

# The Experiential Sabbatical

Martin H. Pritikin

## I. Introduction

Recent years have seen loud and frequent calls for reform in legal education. The Carnegie Report<sup>1</sup> and *Best Practices*<sup>2</sup> exhorted law professors to infuse their teaching with practical skills and professionalism.<sup>3</sup> Many have heeded the call and many law schools have supported such efforts. The number of law schools with an associate dean for experiential learning, for example, has skyrocketed in the last few years.<sup>4</sup> One vehicle for reform in legal education, however, appears to remain underused: the experiential sabbatical.

Sabbaticals became a ubiquitous feature of legal academia (at least for traditional tenure-track faculty) during the 20th century.<sup>5</sup> Their purposes, however, remain a somewhat contested topic, particularly in light of recent budget cuts, the media scrutiny law schools have faced since the Great Recession and the weakening of the legal job market. Yet educators generally agree that sabbaticals should promote faculty professional development.

If sabbaticals should promote professional development and law professors should develop their teaching skills by integrating practice skills and professionalism, one might think that law schools would allow, even encourage, law professors to take sabbaticals to engage in law practice. Indeed, some complain that law professors have become out of touch with

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1. See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 107-11* (2007) [hereinafter “Carnegie Report”] (discussing how simulated practice in the classroom works).
2. See ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007) [hereinafter “Best Practices”].
3. See *infra*, text accompanying note 19.
4. “In 2011, there were fewer than a dozen law school deans or directors with “experiential” in their titles. As of [2013], there are 47.” Don J. DeBenedictis, *Practical Skills in Vogue in Law School Classrooms*, *DAILY J.*, Sept. 17, 2013, at 1.
5. See *infra*, text accompanying notes 8-11.

the practice of law and lack the personal practice experience that would help them guide and train law students.

However, few law schools allow law professors to take sabbaticals to pursue legal practice experience that does not directly result in published work. And at the law schools that do allow sabbaticals for such purposes, few law professors pursue the opportunity to return to or enter the trenches of law practice.<sup>6</sup>

Admittedly, self-interest sparked my interest in this issue. I teach and write about criminal law, among other subjects, and I direct Whittier Law School's Institute for Trial and Appellate Practice. In these positions, I regularly train mock trial students on how to conduct criminal trials. Yet, with the exception of a criminal defense clinic I participated in as a student nearly 15 years ago, my litigation experience has been in the civil arena. As I approached eligibility for my first sabbatical, I wanted to use it to volunteer with a prosecutor's office. I reasoned that the experience would enrich my teaching of criminal law, evidence and trial advocacy by enhancing my own practical skills and exposing me to real-life ethical dilemmas and strategic challenges. I also expected to discover new material for scholarly articles. Finally, I believed that my professional network would broaden, which would give me credibility as a reference for students seeking jobs and access to potential speakers and adjuncts with practical skills and ethical insights.

As I explore below, my experience at the Orange County District Attorney's Office met or exceeded my expectations. Because I found my sabbatical so valuable to my professional development in all areas, I hope that sharing my experience will encourage more law schools to offer such sabbaticals and more law professors to apply for them.

## I. The Role of the Law School Sabbatical

### *A. The Development of the Sabbatical in Higher Education*

The modern academic sabbatical began in the late 19th century, and expanded rapidly throughout the 20th century. Harvard University offered the first sabbatical in 1880 to attract potential faculty members.<sup>7</sup> By 1920, at least 50 institutions of higher education had sabbatical systems in place<sup>8</sup> and by the early 1930s that figure had ballooned to 178. A study conducted in 1973 of nearly 400 institutions of higher education found that two-thirds

6. *See infra*, text accompanying notes 26–28.

7. Walter Crosby Eells, *The Origin and Early History of Sabbatical Leave*, 48 AAUP BULL., 253, 253 (Sep. 1962), available at <http://www.jstor.org/discover/10.2307/40222893?uid=3739560&uid=2129&uid=2134&uid=379629941&uid=2&uid=70&uid=3&uid=379629931&uid=3739256&uid=60&sid=21103576925401>.

8. *Id.* at 254.

of all respondents granted sabbaticals.<sup>9</sup> Today institutions commonly award sabbaticals as semester- or year-long paid leaves of absence available every seven years, primarily to tenure-track or tenured faculty.<sup>10</sup>

From its inception, educators envisioned the sabbatical partly as an opportunity for faculty rejuvenation and renewal but primarily as a vehicle to increase faculty capacity for usefulness to the university.<sup>11</sup> Whether the faculty member returns from a sabbatical with higher morale or motivation, a more developed publication reputation or enhanced teaching or other skills, the student is—or should be—the ultimate beneficiary.<sup>12</sup>

Although sabbaticals have become pervasive in higher education, there is no clear consensus on their actual purpose. Limited empirical research on sabbaticals in higher education,<sup>13</sup> none of which focuses exclusively on law schools, reveals a general lack of clarity about the purposes a sabbatical should serve. A review of 75 undergraduate and graduate degree programs found that 65 percent had only a general statement of purposes, 28 percent had either an implied statement or no statement at all about purposes and only 7 percent specified particular goals like teaching, renewal or research.<sup>14</sup>

By far, the enhancement of faculty research productivity emerged as the most common way institutions expected sabbaticals to improve faculty work.<sup>15</sup> Perhaps this purpose dominated because of the value that institutions, or the professors themselves, place on research and scholarship. Or research productivity simply might more easily lend itself to measurement than teaching effectiveness or service.

In addition to the vagueness of purpose, little evidence exists on the efficacy of sabbaticals. Some studies have found that post-sabbatical research

9. AUGUST W. EBERLE & ROBERT E. THOMPSON, *SABBATICAL LEAVES IN HIGHER EDUCATION* 5 (1973) available at <http://eric.ed.gov/?id=ED072754>.
10. *See id.* at 16–17.
11. Bruce A. Kimball, *The Origin of the Sabbath and Its Legacy to the Modern Sabbatical*, 49 *J. HIGHER EDUC.* 303, 304 (1978), available at <http://www.jstor.org/discover/10.2307/1979188?uid=3739560&uid=2129&uid=2134&uid=379629941&uid=2&uid=70&uid=3&uid=379629931&uid=3739256&uid=60&sid=21103576925401>.
12. Linda R. Otto & Michael Kroth, *An Examination of the Benefits and Costs of Sabbatical Leave for General Higher Education, Industry, and Professional-Technical/Community College Environments*, 48 *J. STEM TCHR. EDUC.*, 22, 24, 27–28 (2011), available at <http://scholar.lib.vt.edu/ejournals/JSTE/v48n3/pdf/otto.pdf>.
13. See Katherine L. Wildman, *Staff Sabbaticals: An Examination of Sabbatical Purposes and Benefits For Higher Education Administrators* 21, 24–25 (May 2012) (unpublished Ph.D. dissertation, University of Iowa), available at <http://ir.uiowa.edu/etd/3009/>.
14. Michael T. Miller, Kang Bai & Richard E. Newman, *A Critical Examination of Sabbatical Application Policies: Implications for Academic Leaders*, 15 *C. Q.* 4 (2012), available at <http://www.collegequarterly.ca/2012-vol15-num02-spring/miller.html>.
15. See Ketevan Mamiseishvili & Michael T. Miller, *Faculty Sabbatical Leaves: Evidence from NSOPF, 1999 and 2004*, 24 *J. FAC. DEV.* 11, 12 (2010).

and teaching actually declined on average.<sup>16</sup> At least two studies have found that sabbaticals do enhance faculty development “in terms of tangible and intangible benefits for both the faculty member and the university” but that “pre- and post-sabbatical reports were an essential component of the sabbatical.”<sup>17</sup> These reports help to ensure that institutions grant sabbaticals for appropriate reasons and encourage professors to meet the articulated goals of the sabbatical.

### *B. The Sabbatical and Faculty Development in Law Schools*

The debate about the appropriate role of the sabbatical as a vehicle for faculty development within law schools is tied to the larger debate about how law faculty should develop. Should faculty “develop” into trainers of law practitioners or should they develop as scholars? If practical education is becoming more of a central focus in law schools, a key question is what law schools can do to enable law professors to better educate students for practice.

To some extent, law schools can rely on adjuncts or visitors to provide practical training and assign tenure-track faculty to traditional doctrinal courses. But the reform literature resoundingly rejects the divide between theory, practice and professionalism in legal education. The Carnegie Report urges schools to adopt an approach that integrates “each aspect of the legal apprenticeship—the cognitive, the practical and the ethical-social.”<sup>18</sup> The notion of an “apprenticeship” implies the presence of a master or expert to which one can be an apprentice. Not surprisingly, the reform literature has widely acknowledged that law professors can and should serve as models of competent and ethical lawyering.<sup>19</sup>

The difficulty with having law professors serve as role models for practice, however, is not only that most law professors do not practice law but that many have not done so in a long time, if ever.<sup>20</sup> Those who did practice did so under fairly homogenous conditions—no more than several years doing mostly

16. Miller, Bai & Newman, *supra* note 14, at 2.

17. CARL H. BOENING & MICHAEL T. MILLER, RESEARCH AND LITERATURE ON THE SABBATICAL LEAVE: A REVIEW 13 (1997), available at <http://eric.ed.gov/?id=ED414777>.

