Minnesota Journal of Law & Inequality

Volume 42 | Issue 1 Article 5

June 2024

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Recommended Citation
Sarah J. Schendel & Sam E. Bourgeois, *Teaching "Mistrust"*, 42(1) LAW & INEQ. 183 (2024), DOI: https://doi.org/10.24926/25730037.693.

Teaching "Mistrust"

Sarah J. Schendel and Sam E. Bourgeois†

Abstract

Do lawyers have an ethical duty to cultivate client trust? Sociologist Matthew Clair's ethnographic study of the Boston-area court system, *Being a Disadvantaged Defendant: Mistrust and Resistance in Attorney-Client Interactions*, focuses on the ways criminal defendants engage with, withdraw from, and resist attorney-client interactions. Composed of Clair's observations and analysis, along with the actual words of clients and attorneys, it is a powerful—if somewhat unusual—addition to the professional responsibility (PR) curriculum for the professor looking to incorporate social science research on race and class into the law curriculum, and to inspire in-class discussions beyond the Model Rules of Professional Conduct. Clair's article offers opportunities to discuss both traditional legal ethics subject matter like the allocation of authority and communication in the attorney-client relationship, as well as complex topics too often neglected in the PR curriculum, like the role of race and class in said relationships.

This Article, coauthored by a professor and student, discusses the whys, hows, and lasting impact of using *Mistrust and Resistance* as an assigned reading in a course on professional responsibility. After discussing the pedagogical justifications for including Clair's article in the course and practical considerations about how and when to assign it, the Article then describes student, professor, and guest speaker reactions to *Mistrust and Resistance*. This Article—like any good professional responsibility class—attempts to connect

†. Sarah J. Schendel is an Associate Professor of Academic Support at Suffolk University School of Law. Prof. Schendel (hereinafter identified in the first person) thanks Matthew Clair for his work and for being a generous guest speaker in my class. Any errors or misstatements of his work are entirely my own. This Article owes a debt of gratitude to Prof. G.S. Hans's article *How and Why Did It Go So Wrong: Theranos as a Legal Case Study*, which provides practical insights as to using a non-legal text in an ethics class and helped expand my thinking about the course. 37 GA. ST. U. L. REV. 427 (2021). Thank you most of all to my students, who inspire me daily and drive me to be a better teacher and lawyer. Sam E. Bourgeois is a 2023 graduate of Suffolk University Law School. Sam first and foremost would like to thank Prof. Schendel for his inclusion as a co-author in this piece. Additionally, he thanks his friends, family, and mentors for their untiring support. It has been a long, and at times potholed, ride.

professional identity formation, the value of students' practical experience, quality of client experience, bias, and public perceptions of the legal profession to better understand the ethical duties facing attorneys.

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Introduction

There is no ethical rule explicitly requiring an attorney to gain a client's trust, but it would be nearly impossible to fulfill many of the ethical obligations of legal practice without such a foundation.[1] Paradoxically, it is challenging to earn a client's trust without first demonstrating a commitment to those same ethical obligations: communication, allocation of decision-making, and confidentiality, for example. Prominent sociologist Matthew Clair's article, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in*

1. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR. ASS'N 2023) (containing no explicit rule requiring an attorney to gain a client's trust).

Attorney-Client Interactions ("*Mistrust and Resistance*"), is the result of a multi-year ethnographic study of the Boston-area criminal court system that focuses on the ways "socioeconomically and racially disadvantaged defendants" engage with, withdraw from, and resist attorney-client interactions and the demands and expectations of the criminal justice system more broadly.[2]

Composed of Clair's observations and analysis, along with the actual words of clients and attorneys, *Mistrust and Resistance* is a powerful—if somewhat unusual—addition to the professional responsibility (PR) curriculum for any law professor looking to inspire class discussions beyond the Model Rules of Professional Conduct ("Model Rules"). Clair's piece offers opportunities to discuss traditional legal ethics topics such as the allocation of authority (Rule 1.2) and communication in the attorney-client relationship (Rule 1.4). It also allows students to consider complex topics too often neglected in the PR curriculum, including the limitations of the representational system, client "lay legal expertise" and resistance to the expectations of legal proceedings, and the role of race and class in attorney-client relationships.[3]

This Article was written jointly by Professor Sarah Schendel and law student Sam Bourgeois, and proceeds in three parts.[4] Part I summarizes Clair's article, and why I, Prof. Schendel, chose to use it. Part II explains how I used it and the pedagogical choices behind when, where, and how it was situated in the semester and syllabus. Part III concludes with Sam's first-person response to the article, as both a student in the class and a legal aid intern the following summer. This Article provides a model for professors who teach PR and are interested in how a piece like *Mistrust and Resistance* might offer a dynamic avenue by which to teach the Model Rules, examine public perceptions of attorneys, and foster fruitful discussion of career choice, self-awareness, and professional identity formation.

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2. Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 194, 194 (2021) [hereinafter Clair, *Mistrust and Resistance*]. *See generally* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020) (discussing the issues from this Article in depth, but outside the scope of this Article since the book is not used in class) [hereinafter CLAIR, PRIVILEGE AND PUNISHMENT].

3. Clair, *Mistrust and Resistance, supra* note 2.

4. For clarity of voice, "I" will refer to Prof. Sarah Schendel, and "Sam" will refer to Sam Bourgeois.

I. Choosing Mistrust and Resistance

A. The Article

Prof. Clair's article draws on interviews and ethnographic observations of more than 100 criminal defendants and legal officials in the Boston-area court system to consider "how socioeconomically and racially disadvantaged defendants interact with their defense attorneys, and with what consequences."[5] Specifically, Clair asserts that "[g]iven racialized and classed constraints, many disadvantaged defendants mistrust their court-appointed lawyers."[6] This lack of trust in the attorney-client relationship has a powerful impact on what clients tell attorneys, how clients feel about their representation, and the ways attorneys understand and (mis)interpret client actions.[7] Clair concludes that client "mistrust often results in withdrawal from their lawyers and active efforts to cultivate their own legal knowledge and skills" through defendants' use of "lay legal expertise to work around and resist the authority of their lawyers."[8] This lay legal expertise may arise from their own experiences with the legal system, or those of their communities.

In response to what Clair deems "resistance"—clients speaking in court against the advice of their attorneys or filing motions on their own, for example—defense attorneys and judges often "respond with silencing and coercion" rejecting "disadvantaged defendants' attempts to advocate for themselves."[9] Clair's work touches on the incredibly complex dynamics at work within the criminal legal system and in individual attorney-client relationships.[10] Clair's findings "complicate existing accounts of disadvantaged defendants as passive and contribute to broader sociological theories of how disadvantaged people engage with institutional authorities."[11] His observations and conclusions push attorneys to examine their own expectations of clients and biases they might have that impact their representational choices.[12]

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5. Clair, *Mistrust and Resistance, supra* note 2, at 194.
6. *Id.*
7. *See* Clair, *Mistrust and Resistance, supra* note 2.
8. *Id.* at 194.
9. *Id.*
10. *See* Clair, *Mistrust and Resistance, supra* note 2.
11. *Id.* at 195 (citing JOHNATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972); DEBRA S. EMMELMAN, JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK (2003); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992)).
12. *Id.* at 211–13.

