 145, 146 n.2 (2008). Future dangerousness, depending on the jurisdiction, is important to address in one form or another. The jury will be wondering if the client can kill someone in jail. The jury needs to have these fears put to rest. The best way is to have an expert in future dangerousness look at the client's crime, record, and record in jail and

will have to refute the testimony of an expert who claims that the client poses a future threat to the community. Such cases often result in a "battle of the experts," which is particularly unproductive because nobody can predict the future. Unfortunately, this is an area where the government frequently uses scare tactics to influence the jury to vote for death.

Mitigators are anything in the client's life that should make him or her less morally culpable of the crime. It must be emphasized that mitigators are not excuses, but reasons. There are statutory and non-statutory mitigators. Statutory mitigators include facts such as, the client has no significant prior criminal activity; the client was suffering from a mental or emotional disturbance; the victim was a participant in the crime; the client was a minor participant, the client was under duress; the client had an impaired understanding or capacity to conform himself to the law; or the client's age.[44] Non-statutory mitigators include almost anything that shows the client has positive qualities that make his life worthwhile, especially events or characteristics that should reduce his culpability for the crime but do not fall under the statute.[45] These range from pointing out that the client sat in court cooperatively, to explaining that the client went to rehab and got clean on his own. A non-statutory mitigator may also include an assertion that the client witnessed a terrible event in his youth, but his trauma did not quite rise to the level of a statutory mitigator. Mitigators and aggravators differ by jurisdiction. Aggravators must be proven beyond a reasonable doubt, and mitigators must be proven by the greater weight of the evidence.[46]

As previously stated, mitigation must begin the day a capital case hits the attorney's desk as the amount of investigation required for mitigation in any death case is almost unfathomable. For instance, if an attorney wanted to provide mitigating evidence by introducing testimony that showed his client sat quietly and behaved well all through third grade, the attorney would have to speak to the client's third grade teacher. Someone on the defense team would then have to talk to every teacher the client had to find compelling information for the client. Mitigation investigation is a black hole that never ends; it could go on forever. Saying "there is nothing left to investigate regarding mitigation"

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discuss the likelihood that he will be able to injure anyone in jail. There are many experts of this sort available. They should be very familiar with prison procedures and emergency protocol.

44. FLA. STAT. ANN. § 921.141(6).

45. Sharon Turlington, *Completely Unguided Discretion: Admitting Non-Statutory Aggravating and Non-Statutory Mitigating Evidence in Capital Sentencing Trials*, 6 PIERCE L. REV. 469, 469 (2008).

46. *See, e.g.*, *Steele*, 921 So. 2d at 543 ("To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance . . . ."); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (noting that mitigating factors must be reasonably established by the greater weight of the evidence);

would not be an accurate statement. Mitigation can be almost anything. It is hardly possible to imagine one person having the ability to do it all, especially because that one person will be working on other cases.[47] This is one of the reasons why the support level of capital lawyering needs to be improved. Death penalty clinic students provide labor at no cost. Further, each case should have a mitigation specialist to ensure that it is being investigated properly.[48] Much of the information regarding the *Simon* case came from experts who evaluated and tested Simon. Students need to learn when an expert is needed, how to determine what kind of expert is needed, and how to select the right expert to testify. A solid connection with the capital community and access to resources are essential to litigating a capital case properly. The defense attorneys must determine everything possible about a potential defense expert, just as the defense must thoroughly investigate a government expert.

Death penalty clinic cases usually have multiple aggravators, many of which can be gruesome or disturbing. Through learning about mitigation and working closely with individuals facing the death penalty, students almost invariably learn to separate the individual from the crime. Students who get to know their clients tend to genuinely care for them, regardless of the nature of their crimes. This is also true for students who began the death penalty clinic pro-death penalty. Without sensitivity discussions, it is doubtful that pro-death students would come to care for and sincerely fight to save the lives of clients who committed heinous and brutal crimes. Bringing compassion to the profession facilitates the attorney's own strength and balance and provides clients with a better defense.

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47. It is also unimaginable for any defense team to have the funds to do truly extensive and complete mitigation.

48. A Mitigation Specialist generally has the following duties: compile evidence and extensive documentation relating to the client's background through investigation; interview; search records; collaborate with local law enforcement agencies, medical professionals, and educational institutions; collect information and records on the client's life history, including family background, prior personal relationships, educational history, medical history, employment history, and criminal history to obtain information to assist in mitigation; counsel clients and family members regarding procedures, possible sentences, and local resources; collect and maintain all resource material relating to death penalty sentences and trends; obtain court orders, subpoenas, and other legal process from the appropriate authority; execute same by locating parties named in each document and performing proper in-person service of the documents to named parties; locate witnesses; interview and coordinate court appearances; serve subpoenas and conduct background investigations as necessary; obtain statements as part of the evidentiary process by interviewing witnesses, defendants, informants, co-defendants, victims, suspects, and other relevant parties; initiate and maintain a variety of resource materials, files, and records (computerized and manual) related to case mitigation and information gathered; and prepare written reports for attorneys and courts. *See* Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 824 (2008).

