December 2001 Newsletter

The December edition of our newsletter includes articles on a variety of subjects. We begin with an update on the fundraising activities of the Friends of the Remington Center Endowment (FORCE), the private non-profit corporation which raises funds to supplement summer stipends for Remington Center students.

As always, we have included the perspectives of students on their activities in the Remington Center. Jorge Castro, a student in the Criminal Appeals Project, writes about his experience arguing a federal appeal in the Seventh Circuit; while Julie Bachir describes how her work in LAIP unsettled her prior assumptions about the criminal justice system; and Ben Dickey, a student in the Wisconsin Innocence Project, discusses what he sees as the Project's contributions to Wisconsin's justice system.

Finally, we present two articles from our clinical faculty. In addition to our role as educators, we believe that the Remington Center's faculty should strive to embody "the Wisconsin idea" by working cooperatively with actors in the justice system to identify problems and suggest remedies. Ben Kempinen, director of the Prosecution Project, describes his work with the Wisconsin District Attorney's Association to revise the Supreme Court ethical rules governing prosecutors' contact with unrepresented defendants. Keith Findley, co-director of the Wisconsin Innocence Project describes a successful effort to pass legislation ensuring the preservation and testing of biological evidence that may prove claims of innocence.

We'd love to hear from our readers; comments, questions, suggestions, and editorial contributions are welcome. Please feel free to email Meredith Ross at mjross1@facstaff.wisc.edu; or you can write to:

Remington Center Newsletter
c/o Meredith Ross
Frank J. Remington Center
UW Law School
975 Bascom Mall,
Madison WI, 53706

We hope you enjoy this edition of the newsletter, and that you have a safe and joyful holiday season.

Walter J. Dickey
Faculty Director, Remington Center

Meredith J. Ross
Director, Remington Center

Raising Funds for Student Stipends
Walter Dickey

I am happy to report that our fundraising through the Friends of the Remington Center Endowment (FORCE) has gone quite well. This turned out to be a more ambitious and demanding endeavor that I imagined when we started. However, I did not fully realize how worthy the cause. It has become very clear to me that the majority of students at the Law School take on large amounts of debt to pay for their education. Many already have substantial debt when they enter from their undergraduate work.

This debt affects the students in a variety of ways. Some are not able to participate in programs such as the Remington Center because they need to earn more money while in school than we can provide. Some are channeled into jobs while in school and after graduation that are not necessarily in their fields of interests. It's true that we can't all have what we want, but the facts of economic life for law students make it incumbent upon us that we lessen these burdens and try to give the students as many educational options and options in life as is reasonably feasible.

Earlier this year we were able to persuade the University to give our students tuition remissions during the summer, and this change helped alleviate some of the financial pressures on them. In effect, it put more money in the pockets of students during the summer, perhaps enough to make it possible to go through the summer without going into further debt. Still, I doubt that any were able to save towards the coming academic year.

Our fundraising goals continue to include supplementing the income of students who participate in the summer program to make it possible for all students who want to be in the program to participate. Our stipend, approximately $2,500 before taxes and University fees, is but a fraction of what the students could earn in other jobs over the course of thirteen weeks. The money we have raised so far is conservatively invested and we hope will grow both by wise investment decisions and through the generosity of our graduates and supporters.

We thank all those who have donated so generously, and note that FORCE is still happy to accept donations and pledges from those interested in giving to support student stipends. If you would like to make a tax-deductible donation to FORCE, please send a check or money order to:

Friends of the Remington Center Endowment
975 Bascom Mall
Madison, WI 53706

All donations will go directly to support stipends for our future summer students.

Thank You, Remington Center!

