

TURNING CRIMINAL LAW STUDENTS INTO PROSECUTORS AND DEFENSE ATTORNEYS (AT LEAST FOR ONE DAY)

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“When are we going to do some real lawyer stuff?”

If my recollection is correct,¹ that was my primary frustration during law school, especially during my first year. After all, I came to law school with a pretty firm image of what “real lawyers” did, and what I was doing in my classes did not look or feel much like that image.

Of course, my image of who the real lawyers were was a bit off. In my mind, the “real” lawyers were Perry Mason, Atticus Finch, Clarence Darrow, F. Lee Bailey, and Vincent Bugliosi. Now, of course, I realize that my mental images of these fellows,² even the ones who actually existed, were based far more upon their reputations as “reel” lawyers than their work as real lawyers.³

Back in my days as a law student, though, my basic image of lawyers was firmly entrenched. Real lawyers were trial lawyers. More precisely, they were criminal lawyers. And almost nothing that I did in my law school classes looked much like trying a criminal case. Though I came to realize that law school was far more about developing a lawyer’s analytical skills, with at least a bit of practice in writing persuasively, my initial frustration never completely subsided. As I sat in those seats in law school classrooms, I wondered why we could not at least do something somewhere along the way in one of these core law school classes⁴ that sort of looked like trying a case.

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1. As criminal law professors familiar with the research demonstrating problems with eyewitness testimony realize, trusting a twenty-year-old recollection is a dicey proposition. In this instance, though, there is relatively little to be lost if my recollection is incorrect. Therefore, I request a bit of leeway from the reader regarding the accuracy of my sometimes faulty memory.

2. Back then (in a period of time my children refer to as “the olden days”), they were mostly fellows.

3. My images of what Clarence Darrow, F. Lee Bailey, Vincent Bugliosi or almost every other “real” lawyer I had heard about were based not upon their work per se, but upon the media’s portrayals of them.

4. In many law schools, students participate in a mandatory moot court appellate argument as a requirement of the first-year Research and Writing course. This exercise helps a bit to satisfy

Twenty years later, I no longer sit in the seats in law school classrooms. Through a marvelous twist of fate, I managed to somehow end up standing in the front of those rooms. As I planned my approach to teaching my only first-year class, Criminal Law, though, the twenty-year-old question still nagged me. Was there some way to help students develop analytical skills, learn some substantive criminal law, and do something that resembled trying a case?

Having each student “try” a case from beginning to end was not practical, because there was not enough time in the semester to conduct the dozens of trials that would be needed. Perhaps the substantial logistical problems should have led me to just drop the whole idea.⁵ But I am a rather stubborn sort whose twenty-year-old concerns do not resolve themselves that easily. So, I said to myself, if there is not enough time to have each student do a full trial, how about a miniaturized version of a trial? If I could just find a way to get the basic facts presented without taking the time for both a prosecution and defense case in chief, I could have the students present final arguments to their classmates. But I had no idea where I would find the substantial time needed to find fact patterns, investigate them, and write factual summaries.

I. STATE V. _____ MINI TRIAL STRUCTURE

Fortunately, I discovered that all of this work had already been done for me. In Paul Robinson’s *Criminal Law Case Studies*,⁶ Professor Robinson has located interesting fact patterns from twenty-two actual cases, researched these cases, and written short summaries of the important facts. He has even included photographs, which demonstrate to the students that these are actual fact patterns involving real people. In addition, his Teacher’s Manual includes

the hunger for a “trial-like” experience, but it still did not seem too much like a trial to me. I am almost certain that I had no concept of what an appellate argument looked like before I attended law school. Also, to the extent that practicing lawyers have fewer and fewer trials, the same can be said about appeals. If fewer cases are being tried, there are fewer post-trial appeals.

5. Others have struggled with the pros and cons of using simulated exercises in law school. Substantial legal scholarship has been devoted to simulations. Recent contributions to this scholarship include: Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417 (2002); Steven H. Goldberg, *Bringing The Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414 (2000); Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 410-12 (1999); Alan D. Hornstein & Jerome E. Deise, *Greater than the Sum of Its Parts: Integrating Trial Evidence & Advocacy*, 7 CLINICAL L. REV. 77 (2000).

In this short essay, I do not study these interesting simulation issues in depth. Instead, this essay merely shares one instructor’s experiences with a particular type of simulation—mini-trials in a first-year Criminal Law class. Those considering adopting simulations into their classes will benefit from consulting the simulation scholarship.

6. PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* (2d ed. 2002). This book is a West Group publication.

a “Case Aftermath” essay, often with additional photographs, that an instructor can use to inform the students about what happened in the actual case.

Professor Robinson has selected fact patterns that match the topics typically raised in introductory Criminal Law courses. As a result, it is quite easy to sprinkle the mini-trials of these cases throughout the semester, or to use his fact patterns in other ways to supplement the review of appellate cases that is the staple of core courses like Criminal Law. Though I used only Professor Robinson’s cases the first two times I used mini-trials, I have now taken to watching the newspapers for interesting fact patterns that would work in these exercises. This year, for example, I wrote two fact summaries, thereby demonstrating that imitation is the sincerest form of flattery.⁷ While it would be a daunting task to research and draft enough factual summaries to support an entire semester, it is relatively easy to draft a fact pattern or two every year. This also gives me the chance to add some local flavor to the course, which helps to generate student interest.