Unlike defense attorneys, prosecutors and juries do not have months to discover the humanity within a person who appears to be a monster to the outside world. This is unfortunate because the majority of the time, an individual who commits horrific crimes has many mitigators that help to explain how such crimes occurred. Even clients who do not overtly exhibit any visible mitigators or redeeming qualities likely have abundant mitigation.

Sociopaths and psychopaths are a different case; they often do not have traumatic childhoods, and their criminal behavior does not usually stem from brain damage or chronic emotional trauma but rather stems from their psychopathy.[49] This illness is characterized by the ability to manipulate others. Psychopaths are also highly concerned with image.[50] Mitigation in these cases usually comes from superficial good deeds done by the client for the purposes of gaining another's good favor.[51] Students should realize that finding virtue and value in the psychopath will be more difficult than finding it in the majority of other clients because a psychopath's kindness does not come from the wish to help, but only from the desire to be viewed as kind by others. Perceptive students may recognize their client's insincerity and hold it against the client. Students must therefore learn the differences between mental illnesses and how to recognize each illness. A student who is unable to feel compassion for the psychopathic client may have difficulty defending that client with the necessary passion. That student may also feel as though she failed an important part of the job. The student's personal well-being and ability to defend the client will improve if she understands that her feelings toward the client do not stem from her but from his mental illness. Students should be taught that almost every death client should be examined thoroughly by a mental health professional.

The majority of the clients, however, exhibit overwhelmingly positive qualities and virtuous traits because such characteristics are part of

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49. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (4th ed. 2000) (defining Antisocial personality disorder (APD), the technical word for the mental disorder under which psychopathy and sociopathy are classed, as a mental disorder characterized by the "pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood"). Under this definition, sociopathy and psychopathy are also characterized by "(1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeatedly lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsiveness or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another." *Id.* at 649–50.

50. *See id.* at 647.

51. *See id.*

their intrinsic value system. Students find difficulty in articulating to the prosecution, the judge, and the jury that someone like Simon or any death client is filled with many of the same joys, sorrows, weaknesses, and regrets as the rest of humanity. Students find it even more difficult to simultaneously distinguish that client from the rest of us as having trauma, mental health problems, and other mitigators, and explain why that should exempt him from the death penalty. Yet, students in the death penalty clinic learn to do just that by simply discussing the issues and mitigators with each other in class, formally making arguments in class, and writing a mitigation letter or writing a closing argument (for a death sentencing phase). Students find these exercises challenging at first, even the adamantly anti-death penalty students. An important lesson for law students to learn early on in death work is that like the trial phase of the case, mitigation and the penalty phase should have a theme. The theme must show that the student genuinely cares about his client and that the jury should care about the client too. This theme may involve a catchphrase that is repeated, as one would do in a trial of any kind. Sometimes quotes from those who articulate sentiments better than the attorney's own words are used. In Simon's case, the closing argument began with a quote from Nobel Prize winning scientist Marie Curie: "Nothing in life is to be feared, it is only to be understood. Now is the time to understand more, so we may fear less." This quote was followed by the reasons (mitigators) that assisted the jurors' understanding of why Simon committed his awful crimes. Another quote which was considered for this case was from Jeremy Taylor, a seventeenth century cleric in the Church of England: "To preserve a man alive in the midst of so many chances and hostilities, is as great a miracle as to create him."

Students must learn early on that they must communicate to the jury that they respect their client and genuinely care for the client's life. Speaking from the heart during the sentencing phase is critical because the jury is evaluating the attorney's honesty at each turn. If the jury believes that the attorney finds value in the client's life, this alone can be the difference between life and death. Lawyers who turn their back on the client in court, who do not meet their client's eye, and who do not touch, hug, or hold the client's hand in times of stress are communicating something very negative to the jury—that they are unsure of the decency or dignity of their own client. Lawyers frequently underestimate the importance of body language in court and lose track of the fact that the lawyers are constantly being watched and judged by the jury. Whatever judgment the jury makes about the lawyer will be held against the client.

When students are permitted to sit at counsel table their actions are of utmost importance even if they do not speak on the record. If a student is permitted to sit at counsel table during the sentencing phase, the student can communicate to the jury that the student respects the client's life and values his humanity through body language alone. In a death penalty clinic classroom setting, role-playing, by sitting next to a client in court who has decapitated a small child, is an effective technique to demonstrate the importance of showing this. When in the presence of the jury, students are expected to hug the client when saying hello and also when the corrections officer takes him away. While at counsel table, the student is expected to smile while whispering to the client and to pat the client on the shoulder frequently. When the witness is testifying about something horrible that the client did, the student is expected to alternate between putting his or her arm around his shoulders, giving him a tissue (even if he is not crying), and holding his hand, if his hand is lying on the table. The student is expected to watch the jury, making eye contact while looking slightly forlorn. All these non-verbal actions can make a considerable difference in the outcome of the case.