Jorge Castro, 3L
It all started way back in the second semester of my first year of law school. I was sitting in Professor Ben Kempinen's Criminal Procedure course when a group of second and third-year law students from the Remington Center came to inform our class of the various clinical programs the Center had to offer. Although all of the clinics seemed interesting, the Criminal Appeals Project stood out in my mind for one simple reason: the possibility to argue (as a law student!) before the United States Court of Appeals for the Seventh Circuit. When that possibility was mentioned, I suddenly pictured myself arguing before Judge Richard Posner or Judge Frank Easterbrook—two legal giants I had recently learned about. So, simply because that possibility was ingrained in my head, I decided to apply for admittance into the Criminal Appeals Project.

Fast-forward about two years. After I was admitted into the Project, chose to work on a federal appeal, analyzed the record and case law, and filed the briefs, the possibility of arguing before the Court became a reality when it decided to grant oral argument. On October 30, 2001, as a third-year law student, I got the incredible opportunity to argue before the Seventh Circuit Court of Appeals. (And, as an extra treat, Judge Easterbrook was among the three panelists! If I am lucky, maybe next time I will have the opportunity to argue before Judge Posner.)

My work on the federal appeal consisted of two phases: 1) the brief writing and 2) preparing for oral argument. The process of writing the brief was the best learning experience I've had in law school, and at the same time it was the most arduous. Soon after I began the semester and was assigned to work on the appeal, Kate Kruse, my supervising attorney, and I received four boxes relating to our client's case: the official record from the trial court and our client's file from the Federal Public Defender's Office. My first assignment was to comb through the documents in order to fully learn the case and, during the process, identify possible issues. I recall thinking, in amazement, "How are we supposed to convert mountains of documents into a compact brief?"

However, although I was at first intimidated by the sheer size of the material I was expected to digest, I found a lot of value in that first assignment. I learned lessons that had not and could not have been taught in a traditional classroom setting. For example, I discovered the importance of developing a good record during the trial and the sentencing hearing, as well as the need to pay close attention to client documents and the record because sometimes items that are very important to your issue will be hidden within a voluminous amount of documents.

After we finished analyzing the record and consulted with our client about possible issues to bring on appeal, we narrowed down the case to one issue and began writing the brief. Although it was indeed a difficult process, this phase of my appellate work was also the most rewarding because Prof. Kruse allowed me to take a lead role and "learn by doing." Under her guidance and supervision, I played a key role in writing and presenting the facts and issue. I realized the importance of presenting facts in a vivid and persuasive manner. When laying out the issue, I learned the need to be brief and concise, yet without compromising my analysis.
Following the writing and filing of our opening and reply briefs, the Seventh Circuit decided to grant oral argument in our case (*to my delight!*). Preparing for the argument was the most exciting part of working on the appeal because it allowed me to sharpen my oral advocacy skills. My supervisor arranged several mock arguments for me so that I could practice my argument in front of a judicial panel made up of professors. The feedback I received from these professors was phenomenal because after each argument they pointed out aspects of

my case I had not contemplated. I realized after my October 30th argument that the professors had done an excellent job in anticipating questions that the Seventh Circuit judges may have asked. Indeed, I felt well prepared going into the real argument, thanks to the faculty.

Working on a federal appeal was a wonderful experience because it enabled me to do "real work" and apply what I have learned in the classroom. In both phases of the appeal, the brief writing and oral argument preparation, my supervising professor allowed me to be intimately involved with the case and become a key participant--that was the beauty of my clinical experience. Although it was at times a nerve-wracking experience, that memory is quickly forgotten when I think about how much I learned and the amount of confidence I gained as the appeal progressed. Realizing, as a law student, that I could do lawyer's work and argue before the Seventh Circuit Court of Appeals was a feeling without comparison--thank you, Remington Center!

**The Remington Center: More than Clinical Experience**

Julie Bachir, 2L

I joined the Remington Center because I believed it would be an excellent way to develop my legal skills and to gain a unique perspective of the legal system. I was right. What I did not expect to gain, however, was knowledge about our society which few people have the opportunity to acquire: I learned what really goes on in Wisconsin's prisons.