In my Criminal Law class, each student is assigned to serve as a member of a two-person prosecution or defense attorney team for what we call a “*State v. _____*” mini-trial at some point during the semester.⁸ At the trial, the remaining members of the class serve as the jurors. The jurors are required to read the facts, as outlined in Professor Robinson’s book (or, where applicable,

7. One of my new cases involves a woman who allowed her young son to stray into her Rottweiler’s pen, spoke on the phone for several minutes, and then discovered that her dog had mauled and killed her son. I have added it to the discussion of unintentional killings. The other new case involves a prisoner who wrote an underage girl several letters to try to arrange a sexual encounter with her. *See State v. Bates*, 70 S.W.3d 532 (Mo. Ct. App. 2002). We will cover it when we discuss attempt.

8. If the total number of students is not divisible by four, I assign some students to serve as solo defense attorneys for secondary defendants in a few cases. Several cases from Professor Robinson’s case files can be converted to multi-defendant trials. One such case is the Roger Thomas rape case. ROBINSON, *supra* note 6, at 77-80. The Joseph B. Wood “two shooters” case will also work. *Id.* at 64-68. Finally, the Keith Mondello mob violence case can be used. *Id.* at 81-87. Of course, the classic “lifeboat cannibalism” case of Thomas Dudley could easily be a two-defendant case, but I use this as the first problem in the semester, before I know whether I will need multi-defendant mini-trials. *Id.* at 14-20.

Other scheduling quirks can arise, of course. The first time I used mini-trials, one of the students became seriously ill on the day he was scheduled to try his case. I excused him from that assignment, and then added an “extra” trial at the end of the semester, so that he could fulfill the course requirements. Professor Robinson’s Linda Ruschioni case works well for this purpose. *Id.* at 61-63. This case involves a young girl who finds and keeps a lottery ticket that turns out to be a winner. It can easily be handled by one prosecutor and one defense attorney (with shorter than normal time limits for closing arguments) or by teams of two attorneys on each side. Also, it works well at the end of the semester, because it is a nice vehicle for returning to and reviewing the “when is punishment appropriate?” themes introduced at the beginning of the semester. Therefore, I now keep this case out of the standard schedule and use it if needed at the end of the semester.

my summaries), before coming to class. They also review each side's short (350 word limit) "brief" that serves as a combination of indictment (in the case of the prosecutor's brief), requested jury instructions, trial brief, opening statement, and evidence summary. Therefore, the in-class trial consists solely of a six-minute closing argument by the prosecution team, an eight-minute closing argument by the defense team, and a two-minute rebuttal closing by the prosecution team, along with a few minutes, usually about five, of deliberation by the jurors.

My syllabus outlines the rules for these presentations, including those discussed above and several others. A copy of my standard syllabus instructions regarding the *State v. _____* presentations appears as the appendix to this essay. The syllabus instructions outline the rules and requirements for the attorneys' briefs and the in-class "trials," including the prohibition against using briefs filed in previous years or consulting anyone other than their partner and the instructor for research assistance and advice. The syllabus also outlines the grading system for the *State v. _____* exercises and informs the students that they will be responsible, for final exam purposes, for the material covered by their fellow students in these mini-trials. A sample brief is also included in the syllabus. Because the *State v. _____* presentations are new to students who are accustomed to more typical law school classes, I also spend a bit of time reviewing the rules for the presentations on the first day of class. In that review, I encourage the students to practice their final arguments out loud about half a dozen times. I warn them that it will be quite easy for their fellow students and me to identify those who did not practice out loud, because those students will end up being cut off by the timekeeper. As I tell the students, eight minutes will go by much quicker than they anticipate, so they will be forced to leave some good arguments unmade.

The syllabus instructions also note that each student team is required to meet with me before the in-class trial. At these short conferences, I serve as the hypothetical supervising attorney by reviewing the attorneys' statutory and case law research, discussing tactical decisions, answering the attorneys' questions, and gently (and occasionally not so gently) guiding them toward the correct issues when they appear to have gone astray.

We apply the current law of our law school's home state, Missouri, to these fact patterns, with a few exceptions.⁹ Of course, any jurisdiction's law

9. Occasionally the fact patterns work best if the student attorneys apply the law of the jurisdiction where the offense actually took place. The first time I assigned the well-known Julio Marrero case, in which the critical issue is whether corrections officer Marrero is a "peace officer" who is entitled to carry a firearm without a New York permit, I tried to use a combination of New York and Missouri law. ROBINSON, *supra* note 6, at 33-53. I have since discovered that this problem works best if the students simply apply the law of New York state as it existed at the time of the alleged offense.

would presumably work equally well, but we use Missouri law because many of our students will eventually practice in Missouri. Because Missouri law applies, the students are required to research Missouri statutes and cases to determine the current law applicable to their case. In the first class of the year, I invite them to come to me for guidance about where to look if necessary, but only after first trying to find the applicable statutes themselves. Students are invited to refer to other sources of law, including the statutes and court decisions in other jurisdictions and Model Penal Code provisions. They are also invited to make public policy arguments in their briefs and final arguments to the extent that space and time permit.