Word choice is also profoundly important when attempting to convey the seriousness and magnitude of the jury's decision. Up to this point the jury's job has been described as reaching a decision about life or death. Technically, the jury merely provides the judge a recommendation. It is much closer to reality, however, to call the jury's job a decision or ruling because the judge puts great weight on its recommendation and rarely overturns it. The students should be taught to carefully consider what the jury and/or prosecutor will be thinking in order to determine what the student will say and how they will say it.[52] By that point, the students should acknowledge that each member of the jury is fundamentally pro-death penalty. Therefore, the attorney's and the student's jobs are to convince the jury or the prosecutor that this particular case and client do not warrant the death penalty. A general moral speech against the death penalty will nail the client's coffin shut. Juries will generally be inclined to vote for death.[53] They want answers as to why they should not recommend death. Capital jurors will likely be thinking:

(1) How can it be possible that I should spare his life even though I believe he deserves to die for what he did?

52. This presumes a student is permitted to speak in front of the jury. This would also apply to plea negotiation and writing a mitigation packet.

53. *See, e.g.*, David Lindorff, *The Death Penalty's Other Victims*, DEATH PENALTY INFO. CTR. (Jan. 2, 2001), http://www.deathpenaltyinfo.org/node/607 (noting that in all capital cases, the jury pool is carefully, and legally, purged of anyone who has doubts about the death penalty).

(2) Tell me why the ultimate crime should not be paid for by the ultimate punishment?
(3) What could possibly be wrong with the concept of "revenge" in light of the absolutely horrific brutality he demonstrated in killing her?
(4) Because of what he did to her, his death now feels like the only answer. Do you have an answer for me that feels better?
(5) If I spare his life, how can I ever look her parents in the eye?
(6) Wasn't her life worth more than just returning this monster to a place he knows and in which he lives comfortably?
(7) I know that if it were my child he killed so brutally, I would want him to die for what he did. Why, then, should I deny this to her parents?
(8) When someone has led such a terrible life of crime and destruction as he has, doesn't there come a time when we have to say, "Enough is enough. You cannot do this to us anymore"?
(9) So what if he had a bad childhood, or was taking drugs, or is not as smart as the average guy, or was young? Why in the world should this outweigh the horrible thing he did?
(10) I was always taught that you must accept responsibility for the choices you make and the actions you take. Why, then, should he not be held accountable for the choices he, alone, made and the actions he, alone, took?
(11) I see no signs of remorse coming from him in any way. In fact, he seems cold and distant and almost arrogant about all of this. Why in the world should a man like this have his life spared?
(12) If he wins and we spare his life, what kind of message are we sending to our community? Aren't we saying that it is okay to do what he did?
(13) Why should I feel bad for voting for death for him when he did not feel the slightest bit bad when he killed her?

There are answers to these questions that can be taught to students. Students can then give the answers to jurors or to the prosecutors in a mitigation packet. The answers will vary depending on the client and case. Even death-qualified juries[54] can be persuaded by properly presented mitigation. In a death penalty clinic, however, the director may choose to discuss these questions in the classroom, rather than spoon-feed them to the students. Students often come up with superb answers, and the class always comes away with a better understanding of mitigation. Stu-

54. "In order to be 'death-qualified' to serve on a capital jury, a person must be willing to consider all of the sentencing options—usually death and life imprisonment without parole." *Death Qualification*, CAPITAL PUNISHMENT IN CONTEXT, http://www.capitalpunishmentincontext.org/resources/deathqualification (last visited Nov. 13, 2012). "If their opinions would prevent them from considering any of the sentencing options, then they are not "death-qualified" and are stricken from serving on the jury." *Id.*

dents should eventually be able to articulate mitigators and what is mitigating about them when given only the facts of a case. These discussions helped students understand why Simon's chronic emotional trauma was mitigating.

In short, this is how students described Simon: Simon watched his seven-year-old sister get raped and killed by three white men (Simon is black) at a construction site. Simon was four years old at the time. He hid and watched in fear as his sister was raped. Simon felt hopeless and guilty that he failed to save his sister. Simon was so damaged by this event that he never learned to trust others or feel a sense of self other than guilt and fear. Watching his young black sister get raped by three white men also solidified Simon's conception of a black man's place in the world. He viewed himself as weak, helpless, and full of shame. This traumatic experience is one of many shocking events that occurred in Simon's youth that led him to grow into a man with a shattered view of the world. He felt nothing but fear and distrust of others. He had a damaged sense of self with recurring symptoms of trauma, including nightmares, delusions, persistent bad memories, and paranoia. Simon was not a monster but a sick and struggling man laboring to cope with incapacitating deficiencies that prevented him from controlling his impulses. Simon could not control his impulses because he had frontal lobe brain damage, which affects executive functioning such as impulse control. He used crack and alcohol to numb his pain, which increased his paranoid delusions. At the time of the murder, Simon was experiencing hysteria, paranoia, and delusions. As a child, Simon experienced tremendous neglect by his mother and was raped by his own third grade teacher.

These mitigating factors were compelling to the jury and painted the picture of a sad and mistreated little boy who was molded into the troubled man that sat before them.[55] At this point, jurors will often think of someone in their lives who suffered terribly and did not go on to murder and rape. The questions of why someone like Simon commits murder and rape, while others who suffer from chronic emotional trauma do not, need to be addressed head on. The student must address what made an individual like Simon particularly vulnerable to his own tragic events and unable to overcome them. This is where the complete image and portrayal of the client's life must be presented to the jury, such that the jury is provided with a full understanding of the client's being, existence, motivations, joys and sorrows. The "how this happened" and "why this happened" must be answered, at least in part. The

55. There were many more facts and complexities in Simon's case left out here for simplicity.

jury must get to know Simon, and by knowing the true Simon, the jury will see the humanity in Simon. It is difficult to kill another human.

