Equal Justice from a New Perspective: The Need for a First-Year Clinical Course on Public Interest Mediation

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EQUAL JUSTICE FROM A NEW PERSPECTIVE: THE NEED FOR A FIRST-YEAR CLINICAL COURSE ON PUBLIC INTEREST MEDIATION

DAVID DOMINGUEZ*

I. INTRODUCTION

As you read this Article, there are children in Utah, likely poor, perhaps recent immigrants, who are being accused of habitual truancy by local elementary, middle, or high schools, and who are being officially notified that suspension, expulsion, or perhaps even jail time awaits them unless the problem gets resolved. Various hypothetical examples help illustrate this series of unfortunate circumstances.

In the hypothetical case, a child has failed to attend school for medical reasons but cannot produce a doctor’s note excusing the absence, as required by school policy because the child’s family circumstances do not provide a means to visit a doctor. If the indigent child is extremely lucky, a mediator or lawyer will volunteer to resolve the matter, explain to the school that financial hardship (or cultural/language barriers or lack of transportation) made it unthinkable for the family to visit a doctor, and get the parties to agree to certain terms and conditions to improve the child’s attendance. The case gets settled. But no one addresses the real issue: Why is there no school-based advisory group to contact the family and to review the legitimacy of these medical excuses before the family is subject to truancy enforcement?

In a second hypothetical case, the enforcement proceeding is at the mediation stage and the mediator, as is customary at these sessions, asks the parent—a single mother with four more children, all younger than the truant—to say something she likes best about her teenage child. “Nothing,” she replies, “I can’t think of anything that I like about her. I have another daughter in the hospital and all this one can think about is herself.” After an awkward silence, the mediator proceeds with the session, finally getting the daughter to agree to buy an alarm clock and wake up in time for school and getting the mother to agree to drive her daughter to school by a certain time. The case gets resolved but no one raises the hard question: Who will help this single mom before the rest of the children are placed at risk of chronic absenteeism, truancy infractions, or worse?

* Professor of Law, J. Reuben Clark Law School, Brigham Young University. I would like to thank the Utah Council on Conflict Resolution (UCCR) for its encouragement and support of this Article. This text builds on presentations I gave on Public Interest Mediation (“PIM”) at the 2005 and 2006 UCCR Annual Symposia.

1 It seems a bit strange that the way to impress the importance of regular attendance at school would be to formally remove the child from public education for an extended period of time. Does a truant see suspension/expulsion as a punishment or reward?
In a third hypothetical case, an immigrant child’s Spanish-speaking parents tell him that he will not go to school on certain days because they need him, as the family’s only English speaker, at administrative hearings, at the hospital, and at other such appointments. Once the family is served with a summons to appear at truancy school, the immigrant parents, who are undocumented, fear their attendance may lead to apprehension and deportation and they refuse to attend, which in turn results in more complicated legal proceedings for the child before the juvenile court. Fortunately, a lawyer steps forward and gets the case dismissed before the child’s placement in secure confinement. Everyone involved moves on with life. Yet no one addresses the underlying questions: How and why did the legal process get so far, and whose responsibility is it, in light of the case, to better inform the immigrant community on Utah’s Compulsory Attendance Law, giving them fair warning and understanding of the statute’s importance?2

These hypothetical situations illustrate the need for action. Indeed, these simplistic cases indicate that there are currently more questions than answers. More specifically, in what sense does the lawyer’s or mediator’s resolution of these three truancy cases amount to equal justice—that is, how do these episodes of legal problem-solving serve the greater good, anticipate and prevent larger problems, and make it unnecessary for still more poor folks to depend on still more attorneys and mediators to donate professional services? How have lessons been drawn, culled, and disseminated from these and other isolated settlements, leaving the public at large better off? What more could have been done to tie these interventions to grassroots efforts to help poor parents locate needed resources? How might truancy settlements serve to integrate diverse racial groups, faith traditions, and disparate socio-economic clusters, engaging the community in an inclusive dialogue on pressing civic challenges and opportunities?

Studies on chronic absenteeism from school have repeatedly shown “[t]he effects of chronic truancy are widespread” and “[u]nxcused absences is one of the first predictors that a youth is disengaging from school” and headed toward juvenile delinquency and a life of adult crime.3 Given this research, school districts act quickly and decisively to institute truancy proceedings when a child is

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2 Under the Utah Compulsory Attendance Law, it is the responsibility of both parties to work together, along with community assistance, to correct the truancy problem. See UTAH CODE ANN. § 53A-11-103(1), (6) (2004); see also UTAH ADMIN. CODE r. 277-609-4 (2004) (“A continuum of intervention strategies must be made available to assist students whose behavior in school is repeatedly short of reasonable expectations. Earnest and persistent effort shall be made to resolve individual discipline problems within the least restrictive school setting.”).

repeatedly absent.\textsuperscript{4} If the child fails to correct the problem, the school district may impose penalties on both the child and parent, including referring the matter to juvenile court.\textsuperscript{5} At the extreme end of truancy enforcement, the child can be subject to a court order requiring regular and punctual attendance, the violation of which can result in placing the child in secure confinement (jail).\textsuperscript{6}

The child and parent can point to procedural defects (inadequate notice, improper service of citations) and substantive claims of legal insufficiency (failure on the part of the school district to satisfy the statutory requirement of “reasonable effort” to work with the child to solve the problem) as defenses to habitual truancy.\textsuperscript{7}

This Article describes a clinical experiment in the first-year law school curriculum at Brigham Young University J. Rueben Clark Law School (“BYU Law School”): Legal Problem Solving for Equal Justice and Community Service.\textsuperscript{8} The goal of the experimental course was to open the eyes of forty-two first-year law students to the reality that legal problem solving, in order to deliver on our nation’s pledge of “liberty and justice for all,” requires far more legal education than “thinking like a lawyer.” Even assuming that we hone our intellect during law school to the point where we have brilliant legal minds, this analytical refinement does nothing to relieve the mushrooming demand for affordable, accessible legal services. Rapier-sharp legal “thinking” does not change the obvious fact that for every poor or, increasingly, middle-class person we help with free legal expertise, there are tens of thousands of legal claims that will never get the benefit of our assistance.

