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## Lawyers for the Abused and Lawyers for the Accused: An Interfaith Marriage

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# LAWYERS FOR THE ABUSED AND LAWYERS FOR THE ACCUSED: AN INTERFAITH MARRIAGE

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## I. INTRODUCTION

We tend to despise each other. Lawyers for the abused<sup>1</sup> would rather spend time with the most vicious abusers than

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1. When we refer to lawyers for the abused, we mean lawyers in a variety of legal settings who represent women who have been abused by spouses or partners. We include lawyers who practice in family court, housing court, criminal court (when they appear on behalf of complainants or witnesses), before administrative agencies, and in general civil trial court. In the context of the criminal justice system, we will refer to those who claim to have been battered or abused as either "alleged victims" or "complainants." In the civil setting, we will refer to those who claim to have been battered or abused as "victims of domestic violence" or "battered women," as the prevailing reality of domestic violence is that women tend to be victims and men perpetrators. See Evan Stark & Anne Flitcraft, *Spouse Abuse*, in PUBLIC HEALTH & PREVENTIVE MEDICINE 1040 (J.M. Last & R.B. Wallace eds., 1992). For a discussion of the complex, perplexing and ultimately unsatisfying vocabulary of domestic violence, see ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 82-87 (1994) (criticizing the term "domestic violence" as a "euphemistic abstraction" and "battered woman" as deceptive and restrictive); ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW MAKING 60-68 (2000) (critically examining the terms that have been used to describe the concept of battering and noting the interrelationship between definition and strategy); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist*

someone who regularly represents them. Lawyers for the accused<sup>2</sup> would rather convene with a crowd of alleged victims of abuse than their lawyers. When we do meet up, it is seldom pretty. We try to hold our tongues—especially when it is in our clients' interest to do so—but invariably contempt leaks out. At best there is a kind of wry jousting.

Let us be clear. This is no "Adam's Rib" relationship: Opposing counsel are not Katherine Hepburn and Spencer Tracy; they do not spar during the day and dine together at night;<sup>3</sup> there is no romance here. The testiness—if not outright hostility—between lawyers for the abused and lawyers for the accused is not limited to the courtroom; neither is terribly glad to see the other even in the neutral setting of a professional conference.<sup>4</sup>

Perhaps this hostility is not surprising. Lawyers for the abused and lawyers for the accused are adversaries in a system that is based on competition.<sup>5</sup> Rivalry and conflict are an inevitable part of advocacy.<sup>6</sup> There is often tension between opposing

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*Theory and Practice in Work on Woman—Abuse*, 67 N.Y.U. L. REV. 520, 529–31 (1992) (questioning the term "battered woman").

2. When we refer to lawyers for the accused, we mean criminal defense lawyers, the vast majority of whom are public defenders or court-appointed counsel in this context.

3. ADAM'S RIB (Metro-Goldwyn-Mayer 1949). In the film, Spencer Tracy is a district attorney prosecuting a woman for attempting to kill her philandering husband. Katherine Hepburn is the lawyer for the accused, whom she portrays as an abused woman.

4. At clinical teaching conferences, those who teach in clinics representing alleged victims and those who teach in clinics representing alleged perpetrators tend to attend separate workshops when they are defined by practice area. Lawyers who represent battered women are in "domestic violence" small group discussions, and criminal defense lawyers are in "criminal justice" small group discussions. Of course, not every domestic violence clinician is hostile to every criminal defense clinician, and vice versa, as the co-authorship here demonstrates.

5. See David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371, 409 (2000) (noting that the adversary system "is an inherently competitive undertaking with consequences for those caught in it"); see also Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 13–24 (1996) (criticizing the adversary system for its emphasis on competition and winning); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 465–87 (1992) (criticizing the American criminal trial as excessively adversarial in favor of nonadversarial Continental systems). But see MONROE FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 13–42 (1990) (explaining the benefits of the adversary system).

6. See Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part One: The Conflict Between Advocacy and Contempt*, 65

parties, as well as tension between either or both of the parties and the judge.<sup>7</sup> Otherwise congenial, pleasant people can sometimes become contentious and unruly in an adversarial setting.<sup>8</sup>

But the rivalry here seems to go further than most.<sup>9</sup> Perhaps this is because lawyers for the abused and lawyers for the accused are groomed in very different cultures of practice<sup>10</sup> and, as a con-

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WASH. L. REV. 477, 514 (1990) [hereinafter *Advocacy and Contempt, Part One*] (stating that "some level of emotional reaction, some degree of temporary animosity, and a measure of turmoil, are part of the natural processes of trial advocacy"); *Taylor v. United States*, 412 F.2d 1095, 1096 (D.C. Cir. 1969) ("a criminal trial is not a minuet"). See also MARVIN FRANKEL, *PARTISAN JUSTICE* 11 (Hill & Wong eds., 1980) (describing the adversary system as a "battlefield" on which lawyers "marshal the[ir] forces" for a "grimly combative" fight).

7. As Monroe Freedman has noted:

The problem is, in part, one of perspective. Along with a great deal of mutual respect between judges and the lawyers who appear before them, there is also a considerable amount of tension between them. One probable reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties. From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is *not* entitled. From the perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client *is* entitled.

FREEDMAN, *supra* note 5, at 73.

8. *In re McAlevy*, 354 A.2d 289, 290 (N.J. 1976), *quoted in* FREEDMAN, *supra* note 5, at 73.

He sprang from his chair screaming, grabbed opposing counsel by the throat and began to choke him. The judge and the law clerk tried to separate the two men who were now locked in combat, and at one point all four persons—the judge, his law clerk and the two attorneys—were rolling on the floor. The judge suffered minor injuries before the two combatants could be separated.

*In re McAlevy*, 354 A.2d at 290. Although the above conduct is clearly over the top—it is unsurprising that the New Jersey Supreme Court issued a strong reprimand—what may sometimes appear to be "undignified, discourteous, or degrading" behavior by a lawyer may be "essential to . . . effective representation." FREEDMAN, *supra* note 5, at 73; see also Monroe H. Freedman, *The Ethical Danger of "Civility" and "Professionalism,"* 6 N.Y. ST. B.A. CRIM. JUST. J. 17 (1998) (noting that the call for civility, courtesy and professionalism among lawyers often masks a serious attack on the ethic of zeal).

9. The intense rivalry between defenders and prosecutors may be comparable. See generally Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

10. For an exploration of the culture of practice for public defenders, see generally LESLIE ABRAMSON, *THE DEFENSE IS READY: LIFE IN THE TRENCHES OF CRIMINAL LAW* 61–133 (1997); LISA MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987); JAMES KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE?: THE MAKING OF A CRIMINAL LAWYER* (1983); SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1981). The culture of lawyers who represent battered women might fairly be said to be an amalgam of the cultures of the women's movement, see ROBIN MORGAN, *SISTERHOOD IS*

sequence, seem to speak a different language.<sup>11</sup> They certainly seem to have markedly different sensibilities. At their worst, victims' lawyers revel in their clients' victimhood, connecting it to a deep sense of their own victimhood.<sup>12</sup> At their worst, defense lawyers make fun of *everything*, lampooning even the most tragic human events.<sup>13</sup>

Antagonism toward the opposition is built into the culture of practice for both sets of lawyers. To lawyers for the abused, defenders are amoral, insensitive cowboys who enjoy humiliating victims and never consider the secondary social consequences of their client's violent conduct, like the effect of spousal abuse on children.<sup>14</sup> Defenders have no concern for the truth of what really

POWERFUL (1970), the anti-violence against women movement, see ANDREA DWORKIN, *WOMAN HATING* (1974); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982), and the victims' rights movement, see GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995), with a little prosecution culture thrown in for good measure, see generally MARK BAKER, *D.A.: PROSECUTORS IN THEIR OWN WORDS* (1999); DAVID HEILBRONER, *ROUGH JUSTICE: THE DAYS AND NIGHTS OF A YOUNG D.A.* (1990).

11. See generally JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIPS* (1992); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Citing these two books suggests that the cultural differences between victims' lawyers and criminal defenders may be "gendered," irrespective of the gender of the individual lawyer. Although there is some truth to this stereotype, in fact the cultures are not so rigid. See generally RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

12. See generally WENDY KAMINER, *I'M DYSFUNCTIONAL, YOU'RE DYSFUNCTIONAL: THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS* (1992) (examining the recovery movement's obsession with victimhood); WENDY KAMINER, *IT'S ALL THE RAGE: CRIME AND CULTURE 1-90* (1995) (examining the criminal justice system's obsession with victimhood).

13. For example, a couple of years ago, the Georgetown Criminal Justice Clinic represented a young man accused of shooting a ten-year-old girl in the chest in the course of a gang-related incident. The little girl—a classic innocent bystander who was standing on her own porch when gunfire erupted—was the chief government witness. In the course of preparing for trial, lawyers in the clinic began to poke fun at the little girl—calling her a young hussy, a chronic liar, and a poor student who wasn't contributing much to the world anyway. Distasteful though it may sound, this is the kind of conduct defenders engage in to cope with the anxiety of handling such a serious case and of facing such a sympathetic witness. There is a reason public defenders prefer the term "complainant" or "complaining witness" to "victim" or even "alleged victim." It creates some distance. The term "complainant" implies that these people are not true victims, worthy of sympathy. Rather, they appear as *complainers*. Their testimony will consist of complaining: they will complain, complain, *complain*.

14. See generally GEORGE W. HOLDEN ET AL., *CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES* (1998); see also JONES, *supra* note 1, at 84-85 (noting that studies suggest that children who witness battering may suffer long-term conse-

happened,<sup>15</sup> they routinely lie, cheat, and engage in other nefarious practices in order to get their clients off,<sup>16</sup> and are just not nice people.<sup>17</sup>

To lawyers for the accused, so-called “victims’ lawyers”—if they are lawyers at all, and not the peculiar subspecies “victim/witness advocate”—are shrill fanatics obsessed with their cause. Victims’ lawyers make no connection between criminal defendants and complainants, though they can sometimes be interchangeable<sup>18</sup> and certainly have more in common than anyone

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quences such as anxiety, depression, or aggressiveness); Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 VIOLENCE & VICTIMS 101–24 (1986) (reviewing psychological studies of batterers and concluding that many witnessed the battery of their mothers when they were boys); Dorothy O. Lewis et al., *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 137 AM. J. PSYCHIATRY 1211–16 (1980) (finding that nearly four-fifths of seriously violent youth in a delinquency institution in Connecticut had witnessed extreme family violence). The Lewis study found that the single most important factor distinguishing families of violent children from other families is the father’s severe violence against the mother. *See id.*

15. Others share this concern. *See, e.g.*, FRANKEL, *supra* note 6, at 73–86 (arguing that the unchecked partisanship in the adversary system undermines the search for truth and justice); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (arguing that the adversary system “rates truth too low among the values that institutions of justice are meant to serve”); William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1704 (1993) (noting that defense lawyers routinely subvert the truth by presenting perjured testimony, impeaching truthful witnesses, and arguing evidence that supports inferences they know to be false); Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 126–227 (1987) (arguing that criminal defense lawyers should be prohibited from putting on evidence to accredit a false theory or impeaching truthful government witnesses); Van Kessel, *supra* note 5, at 435–45 (arguing that criminal trial advocacy routinely includes deceptive and frivolous claims).

16. This view has been articulated by many outside the context of domestic violence. *See, e.g.*, HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 222–38 (1996) (criticizing the defense lawyering in the O.J. Simpson case); Simon, *supra* note 15, at 1704–05 (criticizing defense tactics such as drawing out and delaying cases, subverting truth, and threatening to disclose information that will embarrass witnesses and discourage the prosecution from going forward); Subin, *supra* note 15, at 153 (noting that much of the public regards criminal defense lawyers as “not to be trusted,” “truth manipulators or worse” and “little more than the alter ego, if not alter id, of his or her client”).

17. Defenders protest that they *are* nice to some people. *See* Mary Halloran, *An Ode to a Criminal Defense Lawyer*, CALIFORNIA LAWYER, June 1998, at 96 (noting that criminal defense lawyers “cry in public if the subject has to do with justice or the death penalty . . . [and] [o]ddly . . . make loving parents”).

18. As those of us who practice in the trenches of criminal court will attest, today’s complainants are often tomorrow’s defendants and vice versa.

else in the criminal justice system.<sup>19</sup> They believe everything their clients say, because battered women never lie. They seek only harsh punishment—preferably castration, but at the very least imprisonment—for criminal defendants.<sup>20</sup> They believe all batterers are monsters.<sup>21</sup>

The authors of this article have generally avoided this hostile dynamic. It probably helps that we have never opposed each other in court and have never even practiced in the same court, even when we lived in the same city. No doubt it helps that we are friends. But, our lack of hostility is not merely the result of professional avoidance or personal friendship—or even our joint tendency to resist fitting into the usual mold.<sup>22</sup> Notwithstanding our different adversarial roles, we find that we have a shared vision.