18. Carnegie Report, *supra* note 1, at 191. Scholars are not the only ones advocating more integration of practical skills and ethics. Survey evidence shows that law students want professors’ teaching geared toward the realities of practice. It also shows that practicing attorneys regret they did not get better training in these areas while in law school. See, e.g., Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV 623, 630-34 (2004).

19. See, e.g., Carnegie Report, *supra* note 1, at 27, 135.

20. See, e.g., Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 600-05 (2003) (study finding that most new law professors had an average of 3.7 years in practice, and that time spent in practice has been decreasing).

research and writing at a large firm.<sup>21</sup> And they often did not particularly enjoy the experience (or else they would not have left practice to teach).<sup>22</sup>

To better match law students' need for apprenticeships with law faculties' general dearth of apprentice masters, the reform literature for decades has endorsed doctrinal law professors getting more practice experience.<sup>23</sup> Some have advocated using the sabbatical in particular as an ideal opportunity for law professors to obtain this practical experience.<sup>24</sup>

But the question remains: how often is this really done? To find out, I circulated a brief survey among the ABA's Associate and Assistant Deans' listserv. Representatives of 30 schools responded.<sup>25</sup> They were asked: "Do your school's policies permit sabbaticals to develop skills/knowledge through legal practice or similar work experience (assume that the experience does not directly result in published work)?" Only a quarter of respondents answered affirmatively. The remainder split equally between those whose policies would not permit such sabbaticals and those for whom it was not clear if they would.

The second question asked whether, in the past five years, any professors at the school had taken such a sabbatical. Here, the results were more skewed. Only 10 percent indicated that such sabbaticals had been taken recently and an equal percentage indicated that it was unclear or unknown. The remaining 80 percent indicated that such sabbaticals had not been taken. Together, the responses suggest that most schools do not allow practice-based sabbaticals—or at least do not make clear that they do—and that, even among schools allowing them, professors are not frequently availing themselves of that opportunity.

21. See Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 758 (1998).
22. Emily Zimmerman, *Should Law Professors Have a Continuing Practice Experience (CPE) Requirement?*, 6 NE. U. L. J. 131, 137 (2012), available at <http://nulj.org/sites/default/files/files/NULJ-Vol-6-No-1-ExpEd.pdf>.
23. See, e.g., Carnegie Report, *supra* note 1, at 157; A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 271–72 (1992); Alex M. Johnson Jr., *Think Like A Lawyer, Work Like A Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991).
24. See, e.g., Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95, 97 (1995); J. Timothy Philipps, *Building a Better Law School*, 51 WASH. & LEE L. REV. 1153, 1160 (1994).
25. Survey responses are on file with the author. More detailed information about the data, including graphical representations, can be found at the author's SSRN page at <http://ssrn.com/abstract=2421581>.

This is consistent with the fact that practice-based sabbaticals are so rare and distinctive that they constitute fodder for articles in law reviews<sup>26</sup> and media.<sup>27</sup>

At institutions that do not make it clear that they would permit experiential sabbaticals, interested professors are unlikely to pursue them because of uncertainty over whether they would be approved. Moreover, in institutions lacking policies that clearly permit experiential sabbaticals, there is at least an implicit message that such sabbaticals are not encouraged. And at institutions whose policies do permit experiential sabbaticals, professors often may not take them because of implicit expectations of publication or because of a sense that pursuing such sabbaticals will not enhance their reputations and standing at the institution or externally among their peers. It also is true, of course, that many professors may simply have no interest in taking such a sabbatical.

The purpose of this article is not to exhort every tenured law professor to return to practice. However, as I will demonstrate, my own practice-based sabbatical is at least anecdotal evidence that such experiences can be a powerful tool for faculty development in terms of teaching, scholarship and service in ways that benefit both the faculty member and the institution.

## II. The Benefits of My Experiential Sabbatical

Fortunately for me, the Office of the District Attorney for Orange County already had in place a program that was very much in line with what I wanted to do during my sabbatical. Their Trial Attorney Program, or TAP, is designed for civil attorneys seeking more trial experience than they typically would get in their practices. TAP attorneys, as they are called, spend two months as deputy district attorneys and typically handle misdemeanor pre-trial motions and trials, felony preliminary hearings and case resolutions through plea bargaining. For better or worse, they typically have more limited exposure than full time deputy DAs to the more ministerial aspects of prosecution work.

The TAP program has been in operation for a number of years and is offered several times each year. As far as I know, I was the first law professor in at least a decade, and perhaps only the second one ever, to participate in the program.

Orange County has a central District Attorney's office and four branch offices associated with various local courts: North, West and Harbor, which

26. See, e.g., Suzanne Rabé & Stephen A. Rosenbaum, *A "Sending Down" Sabbatical: The Benefits of Lawyering In The Legal Services Trenches*, 60 J. LEGAL EDUC. 296 (2010); Cohen, *supra* note 18, at 643; Bobby Marzine Harges, *Law Professor's Sabbatical in District Attorney's Office*, 17 TOURO L. REV. 383 (2001); Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 32 (2001); Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 1 (1996); Gary S. Gildin, *Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender*, 44 J. LEGAL EDUC. 199 (1994).
27. See, e.g., Don J. DeBenedictis, *Professors Seek Practice Time: Law Schools Are Lukewarm on Real-World Sabbaticals for Academics*, DAILY J., July 10, 2012, at 1; see also Bruce Vielmetti, *Marquette Law Professor Trades Classroom for Courtroom*, MILWAUKEE WIS. J. SENTINEL (Jan. 24, 2012), <http://www.jsonline.com/news/wisconsin/marquette-law-professor-trades-classroom-for-courtroom-pv3thop-138018698.html> ("[H]er gig remains an unorthodox sabbatical.").



handle adult criminal matters, and the Juvenile Court Division. My TAP experience was somewhat unusual, in that I split my time between the juvenile division and adult criminal work in the West branch. The supervising attorney for the TAP program believed that this would give me a fuller picture of the workings of the criminal justice system. She also knew that some of my scholarship had focused on rehabilitation, which gets greater emphasis in the juvenile system than in the adult system.

Dividing my time this way did have some drawbacks. First, the juvenile and adult systems are quite different with their own statutes, procedures and practices. Just as I was starting to become familiar with the idiosyncrasies of juvenile court, I was transferred to the adult courts and had to start a new learning curve. Second, I did not get the continuity that comes with working in one branch for a longer period of time and so may have missed out on opportunities for deeper connections with colleagues and judges. Third, on a more basic level, given the nature of trial assignments and scheduling, I might have conducted more trials had I spent all my time at one branch.

Despite these limitations, the experience was overwhelmingly positive and was deeply beneficial to my teaching, scholarship and role as an institutional citizen.

### *A. Benefits to Teaching*

#### 1. New and Better Problems and Simulations

Working as a prosecutor provided me with excellent fodder for practice problems, in-class examples and simulations and exam questions. Not only did I acquire much new material but it came with the depth that only real law practice could provide.

Consider just one case I handled at the juvenile division. The respondent, 17 years old, was accused of petty larceny for taking \$14 worth of alcohol from a supermarket. A few blocks away, he was struck by a car while skateboarding across an intersection. Police initially responded because of the accident. But when they arrived at the scene, they saw a shopping basket from the supermarket and bottles of alcohol strewn across the street. One officer went to the hospital to speak with the minor, who had been taken there for treatment of his injuries. The youth initially denied taking the alcohol, but soon admitted stealing it. A second officer was called and sent to the supermarket to review the applicable surveillance tape. The tape showed that, minutes before the accident, someone matching the minor's description and carrying a skateboard took several bottles from the alcohol aisle, placed them in a shopping basket, and exited past the checkout aisles without attempting to pay.

At the trial, my two witnesses were the officer who spoke to the minor in the hospital and the officer who went to the supermarket. Although the case initially seemed straightforward, a clever public defender quickly complicated things.

The second officer reviewed the supermarket surveillance tape but did not preserve it. It was erased in the ordinary course of business by the supermarket 30 days later. The defense<sup>28</sup> sought to exclude the officer's testimony about the tape as unduly prejudicial.<sup>29</sup>

I countered that under California's secondary evidence rule (unlike the federal best evidence rule<sup>30</sup>), "[t]he content of a writing may be proved by otherwise admissible secondary evidence."<sup>31</sup> According to Law Review Commission Comments: "The nature of the evidence offered affects its weight, not its admissibility. The normal motivation of parties to support their cases with convincing evidence is a deterrent to introduction of unreliable secondary evidence."<sup>32</sup> Thus, the defense was free to argue that my proffer of the officer's testimony about the surveillance tape, rather than the tape itself, raised a reasonable doubt as to the minor's guilt.<sup>33</sup> But this was not grounds for exclusion of the testimony.

The defense pointed out that the statute further provides that secondary evidence "shall" be excluded if the court determines either that "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or that "[a]dmission of the secondary evidence would be unfair."<sup>34</sup> The defense asserted that there was a genuine dispute as to the contents of the surveillance tape, since the minor denied that it would have showed him stealing, and that justice and fairness required the exclusion of the officer's testimony because the defense had an inadequate basis on which to cross-examine the officer about the tape.

I responded that, as the Law Review Commission Comments and the secondary evidence rule itself made clear, a separate statute, Section 1523 of the Evidence Code, governed the admissibility of oral testimony to prove the content of a writing.<sup>35</sup> Section 1523 provides that oral testimony is not inadmissible (that is, it may be admitted) "if the proponent does not have possession or control of a copy of the writing and the original is lost or has

28. In juvenile court, the minor is referred to as the respondent, not the defendant. However, for readability I will use the more common "defense counsel" or "defense" to refer to the minor's attorney.