My hope for the course, then, was that these first-year law students would see early in their legal training that equal justice is not simply the struggle to generate more volunteer hours from attorneys, but also the need to find new problem-solving strategies and methods to supplement the standard construction of “lawyer as public servant”—whether by pro bono legal services, public interest law practice, or alternative dispute resolution (“ADR”). While I made sure to impress the important contributions of different forms of traditional public service lawyering (and why the requisite skill-set of each method is worthy of further study in the second and third years of law school), I was determined to structure clinical experiences that would teach students what more we could do to mix and blend various legal problem-solving skills to address broader concerns of


\textsuperscript{5} See id.

\textsuperscript{6} \textsc{Utah R. Juv. Proc.} 31.

\textsuperscript{7} \textsc{Utah Code Ann.} § 53A-11-103(1), (6).

\textsuperscript{8} Legal Problem Solving for Equal Justice and Community Service was one of four sections of the first-year Perspectives curriculum. First-year students must choose one of these sections to satisfy the Perspectives requirement.
community building and social justice. To this end, students pursued statutory construction and analysis, reading assignments and field work, case handling, and final papers to account for "what worked best—and what might work better" given the client, situation, institution, and desired remedy.

The statute we focused on was Utah’s Compulsory Education Law. In a nutshell, this public law requires every child between six and seventeen years of age, to be enrolled in school, with certain limited exceptions, notably for home schooling. A statute addressing children was necessary for the experiment, so, notwithstanding the political views of my students, there would be universal commitment among them toward befriending a vulnerable segment of the community. Without exception, the law students saw the importance of volunteering their legal talent to ensure young people, regardless of economic class, race, religion, nationality, or any other factor, got a fair chance to excel at public education and pursue their adult lives without the stigma of labels such as “habitual truant,” “juvenile delinquent,” or “detainee.”

As you might imagine, hundreds of scenarios arise from the construction and enforcement of Utah’s Compulsory Education Law. There are legal claims galore. During the semester I posed to students the following questions: What is the role of the legal counselor or mediator when handling such a claim, assuming that the larger quest of legal problem-solving is to promote equal justice? Are we to act as pro bono attorneys, doing our part to make certain that every indigent family caught up in truancy enforcement receives competent legal services free of charge, bringing that one case to a fair settlement? Are we to assume the role of public interest lawyers, selecting among these cases to strategically leverage a particular set of circumstances for the greater impact of institutional reform and legislative change? Should our intervention take the form of negotiation, mediation, or some other method of alternative dispute resolution so that the client can have far more say in the articulation and handling of the matter, thereby deriving a deeper level of satisfaction from both the process and the outcome? Or is there some way to pick and choose among these interventions, mixing and blending the best of these legal problem-solving methods to make justice more equal and accessible?

The forty-two students in the Legal Problem Solving for Equal Justice and Community Service course teamed up with Provo School District’s truancy officers on approximately fifty cases to see what difference it would make if law school students completed a “four consultation cycle” with families served with

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9 The assigned textbook was MARTHA R. MAHONEY ET AL., CASES AND MATERIALS ON SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW (2003). There is also a helpful teacher’s manual that accompanies the text.

10 It should be noted that upper-division students in my Community Lawyering clinical course played a helpful role in overseeing the academic and clinical work of the first-year students.


12 Id.
legal notice of habitual truancy. These four clinical consultations were designed so that law students would experience a particular method of problem-solving and then offer a critique of its strengths and weaknesses. The four consultations and the results provide the subject of this Article.

In the First consultation (pro bono legal services) students were assigned a family that had been served with the second citation (summons to truancy school). A pair of law students called the family or made a personal visit to the family's home to urge the family to attend truancy school. During this first conversation the law student team explained the law, the procedural history of the case, and impressed the value of truancy school. They followed a script of questions and possible answers and investigated any reasons why the family would not attend. They tried not to leave the home or end the telephone conversation until they secured a commitment from the family to attend. In turn, the law students promised they too would attend and help the family make the most of the proceeding.

The second consultation was the first session of truancy school (ADR in the form of a “pre-mediation”). The teacher of truancy school introduced the law students and had them stand so the families as a whole could appreciate that a large group of law students was taking the time to assist them. The teacher of the session promised the audience he would set aside time at the end of the session for the law students to meet face-to-face with the child and family and to informally discuss their impressions and concerns, fill out evaluation forms, and engage in a “pre-mediation” consultation to prepare the family for the mediation session to take place the following week.

The third consultation was the truancy school session (ADR as mediation) held the following week. The law students observed a mediation session where their assigned family worked with a mediator to devise terms that would correct the truancy problem and otherwise help the family get additional services they needed. The law students received a copy of the mediation agreement and, at the close of the mediation session, confirmed with the family their understanding of the terms and willingness to comply with the agreement.

The fourth and final consultation (public interest law practice) was a private meeting with the family and the law students. The law students visited with the family two weeks after the mediation to monitor and assess fulfillment of the mediated agreement terms. The students then wrote a response to this question: In light of their clinical experience with pro bono and ADR, and assuming they were

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13 I am grateful to Provo School District, especially Truancy Officers Cammie Cox and Chris Miller, for its gracious accommodation and cooperation in this clinical experiment. Although this Article is at times critical of school policies and practices, nothing stated in this Article is meant to disparage the hard work and good-faith efforts of the employees and personnel of Provo School District.

14 During each of the four consultations, law students filled out a form supplied and explained well ahead of time that set forth questions to raise and points to cover at each contact.
able to improve the institutional integrity of truancy enforcement by changing a particular policy or practice, which method would they choose?