Beyond individual choices, however, even when attorneys are open to allocating greater involvement and decision-making to their client, Clair reveals how attorneys are still limited by the customary norms of the court and the limitations of the criminal legal system.[13] While many of the Model Rules focus on the individual decisions facing attorneys, Clair's article interrogates both these decisions and the landscape and systems within which both attorneys and clients are constrained, providing a real-world addition to discussions of the Model Rules in PR classes.

B. Contextualizing and Navigating the Model Rules to Enhance the Attorney-Client Relationship

Throughout his article, Clair challenges lawyers to critically engage with, and go beyond, the demands of rules of professional responsibility. This is consistent with the approach many professors take to teaching the Model Rules as a "floor," a basis, or starting point for professional conduct.[14] Specifically, Clair's article endeavors to help attorneys contextualize the Model Rules within lived experience, helping lawyers to draw effective boundaries when allocating agency in a case, better understand clients' goals, confront structural challenges to building trust, and develop their own professional identity.

i. Effectively Allocating Agency to Build Trust

The relationships, decisions, and challenges in Clair's article implicate numerous rules of professional responsibility. Rule 1.2, for example, governs the allocation of authority between the attorney and client.[15] As the Model Rules dictate, the client is in control of determining the objective of their case, while attorneys should use their expertise and discretion to decide on the exact means taken to achieve that objective.[16] In practice, however, these boundaries can blur or break down.[17] In his study, Clair examines the ways clients sought to exert agency over both decisions around the outcome of a case and the means of achieving those aims.[18]

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13. *Id.* at 208.

14. *See, e.g.*, *Taking Ethics to a Higher Level*, FORDHAM L. NEWS (Dec. 21, 2017), https://news.law.fordham.edu/blog/2017/12/21/taking-ethics-higher-level/ [https://perma.cc/FY2W-2WVM].

15. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2023).

16. *Id.*

17. *See* Clair, *Mistrust and Resistance, supra* note 2, at 198–99.

18. *Id.* at 195.

With regard to the means used in a case, which is generally left to the professional expertise of the lawyer, Clair observed multiple situations where clients wanted to file motions independent of, or against the recommendation of, their attorneys.[19] These instances involved not only decision-making and authority (Rule 1.2), but often also, by necessity, communication (Rule 1.4), and sometimes withdrawal from representation (Rule 1.16).[20] In one instance where a lawyer declined to file motions the client had requested and the two had a disagreement in court, the client told the judge that the lawyer was "not doing what I ask him to do."[21] In response, the lawyer asked to withdraw (under Rule 1.16), citing a breakdown in communication; the judge granted the motion.[22] This withdrawal had serious consequences for the client, who then lost their union-appointed attorney, made too much money to qualify for a court-appointed counsel, and could not afford a private lawyer.[23] Clair understood this as an instance of the judge failing to try to repair the relationship and communication between attorney and client and instead "penaliz[ing] defendants for resisting their lawyers' expertise and authority."[24]

This scenario—an angry response to a client's attempt to be more involved in the process of their case—was common in Clair's experience and clearly created stress for both attorneys and clients.[25] One private defense counsel described how a client attempted to file a motion without the attorney's knowledge while detained.[26] The motion contained various procedural errors, but the attorney seemed most bothered by the client's decision to file at all. The attorney said it "really pisses me off" when defendants seek to file motions on their own because it calls into question the attorney's "legal expertise and practice of the law."[27] This comment

19. *Id.* at 208–10.

20. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023); *see also id.* at r. 1.16; *id.* at r. 1.4.

21. Clair, *Mistrust and Resistance, supra* note 2, at 209.

22. *Id.* at 210.

23. *Id.*

24. *Id.* at 209.

25. *See id.* at 210.

26. *See id.* at 208.

27. *Cf. id.* at 208 (detailing one defendant's account of how he once tried to file a motion to suppress evidence by mailing it to the judge from jail without his lawyer's assistance: "You mail it [from jail]. You put it, and they look at it. And then . . . nine times out of ten, they're going to deny, because the judge, you know, he's an asshole."); *cf. id.* (quoting another defendant's description of the futility of trying to get his lawyer to file motions in his case: "I'm telling him to file these motions because I'm looking up stuff on my own and asking questions of other people. So I'm like, 'File this, this, and this.' And he's like, 'Nah, the judge is a [expletive]. She won't do it. It's

highlights the reality of the attorney's ego in decision-making and how a client's attempts to become more involved in their own case can be interpreted by counsel as an attack on their abilities.

Clair observes that the way a lawyer reacts to client efforts to assert agency can have major consequences for their case. He finds that disadvantaged defendants often develop lay legal expertise as an *intentional investment* in their case and legal experience, a way to "work around and resist the authority of their lawyers" and take ownership over their experience within legal systems.[28] As such, lawyers may be able to begin (re)building trust and respect with clients if they are able to view this assertion of knowledge by the client as an investment in and commitment to the legal process based in valuable lived and community experience, rather than being annoyed or threatened by it and responding "with silencing and coercion."[29]

Some of the most specific examples of client agency in decision-making discussed within Rule 1.2 concern criminal cases where "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."[30] Students' ability to understand and memorize the important decisions that are always in the hands of the client is a necessary part of passing the Multistate Professional Responsibility Examination (MPRE).[31] Clair's article explicitly touches on decisions like plea deals that must be made by clients, highlighting the pressure defendants feel from attorneys who may "try to get [their clients] to take deals."[32] Clair recounts one scenario where an attorney tried "to persuade [a client] to take a plea," telling Clair that they "'don't see a way out of this case' and that the deal would result in far less time in prison than if [the client] were to lose at trial."[33] While advising a client as to the implications of going to trial is an appropriate and necessary role for an attorney, the decision of whether to accept a plea is

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not gonna work.'").

28. *Id.* at 194.

29. *Id.*; *see also id.* at 195, 203, 211 (discussing the common response of lawyers to silence and coerce clients when they questioned their attorney's authority or exercised some level of expertise to establish control of their case).

30. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).

31. The MPRE is a multiple-choice exam that is required for admission to the bar in all but two jurisdictions in the United States (Wisconsin and Puerto Rico). *About the MPRE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mpre/about-mpre [https://perma.cc/H6PW-XRZS].

32. Clair, *Mistrust and Resistance, supra* note 2, at 204.

33. *Id.* at 209.

ultimately in the hands of the client. Clair himself observes an attorney trying "to persuade" a client to take a plea and witnesses the attorney complaining when the client "started to really push back."[34] Some clients perceived this pressure to take a plea deal as being a result of the close relationships between court-appointed lawyers and prosecutors, assuming these professional (and sometimes personal) connections compromised criminal defense attorneys.[35] This discussion often resonates with the many students in class who have interned with criminal defense attorneys, public defenders, or district attorneys. They have experienced the ways these attorneys might interact with opposing counsel and understand how clients might interpret these collegial relationships as a sort of collusion or divided loyalty.