Our shared vision may be a reflection of the similar paths we have taken to the work we do. Both of us began our careers as poverty lawyers—one as a legal services lawyer and the other as a public defender. Both of us became clinical law teachers out of a desire to continue doing the work we were doing, but also to draw

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19. See Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 141–45 (discussing the “comparative powerlessness” of both victims and defendants and other similarities). As Yaroshefsky notes:

Victims and defendants often have more in common with one another than either does with the representatives of the State. Victims and defendants often know one another, live in the same neighborhood, and are of the same educational, racial, or class background. Most importantly, they are both relatively powerless.

This similarity often has been ignored by those in the forefront of the victim's rights movement who focus attention on the antipathy between victims and defendants.

*Id.* at 143.

20. See *id.* at 144 (noting that the victim's rights movement has played a role in diminishing defendants' rights at bail and sentencing, and that those in the forefront of the victim's rights movement often call for more prisons and greater punishment).

21. But see Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 344 n.16 (1995) (noting that “most batterers are not ‘monsters,’ but rather have nice sides”); see also NEIL S. JACOBSEN & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* 36–39 (1998) (refuting the myth that all batterers are alike); DONALD G. DUTTON & SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 24–30, 33–35 (1995) (discussing the range of batterer profiles).

22. Ilene Seidman could be described as a plucky—and occasionally pushy—poverty lawyer. Abbe Smith likes to think of herself as a relatively sensitive, feminist criminal defense lawyer.

students to the work and give them the skills, understanding, and judgment to do it well. Although one of us teaches students and represents clients (often victims) in a civil clinic, and the other teaches students and represents clients (often perpetrators) in a criminal clinic, we both see ourselves as representing poor people in trouble.

There is a shared sensibility, as well. We both like being lawyers who represent individual clients in the lowest courts in the land. We like fighting the good fight on behalf of an underdog, no matter the odds. We believe in the adversary system, no matter its many shortcomings. We also share a particular interest in issues concerning gender, race, poverty, and violence.

In this article, we will explore what unites lawyers for the abused and lawyers for the accused. In Part II, we will discuss our connection as poverty lawyers concerned about the dignity of individual clients. In Part III, we will discuss our shared commitment to the adversarial system, legal process, and access to justice. In Part IV, we will address the challenge of teaching students who represent victims or perpetrators to be zealous and devoted advocates—but also to care about social and legal injustice on both sides.

## II. POVERTY LAWYERS REPRESENTING INDIVIDUAL CLIENTS

By and large, lawyers who represent battered women and criminal defendants—especially in a clinical setting—are poverty lawyers.<sup>23</sup> We represent the aggrieved and afflicted, the forgotten and shunned.<sup>24</sup> We represent those for whom extreme poverty has

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23. For a discussion of poverty lawyers in the “glory days” of the profession, see generally MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–73* (1993); Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995) (reviewing DAVIS, *supra*). For a discussion of poverty lawyers in more recent times, see Louise G. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 FORDHAM URB. L.J. 1123 (1995). For a critique of poverty lawyers as “regnant”—lawyers who “consider themselves the preeminent problem solvers”—as opposed to “rebellious”—lawyers who assist disempowered clients in improving their own lives, see GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 24–28 (1992).

24. See generally ANTHONY LEWIS, *GIDEON’S TRUMPET* 5–6 (Vintage Books 1989) (1964). Gideon was a fifty-one-year-old white man who had been in and out of prisons much of his life. He had served time for four previous felonies, and he bore the



persisted for generations,<sup>25</sup> is an intermittent condition constantly struggled against,<sup>26</sup> or is a relatively new state of being, the result of a crisis.<sup>27</sup> We spend our time in the trenches of poor peoples' courts where the need is great and deliverance doubtful.<sup>28</sup>

We work in settings familiar to the poor and their advocates. Criminal defenders and lawyers for battered women meet with our clients in hallways and holding cells, in hospital rooms and

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physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair. He had never been a professional criminal or a man of violence; he just could not seem to settle down to work, and so he had made his way by gambling and occasional thefts. Those who had known him, even the men who had arrested him and those who were his own jailers, considered Gideon a perfectly harmless human being, rather likeable, but one tossed aside by life. Anyone meeting him for the first time would be likely to regard him as the most wretched of men.

LEWIS, *supra*. See also Marie A. Failing, *Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice*, 67 *FORDHAM L. REV.* 2071, 2073 (1999) (noting that legal services clients are "paradigmatic outsiders"); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 *MERCER L. REV.* 443, 454-58 (1999) (discussing criminal defenders as "poor people's lawyers").

25. See generally CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 143-203 (1992) (discussing the "underclass"); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (examining the "ghetto underclass"). Nonwhites are far more likely than whites to be members of the underclass, and almost always live in racially segregated neighborhoods. See JENCKS, *supra*, at 45; see also Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 *GEO. L.J.* 1961, 1965 (1993) (noting that "extreme . . . persistent, intergenerational poverty" in this country presents a "difficult, perhaps intractable, moral dilemma," because of its roots in racism). For a probing and powerful account of an African American woman caught in a complex cycle of intergenerational poverty, abuse, and crime, see LEON DASH, *ROSA LEE: A MOTHER AND HER FAMILY IN URBAN AMERICA* (1996).

26. See JENCKS, *supra* note 25, at 72-79 (discussing the poverty rate); see also RANDY ALBELDA ET AL., *THE WAR ON THE POOR: A DEFENSE MANUAL* 12 (1996) (noting that when asked by a Gallup poll what amount of income they would use as a poverty line for a family of four, the average person's response was twenty-four percent higher than the official poverty line).

27. See, e.g., CHRISTOPHER JENCKS, *THE HOMELESS* (1994) (documenting the rise in homelessness in the 1980s and examining the causes); PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 143-79 (1989) (discussing the vulnerability to homelessness of the mentally and physically ill, those with substance abuse problems, those with criminal convictions, those with severed ties to friends and family).

28. See Smith & Montross, *supra* note 24, at 457 (footnotes omitted) (noting that "[i]ndigent criminal defense lawyers labor in the lowest courts of the land, where the air is thick with worry and fear, and the halls are lined with the aggrieved and the adamant. This is clearly a gathering place for poor people; it has the smell and feel of so many places to which they are shunted.").

half-way houses. We wander through our clients' crumbling neighborhoods<sup>29</sup> to track down witnesses and family members. In a time of widening inequality,<sup>30</sup> we meet with overburdened social workers, case workers, mental health workers, and probation and parole officers—those who minister to the poor in the dreary, crowded waiting rooms and make-shift offices to which our clients seem forever resigned.<sup>31</sup>

By calling ourselves poverty lawyers, we do not mean to suggest that crime and domestic violence happen only to the poor; to the contrary, crime and domestic violence know no social or economic bounds.<sup>32</sup> Nor are we suggesting that most poor people are victims or perpetrators of abuse; most poor people lead peaceful,

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29. See generally JONATHAN KOZOL, *ORDINARY RESURRECTIONS: CHILDREN IN THE YEARS OF HOPE* (2000); JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* (1995); WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

30. See generally JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (1998); see also Merrill Goozner, *Income Study Confirms U.S. Trend Toward Nation of Haves, Have-Nots*, CHI. TRIB., Jan. 18, 2000, at N8 (citing study of Census Bureau data over the past two decades which found that the poorest fifth of families lost 6.5 percent of household income while the richest fifth posted a 33.3 percent gain); Richard W. Stevenson, *In a Time of Plenty, The Poor are Still Poor*, N.Y. TIMES, Jan. 23, 2000, at D3 (noting that those at the bottom of the economic ladder are not benefitting from the current boom and may be falling further behind).

31. See Smith & Montross, *supra* note 24, at 457.

32. With respect to crime, see generally REIMAN, *supra* note 30, at 110–16 (discussing the double standard in law enforcement when it comes to harmful corporate and white collar crime). With respect to domestic violence, see PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 3 (2000)* (reporting that intimate partner violence is pervasive in the United States, affecting approximately 1.5 million women); Mary P. Koss et al., *The Prevalence of Intimate Violence, in NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY* 41, 41–42 (1994) (noting that between twenty-one percent and thirty-four percent of all women will suffer physical assault by an intimate male as adults); JONES, *supra* note 1, at 87 (noting that domestic violence is the leading cause of injury to women in the United States, and estimating that men batter three or four million women a year); SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING*, *supra* note 1, at 4 (reporting that studies on the prevalence of domestic violence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime, and that on an average day in the United States nearly 11,000 women are severely assaulted by their male partners); Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 As Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465, 470 (1986) (finding that each year in the United States at least two million women of all races and classes are physically abused by a spouse or intimate partner).

law-abiding lives.<sup>33</sup> Still, there is a strong correlation between economic deprivation and inequality and criminal violence in this country.<sup>34</sup> Moreover, while our clients may not start out poor, they are often poor by the time they come to us.<sup>35</sup> Women who flee abusive partners who were their primary source of financial support are often impoverished as a result.<sup>36</sup> Likewise, there are very

33. See Orlando Paterson, *The Nexus Between Race and Police*, 4 GEO. PUB. POL'Y REV. 107, 108 (1999) (noting that most of the urban poor are "hard-working, God-fearing people" who should not be confused with the small percentage of law-breakers); see also Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 10 (1985) (noting that most poor people do not commit crime); but see Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 215-17 (1998) (describing the "incredibly complex relationships between law-abiders and law-breakers in poor urban communities").

34. See generally ELLIOT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 144-79 (1985) (examining the relationship between economic and racial inequality and criminal violence); Judith Blau & Peter Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 114-99 (1984); ANGELA CAMPBELL, *MEN, WOMEN, AND AGGRESSION* 12 (1993).

[There are] subcultures of violence whose members legitimate, even encourage, physical aggression as a response to conflict. An examination of homicide data in Philadelphia gave rise to the idea of such a subculture existing in certain urban neighborhoods among people below the poverty level. Homicides in these neighborhoods seemed to result from trivial disputes. Trapped in an underclass of social isolation, these people face not only economic stress but the social stresses of illness, drugs, poor schools, crumbling buildings, and an environment where no one feels safe. In this oppressive environment tempers flare easily, aggression becomes common, and the whole social system begins to spiral upward to a crescendo of violence. Violence becomes normalized as a routine part of everyday life, and this normalization forms a subculture of violence.

*Id.*

35. See JEFFREY REIMAN, . . . AND THE POOR GET PRISON 48-49, 104-07 (1996) (noting that the majority of those accused and convicted of crime are poor); JONES, *supra* note 1, at 200-01:

Many [abused women] flee one problem—battering—only to become part of another: the "feminization of poverty." Today 65 percent of black children live in a family headed by a single mother, and 45 percent of all American families headed by a single mother live in poverty. . . . We can attribute this [family] "disintegration" in part to violence, just as we can attribute the "feminization of poverty" in part to woman and child abuse, a cause economists and politicians never cite. Today, experts name battery as a "major cause" of homelessness; large numbers of the nation's growing band of homeless are women on their own with children—women and children who, despite the social and economic obstacles, ran from male violence at home.

36. See JONES, *supra* note 1, at 201; see also LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 28 (1984) (reporting that one study found that twenty-seven percent of battered women had no access to cash, thirty-four percent had no access to a checking account, fifty-one percent had no access to charge accounts, and twenty-two percent had no access to a car); Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Vio-*

few wealthy people in jail or prison.<sup>37</sup> In our experience, the majority of criminal defendants and battered women who appear in court are poor.<sup>38</sup>

Although some lawyers who represent battered women consider themselves women's rights lawyers,<sup>39</sup> and some lawyers who defend clients accused of domestic violence regard themselves simply as criminal lawyers,<sup>40</sup> lawyering in domestic violence court

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lence, 22 FORDHAM URB. L.J. 1141, 1150 (1995) (noting that many domestic violence victims are financially dependent on their abusers, and few have the resources necessary to begin a new life on their own). Even the Supreme Court has recognized that abusers often isolate their victims from financial resources. See *Planned Parenthood v. Casey*, 505 U.S. 833, 891–92 (1992) (citing WALKER, *supra*, at 28).

37. See ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 7–8 (Arthur Weinberg ed., 1957) (stating that “[t]he people who go to jail are almost always poor people—people who have no other place to live. . . . When times are hard, then you find large numbers of people who go to jail who would not otherwise be in jail. . . . First and last, people are sent to jail because they are poor.”).