Students are also encouraged to try to use visual aids in their final arguments. They are given discretion, within reason, to create evidentiary exhibits. For example, almost every set of prosecutors in the classic *Dudley* lifeboat case¹⁰ waives “the bloody knife,” which, of course, is always Exhibit One, during the final argument. Many students also prepare PowerPoint slides. In this way, our mini-trials more closely resemble real trials, where attorneys must be prepared to use visual evidence and technology effectively.

After the attorneys have completed their final arguments, the jury uses the remaining class time to deliberate. The student attorneys stay in the classroom to listen to and watch the deliberations, but they are not allowed to say anything or otherwise participate. Also, I try to avoid directing or moderating these discussions, unless I need to stop more than one juror from talking at the same time. At the end of the deliberations, each juror is required to vote, using a red plastic cup for a “guilty” vote and a yellow plastic cup for a “not guilty” vote. If there are multiple charges or lesser-included offenses, multiple votes are taken.

II. ADVANTAGES

Having the students “try” cases in Criminal Law enriches their learning experience in several significant ways. Though I anticipated some of these advantages, a few surprised me.

This year I will use the Richard R. Tenneson case, which involves a former prisoner of war who was allegedly brainwashed by his Communist Chinese captors, to raise insanity defense issues. *Id.* at 124-28. We will handle this case as a court-martial under the Uniform Code of Military Justice, rather than as a civilian trial. This will have the added benefit of giving the students a bit of exposure to the military justice system.

10. *Id.* at 14-20.

A. Providing a Presentation Opportunity for All Students

First and possibly foremost, mini-trials give students the opportunity and the responsibility to “try” their case to their colleagues. While it is true that relatively few of them will try an actual jury case in their careers, and even fewer will try a criminal case, almost all of them will be called upon to attempt to persuade in oral and visual presentations to judges, legislative committees, city councils, school boards, zoning commissions, community groups, law firm partners, and a wide variety of other groups. Most law school exercises, including exam, memo, and brief writing, prepare students to write persuasively. This is certainly appropriate, because most lawyers spend a great deal of their careers attempting to persuade through writing. However, most future lawyers will also spend at least some time persuading orally, and they can benefit from opportunities to hone these skills. In addition, mini-trials give the students the opportunity to present information visually through PowerPoint slides and evidentiary exhibits.

Of course, some of our students come to us with considerable experience in public speaking, from their pre-college and undergraduate speech classes and extracurricular activities like speech and debate. These students, though, still benefit from an exercise that forces them into the “trial” rubric where they might find themselves after graduation. Also, these students tend to really enjoy the mini-trials.

Every law school class also contains several students who are somewhat afraid to voluntarily participate in regular class discussion. Left alone, these students might carefully pick their way through what they see as the minefield of law school without ever attempting to persuade orally, except perhaps in one mandatory moot court exercise. While these students do not relish the mini-trials in the same way as their boisterous colleagues, they might stand to gain the most from being forced to speak in class. To some extent, the professor can present these opportunities by randomly calling on students in class. However, mandatory class participation will usually result in a relatively short time for each reluctant student to speak, and will usually increase that student’s stress level, because the student does not know when her “opportunity” to speak will come. In contrast, the mini-trial format will result in each student speaking for about four minutes, with advance notice and time to prepare for the presentation.¹¹ By forcing every student to speak for four minutes, mini-trials also have the benefit of reducing the amount of class time left to be monopolized by the half dozen to dozen overly forward students that seem to occupy every law school class.

11. Of course, mandatory class participation (in the portions of classes not used for mini-trials) and mini-trials are not mutually exclusive pedagogic tactics. In fact, in addition to mini-trials, I use both mandatory and voluntary class participation in Criminal Law.

B. *Requiring Intensive Criminal Law Research*

Outside of the Research and Writing course, students are given (or, to use a term that some students might believe to be more accurate, force fed) almost all of the “law” that they learn in first-year classes, as well as upper-level substantive law courses. This is not meant to be a pejorative statement, but merely an observation. Those who write textbooks and teach these classes do not have time to send the students to the libraries to search out the law on every one of the many issues covered in a particular course.

When they enter practice, though, that is exactly what our students will be doing. When faced with a client’s legal issue, it will be their job as lawyers to find the applicable law. Therefore, it is beneficial for them to have as much experience as is reasonably possible in going about such an endeavor. Each student’s mini-trial will provide this opportunity because the student will be presented with a set of facts and asked to find the law applicable to the assigned problem. This forces students to look through the statutes, cases, and, in some instances, standard jury instructions. Almost all of them will discover that the criminal law is scattered throughout the statute books and official reporters. Some of them will learn that it is not always easy to find this law. These are valuable lessons.