Indeed, most people in our society do not want to acquire more knowledge about the prison system or about criminals themselves (unless the knowledge is a dramatized spectacle of drugs and goriness on television). I do not blame people for neglecting to increase their awareness. I was an anthropology major in college, and have always made an effort to learn more about cultures and societies different from my own. Yet not until the summer of 2001 did I realize that I had never even given thought to one of the most rapidly expanding cultures in America: the prison population.

Understanding the members of the prison population and their culture is important. It is important because public safety is one of our society's most serious concerns. Only by learning more about the causes of violent crime, and about the sanctions our society imposes, will we be able to reduce it. My experiences with the culture of the Wisconsin prison system were the most shocking experiences of the summer.
In the past, I have always considered the prison system to be a place of rehabilitation. A place where bad guys go in, and good guys come out. During the summer, however, what I observed was that most inmates were simply "doing time"; that is, they were incapacitated, but were not actively engaged in rehabilitation. Some inmates were sufficiently motivated and assertive to take advantage of educational, vocational, or treatment opportunities. But they seemed to be the exception rather than the rule. I saw a lot of inmates hanging around with nothing to do. I also saw some negative interactions between inmates and staff members, some of whom seemed to lack the experience necessary to handle these situations more appropriately. Most of all, I saw no structure to the inmates' lives. One would think that prison would be the place to instill the values of hard work, discipline, and honesty. This was not what I saw.

Many of the cases I took on in LAIP frustrated me. One client accepted a plea bargain and now faces 30 years of confinement and 10 years of extended supervision under Truth in Sentencing. This man loves his children and was holding a decent job before incarceration. He had no prior adult record. According to police reports, there is evidence that gang members came to his house to fight with him and he shot one and killed him. Yes, this man committed a crime. But I wonder if 30 years of incarceration is really necessary to teach him not to kill another human being. I also wonder if 30 years of incapacitation is necessary to protect the public from him. My greatest concern is that under Truth in Sentencing this man has neither the opportunity nor the incentive to change; he's going to serve the sentence no matter what.

The purpose of this article is not to vent my frustrations with the criminal justice system, but to serve as an illustration of the varied experiences one gains from working at the Remington Center. My experiences have inspired me to do more. I have undertaken a research project under the guidance of Professors Walter Dickey and Michael Smith, examining sentencing strategies in Milwaukee in an attempt to offer alternatives to the approach to the public safety problem now being used.

It is important to appreciate the positive aspects of the system as well. For instance, my most successful cases have been jail credit cases. One client regained almost a year of credit and was released at the end of this past summer. Fairness is still an important value of American culture, and it is demonstrated through the criminal justice system. If you do time, you deserve to have it count. It is a simple philosophy but one which we take for granted.

Through the Remington Center I have gained knowledge about prison culture and Wisconsin's criminal justice system in general. I have learned to appreciate the rights and freedoms which our nation provides. I have become more attuned to the measures which we must take to improve public safety, and I have been inspired to move our society closer toward those measures. The Remington Center is an excellent place to gain practical legal experience. But, perhaps more importantly to me, it is a place which offers education about our society, and which fosters the innovative thinking needed to improve Wisconsin's criminal justice system and public safety.
Working to Improve the System: The Wisconsin Innocence Project

Ben Dickey, 2L

Change and innovation were the themes of the summer at the Wisconsin Innocence Project, and they became worthy compatriots to the well-known Remington Center values of service and hard work. In May of 2001, for the first time in its three-year existence, the Innocence Project took on students full time for the summer session. Working under Co-Directors John Pray and Keith Findley, eight students completed a full LAIP orientation program and then immediately began work on Innocence Project cases. I was one of these eight lucky students, and we were joined by eight more of our colleagues in the fall classroom seminar. The summer experience proved fruitful, and we made major strides in more than a few cases as we had thirteen weeks to interview clients and witnesses, track down leads, research the law, discuss strategy, and draft pleadings, all without having to worry about schoolwork, reading, or other distractions. It was a true Remington Center "immersion."