This Article is divided into sections that account for the students’ clinical testing of the strengths and weaknesses of various lawyering methods in relation to those truancy cases. Part II describes the students’ experience with pro bono legal services. Part III discusses the plusses and minuses students discovered as they examined the role of mediation in solving truancy disputes in the second and third consultations. Part IV addresses the students’ engagement in public interest law practice, in which the students saw the strength in selecting cases that would address the “big picture.”

Each section of this Article also offers a critique informed by a new problem-solving skill dedicated to equal justice, Public Interest Mediation (“PIM”).15 PIM seeks to take what is best about pro bono legal services, but looks for ways to extend the benefit of pro bono services for one client to those juveniles who are “next in line” but who may not be fortunate enough to locate or receive affordable legal counsel. PIM takes advantage of opportunities to teach the public at large broader lessons that would improve the community’s knowledge of the Compulsory Attendance Law and, more specifically, the relationship of truancy to such anti-social behaviors as substance abuse, gang activity, juvenile delinquency, and the like.16

15 PIM is mediation with an attitude of advocacy for the greater good—but not advocacy that compromises the mediator’s neutrality, impartiality, or confidentiality. It is advocacy in the sense of drawing forth the latent value in combined, distilled stories and conveying valuable lessons to appropriate audiences for personal development, family strengthening, and structural change.

16 In the same way, as a critique of ADR, PIM challenges the mediator at truancy school to carefully examine mediation outcomes to detect trends and to jumpstart a new public conversation on truancy law. As a method of stretching ADR into the field of community organizing, PIM arranges for divergent interest groups to question the current operational paradigm of compulsory education, namely that of criminal law enforcement, and proposes its reconstruction as a measure to improve public health and safety. For example, PIM asks the community at large to take the reigning message of pathology underlying the statute (“your family is deficient, problematic, and in need of fixing”) and reconsider the difference it would make were it transformed into one of community service (“your child speaks Spanish as a native language and would be very helpful at police dispatch or emergency room intake”). Rather than push truants away with a negative label, PIM builds on the key benefits of traditional ADR, redeeming pain and hardship, dignifying personhood, and drawing out useful contributions, thereby restoring the human connection of the “truant family” to the rest of us.

Finally, PIM draws from the major strength of public interest law, strategically leveraging particular cases of truancy enforcement to expose a larger trend or pattern of cases. By culling lessons from many specific cases and generating data from a wide range of cases, PIM speaks with the public interest attorney’s credibility when drawing the school district’s attention to needed reform of particular school practices or policies. But PIM pursues these institutional changes as “grassroots” advocacy, teaming with community
II. PRO BONO LEGAL SERVICES

A. First Consultation: A Family Commitment to Attend Truancy School

Over a typical school year approximately 1600 students enrolled in the Provo School District receive first citations informing them that inconsistent attendance may result in “further consequences.” Written in English and Spanish, these citations provide all the written information needed to deliver a “wake-up call” to those parents who take a serious interest and are involved in their children’s education. Presented in letter form, the citation includes the student’s attendance record and assures the family that the school district is “here to help you” and “take[s] our legal responsibilities very seriously.”

Of those receiving the first citation, 600 do not improve their attendance and are legally served with the second citation ordering appearance at truancy school at BYU Law School. Truancy school consists of two successive Tuesday evenings. The first session consists of a class where the teacher explains the importance of attending school in general and section 53A-11-101 of the Utah Code in particular. (It has the feel, more or less, of traffic school.) The second session of truancy school, the following week, takes the form of a mediation session between the truant and the parent.

Of the 600 school children summoned to truancy school, approximately half attend. The other half do not attend for various reasons. Of those who fail to attend, approximately 130 have their cases referred to juvenile court.

The task of the law students at the first clinical consultation was to fulfill the role of pro bono legal services by explaining the statutory requirements of Utah’s mediators and interested parents to make the case at neighborhood gatherings, school board meetings, city council sessions, or legislative hearings. See, e.g., JOHN McKNIGHT, THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS 17 (Basic Books 1995) (stating that many professional efforts are iatrogenic, further disabling the community in the name of “helping”). For example, as public interest attorneys, in partnership with other community problem solvers, my students and I used PIM to collaborate with Provo High School on a new program for early morning attendance make-up classes and a pilot program of Youth Court. We have also proposed changes in Back to School Night and other school-based orientations to take full advantage of what we learned through truancy enforcement. At these public presentations we intend to start with an explanation of compulsory education law and procedures. We then plan to use ADR creatively, staging a mock mediation session to demonstrate an immediate, affordable, and accessible way to resolve problems that arise from truancy law.

17 The number of students is an approximation taken from interviews with a truancy officer. Interviews with Cammie Cox, Truancy Officer, Provo Sch. Dist., in Provo, Utah (August 2004).
18 Letter from the Provo City Sch. Dist., Truancy Citation #1 (on file with author).
19 Interviews with Cammie Cox, supra note 17.
20 Id.
21 Id.
Compulsory Education Law, especially impressing upon poor, minority, and immigrant families the critical role of public education—e.g., academics, vocational training, social skills, career networking, and duties of citizenship. More than imparting legal knowledge and encouragement, the law students helped the family adjust their perspective on truancy school, seeing it not as a punitive measure but as a bridge to resources that could strengthen family life and offer new opportunities for healthier integration in American society (housing, employment, health care, English language classes, etc.).

The students' communications with the families, both in person and by telephone, were interventions of pro bono legal services. They helped make the law and legal system understandable and accessible to a segment of the population that would not otherwise imagine having free legal information and assistance. They prepared families to meaningfully engage in a legal process that could have serious repercussions. Their interviews covered the following topics: (1) The Family's Awareness and Understanding of Section 53A-11-101; (2) The Procedural History/Future Timeline of the Case and the School's Satisfaction of Its Burden to Use "Reasonable Efforts" under Section 53A-11-103; (3) The Family's Commitment to Attend Truancy School; (4) If the Family Refused to Attend Truancy School, Reasons for Not Attending; and (5) Securing the Child's and Family's Commitment to Attend.