Juries are particularly compelled by remorse. They look for and can be moved by remorse. Clients who exhibit regret or sorrow for the victim's pain reflect their own humanity. Juries who find that a client is living with genuine guilt and shame for his actions will more likely vote for life. Students should be advised of this early in their studies because remorse is one of the most effective non-statutory mitigators.[56] If the client expressed remorse even once, this should be communicated to the jury and repeated often so each juror is sure to hear it. This includes if the clients said "I am sorry" even one time.

Jurors often misinterpret the client's facial expressions in court as cold or heartless. Clients often have expressions in the penalty phase that appear vacant. This expression may influence the juror to view the client as coldblooded and unfeeling. If the client has such an expression, it should be explained to the jury.[57] The proper times to comment on a client's expression would be in the abstract or by analogy in jury selection or directly in closing argument. In closing argument, the attorney can explain that a vacant stare or blank look can be indicative of many different emotions, the least of which is lack of remorse or heartlessness. When presented with this question, students can come up with many different emotions this expression could signify. The best one is that it signifies such overwhelming sorrow and regret for his actions that he is unable to face the proceeding as a mode of self-protection because listening to the horror story over again would be too painful for him to tolerate. His rigid body language and blank stare is indicative of the client bracing himself against the traumatic events that devastate him with grief and remorse. He is also trying to avoid facing the memories of his own personal traumas that cause him shame, guilt, and pain. What other expression would anyone expect from a repentant traumatized man waiting to hear his fate? In other words, even if the client has never shown an inkling of remorse and sits in court with a stone cold blank stare, good lawyering may turn a negative into a positive.

Bear in mind that when the jurors retire to the jury room to discuss the case, they will not recall anything about mitigators or aggravators. They will discuss issues like "life vs. death" or "bad facts vs. good facts."[58] This is damaging for the defense. Students should know that

56. *See generally* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (1998) (examining the effects of different trial strategies on likelihood of a life or death outcome).

57. Hopefully, the judge will agree.

58. *See generally* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 113–14 (2010).

they must dissuade the jury from list-making and encourage them to listen to their hearts. Therefore, it is particularly important that students and attorneys alike convey that no law will ever require the jury to recommend death. On the other hand, the law may require them to recommend life.

In Florida for example, the jury is required to recommend life if no aggravators were proven beyond a reasonable doubt.[59] Even if aggravators are proven beyond a reasonable doubt, Florida law requires the jury to recommend life if the proven mitigators outweigh the aggravators.[60] Hence, even if the aggravators were proven beyond a reasonable doubt, the jury is not required to recommend death.[61] This point is worth repeating: *no law can ever require a juror to recommend death under any circumstances.* The law, however, can and does require a juror to recommend life under a number of circumstances, such as when no aggravators are proven beyond a reasonable doubt or when the mitigators outweigh the aggravators.[62] Importantly, the jury instructions will advise the jury that they may vote for life under any circumstance and for any reason, even if many aggravators were proven and no mitigators were proven.[63] Mercy needs no justification in our society. Further, no juror is required to provide a reason for not recommending death.[64] Jury members can recommend life for any reason. This is the point where articulating the sensitivity that the student has been studying and showing comes into the picture. The abovementioned arguments are discussed frequently in class, and students are encouraged to create their own. They are useful to encourage jurors to vote for life, and they all revolve around sensitivity and compassion. Again, sensitivity pervades

59. FLA. STD. JURY INSTR. (CRIM.) 7.11, p.5 (Aug. 2012) ("In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.").

60. *Id.* at 7.11, p.9 ("If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.").

61. *Id.*

62. *Id.* at 7.11, p.12 ("If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.").

63. *Id.* ("Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death.").

64. *Id.* ("The fact that the jury can recommend a sentence of life imprisonment or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your advisory sentence.").

all aspects of a death penalty case. It must even be explained to the jurors.

Whether to recommend life or death is a personal and private choice for each juror—whether a human lives or dies is the ultimate decision and no juror should feel compelled to provide a reason or explanation for saving a life, no matter how pressured the juror feels.

Even if the foreperson has a mile-long list of aggravators and not a single mitigator, any juror may vote for life and should never feel pressured to explain himself. A jury may be pro-death penalty, but in the case before him, he may feel the desire to leave the client with what dignity he has left by sparing his life. Students should realize how difficult it may be for a juror who wishes to vote for life but is being pressured by the rest of the jury members to give them a good reason. It is the defense attorney's job in closing and throughout the trial to provide that juror with the knowledge that there need not be any words or articulated reasons to defend the desire to provide the gift of life. Though the juror may know he need not provide a reason, the task is not so easy; the defense must also provide the jury with the strength to stand firm and remain committed to their position. The last thing one wants on one's conscience is the death of another.