One of the outcomes of such immersion is inevitably reflection by the students on the work we have done. The Innocence Project provides a unique opportunity for constant self-evaluation and reflection because of the overwhelming human importance of the cases that come into the Project. The Project represents inmates who have claims of "actual innocence," and that term itself carries quite a lot of weight. The preface "actual" requires a claim that the incarcerated person did not commit this crime, and implies what many of the readers of this newsletter, as well as the general public, already know: there are many claims of innocence that are not "actual." That is, convicted defendants may deny committing a crime despite overwhelming evidence of guilt; or (perhaps more often), they admit that they were involved in the crime, but not to the degree that the State alleged. A second limitation imposed by the Project is that the cases be provable by new evidence—whether that be DNA or other testing of physical evidence, new evidence of alibis, or witness recantations.

One of the most difficult, and most important, tasks the Innocence Project does is screen cases for verification that there is sufficient reason to believe that the incarcerated client could be innocent, and that there may be information that will allow us to prove that claim. The method for evaluation is not always a scientific one – in many instances it cannot be, given the circumstances that led to an innocent person being arrested, convicted, and incarcerated, all the while proclaiming innocence. Witness recantations, suspect or erroneous eyewitness identifications, failure to test physical evidence, incomplete or flawed investigations (by both prosecution and defense), the emergence of alternate suspects, failure to disclose evidence, and incomplete or ineffective assistance of trial and appellate counsel are all factors that Innocence Project students and attorneys must analyze in screening cases. The method for screening, evaluating, and taking on cases of this type requires a dexterity that manages to balance the possibility that our (potential) client is in prison for a crime he did not commit, the personal conviction that he did not actually commit that crime, and the very real possibility that there may be absolutely nothing that we can do to prove it.
Not all of the factors listed above would, on their own, be sufficient to gain a new trial for one of our clients. We also have limited resources – student and attorney time is limited, funds for travel and investigation have to be rationed, and we have an incredible backlog of requests for assistance. But I believe that the Project's role in screening claims of innocence thoroughly serves the criminal justice system by identifying and bringing forward credible and provable claims of innocence. Thorough screening and evaluation of potential cases also continues an important Remington Center tradition, in that it allows inmates to tell their stories and be heard by people who are concerned about them. This is an important part of the Innocence Project's work, because even if we conclude that we cannot find evidence to prove an inmate's claim of innocence, it is often helpful to inmates if they know that someone believes them.

Finally, the Project's experience with claims that are and are not provable, but are credible, helps to educate attorneys and students about the potentials for error in the criminal justice system. With more knowledge about the oft-repeated errors, we can better evaluate cases to determine whether we should proceed on a case based on a hunch or a slim chance that we may turn up new evidence. In other words, because of our experiences over time, we can apply the ever-important "sniff test" in a more effective and pointed manner.

The evaluation and pursuit of verifiable claims of innocence serves a valuable role in our criminal justice system. In a time when public defenders and prosecutors have overwhelming caseloads which may interfere with meaningful communication with clients and witnesses, and when plea bargains are used to resolve the vast majority of criminal cases, there is a great deal of value in having an outlet for inmates' claims of innocence. Every bureaucratic system such as our criminal justice system, with many adversarial agencies and actors, has the potential to make mistakes. As a society, we need a mechanism to evaluate those mistakes and determine how to remedy them, so that inmates are not denied access to that which the system holds up as its main goal—the pursuit of truth and justice.

I am proud to say that I believe that the Innocence Project is carrying on the best of the Remington Center traditions, in that it educates students about important wrongs in our criminal justice system today, it provides service to clients whose very needs reflect the most egregious of those wrongs, it works within the system to provide remedies to the individual, and it acts as a counter or balance to procedural rules which may perpetuate errors in the name of finality. The Innocence Project is working to prove that justice is not a one-way street in our state and our nation. Justice is not merely convicting individuals and assigning periods of incarceration to them. Justice can also be achieved by working to release from prison those who do not deserve to be there in the first place.