29. *See* CAL. EVID. § 352 (West 2012).

30. FED. R. EVID. 1002.

31. CAL. EVID. CODE § 1521(a) (West 2012).

32. CAL. EVID. CODE § 1521 (West 2012) law revision commission cmts.

33. In juvenile court, a minor is not found guilty or not guilty; rather, the petition is either sustained or found true, on the one hand, or denied or not proven true, on the other.

34. CAL. EVID. CODE § 1521(a)(1)-(2) (West 2012).

35. *See* CAL. EVID. CODE § 1521 (West 2012) law revision commission comments ("Subdivision (b) explicitly establishes that Section 1523 (oral testimony of the content of writing), not Section 1521, governs the admissibility of oral testimony to prove the content of a writing.").



been destroyed *without fraudulent intent on the part of the proponent of the evidence.*<sup>36</sup> Accordingly, I argued that because the original evidence (the surveillance tape) was not destroyed by the police, let alone with any fraudulent intent, the oral testimony about the tape's contents was admissible.

Ultimately, the judge sided with the defense, ruling that the secondary evidence rule's "carve-out" for oral testimony of a writing's contents did not negate the rule's fairness requirement and that admitting the testimony when police did not take reasonable steps to preserve the surveillance tape was unfair to the defense.

As an advocate, I was obviously disappointed with the judge's ruling. As a professor, I thought the ruling was defensible (although it raised line-drawing problems). But had the issue not been litigated, I do not know that the arguments on both sides would have been fleshed out as thoroughly as they were. In the decade that I have been teaching evidence, I have never come up with a hypothetical involving the secondary (or best) evidence rule that was so organically woven into the facts of a case or that warranted such a close reading of applicable statutes.

A hypothetical based on this real dispute would present a good opportunity for students to practice both statutory interpretation and application of law to facts—two areas in which students often lack sophistication and need repetition. At the same time, the legal issue did not require extensive background knowledge of the field. The only raw materials with which the parties worked were a few statutes, some brief Law Review Commission commentaries and a handful of applicable cases. Thus, I could raise the issue with the students in a "closed universe" setting with relative ease. I could also easily modify how I present the issue, posing it as a writing exercise, an in-class oral advocacy simulation or a question on a midterm or final exam, depending on the time I want to allocate and the skills on which I want to focus.

But this was only the first key evidentiary issue raised in the case. Once defense counsel succeeded in excluding the officer's testimony about the supermarket surveillance video, he moved to dismiss the entire case on the ground that the people had failed to prove the *corpus delicti* of the crime. In California, the *corpus delicti* rule, imposed to prevent a defendant from confessing to a crime that never occurred, requires that the prosecution prove, through some evidence aside from the defendant's admission, the existence or "body" of a criminal act.<sup>37</sup> The defense argued that there was no evidence (other than the minor's confession) that any alcohol was actually stolen from the supermarket: there was no surveillance tape, no testimony about

36. CAL. EVID. CODE § 1523(b) (West 2012) (emphasis added).

37. See *People v. Alvarez*, 46 P.3d 372, 375–76 (Cal. 2002) (Under the common law *corpus delicti* rule "the prosecution must prove the *corpus delicti*, or the body of the crime itself—i.e., the fact of injury, loss or harm and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions or admissions of the defendant.").

the surveillance tape, no supermarket employee to testify that anything was missing and no inventory showing that any merchandise was missing.

I responded by pointing out several key facts and inferences. First, the broken bottles and the basket with the supermarket's logo that were found strewn near the minor at the accident scene suggested that the alcohol had come from the store. The position of the basket and bottles in relation to the minor and the fact that the pavement near the broken bottles was wet with alcohol suggested that the alcohol had been in the minor's possession just before the accident, and did not end up there at some other time or through some other party. And, since a minor could not have lawfully purchased the alcohol, evidence suggesting he was in possession of alcohol from the store was sufficient evidence that the crime of larceny had occurred. The judge agreed with my position and denied the defense motion to dismiss.

It was relatively easy to defeat the defense argument, particularly given the low threshold for establishing *corpus delicti*.<sup>38</sup> But for law students, playing the role of a hypothetical prosecutor, fending off the motion to dismiss could be a meaningful and challenging exercise. The winning argument to defeat the defense challenge required paying attention to small factual details and drawing inferences from them—skills that law students often struggle to develop. Moreover, on most law school exams, students are asked to argue both sides of an issue. But a law student is more likely to notice factual nuances and draw subtle inferences from them if she is in the role of an advocate who needs to come up with arguments to win a case. I base this assertion on the fact that I strived to use factual nuances and draw subtle inferences because *I* was trying to win.

The last major evidentiary issue in the case arose when the defense sought to exclude the minor's confession to the police officer on grounds that it was taken in violation of *Miranda*. I argued in response that if the minor was not free to leave, it was not because of any action by the police but because of the nature of his injuries. He was in hospital custody, not police custody.<sup>39</sup> I also

38. See *Rayyis v. Superior Court*, 35 Cal. Rptr. 3d 12, 16-17 (Cal. Ct. App. 2005) ("The amount of additional proof that is required to satisfy the *corpus delicti* rule is fairly minimal . . . . The People need make only a prima facie showing permitting the reasonable inference that a crime was committed. The inference need not be the only, or even the most compelling, one . . . [but need only be] a reasonable one. . . . Such independent proof may consist of circumstantial evidence and need not establish the crime beyond a reasonable doubt.") (quotations and citations omitted). Of course, appreciating that the burden of proof on this issue is quite different from the far more stringent "beyond a reasonable doubt" standard to prove guilt is itself an important lesson for students.

39. Advisement of *Miranda* rights is only required when a person is subjected to custodial interrogation. See *People v. Mickey*, 818 P.2d 84, 98 (Cal. 1991). What is meant by "custody" is that a "reasonable person in the suspect's position would believe his freedom of movement was restrained to a degree normally associated with formal arrest." *People v. Mosley*, 87 Cal. Rptr. 2d 325, 330 (Ct. App. 1999) (emphasis added). The police are not generally responsible if the defendant's freedom of movement was restrained by third parties. See, e.g., *United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985) ("There are no facts to indicate law enforcement officials were in any way involved in Martin's hospitalization or did anything to extend

tailored my questioning of the officer to elicit various details that collectively demonstrated there was nothing about the encounter that was so coercive as to make the minor's confession involuntary.<sup>40</sup> The judge found that there was no *Miranda* violation and allowed the testimony. Ultimately, the judge found the confession and the circumstantial evidence from the accident scene sufficient to prove the charge against the minor.

Using my knowledge of *Miranda*'s "in-custody" requirement to shape my questioning of the officer on the witness stand is a good example of how lawyers often use deductive reasoning—they harness their understanding of the law to execute a particular legal task. By contrast, in the classic Socratic dialogue employed in law school, students are engaged in purely inductive reasoning—the raw materials (usually edited appellate opinions) are placed before them and their job is to try and distill legal principles. Having encountered this *Miranda* issue in practice, I can now create a simulation in which students review the applicable law and then craft and perform an examination of an officer with an eye toward establishing or negating the applicability of a legal theory. During discussion and critique afterwards, we can address any misunderstandings about the law and evaluate the effectiveness of different examination techniques in employing the law to the advocate's advantage.

Thus, as a result of a single \$14 petty theft trial in juvenile court, I encountered three interesting evidentiary issues that I could use to help deepen my students' understanding of doctrine and how it is applied in practice. Moreover, every other case I handled, whether it went to trial or not, either raised novel issues of substantive, procedural or evidentiary law or involved novel applications of such issues. My brief time in practice was a remarkably effective way to expand and improve my repertoire of hypotheticals and simulations for use with my students.

## 2. Deepened Expertise

Not only did exposure to legal issues in practice equip me with new material to use with students, it forced me to more deeply explore issues I had been teaching for years. And because I went outside my comfort zone of civil litigation into criminal practice, I became more adept at certain doctrines and gained a better appreciation for their relationship to real-life disputes.

For example, in my years as a civil litigator, I rarely if ever encountered a genuine dispute regarding the secondary (or best) evidence rule. Because I never litigated the issue, I did not appreciate the complexity of the statutory language or the policy concerns underlying the rule as fully as I otherwise might have. But after having argued—in two rounds of briefing and nearly

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Martin's hospital stay and treatment.”).

40. Cf. *Mosley*, 87 Cal. Rptr. 2d at 332 (“[T]he interview was in view of and in the presence of medical personnel who continued to treat defendant during the brief interview. We also note that the questioning was not accusatory or threatening, that defendant was not handcuffed, that no guns were drawn and that defendant was about to be transported to a hospital and not to a police station or jail.”).

an hour of oral argument—the issue in connection with the dispute over the police officer’s testimony about the contents of the destroyed supermarket surveillance tape, I am now an expert in the topic in a way that I was not previously, despite having taught it for ten years.

Similarly, in civil matters, particularly business disputes, impeachment of the credibility of a witness with a prior conviction<sup>41</sup> rarely arises. In criminal matters, by contrast, there is rarely a case in which a witness is not subject to impeachment when he has a conviction history. Having now raised the issue before different judges and briefed it with regard to a variety of offenses, I have a much better sense of how a judge is likely to rule with regard to a particular offense category and what kinds of facts judges actually find pertinent to resolution of the issue.