Beware that if any member of the defense team—student or attorney—depicts the client as mentally ill or brain damaged, he or she runs the risk of portraying the client as scary and dangerous as opposed to just ill. Juries may be inclined to fear the client and see him as inhuman—a scary, dangerous, mentally-deranged murderer. It is important that mental health mitigation is dealt with very carefully. Its purpose must be to show a lack of culpability and evil intent. It must be accompanied by the reassurance that the client will be safely locked up in prison for the rest of his life and will never be able to hurt anyone again. Again, students are very capable of uncovering these arguments on their own with the guidance of the clinic director. If students unearth their own way of stating these arguments for life, they will understand and remember them better, and their words will be from their own hearts; this will be vastly more persuasive both in court and in a mitigation letter.

It is important for the death penalty clinic director to keep in mind that although strategy cannot usually be deemed ineffective assistance of counsel,[65] failure to present mitigation in a death case can never be considered strategy and can therefore constitute ineffective assistance of counsel.[66] The law recognizes that mitigation saves lives, and without it,

65. Strickland v. Washington, 466 U.S. 668, 681 (1984).

66. *See id; see also* Porter v. McCollum, 130 S. Ct. 447, 453 (2009) (granting federal habeas

juries might invariably recommend death. Without mitigation, the scales are unbalanced and the process would be unconstitutional. With proper teaching and supervision, students are more than capable of ascertaining and presenting compelling mitigation.

VI. STUDENT HEALTH AND WELL-BEING

Although students are forewarned that they will be challenged emotionally and sign statements indicating that they are mature enough to handle death penalty litigation, it is the director's responsibility to guide students as they venture into an unfamiliar world that they have probably only seen on television. Clinic directors must be mindful that because most of the information will be confidential, students can only discuss their cases with the director and the rest of the class. Death penalty clinic directors must ensure that classroom sessions leave time for free-form talking and encourage teamwork, unity, and cohesion among members of the class. The class should become a "safe zone" where students feel free to express themselves entirely without fear of appearing weak or vulnerable. The "safe zone" should be free from repercussions, insults, affronts, or condescension. Sensitivity is the cornerstone of any "safe zone." Ground rules are essential. When a student is discussing personal feelings, the class must provide support and constructive feedback. If a student is merely providing an opinion, however, then discussion should be wide open. The first classroom session covers sensitivity and how to tell the difference between a student's personal feelings and a student's opinions. Additionally, when a student raises an issue, the director could simply flag the topic if it is not open for debate.

When working with traumatic or sad events for an extended period of time, some distancing is essential. Miami Law Death Penalty Clinic students are routinely told:

> If your client is sentenced to death, it is my fault, it is lead counsel's fault, it is the client's fault—it is several people's fault EXCEPT YOURS! But if your client gets a jury vote for life, a waiver, or a term of years, IT'S ALL BECAUSE OF YOU!!

Good attorneys and clinical students care about their clients. Yet their jobs would be impossible if they were to become too emotionally involved with those clients. Further, remaining too close to a client may cause secondary trauma and an inability to do the job properly. Therefore, some distancing is needed; but how much and what kind? Repression is generally thought of as relating to internal representations,

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relief after finding that defense counsel's failure to uncover and present any mitigating evidence regarding the defendant's mental health, family background, or military service during the penalty phase was deficient).

meaning denying personal responsibility or personal relevance. For example, criminal defense attorneys routinely repress any connection with victims by convincing themselves that such a thing (rape, murder, their own child being hurt) could never happen to them. This is done by distinguishing the victims from the attorney, by rationalizing that the victim did something the attorney would not do or went someplace the attorney would never go. The truth is that any of these crimes could happen to anyone. Nonetheless, a lawyer or a law student cannot adequately defend a client without distancing himself or herself from the horrifying events that happened to the victim. It is often necessary for the student and attorney to mentally place themselves in the mind of the victim in order to investigate the case. This would be too painful if defense attorneys admitted to themselves that this victim could be them.

Conversely, denial is thought to mean the suppression of external facts and issues. Denial of external facts in a case is usually not beneficial to its defense. Yet, there can be exceptions. The attorney must be fully conscious of what she is denying and knowingly decide if she is denying or ignoring a relevant fact. The mind naturally uses defense mechanisms to protect itself—this is healthy and often necessary when dealing with death cases or any traumatic issues. Finding a balance between the need to understand the emotional and painful issues involved in a case and the need to protect oneself from trauma, while still maintaining the ability to make rational and thoughtful judgments, is difficult and comes with experience. Although the advice provided by this article may help deal with trauma, only the individual attorney or student working with trauma can tell when a problem is approaching. The student should be advised to seek immediate assistance when feeling overwhelmed or disturbed. A state of permanent repression or denial can lead to serious problems. Any denial or repression should be done on a case-by-case basis, and the attorney should be aware of its occurrence. Not all disturbing facts in a case can be denied. Criminal lawyers, indeed all lawyers, deal in suffering and must find ways to cope. It is particularly distressing when the cases involve child victims, and many death cases do.