1. The Family's Awareness and Understanding of Section 53A-11-101

Students explained terms of the compulsory education law, in particular the definition of "habitual truant" and the criminal penalties. During this portion of the interview, the students asked various questions to gain an understanding of the families' sensitivity for the compulsory education law. Did the family appreciate that this law requires their school-aged children to attend every class, on time, every day, and that it could be a crime for the parents to fail to do their part to get their children to comply with the law? Did they understand that because this is the

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22 One of the assigned readings in preparation for clinical involvement was ALAN PATON, CRY, THE BELOVED COUNTRY (Charles Scribner's Sons 1948) (describing conditions of inequality and injustice for blacks, especially black youth, in South Africa in the 1940s, and their impact on family life).

23 See UTAH CODE ANN. § 53A-11-101(1)(a) (2004) ("Habitual truant is a school-age minor who has received more than two truancy citations within one school year from the school in which the minor is or should be enrolled and eight absences without a legitimate or valid excuse or who, in defiance of efforts on the part of school authorities to resolve a student's attendance problem as required under Section 53A-11-103, refuses to regularly attend school or any scheduled period of the school day.").

24 See id. § 53A-11-101(3) ("It is a class B misdemeanor for a parent to knowingly: (a) fail to enroll a school-age minor in school; or (b) refuse to respond to a written request which is delivered to the parent pursuant to the provisions of Subsection 53A-11-103(1)(b) by a local school board or school district.").
Did they realize that truancy school is the last step before the referral of the case to juvenile court for formal court proceedings, namely truancy court, and that at truancy court the case becomes subject not only to court supervision but also to valid court orders? Did they understand this means that if they do not go to truancy school and the case goes to juvenile court, the judge can issue a court order and then, if the child fails to comply with the order, find him in contempt and order that the truant go to jail? Thus, did they see that refusing to attend truancy school would not be the “end of the line” for the truant? Was it clear to the family that what may have started innocently enough, such as arriving late to class one day, then skipping a day of school altogether, was now on the verge of becoming a formal legal proceeding in Truancy Court and that the truant could end up finding himself held in a detention facility with hardcore juvenile delinquents? Absent these interviews with the law students, the families would have remained uneducated on the compulsory education law and would have continually placed their children at risk.

2. The Procedural History/Future Timeline of the Case and the School’s Satisfaction of Its Burden to Use Reasonable Efforts under Section 53A-11-103

25 See id. § 53A-11-102 (listing circumstances in which a minor is exempt from school attendance).
26 Hence, despite the express prohibition of placing a child in secure confinement on the basis of truancy found in section 53A-11-105(5)(b), the truancy court judge can nonetheless find that a truant has shown contempt for a valid court order and order him into detention on that basis. UTAH R. JUV. PROC. 31.
27 Section 53A-11-103 reads:

Duties of boards of education in resolving child’s attendance problems—Parental involvement—Issuance of truancy citations—Procedure for contesting citations—Liability not imposed.
(1) For each school-age minor who is or should be enrolled within that school district, the local school board or school district shall make efforts to resolve a minor’s school attendance problems. Those efforts shall include, as reasonably feasible:
(a) counseling of the minor by school authorities;
(b) a written request for parental support in securing regular attendance by the minor delivered by certified mail, containing notice of the requirements of this section and stating that refusal to respond to the notice is a class B misdemeanor;
(c) at least one meeting with the minor and the parents;
(d) any necessary adjustment to the curriculum and schedule to meet special needs of the minor; and
(e) monitoring school attendance of the minor for a period not to exceed 30 days.
A second part of the interview concerned uncovering the families' understanding of the history and timeline of their cases and the school procedures. The law students' based their questions on obtaining this understanding. What did the parents understand regarding the history of this matter? What did they make of the current circumstances and relationship between the family and the school? Where do they see the case going—where is it headed from their perspective? Did they receive the first citation? What did they understand that letter to mean? Did they appreciate that the situation had become a serious matter at that point? Did they meet with a school counselor or other school representative to discuss the situation? What was their impression of that meeting? What did they learn from that meeting? Was it helpful? What other steps has the school taken to work with the family to improve attendance? What steps have they taken to work with the school to improve attendance? How has the “school district . . . enlist[ed] the assistance of [the] community?”

Did they receive the second citation? What is their understanding of that notice and summons? Regarding the present stage of the case, how well did the child/parent appreciate the urgency of the situation? From their perspective, has each side tried its best to improve attendance? What more could have been done before getting to this point?

As you might expect, the answers to these questions illustrated the need for a comprehensive assistance program to educate and provide equal access to understanding and justice.

3. The Family's Commitment to Attend Truancy School

The third objective of the interview was to uncover the families' commitment and desire to attend truancy school. To measure the commitment, the law students focused on various questions. What were the family’s expectations? What did the family hope to get out of truancy school both for the child and the family? If truancy school worked out satisfactorily, what changes would there be in the behavior of the child/parent? How about changes at school, and with peers and teachers? What would need to change to give the child more reasons to attend school everyday and to get to each class on time?

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(2) In addition to the efforts listed in Subsection (1), the local school board or school district may enlist the assistance of community and law enforcement agencies as appropriate and reasonably feasible.

*Id.* (subsections (3)-(7) omitted).

28 *Id.* § 53A-11-103(2).
4. If the Family Refused to Attend Truancy School, Reasons for Not Attending

It was important to discuss the families' excuses for not attending truancy school because it would likely provide patterns and reasons shared by other families. If so, the school could identify these common reasons and consider ways to eliminate the problem. Indeed, students heard a wide variety of reasons why the families would not attend truancy school, but certain of these reasons were stated by several families, including: need to reschedule; prohibitive fifteen dollar fee; lack of childcare, especially for single parents; inability to take time off from work; failing to attend does not seem to be all that serious; there are many other problems with the family or child far more serious than the child's missing school; parents feel they have lost control over their child; parents believe it is their right to decide when and how often a child attends school; illiteracy, inability to read citations, despite being translated into Spanish; and perceived risks related to immigration status (e.g., risk of detection by immigration authorities, possible deportation, potential break-up of their family).