I also learned how to lay a foundation for a new and different kind of evidence. In my years of business litigation, the only types of evidence I ever had reason to authenticate were documents and, occasionally, photographs. Yet as a prosecutor, I quickly had to become adept at laying the foundation to authenticate 911 audio tapes and transcripts, as well as police patrol car videos. Authenticating these types of evidence involved somewhat distinctive procedures, as well as different technologies: in my time as a civil litigator, I had never had occasion to connect my laptop to the courtroom’s audio/visual outlets to ensure that the jury could see and hear the evidence I was presenting.<sup>42</sup> And, although I was previously aware of California’s requirements for admitting hearsay evidence through the testimony of a police officer at a preliminary hearing under Proposition 115, this meant much more to me once I was routinely required to lay that foundation in my own hearings.

I am not suggesting that one cannot competently or even superbly teach a doctrine without having applied it in practice. Law professors have the luxury of time to analyze the law in depth in ways that practitioners do not. And practice is not a guaranteed formula for expertise. Even if one were to practice for decades, he or she would not have occasion to encounter every issue that could potentially arise. But I think it is fair to say that one is unlikely to get the feel for a doctrine or to appreciate the nuances of its application as deeply without engaging with it as lawyers do. Indeed, it is reasonable to expect that a professor would be better able to teach students how to “think like a lawyer” if he or she has personally done so.

Aside from any increase in my actual expertise, my heightened credibility as an “expert” in my students’ eyes is itself valuable. Moreover, when I tell students about my foray into criminal practice, they routinely indicate that

41. See FED. R. EVID. 609; CAL. EVID. CODE § 788 (West 2012).

42. In the civil litigation I had experienced, to the extent that in-court technology set-up was necessary, the firms I worked with usually hired outside technology consultants to handle it. Conversely, the fact that criminal practice was (largely for budgetary reasons) in some ways more “low tech” forced me to master certain technological issues myself. The same applied outside the courtroom: The hard copy of the California Penal Code and Evidence Code was probably the single most frequently used research resource in the office.

they view my decision as a sign of my commitment to their well-being and what they care about—becoming practice-ready. Thus, my practice experience raises my standing in their eyes not only as an expert, but as an educator and mentor.

My experience also served as a refresher about the limits of doctrine and the centrality to practice of the types of skills that rarely get taught in doctrinal classes. For example, during a jury trial I tried, the judge—outside the presence of the jury, and not yet knowing that I was a law professor (let alone a professor of evidence)—commended me on making several evidentiary arguments that he had never heard before. He even did research and confirmed that my arguments were based on correct readings of the law. Nevertheless, the judge said, he was sticking by his rulings against me on those issues. Thus, getting the “right” answer does not always translate into winning—a distinction that students rarely hear about, let alone experience first-hand, until after they graduate.

### 3. Increased Exposure to “Cross-over” Topics

Colleagues at my own and other institutions have noted students’ frequent difficulty recognizing how concepts and skills learned in one subject apply in another. They will learn, for example, about the “reasonable person” standard in connection with negligence in their torts course but fail to see any connection between that and, say, the “reasonable investor” standard discussed in their Corporations or Trusts course. Or they will learn the IRAC format for analyzing issues in their writing classes and fail to see how that tool has anything to do with their analysis of issues in their doctrinal courses. Despite being told explicitly about the transferability of these ideas, students may fail to see how they connect.

In real life, of course, substance and procedure, as well as different areas of substantive law, do not present themselves in neat, discrete boxes. A client does not walk in the door and say, “I have a torts problem.” She says, “I have a problem.” And it is up to the lawyer to determine which causes of action—whether grounded in tort, contract or otherwise—may best serve the client’s interests. Similarly, no matter what the subject matter of litigation, it is handled in a procedural context and lawyers must use procedural tools to pursue the strategic interests of their clients.

Understanding the interaction between subjects is important for students not only to prepare them for practice but for the bar exam. The California bar exam’s essay and performance test portions often include “cross-over” questions that span two or more subjects. Certain subjects readily lend themselves to be paired in cross-over questions, such as wills and trusts and community property or business associations and contracts.

Before my time at the district attorney’s office, I was already well acquainted with the importance and prevalence of cross-over issues. I have taught or lectured in evidence, criminal law and criminal procedure numerous times

in the past and these three subjects naturally overlap. I had even designed an Advanced Litigation Seminar that focused on four facets—procedure, substance, strategy and ethics—that a lawyer must engage and integrate at every turn. But my field experience as a criminal prosecutor reminded me of the centrality of cross-overs and also gave me experience applying cross-overs in new contexts. I can now use this experience to help my students better see how areas of the law weave themselves together into an organic whole.

For example, in my juvenile court trial involving the minor who stole alcohol from the supermarket,<sup>43</sup> the three major issues I litigated spanned the topics of evidence, criminal law and criminal procedure. The secondary evidence issue regarding the police officer's testimony about the surveillance video obviously involved evidence doctrine. Once I lost this issue, the defense motion to dismiss on grounds of inability to establish the *corpus delicti* of the crime was, in a sense, an evidentiary one, but it also went the heart of the elements of the substantive criminal offense itself. And when this motion failed, the defense's subsequent attempt to exclude testimony about the minor's confession on *Miranda* grounds was a classic criminal procedure issue. By administering a hypothetical scenario based on this case, I can expose my students to three different subjects at one time and help them see how the subjects interact with each other in practice.

Admittedly, there may be good reasons for segregating different topics in the classroom. For instance, when I introduce my Evidence students to Federal Rule of Evidence 409, which provides for the exclusion of statements made during failed plea negotiations, I am faced with the logistical reality that some students may have already learned about *Miranda* in their Criminal Procedure course, while others have not.<sup>44</sup> Although a defendant's statement that survives Rule 409 scrutiny may nevertheless ultimately be excluded on *Miranda* grounds, I cannot in fairness expect each of my Evidence students to accurately predict the admissibility of the statement if they have had disparate exposure to the relevant doctrines. Thus, I typically tell them to assume that police had complied with *Miranda* in conducting their Rule 409 analysis.

But my time in practice spurred me to reconsider my reluctance to ask my students to handle cross-over problems. Opposing counsel routinely comes to cases with different backgrounds or depths of experience with particular topics and law students must learn to navigate such scenarios. Considering once again my Rule 409 example, I could assign my students to role play as prosecutors or public defenders, give them advanced notice about the *Miranda* issue and provide them with background materials or a mini-library of relevant authorities. Moreover, as long as students are being graded exclusively (or primarily) on their Rule 409 analysis, any unfairness based on differentials in prior doctrinal exposure is mitigated.

43. See *supra* Part III.A.1.

44. Either because different Criminal Procedure professors cover different topics at different points in the semester, or because some students in my Evidence class have not yet taken Criminal Procedure.



Student fairness aside, efficiency concerns may counsel against the cross-over approach. All law professors feel pressure to cover a lot of material in a limited amount of time. The professor who teaches evidence feels she can hardly get through all of the evidence topics she wants to cover in the time allotted, without spending time on criminal procedure topics like *Miranda*. But there are many different ways to structure an assignment or classroom time. To go back to my Rule 409 example again, I could role play as a judge and issue a written tentative ruling on defense counsel's motion to exclude the defendant's statements on both Rule 409 and *Miranda* grounds. I could cite relevant authorities in the tentative ruling, so students in the role of criminal trial attorneys know what to focus on. I could even state explicitly in the ruling itself that I am more troubled by the Rule 409 issue and want the lawyers to focus more heavily on that issue at oral argument (i.e., class discussion).

Moreover, any assessment of efficiency necessitates an analysis of one's objectives. By adding a *Miranda* issue to a Rule 409 problem, I am undeniably taking some amount of time away from my goal of covering evidence concepts. However, in every class, each professor pursues multiple goals. If a key course goal is to help students see how evidentiary concepts interact with concepts from other fields in real-life practice, a simulation exercise may be the best way to serve that goal.

Simulations also present opportunities to integrate application of doctrine with other skills. For example, in my Evidence class, students are typically presented with a "closed universe" of facts and are asked to assess the admissibility of a given piece of evidence. However, such an exercise presents a narrow window into what litigators do in practice and overlooks the larger and more difficult job of developing facts within a realm of uncertainty. Trial lawyers must understand their theories of the case to know what evidence they hope to uncover, what witnesses to contact and interview and so on. And as lawyers obtain evidence, their theories and strategies of the case often shift, requiring them to develop yet more or different evidence. Simulations can help students develop these critical skills concurrent with mastering doctrine.

One way I now plan to help my Evidence students experience the role of lawyer as fact developer is by presenting two case fact patterns—one civil, one criminal—and revisiting them throughout the course of the semester. Sometimes, students will role play as trial lawyers arguing objections to testimony or evidence. At other times, they may participate in or view a witness preparation session to see how ethical issues arise<sup>45</sup> and to see the connections between what goes on before trial and during trial. Or students may draft or respond to motions *in limine* or exhibit lists, which requires them to develop coherent ideas about which pieces of evidence they do or do not want admitted and why. Of course, at the same time, they will be applying and reinforcing the doctrines we have been learning in class but they will be doing so in a more organic way.

45. See *infra* Part III.A.4.

Professors and institutions must make their own decisions about their student learning goals and their methods for pursuing them. But for myself, my time as a prosecutor has reignited my passion to pursue multiple goals in my classroom and has provided insights about how to better go about doing that.