Similarly to different experiences of the relationships between opposing counsel, a failure to address differences in lived experiences between the attorney and client can foment distrust in the relationship. For example, Clair observes that attorneys' lack of personal or community exposure to policing or other mechanisms of surveillance often led them to value terms of probation differently than their clients:[36]

> [D]isadvantaged defendants, many of them who lived in highly surveilled, policed neighborhoods, [and] had a preference for incarceration over probation. Of course, most lawyers and most middle-class people think of probation as a less serious offense . . . . It's supposed to be less costly, it's supposed to be an alternative sanction, right? But for many disadvantaged defendants recognizing sort of all the tolls of being on probation, job requirements, going to drug treatment, moving in and out of the cities, or getting on the T to go to different places for drug rehab, paying for services. But then also just the threat of being surveilled by the system and ultimately being able to be pulled back in, they just wanted to do their time and be done. So that

34. *Id.*

35. *Id.* at 204.

36. Clair, *Mistrust and Resistance, supra* note 2, at 205 (describing Richard, a defendant who was encouraged to take a plea and then became justifiably upset upon realizing that the charge was on his record as a result); *cf.* Brianna Remster & Rory Kramer, *Race, Space, and Surveillance: Understanding the Relationship between Criminal Justice Contact and Institutional Involvement*, 4 SOCIUS 1, 14 (2018) (suggesting that avoidance of formal institutions is associated with criminal justice contact) and Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53, 67 (2017) ("Probation is neither a simple alternative nor complement to imprisonment, but a unique form of state control."); *see also* CLAIR, PRIVILEGE AND PUNISHMENT, *supra* note 2, at 152) ("Just under 25 percent of staff public defenders serving in Boston-area courthouses in 2016 were racial minorities, whereas nearly 67 percent of defendants in 2012 were racial minorities.").

> legal goal differed right between the lawyer and the client.[37]

Such differences in perspectives, if unaddressed, can lead to fundamental misunderstandings about the desired goal of the client and the ideal outcome in the case. The example of some clients preferring incarceration to probation is often a very powerful one for students, many of whom may lack personal experience with policing and the oversurveillance of communities of color. An assumption by attorneys that probation is preferrable to incarceration may arise both from a lack of lived experience and also from excessive focus on the legal outcome of the client's case:

> [W]ith respect to the ultimate goal or purpose, oftentimes disadvantaged people surprisingly had different things they wanted to achieve that maybe actually would harm them more in the legal way, but ultimately achieved different forms of what they were seeking with respect to justice or with respect to how they understood how criminal legal sanctions operated in their daily lives.[38]

Though seemingly counterintuitive for lawyers and law students who may view any plea or period of incarceration as a failure, a client's individual lived experience or community knowledge may inform their desire to settle a case and spend a short period of time in jail in order to avoid a term of probation.[39] Without adequate communication and trust, an attorney may be baffled—frustrated even—by a client's rejection of a plea. While Rule 1.2 instructs lawyers to "abide by a client's decisions concerning the objectives of representation," it does not tell lawyers how best to elicit and understand a client's goals.[40] Similarly, Rule 1.4 does little to explain what it means to "*reasonably consult* with the client about the means by which the client's objectives are to be accomplished."[41]

Also, many of the Model Rules, and thus many PR classes, focus primarily on the individual attorney-client relationship, perhaps at a cost to the other relationships informing a client's decision-making.[42] For example, a client's desire to reject a plea and

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37. Matthew Clair, Address to Prof. Schendel's Professional Responsibility Class (Fall/Winter 2021) (transcript on file with author).

38. *Id.*

39. *See* Clair, *Mistrust and Resistance, supra* note 2, at 12, 16; *see also* GIDEON'S ARMY (HBO Documentary Films 2013); DAVID C. MAY & PETER B. WOOD, RANKING CORRECTIONAL PUNISHMENTS: VIEWS FROM OFFENDERS, PRACTITIONERS, AND THE PUBLIC 43–46 (2010).

40. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).

41. *Id.* at r. 1.4 (emphasis added).

42. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR. ASS'N 2023) (lacking reference to, for example, community).

go to trial might be rooted less in concern for their individual sentence and instead focused on the opportunity to cross-examine a police officer about the practices of surveillance and harassment the client's community faces.[43] In this way, a system of individual representation can obscure the larger issues and communities impacted, as the "procedural safeguard of representation" may in fact "quiet[] community discomfort with criminal systems" by seemingly providing advocacy for defendants while not addressing inequities in the underlying systems.[44] This critique rejects a view of individual representation as a lawyer "stand[ing] between the client and the overwhelming power of the criminal process" and instead reads such a dynamic as the lawyer standing "between the public and that process to obscure the realities of a system that fall disproportionally on marginalized populations."[45] When viewed in a legal vacuum, this issue is relatively straightforward under Rule 1.2: the decision of whether to accept a plea for probation or go to trial is in the hands of the client.[46] However, Clair's article illustrates how such a decision often involves so much more than the preferences or expertise of two individuals.[47]

Discussing with students how they might react to scenarios where a client seeks to assert more agency and ownership over their case is a perfect opportunity to review decisions through the lens of Rules 1.2 and 1.4. Additionally, it opens the door to discussions about the complexities of attorney-client relationships and the role of ego in decision-making: specifically, how attorneys can (and must) work to separate their response as a professional from their

43. *See* CLAIR, PRIVILEGE AND PUNISHMENT, *supra* note 2, at 167; *see also* Brittany Friedman, *Book Review: Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court*, 25 THEORETICAL CRIMINOLOGY 687, 688 (2021) ("Clair convincingly reveals how the legal culture of criminal courts, which requires people navigating the system as criminal defendants to perform unquestioned deference to legal actors—including their attorney, prosecutors, and judges—constrains disadvantaged people who instead tend to draw on previous negative interactions with the criminal legal system to question legal actors and make civil rights demands of the system, including of their defense attorneys.").

44. *See* Jenny E. Carroll, *If Only I Had Known: The Challenges of Representation*, 89 FORDHAM L. REV. 2447, 2452–54 (2021) ("[T]he appointment of effective defense counsel is as much about making the public believe that it could be just as it is about actually providing some protection for the accused and some resistance to the state[.] Representation emerges not as a balancing force for systems that might suffer bias and injustice but as a fraught and broken proposition.").

45. *Id.* at 2454.

46. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).

47. Clair, *Mistrust and Resistance, supra* note 2, at 206–07.

annoyance at a client's decision and any sense of being insulted or undervalued.[48]

ii. Recognizing Structural Barriers to Competency and Trust

While probing and thoughtful about individual attorney decisions and client interactions, Clair is also intentional about clarifying that a lack of trust between attorney and client is often not solely the result of interpersonal and individual challenges, but also structural ones.[49] While criminal defense attorneys might not always see themselves as part of the same system as prosecutors and judges, that distinction is not always clear to defendants.[50] The perception by clients that all judges and lawyers are ultimately part of the same system can lead clients to impute experiences with past judges to their current attorneys;[51] to view the friendly or cordial relationships between defense attorneys and prosecutors as suspicious;[52] or to believe that, regardless of a lawyer's individual intent, their high caseloads make it impossible to provide competent representation.[53]

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48. *See, e.g.,* Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97 (2016) (discussing how social psychological dynamics arising from online reviews unleash processes of ego threat and cognitive distortion that encourage overreaction); s*ee also id.* at 98 (discussing the complexities of attorney-client relationships and the role of ego in decision-making).

49. *See* Clair, *Mistrust and Resistance*, *supra* note 2, at 204.

