

RETHINKING CRIMINAL DEFENSE CLINICS IN “ZERO-TOLERANCE” POLICING REGIMES

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ABSTRACT

This article explores one defense clinic’s evolution from an individual direct representation model to a “combined advocacy” approach in response to systemic civil rights violations associated with aggressive prosecution of “zero-tolerance” policing strategies in New York City. The pedagogical and ethical implications of engaging students in this form of criminal defense “cause lawyering” is deconstructed through an examination of the student attorneys’ experience litigating individual cases and their collaborative work with community residents, social scientists, and public interest attorneys. Finally, this piece proposes a mobile clinic to bring interdisciplinary advocacy resources directly into neighborhoods targeted by Compstat for intensive zero-tolerance policing.

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I. INTRODUCTION

On a late November night in the vestibule of a South Bronx high-rise, Dwayne was confronted by three police officers.¹ Police told Dwayne he fit the description of a shooting suspect who had fled into the building—a young African-American male with braids. Dwayne told the officers he had been upstairs in apartment 12C watching the Manny Pacquiao fight with some friends, but he was handcuffed and told he would be taken outside for an identification procedure. The identification procedure never happened. Instead, he was loaded into a police van, where he sat for the next four hours while police arrested several other young men of color as they exited buildings from nearby housing projects. The officers filled the van before transporting all the young men to the 44th Precinct for booking. It was not until the next day, when a law student from the Pace Criminal Justice Clinic sat across from him in a dank holding cell, that Dwayne learned that he had been charged with criminal trespass.

Five months later, Dwayne sat at the defense table in a Bronx courtroom as his student attorney approached the lectern to begin her cross-examination of the arresting officer. On direct examination, the officer claimed that he had arrested Dwayne for trespassing because he was unable to provide the names of the friends he had been visiting and did not know their apartment number. No, the officer admitted on cross-examination, police never conducted an identification procedure; as far as he knew, the shooting suspect was still at large. Yes, he was aware that Dwayne had lived his entire life across the street from the high-rise. Yes, he agreed, if Dwayne had been visiting a friend in that building he would not be guilty of trespassing. Confronted with his partner's memo book, the officer conceded that it read, "perp claimed visiting 'friend'." The memo book

1. Dwayne's name and some of the details of his case have been altered to protect his privacy. He has given me permission to write about his case, as well as his involvement in our broader advocacy initiatives.

precluded the prosecution from proving beyond a reasonable doubt that Dwayne was not an invited guest, and he was acquitted of the trespass charge.

Dwayne is one of the thousands of poor people of color who are swept up on low-level misdemeanors every year as part of the aggressive “broken windows” or “zero-tolerance” policing (“ZTP”) campaigns that the New York Police Department (“NYPD”) adopted in the mid-1990s.² Dwayne’s acquittal marked the end of the Pace Clinic’s direct representation, but it was the beginning of the Clinic’s efforts to organize a citywide advocacy coalition to end this pattern of wrongful trespass arrests. Dwayne was one of twenty clients that Clinic students represented on criminal trespass charges. Fourteen of these cases were ultimately dismissed. Like Dwayne, many of our clients have become engaged in collective action against the over-policing of their neighborhoods. Former clients and community residents are, for example, participating in an empirical research project to document the economic impact the policing is having in their community³ and organizing “know your rights” workshops and community forums. Others have become plaintiffs in class action litigation.⁴

This article calls for criminal defense clinics practicing in high-volume urban courthouses to respond to systemic civil rights violations caused by aggressive prosecution of zero-tolerance strategies. Our Clinic’s experience with strategic representation of trespass clients is offered as one strategy for leveraging a misdemeanor docket for broader social justice goals. The ethical implications, pedagogical rewards, and challenges presented by this approach are examined here through the lens of our student attorneys’ litigation of individual cases and their collaborative lawyering with community and institutional partners.

The article proceeds in five parts. I begin with a discussion of the unique pedagogical benefits of traditional, or “pure service,” defense clinics,⁵ but note that in response to pressing social justice issues a number of these clinics have recently adopted combined advocacy approaches.⁶ A growing trend in clinical

2. The “broken windows” thesis, which has become synonymous with so-called “zero-tolerance” or “order-maintenance” policing, holds that aggressive enforcement against minor “quality-of-life” crimes, such as trespassing and turnstile jumping, not only deters petty crime, but ultimately reduces major crime. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29; see also Richard C. Schrager, *The Limits of Localism*, 100 MICH. L. REV. 371, 378–79 (2001).

3. See *infra* Part V.A. (discussing the participatory action research model, theory and specific project).

4. See *infra* Part III.B. (describing class action lawsuit related to systemic wrongful arrests for criminal trespass).

5. See Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic*, 13 CLINICAL L. REV. 573, 575–77 (2006) (describing Fordham’s “old school” criminal defense clinic, and noting the trade-off between the clinic’s focus on “teaching and learning” and addressing broader access to justice goals).

6. These clinic models are variously referred to as “combined advocacy,” “integrated advocacy,” a “systems approach,” and, most recently, “collaborative individual law.” See Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*,

education, combined advocacy incorporates individual representation and broad-scale advocacy initiatives.⁷ I argue in the second part that defense clinics are obligated to innovate to address systemic criminal justice issues, and that, in New York City, aggressive enforcement of ZTP has created a social justice crisis that compels a response.

The third part of this article describes the way our clinic chose to respond to this crisis: by developing a combined advocacy model to address the widespread pattern of wrongful trespass arrests in New York City, perhaps the clearest manifestation of the harm of ZTP. This new interdisciplinary model leveraged students' direct representation in Criminal Court to pursue impact litigation and legislative advocacy.

I reflect in the fourth part on the pedagogical and ethical implications of engaging law students in criminal defense "cause lawyering."⁸ More specifically, this section explores the apparent tension we faced when we gave up the teaching and learning advantages of relatively complex criminal cases that had previously comprised the bulk of our docket and instead took on more straightforward low-level misdemeanors. I conclude that, rather than presenting a trade-off between pedagogy and the broader agenda, focusing on trespass cases provided unique teaching opportunities, both in terms of skills training and social justice education. This section also discusses the potential "material limitation" conflict of interest presented by representing individual clients in criminal court for goals that were, at least initially, collateral to those of our clients.

In the fifth part, I offer a vision for combined advocacy defense clinics that address the widespread harms of zero-tolerance policing in the communities most impacted by the policy. I build upon our Clinic's work engaging directly with one neighborhood in the Bronx to document the economic impact of ZTP on all community stakeholders. Based on the success of this block-based interdisciplinary advocacy approach, I propose a model for a mobile clinic that borrows from the Compstat-based policing strategy. Police departments use programs such as Compstat to identify areas of high crime, allocate scarce

17 CLINICAL L. REV. 563, 566–70 (2011) (integrated clinical legal education); Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 HOW. L.J. 135, 138 (1994) (systems approach); Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 616 (2011) (collaborative individual law).

7. See Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451, 451 (2010) ("A growing number of clinics have adopted a combined advocacy model, in which students both represent individual clients and participate in broader-scale projects to achieve social change.").

8. Cause lawyers use the law as a vehicle to create change, but often advance policy goals that are collateral to the goals of their individual clients. See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1225 (2005) ("For these activist lawyers, the client's goal may reflect the greater cause but it is not necessarily an end in itself.").

resources to those areas, and hold local precinct commanders accountable.⁹ I argue in this part that Compstat should be a community tool, not simply a policing tool. The program identifies areas that are in need of much more than policing. The same discrete areas targeted by police for aggressive law enforcement campaigns can and should be targeted for intensive, holistic advocacy work on behalf of the community's residents.

II.

THE PEDAGOGY OF CONVENTIONAL CRIMINAL DEFENSE CLINICS

It is with good reason that the criminal defense clinic is a staple of law school clinical programs. The evolution of a tremulous student to an assured courtroom advocate is as satisfying for the teacher¹⁰ as it is empowering for the student, and, in my view, the most formative experience a law student can have.¹¹ Nor can the clinical experience be easily replicated in other areas of the law, particularly the experience in a year-long clinic, where students can take a criminal case from its inception through final disposition. Impact litigation, "big case" litigation or appellate work may play out over the course of years and involve innumerable student attorneys. By contrast, students in small-case criminal defense clinics are immediately and completely immersed in their individual cases.

It is beyond dispute that engaging in such representation requires an inexperienced law student's complete dedication.¹² Liberty and a minefield of debilitating collateral consequences are at stake for the defendant in nearly every criminal case for which students are responsible.¹³ Shouldering this responsibility and providing not merely adequate, but exceptional,

9. See, e.g., Adam Benforado, *The Geography of Criminal Law*, 31 CARDOZO L. REV. 823, 860 n.144 (2010).

10. Weinstein, *supra* note 5, at 573 (describing the satisfaction of observing initially tentative students grow into more confident advocates over the course of a semester).

11. See Adele Bernhard, *Raising the Bar: Standards-Based Training, Supervision and Evaluation*, 75 MO. L. REV. 831, 831 (2010) (describing the "heady and terrifying" experience of participating in NYU's criminal defense clinic); Mae C. Quinn, *Finding Power, Fighting Power (or the Perpetual Motion Machine)*, 20 HASTINGS WOMEN'S L.J. 245, 249 (2009) ("With my Criminal Defense Clinic experience I went from feeling entirely disconnected from my legal education to becoming awake, alive, and engaged."); Norman Reimer, *Let the Journey Begin (Inside NACDL)*, THE CHAMPION, Jan.-Feb. 2007, at 53, available at <http://www.nacdl.org/Champion.aspx?id=4699> ("My career as a defense lawyer literally began in my third year of law school at NYU, where I practiced under supervision in one of the profession's first criminal defense clinics.").

12. See generally Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003) (discussing the challenge of criminal defense work).

13. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) (listing various collateral consequences aside from deportation that can result from criminal convictions); Jenny Roberts, *Proving Prejudice, Post Padilla*, 54 HOW. L.J. 693, 725-26 (2011) (discussing the collateral consequences that can flow from convictions for low-level offenses); *infra* note 108 (discussing the collateral consequences of convictions for criminal trespass in New York).

representation¹⁴ requires students to continually learn and employ new skills, beginning with the nuances of a successful client interview at arraignments (the first court appearance after arrest), through oral bail applications, field investigation, routine and substantive motion practice, routine and complex court appearances, client counseling, plea negotiation, preparing for and conducting pre-trial hearings, and, finally, preparing for and trying a criminal case to verdict. Students are, and must be, deeply engrossed in mastering each step in the adjudication of a criminal case.

Moreover, consistent with contemporary norms of holistic criminal defense, students are obligated to manage client crises that arise outside of the four corners of an accusatory instrument, such as public benefits, employment, or housing issues, and, of course, the potential immigration consequences of a criminal conviction.¹⁵ Finally, student attorneys must resolve the often significant existential issues associated with defending people who are accused, and often guilty, of serious crimes. This is an issue that can weigh on public defenders during the nascent stages of their careers.¹⁶

In addition to teaching fundamental litigation skills and advocacy strategies related to holistic representation,¹⁷ professors in criminal defense clinics seek to instill poverty-lawyering values, including client-centered representation¹⁸ and cross-cultural competence.¹⁹ Clinical professors also endeavor to give students

14. For an empirical study concluding, in accord with my own observations, that clinical students provide superior representation on misdemeanor offenses in terms of both outcome and the quality of lawyering compared to assigned counsel, see Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 919 (1996). See also Margaret Moor Jackson & Daniel M. Schaffzin, *Preaching to the Trier: Why Judicial Understanding of Law School Clinics is Essential to Continued Progress in Legal Education*, 17 CLINICAL L. REV. 515, 530 (2011) (“[L]aw students have long distinguished themselves by providing thorough, comprehensive representation for their clients.”).

15. See Padilla, 130 S. Ct. at 1486 (holding that criminal defense counsel has an obligation to advise a client whether a guilty plea carries a risk of deportation); Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 965–66 (2010) (describing the holistic models of the Public Defender Service of Washington, D.C., the Neighborhood Defender Service of Harlem, and the Bronx Defenders); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004) (discussing the Bronx Defenders’ holistic, client-centered philosophy).

16. See Smith, *supra* note 12 at 116–17 (discussing the “moral dilemmas” associated with defending guilty clients).

17. See McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494–96 (2005) (describing innovative ways in which criminal defense attorneys can educate prosecutors and judges about collateral consequences of conviction in order to achieve better dispositions for their clients).

18. See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 371 (2006) (noting that client-centered skills training is “one of the most influential doctrines in legal education today”).

19. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33–34, 35 (2001) (providing exercises to teach cultural awareness in law students).

near total ownership of their cases²⁰ and, at a minimum, impart awareness that such cases implicate larger social justice issues.²¹

Put simply, it is an ambitious agenda. Because the student attorney experience in conventional defense clinics is so demanding, pursuing social justice goals beyond representing the individual clients poses a unique challenge.²² Nevertheless, in response to pressing social justice issues, more defense clinics have recently begun adopting combined advocacy models.²³

Combined advocacy clinics integrate individual direct representation with initiatives designed to effect larger-scale change, such as impact litigation, legislative advocacy, community lawyering, and organizing. Combined advocacy approaches have been adopted by clinics engaged in widely varying areas of law, including immigration, small business practice and development, employment, housing, domestic violence, HIV advocacy and civil rights.²⁴

20. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 144 (2007) (“The goal of most clinical teachers is to allow students to carry complete responsibility for their cases while the teacher serves as a resource when needed.”).

21. These teaching goals are, of course, not exclusive to criminal defense clinics. See generally Lisa V. Martin, Margaret M. Barry, A. Rachel Camp, Margaret Ellen Johnson, Catherine F. Kline, *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401 (2012); see also Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 334–35 (2001) (discussing the need for law students to “create their own legal theories and strategies to effect positive social change” when defending homeless clients facing eviction from emergency housing); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1490 (1998) (describing the holistic approach of St. Mary’s Civil Justice Clinic); Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 31–33 (1997) (discussing Arizona State Law School’s clinical program to address the legal needs of clients with HIV).

22. This issue is not unique to law school clinics. Indeed, the combined advocacy initiative at Pace is driven by my experience as a public defender in the Bronx. Many colleagues, including current partners in broad-scale initiatives, experienced frustration due to the inability of one lawyer with hundreds of clients to do more, especially when confronted with systemic abuses associated with the zero-tolerance policing model.

23. See Ingrid V. Early, *Criminal Clinics in Pursuit of Immigrant Rights: Lesson from the Loncheros*, 2 U.C. IRVINE L. REV. 91 (2012) (discussing UCLA’s experiment with combined advocacy in response to enforcement of municipal codes that serve as “indirect” forms of immigration regulation); Katherine Mattes, *The Tulane Criminal Law Clinic: An Evolution into a Combined Individual Client and Advocacy Clinic*, 18 CLINICAL L. REV. 77, 77–78 (2011) (describing Tulane Criminal Law Clinic’s adoption of a combined advocacy model in the aftermath of Hurricane Katrina, which destroyed the public defender system and left thousands of defendants unrepresented). Post-conviction clinics have also engaged in forms of combined advocacy. For example, Stanford’s Mills Criminal Defense Clinic represents individual clients with the broader goal of establishing that the Sixth Amendment requires defense attorneys to develop mitigating evidence for sentencing hearings under California’s “Three Strikes” law. Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California’s Three Strikes Law*, 21 STAN. L. & POL’Y REV. 311, 318 (2010).