In those cases where the family offered a reason to excuse their absence from truancy school, the students tried to counsel the family to appreciate the full consequences of their decision and to see the matter from a different perspective. For example, if the concern was the family's lack of legal residency, the students explained that there are no questions asked about whether someone is here in this country legally, and that there are no police officers or agents of any other government agency, including immigration, at truancy school.

5. Securing the Child's and Family's Commitment to Attend

The law students tried to extract a promise from the family to attend and offered an incentive by promising to come to the truancy proceedings and help the family better understand what was going on. Also, the students promised that after the first session was over they would meet in person with the family to talk about the family's experience and to answer any lingering questions.

B. Pro Bono Legal Service as an Expression of PIM

Law students, during this first consultation, appreciated that pro bono legal services requires mastery of the fundamental clinical skill of interviewing and counseling. They reported that helping the children and families understand the

29 When we took a careful look at interviewing and counseling in relation to the clinical experience of pro bono legal services, we had a guest lecture by a law school faculty member who teaches the semester-long course on this subject matter. I continued to intersperse such lectures as we addressed mediation, negotiation, and public interest law. Students were pleased (and relieved) to know the law school curriculum offered in-depth treatments of these critical lawyering skills.
law and figure out what they had to do to comply with legal requirements and school policies proved more challenging than they supposed it would. They spoke about the difficulty of interviewing and counseling, especially when they could not get the child and family to accept personal responsibility for their choices or when they could not convince immigrant parents that the United States insists on children’s enrollment in school, even when it overrides the parents’ wishes, unless they have made other arrangements.

As the students continued to debrief their clinical experiences following the first consultation, it became apparent they were struggling with preconceptions, (un)conscious agendas, and hidden prejudices. They critically reflected on their own upbringing and conditioning. They admitted that, to a certain extent, all they wanted to do during the first consultation was complete the assignment, “check off the box,” and define their role as narrowly as possible. Some said they were primed to sound the alarm by delivering the following message: “Wake up! Don’t you see what is about to happen? Obey the law and get right with the Compulsory Attendance Law before it gets harder on you and makes your life even more difficult. You could wind up being turned over to Juvenile Justice Services if you don’t act now to correct the problem.” But once they engaged the families in an extended interview, the students were pleasantly surprised that families were willing to give their side of the story and provide insight on truancy enforcement for the school district to consider.

In this way, the students were stretching the traditional boundaries of pro bono legal services to include PIM. By pooling their notes from their first consultation and reporting their findings to the school district, they were able to contribute a public benefit that pro bono attorneys do not typically confer. By conveying the families’ important messages to the school district, the students were making the school district’s commitment to truancy enforcement as effective and successful as possible, thereby helping other similarly situated children and parents. For example, based on PIM, Provo High School intends to schedule public meetings at the start of the school year to impress upon all families, but especially minority and immigrant children and parents, the legal requirements of the compulsory education law.30 During these presentations it is anticipated the families will come to understand how and why public education, in addition to academic education, offers many other civic and employment benefits. What should be emphatically underscored is the importance of parental support and encouragement of regular attendance, scholastic achievement, and meaningful integration in school activities.31

30 Provo High School has 1900 students, approximately 30% of whom are Latino. Interviews with Jose Enriques, Assistant Principal, Provo High Sch., Provo, UT (Summer 2006).

31 Id.
III. ALTERNATIVE DISPUTE RESOLUTION

At the close of the first meeting of truancy school, the law student teams, as promised, met with the families with two goals in mind. First, in an effort to finish up with the role of pro bono attorney as informed by PIM, the law students elicited reactions and impressions from the families—what did they learn and how might their evaluation improve truancy school for the next in line? The students also asked many follow-up questions to measure the effectiveness of the proceedings. Given what was covered, how useful was the material itself? What was the most valuable lesson from their viewpoint? What did they learn best or most of all? What would they have liked to hear more about? What was missing? Given their hopes and expectations for the evening, how satisfied are they? What might they suggest with regard to other subjects that ought to be covered? How about the method of delivery—would they suggest other formats or other ways to address, teach, and learn the material (e.g., increased interactivity, hand-outs, hypos/problem-sets, “testimonials” from former truants who have turned their lives toward a better path)? All in all, are they glad they came? To emphasize the aspect of PIM, these separate evaluations with the child and parent were later pooled with evaluations conducted by other teams of law students and the findings were reported to the Provo School District.

The second goal was for the law students to begin their transition to the ADR phase of the course by preparing for the mediation session held the following week. The second week of truancy school consists of a mediation session between the truant and parents. The mediator, as a neutral third party, tries to help the child and parents open up to each other and explore many alternative descriptions of the issues so they can appreciate a greater variety of options for resolving their dispute. Truancy school mediation tries to enrich the relational process of dialogue within the family as a precondition for suitable outcomes—i.e., the more that mediation can help the parties learn and practice a healthier form of communication, the more likely it is that the parties will execute the terms of the agreement in good faith. Ideally, the mediator facilitates structured agreements the parties themselves have designed and that are most responsive to their particular circumstances and needs. One of the key benefits of mediation is that a skilled mediator guides the parties to dialogue effectively toward an outcome that best fits them—one that is tailor-made for their unique lives.

Unfortunately, the actual mediation that takes place in the second week of truancy school is less than ideal because there is only so much time and effort the mediator, youth, and parent can spend trying to learn new perspectives from each other. Given the need to construct customized agreements for solving their unique experience with truancy and to secure the commitment of the child and parent to carry out the agreement, the parties are forced by limited time and inadequate trust to cut short the discovery of new angles and the exploration of options. Consequently, the less time that can be given to the give-and-take of viewpoints and ideas, the less time there is to improve the quality of communication between the child and parent—which may be the number one problem underlying not only
truancy, but related legal issues (curfew, smoking, drinking alcohol, dangerous peer groups, etc.).