#### 4. Sharpened Focus on Ethics

The integration of ethics and professionalism training with substantive knowledge and skills is more than just another manifestation of a cross-over question. To the practicing lawyer, ethics is not merely another subject, it is a substrate underlying everything he or she does. Not surprisingly, engaging with criminal law and procedure as a practitioner vividly illustrated for me the ways that ethical issues interact with substantive, procedural and strategic issues.

Witnessing first-hand and experiencing this ethical dimension from the prosecutor's perspective was particularly valuable.<sup>46</sup> Prosecutors play a unique role in our adversarial system. They are supposed to be zealous advocates not of a client's position—their only client is the amorphous “people”—but of the interests of justice.

It was heartening to see everyone I worked with at the district attorney's office take this responsibility so seriously. They sought to vigorously maintain the distinction between the “hard” cases (where they believed beyond a reasonable doubt that the defendant was guilty but were uncertain whether a jury would convict based on available evidence) and the “weak” cases (where they had reasonable doubt about whether the defendant was in fact guilty and which they dismissed). Although there is some talk in the literature about prosecutors over-charging defendants to create leverage in plea negotiations, I neither saw nor heard of anyone doing this. To the contrary, the district attorneys were loathe to level any charge against a defendant that they did not feel strongly was justified by the evidence. In one instance, a deputy district attorney even criticized a colleague for retaining a particular charge against a defendant until he laid out all the evidence demonstrating guilt. And they went out of their way to promptly and thoroughly comply with their disclosure obligations to defense counsel (although some defense counsel would no doubt view this differently).

It was also eye-opening to wrestle with ethical issues myself. Often, prosecutors rely at trial on witnesses who have criminal records and are not always 100 percent trustworthy. Moreover, over time even completely honest witnesses acting in good faith will have inconsistencies in their recollections of events and there may be apparent discrepancies between different witnesses' accounts. I had to make judgment calls about which details were material

46. While in law school, I satisfied my professional responsibility graduation requirement by taking a course called Prosecutorial Ethics. Unfortunately, whether because of the passage of time without using the material or because the course was taught almost entirely in a traditional lecture and Socratic Method format, I remember virtually nothing about it.

enough to disclose to defense counsel.<sup>47</sup> As an advocate, I was pulled in the direction of non-disclosure and saw how tempting it was to rationalize that something was not material. But there was the countervailing incentive of not wanting to violate my constitutional and statutory obligations, thereby jeopardizing the case, my own professional standing and the reputation of the office. These competing pressures are not difficult to imagine but they are not truly felt unless they are experienced in practice.

I viscerally experienced the human element of criminal law practice when I lost a jury trial and had to call the victim and tell him that the jury had acquitted the defendant. The defendant had been charged with assault, battery and vandalism in connection with an alleged unprovoked alcohol-induced attack on the victim and his car in a liquor store parking lot. The victim, his sister and his sister's friend, all in their early twenties and none of whom had ever appeared in court before, were all nervous about testifying. Prior to trial, I took pains to explain to them all that the victim was not my client and was not a party to the criminal proceeding. Nevertheless, I definitely felt a sense of responsibility to him to win the case and I believed I had let him down personally when I lost. Calling him and informing him of the not guilty verdict was one of the more difficult things I have had to do as an attorney. The memory of that experience drives me to emphasize to my students the impact that their professional actions can have on ordinary people's lives.

Surprisingly, I found participating in the sentencing of a defendant who was found guilty to be almost as difficult as telling a victim that I had lost a case. In the heat of trial, I am focused on the evidence, on my courtroom skills and, ultimately, on the judge's ruling or jury's verdict. But once a case was won, I had to rapidly transition into a different role. My primary responsibility was still to do justice but it was not always crystal clear what that meant, particularly because I found my own ego factoring into the calculus. On the one hand, I did not want to appear "soft" to the judge and recommend a sentence that was too light, thereby devaluing the conviction I had just secured. On the other hand, having already won on the issue of guilt, I did not want to appear to be adding insult to injury by advocating for an unduly harsh punishment. And I certainly did not want to erode the credibility I had worked so hard to build up with the judge. To try to set both of these feelings aside, I needed to acknowledge that they were there. I could not have had this window into these conflicting concerns had I not personally engaged in this role.

Perhaps my most illuminating case from an ethical perspective was one that never went to trial. At 3 a.m., a 911 caller reported seeing a man in a parking lot roughly dragging a woman to a car. When police arrived, they saw the defendant pinning his wife in the passenger seat of their car, apparently choking her.

47. This brought home for me the practical importance of having a third party (be it an investigator or even another deputy district attorney) present whenever I interviewed a witness. If the witness gives testimony that is inconsistent with a statement made during the interview, the last thing a prosecutor wants is to be called by the defense as a witness to impeach his or her own witness because of an inconsistent statement.

Unlike the typical domestic violence case, in which the victim initially reports abuse but then recants by the time of trial, in this case both the husband and wife told similar stories to police at the scene: the wife was drunk and out of control and the husband was trying to help her by forcing her into the car. The husband claimed he was trying to get the wife's seatbelt on and call her mother at the same time. Yet the police report noted that this was impossible, because the cell phone battery was dead. As the trial date approached, I called the victim into my office for an interview. When she reiterated the story about her husband trying to call her mother on their cell phone, I pointed out the inconsistency with the police officer's report. She responded that the officer checked the phone's battery nearly an hour after he arrived at the scene and that it had been working at the time officers saw her husband on top of her. I invited her to check her cell phone records online. Sure enough, they showed a two-minute call from her number to her mother, made exactly one minute before the time police arrived. In light of this revelation, our office decided to dismiss the assault charges against the husband. It was not a trial victory but it felt like a moral victory. It illustrated for me the importance of thorough investigation and pre-trial preparation. It also powerfully demonstrated that, although the ethical challenges lawyers face can sometimes be daunting, there is no greater reward than feeling confident that one has done the right thing.

Had I not experienced these ethical issues and competing pressures in the context of adversarial practice, I do not know that I would have learned these lessons so well. Now that I have experienced them, I am in a much better position to create simulations or otherwise develop lessons for my students that fuse ethical issues with skills development and the transmission of substantive knowledge. In other words, I can be a better role model for my students.

### 5. Insight into the Student's Perspective

The longer I teach, the more challenging it is for me to remember and appreciate what it was like to be a law student: the anxiety of being in an unfamiliar environment with unfamiliar jargon, the desire to please and impress my professors as well as my colleagues, and my frustratingly slow speed in completing tasks that a more seasoned veteran seemed to do quickly and effortlessly. Other professors to whom I have spoken have echoed this sense of gradually increasing remove from the student perspective.

In my Criminal Law course, for instance, I am obviously intimately familiar with the material that we cover: I am the one who selects the course casebook, I design and refine my syllabus and I cover largely the same topics year after year. Moreover, because it is a first-year class designed to expose students to general principles, I do not focus on the law of any single jurisdiction. Rather, we examine cases from across the country (and sometimes beyond) in an effort to distill the ephemeral "majority rules," plus certain Model Penal Code distinctions (which are not the law anywhere unless and until a particular jurisdiction chooses to adopt them). As a result, prior to my sabbatical, there

were few California Penal Code statutes that I could cite from memory and I would say that my teaching was none the worse for it.

As soon as I arrived at the district attorney's office, I found myself thrust back into the role of novice. Not only did I have limited familiarity with California's criminal statutes but I knew virtually nothing about the juvenile justice system, which is quite distinct in many ways. The district attorney's office did provide an excellent two-day orientation, which served as a crash course on the California criminal justice system, among other things. But no one else in the program was going to be splitting their time between the adult criminal system and the juvenile system like I was and there was almost no mention of the differences between two.

On my third day in the program—my first day at the Juvenile Division office—I spent the morning observing court proceedings. Both the attorneys and the judge were effortlessly using statute numbers as metonymies for criminal offenses, procedures and remedies, such as: “I don't see how they can call this a 777, it's clearly nothing more than a 654.” Everyone in the room (except me) had no problem understanding this code and responding accordingly. The shorthand continued that afternoon in the office, as the deputy district attorneys discussed their cases with each other and as I was given my first assignments (a trial, a probation violation hearing and a restitution motion). Within short order, I found myself flipping furiously through a code book every time I heard a new statute number. Even when I was provided with handouts that summarized a particular statute or statutory scheme or when a senior prosecutor explained it to me, I still found that I needed to review the statute several times before it stuck in my head.

I cannot overstate how eye-opening this was to me as a professor. In my scholarly research, I come across new concepts and ideas all the time. In the classroom, however—the arena of on-the-spot interaction—I am rarely challenged with something entirely new and unfamiliar. Thus, when I explain a concept to my students in class, particularly one that was already addressed in the reading, I find myself somewhat surprised and disappointed when they still do not get it. But being in the role of a neophyte prosecutor reminded me that exposure to a doctrine once or twice—even clearly explained—is often not enough to make it stick. Repetition and application is essential to learn new material. Thus, my experience in practice provided me a critical lesson about the importance and virtue of patience and persistence as a teacher.

My field experience helped me recalibrate my sense of pacing as a teacher not only with regard to coverage but also with the length and complexity of assignments. As a new prosecutor, because I was not familiar with procedures and statute numbers, assignments that may have taken a more seasoned prosecutor an hour may have taken me two or three times as long. It is hardly different for students. They tend to take longer and produce weaker drafts not because they lack intelligence but because they spend so much of their time looking up rules and refreshing themselves about concepts. Because of their lack of familiarity with the material, they also spend more time sifting through

rules and authorities to try to distinguish those that are on point and persuasive from those that are only tangentially relevant or altogether inapposite. Thus, if my primary purpose for a writing assignment is to assess students' analytical skills and writing abilities and not merely their effort in assimilating doctrine and sifting through sources, I need to be sensitive to what assignment length and complexity will provide a reasonable opportunity to demonstrate those skills.