50. As a companion to Clair's piece, I also assign students Prof. Jenny Carroll's article about her experience of being a public defender, *If Only I Had Known: The Challenges of Representation*. *See* Carroll, *supra* note 44, at 2452 ("[T]he appointment of effective defense counsel is as much about making the public believe that it could be just as it is about actually providing some protection for the accused and some resistance to the state[.] Representation emerges not as a balancing force for systems that might suffer bias and injustice but as a fraught and broken proposition."). Both Clair and Carroll discuss the importance of the individual attorney-client relationship, while also centering the relationship in the broader context of the the legal system. *See id.* at 2453–57; *see also* Clair, *Mistrust and Resistance, supra* note 2, at 204.

51. Clair, *Mistrust and Resistance*, *supra* note 2, at 205 ("And then [the judge] said, 'Shut up. I'm not talking to you.' These early experiences of mistreatment have stuck with Donna for over three decades; she cannot shake the feeling that her lawyers are always 'working for the other side.'").

52. *Id.* at 204 ("Robert . . . told me: 'Sometimes you get the feeling like a lot of these public defenders are friends with the DAs, you know. They don't want to fight them because they have to eat lunch together later in the day.'"). This is a Rule 1.4 communication issue; helping clients understand why you might be speaking with the district attorneys may alleviate such concerns.

53. *Id.* ("Others felt that the indigent defense system was structurally overwhelmed by a high caseload, resulting in their lawyers making tradeoffs between clients."); *see also id.* ("Christopher . . . said: ' . . . I know public defenders

Scholars like Professor Paul Butler have proffered that "many of the problems identified by critics [of the criminal justice system] are not actually problems, but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work."[54] Both Clair and Prof. Jenny Carroll's articles push students and professors to reexamine the ways our clients might view us and our role in the legal system while also asking us to consider the ways that we might contribute to our clients'—and their communities'—silencing.[55] Ultimately, both authors recognize that these questions culminate in a disquieting question: whether it is possible for criminal defense attorneys to provide ethical representation within existing legal structures.[56]

One key component of ethical representation is attorney competence. Clair highlights perhaps the most daunting barrier to competence facing many criminal defense attorneys: time.[57] It takes time to be competent under Rule 1.1, time to develop the legal knowledge and skills necessary, and time to be thorough in preparation.[58] Heavy caseloads and their impact on the ability of even well-meaning attorneys to thoroughly prepare is not lost on defendants.[59] Beyond leaving attorneys underprepared, defendants often perceive the crunch on time as incentivizing some attorneys to advocate for pleas and other means of moving cases along quickly.[60] For the defendants Clair observed, "the caseload pressures perceived to be a routine part of a court-appointed lawyer's job result in perverse incentives to reduce their caseload by coercing defendants to plea or by refusing to employ time-consuming legal procedures."[61]

Closely related to competence, and often entwined, is a lawyer's duty of diligence under Rule 1.3, wherein the Model Rules instruct a lawyer to act with reasonable diligence and promptness in representing a client.[62] For the defendants in Clair's study, attorneys struggled to exhibit diligence often because of time constraints, failing to reply in time or in sufficient ways to clients'

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have like huge caseloads and no time.'").

54. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2019).

55. *See* Carroll, *supra* note 44; *see* Clair, *Mistrust and Resistance*, *supra* note 2.

56. *See* Carroll, *supra* note 44; *see* Clair, *Mistrust and Resistance*, *supra* note 2.

57. *Id.* at 204.

58. *Id.*; *see* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

59. Clair, *Mistrust and Resistance*, *supra* note 2, at 195, 204, 213.

60. *Id.* at 204.

61. *Id.*

62. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).

request for information or action on a case.[63] Even for those who have not worked in public defenders or district attorneys offices, fears of being overwhelmed by cases are likely relatable for most law students, many of whom are sympathetic to the strain on the criminal legal system.[64]

Lastly, structural constraints may impact how clients view their attorney's loyalty. The ethical duty of loyalty is closely related to trust—essentially, if a client doesn't feel like a lawyer is loyal to them and their interests, they won't (and shouldn't) trust the lawyer.[65] While loyalty is most explicitly discussed in the Model Rules addressing conflicts, like Rules 1.7, 1.8, and 1.9, the individuals Clair interviewed expressed concerns about their attorney's loyalty in a few ways.[66] As previously mentioned, disadvantaged defendants were skeptical of their attorney's role within the broader legal system and how it might preempt their loyalty to their client; for example:

> Court-appointed lawyers, who routinely interact with prosecutors to make deals and to socialize, were assumed to be professionally compromised. [One defendant told Clair]: 'Sometimes you get the feeling like a lot of these public defenders are friends with the DAs, you know. They don't want to fight them because they have to eat lunch together later in the day.'[67]

Another defendant said that "half the time, the public defenders are working with the DA."[68] This perceived closeness with prosecutors and the criminal legal system as a whole led defendants to be "skeptical of court-appointed lawyers' abilities, precisely because they were part of the indigent defense system."[69] Clair outlines how mistrust and questions of loyalty might arise when clients feel excluded from communication, using an example of a time when discussion between the lawyers at the judge's bench didn't include the client.[70] In response to being excluded, the client, understandably, wanted to know why a conversation between attorney and judge happened outside their presence, saying, "This

63. *See* Clair, *Mistrust and Resistance*, *supra* note 2.

64. *See* Jak Petzold, *Law Student Stress and Anxiety*, LSSSE (May 11, 2022), https://lssse.indiana.edu/blog/law-student-stress-and-anxiety/ [https://perma.cc/KCY2-7LAP].

65. *Id.*

66. *See* MODEL RULES OF PRO. CONDUCT r. 1.7, r. 1.8, r. 19 (AM. BAR ASS'N 2023).

67. Clair, *Mistrust and Resistance*, *supra* note 2, at 204.

68. *Id.*

69. *Id.*

70. *Id.* at 209.

is my life we're talking about here."[71] Again, such confusion and mistrust implicates perceived failures of loyalty and actual failures of communication.

iii. Professional Identity Formation

Teaching law students about cultivating client trust and responding to client mistrust is also a gateway to discussing their individual professional identities. While hardly the first development in or push for greater attention to professional identity formation in law schools, the American Bar Association's recent revisions to Accreditation Standard 303 have placed the issue in the spotlight.[72] As defined within 303-5, professional identity formation focuses on "what it means to be a lawyer and the special obligations lawyers have to their clients and society."[73] A curricular focus on helping students develop their professional identity "should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice."[74] Additionally, the revised requirements of 303(c) provide that "[a] law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of their program of legal education, and (2) at least once again before graduation."[75] By observing the consequences disadvantaged defendants face for expressing resistance alongside those that attorneys experience as a result of client mistrust, Clair's article provides numerous opportunities to work towards these facets of professional identity development and cross-cultural competency.[76] Additionally, class discussion about the article prompts students to reflect on the way their own race, class, and community origins may be different to or align them with the clients they represent.

71. *Id.*

72. *See* Harmony Decosimo, *Taxonomizing Professional Identity Formation*, 67 ST. LOUIS U. L.J. 1 (2022) (reviewing a comprehensive survey of the history of PIF and how it has been used in legal education).