24. See Aiken, *supra* note 21, at 31–32 (HIV advocacy); Barry, *supra* note 6, at 138 (domestic violence); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in the Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 354 (2009) (describing Stanford’s community lawyering program and arguing that community-based clinics achieve a “middle ground” between pure service and impact dockets); Srikantiah & Koh, *supra* note 7, at 458 n.24, 459–62 (describing the combined advocacy model developed by

These hybrid programs provide students with experience in a broad range of judicial and administrative forums and proceedings, advance social justice agendas, and teach a formidable array of lawyering skills not utilized in conventional defense clinics.²⁵

As noted, due to the inherent demands of individual direct representation, there are significant challenges to integrating a combined advocacy agenda with a traditional defense clinic docket. And, of course, a successful teaching and learning-centered model should not be abandoned simply in the name of innovation.²⁶ But if social justice and pedagogy are the “twin pillars” of clinical education,²⁷ a true commitment to the first pillar compels us to respond to systemic injustice. Put differently, defense clinics should not act as silos within the justice system. As Stephen Wizner and Jane Aiken argue:

If we simply expose our students to injustice without addressing it explicitly, we are complicit in their desensitization, and fail in carrying out our responsibilities as teachers. We may even become a part of the problem because it is not possible to be a neutral observer of injustice. We want to leave our students with the sense that they can make change.²⁸

In New York City, and in high-volume urban courthouses across the country, increasingly aggressive prosecution of zero-tolerance policing strategies has created a social justice crisis that demands a response.²⁹

III.

DEFENSE CLINICS IN ZERO-TOLERANCE POLICING REGIMES

Over the past two decades ZTP has quietly revolutionized the way the urban poor are policed. Urban police departments have shifted away from reactive or

Stanford’s Immigrants’ Rights Clinic and crediting NYU’s immigration clinic as the vanguard combined advocacy program); see generally Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L. J. 1603 (1989) (civil rights).

25. For example, students in Stanford’s Community Law Clinic are involved in, among other things, individual and collective eviction defense, wage and hour litigation, criminal record expungement, community education workshops, organizing, and legislative and “quasi legislative” activities. Brodie, *supra* note 24, at 354–68.

26. This article does not purport to provide a singular approach to resolving the tension between traditional small-case criminal defense pedagogy and what I argue is the social justice imperative of larger-scale advocacy work in zero-tolerance jurisdictions. Instead, it examines one approach and invites alternative ideas and models. Any combined advocacy model will largely be dictated by the broader criminal justice issue to be addressed.

27. Brodie, *supra* note 24, at 333.

28. Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1009 (2004).

29. See generally M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373 (2011); K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009).

“911 policing,” in which the primary role of patrol officers is to respond to crisis, and have turned instead to proactive strategies in communities identified as high-crime areas.³⁰ This approach is rooted in the “broken windows” theory, which holds that visible signs of disorder create an environment that attracts more serious crime. According to the theory, enforcing social behavioral norms by prosecuting conduct that impacts negatively on the quality of life, such as aggressive panhandling, will bring order to the streets, reduce fear, and ultimately reduce violent crime.³¹

In order to implement this strategy, police departments rely on statistical and mapping programs such as Compstat to track crime by neighborhood, and they use this detailed statistical analysis to make decisions about how to deploy law enforcement resources.³² The programs invariably identify poor communities of color as high-crime areas, and, as a result, these neighborhoods become the targets of aggressive police activity. To deter violent crime in these neighborhoods, police conduct intensive stop-and-frisk³³ campaigns (or *Terry* stops)³⁴ and vigorously enforce local municipal ordinances³⁵ and “order-maintenance” (“OM”) offenses. Common New York City OM (or public order) offenses include public possession of marijuana, criminal trespass, subway turnstile jumping, simple drug possession, loitering, and disorderly conduct, a catch-all offense that can be invoked in widely varying circumstances where individuals engage in conduct that in some way contributes to public disorder.³⁶

30. See, e.g., Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 9–10 & n.44 (2004) (discussing the “quiet revolution” of broken windows policing and the abandonment of “911 policing”).

31. See *supra* note 2 (summarizing the “broken windows” or “zero-tolerance” theory of crime control).

32. See Benforado, *supra* note 9, at 860 n.144.

33. Street stops in New York City rose 500 percent from 2003 to 2007. These stops disproportionately targeted blacks and Latinos, and data from other jurisdictions reflect similar disparities. Stephen J. Schulhofer, Tom Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 349 (2011); see Jeffrey Fagan, Amanda Geller, Garth Davies & Valarie West, *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309, 311 (Stephen K. Rice & Michael D. White eds., 2010) (“We find that the dramatic increase in stop activity in recent years is concentrated predominantly in minority neighborhoods, and that minority residents are likely to be disproportionately subjected to law enforcement contact based on the neighborhoods in which they live rather than the crime problems in those areas.”).

34. *Terry v. Ohio*, 392 U.S. 1 (1968) (requiring that police have an articulable, reasonable suspicion that “criminal activity may be afoot” to stop or “seize” a suspect, and that police must have an articulable suspicion that the suspect is armed before conducting a “frisk” of the outside of the suspect’s clothing).

35. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1416–1418 (2001) (discussing the criminalization of a wide array of conduct by municipal lawmakers in response to localized community concerns).

36. N.Y. PENAL LAW (McKinney 2010) (hereinafter “N.Y.P.L.”) § 221.10 (marijuana possession); §§ 140.10, 140.15 (criminal trespassing in the second and third degrees); § 165.15(3) (theft of services/turnstile jumping); § 220.03 (criminal possession of a controlled substance in the

In New York City, enforcement of these OM offenses increased by 60 percent with the introduction of ZTP in the mid-1990s.³⁷ Low-level misdemeanors now comprise the overwhelming majority of crimes charged annually.³⁸ Arrests are so routine, numerous, and seemingly trivial that nearly half of these complaints are resolved at arraignments.³⁹ Less than one-half of one percent of all misdemeanors are resolved by a trial on the merits,⁴⁰ despite evidence that many arrests are tainted by illegal police practices⁴¹ and that arrests of factually innocent people are routine.⁴² As is well documented in criminal procedure literature, public order statutes are susceptible to abuse due to the wide discretion conferred upon police as to whether and how to enforce the law.⁴³ Conduct tolerated in privileged communities results in full-blown

seventh degree); § 240.35 (loitering); § 240.20 (disorderly conduct).

37. Martha Rayner, Conference Report, *New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1026 (2004) (discussing New York City's implementation of zero-tolerance policing in 1993 and noting a 60 percent increase in the number of misdemeanor arraignments between 1992 and 2002).

38. JUSTIN BARRY, CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2009 30 (2010) [hereinafter CRIMINAL COURT ANNUAL REPORT 2009], available at <http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf>.

39. *Id.* at 29. When a defendant has been arrested and held in custody, the arraignment will typically occur within 24 hours of arrest. See *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422 (1991) (holding that a delay of more than twenty-four hours was presumptively unnecessary and in violation of the statutory prescription that a defendant arrested without a warrant must be arraigned "without unnecessary delay" (citing N.Y. CRIM. PROC. LAW § 140.20(1))). When the defendant has been released without arrest (e.g., on a summons for carrying an open container of alcohol), the arraignment is likely to be four to six weeks later.

40. CRIMINAL COURT ANNUAL REPORT 2009, *supra* note 38, at 16.

41. See Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2017–18 (2009) (arguing that so-called vertical patrols, in which police automatically stop and question everyone they encounter in public housing projects, are systemic violations of New York state law protections against unreasonable searches and seizures); Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. EMP. LEGAL STUD. 591, 614–18 (2010) (analyzing data on marijuana enforcement in New York City and finding a pattern of unconstitutional stops); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 344 (1998) (criticizing proponents of the order-maintenance strategy for suggesting that "the desire for order excuses the questionable legality of the arrests."); D. Taylor Tipton, *The Dunkin' Donuts Gap: Rethinking the Exclusionary Rule as a Remedy in Constitutional Criminal Procedure*, 47 AM. CRIM. L. REV. 1341, 1352 ("The goal of zero-tolerance policing is the removal of contraband from the street, creating a safer atmosphere in neighborhoods, while attention to appropriate search and seizure procedures, arrests, and convictions are often of peripheral importance.").

42. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1696 (2010) ("[P]olice [enforcing ZTP policies] are motivated to make an arrest once they have consummated a search (regardless of whether the search uncovers additional evidence of more serious crime), because nonarrest can be taken as a signal that the underlying search was unwarranted[.]"); Fabricant, *supra* note 29, at 395–401 (describing the root causes of false arrests that result from aggressive ZTP).

43. See, e.g., David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1093 (1999) (arguing that police discretion "makes the implementation of double standards possible without making them explicit on the

custodial arrests in areas subjected to Compstat-based ZTP.⁴⁴

Proponents of this policing strategy contend that it has resulted in reduced crime rates,⁴⁵ but this argument finds little support in mainstream criminal procedure literature.⁴⁶ Although there was a drop in crime in New York City roughly coinciding with the advent of “broken windows” policing, scholars argue that the evidence merely establishes correlative trends and lacks a sufficient empirical basis to prove causation.⁴⁷ Recent scholarship suggests that rather than reducing crime rates the zero-tolerance policing strategy may in fact be criminogenic because it provokes resentment among targeted communities and undermines the legitimacy of the police.⁴⁸ Yet, the absence of empirical or scholarly support has not deterred policymakers from pursuing ZTP, particularly in New York City,⁴⁹ nor is there significant popular opposition to ZTP because crime rates have remained relatively low.⁵⁰ Thus, the strategy has emerged as the

surface” by allowing police to focus enforcement efforts on low-income urban communities); *see also infra* note 103 (discussing the history of vagrancy and antiloitering statutes).

44. *See* Howell, *supra* note 29, at 307 (“The person arrested for having an open beer on a neighborhood stoop is fully aware that such rules are flouted in Central Park during classical music performances with no repercussions.”); Logan, *supra* note 35, at 1443 n.202 (“Evidence in New York City . . . suggests that police are not shy about executing full-blown custodial arrests for minor offenses, as permitted by state law.”).

45. DENNIS C. SMITH & ROBERT PURTELL, AN EMPIRICAL ASSESSMENT OF NYPD’S “OPERATION IMPACT”: A TARGETED ZONE CRIME REDUCTION STRATEGY 9 (2007), *available at* http://wagner.nyu.edu/faculty/publications/publications.php?pub_id=1133 (crediting Compstat-based policing with reducing “all categories of violent crime”).

46. *See, e.g.*, Schulhofer, *supra* note 33, at 343 (“Although early assessments suggested that various order-maintenance approaches were ‘working’ (i.e., reducing crime), more careful analysis revealed that aggressive street-level enforcement focused on quality-of-life offenses did not make cities safer.”).

47. Vanessa Barker, Review Essay, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 499–501 (2010) (summarizing the debate between criminologists and noting that “researchers are skeptical about the degree of relationship” between zero-tolerance policing and reduced crime rates).

48. Schulhofer, *supra* note 33, at 351 (“[I]ntensive law enforcement and a readiness to arrest for low-level offenses is . . . likely to arouse resentment, weaken police legitimacy, and undermine voluntary compliance with the law.”); Howell, *supra* note 29, at 307–308 (arguing that aggressive ZTP undermines police legitimacy).

49. *See, e.g.*, Press Release, New York City Office of the Mayor, Mayor Bloomberg Discusses Crime Reduction Strategies at Citizen’s Crime Commission Breakfast (May 2, 2005) (“We know that if seemingly petty offenses like jumping turnstiles and aggressive panhandling are left unchecked, they create the environment in which more dangerous crime flourishes.”); Celeste Katz, *Adams, Jeffries Defend Stop and Frisk Bill*, NEW YORK DAILY NEWS (May 24, 2010, 4:46 PM), <http://www.nydailynews.com/blogs/dailypolitics/2010/05/adams-jeffries-defend-stop-and-frisk-report/>; *NYPD Defends Latest Stop and Frisk Report*, NY1 (May 12, 2009), http://www.ny1.com/content/top_stories/98979/nypd-defends-latest-stop-and-frisk-report/ (quoting New York City Councilman Peter Valone, Jr. defending the NYPD’s “stop-and-frisk” policy and linking it to reduced crime rates).

50. *See* Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1563 (2003) (describing zero-tolerance and order maintenance policing as “politically popular theories”); David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM.

prevailing thesis in contemporary law enforcement. ZTP has been adopted by virtually every major urban police department in the country and continues to be credited by policymakers for reduced crime rates.⁵¹ As a result, tens of thousands of poor people of color are processed through criminal courts annually in pursuit of a discredited policy, leading to systemic human rights violations.⁵²

The Pace Criminal Justice Clinic practices in the South Bronx, the poorest Congressional District in the country,⁵³ and the borough with the highest arrest rate in New York City.⁵⁴ The confluence of high arrest rates and extreme poverty places the Bronx Criminal Court at the epicenter of the harm imposed on New York's poor communities by zero-tolerance policies. Clinic students on inaugural court visits witness lines snaking around an entire city block of poor African-Americans and Latinos waiting for court dates, largely for meaningless offenses. In arraignments, students observe a steady procession of defendants, almost entirely of color, shuffled in and out of unsanitary holding cells, to enter plea after plea to petty offenses with virtually no allocution.⁵⁵

The harm caused by this process is exemplified most acutely by the widespread pattern of arbitrary arrests for criminal trespass.⁵⁶ Trespassing laws are enforced as a form of OM policing in New York. Defendants are charged with trespassing not in response to a civilian complaint, but when police

L. & CRIMINOLOGY 381, 381 (2004) (arguing that the “backlash” against zero-tolerance policing strategies among scholars has not necessarily extended to “policymakers and the public”). The NYPD’s discriminatory enforcement of marijuana laws and its stop-and-frisk policy have, however, become increasingly controversial. See Thomas Kaplan, *Police and Mayor Back Plan To Curtail Marijuana Arrests* N.Y. TIMES, at A1 (June 5, 2012) (discussing controversy). The New York State Senate raised but then abandoned a plan to limit marijuana arrests. Thomas Kaplan & John Eligon, *Wide Divide Kills Proposal on Marijuana*, N.Y. TIMES, at A21 (June 20, 2012).

51. See Garnett, *supra* note 30, at 10 (“While former New York City mayor Rudolph Giuliani’s aggressive ‘quality of life’ campaign is perhaps the best-known example, order-maintenance policies have won a place of respect in government agencies throughout the country.”).

52. See Fabricant, *supra* note 29, at 378–82 (arguing that Compstat-based ZTP is a human rights violation because it is a form of collective punishment of targeted poor communities of color).