38. The authors have practiced law in Massachusetts, New York, Pennsylvania, and Washington, D.C. Although we occasionally see middle-class or affluent people in domestic violence court, the vast majority of alleged victims and perpetrators are poor and—if they have a lawyer at all—do not have privately retained counsel. See Peter Edelman, *Responding to the Wake-up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 550 (1998) (noting that the numbers of individual poor people who need lawyers far outpaces the number of lawyers available to represent them); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999). “In the ‘poor people’s courts,’ civil cases involving at least one unrepresented litigant are far more common than cases in which both sides are represented by counsel. This phenomenon is hardly surprising, given widespread reports that over eighty percent of the legal needs of the poor and working poor currently are unmet in the United States.” *Id.* at 1987. See also William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 19 S.U. L. REV. 273, 273 (1992) (stating that “[b]etween 85% and 92% of the low income people in Louisiana who had civil legal needs in 1991 were not represented by an attorney”); Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 FORDHAM L. REV. 5, 8 (1994) (stating that “at least eighty percent of the poor and the working poor in the United States do not have access to legal services”). The court-appointed counsel systems in many jurisdictions are overworked and at the mercy of politicians who hold the purse-strings. See, e.g., David L. Wilson, *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota’s Public Defender System: Kennedy v. Carlson*, 22 WM. MITCHELL L. REV. 1117, 1137 (1996).

39. See Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN’S L.J. 1, 1 (1991) (arguing that “feminist litigation . . . occurs when we individually represent single mothers seeking public benefits” but also noting that one of the goals of feminist litigation is “the elimination of violence against women”).

40. There are, of course, many criminal lawyers who do not primarily represent the poor. See, e.g., WILLIAM M. KUNSTLER & SHEILA ISENBERG, *MY LIFE AS A RADICAL LAWYER* (1994) (autobiography of the criminal lawyer William Kunstler, who represented political

is—and must be—poverty lawyering. The immediate problem that has drawn our clients to court may have to do with domestic violence, but they also face other vexing problems.<sup>41</sup> Hence, thoughtful lawyers doing domestic violence work will approach clients and cases from the broad, contextual, interdisciplinary perspective of a poverty lawyer.<sup>42</sup>

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activists); see also Fredric Dannen, *Defending the Mafia*, NEW YORKER, Feb. 21, 1994, at 64 (examining the professional life of Gerald Shargel, a prominent criminal defense lawyer who represents alleged members of organized crime). Still, most lawyers who represent criminal defendants are either public defenders or court-appointed counsel. See STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, *INDIGENT DEFENSE* (1996). In 1992, eighty-one percent of felony defendants in the nation's seventy-five largest counties had a public defender or court-appointed counsel at trial. *Id.* at 4 tbl.8. In 1991, seventy-six percent of state prison inmates and fifty-four percent of federal prison inmates had court-appointed lawyers representing them for the offenses for which they were incarcerated. *Id.* at 3 tbl.3. In 1989, seventy-eight percent of inmates in local jails had court-appointed counsel. *Id.*

41. See, e.g., Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2126–27 (1999) (describing a client who was referred to a civil legal services clinic because of a housing problem, but who turned out to have additional problems relating to his inability to pay his phone bill and the threatened loss of food stamps); Paul Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2519–21 (1999) (describing a woman who comes to a legal services office with a host of problems in addition to being battered). The prospective client in Professor Tremblay's article discloses the following: She has lived with her boyfriend for six years and has a three-year-old daughter with him; her boyfriend has a serious drug and alcohol problem, which has worsened since the boyfriend was laid-off from his job; the previous night, the boyfriend brutally beat the woman with his fists and then left the house in a rage; when he left, he took the daughter with him; the woman believes her boyfriend may have gone to his parents' home in a neighboring state. See *id.* Although the prospective client focuses on her desire for a restraining order to keep her boyfriend from abusing her, and a custody order to keep him from taking the daughter again, there may also be problems relating to how she will support herself and where she will live now that her boyfriend and child are gone. See *id.* at 2519. Looming in the background are the boyfriend's need for employment or job training, drug and alcohol treatment, and, no doubt, counseling—as, irrespective of what happens between the woman and her boyfriend, he is the father of her child. See Naomi Cahn & Joan Meier, *New Approaches to Poverty Law, Teaching, and Practice: Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 344 n.16 (1995). For two vivid portraits of the complex needs of poor families in contemporary urban America, see generally KOZOL, *AMAZING GRACE*, *supra* note 29; ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991); WILSON, *supra* note 29.

42. See generally Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 (1995) (arguing that domestic violence issues should be integrated into a more contextual approach to poverty law); Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POL'Y 205, 220–25, 227–30 (1997) (noting

A recognition of the importance of social context is an important aspect of effective lawyering on behalf of the poor abused and accused.<sup>43</sup> The complex social context—which implicates questions of individual and social responsibility<sup>44</sup>—should be reflected both in case theory<sup>45</sup> and evidentiary arguments at trial.<sup>46</sup>

the connection between poverty, welfare, and domestic violence); *see also* Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1989 (1993).

Whenever I listen intently to poor women talk about their lives, I hear stories of violence: the violence of racism and class bias that they remember—and expect—from school; the violence of industrial hazards, braindeadening routines, repressive discipline, and sexual harassment that they face in the few available jobs; and the violence inherent in the bargain when they seek to secure their children's futures through a man.

*Id.*

43. *See generally* JODY RAPHAEL, *SAVING BERNICE: BATTERED WOMEN, WELFARE AND POVERTY* (2000). For an argument in favor of the admissibility of evidence of environmental deprivation in the guilt phase of a criminal trial, *see* Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994).

44. *See* Smith, *supra* note 43, at 457–58. In a previous article, one of the authors contemplates individual responsibility and social responsibility in the context of poverty and violence:

When a child is abused and then becomes an abused or abusive adult, is that person acting out of free will as we know it? What is the nature of individual responsibility when there is less and less freedom? What is the social cost when we lay the blame for crime on individuals who often themselves have been victims of crime, and what is the individual cost when we lay the blame for crime on society?

I think choice lies on a spectrum, and criminal and moral responsibility should reflect where a person falls on that spectrum. It is wrong to evaluate responsibility—criminal, moral, and social—from the point of view of *either* free will *or* determinism, as if they are incompatible and as if the free will/determinism calculus sufficiently answers the responsibility question.

*Id.* at 458 (emphasis added) (footnote omitted). *Cf.* SCHNEIDER *BATTERED WOMEN AND FEMINIST LAWMAKING*, *supra* note 1, at 147.

[B]ecause this work argues for affirmative recognition of the significance of social context, and of the necessary interrelationship between individual action, social context, and social responsibility, it challenges fundamental assumptions about "free will" in the criminal law, and triggers considerable resistance for some criminal law scholars. All these aspects of resistance are forms of resistance to equality. The legal problems of battered women who kill demonstrate the devastating impact of social failure to link violence to equality.

*Id.*

45. *See generally* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

A poverty lawyer's approach to domestic violence recognizes the importance of counsel,<sup>47</sup> of making a meaningful connection with a client, no matter his or her life circumstances,<sup>48</sup> and of providing clients with a voice in court and beyond.<sup>49</sup>

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46. See generally Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45 (1998); Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men*, *supra* note 43.

47. See Margulies, *supra* note 42, at 1091–93 (discussing access as a key element of lawyering on behalf of victims of domestic violence); Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869 (1997) (arguing the importance of defending the poor accused). For one of the most powerful accounts of the importance of counsel, see generally Lewis, *supra* note 24 (recounting the story behind *Gideon v. Wainwright*).

48. See Margulies, *supra* note 42, at 1093–97 (discussing connection as a key element in lawyering on behalf of victims of domestic violence); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 619–20 (1994) (stating that “lawyers must learn how to ‘feel with’ others . . . to truly apprehend the reality of the other . . . not just to understand instrumentally how to move, persuade or affect that person, but to understand what meaning the interaction has for that person in a caring and existential sense”); Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1272 (1993) (characterizing the relationship between lawyer and indigent criminal defendant as “a true friendship”); Smith & Montross, *supra* note 24, at 515–19 (discussing connection to client as the central virtue for criminal defense lawyering); see also ROSELLEN BROWN, *BEFORE AND AFTER* 249 (1992) (stating that “[a] defense lawyer, you know, is not just a prosecutor turned inside out. He tends, by practice and maybe by temperament, toward a little compassion for his felon.”).

49. See Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2132 (1991) (examining the importance of client narratives in poverty law practice); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1613 (1989) (arguing that client voice should be at the center of lawyering strategies); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); see also Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.–C.L. L. REV. 287, 292–93 (1996) (noting that poor peoples’ voices are seldom heard because of their lack of political clout). For a discussion of the importance of providing a voice to victims of domestic violence, see SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING*, *supra* note 1, at 101–02 (noting that “[s]torytelling—using the ‘stories’ of clients as the essential factual matrix of the case—has always been an essential part of good lawyering, and narrative accounts of battered women’s experience have historically been incorporated into feminist lawmaking”); Margulies, *supra* note 42, at 1097–1100 (discussing the importance of providing a voice to victims of domestic violence, including “find[ing] a way of stopping the war on women in poverty”). For a discussion of the importance of providing a voice to criminal defendants, see John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide*, 6 CLINICAL L. REV. 85, 98–101 (1999) (illustrating criminal defense lawyer arguing the importance of “culling

This question of client “voice” can be complicated, however, and dovetails into the question of client autonomy. Discerning what a client is saying and what a client *wants* can sometimes be a difficult undertaking. Determining what it means to uphold a client’s “autonomy” and “dignity” can be even harder.<sup>50</sup> This is challenging for all poverty lawyers<sup>51</sup>—the reality is that poor clients are often *different* from their lawyers—and may be especially so for lawyers representing the accused and the abused.<sup>52</sup>

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much fuller stories from my clients and actively involving them in strategy and decision making”). Professor Mitchell now “cringes” as he recalls his early lawyering days, when he saw his clients as little more than an impediment to winning “his” case.

By casting my clients as powerless and dependent, with my legal story as the only one that counted, I set myself above them, enjoyed my superiority, and stole their voice—or at least made them self-edit that voice to give me what they knew I was seeking—and, in the process, to an extent I hurt them. I took their dignity, if only for the brief term of our interaction.

That has changed, though undoubtedly imperfectly. I now seek and teach my students to seek, the full person—a unique person, in part defined by culture, gender, race, sexual preference, and the political world, but ultimately unique. I do so, not just because I believe it is the right thing to do, but because it makes me (and my students) better lawyers. I know who I’m dealing with and can work in a relationship of mutual respect. And in truly hearing the client’s story, the client and I (and/or the students) can make a range of strategic decisions which otherwise would not be possible.

Mitchell, *supra*, at 100–01.

50. See Deborah Rode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985) (“The second premise of adversarial ideology is that lawyers’ undivided client allegiance serves fundamental interests of individual dignity, privacy, and autonomy. From this essentially deontological perspective, justice depends not on the realization of substantively correct outcomes, but on the preservation of private rights.”); see also FREEDMAN, *supra* note 5, at 43–64; DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); DOUGLAS ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE?* 2, 154 (1974); Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717, 733–53 (1987); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 545, 593 (1981); Mark Spiegal, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 73–77 (1979); Richard Wasserstrom, *Lawyers As Professions: Some Moral Issues*, 5 HUMAN RIGHTS 1, 21–24 (1975).

51. At least this is so at the time of the representation. Of course, some lawyers grew up in poverty too.

52. What defender in the course of representing clients—juveniles, non-English speakers, the illiterate, those who are mentally retarded or cognitively impaired, those who are suffering from mental illness, those who are addicted to drugs or alcohol, the abused and discarded, and those without any resources at all—has not wondered about whether she truly understands her client’s wishes in the short and long term? What battered women’s lawyer in the course of representing clients who fall into the same categories has not wondered the same thing? Even when our clients clearly and forcefully express their interests, who among us has not wondered whether they are being fully autonomous—not to mention wise—in doing



A poverty lawyer's approach also recognizes that clients are not perfect people, do not always (or even often) embody the lofty causes to which we mean to contribute,<sup>53</sup> and sometimes are downright exasperating.<sup>54</sup>

By and large, poverty lawyers are social justice lawyers one case at a time.<sup>55</sup> We are not in it for the glamour or prestige—

so? Defenders grapple with a variety of dilemmas: helping a client get back on the street where he or she may reoffend, helping a client get back on the street where he or she may be rearrested, acceding to the wishes of a client who needs but declines services or treatment, acceding to the wishes of a client who is acting to protect someone else. Battered women's lawyers have their dilemmas too: what to do about clients who initially seek and then withdraw from the criminal prosecution of abusers, clients who return to their abusers in spite of the danger, clients who need but decline services or treatment, clients who are acting to protect someone else.