73. *See* NAT'L ASS'N FOR LAW PLACEMENT, REVISED ABA STANDARDS 303(B) AND (C) AND THE FORMATION OF A LAWYER'S PROFESSIONAL IDENTITY, PART 1: UNDERSTANDING THE NEW REQUIREMENTS, § 1(1) (2022), https://www.nalp.org/revised-aba-standards-part-1 [https://perma.cc/59AP-P9Y7] ("Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities during each year of law school and in a variety of courses and co-curricular and professional development activities.").

74. *Id.*

75. *Id.* at § 1.

76. *See* Clair, *Mistrust and Resistance*, *supra* note 2 (documenting sources of distrust between disadvantaged criminal defendants—"those who are working-class or poor and often racially subordinated"—and the legal professionals they rely on to navigate the system).

Students can build their own professional identities through reflecting on how other attorneys respond to client mistrust and resistance, and by learning about clients' experiences in the courtroom. Further, reflecting on Clair's piece often prompts students to share their experiences with the legal system and listen to the way their fellow students' identities inform their trust of the system's efficacy and outcomes.

The roles of race and class are at the heart of Clair's article and his attempts to understand the relationships between clients and attorneys.[77] In one instance, a defendant whom Clair calls Slicer discusses being assigned two court-appointed lawyers, one a Black man and the other a white woman.[78] Despite similar outcomes in both cases, Slicer felt that his Black lawyer was "looking out for a black brother" while his white lawyer was a "white liar" who was "working for them [the government]."[79] Disadvantaged Black defendants reported to Clair that they often felt stereotyped by their lawyers, even those who were also Black.[80] One defendant, Tim, was initially excited to be assigned a Black lawyer in one of his cases, but ultimately failed to establish a trusting relationship with his counsel given their cultural distance and his sense that she stigmatized him as a drug dealer.[81] These are important client experiences for students to be exposed to in order to gain a better understanding of how they might be perceived, what steps they can take to acknowledge and address these dynamics, and what it might mean for them as attorneys and people. Any exposure to first person narrative is also powerful in another way: law school can often make students—especially students of color—feel as though their lived experiences, their own lay legal expertise and that of their communities, are less significant than case law.[82] Conveying the importance of lived client

77. *Id.*

78. *Id.* at 204.

79. *Id.*

80. *Id.*

81. *Id.* ("After a few meetings, Tim felt she was 'stereotyping me [. . .] like I was some drug dealer,' because 'so many black kids come through there with criminal records [and] she was surprised that I had only, like, petty cases like trespassing.' Tim was annoyed his lawyer kept expressing surprise that his record had no major drug-related arrests on it. He concluded his lawyer was a 'sellout'—'one of them type of [black people] who is like "Yes, sir." "No, sir."'").

82. *See* O.J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam,* 107 MINN. L. REV. 2663, 2676 n.25 (2023) ("[N]on-traditional students remain marginalized on campus, left out of the community, devalued, and underappreciated.") (alteration in original) (quoting L. Sch. Surv. Of Student Engagement, *Diversity & Exclusion: 2020 Annual Survey*

experience counteracts such tendencies, opening the door for discussions critiquing the forced objectivity that a falsely value-neutral legal education uses to silence and exclude so many students.

In addition to the revised Rule, the accompanying interpretations provide additional guidance.[83] New Interpretation 303-6 emphasizes "the importance of cross-cultural competence to professionally responsible representation" and finds that "the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced."[84] Beyond the elements of professional identity formation elaborated on in 303, it should also be the goal of professional responsibility professors to push students to think not only about what the Model Rules permit or allow, but what choices reflecting their personal values they want to make beyond the Model Rules' requirements. This might include what they want their relationships with clients to look like, and what constitutes sufficient communication for the needs of their individual clients. Finally, Rule 8.4(g), which classifies several types of harassment and discrimination as professional misconduct, is the site of contentious nationwide debate, including challenges from conservative groups as to the constitutionality of such a rule and its enforcement by disciplinary boards.[85] While we only talk about Rule 8.4(g) briefly in class, it is a powerful reminder to

Results, IND. UNIV. CTR. FOR POSTSECONDARY RSCH. 5 (2020)); *see also id.* at 2676–77 (describing the author's experience as a non-traditional law student who felt "like the traditional law school classroom—with its focus on students reading judicial opinions and professors asking Socratic-style questions—often amplified the size of the hole [separating traditional and non-traditional law students]" and forced non-traditional students to "[play] 'catch-up' in a game that seemed to only value certain skills and life experiences.").

83. *See* NAT'L ASS'N FOR L. PLACEMENT, *supra* note 73.

84. *See id.* at § 2(2).

85. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023) ("It is professional misconduct for a lawyer to . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."); *see, e.g.,* Dennis Rendleman, *The Crusade against Model Rule 8.4(g)*, AM. BAR ASS'N (Oct. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/ [https://perma.cc/D66X-LBPH]; Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018); *A Misguided Proposed Ethics Rule Change*: *BA Model Rule 8.4(g) and the States,* CENTER FOR LAW & RELIGIOUS FREEDOM, https://www.christianlegalsociety.org/center/aba-model-rule-8-4g-and-the-states/ [https://perma.cc/2TPN-9LNL].

students that the Rules and ethical duties of lawyers are topics being debated and decided every day, and they should be a part of these discussions.[86]

In conclusion, Clair emphasizes that it "remains important to investigate the way people are rewarded or penalized in their interactions with professionals."[87] In order to support our own professional identity formation, lawyers need to frankly reflect on the ways we punish clients (intentionally or unintentionally) for not responding to us or other professionals in the way we anticipate or expect.[88]

II. Using *Mistrust and Resistance*: When, How, Why

Students are first introduced to Clair's piece during week two of our Professional Responsibility class.[89] For our first class, I always begin by posing the intentionally provocative question, "Who should be a lawyer?" as we jump into questions about who is granted and denied admission to the bar and why.[90] Beginning with admission means we jump right into the Model Rules while also touching issues like gatekeeping, class, and race in the legal profession. Reginald Dwayne Betts's *The New York Times* article, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, provides a powerful personal story to fuel this discussion.[91] For week two, students are assigned Rules 1.1, 1.2, 1.3, and 1.4, as well as two articles: Clair's *Mistrust and Resistance* and Prof. Jenny Carroll's *If Only I Had Known: The Challenges of Representation*.[92]

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86. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023); *see* Rendleman, *supra* note 85; *see* Aviel, *supra* note 85.

87. Clair, *Mistrust and Resistance*, *supra* note 2, at 213.

88. *E.g.,* Clair, *Mistrust and Resistance*, *supra* note 2, at 212. There is also much for professors to examine here about the way that we respond to students' interactions or requests that are unexpected or unwelcome. *See id.* ("[R]esearch on the navigation of schools—a commonly studied institutional space—has shown how working-class and poor people defer to teachers and other professionals, whereas middle-class parents and students gain rewards through proactive and demanding interaction styles.") (first citing Jessica McCrory Calarco, *Coached for the Classroom Parents' Cultural Transmission and Children's Reproduction of Educational Inequalities*, 79 AM. SOCIO. REV., 1015–37 (2014); and then ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE (2011)).

89. Sarah Schendel, *Professional Responsibility Syllabus* (2023).

90. *Id.*

91. *Id.*; Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/magazine/felon-attorney-crime-yale-law.html [https://perma.cc/Y2BD-G2TC].