53. Richard Sisk, *South Bronx is Poorest District in Nation, U.S. Census Bureau Finds: 38% Live Below Poverty Line*, THE DAILY NEWS, (September 29, 2010), http://articles.nydailynews.com/2010-09-29/local/27076750_1_poverty-rate-poverty-line-south-bronx.

54. Chris Herring, *Bronx Acquittals Set Record-Borough Is Marred by High Arrest Rate, Tense Relations; ‘Let the Guy Walk,’* WALL ST. J., May 4, 2010, at A24 (noting that the adult arrest rate in the Bronx in 2009 was 88.1 arrests for every 1,000 residents, far above the second-highest borough, Manhattan, which had 64.6 arrests for every 1,000 people).

55. See, e.g., Harry I. Subin, *The New York City Criminal Court: The Case for Abolition*, 12 N.Y.U. CTR. FOR RES. IN CRIME & JUST. 8 (1992) (calling for the abolition of the New York City Criminal Court, which is “[h]opelessly awash in a sea of cases” and “unable to administer justice”); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1160 (2004) (describing the “essentially lawless, rapid processing” of low-level misdemeanors in criminal court).

56. Fabricant, *supra* note 29, at 397–401 (detailing the trespass arrest crisis in New York City’s poorest neighborhoods).

determine a suspect has “knowingly enter[ed] and remain[ed] unlawfully” on the grounds or in the common areas of a public housing project.⁵⁷ Individuals can also be charged with trespassing in private housing buildings that are enrolled in the city’s “Clean Halls” program.⁵⁸ Thus, the decision to make an arrest for trespassing relies entirely on police discretion. Wrongful arrests such as Dwayne’s⁵⁹ have been routine in New York’s poorest communities since the advent of ZTP.⁶⁰ Some defendants are arrested *in their own apartment buildings* because they cannot produce identification, and others are arrested while visiting friends or relatives when the police choose not to credit their explanations for being in an apartment building other than their own.⁶¹

The systemic nature of the wrongful trespass arrests presented an opportunity to focus the Clinic’s work on this particular category of OM offense. Because our Clinic is located in a community with high concentrations of arrests for criminal trespass, I felt compelled as a teacher and public interest lawyer to respond. Following years of advocacy work, the strategy discussed below helped to end the Bronx District Attorney’s routine prosecution of wrongful trespass arrests, and to reduce by nearly 40% the annual number of trespass arrests in the Bronx.

IV.

LEVERAGING A SPECIALIZED DOCKET FOR BROAD-SCALE CHANGE

The following sections describe our Clinic’s experience leveraging our misdemeanor docket to work towards ending the pattern of wrongful trespass arrests in New York City. As this section explains, our work involved a combination of litigation strategies in Criminal Court, impact litigation, and legislative advocacy.

A. Impact Arraignment and Motion Practice

As the first part of our Clinic’s multi-pronged strategy, we sought to convince Criminal Court judges on oral and written motions to dismiss our clients’ trespass charges. In New York City, the factual allegations contained within the accusatory instruments charging criminal trespass are essentially boilerplates, copied and reused over and over, with only defendants’ names and building locations changed. Students identified four common fact patterns alleged to establish that the defendant “knowingly enter[ed] or remain[ed]

57. N.Y.P.L. §§ 140.10(e)–(f) (third degree criminal trespass), 140.15 (second degree criminal trespass).

58. The Clean Halls program is discussed in more detail *infra* Part III.B.

59. See *supra* note 1 and accompanying text.

60. Fabricant, *supra* note 29, at 397–98.

61. *Id.* at 399–400.

unlawfully in a dwelling”⁶²; one, the suspect admitted she was trespassing (or in the building to purchase narcotics);⁶³ two, the suspect was unable to explain her presence in the building to the satisfaction of police;⁶⁴ three, the suspect was observed engaging in independent unlawful activity, such as possession of narcotics; and four, the suspect asserted that she was visiting a friend or relative in a specific apartment, but police were unable to verify the suspect’s assertion of privilege.⁶⁵

Many of the boilerplate fact patterns have been found “facially insufficient” by Criminal Court judges,⁶⁶ but the decisions are often unpublished and unavailable in legal databases. Written opinions are simply distributed to the litigants and kept in court files. To develop a database, Clinic students began collecting these opinions, many of which had been generated by previous Clinic students. They studied these decisions before undertaking direct representation. Appearing for trespass clients at arraignments, students developed oral arguments to dismiss accusatory instruments they identified as boilerplates and thus vulnerable to facial insufficiency challenges.

Defense attorneys rarely offer oral applications for dismissal of charges at arraignments.⁶⁷ Student attorneys had to withstand a palpable and collective groan within the well of the court, because the arguments slowed down the efficient processing of cases, which is the chief objective of Criminal Court arraignments in New York City.⁶⁸ Nevertheless, our decision to pursue this strategy proved fruitful. For example, one arraignment judge refused to dismiss

62. N.Y.P.L. § 140.15.

63. *See, e.g.,* *People v. Lightfoot*, 803 N.Y.S.2d 188, 189 (App. Div. 2005) (noting that “the defendant admitted that he did not live in the building and asserted that he knew no one there”).

64. *See, e.g.,* *People v. Messina*, 919 N.Y.S.2d 814, 818–20 (Crim. Ct. 2011) (acknowledging defendant’s Fifth Amendment right to remain silent but denying his motion to dismiss on those grounds).

65. *See, e.g.,* *People v. Quinones*, 2002 N.Y. Slip Op. 50091(U) (App. Div. 2002) (upholding complaint alleging that defendant told police he was in the building to visit a friend but could not provide the friend’s last name or apartment number).

66. An accusatory instrument is facially insufficient if it and the accompanying supporting deposition(s) fail to provide non-hearsay factual allegations that, if true, would establish every element of the charged offense. N.Y. CRIM. PROC. LAW § 100.40(1)(c). Failure to satisfy the requirements of section 100.40 creates a non-waivable jurisdictional defect requiring dismissal of the defective count. *People v. Alejandro*, 511 N.E.2d 71, 72–73 (N.Y. Ct. App. 1987). To be facially sufficient, “an information [must] state the crime with which the defendant is charged and the particular facts constituting that crime.” *People v. Hall*, 401 N.E.2d 179, 180 (N.Y. Ct. App. 1979). New York courts require that “the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense.” *People v. Casey*, 740 N.E.2d 233, 236 (N.Y. Ct. App. 2000).

67. The court “must dismiss” a misdemeanor complaint and “discharge the defendant” if the accusatory instrument is “not sufficient on its face,” and “if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face.” N.Y. CRIM. PROC. LAW § 140.45.

68. *See* Fabricant, *supra* note 29, at 403 (noting that the “desired outcome” of the arraignment process, “shared by all institutional constituents, is to resolve the greatest number of cases as quickly as possible.”).

the complaints but he accepted copies of opinions dismissing similar complaints and, upon glancing through them, required the prosecution to re-draft the accusatory instruments and released the students' clients on their own recognizance.⁶⁹ Over the next two months, students appeared before the same judge on behalf of new clients charged with trespassing, and on each occasion the students repeated their arguments. Ultimately, the judge agreed that the accusatory instruments were facially insufficient and incapable of being properly drawn, and, in an extraordinarily rare move, dismissed three trespass cases outright at arraignment.⁷⁰ Because arraignment judges sit for six-month rotations and preside over hundreds, perhaps thousands, of trespass arrests,⁷¹ the students' advocacy on behalf of individual clients potentially impacted hundreds of other cases.

For cases that were not dismissed at arraignment, students drafted written motions to dismiss the complaints. Since New York appellate courts provide little guidance related to the legal sufficiency and adjudication of criminal trespass charges, lower courts are often in disagreement in the relatively few published opinions.⁷² However, the database of local unpublished opinions created by the students allowed them to argue to individual judges that the judges' colleagues viewed virtually identical complaints as inadequately pled, which proved to be persuasive precedent.⁷³ Additionally, students provided copies of motions, which included as exhibits hard copies of the local Criminal Court opinions, to staff attorneys at institutional defender agencies. Public defenders in the Bronx and Brooklyn adopted the motions to use for their own clients, and, as a result, the students' litigation impacted innumerable additional cases.⁷⁴

69. *People v. King*, Doc. No. 065631C-2009 (N.Y. Crim. Ct. Oct. 13, 2009), *dismissed on subsequent written motion*, Nov. 10, 2009.

70. *People v. Dixon*, Doc. No. 065504C-2009 (N.Y. Crim. Ct. Oct. 12, 2009); *People v. Martinez*, Doc. No. 078129C-2009 (N.Y. Crim. Ct. Dec. 8, 2009). A public defender adopted the students' arguments on behalf of a codefendant, resulting in the third dismissal.

71. In 2010, New York City police arrested nearly 8,000 people in the Bronx alone for trespassing. See NEW YORK STATE DEPARTMENT OF CRIMINAL JUSTICE SERVICES, COMPUTERIZED CRIMINAL HISTORY SYSTEM (May, 2011) (hereinafter DCJS TRESPASSING REPORT) (data spreadsheet on file with the author).

72. Compare *People v. James*, 902 N.Y.S.2d 293, 298 (N.Y. Crim. Ct. 2010) ("It is the prosecutor's burden to prove Defendant's trespass, and not Defendant's burden to establish that his presence in a building was legitimate."), with *People v. Messina*, 919 N.Y.S.2d 814, 820 (Crim. Ct. 2011) ("[T]he existence of . . . an invitation [to visit a tenant] can be raised as a defense at trial and must be proven by the defendant.").

73. During the 2010-11 school year, for example, five student attorneys' motions to dismiss were granted pursuant to N.Y. CRIM. PROC. LAW §§ 100.15(3), 100.40(1)(b): *People v. Murray*, Doc. No. 067705C-2010 (N.Y. Crim. Ct., dismissed Jan. 10, 2011); *People v. Griswold*, Doc. No. 073207C-2010 (N.Y. Crim. Ct., dismissed Jan. 11, 2011); *People v. Alvarado*, Doc. No. 067632C-2010 (N.Y. Crim. Ct., dismissed Feb. 22, 2011); *People v. Jefferson*, Doc. No. 067704C-2010 (N.Y. Crim. Ct., dismissed March 22, 2011); *People v. Ventura*, Doc. No. 076219-2010 (N.Y. Crim. Ct., dismissed March 31, 2011).

74. Based on conversations with Alexis Karteron, Senior Staff Attorney, New York Civil

B. Impact Litigation and Legislative Advocacy

Relying on practice-based knowledge of the widespread pattern of wrongful trespass arrests, the Clinic helped to organize a coalition of public interest law firms to coordinate strategies to end the practice.⁷⁵ During the first year of the coalition's work, students introduced their former trespass clients as potential plaintiffs in a class action suit against the City of New York and the NYPD alleging a pattern of wrongful arrests in New York City Public Housing Authority ("NYCHA") buildings.⁷⁶ Additionally, we conducted community outreach citywide, focusing on tenant associations and community-based organizations. To that end, we held public forums to better understand the policing practices and needs of public and low-income housing residents and to mobilize community support for the advocacy agenda.⁷⁷ Students recruited their clients to attend these forums. The Clinic also developed a primer to distribute at the forums that outlined the central issues related to the pattern of unlawful trespass arrests.

Our primary objective during these events was to educate ourselves. We hoped to gain a perspective on policing issues not only from our clients, tenant association leaders, and policy advocates, but from ordinary residents, many of whom desired a stronger police presence in their buildings and supported the NYPD's trespass enforcement initiative. In order to gain broad-based community support to end the pattern of unlawful arrests, it was essential for us to understand this perspective and to explicitly address it in any demand for reform. In our Clinic seminar, we discussed a variety of options for enforcing trespass laws that would be consistent with the need for a police presence in

Liberties Union (NYCLU), and Heather Shea, Legal Fellow, NYCLU (Nov. 1, 2011) (email exchanges on file with author); Justine Olderman, Managing Attorney, Criminal Defense, Bronx Defenders (Dec. 8, 2009); Elizabeth Felber, Supervising Attorney, Criminal Defense Practice, Legal Aid Society (Oct. 13, 2010); and Ruben Fernandez, Staff Attorney, Criminal Defense, Bronx Defenders (March 16, 2011) (email exchanges on file with author).

75. The advocacy coalition initially included the Community Service Society, New York Lawyers for the Public Interest, the NAACP Legal Defense and Education Fund (LDF), and the Legal Aid Society.

76. This litigation, brought pursuant to 42 U.S.C. § 1983 (2006), focuses on the systemic Fourth Amendment violations resulting from the NYPD's vertical patrols of NYCHA buildings, which have led to wrongful arrests for trespassing. *See* Carlis, *supra* note 41 (describing systemic top-to-bottom search and seizure operations of public housing projects). The suit was brought by the Legal Aid Society, LDF, and the firm of Paul, Weiss, Rifkind, Wharton & Garrison. Cara Buckley, *Lawsuit Takes Aim at Trespassing Arrests in New York Public Housing*, N.Y. TIMES (Jan. 29, 2010), <http://www.nytimes.com/2010/01/26/nyregion/30housing.html>.

77. For example, the Community Service Society hosted a day-long forum entitled *Public Housing Forum: The Issues and Opportunities for NYCHA Residents* (Jan. 16, 2010) (forum materials on file with author). Coalition members, Clinic clients, and tenant leaders spoke at the forum, which focused not only on trespass arrests, but also on diverting monies currently expended on (over-)policing to job opportunities for residents, pursuant to Section 3 of the Housing and Urban Development (HUD) Act of 1968. 12 U.S.C. § 1701u (2001) (requiring public housing authorities and other recipients of HUD funds to provide training, employment, and contracting opportunities for low- and very low-income persons) (hereinafter HUD Act of 1968).

NYCHA buildings. For example, students suggested employing tenants as security guards to identify trespassers, a proposal that could be tied to Section 3 of the Housing and Urban Development Act of 1968, which requires any entity that receives HUD funding to provide employment opportunities to low-income individuals.⁷⁸

Wrongful arrests for criminal trespass are not limited to public housing projects. Through a program known as “Operation Clean Halls,” private property owners grant the NYPD access to patrol their buildings to sweep for trespassers. The pattern of arbitrary trespass arrests in these buildings is nearly identical to those in NYCHA buildings.⁷⁹ Since the representative class in the initial suit against the City of New York and the NYPD was limited to NYCHA residents, the Clinic began to look specifically for arrests like Dwayne’s that occurred in private buildings. The advocacy coalition was then expanded to add the resources necessary to bring a companion class action suit to address this subcategory of arrests.⁸⁰ Clinic students participated with the coalition in all aspects of filing this second suit, from working up the complaint to canvassing for class members. Students also shared their expertise in litigating trespass cases with coalition lawyers who were representing other potential plaintiffs in Criminal Court.⁸¹

To augment the litigation, the coalition engaged in legislative advocacy. Students identified individual New York City Council members who represented districts in which trespass cases had originated and targeted these council members for individual lobbying. We provided council members with a legislative fact sheet that included both previously unreported data regarding the frequency of trespass arrests and individual client narratives.⁸² The lobbying

78. HUD Act of 1968. This demand was included in the Clinic’s testimony before the New York City Council.

79. The NYPD established the Clean Halls program in 1991 in conjunction with private landlords, NYCHA, and New York City’s District Attorney offices. When a building owner has signed a Clean Halls affidavit, police are purportedly authorized to stop, question, and demand identification from any individuals in the building or on the grounds. The trespass affidavit program grants the same authority to police in all NYCHA buildings. Fabricant, *supra* note 29, at 398–99; *see also* *People v. Powell*, 691 N.Y.S.2d 263, 265 (Sup. Ct. 1999) (describing enforcement of Operation Clean Halls).