C. *Prying a Little Actual Criminal Law into Criminal Law*

Mini-trials are not the backbone of a Criminal Law course. Instead, even if you use mini-trials, you will spend far more class time with the more traditional teaching tools of reading cases, the Model Penal Code, and other statutory provisions. Most of your class time will be spent discussing these sources of law with your students in class.

However, Criminal Law suffers from the somewhat unusual (among core law school classes) problem of having multiple rules from these different sources. When discussing a particular issue, I often find myself reviewing the old English common law position, the Model Penal Code, a “majority” American statutory or case law position, and one or more minority positions. For first-year students, this often leads to the “what is the law, dammit?” frustration that was perhaps best articulated by former student James Gordon. Gordon famously described the basic Criminal Law class as: “Study common law crimes that haven’t been the law anywhere for more than 100 years. Then, to bring things up to date, study the Model Penal Code, which is not the law anywhere today.”¹²

Of course, one of the important lessons that a student should learn in Criminal Law is that the law is not uniform across all American jurisdictions.

12. James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991).

Nonetheless, in each jurisdiction, there is a set of statutes, and related cases interpreting and applying those statutes, that outline the criminal law in that jurisdiction. Requiring students to find this law for a particular set of facts, and then teach their fellow students about it, reinforces this point.

D. Gaining Experience in Making Difficult Tactical Decisions

Prosecutors face critical and often difficult decisions about which charges to bring and whether to charge in the alternative, thereby giving jurors the opportunity to find the defendant not guilty of a more serious offense but still find him guilty of a less serious offense. Defense attorneys must decide whether to pursue a potentially available affirmative defense and whether to request jury instructions on lesser included offenses. Mini-trials present student prosecutors and defense attorneys with these same dilemmas, thereby giving them the chance to review the competing considerations and decide upon the best strategy. In addition, they have the opportunity to watch jurors deliberate and thereby receive specific feedback about the wisdom of their decisions.

E. Learning to “Work Well with Others”

As lawyers, our students will often be called upon to work with other lawyers and with legal assistants, investigators, expert witnesses, and other professionals. Mini-trials provide an opportunity for experiencing the dynamics of working within a team. When team members do not agree about how to resolve the tactical dilemmas discussed above, they will gain experience in managing and resolving these disagreements.

F. Forcing Contact with the Professor

Even though there are relatively few Professor Kingsfields in today’s law schools, many students are still somewhat intimidated by their professors. It is difficult for many of them to approach us. Forcing them to meet with you to fulfill the requirements of your course will give them some contact with at least one professor. Many will realize that they can supplement their classroom learning by occasionally meeting their professors outside of class to discuss concepts that are perplexing to them.

G. Bringing a Bit of the “Real World” into the Ivory Tower

Students lament the disconnect between the cases they study in law school and that place they plan to occupy as lawyers, “the real world.” Trying cases based upon what actual people did in “the real world” adds a bit of realism. It also helps to dispel the students’ common stereotypes about the criminal justice system—that almost all crimes are inhuman, horrible acts by awful people preying upon completely blameless victims. Professor Robinson’s case

files introduce students to defendants who are at least somewhat sympathetic¹³ and to crime victims who have themselves engaged in questionable conduct.¹⁴

H. Encouraging Active Learning

Mini-trials do not only benefit the students who are trying the case on a particular class day. Because the remaining class members deliberate and, ultimately, vote¹⁵ after each trial, they become active learners in these mini-trials.

I. Giving Them a Break from the Professor

In any given semester, you will be the primary speaker for thousands of minutes of class time. No matter how talented and entertaining you are, your audience will naturally grow tired of your “shtick” by the end of the semester, if not substantially earlier. You can counter this inevitable phenomenon by turning your classroom over to other instructors who will have different styles.

J. Expanding the Corps of Classroom Volunteers

Allowing at least some class time for jury deliberations has produced one benefit that I did not expect. Because I try to stay out of the deliberations, students are not concerned that I will challenge their comments during deliberations. As a result, some students who rarely or never volunteer to participate in the regular class discussion will sometimes take an active role in

13. Examples of possibly sympathetic defendants from Professor Robinson's cases include: the loving, but perhaps incompetent, parents in the Bernice J. and Walter L. Williams case who watched a toothache cause a child's death, ROBINSON, *supra* note 6, at 8-13; the dehydrated, starving rowboat occupants in the Thomas Dudley case, *id.* at 14-20; the eight-year-old girl who found a lottery ticket in the Linda Ruschioni case, *id.* at 61-63; the abused inmate in the John Charles Green case, *id.* at 95-100; the abused wife in the Janice Leidholm case, *id.* at 110-16; the framed and drugged defendant in the Barry Kingston case, *id.* at 117-19; the brainwashed prisoner of war in the Richard R. Tenneson case, *id.* at 124-28; the kidnapped and sexually abused boy who later became the adult defendant in the Alex Cabarga case, *id.* at 129-33; and the abused and neglected eleven-year-old defendant in the Robert “Yummy” Sandifer case, *id.* at 134-39, among others.

14. Two of the homicide victims in Professor Robinson's case files were husbands who physically abused their wives. See ROBINSON, *supra* note 6, at 64-68 (Joseph B. Wood case); *id.* at 110-16 (Janice Leidholm case). The victim of another shooting was attempting to steal fruit from the defendant's orchard. See *id.* at 101-05 (Johann Schlicht case).