I also gained the student perspective in a more immediate sense, because I was a sort of "extern" in the TAP program along with law students placed in the district attorney's office for academic credit. For instance, while I was in the Juvenile Division, my makeshift office was a computer station in the library, sandwiched between two law students, one of whom had been a student in my Evidence and Trial Advocacy courses. In some respects, I was in the same situation as them and we were all learning the ropes. Much like any other colleagues working side by side, when one of us was preparing for a hearing or trial, the other two would provide advice and feedback. At the same time, my former student reported that it was eye-opening to have known me as a professor and then to observe me in a professional role and to see how my knowledge and skills in one capacity informed my performance in the other. Thus, the experience was illuminating both to me and to my student. Of course, neither of us would have realized any of these benefits had I been reading about criminal prosecution rather than doing it.

### *B. Scholarship*

Litigating criminal cases exposed me to a variety of issues that can serve as the bases for future scholarship. Many, if not most, of the issues that would make for interesting hypothetical scenarios for my students<sup>48</sup> would also make good fodder for research.

For example, the best/secondary evidence issue I encountered—whether a police officer's arguable negligence in failing to preserve video surveillance evidence is a legitimate basis for excluding his oral testimony about the video's contents—raises interesting questions of statutory interpretation and of the proper balance of policy considerations that underlie the rule and its exceptions. The issue also has important practical implications: for a variety of reasons that do not amount to intentional fraud, it is not all that uncommon (particularly in misdemeanor cases) for police to fail to preserve surveillance videos or other evidence. Thus, by addressing the issue of the proper framework judges should apply in deciding disputes of this nature, I am also making my scholarship more relevant to the bench and the bar. Indeed, without having practiced as a prosecutor, I would not have had a good sense of whether this issue is of practical import.

My scholarship benefited not only from the issues I encountered in my own cases but from discussions about other prosecutors' cases as well. Much as

48. See *supra*, Part III.A.1.



occurs in a law school clinic's case rounds, the branch head of court would conduct weekly roundtables with the deputy district attorneys where we would share evidentiary, procedural or substantive issues that arose in our cases. Such issues included the proper interpretation of the overlapping but distinct exceptions to the physician-patient and psychotherapist-patient privileges,<sup>49</sup> whether a defendant's rejection of a pre-trial offer of a civil compromise with a victim to resolve criminal charges could be admissible at trial when the defense challenged the victim's credibility by suggesting that he had a financial motive to testify against the defendant,<sup>50</sup> and which types of prior uncharged conduct or convictions can or should be used either to establish a common scheme or plan as "1101(b) evidence"<sup>51</sup> or to impeach credibility under the California Supreme Court's ruling under *Castro*<sup>52</sup> and its progeny.

Furthermore, because the deputy district attorneys actually enjoyed discussing their cases, I was exposed during lunches and in hallway chats to many more legal issues than those raised at the weekly roundtables. Although I might have obtained some of these benefits by interviewing prosecutors without actually working with them, it is unlikely that I would have been exposed to the same breadth and depth of issues if I had not been among them on a daily basis.

My perspective as a criminal law and evidence scholar was enhanced in many ways beyond mere exposure to issues. As I got to know the attorneys in my office, they shared their views about past cases or the broader criminal justice system. It was illuminating, for example, to learn how wide-ranging were prosecutors' views about the appropriate use of incarceration as a sanction and about the appropriate length of sentences for many offenders or types of offenses, particularly in light of California's recent "realignment" strategy to deal with prison crowding. I have written about prison reform and alternatives to prison but had never previously worked shoulder to shoulder with the people who had a role in sending people to prison.

I also benefitted from interacting with other players in the criminal justice system. In reviewing police officers' reports, preparing officers to testify at trials and hearings and discussing cases with them ex-post, I better understood the challenges they face and got a better sense of what types of criminal justice reforms can be implemented realistically. I also saw the ways in which police

49. See generally CAL. EVID. CODE §§ 990–1007 (West 2012) (physician-patient privilege); CAL. EVID. CODE §§ 1010–1026 (West 2012) (psychotherapist-patient privilege).

50. See CAL. EVID. CODE § 1153 (West 2012) ("Evidence of . . . an offer to plead guilty to the crime charged . . . made by the defendant in a criminal action is inadmissible in any action") (emphasis added); *People v. Crow* 33 Cal. Rptr. 2d 624, 630 (Cal. Ct. App. 1994) (permitting statements made during plea negotiations that are otherwise inadmissible under Evidence Code § 1153 to be used for impeachment); *Cf.* CAL. EVID. CODE § 1153.5 (West 2012) (excluding evidence of "an offer for civil resolution of a criminal matter pursuant to the provisions of Section 33 of the Code of Civil Procedure").

51. See CAL. EVID. CODE § 1101(b) (West 2012); see also FED. R. EVID. 404(b).

52. *People v. Castro*, 696 P.2d 111 (Cal. 1985).

sometimes fail to act as thoroughly or diligently as they could or should. Seeing these shortcomings developed in me a deeper sense of sympathy for criminal defendants, even as I sought to fulfill my duty to vigorously prosecute those I genuinely believed were guilty. This gave me a more well-rounded view of the criminal justice system and a more meaningful sense of context within which I can propose further reforms.

In my interactions with victims, I saw a variety of attitudes and perspectives, which no responsible assessment of the success of the criminal justice system can ignore. Victims are in a unique position in the legal system because they are not anyone's "clients"—yet it is harm to them that has triggered legal proceedings. Anecdotal evidence of what victims want and think should never substitute for broad-based empirical survey evidence. But it is an important supplement, and helps ensure that the human element of the system is not forgotten as sweeping ideas for reform are proposed.

It was also fascinating to speak with judges and get their ex-post views about cases, which provided an incredible window into both the process of judicial decision-making and the array of judicial perspectives. The public defenders and private defense counsel with whom I spoke also had a diverse range of opinions and perspectives. Even my conversations with court staff, including clerks and bailiffs, were eye-opening since the courthouse staff sees everything.

Immersing myself in a different context than I was used to also helped me to think in new ways about familiar territory. For example, at the risk of being overly general, criminal law practitioners tend to be more "civil" to each other than civil attorneys. The root causes for this appear to be at least in part structural: much of the animosity generated among civil attorneys arises during the lengthy, expensive and contentious discovery process. But in criminal cases, prosecutors are obligated to turn over essentially everything they have, so there is relatively little time or energy spent on discovery disputes.<sup>53</sup> Experiencing this cultural difference first-hand has led me to think about ways in which changing the procedural rules for civil litigation might alter professional interactions and thus has shifted my scholarly perspective on the issue.<sup>54</sup>

If I could have done one thing differently with my sabbatical, I would have tried to arrange to spend time volunteering as a public defender as well. I have

53. Moreover, the criminal bar is relatively small and highly localized, so the same attorneys routinely work with each other again and again. The civil bar, by contrast, is so vast that attorneys rarely expect to see each other again and are less concerned about "burning bridges." It may also be the case that because prosecutors do not have a distinct client, who is urging them to be as aggressive as possible, this has a tempering effect in criminal cases.
54. The initial disclosures and other required disclosures under Federal Rule of Civil Procedure 26(a) were designed to move civil discovery practice somewhat closer to the mandatory disclosure model that criminal prosecutors must follow. However, my experience in civil practice has shown that the initial disclosure rule often just creates more or different issues for lawyers to fight about.

no doubt that participating in criminal law practice from both sides would have given me a fuller picture of the criminal justice system in its totality and thus would better position me to propose useful reforms on a substantive, procedural or structural level.<sup>55</sup>

### *C. Service*

#### 1. Career Counseling

Emily Zimmerman has discussed the ways in which practical experience should make law professors more effective career advisers for students—a role in which they often find themselves. Professors with experience “would be in a better position to inform students about different practice settings” and “might also be better able to make connections between their students and practicing lawyers because [practice experience] would increase the number of practicing lawyers that law professors know.”<sup>56</sup> My own experience has borne out these predictions.

The interests of students who come to me seeking career advice are as varied as the disparate areas of law. Students ask about which areas of law to pursue, how to secure a job or advance in their chosen field, what the work is like and the office dynamics and politics to expect. When counseling students about the practicalities of law practice, I am obviously likely to draw on my own experiences. Yet aside from my time in academia, my own practice experience has consisted almost entirely of business litigation at a large law firm and a smaller boutique. And much of that experience consisted of working on three different high-stakes, multi-year cases for large corporate clients, who possessed (at least from my perspective at the time) seemingly unlimited budgets to fund painstaking legal research, exhaustive discovery and intricately fine-tuned briefs.

Many of the students who come to me seeking advice, however, will not be joining large law firms. They will be joining small firms or opening solo practices, or going into government service, where time, money and resources are limited. They may have no interest in business litigation, if they want to be litigators at all. And because I teach criminal law, many come to me specifically because they are interested in practicing in that field and want to know more about what it is really like to practice. My experience at the district attorney’s office greatly enriched and broadened my experience base, enabling me to provide guidance to my students that is both more robust and more nuanced.