80. The Clinic partnered with the NYCLU, the Bronx Defenders, and Latino Justice PRLDEF to co-counsel a second class action suit, which was filed in March 2012. Al Baker & Aidan Gardiner, *New York Police Dept. Is Sued Over Stops in Private Buildings*, N.Y. TIMES, CITY ROOM (March 28, 2012), <http://cityroom.blogs.nytimes.com/2012/03/28/suit-accuses-police-of-violating-rights-of-residents-in-private-buildings/>.

81. The NYCLU represented several individual clients who we believed had been wrongly arrested for trespassing in Clean Halls buildings. Students shared their motions to dismiss with the NYCLU attorneys and, in seminar, developed strategies for trial and for addressing the legal sufficiency of complaints alleging new boilerplate fact patterns. *See supra* Part III.A (discussing motion practice).

82. In collaboration with LDF attorneys, students requested the data from the NYPD on August 1, 2010 through a Freedom of Information Law (FOIL) request, the New York State equivalent of the federal Freedom of Information Act. N.Y. PUB. OFF. LAW §§ 84–90 (McKinney

efforts prompted a City Council hearing. Students researched and drafted Clinic testimony and distributed the fact sheet at the hearing, which drew significant media coverage.⁸³ Coalition members and several young people who had been wrongly arrested also testified. In drafting its testimony and demands for reform, the Clinic received input from coalition members, who made similar demands in the class action litigation and in their own statements before the City Council.⁸⁴

Although the litigation and policy initiatives discussed in this section have not ended the practice of wrongful trespass arrests citywide, the Bronx District Attorney discontinued the use of the boilerplate trespass complaints that Clinic students had attacked systemically. Arresting police officers are now required to meet with the assigned assistant district attorney to swear out the complaint. Adoption of the new procedure, which “essentially accus[ed] the police of wrongfully arresting people”, has resulted in a 38.2% decline in trespass arrests in the Bronx since 2011.⁸⁵

In terms of the pedagogy, complex advocacy projects such as these often present problems regarding student turnover, case ownership, and general continuity issues.⁸⁶ But our model allowed the students to retain total ownership over a core element of the coalition’s strategy: identifying and generating class action plaintiffs in Criminal Court.⁸⁷ Thus, students continually fill a concrete component of the reform agenda and contribute insight that is highly valued by

2008). In a third response, received nearly a year later, the NYPD stated that “due to broad scope of your request,” the “time requested to process your request has exceeded the initial [90 day] estimate of time required.” Letter from NYPD FOIL Unit (June 14, 2011) (on file with author). Thanks to the ever-resourceful Dr. Harry Levine, professor of sociology at Queens College, City University of New York, for ultimately providing the Clinic with the data.

83. See Al Baker, *As Police Tactics in Public Housing Come Under More Scrutiny, New Rules Evolve*, N.Y. TIMES, CITY ROOM (Oct. 8, 2010), <http://www.cssny.org/userimages/downloads/article%20-%20New%20York%20Times%2010.8.10%20As%20Police%20Tactics%20in%20Public%20Housing%20Come%20Under%20More%20Scrutin%20New%20Rules%20Evolve.pdf> (quoting Clinic testimony at the council hearing regarding wrongful trespass arrests); Ray Rivera, *At Council Hearing on Stop-and-Frisk Policy, The Police Stay Silent*, N.Y. TIMES (Sept. 28, 2010), <http://www.nytimes.com/2010/09/29/nyregion/29frisk.html> (reporting on the NYPD’s refusal to participate in the hearing).

84. Representatives from the Bronx Defenders, the Legal Aid Society, and the Community Service Society also testified at the hearing. The advocacy coalition exchanged drafts of testimony prior to the hearing and coordinated demands. (Sept. 27, 2010, email exchange and draft testimony on file with author).

85. See Joseph Goldstein, *Prosecutors Deal Blow to Stop and Frisk Tactic*, N.Y. TIMES, at A1 (Sept. 26, 2012).

86. See Srikantiah & Koh, *supra* note 7, at 474–75, 478–79 (discussing continuity and ownership issues in large-scale advocacy initiatives).

87. The Clinic’s role generating potential plaintiffs is a continual process because the defendants have exercised their right to settle individual claims in an effort to secure dismissal of the class action. Individual plaintiffs have accepted settlements, requiring amendment of the original complaint to add new plaintiffs. See ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11:75 (4th ed. 2002) (describing private individual settlements in class action litigation).

institutional partners.⁸⁸ Students also remain advocates on behalf of their individual clients, whose voices are often lost in impact litigation and other broad policy initiatives that use individual cases as vehicles for reform.

V.

ENGAGING STUDENTS IN “SMALL CASE” CAUSE LAWYERING

The students’ collaborative lawyering and their participation in the wide range of advocacy strategies discussed in the preceding section broadened their awareness of the many tools lawyers can employ to create change.⁸⁹ This part explores the pedagogical and ethical issues raised by engaging students in this form of criminal defense “cause lawyering.”

A. Pedagogical Benefits

The Clinic’s docket was traditionally comprised of criminal complaints that presented the greatest learning opportunities in terms of pure litigation skills: “hard” cases with relatively complex and serious factual allegations.⁹⁰ Although these charges remained part of our docket,⁹¹ we changed our intake criteria in order to capitalize on the Clinic’s potential as a “laboratory for social change.”⁹² Selecting cases for political reasons, rather than solely for pedagogy, initially appeared to require a significant trade-off. We took fewer factually rich cases with multiple witnesses, discovery battles, challenging investigation and suppression issues, and relatively high stakes. Instead, we shifted our focus to trespass cases, which typically involve a single police witness, no suppression issues, and lower stakes. I was concerned that the latter would undermine skills training in favor of our broader goal of challenging ZTP practices. Instead, I discovered unique teaching and learning opportunities that, in the final analysis, outweighed any drawbacks of litigating fewer weighty offenses.⁹³

88. *See supra* note 81.

89. *See supra* notes 5–6, 22 and accompanying text (discussing combined advocacy models).

90. Examples include misdemeanor sexual misconduct cases such as “forcible touching” (N.Y.P.L. § 130.52), simple assault (N.Y.P.L. § 120.00), menacing (N.Y.P.L. § 120.14), criminal sale of marijuana (N.Y.P.L. §§ 221.40, 221.45) and driving under the influence of alcohol or drugs (N.Y. VEH. & TRAF. LAW §§ 1192(2)–(4)).

91. Every student is assigned at least one trespass case, but they also represent clients on a variety of other misdemeanors, which are selected using traditional criteria.

92. This is a phrase used to describe the potential of all law school clinics for social change that I overheard during a “Bellow Scholar” meeting at the Clinical Legal Education Conference in Seattle. Association of American Law Schools Section on Clinical Legal Education, Committee on Lawyering in the Public Interest (June 16, 2011) (notes on file with author).

93. Although this discussion is grounded in our Clinic’s experience litigating criminal trespass cases, the pedagogical and ethical issues discussed here would, to a certain degree, translate to strategic representation of individuals charged with any OM offense enforced as a means of social control.

1. Case Ownership and Shared Learning

The clinical orthodoxy of maximizing student ownership of cases⁹⁴ is more readily achieved in “small case” criminal defense clinics than in many other clinical settings, particularly those engaged in complex litigation. At one time or another, all criminal clinical professors have had the experience of observing a student’s carefully mooted court appearance develop into a potential crisis. Clinical professors must weigh pedagogy against protecting the client by making a decision either to intervene at the student’s expense or refrain from intervening, potentially at the client’s expense.⁹⁵ This is a relatively rare problem when litigating trespass and other OM offenses. Because there are fewer pre-trial issues to litigate, the stakes of typical pre-trial appearances are lower.⁹⁶ As a result, students remain autonomous and bear the brunt of disastrous court appearances—generally the result of judicial intolerance of aggressive student attorney lawyering—more often than clients.⁹⁷ There is simply less that can go wrong in these cases that will impact negatively on the client.

The decision to change the focus of the Clinic’s docket to trespass cases created a highly specialized boutique practice. Like any boutique firm, the Clinic’s focused practice served to lift the overall level of lawyering on these cases.⁹⁸ This expertise not only benefited individual clients, but, as discussed above, gave students and their clients an opportunity to meaningfully contribute to the larger advocacy campaign.⁹⁹ The similarity of the factual allegations and the commonality of the relevant penal code sections facilitated non-directive teaching and shared learning. Because their cases were similar, students were well equipped to draft substantive motions and develop trial strategies together.

Students also acted as each other’s investigators on the trespass cases. Typically this involved documenting the scene, including relevant signage; researching building management, sometimes through subpoenas; and interviewing tenants, either as potential witnesses or for background on the policing of their building (which also informed our policy initiative). Student investigators then testified as defense witnesses, which provided a unique

94. See *supra* note 20 and accompanying text.

95. See Jackson & Schaffzin, *supra* note 14, at 530 (“[C]linicians must engage in the constant struggle to synchronize student-focused educational methods and aspirations with the paramount obligation to protect the interests of clinic clients.”).

96. But see *infra* note 108 (detailing collateral consequences of a conviction for criminal trespass).

97. But see *infra* note 108 (detailing collateral consequences of a conviction for criminal trespass).

98. See George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. Rev. 1635, 1657 (2006) (attributing the success of boutique firms to, among other things, “highly-specialized and narrowly-focused expertise”); Etienne, *supra* note 8, at 1247 (“[T]he empirical evidence demonstrates that there are many instances in which cause lawyering is very valuable to criminal defendants.”).

99. See discussion *supra* Part III.B.

learning opportunity in its own right. And as an additional benefit of these investigative outings, students were able to identify potential plaintiffs for the class action litigation by canvassing the buildings in which their clients had been arrested.

Our trespass docket not only facilitated student ownership and shared learning, it also provided more challenging lessons in litigation than the straightforward nature of the charges might suggest. Although OM offenses do not often present complex factual allegations,¹⁰⁰ the legal issues are often thorny. The validity of the statute itself (OM statutes routinely run afoul of the void for vagueness doctrine),¹⁰¹ whether the charged conduct constitutes a violation of the statute, and/or whether the law was unconstitutionally applied, are common challenges to the prosecution's case.¹⁰² These persistent drafting and charging issues offered opportunities for students to work together to mount creative legal challenges to the sufficiency of the accusatory instruments. Moreover, seminars devoted to these efforts often led to robust policy discussions regarding the history of racially discriminatory policing associated with these statutes,¹⁰³ the use of OM statutes to suppress dissent,¹⁰⁴ and, of

100. Many OM complaints allege essentially boilerplate fact patterns, making them susceptible to systemic attack. Students' exploitation of this vulnerability in the context of trespass complaints is discussed in Part III.A.

101. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 588 (1997) (discussing the problem of drafting "adequately definite" OM legislation).

102. See, e.g., EVE CARY & RICHARD A. GREENBERG, N.Y. PRACTICE CRIMINAL LAW § 30:7 (6th ed. 2011) (discussing facial and as applied constitutional challenges to New York's disorderly conduct statute).

103. Vagrancy and loitering laws, for example, have long histories of discriminatory enforcement. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170–71 (1972) (holding unconstitutional a vagrancy ordinance that encouraged arbitrary and discriminatory enforcement); Jordan Berns, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 734 (1989) (arguing that loitering laws are enforced more aggressively against racial minorities); Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603, 647 (1956) (describing class-based discrimination in the enforcement of vagrancy laws in Philadelphia). Indeed, anti-loitering statutes have targeted poor people of color since the Civil War and continue to be so enforced today. See Jocelyn L. Santo, Note, *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws*, 22 CARDOZO L. REV. 269, 271 (2000) (tracing the discriminatory history of antiloitering statutes); John Eligon, *City Held in Contempt on Loitering*, N.Y. TIMES (April 27, 2010), <http://www.nytimes.com/2010/04/27/nyregion/27contempt.html> (quoting District Court Judge Shira Scheindlin excoriating the NYPD for "unlawfully" enforcing loitering laws "tens of thousands of times," primarily against the "poor and gay men"). Trespass laws in New York City are enforced as another variation of an anti-loitering statute. Like loitering, trespassing is easily charged, relies entirely on police discretion, and has been arbitrarily enforced to clear "undesirable" people from a particular area. See Fabricant, *supra* note 29, at 397–401. Three months prior to being held in contempt for its continued unlawful enforcement of loitering laws, the NYPD defended its enforcement of trespass laws as a means "to prevent nonresidents with ill intent, like drug dealers, from loitering in buildings." Buckley, *supra* note 76 (citing NYPD spokesperson Paul Browne). The Clinic's role in the suit related to trespass arrests is discussed in Part III.B.

104. The NYPD's use of the disorderly conduct statute in response to monthly "Critical Mass" bicycle rides, during which cyclists gather together and ride in a large, leaderless group to

course, the “broken windows” policing doctrine at the heart of our policy agenda.

When trials happen in trespass cases,¹⁰⁵ the proceedings tend to last no longer than a day, and nearly all are bench trials.¹⁰⁶ But these trials are in many ways ideal for inexperienced student attorneys. The Clinic’s institutional expertise provides students with a solid grounding in relevant case law. The legal foundation gives them confidence and an advantage over adversaries, most of whom are inexperienced assistant district attorneys with little understanding of the difficulty of sustaining their burden of proof in trespass cases.¹⁰⁷ Although the collateral consequences associated with a conviction can be life-altering,¹⁰⁸

“reclaim” public spaces, is illustrative. In an effort to suppress the demonstrations, police made “mass arrests,” charging participants with, among other things, disorderly conduct. Although each individual engaged in essentially the same conduct—riding a bicycle in a large group—courts were inconsistent in their conclusions as to whether such conduct violated the statute’s prohibition against impeding pedestrian and vehicular traffic. *See* Gideon Orion Oliver, *A Criminal Mess: New York City’s Response to Critical Mass Bicycle Rides, 2004–2010*, 67 NAT’L LAW. GUILD REV. 37, 42–43 (2010).