15. Some who use mini-trials might want to give students the opportunity to abstain or to vote “I am not sure” in addition to my options of “guilty” and “not guilty.” I have considered allowing such votes, but decided against it. Law school tends to focus on difficult cases, and Professor Robinson's book honors this tradition. I want the students to be faced with making tough choices, instead of allowing the option of avoiding these difficult decisions, because I believe this fosters careful attention to the readings, briefs, and arguments presented by the prosecutors and defense attorneys.

deliberations. This adds to the benefit of distributing class speaking time among more students, which is discussed above.

III. DISADVANTAGES

Introducing student presentations into a Criminal Law class is certainly not without its costs. Two of them, involving substantial devotion of classroom and office time to these presentations, cannot be eliminated. No Criminal Law instructor should introduce mini-trials into her class before realistically assessing these burdens and determining that the benefit of adding this program to the standard Criminal Law class is nonetheless worthwhile. Many of the other disadvantages can be alleviated somewhat by adopting the strategies outlined below. I learned about several of these problems and their counters only through the school of hard knocks the first few times I used in-class mini-trials. If you decide to use mini-trials in your class, perhaps you can use these or other strategies to avoid a negative experience.

A. *Using Substantial Classroom Time*

Any professor's most precious classroom resource is time. We never seem to have enough time to cover the material we want to reach, particularly when we need to leave some time for classroom discussion.

Using mini-trials is not an efficient way to cover material. In my classes, each mini-trial occupies the last (or, occasionally, the first) twenty minutes of class time. I am certain that I could almost always cover more topics in those twenty minutes if I continued with the lecture and discussion format that I use during the remainder of the class time.

Yielding precious class time is especially difficult in Criminal Law because, as noted above, there is so much law to cover. This is particularly true if you teach a three-credit Criminal Law class, as I did the first two times that I used mini-trials. I am hoping that it will be somewhat less true this year, because our law school has converted Criminal Law to a four-credit class. However, I realize that my colleagues expect me to cover additional topics, to justify the four-credit designation.

B. *Wrecking Havoc on the Professor's Office Time*

Whenever you introduce a practice component into your class, you will spend substantial time with students that you can avoid by simply not using a practice component. Mini-trials require you to schedule the trials, meet with students in advance to discuss their trials, review and comment on their briefs, and critique their in-class presentations. There is no denying it: That will take a lot of time. It will require significantly more time than simply preparing to use that same twenty minutes in class for traditional lecture and discussion.

You should not use mini-trials unless you are prepared to invest both classroom time and your own time outside the classroom to make them work. In other words, you must conclude that the benefit to the students outweighs the costs to them and to you before taking on mini-trials and their associated hassles.

C. *Introducing Scheduling Difficulties*

In addition to its drain on your time, scheduling is a surprisingly difficult task. In the first instance, if you are going to assign students to in-class presentations, you will have to tell them when they will do these presentations. As a result, you will be forced to schedule your discussion of related topics several weeks in advance and then stick to that schedule, instead of using the somewhat customary “we will decide which topics we will discuss in the next class at the end of this class, when I know where we are” law school scheduling system.

You will also want to make some effort to work around substantial student scheduling conflicts, to the extent possible. In the first class of the semester, I ask the students to advise me of the conflicts that they are aware of by writing them onto a form that is passed around the room. I also let them sign up as a two-person team during or just after that first class, if they choose to do so.¹⁶ The students seem to appreciate both of these accommodations.

Another scheduling matter that will require your attention, particularly the first time you use mini-trials, is reviewing Professor Robinson’s case files and determining which of them should be used and when (during the semester) they should be used. Fortunately, Professor Robinson gives you some help in this regard, by including a Teacher’s Manual appendix with suggested case assignments to match most, if not all, of the textbooks and hornbooks commonly used in our Criminal Law courses.¹⁷ For professors who use the

16. During the first class, I tell students that they are allowed, but not required, to pick a partner and sign up their team on a sheet that is available to them during and after class. I tell them that the “cost” of exercising this option is taking the risk that they will be assigned to a *State v. _____* mini-trial early in the semester. Within a day or two after the first class, I assign students to the problems for about the first third of the semester (except for the first problem, *see infra* Part III.H), using the teams selected by the students.

This method has the added benefit of generally keeping me from assigning a student to a mini-trial, and then later learning that the student has dropped the course. Most students will not assign themselves to a team unless they are relatively sure that they will not drop the course. By the time we get a third of the way through the semester and it is time to assign students to mini-trials for the last two-thirds of the semester, most who will drop have already dropped. At that point, it is relatively safe to assign the remaining students to mini-trials.

17. See appendix of accompanying teacher’s manual to Paul H. Robinson’s book *Criminal Law Case Studies* (2d ed. 2002), *supra* note 6.