First, in terms of what it is like to practice criminal law, I now have a personal basis for my advice. I certainly had some basis previously, based on my teaching, my research and my interaction with criminal practitioners. But

55. It would have also allowed me to experience the direct client representation issues that are absent from the role of a prosecutor.

56. Zimmerman, *supra* note 22, at 142-43.

now I can relate first-hand the joys and frustrations, the broader philosophical implications and the day-to-day banalities of criminal law practice. I am now in a better position to help students assess whether criminal law is a field they would want to pursue.

Second, I am in a position to better advise students about which skills they should be trying to cultivate. I now have the experience of handling a relatively high volume of smaller cases, for which somewhat different skills are required. Caseload management is critical, but was something I worried about much less when I was working exclusively on a single large case or a handful of cases. With many small cases, each with a time horizon of days or weeks, rather than the months or years involved in large litigation, one must quickly assess the discovery and motions that will be essential to the case. Thus, speed, efficiency and setting priorities for the most essential tasks are indispensable. Given that there is relatively limited support staff compared to a large firm—an attorney cannot readily farm out research, document assembly or other tasks to junior associates, paralegals or secretaries—these issues are all the more important.

Thoroughly researched and expertly written legal briefs were certainly encouraged at the district attorney's office but there was no expectation that this would be done in every case—there simply was not enough time. And because judges in criminal matters have come to expect oral motions, or at least shorter and simpler written motions, there is often not enough advantage gained by submitting an exhaustive and highly polished brief to justify the time it takes to write one. The ability to think on one's feet is more highly prized in this context.

Budding criminal practitioners must also reckon with the fact that much of their time and energies will be spent dealing not with lawyers or judges but with police, probation officers and associated personnel. Police department liaisons are critical points of contact for securing police witnesses for hearings and trials and for obtaining timely and accurate discovery materials for defense counsels and for use at trial. A similar dynamic exists with victim witness liaisons. A prosecutor's interpersonal skills in dealing with these personnel are a critical tool. And it is not enough to "sweet talk" them: a prosecutor must understand and try to accommodate their scheduling and other professional pressures. As one small example, a prosecutor should be extremely solicitous of a police officer who has just worked a graveyard shift and is now being asked to arrive in court at 9 a.m. to testify.

Third, I have experience dealing with different office dynamics. The lifeblood of a large firm, for better or worse, is primarily rainmaking—bringing in clients, cultivating relationships and increasing the book of business. And from a law firm associate's perspective, billable hours are, more than anything else, what dictate bonuses and promotions. Trial experience or success at trial is a relatively insignificant factor in evaluating associates, since few cases actually go to trial—and, when they do, junior associates rarely get much courtroom experience.

But at the district attorney's office, there is no wooing of clients because there are no clients. The office represents the people of the state and it has a monopoly on the prosecution of all criminal matters within its jurisdiction. As such, there are no rainmakers. There are also no billable hours because there is no one to bill: the deputy district attorneys are all government employees who make a fixed salary no matter how late they stay at the office. The primary currency for advancement in the office is the number of trials conducted, as well as the success rate at trial. Thus, those intent on a career as a prosecutor may want to cultivate a different skill set than those interested in civil litigation.

Perhaps because of these structural differences, or perhaps simply because the branch offices at which I volunteered were relatively smaller than a large private firm, the intra-office dynamic was different as well. My sense in the large civil firm was not that associates sought to undermine each other but that they saw themselves as independent units in a larger confederation rather than as players on a larger team. Other than e-mails asking if anyone had an exemplar of a particular type of document or experience with a particular judge, opposing counsel or mediator, there was little collaboration with attorneys not assigned to a given case. But at the district attorney's office, people *liked* talking about their cases and they were eager to help each other. The unofficial motto was, "when one of us is in trial, we're all in trial." Junior and senior prosecutors alike were eager to share their knowledge and give advice based on their own experiences.

At the same time, it is useful for me to be able to tell students about which dynamics are common to large civil firms and smaller prosecutor's offices. After all, politics is politics. In any office, there are certain individuals who gravitate toward each other because of shared personalities, interests or world views. At the district attorney's office, one's trial record is important, but it is not everything. Much like the relationship between associates and partners, superiors form a subjective impression of a young prosecutor's abilities based on personal interactions, reputation or perhaps just gut instinct—and that is bound to have some impact on the speed and trajectory of one's rise through the ranks. And even if a supervisor favors a junior prosecutor, different supervisors may have different circles of influences within the larger organization and may be in position to lobby for promotions of those they favor.

Lastly, my time at the district attorney's office expanded my network of professional contacts. Not only did I get to know the players within the district attorney's office, I had positive interactions with judges, public defenders, private criminal defense attorneys and even senior court administrative staff. I am thus in a better position to reach out to people within this broader network to inquire about opportunities for employment, field placements or *pro bono* experiences for our students and graduates. And when students ask me for letters of recommendations that will find their way onto these people's desks, it stands to reason that my endorsement will carry more weight because the decision-makers know me personally.

## 2. Administration

One of the capacities in which I serve my law school is as the director of our Institute of Trial and Appellate Practice. The connections that I made while at the district attorney's office not only help me assist our students and graduates as they seek jobs but it has helped me bring practitioners to campus and create opportunities for our students and our institution in other ways.

First, through my work, I met both a district attorney and a public defender who expressed interest in serving as adjunct teachers in practice-related courses. One of them likely will serve as a coach for our competitive mock trial team, which is one of the programs I oversee as director of the institute. The other expressed interest in teaching or even developing an experiential course. Second, I met experienced trial lawyers and judges who expressed a willingness to speak to our students on campus at colloquia that I organize. Third, one of the practitioners I met is also active in a local bar association. By interacting with her, I have strengthened my ties with that organization and opened other doors to contacts with potential adjuncts and speakers. Fourth, as noted above, I was in contact with senior court administration personnel during my sabbatical and have discussed with them setting up *pro bono*, externship and other practiced-based educational opportunities for our students. Fifth, as a result of these court contacts, I was able to secure the use of a local courthouse for a regional mock trial competition that my school is hosting.

Thus, by expanding my own professional network, I was able to add value to my institution in a number of ways. And this was in the course of just two months. I would expect the benefits to have extended further had I spent more time in practice.

## 3. Service to the Community

When law schools talk about law professors engaging in teaching, scholarship and service, the service typically includes internal institutional service as well as external service. It should not be overlooked that the time I spent as a prosecutor, representing the people of California, was a service to the community. I was helping put "bad guys" in jail, I was negotiating less stringent punishments for offenders when justice warranted it and I was involved in dismissing cases when that was appropriate. I also used my background as a professor to counsel and teach some of the more junior deputy district attorneys on issues of evidence and trial presentation. To the extent that law schools are institutions dedicated to the public good, I furthered this goal in my own small way.

Moreover, there is something to be said for "doing well by doing good." By working in the trenches with other trial lawyers, I definitely boosted my own and my law school's credibility in the eyes of the prosecutors, defense lawyers, judges, police officers and witnesses with whom I interacted. Many were impressed that I had ventured outside the ivory tower to get criminal



trial experience. Those initial impressions sometimes led to longer and more involved discussions about the value of experiential learning in legal education, thus providing deeper appreciation of the challenges facing law schools and the strides being made by many professors and institutions.

If more professors followed my example, my foray into practice would be more commonplace and of less interest. But I would welcome that tradeoff. Indeed, if law professor participation in practice became more prevalent, the esteem of law schools in general in the eyes of the legal community undoubtedly would rise.<sup>57</sup>

My analysis of the benefits of my experiential sabbatical has focused almost exclusively on the benefits to my institution or to related constituencies such as students, alumni or the legal community. In case there is any doubt, I should state unequivocally that my time in practice was also extremely rewarding to me on a personal level. I returned to school more excited about my role as a teacher and scholar, armed with a plethora of examples and ideas I can use and more confident that I have the skills and knowledge base to effectively teach and prepare my students for practice. It was invigorating to experience new settings and work challenges and intellectually stimulating to speak and interact with people in a variety of roles. And it was exhilarating to stand before a judge or jury, making the types of arguments that I have been preparing my students to make for years. Oh yes, and it was just plain fun.

### III. Implementation Challenges and Recommendations

The anecdotal evidence from me and others, as well as various educational theories, suggests that experiential sabbaticals would be rewarding to the law professors who engage in them and benefit the institutions they serve. But to be clear, my purpose is not to advocate, as some have done, that law professors be required to periodically engage in practice (although there may be merit in such proposals). Rather, my point is that, because experiential sabbaticals are so well-suited to serve the professional development goals for which sabbaticals are designed, they should be encouraged or at least unambiguously permitted by more law schools.

In other words, if law schools claim that they are—or want to become—more engaged with the practice of law, they should facilitate their faculty becoming more engaged with the practice of law. As the Carnegie Report, *Best Practices* and numerous other sources make clear, relying on adjuncts or clinicians to shoulder all of a law school's experiential teaching is insufficient. And even

57. It could also do an immense amount of good. Consider that there are just over 200 ABA-accredited law schools. Assuming conservatively that the average school has 25 tenured faculty members, there are an estimated 5,000 total tenured professors at such schools. If, in any given year, one in seven tenured professors takes a sabbatical, that is about 700 per year. If each professor spent a semester-long sabbatical working as a prosecutor, public defender or in legal services and worked 40 hours a week, they would each deliver 600 hours of services to the poor or for public benefit—a total of 420,000 hours per year. At a time when prosecutor's offices, public defender's office, and legal aid organizations' budgets are facing cuts, this could provide a much-needed boost to their manpower.

if a law school hires doctrinal professors with significant practical experience, with every passing year that experience becomes more distant and potentially less relevant. This risk may be particularly acute now, given the rapid changes in law practice technology and recent market disruptions in the legal field. Traditional doctrinal faculty would benefit from obtaining more practical experience and their students would benefit from it, as well. Yet the limited empirical data indicates that many, if not most, law schools are not making experiential sabbaticals available or at least are not clearly signaling that such sabbaticals would be permitted.