Can students avoid secondary trauma by detaching themselves from their client's suffering? Perhaps. However, students (and attorneys) cannot properly investigate or litigate a case until they embrace the pain of the entire cast of characters in the case. To "embrace the pain" means to understand it, recognize it, reflect upon it, and never ignore it. The pain is an integral part of any homicide, rape, or violent crime. There are things students can do to avoid secondary trauma. For example, as discussed, students should carve out time for themselves where they put the

cases away. Students may imagine a cardboard box and visualize that their case, everyone's pain, all the suffering, and all of the problems associated with the cases are inside that box. Students should then imagine putting the lid on that box, wrapping a tight bungee cord around it. The student may not open the box until her own designated "away from work" time is over. Students must find time to relax and rejuvenate. Interestingly, this advice also works for directors of death penalty clinics who are also human and prone to be disturbed, upset, overworked, and stressed as well.

Students must remember not to become too dissociated from the facts involved in the case. Many students leave the crime scene or medical examiner's photos in the cardboard box for too long. These photos can provide some of the defense's best evidence and must be scrutinized closely many times. Students should also be aware that being overly exposed to such sensitive material might lead to desensitization. The defense could damage the client's case by appearing unmoved when these photos are shown to the jury. The balance between empathy and professional distance is not always easy to achieve, and this is an area the clinic director must help students manage.

> Perhaps I know best why it is man alone who laughs; he alone suffers so deeply that he had to invent laughter.
> –Friedrich Nietzsche

Humor is a natural defense mechanism. At first this may sound inappropriate. Shared humor, however, sometimes referred to as "gallows humor," is often a very constructive sublimation of the distressing or helpless feelings which are inevitable when working with capital cases. The Nietzsche quote above states it best. Humor has been shown to be an effective way of distancing oneself from trauma. Humor has also been shown to reduce stress.[67] One of the best remedies for a student is to laugh. It is acceptable to make a joke or two about cases in appropriate circumstances; it helps. In death cases, it takes time for this to happen naturally. Yet, it always does happen as it is an involuntary response to very painful events. There are, however, parameters regard-

67. "Numerous studies have supported the anecdotal view that humor and laughter are therapeutic for relieving tension and anxiety. Whereas stress is linked to psychological distress, humor appears to buffer an individual against the negative effects of stress." Millicent H. Abel, *Humor, Stress, and Coping Strategies*, 15 INT'L J. OF HUMOR RES. 365, 365 (2002) (citations omitted), *available at* http://www.csulb.edu/~djorgens/abel.pdf. "[H]umor positively affects the appraisal of stressful events and attenuates the negative affective response, and related to humor producing a cognitive shift and reduction in physiological arousal." *Id.* at 376 (citation omitted). "Humor has been linked to several coping strategies such as distancing oneself from the stressor, aggressive efforts toward confronting and dealing with the stress, and resolving the problems causing stress." *Id.* (citations omitted).

ing joking about others' pain and suffering that should be communicated to the student:

(1) Never joke about cases around anyone who is connected to the case other than with those in the program.
(2) Avoid vulgar and foul language.
(3) Before or immediately after making a joke, provide a disclaimer along the lines of, "you just have to joke about this stuff sometimes to get through."
(4) Do not joke in front of your professor or supervisor unless you have obtained specific permission to do so or your professor does it too and encourages you to do so as well.
(5) Use good, mature judgment and do not take joking too far or do it too often—always remember you are dealing with someone's very serious pain and suffering.
(6) Be cognizant of who is around you and whom you may unwittingly offend. Someone may have a family member or relative who may have been the victim of a serious crime and be upset by the joking.

Many students report that laughing about the cases with their classmates in the clinic class, without fear of ramifications, contributed to an atmosphere of camaraderie and played a major role in helping them handle the horrific issues they dealt with day in and day out.

Students are expected to prioritize their clients and give it their best. Trying one's best does not mean devoting one's life to the cause. In order to do true good in the world, one must take care of one's self first. Students must have a happy life of their own and must be careful not to burn themselves out. This is like the crashing airplane rule: Put your own oxygen mask on before attempting to help others with their air masks. Sadly, many of the students' cases will be like a crashing airplane, and if the students do not put their air masks on, they might not be able to breathe. If they cannot breathe, they certainly cannot help their clients. Students should follow these rules no matter how impossible they believe it is to do so:

(1) Never give up the things in life that make you happy—be it a hobby, a yearly trip, or any activity.
(2) Always eat well and get enough rest.
(3) Make time for friends, family, relationships.
(4) Make time for simple fun.

The students will balk, laugh, and say there would need to be thirty-six hours in a day to perform everything on this list. They should be reminded that if they do not take care of themselves, they will not be able to breathe and will likely fail out of law school or worse—be unhappy.

Most students who take a death penalty clinic report becoming involved for one particular value. One student may want to save lives, another may want to litigate, and another may want to work toward abolition. Most students join the clinic with a principle for which they want to fight. These principles themselves help maintain the student's well-being and motivation in the face of trauma and difficulties. Their ideologies guide them and help maintain their stamina and enthusiasm.[68] Clinical directors should help students remain aware of these philosophies that brought them to this work in the first place. It helps to teach students to use their values and principles as a protective force-field to keep them safe.