105. For all cases in Criminal Court in 2009, charges that were resolved through a bench trial (in front of a judge with no jury) took a mean length of 387 days until disposition. CRIMINAL COURT ANNUAL REPORT 2009, *supra* note 38, at 53. New York’s speedy trial statute requires the prosecution to bring a felony case to trial within six months from arraignment, ninety days from the commencement of an A misdemeanor, sixty days from the commencement of a B misdemeanor, and thirty days from the commencement of a violation. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2003); N.Y.P.L. §§ 55.05–10. The statute allows the prosecution to request a continuance for “exceptional circumstances.” N.Y. CRIM. PROC. LAW § 30.30(4)(g). Prosecutors can and do exploit this section by asking for an adjournment of a few days, knowing that, due to crowded dockets, the case will be rescheduled for many weeks later. However, only the few days requested by the prosecutor count against the speedy trial clock. *See, e.g.,* *People v. Dushain*, 239 A.D. 2d 151, 153 (N.Y. App. Div. 1998). In my experience, OM cases tend to go to trial more quickly, because there are fewer excuses for avoiding litigation. There are fewer, if any, pretrial issues to litigate, and there are only one, perhaps two, witnesses’ schedules to accommodate.

106. In New York City, defendants are entitled to a jury trial only if the exposure to incarceration is greater than six months, generally for A level misdemeanors and felonies. N.Y.P.L. § 70.15(1); N.Y. CRIM. PROC. LAW § 340.40(2). The trespass statute contains both an A level misdemeanor offense, N.Y.P.L. § 140.15 (trespassing in a “dwelling”), and a B level offense, N.Y.P.L. § 140.10 (trespassing in a “building”). A B misdemeanor carries a three-month maximum sentence. N.Y.P.L. § 70.15(2). Although most trespass complaints charge both the A and B misdemeanors, the top charge at trial is typically the B misdemeanor, because prosecutors dismiss the top count to avoid jury trials, notwithstanding defense objections. *See People v. Urbaez*, 886 N.E.2d 142, 144 (N.Y. Ct. App. 2008) (rejecting appellant’s argument that reduction of misdemeanor charges denied him his right to a trial by jury); *People v. Wrighton*, 918 N.Y.S.2d 724, 724 (App. Div. 2011) (same).

107. Because there are no civilian complainants, such as a tenant who could testify that the defendant was trespassing, the prosecution is often in the unenviable position of proving a negative: that the defendant was not an invited guest. Absent an inculpatory statement or conduct clearly inconsistent with license or privilege, the prosecution must seek to establish the charge through the arresting officer’s testimony, which tends to be circumstantial evidence. *See, e.g.,* *In Re Daniel B.*, 768 N.Y.S.2d 230, 230 (App. Div. 2003) (reversing a trespass conviction because the only evidence at trial was a police officer’s testimony that defendant was observed in the lobby and, when asked to explain his presence, the defendant said he was “hanging out”).

108. A conviction for criminal trespass in the third degree, a class B misdemeanor—the typical charge at trial (*see supra* note 106)—results in a lifelong criminal record and a variety of

the students' clients are unlikely to be jailed as a result of a conviction, alleviating some, though certainly not all, of the anxiety associated with trying a criminal case.

The advocacy stakes on the trespass cases, however, were higher than might be anticipated. This is primarily because we believed most of our clients were factually innocent,¹⁰⁹ but also because the students hoped to generate potential plaintiffs for the class action litigation.¹¹⁰ Our students were therefore deeply invested in these cases and developed strong relationships with these clients.

2. Teaching Social Justice¹¹¹

Although many public defenders enter the profession to promote social justice,¹¹² students are attracted to the work for a variety of reasons, many simply for litigation experience. Students know their clients will be indigent; often they assume their clients will be of color and drug-dependent; and most assume their clients will be guilty of violent crimes perpetrated against blameless victims. They have, in other words, absorbed most of the stereotypes associated with criminal defendants and the work of a public defender.¹¹³ Mere exposure to

civil disabilities, including ineligibility for public housing and restrictions on employment. See THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS 11–27 (2010), available at <http://www.reentry.net/ny/library/attachment.172234> (registration required) (outlining collateral consequences of criminal proceedings in the areas of employment and housing).

109. Not surprisingly, the dearth of literature on the added burdens of defending innocent clients is largely devoted to serious felony charges. See Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L.J. 167, 177 n. 36 (2003) (“The pressures of representing guilty clients are obvious, but the burden of representing innocent clients may be even weightier.”); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 495 (2000) (describing the author’s work defending an innocent client serving a life sentence for murder). However, even with considerably lower stakes, students certainly experienced additional pressure defending their innocent trespass clients.

110. See discussion *supra* Part III.B.

111. Teaching social justice and cross-cultural literacy begins in our clinic with Adrian Nicole LeBlanc’s *Random Family*, an extraordinary book chronicling the lives of young men and women growing up in the South Bronx, which is assigned as a summer reading assignment. See ADRIAN NICOLE LEBLANC, *RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX* (2003).

112. Abbe Smith describes her decision to become a criminal defense lawyer as arising “out of a concern for social justice,” and argues that “criminal defense lawyering is not merely a political imperative, but a moral one.” Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 935 n.61 (2000) (citations omitted). See also Etienne, *supra* note 8, at 1208–10 (reporting results of an empirical study on what motivated criminal defense attorneys to begin their careers and what motivates them to continue).

113. See Stephen D. Easton, *Turning Criminal Law Students into Prosecutors and Defense Attorneys (at Least for One Day)*, 48 ST. LOUIS U. L.J. 1217, 1224–25 (2004) (discussing the ways that practical experience in a Criminal Law course can challenge students’ stereotypes about criminal defendants).

Bronx Criminal Court begins the process of disassembling these stereotypes, principally those related to the gravity of the offenses the justice system is chiefly occupied with adjudicating. And once students begin handling individual cases, client-centered representation bridges gaps between student attorneys and their clients.

Relying solely on a client-centered approach can, however, obscure the connection between a client's immediate difficulties, the "larger context of the systems within which the client operates," and the "social justice issues at stake in the representation."¹¹⁴ Our focus on trespass cases proved to be an excellent tool for teaching social justice and providing a larger context for students' work as defense attorneys. As previously noted in Part V(A)(1), seminar discussion inevitably focused on the use of public order statutes as a means of social control against minority populations and other "undesirable" elements.¹¹⁵ Once students got into court and saw firsthand the discriminatory and arbitrary enforcement of these statutes, any remaining assumptions about the law's neutrality were effectively eliminated, and the privilege students enjoy as mostly white, middle-class people was "unmasked."¹¹⁶ One student published an essay about the transformative experience:

"Over-policing" is something I was not familiar with and, to be honest, a bit skeptical about. I come from a community where the police are rarely seen on a day-to-day basis and when you do interact with them, it is usually because they have been called to help. And I thought that yes, of course, the policing is intense in places like the South Bronx because there are intractable crime problems there. But when the problem manifests in the eyes of your client, the skepticism dissipates. And as Ms. A told me her story, I couldn't help but feel anger. I couldn't imagine spending a night in those cells, let alone for the "crime" of visiting a family member who wasn't home. Ms. A is not a drug dealer or violent criminal. She is a 29-year-old mother, struggling to survive in extreme poverty.¹¹⁷

Of course representing clients known (or believed) to be innocent is uniquely effective at provoking appropriate outrage and "nurtur[ing] students'

114. Kruse, *supra* note 18, at 392 (discussing the limitations of client-centered representation related to teaching social justice).

115. See *supra* note 103 and accompanying text (noting the history of discriminatory enforcement of OM offenses, particularly anti-loitering laws).

116. See Aiken, *supra* note 21, at 12–13 (describing privilege as "invisible," a "conferred dominance" to those possessing the favored characteristic—such as white skin—exercised through "systems of subordination" that perpetuate injustice, rather than simply "acts of cruelty by one group against another group or an individual").

117. Alex Gastman, *From Lecture Halls to Tenement Walls: The Making of a Future Advocate*, PACE LAW SCHOOL ALUMNI MAGAZINE 15 (Spring 2011) (student attorney essay describing his clinical experience), available at http://view.digipage.net/?d=pacelawschool_alumni_magazine_spring_2011.

capacity for moral indignation at injustice in the world.”¹¹⁸ In criminal defense, this phenomenon can hardly be counted upon. The majority of criminal defendants are guilty of some criminal act, though they are often not guilty of all of the acts alleged by the prosecution.¹¹⁹ My concern was that the insights that students gained about the role that privilege plays—in the justice system specifically and in access to justice more broadly—would be compartmentalized, limited to their trespass clients and not to the “violent criminals” and “drug dealers” from whom Ms. A was distinguished above.

Attempting to erase all distinctions between clients believed to be innocent and those believed to be guilty would have been futile.¹²⁰ Clients facing trespass charges were generally contesting them because they had committed no crime and, in any event, faced no jail time. I never observed value judgments being made about these trespass clients’ lifestyle choices, and students were quick to forgive missed appointments. Students initially afforded less latitude to clients facing more serious charges. I observed expressions of disbelief that someone facing jail time would fail to keep an appointment with her attorney. This distinction between trespass clients and other clients facing more serious charges was somewhat predictable and unavoidable.

It was essential, however, for students to learn that, beyond guilt or innocence or over-policing issues, wrongful trespass arrests were a symptom of the community’s disenfranchisement. The poverty-related issues impacting the lives of their trespass clients were the same issues that our Clinic’s other clients faced.¹²¹ Commitment to holistic representation of all our clients required addressing those issues¹²² as well as collateral problems related to immigration, housing, employment and public benefits arose for virtually all Clinic clients.

As students lobbied employers to allow their clients to remain at their jobs while their cases were pending, fought school suspensions, and negotiated pleas that would not result in deportation, I began to notice students drawing fewer distinctions between clients based on presumed culpability or on the perceived moral underpinnings of the crimes with which they happened to be charged. Students’ capacity for moral indignation began to grow out of the injustice of the collateral consequences so many of their clients faced, which far outweighed the

118. Wizner, *supra* note 21, at 330.

119. See Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 No. 5 CRIM. LAW BULLETIN ART 4 (2010) (“The vast majority of . . . defendants are guilty of some criminal act(s), although maybe not all or some of the acts charged by the district attorneys’ office.”).

120. See *supra* note 109 and accompanying text (discussing the added burdens of defending innocent clients).

121. In her article about Wisconsin Law School’s Neighborhood Law Project, Juliet Brodie offers an excellent discussion of a similar dichotomy in a civil context. Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL’Y 201, 260 (2006) (comparing students’ reactions to their “deserving” poor immigrant worker clients with their “undeserving” poor welfare/eviction clients).

122. See *supra* note 15 (describing holistic representation).

severity of the offenses.¹²³ On a more simple human level, through their holistic advocacy, students got to know their clients outside of court and saw them as real people, not defined by their criminal records or the charges pending against them. They began to understand that “good people can do bad things.”¹²⁴

Adopting a combined advocacy approach gave the Clinic a unique opportunity to teach these social justice lessons and provide students with a global perspective on poverty lawyering. Relying solely on client-centered representation can obscure the systemic social justice issues the students’ clients face.¹²⁵ The danger is that students will view the collateral issues their individual clients are facing as unique to those clients. By engaging students in systemic reform initiatives arising directly out of their work as defense attorneys, including the research and community lawyering initiatives discussed below,¹²⁶ the Clinic makes the connection between criminal justice policy and its impact on the entire community obvious and tangible.

B. Potential Drawbacks

I have discussed above the advantages of litigating trespass cases in a clinical setting, particularly the potential for creating larger change, which I believe outweighs any drawbacks of taking fewer “serious” cases. However, in terms of pure litigation skills training, the focus on trespass cases did raise two concerns worth considering: one, that students would not develop sentencing advocacy skills; and, two, that their advocacy on behalf of these clients would be stymied by entrenched courthouse norms related to the adjudication of public order offenses.

1. Sentencing Advocacy

In trespass cases, the prosecutor’s best plea offer, a non-criminal disposition,¹²⁷ is usually offered on the first court date. Declining this offer and

123. For example, we represented a fifty-year-old woman with no criminal record on a simple assault charge with no allegations of an injury requiring medical treatment. Although she was a lawful permanent resident in the United States, our client faced deportation upon conviction; she was suspended from her job while the case was pending, requiring her to apply for welfare benefits; and her landlord brought eviction proceedings against her. Fueled by a strong sense of injustice, the student attorney’s advocacy on his client’s behalf focused nearly entirely on issues collateral to her case. The favorable plea the student ultimately secured for the client was celebrated nearly as enthusiastically as an acquittal after trial. *See also supra* note 108 (discussing the severity of collateral consequences of OM offenses).

124. Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety About Innocence Projects*, 13 U. PA. J. L. & SOC. CHANGE 315, 326 n.76 (2010).

125. Kruse, *supra* note 18, at 392.

126. *See infra* Part V.A.

127. The plea offer is typically a “violation,” a non-criminal offense, which will not result in a criminal record. A violation conviction does, however, result in a permanent arrest record and requires the defendant to plead guilty and pay \$120 in court costs. *E.g.*, N.Y.P.L. § 140.05 (trespass as a violation).

contesting the charges requires a commitment of resources and perseverance that privilege assumes and poverty precludes.¹²⁸ Choosing to litigate a case can take in excess of a year¹²⁹ and involves countless court appearances and innumerable adjournments. As a result, “[t]he accused often plead guilty because they are tired of missing days of work, and not because they have, in fact, committed a crime.”¹³⁰ Thus, absent parole or probation conditions and/or exposure to civil disabilities, our Clinic clients fighting their trespassing charges did so as a matter of principle; it is always more expedient to plead guilty to reduced charges. There can be no sentencing advocacy under these circumstances.¹³¹

In more serious cases, by contrast, a prosecutor’s best plea offer is very unlikely to be offered on the first court date. In cases involving injuries to civilians or conduct that endangers public safety, such as driving while intoxicated, sentencing advocacy is often the only real advocacy in which defense attorneys engage. Moreover, the overwhelming majority of criminal cases are resolved by plea bargains.¹³² Thus, dispositional advocacy is an essential litigation skill for attorneys interested in a career in criminal justice.

When the clinical docket is comprised of more serious offenses, students have many chances to practice this skill. For example, a student may be able to persuade the district attorney to agree to a treatment program in lieu of a jail sentence for a client whose charges are associated with drug or alcohol dependency. This requires researching the offerings of local social service agencies and working with “community court” programs to propose a problem-solving disposition as an alternative to incarceration.¹³³ Students representing

128. Revealing privilege through OM litigation is discussed in more detail in Part IV.A.2, *supra*.

129. See *supra* note 105 and accompanying text.

130. Rayner, *supra* note 37, at 1036. Trespass clients who initially chose to contest the charges, but capitulated and pled guilty once their resources were expended, provided students with another lesson in the role privilege plays in access to justice. These clients finally accepted pleas they could have accepted months before. Students who believed in their clients’ innocence were stunned by the fact that individuals were pleading guilty to offenses they had not committed.

131. Student attorneys do press prosecutors for dismissals. When pushed, prosecutors often ask student attorneys to assume the burden of proof and to prove to them that their clients were not actually trespassing. Apart from those instances where clients were arrested in their own homes, demonstrating that the client had permission to be in the building typically requires the resident whom the client was visiting to come to court, with a lease and government-issued identification, and meet with the prosecutor. For people living in poverty, taking the day off from work or finding childcare to come to court for this purpose is often too much to ask. Moreover, many are distrustful of police and prosecutors and do not want to involve themselves in a criminal case.