92. Schendel, *supra* note 89; Carroll, *supra* note 44, at 2447. Other benefits of using Carroll's article include the author's identity as a first-generation lawyer, which is important representation for students, especially the 25% of Suffolk Law

Including *Mistrust and Resistance* early in the semester has the added benefit of allowing for callbacks to the piece throughout the semester. For example, in week three the class focuses on choosing clients, withdrawing from representation, and communication, topics which overtly tie into the article.[93] We discuss the reality that public defenders and court-appointed attorneys don't have the same choice over clients as private attorneys might and that clients of appointed counsel may also have limited choice.[94] Clair's article brings these issues to light and examines how a lack of choice—especially on the side of the client—impacts the attorney-client relationship.[95] Along with selecting clients and being retained, we also discuss the realities of withdrawing from or terminating representation, and how this impacts the client. Clair's article explicitly discusses situations where a client fires an attorney, how that choice is perceived by the judge, and what it means for the client's case moving forward.[96]

The following week, we discuss the ethical issues implicated by career choice, discussing prominent attorneys whose tactics, choice of clients, and conduct as advocates have been critiqued, including David Boies, Neal Katyal, and Paul Clement.[97] We debate what 'representation for all' means, which lawyers truly have a choice over their clients, and public perception of whether a client's crimes or positions can be assigned to their counsel.[98] This is often a lively discussion, and I lead us towards the related topic of

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students who are the first in their families to attend college. *See ABA Required Disclosures & Consumer Facts*, SUFFOLK UNIV. (2023), https://www.suffolk.edu/law/about/aba-required-disclosures-consumer-facts [https://perma.cc/J484-TCPH]. *See* MODEL RULES OF PRO. CONDUCT r. 1.1—1.4. (AM. BAR ASS'N 2023).

93. Schendel, *supra* note 89.

94. I have also assigned, and often refer to, Andrew Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 830 (2001).

95. Clair, *Mistrust and Resistance*, *supra* note 2, at 199.

96. *Id.* at 206.

97. Schendel, *supra* note 89. Assigned reading includes Alex Pereene, *Neal Katyal and the Depravity of Big Law*, NEW REPUBLIC (Dec. 8, 2020), https://newrepublic.com/article/160481/neal-katyal-depravity-big-law [https://perma.cc/5TD6-BDTB]; James B. Stewart, *David Boies Pleads Not Guilty*, N.Y. TIMES (Sept. 21, 2018), https://www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.html [https://perma.cc/BX2E-ZAUS]; *Foundations for Practice,* UNIV. DENV. IAALS, https://iaals.du.edu/projects/foundations-practice [https://perma.cc/T78J-TBLR]; Paul Clement & Erin Murphy, *The Law Firm That Got Tired of Winning*, WALL ST. J. (June 23, 2022), https://www.wsj.com/articles/2nd-amendment-bruen-new-york-gun-case-supreme-court-decision-kirkland-and-ellis-rule-of-law-constitution-11656017031 [https://perma.cc/5VGW-5LFW].

98. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2023) (stating that client positions are not attributable to attorneys).

whether legal education and the practice of law are "value neutral" and whether they should be.[99] Again, Clair's article ties in seamlessly to these related readings and topics. In the following week, when we address stigma, substance abuse, and mental health challenges in the profession, both Clair and Carroll's articles are incredibly useful for illustrating how the criminal system can be traumatic for both attorneys and their clients.[100]

Towards the middle of the semester, we turn our focus to access to justice. I've tried to tie this into the Model Rules about unauthorized practice as a way of both covering those important rules and also questioning how the profession limits access to attorneys, pushing us to think about access to justice as something more than simply access to counsel.[101] We look at the devastating experience of Kalief Browder's incarceration and fight for justice, where having an attorney was not enough to protect him against torture at the hands of the criminal justice and carceral systems.[102] Turning away from criminal law, we also read *Turner v. Rogers*,[103] originally a family court case, to discuss the limitations of *Gideon v. Wainwright*,[104] and the high stakes facing those in many civil proceedings.[105] Again, this allows us to revisit Clair's article, this time thinking beyond lawyers as the sole solution or challenge to a client's access to justice and the courts.

While perhaps not initially expected, *Mistrust and Resistance* also retains relevance during our week on fees, billing, and finances. In that class, we watch the trailer for *A Civil Action*,[106] a film in which class representatives for families impacted by environmental pollution and corporate greed seek justice for their community. The clip highlights the connection between fees and trust in a few ways:

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99. For an important discussion of the role of values in Professional Identity Formation and legal education, see Decosimo, *supra* note 72.

100. Clair, *Mistrust and Resistance*, *supra* note 2, at 205; Carroll, *supra* note 44, at 2457.

101. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2023) (forbidding unauthorized practice of law and setting standards for interstate practice).

102. *See* Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Sept. 28, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/AAZ2-XET6].

103. 564 U.S. 431 (2011).

104. 372 U.S. 335 (1963) (holding that the Sixth Amendment guarantees a right to counsel for criminal defendants, and that states are required to provide attorneys to defendants who cannot afford their own).

105. Specifically, the assigned reading for the week on access to justice and unauthorized practice includes MODEL RULES OF PRO. CONDUCT r. 5.3, 5.5, 5.7 (AM. BAR ASS'N 2023) and *Turner*, 564 U.S. 431.

106. *See* A CIVIL ACTION (Touchstone Pictures 1998).

one class representative, a parent whose child is chronically ill because of the chemical pollution in question, tells the attorney that their goal in the litigation was not to get money from the company, but to find out what happened and get an apology.[107] This same class representative also asks where the money from the settlement is going, noting the attorney's expensive suits and first-class airfare.[108] In talking about *A Civil Action*, we discuss the impact of the contingency fee structure on Rule 1.2 authority allocation issues, when the attorney has an interest in the financial outcome of a case, and the limits of representation discussed in Carroll's article, where the parents want something (answers, an apology, etc.) that is not necessarily among the outcomes the court system is structured to provide.[109] While the clients in *A Civil Action* fear their attorney is being driven by financial interest, rather than having their best interests in mind, Clair notes in his article client concerns about public defenders having no financial incentive to work hard for a better outcome, with one client saying, "If you pay them money, they give a [expletive]."[110]

Interestingly, Clair observed that middle-class defendants had *more* trust in their lawyers in part because they have paid them a considerable amount.[111] One defendant, for example, said that having a privately retained lawyer made them feel "confident" because "[in] hiring him and paying him a huge lump of money, there is a certain level of trust there."[112] When discussing fees and money in class, I make a point to expand discussion beyond the Model Rules to Interest on Lawyers' Trust Accounts (IOLTA) and retainers and have a broader discussion about what money means to clients and to attorneys. I often take this chance to remind students that many people (both attorneys and clients) are uncomfortable discussing money and that it's worth taking the time to think about our relationship with these conversations so we can have fruitful and clear communication with clients about fees.