53. Battered women's lawyers often see themselves as part of the struggle to end violence against women, *see generally* SUSAN SCHECTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982), while many criminal defenders see themselves as part of the struggle for social and racial justice. *See* Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983-84) (describing the "political activist" motivation for criminal defense work); Smith & Montross, *supra* note 24, at 453 (describing the authors' identification with social justice activism). For a discussion of social justice lawyering generally, *see* Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 31-68 (Austin Sarat & Stuart Scheingold eds., 1998).

54. *See generally* DASH, *supra* note 25. Rosalee, the central character in Leon Dash's memorable portrait of urban underclass life, was abused as a child, periodically abused by husbands and boyfriends, and in and out of jail for prostitution, drugs, and shoplifting. *Id.* Though she is by no means a "typical poor client," she is a good example of an exasperating one. *Id.* She is alternately charming, humble, generous, and loving—and then manipulative, deceitful, exploitive, and generally loathsome. *See* KUNEN, *supra* note 10, at 60-61:

The word for Cheryl Lee Harris was *formidable*. She was only fifteen, but looked much older. Intelligent, sophisticated, and self-possessed, she could look you in the eye and lie, and you'd never suspect a thing. She had the delicate wrists and elegant hands of an artist, and an artist's eye for clothes, and a face . . . . She had *presence*: you wanted her to like you, and she did—she was a real sweetheart, very friendly. Of course, she *was* quite pretty, and I am inclined to ascribe all good qualities to pretty girls, but *everybody* liked her. The detective liked her. The FBI men liked her. Even the teller she robbed at the bank liked her, as much as could be expected.

55. *See* John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 183-84 (Austin Sarat & Stuart Scheingold eds., 1998).

At the heart of Anglo-American legal practice is the notion that a professional attorney has a basic professional responsibility to focus on the legal needs and interests of her or his individual clients. Given this tradition, it was only natural when the legal community began to take an interest in the legal needs of the disadvantaged that the effort would be based on individual client lawyering. The basic

because there is not much of either in the work.<sup>56</sup> We do what we can to ease our clients' burdens and pain,<sup>57</sup> and sometimes we make a difference.<sup>58</sup>

When we see that our clients come from the same impoverished communities,<sup>59</sup> have more in common with each other than

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goal of this style of lawyering is to provide service to individual clients who would otherwise go unrepresented. The reason for this is simple. As a result of their financial situation, the poor have little or no independent access to the civil justice system. Anyone seeking to improve the legal status of the poor must, at some level, deal with the individual, microlevel legal problems of poor clients. Thus, client lawyering for the poor is made up of all of the activities associated with lawyering in general, including counseling clients on their legal situation, negotiating with societal actors on behalf of clients, drafting legal documents for clients, and litigating on behalf of clients before judicial and administrative tribunals.

Kilwein, *supra*, at 183–84. See also SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW-MAKING, *supra* note 1, at 220 (noting that students in a clinical seminar on battered women and the law found that working on behalf of individual battered women “could be a practical vehicle for social change”). For other depictions of lawyering on behalf of individual poor clients, see MILNER BALL, THE WORD AND THE LAW 60–72 (1993); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995).

Of course, in both civil poverty work and criminal defense, lawyers sometimes engage in other than individual client representation. Among the strategies civil and criminal poverty lawyers employ are impact litigation, organizing or mobilizing clients, and what has been called “client voice lawyering.” See Kilwein, *supra*, at 184–86.

56. See Ogletree, *supra* note 48, at 1278 (stating that “the luster soon fades as the defender confronts the practical realities of the job—the daily drudgery of paperwork and the less-than-glamorous settings of the public defender’s office, the criminal court, and the jail”); Robert Rader, *Confessions of Guilt*, 1 CLINICAL L. REV. 299 (1994) (noting a student in criminal defense clinic stating, “Contrary to my imagination, criminal defense work was *not* glamorous. It was not heroic.”).

57. See Paul R. Tremblay, *The Crisis of Poverty Law and the Demands of Benevolence*, 1997 ANN. SURV. OF AM. L. 767, 773 (1997).

I do not know exactly what advocates for the poor might accomplish in the long term, but I know for certain that an effective lawyer can reduce felt pain for real people. Perhaps I should choose a different verb—perhaps I should be saying that lawyers can *defer* pain, or *postpone* pain. But either way the pain is diminished. . . . [T]here is a real immediacy to alleviating the suffering that comes from a lack of money, the worry about having to live in a shelter, the fear of domestic violence, or of losing custody of a daughter, even if only for a short while.

*Id.* (emphasis added).

58. See, e.g., MELISSA F. GREENE, PRAYING FOR SHEETROCK (1991) (recounting the political awakening of a small, isolated African American community in Georgia in the 1970s and the successful collaboration of community members and legal services lawyers in the struggle); see also Tigran W. Elgren & Thomas Schoenberr, *The Lawyer’s Duty of Public Service: More Than Charity*, 96 W. VA. L. REV. 367, 373 (1993) (noting that, in New York City Housing Court, eighty to ninety percent of landlords have lawyers, while tenants have counsel no more than fifteen percent of the time, and reporting that eviction rarely occurs when tenants are represented).

any of the institutional actors they encounter,<sup>60</sup> and could well be in the shoes of the opposing party,<sup>61</sup> we should recognize that we are doing the same basic work with many of the same goals.

### III. THE ADVERSARIAL SYSTEM, LEGAL PROCESS, AND ACCESS TO JUSTICE

In addition to being poverty lawyers, lawyers for the abused and lawyers for the accused share a similar approach to legal advocacy. We believe in the adversary system and in zealous adver-

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59. See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1936–37 (1999) (noting that while “community” is a difficult concept, in the context of poverty lawyering it is “not a romantic abstraction, but rather the site of material deprivation and relations that are formed to cope with oppressive circumstances”); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 *U. PA. L. REV.* 1233, 1271 (1995) (stating that “[w]hen there is nowhere to run and nowhere to hide, people must make a stand in place, at one’s home base. For many of the inner-city poor, this is their predicament.”); cf. Regina Austin, *“The Black Community,” Its Lawbreakers, and a Politics of Identification*, 65 *S. CAL. L. REV.* 1769, 1817 (1992) (stating that “[t]hrough the ubiquitous experience of racism provides the basis for group solidarity, differences of gender, class, geography, and political affiliations keep blacks apart. These differences may be the best evidence that a single black community no longer exists.”).

60. See Yaroshefsky, *supra* note 19, at 143.

61. Many people accused of crime—especially those accused of violent crime—have themselves been victims of abuse. See generally JAMES GILLIGAN, *VIOLENCE* (1996); see also ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 23 (1987) (reporting that seventy-one percent of battered women who committed homicide described physical violence in their childhood homes, and ninety-one percent believed that there was physical violence in the man’s childhood home); CAMPBELL, *supra* note 34, at 105 (stating that “[o]ne of the strongest predictors of wife beating by men is whether they were exposed to violence in the home as children”); G.T. Hotaling & D.B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, in 1 *VIOLENCE AND VICTIMS* 101–24 (1986) (finding that a boy who witnesses his father’s violence is three times more likely to beat his own wife when he marries); D.S. Kalmus, *The Intergenerational Transmission of Family Aggression*, 46 *J. MARRIAGE & THE FAM.* 11–19 (1984) (documenting the connection between experiencing or witnessing violence as a child and later battering). Of course, battered women sometimes become criminal defendants. See generally BROWNE, *supra* (examining the circumstances under which battered women commit homicide); KATHLEEN DALY, *GENDER, CRIME, AND PUNISHMENT* 46–48 (1994) (noting the significant percentage of women accused of felonies in New Haven, Connecticut, who had experienced physical abuse, sexual abuse, neglect, and battering); ANN JONES, *WOMEN WHO KILL* 281–95 (1980) (describing the battered woman’s self-defense cases of Francine Hughes and Jennifer Patri); SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING*, *supra* note 1, at 112–47 (discussing battered women who kill).

arial advocacy as the best way to protect our clients' rights.<sup>62</sup> We believe in a system in which lawyers on both sides fight hard and with sufficient resources to uphold clients' rights and pursue clients' rights and interests.<sup>63</sup>

Unfortunately, there are regular efforts to shunt poor people out of the adversary system and into other systems of "dispute resolution."<sup>64</sup> There are also problematic efforts to encourage women to resolve their legal problems in less formal settings.<sup>65</sup>

62. See generally FREEDMAN, *supra* note 5, at 13–42; see also Barnhizer, *supra* note 5, at 377–80 (arguing that "strong advocates are a critical balance against entrenched power"). There are, of course, critics both within and without the legal profession of the notion that adversarial advocacy is the best means of resolving disputes. See, e.g., DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1998); see also ANNE STRICK, *INJUSTICE FOR ALL: HOW OUR LEGAL SYSTEM BETRAYS US* (1996); Carrie Menkel-Meadow, *New Roles: The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 788–92 (1999) [hereinafter Menkel-Meadow, *The Lawyer as Problem Solver*].

63. See FREEDMAN, *supra* note 5, at 13–42; Barnhizer, *supra* note 5, at 376.

I argue that it is our failure to honor this duty [of zealous advocacy]—rather than the reverse as many suggest—that is at the center of many of the most intractable conditions in American society. This means there are reasons to seek a clarification and a strengthening of the adversary system and the role of the advocate in our society, rather than the weakening that seems to be the prevailing view. A legal profession without a strong sense of duty to its clients is not entitled to any special privileges or status in our society. Too frequently, however, claims of service to society are only masks for privilege.

Barnhizer, *supra* note 5, at 376.

64. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1379 (arguing that alternative dispute resolution disadvantages minority disputants); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3 (1993) (critically examining the emphasis on "harmony" values over "justice" values in alternative dispute resolution to the detriment of poor people).

65. See generally Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); see also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 447 (1992); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984). But see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664 (1995) (defending "settlement" in some cases and characterizing the criticism of alternative dispute resolution as "simplistic" and "adversarial"); Menkel-Meadow, *The Lawyer as Problem Solver*, *supra* note 62 (arguing that "the traditional conception of the role of lawyer as an advocate of his client and as someone else's adversary is a crabbed and incomplete conception of the lawyer's role"); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from*

Although some proponents of alternative dispute resolution claim that ADR has the potential to provide greater access to justice,<sup>66</sup> we are skeptical.

For battered women in civil cases and defendants in criminal court, the power differential between the parties,<sup>67</sup> and the enormity of what is at stake,<sup>68</sup> necessitate the strongest adversarial

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*the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 410 (1997) (critically examining adversarial advocacy).

66. See Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 65, at 2691 ([T]hese new processes offer the potential of making more, rather than less, justice available, both in terms of processes available and the variety of outcomes that may be achieved.)

67. See Jennifer F. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 337-38 (1995) (stating that "[i]f a relative equality of power cannot be achieved, mediation is an inappropriate method of dispute resolution for the situation. . . . The very nature of an abusive relationship makes a fair, safe, or mutually acceptable settlement an impossibility."). Maxwell relies on findings by the Academy of Family Mediators and the Association of Family and Conciliation Courts, 1995, the American Bar Association Family Law Section Task Force, 1997, and the American Arbitration Association, 1994. For a discussion of the power difference between battered women and their abusers, see generally JONES, *supra* note 1, at 129-66 (examining why battered women "do not leave"); CAMPBELL, *supra* note 34, at 104-09 (examining men, intimacy, and control); LENORE WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42-45 (1985). See also Fischer et al., *supra* note 65, at 2171-74. Although the battered women and alleged batterers whom we represent tend to both be impoverished—so that the balance of economic power is relatively equal—the overall balance of power within the relationship is not. Fear can be terribly disempowering. See *id.* See also ANNA QUINDLEN, *BLACK AND BLUE* (1997) (depicting the terrified flight of a battered woman from her abusive husband). In Anna Quindlen's vivid portrait of domestic abuse, the central character is an educated woman who, as a registered nurse, makes more money than her police officer husband. See *id.* Still, the economic and social equality between the two means nothing in the face of the husband's rage and violence. See *id.* There is no question in the context of criminal prosecution that the government has enormous power in comparison to an individual accused. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 61-82 (1993) (examining the "mechanics of power" in the creation of the American legal system after the Revolution). As Professor Friedman notes, "about half the text of the Bill of Rights . . . is concerned with criminal justice. . . . The nightmare image was King George III, a despot sitting on a faraway throne. . . . On these shores, a castle wall of law would guard citizens from abuse, and prevent the central state from oppressing its subjects." *Id.* at 72.