132. See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (Supp. 2006) (citing statistics showing that 95 percent of state criminal cases and an even higher percentage of federal criminal cases are resolved through guilty pleas).

133. Community courts typically address non-violent offenses that would otherwise be resolved by traditional courts and impose non-traditional sentences, such as counseling or community service. See, e.g., Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L. J. 813, 822–23 (2007) (discussing the success of the Bronx Community Solutions program).

clients with mental disabilities or sympathetic histories can collaborate with social workers and family members to develop psycho-social histories. Student attorneys can use such histories to argue for leniency or treatment options. Through this process, students discover that advocacy on behalf of their clients often has nothing to do with the law, and they discover some of the underlying causes for their clients' involvement in the criminal justice system.

Because our Clinic chose to focus on trespass cases, our students had less exposure to these valuable learning opportunities. I resolved this issue by not devoting our docket exclusively to trespass cases. Sentencing advocacy does, however, remain an area of litigation that receives less attention in our Clinic.

2. Challenging Courthouse Norms

The context in which attorneys practice is often in conflict with the legal entitlements theoretically available to their clients. Due process is often less defined by the law and more dependent on "how we do things here," even in a criminal case.¹³⁴ In New York City, perhaps the greatest challenge for students aggressively litigating trespass complaints (or any other OM offense) is that aggressive litigation of these charges is so unusual.¹³⁵ The procedural regimes for resolving these offenses are routinized to such a degree that all institutional constituents, and most clients, expect that the case will be resolved (usually with a guilty plea) at the first court date. Fidelity to the status quo can result in judges issuing summary dismissals of students' carefully crafted written motions¹³⁶ and prosecutors exploiting procedural devices to frustrate resolution of the charges,¹³⁷ which is discouraging to students.

Most troubling is that judges occasionally resort to bullying student attorneys. For example, in one of our trespass cases, the judge declared a contested suppression hearing "pointless," pressing the student to accept the prosecution's "entirely reasonable" offer. Because the judge believed the case was being litigated for "practice," she sped through the proceedings, refusing to allow the student attorney to properly introduce evidence or make timely objections. This undermined both the due process afforded the client and the learning experience for the student.¹³⁸

134. For a thorough exploration of this topic see Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801 (2000).

135. See *supra* note 67 (noting infrequency of contested misdemeanors).

136. See Melissa Breger, Gina Calabrese & Theresa Hughes, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 339 (2003) ("[W]ith respect to written submissions, judges can be alternatively impressed or annoyed by extensively researched motions and briefs.").

137. See discussion *supra* note 105 (describing New York's speedy trial statute).

138. Expressions of judicial intolerance of student attorney litigation, or misunderstanding of the goals of clinical education, are not limited to OM cases, however. See Jackson & Schaffzin, *supra* note 14, at 531-32 (discussing judges' concerns that law students "would unnecessarily prolong litigation by arguing every small aspect of a case and even filing frivolous motions.").

During a break in the proceedings, the student and I discussed how he might respond to the judge's trivialization of the litigation. The student felt patronized and wanted to make a political argument related to the policing of his client's neighborhood generally and wrongful trespass arrests in particular. I was concerned that such arguments would result in the Clinic's larger goals surfacing in the courthouse, which had the potential to impact all of our cases. In the small world of the Bronx Criminal Court, I did not want the student attorneys to be viewed as "troublemakers" and thereby invite informal sanctions by judges who hold unfavorable views of lawyers using their courtrooms for purposes other than adjudicating cases.¹³⁹ At the resumption of the proceedings, the student decided not to raise the political argument and not to inform the court of our collateral agenda, but he was frustrated by the entire process (which ended in a loss).

C. The Ethical and Pedagogical Issues of Parallel Agendas

The incident described above exposes some inherent tensions in cause lawyering in a clinical setting. First, pedagogy occasionally competes with the political agenda. Absent the collateral goals of our representation, I would not have discouraged the student from making a political argument because I did not believe the client would have been adversely affected by the argument. I actually may have encouraged it as a useful learning experience about the (in)effectiveness of such arguments in that context. However, I counseled the student against making such an argument in the individual case because of its potential to undermine our broader advocacy strategy.

The second tension relates to the ethical implications of engaging in direct representation while pursuing broader goals that are often collateral to those of the individual client. We pursued the litigation described above because the client was innocent of the trespassing charges,¹⁴⁰ but we were also trying to generate spokespeople for the cause and plaintiffs for the class action suit.¹⁴¹ This ulterior objective created a potential conflict of interest. Generally our larger goals were entirely consistent with those of our trespass clients; clients and students desired that the charges be dismissed. However, a "material limitation" conflict exists if a lawyer's political agenda merely threatens client-

139. See Brown, *supra* note 134, at 810–11 (describing sanctions imposed on lawyers who violate the local norms, including negative gossip, public censor, creating scheduling conflicts, adverse rulings, and the withholding of favorable plea-bargaining terms).

140. Our client had been visiting his mother when he was arrested for trespassing in her building. The trespass charges were dismissed on motion. In a search incident to arrest, however, a small amount of marijuana was recovered from the client. Although the student attorney established during the suppression hearing that police had claimed to speak to someone in a non-existent apartment before arresting the client for trespassing, the court refused to suppress the marijuana that was recovered in the search incident to arrest. The court reasoned that the officer was entitled to rely upon her partner's false assertion that a resident in a fictitious apartment had disavowed the client's claim of license to be in the building.

141. See *supra* Part III.B.

centered representation.¹⁴² Cause lawyering can create such a conflict because judgment about individual cases can potentially be influenced by concerns for the entire class of people the client represents.¹⁴³ As public defenders, students cannot pick and choose the clients for whom they will advocate most zealously, or raise arguments only on behalf of clients they believe to be better potential class action plaintiffs. Nor can they counsel candidates with particularly compelling narratives to prolong their criminal court case or take unnecessary risks simply to generate plaintiffs for the class action suit.¹⁴⁴

To examine these issues more closely, it is useful to consider again our representation of Dwayne. As described in the introduction of this article,¹⁴⁵ he was innocent of the charges against him, and he had been wrongly arrested for trespassing once before. Moreover, like over 50 percent of those arrested for trespassing in New York City in 2010, Dwayne had no criminal record.¹⁴⁶ He was punctual for court, always wore a shirt and tie, and expressed interest in engaging in the broader struggle against the pattern of unlawful arrests. As a result, he was among our most valued clients. The Clinic's collateral agenda permeated "case rounds"¹⁴⁷ when discussing Dwayne's case. The challenge for me was to prevent our political goals from undermining client-centered representation.

On the eve of trial, the prosecutor offered to adjourn the case in contemplation of dismissal, a disposition known as an "ACD."¹⁴⁸ Although plea offers often improve at the last moment in criminal cases, this was the first time it had happened on one of our Clinic's trespass cases. I was concerned that broader advocacy goals might influence the student attorney to counsel Dwayne

142. Lawyers are obligated "not [to] represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, *or by the lawyer's own interests*" MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1983) (emphasis added).

143. Etienne, *supra* note 8, at 1253–56 (arguing that a criminal defense attorney's collateral political agenda creates a "material limitation" conflict).

144. See N.Y. COMP. CODE R. & REGS. tit. 22, § 1200.20, 1200.24, 1200.32 (setting out New York State's ethical rules for zealous advocacy and avoiding conflicts of interest); *People v. Longtin*, 707 N.E.2d 418, 420 (N.Y. Ct. App.1998) (describing the New York and federal constitutional guarantees to representation for criminal defendants that is "conflict-free and singlemindedly devoted to the client's best interests"); see also MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003) ("A lawyer must . . . act with commitment and dedication to the interests of the client. . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . . .").

145. See *supra* note 1 and accompanying text (describing Dwayne's arrest and subsequent trial on trespass charges).

146. See DCJS TRESPASSING REPORT, *supra* note 71.

147. See Sue Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195, 202 (2007) (detailing the unique student learning opportunity of discussing each other's cases and offering a variety of viewpoints).

148. An adjournment in contemplation of dismissal (ACD) requires a six-month period without arrest, after which the charges are dismissed. N.Y. CRIM. PROC. LAW § 170.55.

to reject the offer, because an acquittal after trial would provide a more compelling narrative than acquiescing to a deferred dismissal, both for media advocacy and for the class action litigation. That did not happen. The student unreservedly urged Dwayne to accept the proposed disposition. Dwayne could not be persuaded, even though acceptance of an ACD would not require an admission of guilt and the case would likely be dismissed.¹⁴⁹ Because the student urged Dwayne to accept an offer that would have limited his viability as a plaintiff and spokesperson, and because Dwayne was fully informed of the significant risk he took by asserting his right to a trial,¹⁵⁰ I felt that the student's judgment was not unduly influenced by our Clinic's political agenda.

To the extent that there may have been a "pull" on the student's judgment that impacted her decision-making, it was not toward litigating the case. She was frankly terrified of trying the case and repeatedly pressed Dwayne to reconsider his stance. In addition to the normal performance anxiety associated with litigation, the student feared losing a trial after declining an offer to essentially dismiss the charges.

Other students, conversely, had to temper their desire to litigate with what was in their clients' best interests. Many of these students had been attracted to the Clinic for litigation experience and were often less interested in social justice issues; they viewed themselves as "courtroom warriors" and wanted to try cases.¹⁵¹ This was particularly true with their trespass cases because they perceived them as winnable.¹⁵² Much of my supervision of these students was devoted to reinforcing their obligations related to client-centered representation. As a result, I concluded that, although for different reasons, at the moment a trial is about to begin, the larger reform agenda does not influence student attorneys' judgment; they are understandably "in the moment."

Client counseling quandaries related to the Clinic's political goals also arose

149. Dwayne refused to accept this disposition because of his previous experience with an ACD. In a prior case, he accepted an ACD without understanding that the charges would not be dismissed for six months, and that he could be fully prosecuted on the charges if he was rearrested for any offense during that time. Since he had been rearrested in our case (on the same charges) within that six-month period, even though the previous charges were not restored to the calendar, the only acceptable outcome for him was an outright dismissal. Interview with Dwayne (July 11, 2011) (notes on file with author). It is worth noting that Dwayne was not our only client in 2010–11 who turned down an ACD. A client who had been charged with aggravated harassment refused to accept an ACD, took her case to trial, and was acquitted.

150. The risk of exposure to collateral consequences is largely dependent on whether the client already has a criminal record. Those without a criminal record risk acquiring one, which can have profound consequences. *See supra* note 108 (discussing potential civil disabilities associated with a conviction for criminal trespass). Paradoxically, clients who already have criminal records are at an advantage in the context of OM litigation because they risk relatively little by pursuing their day in court.

151. Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 454 (2001) (discussing the stereotypical "trial jocks" or "courtroom warriors" who want to litigate and are uninterested in larger social justice matters).

152. *See supra* note 107 (discussing prosecutorial disadvantages in trespass litigation).

outside of the context of litigation. Specifically, we struggled with whether to enlist Dwayne and other clients in collective action while their criminal cases were still pending. This was as much about the principles of client-centered lawyering as it was about black letter ethical rules. Students were engaged in public policy advocacy around the wrongful trespass arrest issue while they were simultaneously representing clients on trespass cases. Many of the public policy initiatives involved public speaking opportunities, including a City Council hearing, a Clinic-sponsored conference,¹⁵³ and a variety of community forums.¹⁵⁴ On the one hand, our clients are the most important voices in the discourse on the criminal justice system and essential to the advancement of reform goals. Their perspective must be given free and robust expression; students did not want to contribute to their clients' exclusion from the "marketplace of ideas."¹⁵⁵ On the other hand, students could not compromise their direct representation. Politicizing Dwayne's case may have provoked the District Attorney to prosecute him more aggressively.¹⁵⁶ Nor did his student attorney want him to make a public statement that could potentially be used against him at trial.¹⁵⁷

The decision to speak publicly about his case was of course Dwayne's, but the decision as to who would speak at Clinic advocacy events was, at its core, ours. After much seminar debate, we decided to treat the issue substantially the same as a client's right to testify in his own defense at trial, grounded in the Fifth, Sixth, and Fourteenth Amendments.¹⁵⁸ Thus, we invited all trespass clients to attend and speak at all events. However, consistent with their student attorneys' advice, few clients with pending criminal matters chose to do so. Dwayne's case fortuitously went to trial a week before he was scheduled to speak at the Clinic-sponsored conference noted above.

153. Conference, *The Impact of Compstat-based "Zero-Tolerance" Policing on Low-Income Communities of Color*, Pace University School of Law (Apr. 15, 2011), available at http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/pdfs/Criminal_Justice_Conference_April_15_2011.pdf.

154. See *supra* Part III.B (discussing community outreach and legislative advocacy surrounding the trespass issue).

155. In her excellent article, *Speechless: The Silencing of Criminal Defendants*, Alexandra Natapoff deconstructs criminal defendants' free speech issues and their exclusion from the "marketplace of ideas" concerning the criminal justice system. 80 N.Y.U. L. REV. 1449, 1487–88 (2005).

156. Although not categorically prohibited from doing so, we decided not to speak publicly about any pending cases for fear of undermining our representation. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (1983) (lawyers may not make extrajudicial statements if there is "a substantial likelihood of materially prejudicing an adjudicative proceeding").

157. See *Gentile v. State Bar*, 501 U.S. 1030, 1056 (1991) (plurality opinion of Kennedy, J.) ("[A] defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel. . .").

158. *Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987) (discussing constitutional sources of a defendant's right to testify in his own defense at trial).

Another aspect of our enterprise that gave me pause was the manner in which we entered the attorney-client relationship. We recruited our representative class very differently from most progressive lawyers working on civil rights and poverty cause lawyering. We did not sign up our clients for the larger struggle at the outset of our representation, as is the norm for public interest firms devoted exclusively to policy issues, assuming there exists identifiable clients.¹⁵⁹ Nor did clients come to us to work on issues broader than their individual cases. Our clients had no choice; they were assigned to us for representation in their criminal cases. This made me question the ethics of our representation; it seemed problematic to enter the attorney-client relationship in a criminal case with a predetermined agenda.

In many respects, however, the fact that we were defending our clients against criminal charges made the ethical issues clearer. Unlike cause lawyering that simply uses individual cases as vehicles for the larger agenda (often at the sacrifice of client-centered representation),¹⁶⁰ our ethical obligations were clear: we were required to achieve the best possible results for our individual clients. We did not limit our criminal defense representation to individuals who claimed that they had been wrongly arrested. Many of our trespass clients were not interested in contesting their charges and accepted reasonable dispositions at arraignments. We handled these cases the way we would handle any case.

When clients like Dwayne immediately and emphatically asserted their innocence, we informed them that our Clinic took a special interest in these cases and that we were working toward ending the pattern of wrongful arrests. Client counseling was influenced by the Clinic's political agenda at arraignments simply by encouraging clients who professed innocence not to plead guilty. Provided that clients are fully informed of what litigating a case entails, including the real possibility that it would take nearly a year,¹⁶¹ there is no conflict in enabling a client to challenge the allegations she claims are unfounded.¹⁶² Indeed, allowing a client to allocute to a crime she says she did

159. See Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1114 (1996) (describing how law students working on impact litigation often choose their positions before recruiting clients, and may work for "broad constituencies and loosely defined coalitions rather than identifiable clients").