In the final weeks of the semester, we arrive at the week focused on confidentiality and attorney-client privilege. In addition to more traditional materials about the rules of confidentiality, I assign a podcast called "The Buried Bodies Case," which tells the

107. *Id.*
108. *Id.*
109. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2023); Carroll, *supra* note 44, at 2452.
110. Clair, *Mistrust and Resistance*, *supra* note 2, at 205.
111. *Id.* at 211.
112. *Id.*

story of a case where a criminal defendant told his two attorneys the location of a missing girl (unsure whether she was alive or deceased), their resulting decisions, and the impact for both the case and the people involved.[113] This, again, explicitly relates back to both Clair and Carroll's articles not only because it again discusses criminal defense attorneys, but also because it is another reminder of why trust is crucial to the attorney-client relationship.[114] There are always some students who advocate for changes to Rule 1.6 that would allow attorneys to break confidentiality in cases like the one in *Buried Bodies*, and—while offering sympathy for all involved—I push them to think more critically about what such a change would mean for attorney-client relationships, and how it might further increase client mistrust of attorneys.[115]

Beyond simply assigning the students to read it and mentioning it in class, there are numerous other ways to actively use Clair's article, for an interested professor. One fairly simple way would be as an "issue spotter," asking students what Model Rules they believe are implicated by the clients' stories, either as an exam question or in class by using quotes from actual defendants and lawyers. Another approach would be to have guest speakers, especially public defenders, judges, or past defendants, comment on the article's observations. The first time I taught the article, Clair generously appeared via Zoom as a guest speaker. I asked students to submit questions for him ahead of time, and I conducted the visit interview-style, using some of the students' questions. I recorded the conversation and have used it in a variety of ways over subsequent semesters. When teaching a three-hour-long class (in person or via Zoom), I've used clips from the interview to break up and prompt our discussion.

I've recently developed a PR class for our school's new Hybrid JD program and have assigned the students these clips to view before our live classes together. For example, in week two, when the Hybrid JD students read the Clair article, they also watch a clip of Clair discussing attorney-client relationships generally, as well as another clip of a conversation with a public defender guest speaker discussing the realities of indigent criminal defense practice and how he establishes trust with his clients. Recently, I have also

113. *Radiolab: Buried Bodies*, WNYC STUDIOS (June 3, 2016), https://radiolab.org/podcast/the_buried_bodies_case [https://perma.cc/H8SE-LPBH].

114. Clair, *Mistrust and Resistance*, *supra* note 2, at 196; Carroll, *supra* note 44, at 2461.

115. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2023) (addressing attorney-client confidentiality).

added in a clip of a partner in a large international law firm discussing what attorney-client relationships look like in the field of mergers and acquisitions, with the goal of making these issues appeal to and connect with as many students as possible and showing the transferability of these conversations. In week seven, which focuses on access to justice issues, I have them return to Clair's work by including a clip where he discusses the difficulties of secondary trauma and how it can impact work in the legal field, as well as the need for greater access to justice, and what some approaches and solutions might look like.

One thing that Clair and Carroll's articles share is an acknowledgement of both the individual role of the public defender, and the systemic challenges and barriers in which they work.[116] Carroll is frank about the myth of the defense attorney as a "shield," someone who can protect their client from the injustices of the criminal law system, a task made impossible when the system is closing in around your client from all sides.[117] Carroll's pain and frustration at working with a system where her client's stories cannot be fully told or heard is palpable.[118] Though Carroll and Clair are coming from different perspectives—both from within and outside of the attorney-client relationship—they both place blame on a system that does not make room for a holistic narrative or complete agency for the client.[119]

III. Reactions

A. Mine and Students'

From the first day of class, I inform the students of my biases and background. I practiced as an immigration attorney, representing immigrants and their families for over seven years.[120] A significant portion of this work was on behalf of immigrants who

116. Clair, *Mistrust and Resistance, supra* note 2, at 205; Carroll, *supra* note 44, at 2453.

117. Carroll, *supra* note 44, at 2454.

118. *Id*. at 2447, 2460; *see also* Butler, *supra* note 54, at 75; *see also* Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

119. *See* Clair, *Mistrust and Resistance, supra* note 2; *see also* Carroll, *supra* note 44.

120. *Sarah J. Schendel*, SUFFOLK UNIV. STAFF DIRECTORY, https://www.suffolk.edu/academics/faculty/s/s/sschendel [https://perma.cc/SQ4F-JPYC].

had been charged with or convicted of crimes.[121] I sometimes worked on both their criminal and immigration cases.[122]

At times, I feel defensive when reading Clair's article—defensive of my own work and the work of many hard-working, over-burdened criminal defense attorneys I know. I share these feelings and have found that such disclosures help students who have internalized the message that attorneys must act without emotion, that attorneys must be purely analytical beings. I encourage them instead to become more aware of their emotional reactions and biases, so that they can better separate those from their professional decision-making processes.

For the most part, students respond positively to the variety of somewhat unusual, non-casebook readings assigned in the class, including Clair's article. Every semester there are some students who have worked or interned in the Boston criminal courts, either for the Office of the District Attorney, the Committee for Public Counsel Services, or for individual judges, and some who have longer-term experience (for example, as Victim Witness Advocates) before coming to school. Of course, there are also some students who have had their own personal interactions (individually or through family) with criminal courts, or with attorneys more broadly. It is true that some students who held more idealized views of the attorney-client relationship and the work of lawyers have found both Clair and Carol's pieces "bleak" for the realities and challenges they present. And, as most professors know, student reactions are rarely (if ever) uniform. Some students take issue with the way Clair, and other authors I select, address issues of race, class, and professional identity formation. I tell students from the start that I have three goals for the class: to teach them about the Model Rules and help them pass the MPRE; to talk about current events in legal ethics and media coverage of lawyers; and to help them think through what sort of lawyers they want to be and how their personal values and ethics might inform their professional life. Not all students are interested in the latter two, nor do all PR classes at the law school include such material. While at least one student wrote in their class evaluation that they felt PR "wasn't the place" to discuss issues like bias and race, others have specifically stated that the "real world" readings and inclusion of "communities often excluded by many . . . other classes" were among their favorite parts of the course.

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121. *Id.*
122. *Id.*

B. Sam's Story

Sam was an engaged and thoughtful participant throughout my Fall 2021 PR class, so much so that I asked him to be my Research Assistant in Spring 2022. When I checked in with him Summer 2022 to ask how his internship working in legal services was going, he mentioned that he had been thinking about Clair's article as he navigated relationships with clients. I was thrilled to hear that the piece—and our classroom conversations—had stayed with him, and I asked him to share his reflections, and eventually to join me in co-authoring this Article. Sam, in his own words:

I spent my 2L summer as a student attorney at a legal service organization in Cambridge, Massachusetts, providing legal aid to low-income clients. My caseload consisted of a combination of documented and undocumented people from Honduras, El Salvador, and Guatemala. None of my clients spoke English as their primary language and one or two only spoke Ixil.

From the onset of my summer, I knew there was an explicit difference in class and ancestry between myself and my clients. I am white and speak Spanish as a second language; I have only heard vague family stories of my great grandfather, Julio, who came from Spain to Honduras to reportedly conduct some sort of business with the United Fruit Company. As a white man working with a predominantly Latino/a community, I know that history has carved out room for mistrust in my attorney-client relationships. While I don't use this knowledge as a template for every interaction, I do keep it in the back of my head as a reference point for how others may perceive me.

It was only a week into my time at the legal aid organization that I found myself on the receiving end of mistrust in the attorney-client relationship. Clair's article immediately came to mind, but before I explain, let me set the scene: during my first few days at the organization, I introduced myself to a group of clients who were part of a multi-plaintiff wage theft case. I explained I was their new student attorney for the summer and that I was trying to file affidavits of indigency on their behalf to avoid court fees in filing their claim.