68. For both battered women and criminal defendants, the stakes might well be a matter of life or death. See, e.g., JONES, *supra* note 1, at 82; Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (discussing the pervasiveness of incompetent representation of indigent defendants in capital cases). Or, at the very least, there is loss of liberty and dignity. See JONES, *supra* note 1, at 87-100 (describing the physical injury, isolation, and degradation experienced by battered women); WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* (1992) (depicting the physical injury, isolation, and degradation of prison life); see also Linda Kelly, *Republican Mothers, Bastards' Fathers, and Good Victims: Discard-*

advocacy. For these clients, the vigorous assertion of legal rights is the best means of self-preservation against a fierce adversary in a hostile institutional setting.<sup>69</sup> Even critics of “binary,” winner-take-all advocacy<sup>70</sup> concede that spirited adversarial advocacy is needed in these circumstances.<sup>71</sup>

Moreover, informality has seldom been helpful to the poor or powerless.<sup>72</sup> Informal settings, in which subordinated people have

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*ing Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 584 (2000) (noting that under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, domestic violence offenders can be deported for either domestic violence convictions or for violating the terms of a civil protection order).

69. The various procedural safeguards that exist in the formal adversarial system often do not exist in a mediation setting. For example, in mediation, an alleged victim of domestic violence may divulge information that could be used against her without regard to the right against self-incrimination. An uncounseled alleged perpetrator may do the same. See Grillo, *supra* note 65, at 1597; Maxwell, *supra* note 67, at 348; see also Grillo, *supra* note 65, at 1560 (stating that “[t]he informal law of the mediation setting requires that discussion of principles, blame, and rights, as these terms are used in the adversarial context, be deemphasized or avoided.”). As one commentator has noted, “In no other context is it even suggested that the victim of a violent crime sit down with the perpetrator and be forced to listen to ‘his side of the story.’” Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 875 (1999).

70. See Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 65, at 2672; see also Menkel-Meadow, *The Lawyer as Problem Solver*, *supra* note 62, at 797 (stating that the “adversary conception of lawyering assumes that the other sides’ needs and wants will necessarily be competitive with ours, instead of complementary, and seeks to ‘defeat’ the other side, rather than look for ways to accomplish solutions which are enduring because they satisfy the needs of both (or all) parties”). For battered women and criminal defendants, there is often no “complementary” relationship with the opposing party. The battered woman who has sought counsel is generally not terribly interested in meeting the “needs” of her abuser. Nor does the accused want to meet the needs of the government—unless there is some clear advantage to doing so. See generally Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999) (examining the growing reliance on cooperator testimony in federal criminal court).

71. See Menkel-Meadow, *The Lawyer as Problem Solver*, *supra* note 62, at 788 n.17 (“The adversary system may be most appropriate in those actual clashes or controversies of principles, rights, or facts where there are only ‘two’ sides, such as criminal prosecution as currently conceived; vindication of some, but not all, constitutional or other kinds of rights; or conflicts of authority or principle that require resolution for action to be taken.”). *But see id.* (“However . . . in my view, even many of these obvious ‘adversarial’ issues could productively profit from a ‘third way’ of either substantive resolution or process.”).

72. See Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605, 613 (1999) (contending that informality disempowers poor clients by forcing them into a position of “supplicants . . . granted only the dignity that the targets of their supplication choose to extend”); see also Byrna Bogoch, *Disclosure Dilemmas and Courtroom*

to rely to some degree on the understanding or generosity of those with power instead of being able to invoke rights, tend to replicate power imbalances.<sup>73</sup>

Our strong preference for formal, adversarial process—indeed, our demand for it—suggests what one commentator has mocked as “litigation romanticism.”<sup>74</sup> But, we are not naive romantics about litigation. Lawyering cannot fix all the problems associated with poverty and inequality,<sup>75</sup> and litigation is certainly no panacea.<sup>76</sup> Sometimes we lose.<sup>77</sup> However, no matter the out-

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*Control: The Talk of Trial Judges*, 25 LAW & SOC. INQUIRY 227, 243 (2000) (suggesting that power is obscured when legal discourse is informal).

73. See Margulies, *supra* note 72; Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 85 (1996); see also Fischer et al., *supra* note 65, at 2153 (citing an empirical study that found that battered women were more likely to be abused after separation if they went through mediation instead of a formal adversarial process in which they were represented by counsel).

74. See Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172–73 (1995).

75. See SAUL ALINSKY, REVEILLE FOR RADICALS 14 (Vintage 1969) (1946) (stating that “the radical has the job of organizing people so that they will have the power and opportunity to best meet each unforeseeable future crisis as they move ahead to realize those values of equality, justice, freedom”); SANFORD D. HORWITT, LET THEM CALL ME REBEL: SAUL ALINSKY—HIS LIFE AND LEGACY (1989) (chronicling the life of Saul Alinsky, social justice activist and grass-roots organizer); see also Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970) (stating that “[i]f all the lawyers in the country worked full time, they could not deal with even the articulated legal problems of the poor. . . . In this setting the object of practicing poverty law must be to organize poor people, rather than to solve their legal problems.”).

76. See Barnhizer, *supra* note 5, at 407. “The adversary system is many things—including preserver of power and privilege, occasional righter of wrongs, a mechanism through which we can pretend that justice is done, a callous processor of people who have offended the law, a pressure release valve, and a resolver of disputes through the application of latent societal force.” *Id.* For a discussion of litigation on behalf of individual poor people as opposed to other strategies, see JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION (1982) (discussing the perceived dichotomy between representing individual poor people and engaging in systemic legal work); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1537 (1995) (arguing that many legal services lawyers accept the dichotomy of “service” versus “impact” approaches to poverty lawyering). For a masterful depiction of the complexities and frustrations of class action litigation by the weak against the mighty, see JONATHAN HARR, A CIVIL ACTION (1995) (recounting the efforts of a working-class community badly harmed by chemical dumping to hold corporate polluters accountable).

77. See HARR, *supra* note 76. This seems to happen more and more frequently in criminal defense—especially in some settings. See Associated Press, *Federal Crime Data Show a High Conviction Rate*, N.Y. TIMES, June 1, 2000, at A21 (reporting that eighty-seven percent of defendants charged in federal court were convicted in 1998, and seventy-one percent of those convicted were sentenced to prison).

come, there is value in aggressive advocacy on behalf of an underdog—in “going to the mat”<sup>78</sup>—for both the individual client and society.<sup>79</sup>

Lawyers for the abused and the accused believe in formal legal process for our clients, and in the fundamental right to due process of law.<sup>80</sup> Lawyers for the abused and the accused are vigilant about our clients’ procedural rights, because the less formal the process the likelier it is our clients will be disadvantaged.<sup>81</sup> We also believe that a formal, rights-based system enhances the dignity and autonomy of our clients.<sup>82</sup>

We have both witnessed poor people—our clients and others—at the mercy of informal, slapdash, perfunctory process. We have often seen—and sometimes exploited—backroom conferences that resolve matters based on expediency over fairness. We deplore the trend away from procedural rights, such as the call for nonunanimous jury verdicts,<sup>83</sup> smaller juries,<sup>84</sup> restrictions on the

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78. See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000).

79. See, e.g., Barnhizer, *supra* note 5, at 450 (“Although they are in an impossible situation, responsible criminal defense lawyers have my eternal respect. They are on the front lines of the conflict between state power, community indignation, and ensuring governmental power is held to some standard of accountability.”). Lawyers for battered women ensure the same sort of accountability from police, prosecutors, and sometimes even batterers. See JONES, *supra* note 1, at 219–20 (noting the important role of lawyers for battered women as a check on the system).

80. See generally *Goldberg v. Kelly*, 397 U.S. 254, 264–66 (1970) (requiring notice and an evidentiary hearing before welfare benefits could be terminated); *Boddie v. Connecticut*, 401 U.S. 371, 380–83 (1971) (striking down filing fees for indigents seeking divorce as a violation of due process); *In re Gault*, 387 U.S. 1, 30–31 (1967) (affording full procedural rights to juvenile in adjudicatory hearings); *In re Winship*, 397 U.S. 358, 368–70 (1970) (requiring proof beyond a reasonable doubt in juvenile proceedings).

81. Consider, for example, individuals on probation or parole—most of whom do not have counsel or clout. Prior to the early 1970s, probation and parole officers could basically do as they wished when they believed their supervisees had misbehaved. See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (holding that due process requires that a state provide basic rights of fair treatment when revoking parole—including written notice of the claimed violations, disclosure of evidence against the parolee, opportunity to be heard and to present witnesses and evidence, right to confront and cross-examine adverse witnesses, a neutral hearing body, and a written statement by the fact finders as to the reasons for its decision); *Gagnon v. Scarpelli*, 411 U.S. 778, 782–83, 790 (1973) (extending due process rights to revocation of probation).

82. See MONROE FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* (1990).

83. See *Johnson v. Louisiana*, 406 U.S. 356, 362–63 (1972) (upholding Louisiana statute permitting a nine-to-three verdict in a criminal case); *Apodaca v. Oregon*, 406 U.S. 404,



right to a jury generally,<sup>85</sup> and the trend toward resolving some civil matters in a non-evidentiary forum.<sup>86</sup>

Lawyers for the abused and the accused believe in the cardinal importance of access to justice, and of lawyers in ensuring access to justice.<sup>87</sup> We believe in *lawyers*.<sup>88</sup> We believe that without

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413-14 (1972) (upholding a ten-to-two verdict). However, the unanimity requirement still exists in federal criminal trials. See *Johnson*, 406 U.S. at 369 (Powell, J., concurring) ("Unanimity is one of the indispensable features of the federal jury trial"). Although only two states permit nonunanimous verdicts in criminal cases, there is a recurring call to expand this practice to other states. See, e.g., Jeffrey Rosen, *After "One Angry Woman,"* 1998 U. CHI. LEGAL F. 179, 193-95 (reiterating his tentative endorsement of nonunanimous verdicts as a reform for instances where jury holdouts have "unreasonable doubts"). The call generally picks up steam after a controversial verdict. See Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime and the Law*, 111 HARV. L. REV. 1270, 1283 (1998) (book review) (pointing to California legislators' and prosecutors' efforts to allow nonunanimous verdicts in the aftermath of the O.J. Simpson case).

84. See *Williams v. Florida*, 399 U.S. 78, 102 (1970) (holding that a jury of six persons in a non-capital felony trial is constitutional); but see *Ballew v. Georgia*, 435 U.S. 223, 239-44 (1978) (rejecting a five-person jury on the ground that a jury smaller than six persons would hinder meaningful deliberation and diminish minority representation); *Burch v. Louisiana*, 441 U.S. 130, 139 (1979) (striking down a five-to-one jury verdict).

85. See *Lewis v. United States*, 518 U.S. 322, 329-30 (1996) (holding that a criminal defendant may be convicted of innumerable petty offenses in one proceeding and sentenced to any number of years' imprisonment without a jury trial). In 1995, the District of Columbia reduced the maximum sentence in most misdemeanors to 180 days, so that there are almost no jury trials for misdemeanors. See D.C. CODE ANN. § 16-705 (1998) (limiting the right to a jury to cases punishable by more than 180 days); *Burgess v. United States*, 681 A.2d 1090, 1094-95 (1996) (finding that defendant is not entitled to trial by jury on misdemeanor assault and destruction of property charges in view of statutory amendments).

86. For example, in family court in Massachusetts, serious substantive issues such as custody, visitation, and even allegations of child abuse are often addressed in motion hearings, which are considered non-evidentiary. In the District of Columbia, especially before some trial commissioners, it is hard to characterize proceedings relating to civil protection orders as formal legal proceedings at all. Often neither petitioners nor respondents may have their "day in court."

87. See generally *Lewis*, *supra* note 24 (discussing the importance of counsel to indigent criminal defendants); see also *Powell v. Alabama*, 287 U.S. 45, 58-62 (1932) (holding there is a right to counsel in capital offenses); *Gideon v. Wainwright*, 372 U.S. 335, 342-47 (1963) (holding there is a right to counsel in criminal proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 36-38 (1972) (holding there is a right to counsel for criminal defendants facing loss of liberty even if charged with a petty offense). For battered women in civil court, as for the accused in criminal court, procedural due process would have little effect if it did not include the right to counsel.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to pre-

lawyers, our clients are effectively locked out of the adversary system, they have no means of enforcing important procedural safeguards, and they have no access to justice.<sup>89</sup>

It has become increasingly clear that, just as lawyers are vital to access to justice for the poor,<sup>90</sup> lawyers are essential to battered women obtaining meaningful access to the legal remedies available to them.<sup>91</sup> For many victims of domestic violence, the right to be *heard* requires a lawyer.<sup>92</sup>

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pare his defense. . . . He requires the *guiding hand of counsel at every step in the proceedings.*

*Powell*, 287 U.S. at 68–69 (emphasis added).