**Prosecutor Contact With the Unrepresented Defendant: Proposed Rule Changes**

Ben Kempinen, Director, Prosecution Project
At one time or another all lawyers confront the challenge of how to deal with an unrepresented opponent. The difference in knowledge and training between the lawyer and non-lawyer increases the risk of over-reaching. At the same time, undue sympathy can impede the lawyer's pursuit of his or her own client's objectives. Balancing these conflicting interests is a difficult but important task, one which will only become more important as access to counsel continues to be among our system's most vexing problems. A recurring instance of this problem is prosecutor contact with an unrepresented defendant.

As director of the Remington Center's Prosecution Project, I have been involved in the recent efforts of the Wisconsin District Attorney's Association (WDAA) to clarify how prosecutors should deal with the increasing number of pro se criminal defendants. The issue of fair treatment of the unrepresented is of particular significance to the Prosecution Project, given that student interns frequently deal with pro se defendants. Experience with this population invites thoughtful student consideration of the proper balance between fairness and firmness. This in turn helps students develop an understanding of how the conscientious prosecutor exercises his or her authority.

I have been a member of the WDAA's Ad Hoc Ethics Committee since its formation in early 1998. In the past three years the committee has discussed the problem of the unrepresented defendant with state prosecutors, academics, and members of the defense bar; circulated proposals widely among interested lawyer groups; and prepared a total of eleven drafts of possible changes to the ethics rules. The committee's efforts culminated in the filing of a petition in the Wisconsin Supreme Court seeking modification of several portions of the Wisconsin Code of Professional Responsibility. A public hearing on the proposed changes is set for early spring.

The Ad Hoc Ethics Committee's basic premise was that fairness to the unrepresented defendant has several definable components that should be part of the ethics rules:

- prosecutors should always explain their interest in the case to the unrepresented defendant
- prosecutors should always tell the unrepresented defendant of the right to be represented, and, if the defendant seeks to exercise that right, permit him or her to do so
- prosecutors should be allowed to (a) discuss the case with, (b) provide information to, and (c) explore settlement of the case with the unrepresented defendant; and
- prosecutors should not be allowed to advise the pro se defendant about what decisions to make, or be required by the trial court to assist in the completion of waiver of rights forms.

The current ethical rules do not define the prosecutor's role with the unrepresented in this way. For example, SCR 20:4.3, applicable to all lawyers, would not require the prosecutor to clarify his or her interest in all cases, nor would it prohibit advising the unrepresented defendant what to do. In addition, the text of SCR 20:3.8(c), appears to
flatly prohibit settlements with unrepresented defendants, however fairly conducted, given its unconditional mandate that a "prosecutor in a criminal case shall... not seek to obtain from an unrepresented accused a waiver of important pretrial rights." Current practice does not remotely reflect compliance with this rule. Indeed, strict compliance would deny unrepresented offenders access to plea negotiations, the primary means of resolving cases for defendants with lawyers.

The WDAA petition would substantially rewrite SCR 20:3.8 to expressly permit prosecutor contact with the unrepresented defendant, subject to the duties and limits identified as central to fair treatment. It would also expand the definition of "prosecutor" to include government lawyers in both criminal and civil settings, requiring them to clarify their interest when in contact with unrepresented persons and comply with any other applicable ethical requirements.

A peripherally related but difficult issue arose in the course of the WDAA Ad Hoc Ethics Committee's work: how to reconcile the prosecutor's investigative responsibilities with the general ethical prohibition against deception to third parties. Effective law enforcement investigation of certain offenses may require deception. Deception can yield desirable results, such as the apprehension of internet pedophiles or the leaders of organized crime. However, if unchecked, investigative practices can and have led to abuses. Accordingly, most prosecutors feel a sense of responsibility to advise law enforcement regarding investigative activities. As a result, however, prosecutors who advise law enforcement regarding such activities can find themselves involved in deceptive practices, in apparent violation of the ethical prohibition.