A. The Second Consultation: “Pre-Mediation” Interview in Anticipation of Truancy School Mediation

The role of the law students at the second consultation, in addition to completing the pro bono phase, was to anticipate the difficulty and limitations of the actual mediation the following week and to do whatever they could to better prepare the truants and parents for mediation. In other words, the law students used the second consultation to transition from pro bono to ADR by engaging the family in a “pre-mediation” interview in hopes of setting a better stage for truancy school mediation.

To this end, students raised the following questions with the family in anticipation of mediation: Does the family understand the purpose and procedure of mediation? How ready is the family for mediation? How often and well do parents and the truant communicate? How well and smoothly do they raise and discuss legal issues related to truancy school (curfew violations, smoking, drinking alcohol, fighting and other disorderly conduct, dangerous peer groups, other concerns in the life of the family, etc.)?

On the basis of the second consultation, law students prepared a pre-mediation report for the truancy school mediator. The aim of this report was to provide information and insight on the family that could help the truancy school mediator better prepare for the readiness and ability of the child and parent to speak to each other candidly and effectively during mediation.

B. Third Consultation: The Mediation Session at Truancy School

At the second week of truancy school, the law students observed the mediation and evaluated the family’s honesty and openness in front of the mediator. They gauged the progress the family made from the pre-mediation consultation to the mediation session in terms of communicating concerns, listening to each other, and arriving at a feasible agreement that covered key issues, specific commitments, and timelines. Other questions law students considered as they observed the mediation were: Did the child and parent appreciate the relational and substantive gains of the mediation process to the point

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32 In our clinical experiences with pre-mediation, we found that a pervasive communication and relationship problem in family dialogue is that parents are either too concerned with being a friend to their child or are too authoritarian and will not listen to their child. The former kind of parents refuse to accept the role of disciplinarian, letting their children have too much say in the matter, perhaps even the final word. The latter kind of parents are just the opposite, exercising complete control over the child’s decisions, dominating and silencing him.
they would, on their own, call on a mediator and arrange for mediation in the future? Given the pre-mediation conversation with the child and parent, especially the law students’ assessment of issues underlying truancy, how would they compare the pre-mediation dialogue among family members to the mediator’s discovery and treatment of the range of issues? Did the terms of the final mediation agreement adequately address those issues?33

C. ADR Reconfigured as PIM

There is no question that mediation of truancy cases is helpful. When working most effectively, mediation helps the whole family see that chronic absenteeism may be a symptom of a much larger set of problems, thereby opening up a much-needed and productive investigation of underlying sources that lead to truancy—e.g., the child’s involvement with gang activity or substance abuse, or the parents’ failure to understand compulsory attendance laws. However, when this procedure is reconstructed as mediation in the public interest, two aspirations take on far greater importance. The first is the dignity interest of the family members; the second is the institutional integrity of school practices and policies.

To vindicate the family’s dignity interest during the “pre-mediation” consultation, law students used the skill of negotiation to cast the child and parent in new roles in anticipation of the second week of truancy school. That is, in addition to sorting out interests of family members and exploring with them a range of suitable outcomes for the mediation during the following week, the students urged the family to see themselves in a new light.34 No longer merely passive recipients of information, as was the case at the first meeting of truancy school, they were now expected to cast themselves as active participants in preparation for the upcoming mediation. No longer confined to the “learning end” of the spectrum, they were to see themselves in the role of teachers with the assigned task of guiding the mediator (and each other) to see various matters from new angles.

In conducting the pre-mediation consultation in this way, law students made the family feel needed. They tried their best to ennoble the child and parents as fellow community members and as valuable contributors precisely because they were able to give insights that could make lawyers, mediators, school officials, and other problem solvers more responsive to the issue of truancy and ways to address

33 Some of the law students performed the role of “family advocate” at these mediations. As a family advocate, the law student contributed to the mediation by raising topics and offering information that the law students obtained through the interview with the child and family the previous week. When it appeared the mediation was arriving at a solution but ignoring important topics the law student elicited at the pre-mediation session, the law student tried to get those items dealt with as well.
34 For an extended treatment of how negotiation relates to social justice, see David Dominguez, Getting Beyond Yes to Collaborative Justice: The Role of Negotiation in Community Lawyering, 12 GEO J. ON POVERTY L. & POL’Y 55 (2005).
it. In other words, law students integrated PIM to transform the reigning paradigm of pathology and criminal law enforcement that underlies truancy enforcement (your family is engaged in law breaking) into one of public health, community service, and mutual accountability (your family is needed to improve the well-being of our schools). PIM was used deliberately to dignify the connection of the child and family to the rest of us, drawing out their useful contributions and thus redeeming their pain and hardship. Why should their difficulties and suffering be in vain? Why not give them the role of fellow teachers, providing critical lessons? Why not expect them to shoulder their share of the responsibility for public health and safety?

In addition to serving the dignity interest of the family, law students practiced PIM as a superior method to ADR for furthering the public interest in institutional integrity. After observing truancy mediation, law students asked the following questions: Did the mediation implicate larger school policies and practices? How might the mediator’s resolution of that particular dispute help others avoid that problem? How might those lessons be broadcasted to promote community dialogue? Assuming the truancy mediator drilled down to the underlying cause of an isolated case (e.g., impending divorce), how can the school better learn to deal with these kinds of cases at an earlier stage, especially when there are school-aged siblings involved? Why permit mediators to keep their collective insights and lessons safely tucked away in their memories, denying the school district a truer read on institutional shortcomings of truancy enforcement (e.g., lack of notice and other problems with due process and lack of cultural competence). In the name of equal justice, how does it help the next child who is charged with truancy but has no mediator (and certainly no lawyer) to help?