#### *A. Documentation of Institutional Benefit*

One reason for limited utilization of experiential sabbaticals may be simply that many institutions do not want their faculty taking them. Losing the teaching services of a law professor for a semester or a year can be a significant financial and administrative burden. To be compensated for that loss, law schools may want sabbaticals to culminate in a significant piece of research—a substantial law review article, a book or the like. Presumably, if a law professor can manage to engage in practice and produce scholarship during her sabbatical, a law school would have no reason to complain. In such a case, the professor's time in practice is tantamount to the research she might do before writing her work. But, if the law professor does not produce scholarship at the end of the sabbatical, what does the law school have to show for granting the professor time off from teaching?

There are at least three responses. First, as long as a professor produces a post-sabbatical report documenting her experiences and articulating how they benefitted her in terms of revealing additional avenues of research, improving teaching and/or expanding her network or otherwise strengthening her ability to serve the institution, that should constitute sufficient documentation of the sabbatical's worth to the institution.<sup>58</sup>

A law school may still object that such a post-sabbatical report, while valuable internally, is not something that can raise the school's reputation within the academic community as a law review article or book could. But this merely highlights that empirical research is needed to determine the impact of experiential sabbaticals on scholarship. The limited body of empirical research on the impacts of sabbaticals on faculty productivity has shown only a minimal or even negative correlation with research productivity and teaching quality.<sup>59</sup> It may be the case that medium- or long-term increases in research productivity or increases in the prestige of the journals in which professors' scholarship is placed are at least as great or greater among professors who take experiential sabbaticals as among professors who take traditional research-based sabbaticals. If so, this objection to the experiential sabbatical is really

58. See *supra* text accompanying note 17.

59. Miller, Bai & Newman, *supra* note 14, at 2.

based on a short-sighted focus on immediate gains, rather than on a longer-term emphasis on maximum benefit.

Third, law schools should consider whether the debate over short-term versus long-term research productivity is itself too narrow. Law school administrations should focus on getting maximum overall return on the institution's investment in the faculty member's professional development. Given that experiential sabbaticals by their nature are likely to be far more beneficial to a law professor's teaching and service than traditional sabbaticals, it may be that, even if they do have less impact on research, the trade-off is worth it.

### *B. Compensation and For-Profit Legal Work*

A separate objection has to do with the logistics of compensation. Even if a law school were willing to entertain practice-based sabbaticals in concept, many law schools do not permit professors to be paid for work during their sabbaticals.<sup>60</sup> This would not present an obstacle to sabbaticals in prosecutors' or public defenders' offices or in legal services organizations, which do not typically offer pay to non-employee volunteers. But it would present an obstacle for law professors who wanted to engage in private practice during their sabbaticals. Private practice may provide a broader array of substantive issues, practice settings, interfaces with technology, client interactions and ethical challenges than are available in the *pro bono* realms of government service or legal aid.

Again, there are at least three ways to address the compensation concern. First, limiting experiential sabbaticals to *pro bono* practice settings may be worth the ostensible trade-off in terms of diversity of experiences. Having professors engage in *pro bono* practice enables them to serve as role models to students about the importance of public service. It also, of course, benefits the public. Moreover, the limitations in terms of breadth of work in *pro bono* practice may be overstated. For example, the Legal Aid Society of Orange County provides assistance to low-income clients in general civil litigation matters as well as in other areas, including advanced health care directives, bankruptcy, civil harassment, conservatorship, custody, divorce, domestic violence, elder services, evictions, special education law and taxes. Virtually any volunteer law professor, no matter what his or her research focus or teaching interest, could find a relevant practice area.

Second, precluding law professors from practicing law for pay during their sabbaticals does not necessarily preclude them from working in private practice. Many law firms have significant *pro bono* cases and would likely welcome law professors' assistance on such matters on a full-time basis for a period of several months. Although the professor may not work on the full array of matters that the firm's attorneys engage in, being in residence at the

60. Interestingly, the picture is apparently somewhat different at the undergraduate level. See Eberle & Thompson, *supra* note 9, at 5 ("More than one half of all leave-granting respondents indicated faculty members might accept other paid employment during sabbatical leaves.").

firm would provide a valuable opportunity for the professor to experience or at least observe first-hand the cultural, ethical, economic and technological issues affecting the firm.

Third, creative administration and faculty governance should be able to generate palatable ways for law professors to engage in paid practice if a law school wants to offer that opportunity. One possibility is to require the professor to provide an accounting to the school of all monies earned during the sabbatical. Any amounts up to the salary provided to the professor during the sabbatical term could be reimbursed to the school. Any amounts in excess of that could be retained by the professor. Such an arrangement would ensure that by practicing law, the professor is not gaining at the expense of the law school. And as long as the law school requires a written report or other documentation of the benefit to the institution, this would ensure that the sabbatical does not become an opportunity for a faculty member to take a temporary leave for personal enrichment without corresponding benefit to the school.

### *C. Alternatives to Experiential Sabbaticals*

If law professors want to take time away from teaching to practice law and make extra money, there arguably already is a time for them to do so: the summer. In other words, there is no need to reshape sabbaticals to allow for law practice because a different feature of academic life, the summer break, already provides a way to meet any faculty demand for such time. Again, there are three responses to this objection.

First, given that professors usually spend the first few weeks of the summer grading final exams, they typically would have at most two months during the summer break to practice law. This may not be enough time to accomplish all of the goals a professor might have for an experiential sabbatical. The more time a professor spends in practice, the more exposure he or she will get to different cases, substantive and ethical issues, law practice technology and organizational culture and politics. The professor also would be exposed to more ideas that might generate future scholarship and have more opportunities to make new professional contacts and develop deeper ties with their colleagues. At least one professor has indicated that even a full year in practice was not sufficient to truly feel like an insider.<sup>61</sup>

Second, a shorter window of time for practice may limit the range of work opportunities available to professors. I considered working at a United States Attorney's office within my region but was told that they wanted a minimum six-month commitment. Given my administrative responsibilities, this was more time than I was comfortable taking. But if I only had the summer break available, it would have been out of the question. Law firms and other legal employers may be less willing to invest the time it takes to train a professor and

61. See Caplow, *supra* note 26, at 17.

to shoulder the administrative burdens of hosting her, if she is only going to be working with them for a brief period.

Third, timing issues aside, confining law practice opportunities to the summer could be sufficient if law schools modify their summer stipend policies. Currently, most law schools offer a financial stipend to professors who engage in scholarly research and writing over the summer. This stipend is designed in part to provide professors with an incentive to spend their summer writing rather than making money by practicing law. If a law professor wants to practice over the summer—whether motivated by remuneration, a desire to improve skills and knowledge, or a combination of the two—the current system leaves them free to do so. But what of the law professor who specifically wants to engage in *pro bono* practice over the summer? Given that both private practice and scholarship carry financial rewards, professors are given no incentive to engage in unpaid *pro bono* work during the summer. One solution is for law schools to offer professors summer *pro bono* stipends. Just as faculty members usually must apply for summer research stipends and identify the writing projects they intend to complete, faculty seeking a summer *pro bono* stipend would have to explain their intended work plans and how they expected it to benefit their research, teaching and service. Professors also could be required to submit a post-stipend report articulating what they learned and explaining how they intended to integrate those lessons into their future scholarship and teaching. If a law school still wants to provide a greater incentive for professors to engage in publishing than *pro bono* practice, it could adjust the stipend amounts awarded to reflect those priorities. But the principle should be recognized that law professors engaging in practice during their time away from teaching benefit the institution and should be rewarded accordingly.

#### IV. Conclusion

To provide students with the proper training in integrating knowledge, skills and professionalism, many full-time faculty would benefit from spending time in practice to reorient themselves to the modes of thinking, doctrinal changes, politics, pressures and logistical and technological realities that practitioners face today. But many institutions have been slow to recognize that the sabbatical—the classic tool for professorial development—can and should be reconfigured as a tool to promote and reward such practice-based engagement.

Anecdotally, my own experiential sabbatical was not only extremely rewarding personally but appears to have delivered at least as much return on the institution's investment as if I had pursued a more traditional, research-based leave.<sup>62</sup> I have no reason to think my experience was unique.

62. "Considering scarce fiscal resources, institutions need to ask whether or not sabbaticals provide a good 'rate-of-return' for the fiscal investment." MICHAEL T. MILLER, CREATION AND VALIDATION OF A SABBATICAL ASSESSMENT INSTRUMENT 5 (2002), available at <http://files.eric.ed.gov/fulltext/ED462892.pdf>.

In these fiscally challenging times, empirical research to demonstrate the impact of experiential sabbaticals would be worthwhile to help guide law schools in shaping the future of their faculties' professional development programs. In the meantime, law schools would be well-served to re-examine their sabbatical policies in terms of what professional development of a law professor does or should mean, given the dramatic changes in the legal profession and legal education.