160. See *id.* at 1116–17 (describing the limited strategic input of individual clients in impact litigation).

161. See *supra* notes 130–31 and accompanying text (describing the commitment our trespass clients were required to make to contest the charges).

162. Although we did not require express waivers from our trespass clients, material limitation conflicts can, like most conflicts, be waived. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2008) ("If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters."); *id.* at R. 1.7(b) (setting out when conflicts can be waived by informed consent). In retrospect, the prudent approach to this issue would have been to require a waiver at the outset of our representation.

not commit presents its own troubling ethical dilemma.¹⁶³

Concededly, Dwayne and the students' other trespass clients took informed risks throughout the process by refusing to plead guilty, declining ACDs, and speaking about their criminal cases while the charges were still pending. Their clients took these risks—risks that the student attorneys often counseled them against—because they began to view their cases as less personal and more political, which is the essence of collective mobilization.¹⁶⁴

VI.

THE "COMPSTAT CLINIC": A VISION FOR THE FUTURE

Defense attorneys are of course required to focus on individual clients and can lose sight of the broader social and political context implicated by their clients' cases. Through the students' work on trespass cases, we avoided the often myopic approach typical of criminal defense work. Our model allowed students to fully develop the useful skills and experiences necessary to advance public policy issues, as well as basic litigation skills. However, our Clinic initially engaged in a myopic approach of our own by focusing entirely on trespass cases rather than the broader universe of ZTP-related harms. To remedy this we began engaging in community lawyering, going into our clients' apartment buildings where the arrests were taking place, and developing strategies for documenting and addressing the wider impact of ZTP. Our work in one section of the South Bronx has inspired a vision for a "Compstat clinic" that targets a neighborhood for intensive legal assistance just as Compstat targets neighborhoods for intensive policing.

A. Community Lawyering and Strategic Empirical Research

As noted in Part II, illegal trespass arrests are only one manifestation of the harm caused by aggressive ZTP. Residents of communities targeted for intensive policing are also subjected to arbitrary *Terry* stops and frisks,¹⁶⁵ arrested for non-criminal conduct,¹⁶⁶ and routinely jailed without probable cause for various

163. For a meditation on this particular ethical issue, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1118 (2008) (arguing that defense attorneys should assist innocent clients in falsely allocuting to offenses, because most innocent clients are poor recidivists who are "punished by process and released by pleas," which mandate no jail time or additional court dates).

164. See Caroline Bettinger-Lopez, Davida Finger, Meetali Jain, JoNel Newman, Sarah Paoletti & Deborah M. Weissman, *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL'Y 337, 385 (2011) (describing collaborative lawyering with individual clients in order to advance a collective mobilization strategy).

165. See *supra* note 33.

166. In New York City, a defendant charged with a municipal code violation, such as carrying an open container of alcohol, is either issued a "desk appearance ticket" (DAT) or a summons. A DAT is a custodial arrest, but the suspect is processed at the precinct and released with an order to appear at a later court date for arraignment, rather than being held until

other OM offenses.¹⁶⁷ These neighborhoods are of course not selected at random. Compstat identifies high-crime areas, and local precinct commanders deploy patrol officers in these areas to carry out ZTP in an effort to control more serious crime.¹⁶⁸ New York City uses a version of Compstat known as Operation Impact, which identifies ever more discrete areas or “hot spots” (some as small as a single housing project) and “floods” these areas with patrol officers.¹⁶⁹ For example, in one eight-block section of Brownsville, one of the poorest neighborhoods in New York City, police stopped and frisked 52,000 people in four years, 99 percent of whom had committed no offense.¹⁷⁰

Our Clinic’s clients live in the areas targeted for this type of intensive, arbitrary policing. To better understand the larger policing patterns, student attorneys began mapping the locations where their clients lived and where they had been arrested. Students created a multimedia presentation of the mapping project for coalition lawyers. In collaboration with the New York Civil Liberties Union, students also began canvassing our clients’ neighborhoods, which were typically the same areas as their arrests.¹⁷¹ These community lawyering projects served several purposes. Students conducted investigations on individual trespass cases,¹⁷² began community outreach, and identified potential plaintiffs for the class action suit discussed above.¹⁷³

On one such outing, one of our clients, Mr. Johnson,¹⁷⁴ a 59-year-old father

arraignment on the charges. A summons is a ticket issued to an individual on the street that requires the suspect to appear in Criminal Court to answer the charges. Arrest warrants are issued for failure to appear at later court dates, and these warrants are enforced by NYPD warrant squads. Homeless people with transient lifestyles or drug-dependent individuals are often unable to keep subsequent court dates, and, as a result, are often jailed on non-criminal charges, such as carrying an open container of alcohol. Cf. Todd W. Daloz, *The Challenges of Tough Love: Examining San Francisco’s Community Justice Center and Evaluating its Prospects for Success*, 6 HASTINGS RACE & POVERTY L. J. 55, 86 (2009) (describing a similar procedure in San Francisco).

167. Fabricant, *supra* note 29, at 395–97; see also *supra* note 103 (describing arbitrary and discriminatory enforcement of antiloitering laws).

168. See *supra* note 32 and accompanying text.

169. Thomas J. Lueck, *Study Lauds Police Effort; Commissioner Criticizes Low Starting Pay*, N.Y. TIMES, June 28, 2007, at B3 (describing the introduction of Operation Impact in 2003 “in an effort to zero in on pockets of crime”).

170. Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1 (reporting that out of nearly 52,000 stops in the Brownsville section of Brooklyn between January 2006 and March 2010, the arrest rate was less than 1 percent).

171. Dwayne, for instance, lived across the street from the building in which he was arrested. See *supra* note 1 and accompanying text.

172. Student investigation of trespass cases is fully discussed in *supra* Part IV.A.1.

173. See *supra* Part III.B.

174. Mr. Johnson’s name has been changed to protect his identity. He and his wife have given me permission to write about his case and their involvement in our broader policy initiatives. Mr. Johnson was charged with “obstructing governmental administration” (N.Y.P.L. § 190.05) and three counts of disorderly conduct (N.Y.P.L. § 240.20) after crossing a police crime scene tape to determine if one of the young men who had been shot outside his building was his 17-year-old son. Ultimately, his student attorney tried his case and Mr. Johnson was acquitted of all charges, aside from one count of disorderly conduct, a non-criminal offense. Doc. No. 073202C–2010 (N.Y.

of two, invited us into his apartment, where he and his wife told us about the policing on the block near 163rd Street and Teller Avenue in the Bronx. They have lived on that block for nearly thirty years and have observed the policing of the neighborhood grow increasingly intensive over the last decade. The Johnsons reported that their oldest son and his friends were “thrown against the wall” by police every time they left the apartment, and that their son had been arrested three times in the previous year, all for OM offenses.¹⁷⁵ Two of the cases had been dismissed and they had been fighting the other for nearly six months. Mrs. Johnson kept the telephone number of the local police precinct stored in her cellular telephone, not for emergencies, but to determine if her son, who had no criminal record, was in police custody when she was unable to contact him. Should her son’s telephone go directly to voicemail, Mrs. Johnson would travel to Criminal Court and search for his name on the list of detainees, because she knew it was common practice for the police to remove the batteries from the cellular phones of anyone placed under arrest. Her younger son, a 12-year-old, was just beginning to receive negative attention from the police, and Mrs. Johnson despaired at the cycle repeating.

Students asked the Johnsons if they would be willing to collaborate with the Clinic to bring attention to the issues they had discussed and work toward changing the policing practices in their neighborhood. They agreed, and the following week the Johnsons hosted a resident workshop in the courtyard of their apartment complex. Once a dialogue between students and residents got underway, more people began to open up about their own experiences with the police. Many spoke of their fear of violent crime; many others, especially the mothers of young men, expressed their anger at the aggressiveness of the patrol officers. Community members derided the NYPD’s patterns of excessive policing. They labeled Thursdays “Thirsty Thursdays,” due to the local precinct’s practice of making mass misdemeanor arrests on that day of the week, a phenomenon they attributed to the existence of arrest quotas for patrol officers.¹⁷⁶ As the meeting continued, residents who had no advance notice of the workshop began to gather in the courtyard. All told similar stories and shared similar concerns.¹⁷⁷

This is not to say that community residents rejected a strong police presence. Similar to the views expressed at the community forums discussed in

Crim Ct., Verdict, March 9, 2011).

175. Interview with the Johnsons (May 12, 2011) (notes on file with author).

176. To be sure, there is ample evidence of a quota system within the NYPD. See Fabricant, *supra* note 29, at 395–96 n.108 (citing reports from, among other sources, the *New York Times* and the *Village Voice* regarding the existence of quotas); Al Baker, *Bronx Police Precinct Accused of Using Quota System*, N.Y. TIMES, Feb. 23, 2012 (reporting on a lawsuit filed by the New York Civil Liberties Union alleging that a precinct in the Bronx requires officers to meet strict quotas for arrests, summonses, and stops).

177. Gastman, *supra* note 117, at 16 (describing the community lawyering project at the Johnsons’ apartment complex).

Part III.B, many residents expressed the need for more police officers in their neighborhoods. In particular, this reaction tended to come from older women and others who were less likely to be subjected to negative interactions with patrol officers.¹⁷⁸ The issue for them was the abandonment of reactive policing. In an interview with two elderly sisters, longtime residents of the Johnsons' complex, both immediately praised the police and indicated that they had always been treated with dignity and respect. But when asked whether the police were responsive to their needs, the women spoke of hearing gun shots emanating from their rooftop only days before. The sisters called 911 to report the incident, but police did not arrive until hours later and never conducted an investigation.¹⁷⁹

We decided to focus the Clinic's resources on the Johnsons' block, because the response to the community lawyering workshop was so dramatic and engaging, and because it revealed many different aspects of the policing issues on which we were focused. Students began this experiment by distributing business cards to the residents of the block and offering pro bono representation. The Clinic took over the pending criminal case for the Johnsons' son and also represented two other young men who had been arrested during the same incident. After nearly a year of court dates, all three cases were dismissed.¹⁸⁰ Our new clients, all of whom were young African-American and Latino men, uniformly expressed feelings of being intimidated and disrespected by the police patrolling their neighborhood. They recounted several incidents during which they had been stopped, searched, handcuffed, and taken to the precinct, where they were ultimately released without charges or explanation.

The power of these individual narratives was readily apparent to the students. Their experience drafting the legislative fact sheet also demonstrated the need to bring empiricism to public policy advocacy.¹⁸¹ The Clinic therefore began developing a research project designed to demonstrate empirically the impact of the intensive policing of the Johnsons' block, and, by analogy, other areas subjected to similar law enforcement tactics, such as the eight-block section of Brownsville noted above.¹⁸² To maintain and enhance the collaborative relationships we were working to develop with the Johnsons and our other clients, the Clinic partnered with social scientists from John Jay College of Criminal Justice and the Graduate Center of the City University of New York and embraced participatory action research ("PAR"), a social justice-oriented approach to empirical research.¹⁸³

178. See Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 735 & n.49 (2011) (citing stop-and-frisk data from New York City in demonstrating that young men of color are stopped in disproportionate numbers).

179. Interview with Annie B. and Betsy P. (June 2, 2011) (notes on file with author).

180. The young men were arrested and jailed on "unlawful assembly" charges (N.Y.P.L. § 240.10). Doc. No. 051807C-2010 (N.Y. Crim. Ct., Dismissed, July 29, 2011).

181. See *supra* note 82 and accompanying text.

182. See *supra* note 170 and accompanying text.

183. The Participatory Action Research Collective at the Graduate Center of the City

PAR brings together community residents and students to work as co-investigators. In other forms of social science research, the investigators study “on” or “from above” without engaging the significant knowledge and experience of members of the community. By contrast, the PAR approach is to research “with” community members. A community-based team of students and residents works collaboratively to develop research design, methods, instruments, analyses, and products. This collaborative approach not only enriches the scientific validity of the data, but also builds capacities among co-researchers and creates opportunities for organizing, education, and broad-based community change.¹⁸⁴

Residents are crucial to designing the polling instrument because people like the Johnsons and the elderly sisters discussed above are best informed about the issues impacting their community. Additionally, PAR employs young people from the area as youth researchers, including, in our case, former Clinic clients.¹⁸⁵ These young people can receive college credit for the instructional program on research methodology they receive at the onset of their participation. At the conclusion of the training program, youth researchers will conduct the polling project, lead focus groups, and contribute to the analysis and dissemination of the data.

Our research protocol was inspired by the Million Dollar Block study, which calculated the cost of incarcerating residents of single blocks and raised public consciousness about the appropriate allocation of criminal justice resources.¹⁸⁶ The result of the Million Dollar Block study was transformative. The maps of prison spending influenced state legislatures facing budget shortfalls, and at least one state reallocated resources from the prison budget to

University of New York describes the research model as follows: “PAR deliberately inverts who constructs research questions, designs, methods, interpretations and products; who engages in surveillance; who speaks with authority about social arrangements. Researchers from the bottom/margin of social hierarchies, those under scrutiny and surveillance, the traditional objects of derision and research, reposition as the subjects and architects of critical inquiry, contesting hierarchy and the distribution of resources, opportunities, and the right to produce knowledge.” The Graduate Center, City University of New York, THE FREIRE PROJECT: THE PAULO AND NITA FREIRE INTERNATIONAL PROJECT FOR CRITICAL PEDAGOGY, *Participatory Action Research Collective*, <http://www.freireproject.org/content/participatory-action-research-collective>.

184. This is a paraphrased description of this type of empirical research provided to me by Maria Torre, Ph.D., a social scientist with whom we are collaborating.

185. Dwayne is among our youth researchers. See *supra* notes 1 & 145–158 and accompanying text (describing Dwayne’s collaboration with the Clinic).

186. The Justice Mapping Center and Columbia University’s Spatial Information Design Lab examine patterns of incarceration and accompanying costs using spatial map technology. Their Million Dollar Block project demonstrates that a disproportionate number of people in prisons or jails come from a small number of neighborhoods in big cities, and that, because so many residents from certain blocks are sent to state prison, the cost of incarcerating the residents of those blocks exceeds \$1 million annually. SPACIAL INFORMATION DESIGN LAB, COLUMBIA UNIVERSITY GRADUATE SCHOOL OF ARCHITECTURE, PLANNING AND PRESERVATION, THE PATTERN: MILLION DOLLAR BLOCKS (2008), <http://www.spatialinformationdesignlab.org/MEDIA/ThePattern.pdf> (hereinafter THE PATTERN: MILLION DOLLAR BLOCKS).

community development.¹⁸⁷

Our study focuses on neighborhood blocks that we refer to as “Compstat Blocks,” which are characterized by indiscriminate *Terry* stops, mass misdemeanor arrests, and numerous summonses for OM offenses. Similar to the Million Dollar Block study, the Compstat Block study will calculate the cumulative costs of ZTP to the State, but will also include those costs borne by the residents of the Johnsons’ block. These costs will be expressed in dollars with additional analysis of the qualitative costs. Specifically, the study will quantify the activity associated with the two main categories of ZTP interaction: arrests and summonses for low-level crimes and *Terry* stops. The quantitative or “hard” costs will include the policing and adjudicative expenses associated with the arrests. Additionally, and equally significant, the study will calculate the economic impact of the collateral consequences of the arrests, including the days of work and school missed, jobs lost, deportation of a family’s breadwinner as a result of an arrest for a low-level misdemeanor, the loss of housing, and imposition of court fees and fines. Qualitative or “soft” costs, such as the loss of the legitimacy of the criminal justice system,¹⁸⁸ will be measured, but obviously cannot be expressed monetarily. The project, known as the Morris Justice Project, began during the summer of 2011 and solicits input from a broad range of stakeholders who live and work on the Johnsons’ block, not only those most likely to be targeted by police.¹⁸⁹ The geographic focus and the comprehensiveness of polling within that space will produce objective and defensible data.