Law students used PIM to challenge and expand the mediator’s role to one of a social commentator, reporting the collective results of truancy mediations. Perhaps, as a practical next step, mediators would be willing to add a new form to their mediation paperwork, a “community impact report” for submission to local dispute resolution councils. These community impact reports would answer such questions as: How is a particular case illustrative of a trend or pattern that is hurting many others who will not, unfortunately, be able to access lawyers or mediators? How does this truancy case implicate a larger, ongoing problem in school-based decision-making, domestic relations, peer groups, and substance abuse? In addition to resolving the specific dispute, how does mediation of this truancy case present an opportunity for enriched dialogue between truancy families, community groups, and school administrators regarding attendance policies and practices?

IV. PUBLIC INTEREST LAW PRACTICE

A. The Fourth Consultation: Compliance with the Mediation Agreement

At the fourth consultation, law students visited with the family and verified that the child and parent had executed the terms of their mediation agreement.
With a couple of weeks to live under their privately established rules, the family accounted to the law students how much of a difference it made for a mediator—and, for that matter, the entire truancy enforcement procedure—to enter their home and adjust their relationships and responsibilities. The students focused on the following issues: What had proven to be the most difficult part of carrying out the terms of the mediation agreement? Had school attendance improved? How about increased dialogue on other subjects? Was it perhaps the case the truancy problem was a blessing in disguise, a way to broach important matters and create a better form of communication in the home, strengthening family connections?

Most of the mutual promises were being kept—at least at that early stage. But invariably, law students left those fourth and final family meetings with a mixture of hope and alarm. True, the truancy enforcement process as a whole had arrested the specific problem for the short term; yet the students could not help but wonder about the long term. Given the four consultations, was the family truly alerted to their strengths and talents, as well as to areas of concern? Did the family sense a new and sustainable connection to available resources to continue their newfound direction and dedication? As a matter of legal problem-solving for equal justice, there was a nagging sense that the four consultations offered too little, too late for any particular family’s struggle with truancy, especially given the host of other pressures the children and parents faced. Equally important, the consultations did very little to get the school to audit the ways in which institutional policies and practices were in part responsible for the onset and aggravation of truancy. Was it not true the school itself needed to be subject to a “truancy enforcement proceeding” to determine how its operations were a contributing factor?

Thus, the fourth consultation was a time for students to ask questions about public interest law practice and to consider the relationship of equal justice to the quest for institutional integrity. What changes would be needed in public education for the community to believe schools are doing what they can to be all the more trustworthy and dependable partners in the prevention of chronic absenteeism? My specific challenge to the students at the close of the semester was this: Now that they had been through two complete cycles of truancy enforcement and had twice conducted the four-consultation intervention, what structural reform in public education would they want to pursue as public interest lawyers to foster equal justice in truancy remediation? Were they to pick one case out of the approximately fifty they handled, which would they pick, why, and with what legal strategy and priority in mind? What would be the pivotal message from that case that they would want to single out for public consideration? Why would that message be the most catalytic for positive change?

A number of students argued that, in the name of public interest law practice, we need to pursue a case that tested the school’s burden under “reasonable efforts” as set forth in section 53A-11-103 of the Utah Code.35 They pointed to their own “community impact reports” derived from the mediation sessions and provided a

litany of examples warranting structural reform so the school can get a better handle on the real facts underlying the truancy—attendance policies that fail to give credit for partial attendance, counting absence from one class as though the student missed the entire day (thus giving students that miss one class the incentive to skip school entirely, encouraging poor behavior); grading policies that withhold credit for a “D” grade, giving at-risk students more reason to stay away from school; restrictive policies on valid, acceptable medical excuses (why must there be a doctor’s note to excuse for medical reasons given the expense and transportation required for a doctor’s visit—and perhaps also requiring a day missed from work); policies on excusing late arrival, such as when a youngster shows up late because he was forced to be the babysitter for the single parent until she returned from her night shift (and could not afford to pay for a babysitter); children missing school not in defiance of the compulsory education law but because they are reasonably afraid of gangs at school or are suffering trauma of divorce or death in the family; policies on children leaving the country for a short time (notably Christmas vacation) when teachers could proactively inform parents that when such a trip will be taken, it must be arranged with the school so that the trip to the homeland can be used productively to cover the schoolwork; ditto for those occasions when parents pull their children out of school to act as translators to English-speaking public officials; etc. In these and other situations, the real problem is not truancy; it is that the school is too quick to read “truancy” into absences that would be handled differently if the school, assisted by interested community groups, satisfied “reasonable efforts” to correct what the school first labels as “truancy.”

Others agreed that a public-interest lawsuit ought to test the statutory term “reasonable efforts,” but for a different reason. They wanted to bring to the public’s attention that truancy enforcement needs to be seen in the broader context of other school priorities and commitments, such as No Child Left Behind\textsuperscript{36} (“NCLB”) or Zero Tolerance\textsuperscript{37} (“ZT”). They wanted to mount a public interest legal action to clarify the interrelationship of school academic policies (such as NCLB) and disciplinary practices (such as ZT) to truancy enforcement. In their view, schools were compromising their attempt to satisfy the legal burden of reasonable efforts because truancy enforcement actually (and perversely) served the goal of meeting federal standards set by NCLB. There was a pernicious impact of NCLB, as the students saw it, on school disciplinary policies, notably the incentive to get rid of perceived underachieving “troublemakers.” NCLB increases likelihood that lower income, especially poor minority students, will be targeted for removal from school to artificially inflate the numbers reported to federal government.\textsuperscript{38}

\textsuperscript{37} PROVO SCH. DIST., supra note 4, at 2.
\textsuperscript{38} See James E. Ryan, \textit{The Perverse Incentives of the No Child Left Behind Act}, 79 N.Y.U. L. Rev. 932, 969–70 (2004); see also John Burman, \textit{Juvenile Injustice in Wyoming},
The same is true for the connection of “reasonable efforts” to disciplinary policies. There is growing alarm in this era of “zero tolerance” against violent weapons and illegal drugs at schools that administrators overemphasize protection of students at the expense of fulfilling their statutory burden under the compulsory education law.  