88. Of course, we recognize that nonlawyers also play an important role in pursuing our clients' interests, including legal workers, investigators, social workers, psychologists, and psychiatrists. However, the use of nonlawyers as a means of furthering access to justice is a complicated and not always positive trend. See generally Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241 (1999).

89. For the importance of counsel to the poor in civil court, see Coleman H. Casey & Stewart G. Rosenblum, *A First Amendment Right of Access to the Courts for Indigents*, 82 *YALE L.J.* 1055 (1973); Thomas Grey, *The Indigent's Right to Counsel in Civil Cases*, 76 *YALE L.J.* 545 (1967) (discussing the indigent's right to counsel). See generally BALL, *supra* note 55 (noting the importance of lawyers in the struggle for justice).

There is a powerful courtroom scene in the movie *Philadelphia* (TriStar Pictures 1993), in which Tom Hanks, playing a lawyer who has been fired from his prestigious white shoe law firm because he has AIDS, testifies about his feelings about law practice. "I love the law," he says. "I know the law. I excel in practicing. . . . What I love most about the law is that every now and again—not often, but occasionally—you get to be a part of justice being done. That really is quite a thrill when that happens." Lawyers for the abused and the accused do not love the *law*, and we certainly do not love all *lawyers*, but we *believe in lawyers*. We believe in lawyers who fight hard—and with heart—for those in need. Although our notion of "justice" may vary from client to client, lawyers for the abused and the accused find it thrilling to help our clients obtain access to justice.

90. See generally REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919).

91. See JONES, *supra* note 1, at 219–20 ("If women are to use the legal remedies that now exist on the books, they must have legal counsel. Without lawyers, women are less likely to get orders of protection, and the orders they get are less likely to contain all the provisions they're entitled to."); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 1059 (stating that "without the assistance of her attorney, the victim is terrified, unclear of her legal rights, and highly susceptible to the batterer's influence and control."); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 *GONZ. L. REV.* 329 (1999); Elizabeth M. Schneider, *The Violence of Privacy*, 23 *CONN. L. REV.* 973, 991 (1991) (noting "the lack of skilled legal representation" for battered women).

92. See Martin, *supra* note 91, at 338. Lawyers have always played a vital role in the battered women's movement. See generally SCHECTER, *supra* note 10; cf. JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL*

The connection between effective lawyers and access to justice for the accused has long been recognized.<sup>93</sup> The courts alone—no matter the jurisdiction, no matter the law at issue, no matter how qualified or well-intentioned the judge or prosecutor—can never ensure justice. Able lawyers with adequate resources are an essential prerequisite to criminal justice.<sup>94</sup>

The sad truth is that “able lawyers with adequate resources” does not reflect the reality of criminal practice in this country.<sup>95</sup> As time has gone by, the promise of *Gideon v. Wainwright*,<sup>96</sup> which ensured the right to counsel in criminal cases, has become increasingly empty.<sup>97</sup> This is so in the most serious, high profile cases,<sup>98</sup> as well as in more mundane ones.<sup>99</sup>

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RIGHTS REVOLUTION (1994) (chronicling the work of civil rights lawyers at the NAACP Legal Defense Fund in the 1960s and 1970s).

93. See ATTORNEY FOR THE DAMNED, *supra* note 37, at 12 (quoting Clarence Darrow’s remarks to the inmates of the Cook County Jail in 1902: “If the courts were organized to promote justice, the people would elect somebody to defend all these criminals, somebody as smart as the prosecutor—and give him as many detectives and as many assistants to help, and pay as much money to defend you as to prosecute you.”).

94. See KUNEN, *supra* note 10, at 265.

The courts cannot reduce crime or establish justice. They are just a sorting mechanism between the front end of the system—the police—and the back end—the prisons. To the extent that the public supports adequate judicial resources and effective representation for the accused, the sorting can be done in a just and equitable manner.

*Id.*

95. See ALAN DERSHOWITZ, THE BEST DEFENSE 410 (1982) (referring to the “world full of underzealous, lazy, and incompetent defense lawyers”); Babcock, *supra* note 53, at 182 (referring to “[o]verburdened defense lawyers [who], without investigation or preparation, arrange for the going rates on cases, and trade one off against the other”); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993) (referring to the “world of lawyers for whom . . . advocacy is rare and defense investigation virtually nonexistent; a world where lawyers spend minutes, rather than hours, with their clients”). A *New York Times* editorial on the thirtieth anniversary of *Gideon v. Wainwright* described the reality of indigent criminal defense: “In courts across the land, judges must beg the private bar to step up and take on criminal cases for which many lawyers are poorly equipped and grossly undercompensated. Public-defender systems are soft targets for budget cutters, state and Federal. Congress, which must pay for counsel appointed in the Federal courts, is perennially guilty of late and inadequate funding.” Editorial, *Gideon’s Promise, Still Unkept*, N.Y. TIMES, Mar. 18, 1993, at A22.

96. 372 U.S. 335 (1963).

97. See Anthony Lewis, *A Muted Trumpet*, N.Y. TIMES, Aug. 16, 1991, at A23.

[I]n the *Gideon* case, the Supreme Court held that every poor person charged with a serious crime was constitutionally entitled to a lawyer provided by the state. The Court later extended that rule to all criminal trials.

Lawyers for the abused and lawyers for the accused share a belief in the fundamental importance of available, adequately funded, well-trained lawyers. We have seen too many people caught up in the court system suffer from the alternative.<sup>100</sup>

Finally, lawyers for the abused and accused are committed to *holding the government to the fire* to do what they should as a matter of law and justice. Of course, this is the basic function of a criminal defense lawyer: to put the government to its burden of

The *Gideon* decision is a solid precedent, hailed from all corners of legal philosophy. The current Supreme Court, even while narrowing other rights of criminal defendants, has described the right to counsel as fundamental.

There is just one trouble. In the real world, the promise of *Gideon* is not being kept. Poor men and women in large numbers go to trial in this country with lawyers who are so incompetent, drunk, inexperienced or uninterested that the defendant's right to counsel is a bad joke.

Lewis, *supra*, at A23. See also Nat Hentoff, *A Disgrace to the Law*, WASH. POST, Jan. 23, 1993, at A19 (writing that on the thirtieth anniversary of *Gideon v. Wainwright* the system of indigent representation is by and large a failure).

98. See generally Bright, *supra* note 68 (discussing the pervasiveness of deficient representation of indigent defendants in capital cases).

99. See Luban, *supra* note 95, at 1762 (noting the tendency in indigent criminal defense toward "indifferent mass-processing of interchangeable defendants"); see also Christopher Johns, "Slaughterhouse Justice": *Crushing Workloads, Underfunded Public Defenders Shortchange Indigent Clients*, ARIZ. REPUBLIC, May 23, 1993, at C1 (documenting the underfunding of indigent criminal defense across the nation and in the state of Arizona thirty years after *Gideon*); Ruth Marcus, *Public Defender Systems Tired by Budget Problems*, WASH. POST, Mar. 8, 1992, at A1 (reporting about overburdened and underfunded public defenders in New Orleans).

100. See generally Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment," If You're Trying to Put That Lawyer's Client in Jail?*, 69 *FORDHAM L. REV.* 997 (2000) (vividly describing an incompetent, ineffectual defense lawyer). Professor Merton offers up a memorable portrait of a bad lawyer, in the best tradition of Charles Dickens—or perhaps Tom Wolfe:

All along, he had been leaning against a wall, scribbling with a pencil on a stack of files. He had no briefcase or satchel or backpack to hold a handy CPL or Penal Law. He was, to put it politely, unkempt: flushed, perspiring, uncombed, unshaven, shirt-tails hanging out of his trousers. My first thought was he must be unusually dedicated to come to court when he was so obviously sick with the flu.

As it developed, that didn't seem to be the problem. . . .

"Okay, here it is—Sanchez, yeah, another car thief. Probably young, though, you know? Maybe not such a bad kid—maybe he does it to support his dear mother. (Head thrown back, a gleeful guffaw over his own wit.) What are you looking for? These guys don't care if they get a conviction as long as there's no jail. How 'bout a fine? He can always steal another car to pay it." (Another raucous guffaw that descended into a giggle. Then he started working on something in his ear.)

*Id.* at 1007–08.

proof. Although lawyers for the abused may have an interest in maintaining a kind of partnership with prosecuting agencies, this is not always possible. Lawyers for the abused, like those for the accused, have an ethical responsibility to pursue their *clients' interests*, which is not always consistent with the government's interest.<sup>101</sup> Like lawyers for the accused, lawyers for the abused must sometimes push and prod prosecutors to do the right thing.

#### IV. TEACHING ABOUT JUSTICE

Much has been written about the MacCrate Report's<sup>102</sup> exhortation that lawyers "strive to promote justice, fairness and morality,"<sup>103</sup> and the role of law schools in carrying out this charge.<sup>104</sup>

101. See generally FREEDMAN, *supra* note 5, at 65–86 (examining the notion of zealous representation); see also MODEL RULES OF PROF'L CONDUCT Preamble [2] (1999) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Id.* R 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation."); ABA MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1988) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); *id.* DR 7–101 ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law.").

102. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) (1992) (hereinafter MacCrate Report).

103. The MacCrate Report specifically states:

*Striving to Promote Justice, Fairness, and Morality*

As a member of a profession that bears "special responsibili[ties] for the quality of justice," a lawyer should be committed to the values of:

2.1 *Promoting Justice, Fairness, and Morality in One's Own Daily Practice*, including:

(a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client . . . ;

(2) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society . . . ;

(3) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;

2.2 *Contributing to the Profession's Fulfillment of Its Responsibilities to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them*;

2.3 *Contributing to the Profession's Fulfillment of Its Responsibilities to Enhance the Capacity of Law and Legal Institutions to Do Justice.*

*Id.* at 213.

The MacCrate Report acknowledges that law teachers, both clinical and nonclinical, play a critical role in the development of law students who care about doing good and not just doing well.<sup>105</sup> They do so by teaching about issues relating to justice, fairness, and morality in the classroom and clinic, and by modeling their own commitment to these values in their law practice.<sup>106</sup>

Law school clinics provide the best opportunity to examine our system of justice from the perspective of those with little power but much at stake.<sup>107</sup> In a clinical setting, students routinely experience the chasm between the idea of justice and the reality of justice.<sup>108</sup> The question of justice occupies a central place in clinical work and pedagogy.<sup>109</sup>

104. For a trenchant example, see Jane H. Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1 (1997); see generally Robert J. Condlin, *Learning From Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education,* 3 CLINICAL L. REV. 337 (1997); John C. Dubin, *Clinical Design for Social Justice Imperatives,* 51 SMU L. REV. 1461 (1998); Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice,* 74 TUL. L. REV. 235 (1999).

105. See MacCrate Report, *supra* note 102.

106. See Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory,* 43 HASTINGS L.J. 717 (1992); Stephen Wizner & Dennis Curtis, *"Here's What We Do": Some Notes About Clinical Legal Education,* 29 CLEV. ST. L. REV. 673, 676 (1980). It should be noted that law teachers may also teach about justice, fairness, and morality in their scholarship. See Peter Joy, *Clinical Scholarship: Improving the Practice of Law,* 2 CLINICAL L. REV. 385 (1996).

107. See Aiken, *supra* note 104, at 8 n.23 (stating that "[c]linical legal education is one place in the law school curriculum where those skills [of recognizing privilege and exercising judgment] are learned"); see also Norman Redlich, *Challenging Injustice: A Dedication to Bob McKay,* 40 CLEV. ST. L. REV. 347, 350 (1992) (noting that "idealistic young men and women [are] leaving law school, intently anxious to deal with problems of poverty, discrimination, homelessness, or an inadequate education system, and [do] not possess the widest possible range of tools to make one's legal education effective").

We are referring here to "live client" clinics and not clinical programs that rely on simulations. We believe that the presence of a client gives students the richest opportunity to learn about the quality of justice in this country for the poor, and the day-to-day indignities, inequities, and unfairness that poor people encounter. See Aiken, *supra* note 104, at 30-46 (discussing teaching about justice in a general poverty clinic representing people with HIV); see also Fernando M. Pinguelo, *The Struggle Between Legal Theory and Practice: One Law Student's Effort to Maintain the "Proper" Balance,* BYU EDUC. & L.J. 173 (1998) (describing a clinical law student recounting experience working with indigent clients as a process from "romantic or utilitarian" theories to the practical realities of lawyering on behalf of real clients).