In the field of criminal defense, each individual involved has suffered significant pain; the attorney and student are expected to cure the pain, ease the suffering, and solve the problems. There is perhaps no other profession that deals in so much pain and suffering but is given so little support for the resulting emotions.[69] Criminal defense attorneys are often seen as "bad guys" by the community—as individuals who put criminals back out on the street to hurt people again. Not only do defense lawyers receive little to no support for the resulting secondary trauma from dealing with the chronic pain and suffering of others[70] or for the personal guilt for often failing to solve their client's problems, attorneys are also commonly viewed as weak or ineffective if emotions are a part of their lawyering.[71] This is a myth law schools need to openly address.[72] Sadly, law schools likely created this stereotype which causes imbalanced lawyering. Although too much emotion may cause an attorney to make unclear and slanted decisions based on the attorney's feelings toward the client, be it revulsion or empathy, emotion also leads to

68. *See, e.g.*, Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL. EDUC. 112, 121–22 (2002); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 229, 233–34 (2002); Cathaleen A. Roach, *A River Runs Through It: Tapping Into the Informational Stream to Move Students From Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 683, 685 (1994).

69. Susan Bandes, *Repression and Denial in Criminal Lawyering*. 9 BUFF. CRIM. L. REV. 339, 342 (2006).

70. *See e.g.*, Peter G. Jaffe et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, JUV. & FAM. CT. J., Fall 2003, at 1, 6 (finding that of 105 judges attending a workshop on domestic violence finding, a significant majority showed symptoms of vicarious trauma or compassion fatigue).

71. Bandes, *supra* note 69, at 342.

72. *See generally* Patrick J. Schiltz, *On Being a Happy, Health, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 924 (1999) (discussing the pressures of the legal profession and emphasizing that law students need to consciously decide to be happy, healthy, and ethical attorneys).

action and understanding—emotion must be balanced.[73] Each person, student, or attorney will have a different balancing point. It is important to teach students how to find that point and maintain it.

The death penalty clinic director should also be accessible to the students. This does not only mean reachable. The clinic director should be an approachable person who listens and cares; he or she should be a person who remembers that a student broke up with her boyfriend last week, moved apartments, or failed Contracts. The clinic director should be a person who replies to emails and waits after class to talk to her students. The clinic director must work hard to gain the students' trust. A student who is devastated after losing a death case is a serious issue. The student is an adult and agreed to participate in the clinic knowing the type of material he would be working with; in part, this is why the waiver and forms are important. Yet, no one can predict with certainty what will be unduly upsetting. The clinic director is not a therapist and should not try to be one; this could only make a serious issue worse. The clinic director needs to have a plan about where to refer a student if a student becomes unusually upset. This would usually be an issue for the Dean of Students. Normally, when a client is given the death penalty, any person working on the case will be upset; however, if everything was done properly up to that point, and the student had proper emotional balance, it is not likely to unduly overwhelm the student. Of course, a student can get upset in any law school class, especially in law school where students carry many pressures and stressors.

VII. VICTIM VINDICATION

In combination with student discussions about their own health and well-being, and their client's health and well-being, the victim's and co-victim's pain and suffering is also considered at length in the death penalty clinic.[74] Students who seriously reflect on the pain of the victims are better able to articulate why their client should live and also commonly find a deeper appreciation of their own lives.

Ted Anderson, a Unitarian minister from Nantucket, Massachusetts, once said, "Life itself would be impossible without death."[75] Although this may seem self-evident, when viewed in the context of a mass murder or the death of a young child, or when viewed in the con-

73. *See generally* Bandes, *supra* note 69, at 383–86 (describing the benefits of including emotions in legal work).

74. "Co-victim" is a catch-all term used to refer to anyone (friend, family, etc.) that was hurt by the death of the victim in a case.

75. *See* John Stanton, *The Constant Gardener*, NANTUCKET TODAY (2008), http://www.nantuckettodayonline.com/septoct08/constant-gardener.html.

text of a mother's pain at that loss, juries, judges and prosecutors are not the only ones to find greater worth in their own life on earth—the students often do as well. This first-time reflection alone aids the student to not become overly disturbed by the nature of the work or the setbacks involved. Presumably this is because the student has found joy and a sense of mastery in the midst of what appears to the rest of the world as nothing but suffering on both sides of a case. This is a weighty realization and one that the students carry with them for life. While the students keep a personal distance from the victims' pain, the victim's pain may help the students appreciate their own lives and thereby find the good in their clients' lives.

Students embrace, but do not own, the pain of their clients and the victims. To view the case from only one side is to tip the ship over and drown.[76] To view the case from both sides will provide balance and ultimately better advocacy for the client. As noted, most clinics, by their nature, imply an anti-death penalty stance.

Recently, the death penalty's deterrence justification has been called into question by empirical evidence.[77] Using the notion of providing the victims and co-victims with closure is an easier sell than retribution. It is significant to understand that the victims and co-victims feel pain and anger. They are looking for something to make them feel better. The prosecution has likely promised them resolution or closure by the client's death. This misleads the victims. Death does not provide closure or resolution for most victims, and in any case, the client's death will likely take many years because of the long appeals process.[78] During these years these victims will be asked to recount their pain time and time again. When co-victims are asked to testify in court they speak their pain to a silent courtroom. The death penalty offers nothing therapeutic to the loved ones of the victim in a death case.[79] No one provides them counseling, no one provides them grief therapy or anyone to talk to. The death penalty is revenge, and it puts the co-victims through considerable pain and suffering to get there.