The study seeks to broaden the public perception of contemporary policing by putting a monetary figure on the cost of aggressive prosecution of zero-tolerance strategies and by adding data points beyond crime rates to measure its efficacy. Our expectation is that the policing costs, when coupled with the labor and adjudicative expenses of prosecuting the arrests, will expose an imbalance between the resources devoted to ZTP and the resources devoted to community development. The community and the research project will also benefit from Clinic students’ continued strategic representation of community residents in

187. Jennifer Gonnerman, *Million-Dollar Blocks: The Neighborhood Costs of America's Prison Boom*, VILLAGE VOICE (Nov. 9, 2004), <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/> (reporting that the Million Dollar Block study influenced lawmakers in numerous states and that the Connecticut legislature “change[d] its spending priorities, taking dollars out of the prison budget and steering them toward the neighborhoods with the highest rates of incarceration.”).

188. See *supra* note 48 and accompanying text (arguing that ZTP undermines faith in the neutrality of the criminal justice system).

189. These stakeholders include local merchants, landlords, clergy, school administrators, and teachers. As a form of protest and to bring attention to our research, residents projected initial survey results on the side of a public housing high-rise on the Johnson’s block. See Patrick Wall, *Stop-and-Frisk Data Projected onto Bronx Buildings*, DNAInfo.com (Sept. 21, 2012), <http://www.dnainfo.com/new-york/20120921/concourse-village/stop-and-frisk-data-projected-onto-bronx-buildings>.

Criminal Court.¹⁹⁰ Ultimately, as discussed in the following section, we hope to duplicate this interdisciplinary, block-based advocacy model on other blocks throughout the Bronx.

B. A Compstat Strategy for Delivery of Legal Services

Our work on this one block in the South Bronx has broad implications for rethinking the lessons of Compstat, and how they might be expanded upon to develop a more comprehensive approach to serving the community. One of the principle architects of the “broken windows” thesis, George L. Kelling, credits Compstat with revolutionizing policing in New York City and ultimately across the country.¹⁹¹ “The singular achievement of Compstat,” Kelling argues, is that it “riveted precinct commanders’ attention on precinct problems.”¹⁹² Career advancement, which for decades had almost entirely rested on political considerations, “now rested on [commanders] knowing their precincts, understanding problems there, and doing something about them.”¹⁹³ Compstat, he argues, transformed the NYPD from “a rigid and highly centralized bureaucracy” into a “decentralized and highly responsive organization,” virtually overnight.¹⁹⁴

Putting aside the merits of Kelling’s argument, Compstat should be a community tool, not simply a policing tool. The program identifies areas that are in need of much more than policing. Areas with high concentrations of crime are characterized by social problems that extend far beyond crime rates, including poverty, inadequate resources, lack of job opportunities, and a host of other issues,¹⁹⁵ many of which are exacerbated by the over-policing. The same discrete areas targeted by police for aggressive zero-tolerance campaigns can and should be targeted for intensive, holistic advocacy work on behalf of the community’s residents. Moreover, law school clinics, particularly community-based clinics, have the same advantages Kelling credits Compstat with instilling in the NYPD: decentralized decision-making and responsiveness.¹⁹⁶ Clinics are

190. This strategic representation supplements our docket by taking the cases of any individual from the Johnsons’ neighborhood charged with any category of OM offense.

191. George L. Kelling, *Why Did People Stop Committing Crime? An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 577–79 (2000). Kelling and James Wilson’s essay in *Atlantic Monthly* is generally credited with initiating the widespread change in policing strategies towards ZTP. Kelling & Wilson, *supra* note 2; see Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 902 (2010) (referring to Kelling and Wilson’s “classic *Atlantic Monthly* article” that “brought the broken windows metaphor to urban police work.”).

192. Kelling, *supra* note 191, at 578.

193. *Id.*

194. *Id.*

195. See generally Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877 (2006).

196. See Brodie, *supra* note 24, at 345 (“Community lawyering clinics are characterized by a self-conscious responsiveness to changing community conditions and priorities, which demands

therefore in an ideal position to provide the intensive advocacy that these communities need.

Although there have been neighborhood-based clinics and public defender offices for years,¹⁹⁷ potential clients are required to seek out these offices, limiting their reach to a self-selecting clientele. Our work on the Johnsons' block is convincing evidence of this. Nobody we talked to was aware that the Bronx Defenders, one of the leading public defender offices in the country, was located three blocks away, despite extensive community outreach efforts by that office.¹⁹⁸ The advantage of Compstat-based policing is that it locates scarce law enforcement resources directly where they are most needed and reallocates resources in response to accelerated crime rates. Similarly, highly visible defense clinics should be located in the areas with the highest concentrations of policing, and be capable of moving to those areas with the greatest access to justice barriers.

My specific proposal is to put the Clinic in a bus or RV and bring it into the most heavily policed areas of the Bronx. The mobile clinic would allow us to be responsive to changing community conditions. In partnership with community-based organizations and institutional defenders, the Clinic would be capable of responding to the patterns observed on the ground by clients, such as the "Thirsty Thursdays" noted in the preceding section,¹⁹⁹ and to information gathered in the courts by public defenders. A potential benefit of the proposed Clinic's visibility is that it may act as a deterrent to police misconduct, which rose dramatically with the introduction of ZTP.²⁰⁰ The Clinic would also relocate in response to new policing information, including the release of stop-and-frisk data that reveals a concentrated pattern of arbitrary policing,²⁰¹ such as the eight-block area in Brownsville discussed above.²⁰²

nimbleness and a willingness to shift gears and tread on new ground.").

197. See Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, 17 ST. THOMAS L. REV. 781, 785 (describing, among other institutions, the Neighborhood Defender Service of Harlem's community-based, holistic approach to criminal defense).

198. See Birckhead, *supra* note 15, at 965 (describing Bronx Defenders as one of the "premier public defender offices"); *Community Connections*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/community-connections> (last visited Aug. 20, 2011) (describing outreach efforts); see also Community Education, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, <http://www.ndsny.org/programs/community-education.html> (last visited Aug. 20, 2011) (describing community meetings designed to "let the community know about the variety of legal and social services offered by our office").

199. See *supra* note 176 and accompanying text.

200. See Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 318 (2005) (noting that police brutality and abuse claims increased nearly 50 percent with the introduction of ZTP in New York City).

201. As a result of a landmark racial profiling suit brought by the Center for Constitutional Rights, the NYPD is required to release stop-and-frisk data annually. See Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 141–44 (discussing *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001)).

202. See *supra* note 170 and accompanying text.

This proposal envisions a clinic staffed with student attorneys from defense clinics, but also from clinical programs devoted to immigration, housing, civil rights law, and collective mobilization.²⁰³ Together with volunteer attorneys, including law professors willing to fulfill pro bono obligations by “riding the bus” for a day,²⁰⁴ the holistic legal clinic can adopt a Compstat strategy to deliver comprehensive legal services directly to the areas most in need of them.²⁰⁵ Students can offer direct representation on OM offenses,²⁰⁶ provide advice and referrals regarding other legal matters, and connect residents to social services, including, critically, organizations striving to address reentry issues faced by formerly incarcerated individuals.²⁰⁷ The clinic would also contribute to community enfranchisement through voter registration and participatory action research, which engages residents in research projects aimed at exposing and addressing systemic social justice problems in their own neighborhoods.²⁰⁸

203. See Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2009) (describing a clinical education philosophy devoted to collective mobilization).

204. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (stating that lawyers should strive to perform at least 50 hours of pro bono service annually in order to fulfill their “professional responsibility to provide legal services to those unable to pay”); Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5 (2001) (arguing for greater commitment to pro bono work from the legal academy).

205. It is for this reason, for example, that dental clinics for indigent patients are often mobile. These clinics go into the community to bring healthcare to those who, for logistical reasons or simply a lack of awareness of the availability of the service, would not otherwise benefit from it. See, e.g., Mary Otto, *Mobile Dental Clinic Brings Care to Poor Children in Prince George's County*, THE WASHINGTON POST, Feb. 21, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/21/AR2011022102040.html>.

206. Residents with un-arraigned DATs and summonses will not yet have assigned counsel, so the mobile clinic could offer them representation. Clients with pending criminal matters would of course already be represented, and ethical rules would inhibit the mobile clinic from offering advice or representation on those cases. ABA/BNA, LAWYER'S MANUAL ON PROF'L CONDUCT REFERENCE MANUAL 711:301 (2004); Peter A. Joy & Kevin C. McMunigal, *Anti-Contact Rule in Criminal Investigations*, 16 CRIM. JUSTICE 44, 48 (2002) (“As with most ethics rules, proceeding cautiously when contacting or directing others to contact represented persons is usually the best policy.”). However, in our current work, the Clinic has contacted public defender offices and offered to take over representation for indigent individuals who have expressed interest in student attorney representation. Many attorneys have been grateful for the offer, since they are burdened with enormous caseloads. I assume a similar arrangement would be successful with the mobile clinic.

207. About 650,000 people return home from prison each year, and studies have shown that most return to the same neighborhoods from which they came, often the so-called Million Dollar Blocks. See THE PATTERN: MILLION DOLLAR BLOCKS, *supra* note 186, at 5. The site of the Compstat Block study, near 163rd Street and Teller Avenue in the South Bronx, has one of the highest concentrations of prison populations in the City. *Id.* at 36. The flood of formerly incarcerated people returning to these blocks destabilizes the neighborhoods, demonstrating all the more conclusively the need to concentrate advocacy resources in these areas. See Symposium, *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L. REV. 203, 231 (2008) (“[M]ass incarceration exacerbates stress on neighborhoods. Research shows that incarceration and reentry destabilize neighborhoods by increasing the levels of disorganization.”).

208. The Compstat Block study discussed *supra* Part V.A is designed to be duplicated in other areas experiencing similar issues. See also *supra* note 183 and accompanying text (describing participatory action research).

In essence, the mobile clinic would extend into the community the philosophy and range of services that holistic “bricks and mortar” public defender offices offer their clients now, but the mobile clinic would do so in an even more visible and geographically-focused way.

It is important to emphasize that I do not dispute the need for a substantial police presence in areas experiencing intractable crime problems. The issue is the quality and constitutionality of the law enforcement initiatives once patrol officers are deployed. My argument centers on the arbitrary and discriminatory execution of zero-tolerance policies in these areas,²⁰⁹ which undermine the credibility of the criminal justice system and may be criminogenic.²¹⁰ The impact of mass misdemeanor arrests, moreover, is felt community-wide, not only by those whom criminal defense attorneys encounter in court. Lawful permanent residents are deported for convictions of low-level offenses, tearing families apart;²¹¹ fines and litigation costs associated with the arrests burden entire families;²¹² homeless people are perpetually cycled through the criminal justice system for non-criminal offenses;²¹³ and arrest records severely restrict the employment and educational opportunities of swaths of young men of color who are targeted by police in these campaigns.²¹⁴

A block-by-block approach to holistic representation can create zones of empowerment in the most disenfranchised neighborhoods in the City.²¹⁵ This effort should be led by a clinic primarily focused on criminal defense in recognition of the reality that the criminal justice system acts as the de facto government in these communities.²¹⁶ By incorporating interdisciplinary

209. See Fabricant, *supra* note 29, at 378–82 (arguing that Compstat-based ZTP is a form of collective punishment).

210. See *supra* note 48 and accompanying text (discussing the negative impact of ZTP on the credibility of the criminal justice system).

211. Peter L. Markowitz, *Straddling the Civil–Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 340 (2008).

212. See *supra* Part IV.B.1 (discussing the commitment of resources required for an indigent person to contest a trespass offense).

213. See *supra* note 166 and accompanying text (describing the practice of issuing summonses to homeless people, which often result in arrest warrants and jail time for failing to appear in court). In 2004, police issued 360,000 summonses solely in the areas identified as “Impact Zones” and targeted for intensive ZTP. Press Release, N.Y.C. Office of the Mayor, Mayor Michael R. Bloomberg and Police Commissioner Raymond W. Kelly Re-Launch Operation Impact (Jan. 13, 2005) (on file with author).

214. See Bronx Defenders, *The Consequences of Criminal Proceedings in New York State*, *supra* note 108, at 11–14, 40 (describing the impact of criminal proceedings on employment and on the ability to obtain federal student loans).

215. The wider vision for the Compstat Clinic draws inspiration from Geoffrey Canada’s Harlem Children’s Zone, which began in the 1990s as a one-block pilot project. Today, it provides intensive social services to a 100-block area of Central Harlem, primarily to address parents’ needs and students’ academic preparation. See The Harlem Children’s Zone Project, <http://www.hcz.org/about-us/the-hcz-project> (last visited July 30, 2011).

216. See, e.g., Natapoff, *supra* note 155, at 1490 (“In communities where fifty percent or more of the men are under criminal justice supervision at any given time, where the odds that a

advocacy work, block-by-block lawyering, and the energy and talents of student attorneys, their clients, and community partners, criminal defense clinics can become more decentralized and more responsive to community needs.

VII. CONCLUSION

Through collaborative and community lawyering and the dedication of student attorneys, the Pace clinic helped to spur the incipient movement to scale back racially discriminatory stop-and-frisk practices and arbitrary arrests for criminal trespass, particularly in the South Bronx. Though often underappreciated, the connection between criminal defense work and larger civil rights concerns is apparent. Our experiment and the work of other defense clinics engaged in combined advocacy demonstrate that the insight and credibility on criminal justice issues that student attorneys gain by advocating in criminal court can be used as a platform to pursue effective advocacy strategies, while retaining the extraordinary pedagogical advantages of direct representation. In this article, I have described one approach to leveraging a “small case” docket for larger-scale change, invited alternative ideas, and offered another model as a vision for other law school clinics and for the future of our own Clinic. The ambitious intent spelled out in these pages is to create a spark for a movement within the clinical community to focus its considerable resources on addressing zero-tolerance policing, a social justice crisis prevailing in urban courthouses across the country.

black man will be arrested in his lifetime are one in three, and where thirteen percent of the men are disenfranchised, the criminal system *is* the government.”).