108. See David Hall, *Giving Birth to a Racially Just Society in the 21st Century,* 21 U. ARK. LITTLE ROCK L. REV. 927, 931 (1999) ("If lawyers are not trained with a deep appreciation for the value and calling of social justice, then they will only perpetuate the racial sins of

As lawyers and teachers, we share the concern expressed by Jane Aiken<sup>110</sup> in her thoughtful article, *Striving to Teach "Justice, Fairness, and Morality,"*<sup>111</sup> that law schools have failed to teach about the "social consequences of a lawyer's acts and decisions not to act."<sup>112</sup> Although our main interest is to teach our students to be excellent lawyers, representing clients with utmost devotion and zeal,<sup>113</sup> we have another interest as well. We would like to instill a *sense of justice* in our students—an ability to regard the system not only from their client's perspective, but also from the perspective of justice. As Professor Aiken notes, to do less may serve to perpetuate *injustice*:

If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and, at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.<sup>114</sup>

The first step is to teach students to be zealous and devoted lawyers on behalf of poor, uncelebrated clients: We believe that this kind of lawyering furthers justice.<sup>115</sup> But, in the end, we rec-

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the 20th century."); Karen Tokarz, *Access to Justice: The Social Responsibility of Lawyers*, 1 WASH. U. J. URB. & CONTEMP. L. 1, 8 (1999) (noting the importance of "hands-on exposure to justice issues through clinical education").

109. See Aiken, *supra* note 104, at 3 (noting that "[e]verything we do as law teachers suggests something about justice"); see also David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285, 294 (1992) (arguing that justice applied is a political phenomenon); see generally Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1991) (discussing the central role of justice in clinical legal education); Phyllis Goldfarb, *The Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1662 (1991) (noting that, in the course of clinical work, students examine their responsibility to clients, institutions, and society).

110. Interestingly, Professor Aiken is currently directing a domestic violence clinic at Washington University in St. Louis but has also done criminal defense work.

111. See Aiken, *supra* note 104.

112. *Id.* at 6.

113. See ABA CANONS OF PROFESSIONAL ETHICS 15 (1908) (referring to the lawyer's obligation to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability").

114. Aiken, *supra* note 104, at 6 n.10.

115. See generally SMITH, *supra* note 90; see also CLARENCE DARROW, *THE STORY OF MY LIFE* 301-11 (1932) (discussing his defense of Ossian Sweet, a black doctor accused of mur-

ognize that this is not enough. Although we want students and young lawyers to fight hard for—and believe in—their side, we also want them to see beyond their side when it comes to justice.

There is some natural resistance. How can teachers who have their hands full with the central challenge of clinical legal education—simultaneously providing students with high quality education and clients with high quality representation—take on yet another mission? How can students who have their hands full with their new role—and who ought to be chiefly absorbed in the pursuit of their clients' interests—contemplate *larger* issues?

Of course, the concept of justice—individual justice, social justice, criminal justice—is complicated and elusive.<sup>116</sup> It becomes even more so when a lawyer or student lawyer takes on a particular case with the requisite passion.<sup>117</sup> Interestingly, students in domestic violence clinics and criminal defense clinics often start out with very different perceptions of the justness of their cause.

To students representing victims of domestic violence, the question of justice can appear crystal clear—especially in the be-

der when a mob tried to drive him and his family out of a white neighborhood in Detroit); IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 476–83 (1941) (discussing the *Sweet* case). Darrow tried the *Sweet* case before a jury of all white men. His argument makes plain the enormity of a small murder case:

The Sweets spent their first night in their new home afraid to go to bed. . . . The next night they spent in jail. Now the state wants them to spend the rest of their lives in the penitentiary. There are persons in the North and the South who say a black man is inferior to the white and should be controlled by the whites. There are those who recognize his rights and say he should enjoy them. To me this case is a cross section of human history. It involves the future and the hope of some of us that the future shall be better than the past.

STONE, *supra*, at 483. The jury was out for three days and nights before declaring themselves hung. *See id.*

116. *See* Martha Minow, *Introduction: Seeking Justice*, in *OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA* 3–4 (Susan R. Shreve & Porter Shreve eds., 1997) [hereinafter Minow, *Seeking Justice*] (noting how hard it is to define justice or come to a consensus about the goals and values of justice). Professor Minow concludes: “Perhaps it is easier to know what injustice is.” *Id.* at 4.

117. In the Georgetown Criminal Justice Clinic, we refer to the increasingly passionate belief in one’s case as trial approaches as “trial psychosis.” We call this same sort of wholesale belief in one’s sentencing advocacy “sentencing psychosis.” At these moments of “psychosis”—when the lawyer is so convinced of the rightness of his or her position that any other view is inconceivable—it is nearly impossible to think about abstract notions of justice.



ginning.<sup>118</sup> These students are squarely on the side of the weak and downtrodden against the mighty and tyrannical; they are soldiers in the battle against the ultimate expression of gender oppression.<sup>119</sup> They have the righteousness of poverty lawyers on a moral and political crusade—with a heightened sense of urgency. Their clients' very lives are at stake. Justice is whatever it takes for their clients to prevail—even if it means that others will go to jail.

To students representing alleged perpetrators of domestic violence and other alleged criminals, the question of justice is often more difficult.<sup>120</sup> Many students come to criminal defense work with reservations about the “rightness” of representing clients accused of domestic violence and mixed feelings about whether they will be able to represent these clients with the requisite zeal.<sup>121</sup> One of the initial challenges for clinical teachers in a criminal defense clinic is working through these issues.<sup>122</sup>

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118. We note that students evolve throughout the course of their clinical experience, and their ideas about domestic violence—and crime and violence generally—evolve as well. It has been our experience that students in both domestic violence and criminal defense clinics come to the work with a variety of myths and misperceptions about victims and perpetrators and come away from the work with a more textured understanding. For example, students in domestic violence clinics are often surprised to find that they *do not always like* their clients, or the choices they make. Students in criminal defense clinics are often surprised to find that they *often like* their clients and feel less judgmental than they thought they would about the choices their clients make.

119. See Cahn & Meier, *supra* note 21, at 344 (“In feminist litigation . . . a lawyer often chooses to represent a client precisely because the lawyer affirmatively endorses that client’s goals.”).

120. See Minow, *Seeking Justice*, *supra* note 116, at 1–13 (“If the system calls for adversary advocacy, lawyers may justify zealous work on behalf of venal, guilty clients. If those clients prevail, justice in the particular case may be defeated, but the system itself is protected.”).

121. In a misdemeanor clinic, domestic violence cases present the biggest personal and/or ideological challenge for many students. During the week-long orientation program for students in the Georgetown Criminal Justice Clinic, there is a session in which students voice questions and concerns about doing criminal defense work. Every year, students say they are worried about representing alleged sex offenders, perpetrators of domestic violence, and perpetrators of hate crimes. See Abbe Smith, *When Ideology and Duty Conflict*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 19–20 (Rodney J. Uphoff ed., 1995) (noting that many defenders and prospective defenders are ambivalent about defending “rapists” and “racists,” and acknowledging that “[t]hese are the hard cases”).

122. See Phyllis Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY’S L.J. 981, 981 (1998) (exploring the relationship between being a feminist and representing men

In order to do the work, criminal defense students must learn that, as a matter of professional ethics—and day-to-day reality—they have “nothing to do with justice.”<sup>123</sup> Sometimes, they feel bad about this.<sup>124</sup> Then, suddenly, after a case or two, the student does

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on death row). Professor Crocker talks about reconciling feelings of compassion for the victim and for the perpetrator in the context of domestic violence:

When a man kills a woman as part of a history of abuse, we are all outraged and saddened by her death. The woman's death is tragic on a personal level, but it also speaks directly to hearts of feminists on a political level because it exemplifies a broader reality about the violence that women suffer in our culture. A woman's death at the hands of her husband confirms our fears about the full extent of harm women face from men who beat them and it demonstrates the legal and social service systems' inability to deal effectively with the persistent problem of abuse until it is too late.

These same impulses resonate in the hearts and minds of those of us who represent the man who killed the woman. We understand the personal anguish of the victim's family, but we also see the individual tragedy of the man who committed the murder.

Crocker, *supra*, at 1001. See also Cookie Ridolfi, *Statement on Representing Rape Defendants*, in LEGAL ETHICS 304–05 (Deborah L. Rhode & David Luban eds., 1995) (discussing her “growing discomfort” representing defendants accused of rape); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.–C.L. L. REV. 1, 45–50 (1993) (examining how defenders represent people who “hurt other people”).

123. See James Mills, *I Have Nothing to Do with Justice*, LIFE, Mar. 12, 1991, at 56 (recounting the life and work of Martin Erdmann, former Attorney-in-Chief of the Criminal Defense Division of the Legal Aid Society of the City of New York); see also Merton, *supra* note 100, at 998 n.4 (describing Erdmann as a “redoubtable character”). For the defense lawyer's obligation to pursue the client's interest and not justice, see ABA STANDARDS ON CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4–1.2(b) (providing that “[t]he basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation”); see also Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 3 (1951) (stating that “[t]he lawyer's official duty, required of him indeed by the court, is to devote himself to the client”). As Curtis notes, the better a lawyer,

the worse a citizen. . . . A lawyer . . . has lower standards of conduct toward outsiders than he has toward his clients or his beneficiaries or his patrons against the outsiders. He is required to treat outsiders as if they were barbarians and enemies.

The more good faith and devotion the lawyer owes to his client, the less he owes to others. . . .

*Id.* at 5–6.

124. See Smith, *supra* note 122, at 49 (quoting from a student journal: “How can I communicate that I'm on my client's side and still retain my sense of humanity and compassion. . . . [D]o I park my humanity at the courthouse door?”). The student was wrestling with the morality of defending guilty violent criminals who “will likely go out tomorrow and do something equally bad.” *Id.* at 48. The student had just seen the film *Criminal Justice* (Home Box Office 1990), a powerful depiction of the aftermath of a violent urban crime. In the film, a lawyer whose client is accused of slashing a woman across the face in the course of a robbery, requiring sixty-three stitches and causing permanent disfigurement, tells his client that he only cares about the client and doesn't give a f\*\*\* about [the victim]. *Id.* at 49.

an about-face. Whether prompted by the student getting to know a flesh-and-blood client, or the student embracing professional role, the student no longer has any doubts about his or her cause. The student will do anything and everything within the bounds of the law to get the client off.<sup>125</sup> For the student, the best result, the right result, the *just* result is getting the client out of the clutches of the system even if it means bringing the complainant down.

On the one hand, the students' strong commitment to their clients' cause is a good thing. We applaud it. This is what clinical teachers try hard to instill in students. In order for poor people to have meaningful access to justice, they must be represented by skilled and dedicated lawyers.

On the other hand, the students' embrace of client may make it difficult for them to contemplate broader issues of justice. The stronger the attachment, the greater the righteousness, the harder it is to notice anything else. It sometimes seems that students simply cannot do both; they cannot take on a client's cause body and soul, while keeping an eye on justice, fairness, and equality.

We believe this is a challenge that teachers in both settings—civil clinics representing battered women and criminal defense clinics—ought to take on. Although students who choose zeal on behalf of a client over a broader commitment to justice are doing exactly what they should for the client<sup>126</sup>—and may be comporting with the clinic's goals and standards<sup>127</sup>—the reality is that few of these students are going to continue to practice law on be-

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The student was shocked by this, and wondered about the role of criminal defenders: "Is it true that as Jesse Williams' lawyer, I can't care about Denise Moore's cuts and her 63 stitches? It kind of makes sense that I shouldn't care—my job is to give [my client] legal representation, not hop on the [victim's] sympathy train. . . . But is that right?" Smith, *supra* note 122, at 49.

125. See generally Smith, *supra* note 78.

126. Of course, these students would also be comporting with ethical rules. See *supra* note 101 and accompanying text.

127. In both of the clinics in which we teach, the prevailing ethos is client-centered, zealous advocacy. This is conveyed both explicitly, through curricular materials, and implicitly in the way we relate to clients, prepare the cases, and conduct ourselves in court. We want our students to experience "moments of pride and wonderment that I was managing to function and even derive considerable satisfaction from the devotion of every molecule of my being to this enterprise." Merton, *supra* note 100, at 1048.

half of the abused or accused. Most students will go into some other type of law practice and would benefit from a broad view of justice. Moreover, we believe that even those students who pursue careers representing the abused or accused will be better lawyers and *better people* if they develop a broad, critical perspective of our legal system and are concerned about justice.<sup>128</sup>

We believe we should teach students to recognize and care about the quality of justice our clients experience, and recognize and care about the quality of justice encountered by our opponents. But, how to teach this? How might clinical teachers teach young lawyers to be both zealous and *enlightened* advocates? How might we teach students enough about justice, broadly construed, so that as the MacCrate Report directs, they will promote it in their daily lives as lawyers?