Although both case law and literature recognize the validity of the prosecutor's investigative function, ethical codes are generally silent about acknowledging the issue or suggesting a means of balancing the conflicting interests at stake. The WDAA chose to confront the issue directly, by providing that the proposed changes requiring clarification and candor to the unrepresented defendant do not apply prior to charging if the prosecutor is acting in an investigative capacity.

The rule change petition has generated both support and opposition. Whatever final action is taken by the Supreme Court, the exercise has already created value, both around the state and in the classroom. It has increased the visibility of the problem of access to counsel, and generated discussion from all quarters of the proper roles of all system actors in making our system one that is both efficient and fair.

The Innocence Project: New DNA Legislation

Keith Findley, Co-Director, Wisconsin Innocence Project

When the Remington Center created the Wisconsin Innocence Project in 1998 we hoped that the Project would offer an exciting and valuable educational experience to students, and also of course that it would help exonerate wrongly convicted innocent people. The Project also had another important goal: to reform the criminal justice system in ways
that will minimize the risks of wrongful conviction, and facilitate the exoneration of the innocent.

Several classes of law students have now had what we believe has been a valuable educational experience. And with Chris Ochoa's release from a Texas prison in January, the Innocence Project has begun to meet its goal of exonerating the innocent. More recently, the Project has realized success in another arena: legislative reform.

DNA has now been used to prove innocence after conviction at least 93 times in North America. That number could be much higher if biological evidence were routinely preserved and available for testing after conviction. Unfortunately, innocence projects across the country have found that in approximately 60 percent of the cases in which the projects would like to do DNA testing, the biological material is lost or destroyed before such testing can be arranged. Where the biological material has been preserved, getting access to it and getting it tested has often been a struggle.

Over the summer Wisconsin joined the ranks of a growing number of states that have passed legislation addressing this problem. The Wisconsin Innocence Project played a significant role in developing and passing new postconviction DNA legislation that was signed into law as part of the budget bill, 2001 Wisconsin Act 16.

The effort to create this legislation began in March 2000, when the Innocence Project sponsored a lecture on campus by Barry Scheck and Peter Neufeld. Scheck and Neufeld founded the Innocence Project at Cardozo Law School in New York, and recently published Actual Innocence, a book which describes several innocence cases and draws lessons from them about how the criminal justice system could be improved. Before speaking at the Law School, Scheck and Neufeld addressed a legislative committee hearing at the capitol.

From that talk grew the idea to create a postconviction DNA testing bill in Wisconsin. Thereafter, the Innocence Project worked closely with the State Bar and key legislators in getting that bill passed into law. Ultimately, the bill passed with bipartisan support in both the Senate and the Assembly—including a unanimous vote in the Assembly.

The new law does several things. First, it requires the state to preserve all biological evidence collected in connection with a criminal case as long as any person remains in custody following a conviction in that case. The state may destroy the evidence, but only if it first provides written notice to the defendant and his counsel of the state's intention to do so. If the defendant in response requests that the evidence be preserved, the state must continue to preserve the evidence.

The law also provides a new postconviction remedy under the newly-created Wis. Stat. § 974.07. Under § 974.07, upon motion of the defendant the state must conduct postconviction DNA testing in any case in which DNA test results favorable to the defendant would make it reasonably probable that the outcome of the case would be different. The defendant may request such testing at any time while he or she remains in
custody. In other circumstances, the statute gives courts additional discretionary authority to order DNA testing. If the defendant is indigent, the statute provides that the costs of the testing shall be born by the state.

The new law also provides that courts presented with motions for postconviction DNA testing shall refer unrepresented defendants to the State Public Defender's Office for consideration for discretionary appointment of counsel. If the testing is favorable to the defendant, the court is then authorized to enter an order granting appropriate relief, including an order vacating the conviction.

With this law, the potential for using DNA to test the accuracy of criminal convictions is greatly enhanced. The swift passage for the law provides encouraging evidence that Wisconsin's citizens and legislators want to ensure that the operation of our state's criminal justice system is both fair and accurate.