Teaching clinic students to consider the pain the victims are put

76. This is not to be confused with a failure to advocate zealously. Understanding and embracing the adversaries' pain and circumstances serves to make the attorney a better prepared advocate when the time comes.

77. *See* John J. Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 791–94 (2005).

78. TRACY L. SNELL, CAPITAL PUNISHMENT, 2010 – STATISTICAL TABLES, U.S. DEP'T OF JUSTICE BUREAU OF JUST. STAT. 12 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpst.pdf (noting that the average time between sentencing and execution in 2010 was fourteen years).

79. Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, L. & CONTEMP. PROBS., Spring 2009, at 1, 26.

through may help them litigate the case in a number of ways. It may provide them with ammunition to argue for a waiver or a term of years. Neither the government nor the defense wishes the victims to suffer further. A waiver or term of years can often provide the victims resolution much sooner and allow them to move forward toward healing. A student should learn to articulate this concept intelligently in a mitigation letter or verbally to a prosecutor. Sometimes capital defense attorneys have the opportunity to speak to the aggrieved family along with the prosecutor. Under the right circumstances, these issues can be raised and be an effective means to lessen the victims craving for revenge through the death penalty. Death penalty clinics do not often allow death penalty clinic students to speak in these meeting but do allow them to observe. These meeting are delicate and can be upsetting for the victims. Yet, a student who understands what the victim has experienced and what further distress the victim will be put through may learn volumes about the case's dynamics. If the student is sensitive to the victim, the student will acquire an enhanced knowledge of the case.

VIII. CONCLUSION

Exposing students to the world of the death penalty is the first mission of the Miami Law Death Penalty Clinic. That mission is certainly being met. The second mission, to improve capital defense lawyering and expose its problems, may take longer to achieve. On each individual case, the client's overall defense is improved by the help of the clinic. It is difficult, however, to ascertain if capital defense lawyering as a whole in the community is better as a result of the clinic. One would like to think so.

This article proposes that after teaching clinical students to defend those who they believe to be guilty with fervor and with disregard to their political stance on the death penalty, pro-death penalty students often emerge as some of the best advocators in the clinic. This resolves any issues that may arise because the clinic does not manifest an anti-death penalty mission or an abolitionist point of view and routinely accepts students who are pro-death penalty.

Clinics rarely announce a political point of view because the clinic's primary goal must always be to teach the student (not to promote a political mission). This article finds that by teaching the students the principle that the client must always come first, the client ultimately becomes the primary interest. Thus any political goals must be secondary or a natural side effect of the students' learning.

Finally, this article discusses how the Miami Law Clinic teaches its students to be senstive lawyers in all areas of a case. Articulating mitiga-

tion requires a high level of sensitivty and compassion. Student attorneys who balance their emotions will be better lawyers. Those who can advocate effectively by becoming sensitive, without getting too emotionally involved, will achieve a difficult goal. If law schools and clinical directors begin the dialogue with their students, perhaps the stigma against holistic and sensitive lawyering will change and future lawyers will routinely acquire balance and healthy attitudes. The directors of the death penalty clinics, as well as other live-client clinics,[80] are increasingly producing strong, sensitive, and knowledgable lawyers who are ready to make changes to the realm of the death penalty and many other important areas of the law. Students in death penalty clinics may improve death penalty representation, expose the problems with capital representation, and save lives.

A testament to the success of the Miami Law Death Penalty Clinic was the return of a life sentence in the *Simon* case. The students involved deserve much credit.[81] The case was littered with layers of complexities, including a mass of trial transcripts, extensive aggravators, complicated facts, and compelling mitigators, including traumatic brain injury, chronic emotional trauma and cocaine addiction. The students had to work exceptionally hard. This article proposes that students and attorneys saved Simon with sensitivity (at least in part). The role of sensitivity plays a much larger role in lawyering than many attorneys realize. The death penalty clinic provides students with litigation skills that are applicable to any case and also provides them with the ability to stop, think, and reflect about the lawyering in which they are taking part—making them sensitive, holistic, and highly skilled attorneys.

> It would seem more logical and deserving to me to find understanding and reason for the acts committed by a criminal defendant who had a childhood so horrible and wretched as did most criminal defendants. A person's life story is theirs and theirs alone. It is their story to tell, and it is our job as their attorney to earn their trust so that they tell us their story so that we may use it to find reason and understanding for their crime—reason and understanding so that we can save their lives. These are people. They are loved and would be missed if we fail at our job.[82]

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80. The University of Miami School of Law clinics include: Bankruptcy Assistance Clinic, Children & Youth Law Clinic, Innocence Clinic, Federal Appellate Clinic, Health & Elder Law Clinic, Human Rights Clinic, Immigration Clinic, Investor Rights Clinic, and Tenants' Rights Clinic. *Clinics*, U. MIAMI SCH. L., http://www.law.miami.edu/clinics/index.php (last visited Sept. 18, 2012).

81. Many thanks to Terry Lenamon (lead-counsel) for allowing the students to participate on the case and allowing me to participate.

82. Jessica Houston, Miami Death Penalty Clinic, 2011. Jessica is now working on death cases as a staff attorney at Capital Collateral Regional Counsel – South.