We have several ideas, which follow.

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128. At the very least, we are looking for a recognition of the complexity of justice, and an experience of lawyering that regularly includes both "bliss and agony." See Merton, *supra* note 100, at 1099. Professor Vanessa Merton, a former public defender who currently directs a prosecution clinic at Pace University offers one of the best descriptions we have seen of the moral ambiguity of lawyering for the poor accused:

As a defense lawyer . . . my [e]very reaction had provoked not just an equal and opposite reaction, but a cascade of multiple chain reactions in all different directions. Delight mingled with disgust when I bamboozled an ignorant judge or charmed a sexist one into letting out of jail a client who was undoubtedly guilty—but who just as surely did not belong in jail. Winning an acquittal brought rapture and ecstasy, only to be deflated almost immediately by the grim prognosis for my client as he emerged from jail after twenty-two months without a home, a friend, or a future that could be imagined. Near-homicidal fury possessed me when a miserable, lonely, mentally impaired man or woman accused, and generally guilty, of some petty crime was treated with casual, callous, unnecessary cruelty by police officers and court officers and corrections officers and probation officers and, not infrequently, judges and prosecutors—and other defenders. I learned that legally, there was really nothing I could do to stop the abuse, nor to puncture the lazy, uncaring, unprofessional, shallow and benighted attitudes that fostered it. That fury would quickly reverse field into a less intense but still debilitating anger when clients "got themselves" re-arrested after I had knocked myself out getting them released, or when they wanted to plead guilty but balked at accepting a short jail sentence because a diabolically clever judge was dangling five years of probation in front of them, or when they did any of a number of other self-destructive things.

*Id.* at 1047–48.

## A. Supervision

Consider the following two stories from our clinical experience:<sup>129</sup>

### A Victory for a Battered Woman

A student returns from family court, flush with victory. In court, the student did very little, but came away with everything she had sought: an abuse prevention order against her client's husband, and custody, visitation, and support orders. Although she was well-prepared for a full hearing—she had police reports and hospital records to corroborate her client's testimony of abuse, a detailed direct examination of her client demonstrating a history of long-standing physical and emotional abuse, and her client's present state of fear of her husband—all she had to do was utter a three-sentence response to the judge's query about the nature of the case and the judge granted the restraining order. After that, everything else—custody, visitation, and child support—fell into place in her client's favor. The student is exuberant. She is happy for her client, who received the protection she was seeking, and is relieved that she did not even have to testify. She is happy for herself—the whole thing was a “great experience”—and is relieved that she did not have to offer any of the documents she brought, which contained a lot of hearsay and may not have been admissible. She hardly notes that the husband, who was not represented, barely said a word during the “hearing.”

### A Victory for an Alleged Perpetrator

A student returns from an investigative trip, thrilled with the results. The student reports that she and her investigative partner managed to get a lengthy, nearly fifteen-page statement from a complainant in a domestic violence case. Even though the students introduced themselves, showed business cards, and made clear that they represented the complainant's boyfriend, the complainant allowed them into her home and into her confidence.

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129. Both of these stories are true and are far from novel. These are fairly typical experiences in civil advocacy on behalf of battered women and pretrial advocacy on behalf of criminal defendants.

The complainant gave the students a detailed account of her relationship with the accused, and about the incident which resulted in his arrest. In the course of the statement, which the complainant signed after making and initialing minor corrections, she acknowledged using illegal drugs and consuming a large quantity of alcohol on the date of the incident, having feelings of anger and jealousy over the accused's infidelity, and having told the accused that she would do anything to keep the accused away from his new girlfriend. The student reports without any apparent mixed feelings that the complainant seemed happy to talk to her—and probably would have been happy to talk to *anyone*. She seemed starved for conversation. The complainant had two small children, ages two and four, who were asleep in the next room during the interview (although the student reports that she and her partner played with the four-year-old for a couple of minutes before the child went off to bed). The accused is the father of the two-year-old. From time to time the complainant would get up and check on the kids, because they were just getting over the flu. The complainant told the students that she had barely been out of the house all week and it was nice to have some company.

It is tempting to simply congratulate the students in the above stories. Both students pursued their client's interest and achieved good results for the client. There is nothing wrong with the student deriving satisfaction from the result of the family court proceeding or the criminal investigation, and nothing wrong with the teacher sharing or encouraging that feeling of satisfaction. Depending on the student, unmitigated exuberance at victories of this sort might be a positive step in the assumption of professional role.

Still, there would be a lesson lost if the student celebrated the client victory without contemplating the broader questions concerning the other institutional players. But how to do it?

First, in contemplating the supervision session, the teacher should probably *not assume* anything about the student's experience. Many, if not most, students would feel that something complicated and disturbing happened in both stories. The teacher might best initiate this conversation in an open-ended way, asking the student what they thought about what had occurred. If the student doesn't get to the question of justice, the teacher

might want to be more direct: *What was wrong with that picture*—with the way the alleged domestic violence perpetrator was treated during the civil proceeding, or with the ease with which a damaging statement was obtained from a domestic violence complainant during a criminal investigation?

If the above approaches fail—if the students are so seeped in their adversarial role that they cannot see beyond it—an easy, familiar alternative would be to have the students consider what happened from the perspective of the opposing side. Clinicians recognize that good practice—sound strategic thinking about a case—requires developing a case theory that in some way reflects and addresses the opponent's theory. Developing “both sides” of a case is standard clinical pedagogy. Furthermore, in many cases demonizing—or ignoring—the opponent works to the client's *disadvantage*. The student representing the battered woman should contemplate what happened in court from the perspective of the alleged perpetrator, and the student representing the accused should contemplate what happened during the investigation from the perspective of the complainant.

The point is not to make students feel bad or guilty about serving their clients well. We want to *mobilize*, not paralyze them. But, we also want them to be thoughtful. To this end, there is nothing wrong with a little “shame and contrition”<sup>130</sup> if the situation merits it. There is a “teaching moment”<sup>131</sup> here that begs a discussion of the big picture. We want students to consider the vagaries of law, the unpredictability of the application of law, the arbitrary exercise of institutional authority, the question of power and powerlessness in general.

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130. See Merton, *supra* note 100, at 1050 (referring to her feeling that she and her prosecution clinic students took unfair advantage of an alleged batterer who was represented by an incompetent defense lawyer).

131. See Aiken, *supra* note 104, at 24–30 (discussing the notion of a “disorienting moment”); Fran Quigley, *Seizing the Disorienting Moment*, 2 CLINICAL L. REV. 37, 51 (1995) (coining the phrase “disorienting moment” and defining it as the instant “when the learner confronts an experience that is disorienting or . . . disturbing because the experience cannot be easily explained by reference to the learner's prior understanding—referred to in learning theory as ‘meaning schemes’—of how the world works”).

discussing similarly complex depictions of domestic violence in fiction and nonfiction.<sup>134</sup>

An alternative is to have the teacher in the domestic violence clinic conduct a session on domestic violence for the criminal defense clinic, and the criminal defense teacher conduct one on criminal defense for the domestic violence clinic. It is our feeling that it is not wise for either teacher to teach the "other side's stuff," for three reasons: first, we don't know enough about the other side to be good teachers; second, we are primarily—and rightly—concerned with teaching students to care about our own clients and to *win*; and third, there is an important lesson in seeing another teacher/lawyer who genuinely cares about the other side and voices another perspective.

## V. CONCLUSION

There may always be a certain amount of hostility between lawyers for the abused and lawyers for the accused. Given what is at stake for each of our clients, how could there not be? Still, because lawyers for the abused and accused are essentially poverty lawyers who share the same basic approach to advocacy—an approach rooted in a deep commitment to access to justice—it seems a shame for there to be such outright loathing.

In addition to having these things in common, each of us has much to offer the other. Criminal defenders owe thanks to the

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(Avalon/Fine Line 1994) (New Zealand film powerfully depicting a Maori family coping with abuse, alcoholism, and poverty); *SLEEPING WITH THE ENEMY* (20th Century Fox 1991) (depicting a battered woman who manages to flee her abusive husband, revealing how difficult it is to simply "leave"); *STRAIGHT OUT OF BROOKLYN* (Samuel Goldwyn 1991) (telling the story of a teenager's attempt to get out of his impoverished neighborhood and violent home and providing a complex portrait of his abusive father and abused mother); *WHAT'S LOVE GOT TO DO WITH IT* (Touchstone Pictures 1993) (recounting Ike Turner's abusive relationship with Tina Turner).

134. See, e.g., QUINDLEN, *supra* note 67 (portraying a woman's escape from an abusive marriage); MARY KARR, *LIAR'S CLUB* (1996) (memoir about growing up in an abusive household); DOROTHY ALISON, *BASTARD OUT OF CAROLINA* (1992) (coming-of-age novel about child abuse); Susan Glaspell, *A Jury of Her Peers*, in *THE BEST AMERICAN SHORT STORIES OF THE CENTURY 18* (John Updike ed., 1999) (depicting a battered woman who is accused of killing her husband and suggesting the many forms abuse can take and how abuse is compounded by isolation); MIKAL GILMORE, *SHOT IN THE HEART* (1994) (memoir by the brother of Gary Gilmore on the relationship between family violence and criminality).



## B. Classroom Teaching

We have several ideas about teaching about justice in the clinical classroom. Our first suggestion is that there be a joint class with students from the domestic violence clinic and the criminal defense clinic. The chief goal of such a class would be to expose students in one clinic to the viewpoint and experience of students in another. In so doing, we would hope to expose students to the perspective of the opposing party, get students to consider the professional role in the representation of the abused or accused, and get students to consider how the goal of winning might co-exist with a quest for justice.

The centerpiece of the joint class should be a “double role-play” in which a student from the domestic violence clinic, acting as a criminal defense lawyer, conducts a counseling session with an alleged perpetrator, and a student from the criminal defense clinic, acting as a civil attorney, conducts such a session with a battered woman. We believe that when the students step into the other side’s “shoes”—even in a simulated client interview in class—they will come away with a different understanding.

The reading for the class should include materials that examine or describe role assumption in lawyering.<sup>132</sup> The class might also include viewing a feature film or documentary that accurately portrays domestic violence, depicting both the victim and perpetrator as complex, multi-faceted people,<sup>133</sup> or reading and

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132. See, e.g., Abbe Smith, *On Representing a Victim of Crime*, in LAW STORIES 149 (Gary Bellow & Martha Minow eds., 1996) (recounting a defense lawyer’s representation of the victim of a brutal hate crime and her struggles with the change of sides and role). We also recommend interdisciplinary teaching materials on matters that are common to both sets of clients—e.g., the effects of witnessing or experiencing violence as children, the efficacy of treatment programs for perpetrators and victims of domestic violence, and the role of substance abuse in family violence.

133. See, e.g., THE ACCUSED (Paramount Pictures 1988) (a fictionalized account of a New Bedford, Massachusetts gang rape, focusing on the relationship between the prosecutor and victim); DEFENDING OUR LIVES (Cambridge Documentary Films 1993) (documentary about the Framingham 8, a group of women prisoners in Massachusetts who killed abusive spouses); EAST IS EAST (Assassin Films/BBC 1999) (English film depicting the alternately abusive and loving marriage of a Pakistani man and his English wife); HE GOT GAME (40 Acres & A Mule/Touchstone 1998) (Denzel Washington portraying an abusive husband who, upon being released from prison, attempts to be a father to his estranged son); LADYBIRD LADYBIRD (Channel Four/Parallax 1994) (English movie about a working-class abused woman’s fight to regain custody of her children from social services); ONCE WERE WARRIORS

battered women's movement for important insights into the cycle of family violence (useful at sentencing), and for furthering the consideration of social and individual context in crime and violence (useful at both trial and sentencing). Of course, battered women's advocates appreciate the particular skills and insights of criminal defenders whenever a battered woman assaults or kills her abusive partner and becomes the accused.

Although the chief obligation of students representing the abused and the accused is to zealously pursue their clients' interests, they ought to also consider broader questions of institutional power and social justice. Clinical teachers should do what they can to foster this consideration.