Kadish and Shulhofer text,¹⁸ I would be pleased to provide my own list of reading and mini-trial assignments. Finally, Professor Robinson is currently writing a Criminal Law text that directly incorporates his case studies.¹⁹

Almost inevitably, you will schedule a case or two that turns out to be a “clunker” under the law of your state (or whichever state you assign as the controlling law). Usually this will result because there is a somewhat unusual statute that makes the case an “easy” and therefore uninteresting one in your state. Short of researching your state’s law on each assigned case yourself before scheduling the mini-trials, which would be a rather daunting task, the only way to smoke out these clunkers is to wait until the presentations the first semester you assign mini-trials. Once they are identified in this process, you can replace them in future years with different cases from Professor Robinson’s case files or files that you write yourself based upon cases that you have noticed or found. Therefore, this problem, like the larger one of finding the correct trials and the right time in the semester to cover them, is a problem that will largely disappear after the first year of mini-trials.

D. Fostering Opportunities for Partner Disagreement

Because I have extolled the benefits of group work above, I should also briefly note the problems associated with it. On occasion, students will have trouble finding their partners, getting them to take on their fair share of the work, and finding a way to manage intra-team disagreements. A few of these disputes, but only a few, find their way to your office with panicked visits, phone calls, or e-mails from students. Allowing students to choose their own partners will reduce, but not completely eliminate, these problems.

E. Engendering Resentment from Students Assigned to Tough Cases

Because we tend to focus on difficult, “close” cases in law school, students sometimes think that both sides of a case have a relatively equivalent chance of success. In many criminal cases, of course, defense attorneys face uphill battles, because their clients have engaged in conduct that is, at least arguably, criminal. In many actual cases, the criminal defense attorney’s best chance of success comes from the problems the prosecutor will face in putting on the state’s case.

In the mini-trials, most of the proof problems prosecutors would ordinarily face—including those that might have challenged the actual prosecutors in those cases that did go to trial—are eliminated by virtue of the need to present “the facts” in the written case summaries. In other words, one of the defense

18. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (7th ed. 2001).

19. PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES & CONTROVERSIES* (forthcoming 2004).

lawyer's best tools is removed by virtue of the need to present the facts in a time efficient manner.

As a result, defending these cases can be a challenge. Some of the students assigned to defend resent the difficulty they face in trying to "win" the case. To lessen this concern, I tell the students at the beginning of the semester—and often remind the defense attorneys in our preparation conferences—that prosecutors in our state do not "win" at trial unless they receive a unanimous verdict. Therefore, I tell them, they should consider the presence of any "not guilty" votes a victory or, at least, a partial victory. I also tell them that, in the "real world" we will be exploring, defending criminal cases is often a challenge, because defense attorneys have to find the best argument available, even when none fits perfectly.

F. Lowering Some Student's Satisfaction with the Course and Instructor

Mini-trials are more work not just for the professor, but also for the students. Being assigned to a mandatory mini-trial means that, even if a student would rather "lay low" during the semester and then gear up for the final exam, she must research the law, write a brief, meet with the instructor, and write, practice, and present four minutes worth of final argument. Although many students welcome this opportunity, some will resent being forced to do this "extra" work.

In addition, if the exercise is to be meaningful, the instructor must critique the student's brief and argument. I provide my written comments on a one-page form that I developed for this purpose. Of course, I try to make sure the "positive" comments outweigh the "suggestions for improvement," but the suggestions for improvement are often more important, because they contain the fodder for possible improvement. Although one of the common student criticisms of law school is that "they (meaning us, the instructors) never provide any feedback for the whole semester, and then make us take a final that counts for the whole grade," students are not necessarily as fond of feedback when they actually receive it. Constructive criticism is still criticism, nevertheless, and criticism is not always easy to see or hear. After all, how do we feel when students provide "suggestions for improvement" in their evaluations of our courses?

Speaking of course evaluations, expect your overall ratings to drop if you add mini-trials to your Criminal Law course. At least under the evaluation system at our school, the overall numerical rating of the instructor is based not upon how many students are pleased with the instructor and the class, but largely upon how many are substantially dissatisfied. A few low numbers will drive a class's mean score down more than a corresponding, or even a larger,

number of positive ratings.²⁰ The negative numbers will be provided by the students who did not want to do the “extra” work associated with a mini-trial or did not like your constructive criticism of their trial work.²¹

G. Creating Plagiarism Potential

In any given Criminal Law course, most of the case files that I use for the mini-trials are files that I have used in previous years. As a result, there is some risk that a student might try to find the brief from the previous year or consult with the students who presented the problem the previous year.

In the first class of the semester and in the syllabus, I make it clear that this is not an acceptable form of research. This eliminates the “I thought that was okay” defense to any plagiarism. Also, I tell the students that I keep the copies of the briefs from the previous years. I compare the students’ briefs to those filed in previous years, to see if there is too much similarity. While I am not naive enough to think that these simple steps eliminate the possibility of cheating, I have not seen evidence of this type of cheating on Criminal Law mini-trials.

H. Boring Students

Though students generally welcome the break from instructor-led (and, therefore, instructor-dominated) class discussion, occasionally a fellow student will be an uninspiring or overly nervous speaker. On a few occasions, they might even get the law wrong.