During this introduction, I told the clients that their prior student attorney had left the organization and would be returning in the fall. I continued by letting the clients know that Spanish is my second language. I requested that if at any point they did not understand me, to please let me know.

Immediately following my introduction, I felt mistrust—or at least wariness—seeping into the attorney-client relationship. I knew

many of the clients in this case had formed close relationships with the previous student attorneys during the process of investigating and drafting their initial complaint. My clients were justifiably reluctant to begin that relationship-forming process all over—perhaps especially with a young white man whom they had just met.

From this point, I began picking up on what I considered to be a telltale sign of mistrust: my clients switched from speaking with me in Spanish and began attempting to speak to me in English. Later, some of my coworkers posited this could have been a form of endearment; however, I felt that it was because my clients did not trust me in discussing, let alone handling, their legal issues in Spanish. Shortly thereafter, some of the clients began reaching out asking about their previous student attorney, questioning if I was even capable of "helping" them. I was a few days into my internship, and there was already a solid foundation of mistrust. This was not entirely unexpected on my end, in part because of my own mistrust of the legal system. If someone told me I had a new student attorney for the summer, I would honestly resist trusting my attorney as well.

I thought about Clair's article – the examples of other white men who held much of the apparent power in the client-attorney relationship. I remembered various examples of them, intentionally or negligently, silencing or coercing clients who expressed withdrawal or resistance. Clair's article gave me examples of how not to conduct myself when engaging with disadvantaged clients in the frameworks of mistrust. I thought about how the court and legal systems do not give room to clients experiencing mistrust. But why not? How could I translate this to my own situation?

Truthfully, I began spiraling a bit, and the bleakness of the overarching situation set in. There was no clear-cut answer laid out for me as to how to build trust with clients. I knew I was not violating any of my ethical obligations set out under the Model Rules; however, I was still anxious and felt guilty.

I know there were important differences between Clair's study and my situation: I was a student attorney, whereas attorneys in Clair's article passed the bar. Clair's article focuses on criminal defendants, and I was working with plaintiff litigants. Nonetheless, I tried to focus on the similarities: the need for trust and communication between (student) attorneys and clients. I began reframing my thoughts to come up with a creative solution—there had to be some way to realign this attorney-client relationship. I was okay with my clients resisting me, but I did not want them to withdraw. For me, once my clients withdrew, I would no longer be able to "zealously" advocate for them. The attorney-client

relationship is a two-way relationship after all, I am merely the client's legal (student) representative.

Following some independent brainstorming and a handful of meetings with my supervisor, I developed a plan to potentially (re)gain some of my clients' trust while combating withdrawal. I planned to write and send a letter on official letterhead to each of the clients, inviting them to a group meeting at a community organization in their neighborhood. The meeting at the community organization would be in their neighborhood and be facilitated by a community translator. I wanted a place where we could all sit down, meet, and talk in person about what was going on in the client-attorney relationship.

I chose to send a letter on official letterhead because it was a tangible object that the clients could hold, unlike a phone call or a text. I thought this formality would bolster my legitimacy and start the process of developing a formal client-attorney relationship. Moreover, I felt that meeting the clients in their hometown, with a local and well-known organization, would provide some level of comfort that may not exist in either my office or the courts. For example, many of my clients lacked access to personal transportation and had to travel over an hour on public transportation to reach my office for a meeting. Shifting the burden of transportation to myself was also an attempt to show that I was as committed to this case as my clients.

After not receiving any responses for the next few days, I finally heard back. All of the plaintiffs in the group wage theft case were willing to meet with me. So, I took the commuter line across the Charles River and made my way to the local community organization. Eventually, one by one, the clients began to show up. Anxiously, I made my way into a meeting room filled with the clients and staff members from the community organization. I had planned my opening remarks: I made my reintroduction in Spanish. I admitted to the clients that I was "just a student attorney" and reiterated I did not grow up speaking Spanish; however, I was confident I could be of service to keep their case moving forward if they gave me the opportunity. Additionally, I offered an apology for my original introduction that served as the catalyst for this meeting.

Something clicked. I was in the middle of explaining why I needed to know the address and income of the clients when one of them, an older man, interrupted me: "Okay, okay—what do we have to sign?" From an interpersonal perspective, I regained some of the clients' trust and willingness to work with me by making a sincere personalized display that I was committed to as their advocate. My

race, class, and fluency in region-specific Spanish dialects were less of an issue or barrier upon showing that I was willing to connect with my clients on a community oriented basis. While I know I cannot change my race, class, or the constraints of the American legal system, I can change the modes and methods by which I interact with my clients.

In retrospect, I feel that what worked for me in this situation was meeting with clients in an environment where they felt comfortable: their community, and not a court or office. I put myself in a physical space where the clients were free to speak openly in whatever language they please, question me, and importantly, inquire more about my professional identity. Additionally, by focusing on giving myself space and time to reflect on and respect my clients' mistrust, I was not threatened by this process. I did not withdraw or let my ego get in the way. I was able to eventually find a solution that worked for both my clients and me. I knew a damaged ego could go a long way in terms of silencing and coercing clients who offer their own lay expertise.

Understandably, this is not a one-size-fits-all solution. Each instance of mistrust in the attorney-client relationship will have different needs, challenges, and opportunities. A criminal defense attorney, for example, will often not have the opportunity to meet with the client in their community. There is not a universal solution for rebuilding trust; however, with some creativity and self-awareness, I have realized these situations do not have to be so bleak.

Conclusion

Teaching professional responsibility is an incredible opportunity to discuss the challenges and rewards of practicing law with students, and to push students to turn their gaze inward while also honing their critiques of the systems of power within which all lawyers operate. I truly enjoy teaching Clair's piece every year and am so grateful for the voices it allows students to hear and the issues it pushes them to consider. While it is not enough on its own to tackle every issue involved in representing clients, I am hopeful that intentional use of Clair's article will help students like Sam identify a lack of trust and its impact once they are in practice. Beyond merely identifying the issue, students who have carefully engaged with Clair's article and related classroom discussions will hopefully find themselves more likely to move past an immediate ego-centered reaction to client mistrust and investigate the systemic challenges and causes of a strained attorney-client relationship, as well as the role their own race and class plays in

the relationship, finding ways to interrupt and prevent the silencing of their clients by attorneys and the system alike. While having the gaze of the sociologist turned on our profession can feel uncomfortable, it's an important reminder that the legal system impacts everyone (not just the attorneys and clients intimately involved), and that one of the responsibilities of being a part of the profession is being mindful of the public perception of attorneys and how these perceptions impact access to justice. The personal stories and actual quotes in Clair's piece can stand in stark opposition to the sometimes sterile tone and aspirational, vague nature of the Model Rules. My desire for students in my professional responsibility classroom is, yes, to learn the Model Rules and pass the MPRE, but also to think about what their own values require of them as an attorney, to question their actions even when they are not in violation of the Model Rules, and to get them thinking proactively about some of the decisions they may face in practice. Clair's article has become a valuable part of these discussions, and of helping me walk with students down the path of observing and critiquing our legal systems, with the hope they will feel empowered—and obligated—to improve them.