Finally, a number of students want to see a test case to determine the scope of section 53A-11-105(b), which expressly prohibits placing a truant in a detention center or other secure confinement facility. As noted above, once a truant is subject to a valid court order requiring attendance but fails to abide by the terms of that order, he can be placed in detention for contempt of the court order. Is this an “end-run” around the express provision of the compulsory education law? Should a public interest lawyer file a class action on behalf of these children, file a protest with the school board and/or legislature, or pursue other legal remedies?

B. Public Interest Law Practice through the Lenses of PIM

Even assuming these public interest law cases were successful and produced desired structural changes, what would the community really learn from these legal problem-solving efforts about securing institutional integrity in other areas, other than to rely on professional problem solvers for equal justice? Indeed, public interest lawyers have a long history of achieving important institutional reform, but their legal problem-solving skills have often been too narrowly focused on complicated legal maneuvers. As valuable as the legal victories may be for social reform and the development of law, there may be little change “on the ground” for

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4 Wyo. L. Rev. 669, 709 (2004) (arguing that a stay in detention jumpstarts a downward cycle of falling behind in school, which then increases the likelihood of suspension or expulsion, which then leads to higher drop-out rates).


40 UTAH CODE ANN. § 53A-11-105(b).

41 See supra note 26.

42 The Utah Legislature has been considering an amendment to the Compulsory Attendance Law during recent sessions and will revisit the matter in 2007. The proposed amendment sponsored by Rep. Eric Hutchings would distinguish the broader policy goal of compulsory education—encouraging all children to stay in school until they are eighteen—from the policy goal of truancy enforcement. Under the proposal, parents would have more responsibility to cooperate with school officials to correct truancy. Also, formal truancy enforcement would not be pursued against elementary school children. Instead, it would be directed strategically at pre-teens and young teenagers—i.e., middle school through sophomore year of high school. Those students are old enough to see the need to improve attendance, but not yet to the point when, given their age and unrealistic prospect of graduation, truancy enforcement resources are not wisely invested.
the complainants (let alone any positive difference in the day-to-day lives of similarly situated people).

Public interest law practice, as an expression of PIM, needs to be rooted in community-based legal counsel, looking for opportunities to teach the public broader lessons that would improve the community’s knowledge of and relationship to school operations as a whole. Public interest lawyers need to stretch their skill sets to work in partnership with community leaders and civic organizations to anticipate and prevent recurrence of the larger problem. Assuming a truancy dispute has already arisen, there needs to be a way to use that situation not only to settle the legal matter, but also to teach interested parties to resolve similar conflicts on terms most meaningful to their circumstances and relationships.

When seen through the lenses of PIM, public interest law practice fosters equal justice when it is tied to the down-and-dirty, in-the-trenches, balancing and re-balancing of such disparate interests as the community’s interest in safety, the family’s dignitary interest in being deemed worthy as fellow members of society, and the school’s interest in institutional integrity. Major legal victories are great, but PIM looks for ways to connect them to the ongoing desire for equal justice—namely, the everyday, practical challenge of finding a workable equilibrium among diverse viewpoints.

PIM, at its best, turns public interest law practice into the optimal collaboration among mediators, lawyers, community activists, and public officials. Working in partnership with local agencies, public interest attorneys can leverage their legal work by anticipating and arranging for a “hand-off” to community mediators and other interested parties. This arrangement can better equip community members with legal problem-solving skills that, while maybe not as sophisticated or effective as formal mediation or other ADR methods (and certainly not approximating formal legal representation), would nonetheless provide an easy and free “first step” toward prevention/immediate resolution of community conflict. On the practical level, the efforts by community mediation agencies to obtain federal and state grants are more compelling when the “back story” is one of sustaining the quest of a public interest lawsuit for equal justice. As an illustration of this, I am continuing the work of my first-year students and using PIM as a member of the board of directors of the local mediation center, Community Dispute Resolution Services (“CDRS”). CDRS is teaming up with local school districts, community-based agencies, a local public interest law firm, and the community-based Latino network to schedule public dialogue on the connection of truancy to poverty and immigration.

V. CONCLUSION

The time has come for the first-year law school curriculum to prepare entering students for the real demands of legal problem solving and professionalism, especially the professional responsibility of all lawyers to do their part to promote equal justice. We need to teach first-year law students—while they are still
somewhat receptive to looking expansively at the study and practice of law—how to make the most of public service lawyering, especially when donating professional hours and intervention. They need to become skillful at tying their legal work in one isolated case to collaboration with the ongoing efforts of community mediators and other local problem solvers so that, together, with all of us doing what we can, where we can, ordinary folks and local institutions can improve problem-solving procedures and outcomes for the entire community.

As it stands today, legal education continues to overly emphasize certain professional skills (advocacy, legal reasoning and analysis, writing) at the expense of impressing the need to learn interviewing and counseling, negotiation, mediation, group facilitation, community dialogue, and other problem solving skills. To be seriously committed to training students to do their part for equal justice, law schools need to include a clinical experience in the first year to open students’ eyes to the full range of professional skills needed to deliver competent legal services to the financially strapped and culturally marginalized. Law school professors need to instill in law students the desire to experiment with a dynamic blend of legal problem-solving methods so they handle a legal claim with the best legal counsel, bringing to bear the problem-solving continuum from informal, grassroots resolution among neighbors to the most sophisticated and complicated court procedures before the judge.

It really is possible to deliver enough no-cost or low-cost legal problem-solving services to provide equal justice. To get there, however, we need to experiment with new strategies and methods to achieve the goal, including the new skill of PIM. My hunch is that if first-year law students can prove to themselves in a clinical setting that public service lawyering can produce a multiplier effect for the greater public good, a new commitment to equal justice will emerge in the legal profession.