Although this has not been a major problem, because most students have both the skill and the desire to handle their presentations effectively, I do take some steps to try to reduce the chances of “clunker” presentations. First, I try to set the bar for the presentations at a high level early in the semester by “not so randomly” selecting the students for the first presentation. Because Criminal Law is a second semester class at our law school, I usually ask one of the first-semester instructors to make recommendations regarding which students will do well on these presentations.

20. Our students are asked to give the instructor a grade on a scale from one to five, with five as the highest score. In most semesters, the mean score is near or above four. Therefore, there is far more room for extremely dissatisfied students to give an instructor a score substantially lower than the mean than there is for extremely pleased students to give an instructor a score substantially higher than average.

21. My standard teaching package includes three “core” courses, Criminal Law, Professional Responsibility, and Criminal Procedure. I use and provide feedback for student presentations in the first two courses but not in the third. In most other respects, my general teaching approach is the same for all three courses. Almost always, the students’ overall rating of my teaching performance is highest in Criminal Procedure—the course with no student presentations and, therefore, no instructor feedback on those presentations.

The student-instructor meetings can help you identify mistaken legal analysis and redirect students toward the correct law. Although these meetings were merely recommended the first two years I taught the course, I have now decided to require them.

In the first class of the semester, I remind the students that they are responsible for checking their opponents' briefs and pointing out any mistaken statements about the law. I spend a bit of time emphasizing that this is their job as attorneys in the case, to try to overcome the typical student reluctance to "show up" a fellow student in class. Finally, as noted above, I also strongly encourage all students to practice their presentations out loud.

I. Increasing Student Inattention

Students might be tempted to be less attentive when listening to a fellow student than when listening to the professor. Overcoming this problem is a simple matter of turning the "will this be on the final?" phenomenon, which we know all too well, to your advantage. Tell the students on the first day of the semester that there will be questions on your final that they cannot answer properly without learning the material presented by other students. Then, of course, make sure that this is the case, by writing some questions based on the law presented by the students. At least one of these questions should be a rather obvious attempt to require attention to the student presentation, so the students will tell the students in your next Criminal Law class that they will see such questions on the final.

IV. CONCLUSION

Providing students with the opportunity to prosecute and defend criminal cases during Criminal Law comes with a substantial price tag, in terms of classroom time and instructor effort. Therefore, it is not an option that everyone should exercise.

If you are ready and willing to pay that price, however, those trials can enliven your classroom, enrich your students' learning, and even brighten your own teaching career. Few things in life are as dramatic as a criminal trial, for both the participants and the observers. Few teaching experiences in law school are as positive as taking the risk of team-teaching with your students and then seeing them come through with flying colors.

APPENDIX
(Excerpts from Syllabus)

“State v.” Assignments

Each student will be assigned to serve as a Prosecuting Attorney or a Defense Attorney in a “*State v. ____*” assignment. Most of these presentations will be based on a case file from Professor Paul F. Robinson’s CRIMINAL LAW CASE STUDIES, which is a required text for the course. The following rules apply to these assignments:

1. With rare (and explicitly noted) exceptions, we will assume that current Missouri statutes and case law apply to the case. In some cases, this will be a bit odd, because some of the fact patterns could not or would not occur in Missouri. Nonetheless, assume that current Missouri law applies.

2. Each TEAM of attorneys must complete a “brief” by the assigned deadline. The word “brief” is in quotes, because you will not be allowed to file a full-length brief. Instead, your brief must be no longer than one-page, using at least twelve-point font, with a maximum word count of 350 words. [Most word processing programs will count the words for you. You are required to list the total number of words in the bottom-right corner of your brief.] The Class Number and date (of the class when you will make your presentation) should appear at the top of your brief. A sample brief is included in this syllabus.

3. Your brief should reference applicable Missouri law. It MAY reference the Model Penal Code or the statutes and cases from other jurisdictions (or secondary sources such as articles and books), but it MUST reference Missouri law. You will need to do some research to file this brief. [In addition to researching Missouri statutes and cases, you might want to check the Missouri Approved Instructions (“MAI”)-Criminal, in “Law Reserve” at our library, KFM 8383.M58 (1987). If there is an MAI-Criminal applicable to your case, it could be a helpful summary of Missouri law.] I recommend that you spend no more than about three to five hours researching. *Because the brief is due several days before the class when you will give your presentation, you may need to read ahead in the assignments a bit to write the brief.*

4. You must do the following with your brief:

a. FIRST (before filing copies with the instructor): File one copy in the student mailbox for each of your opponents. This must be done before the deadline.

b. Send each of your opponents an e-mail with your brief attached. This must be done before the deadline. [Ordinarily, the deadline for the prosecution's brief is 8:30 a.m. one business day before the trial and the deadline for the defendant's brief is 8:30 a.m. the morning of trial. Student attorneys are allowed to agree to earlier deadlines, but you cannot agree to later deadlines.]

c. Then file *THREE copies* in the tray on the door outside my office (Room 322). This must be done before the deadline, but it must be done **AFTER** you file a copy on each of your opponents. [Do NOT e-mail your brief to me.]

d. Then make 80 copies and bring them to class **AT LEAST FIVE MINUTES BEFORE CLASS** on the date of your presentation. Place them near the instructor's handouts, so each student receives one before class.

5. You will be responsible for pointing out any errors in your opponents' brief (during your presentation to the class). By "errors," I am referring to misquotations, citations to cases that have been overruled by later cases or statutes, etc. An argument about how a correctly cited, current statute or case applies to the current facts is NOT an "error" by your opponent, though you will of course want to point out these disagreements. Because your opponents will be checking your citations, you will want to make sure they are correct.

6. Your job will be to convince the "jury," which consists of all class members other than those who are serving as attorneys, that they should return a "guilty" verdict (if you are a Prosecuting Attorney) or a "not guilty" verdict (if you are a Defense Attorney). At the conclusion of your presentation, the jury will deliberate (if time permits) and then vote "guilty" or "not guilty."

7. The following time limits will apply:

Prosecuting Attorneys: Six minutes for "case-in-chief."

Defense Attorneys: Eight minutes.

Prosecuting Attorneys: Two minutes for "rebuttal."

These are total times for your team. You can assign the time within your team as you see fit, as long as each team member participates significantly in the presentation.

You are strongly encouraged to practice your presentation **OUT LOUD**, several times! This will improve the quality of your presentation. Perhaps more importantly, it will help you to realize that eight (or six!) minutes is a

very short period of time. [Those who have not practiced their presentations out loud will readily identify themselves by rushing to finish in the assigned time.]

8. *Students are REQUIRED to meet briefly (for 15 to 30 minutes or so) with the instructor while planning their “State v. ____” briefs and presentations.* To make this meeting most effective, you should first review the problem thoroughly, attempt to identify the key issues, and conduct at least some of your research. You may want to e-mail the instructor with a preferred meeting time. [Do not ask about a meeting time after class, because I will not have my calendar with me.] If you do not meet with me, your “State v. ____” grade will be reduced.

9. In your work on your State v. ____ presentation, you are not allowed to consult former Criminal Law students who were assigned to the same problem or to read their briefs. It is your job to research the law, make strategic choices, write your brief, and outline your argument for the in-class trial. To the extent that you are having difficulty finding the applicable law, please discuss this with the instructor.

10. You will receive a grade, based upon the brief and the presentation, on the “-, 0, +, or ++” scale. [Not following the instructions for briefs can result in a reduced grade for this exercise.] Almost always, your team will receive a joint grade, though I reserve the right to assign individual grades if I conclude that one or more team members is not pulling her or his weight. This grade will be the major component of your class participation grade. If you do not complete an assignment, you will receive a “-” score, which will reduce your final grade in the course. This will be true even if the instructor failed to assign you to a “State v. ____” team. Therefore, *it is your job to make sure you have been assigned to a team, and to make sure I add you to a team if you do not receive an assignment!*

11. *All students are expected to read the relevant case file from Professor Robinson’s book before class* (as well as the Model Penal Code sections noted on the reading list). Therefore, in your brief and in your class presentation, do not spend too much time reviewing the facts of the case. Instead, assume that the jurors know “the facts,” and apply the relevant law to those facts.

12. *You WILL be tested on the material presented by your fellow students in “State v. ____” briefs and presentations.* These presentations will serve as the primary means of covering Missouri law in class. If the instructor notes mistakes regarding the law in a presentation, he will point them out. Barring

this, you should learn the law taught to you by your fellow students, and be prepared to answer questions about it on the final exam.

[Sample Brief:]

Class No. 7 February 20, 2004

State of Missouri)	State's [or Defendant's] Brief by Attorneys
v.)	Tamara Thompson
James Johnson)	Charlie Champion

The text of the brief will appear here. Remember that the “jurors” will only have a few moments to review this “brief,” so keep it short and make it readable.

You may want to consider using outlines or bullet points, e.g.:

- The Missouri statute outlaws “conduct causing a disturbance in a public arena.” Mo. Rev. Stat. § 1234(b)(1) (2001).
- Similarly, the Model Penal Code prohibits “creating a public commotion.” Model Penal Code § 7.08(9)(c).
- MAI-Criminal 328.07 forbids “a disruption of a public proceeding.”
- Recently the Missouri Supreme Court held that entering the playing field of a sporting event constituted a violation of section 1234(b)(1). *State v. Sillyman*, 28 S.W.3d 456 (Mo. 2001).
- Therefore, James Johnson’s tackling of the opposing team’s mascot is a violation of section 1234(b)(1).

Of course, regular “prose” text is also acceptable. Bulleting or highlighting in some fashion might help you make your point, however, because it will be easier for the jurors to scan your brief.

Remember the following rules regarding the brief:

1. You must use at least twelve-point font.
2. One page maximum, with a maximum of 350 words.
3. You do NOT have to use the entire page (and perhaps you should not!).
4. Put the Class Number in the upper-left corner and the date (of the class) in the upper-right corner.

5. File (and e-mail) copy on each of your opponents, then file **THREE** copies at Room 322.

6. You must list the total number of words in the lower-right corner.

281 words.