

# Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith

Katherine R. Kruse\*

Lawyers should be more like social workers. That is the message of *Law as Social Work*, the provocative essay by Jane Aiken and Stephen Wizner (Aiken & Wizner) in the *Washington University Journal of Law & Policy* volume,<sup>1</sup> which preceded the conference on Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship, hosted by Washington University School of Law in March 2003.<sup>2</sup> Almost as if in reply, Abbe Smith's contribution to the same pre-conference volume reasserts the importance of lawyers as zealous and partisan advocates, using the realities of the criminal defense context to argue for the value of the lawyer's traditional adversarial role.<sup>3</sup>

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\* Associate Professor, William S. Boyd School of Law, University of Nevada Las Vegas. J.D. 1989, University of Wisconsin Law School; M.A. 1986, University of Wisconsin-Madison Department of Philosophy; B.A. 1984, Oberlin College. I thank my colleagues at the Thomas & Mack Legal Clinic for their helpful feedback on an earlier draft of this Article, as well as for the contribution each of them makes to the creative, thoughtful, and collaborative spirit that animates our work together. Special thanks go to my legal colleague, Annette Appell, who is light years ahead of me in thinking through the issues addressed in this Article, and my social work colleague, Ina Dorman, for her willingness to honestly and courageously confront these issues with us. I am indebted to David Tanenhaus and Marty Guggenheim for sharing their perspectives on the history of the juvenile court with me and for directing me to additional and invaluable sources. Finally, I thank the participants at the Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship Conference for all the insights, stories, challenges, and questions they brought to and shared at that event.

1. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL'Y 63 (2003).

2. The conference—which explored the practical, pedagogical, ethical, and social justice challenges and rewards of interdisciplinary teaching, practice, and scholarship—was planned in celebration of the thirtieth anniversary of Washington University School of Law's clinical education program. Karen L. Tokarz, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship: Introduction*, 11 WASH. U. J.L. & POL'Y 1, 1 (2003).

3. Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003).

The competing views of the professional role embodied in the Aiken & Wizner and Smith Articles, as well as the visions of social justice that underlie them, are familiar territory for those who teach lawyering in the context of law school clinics, where initiating students into the ethics and culture of the legal profession is often a primary pedagogical goal. The tensions and similarities between law and social work emerge in particularly vivid form for clinical teachers first venturing into interdisciplinary practice in collaborative environments between lawyers and social workers. As a new initiate into the ranks of law professors who teach in interdisciplinary clinics;<sup>4</sup> as a teacher of professional lawyering ethics; as a believer in adversarial ethics firmly grounded in criminal defense practice; and as someone committed to teaching law as social justice,<sup>5</sup> I find myself struggling to find a comfortable place of reconciliation between the ideals of Aiken & Wizner's and Smith's pragmatics. This Article is my attempt at such a reconciliation.

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4. When I joined the faculty at the newly created William S. Boyd School of Law at the University of Nevada Las Vegas in Fall 2002, the Thomas & Mack Legal Clinic was in its third year of operation. The law school opened its doors in the Fall 1998, but plans for the clinic had begun even before the law school admitted its first class. Two of the founding faculty members, Annette Appell and Mary Berkheiser, had been hired to teach in the clinic, and they formulated the vision of an interdisciplinary clinic focused around issues of children and families. By Spring 2003, when I first taught in the juvenile justice component of the clinic, the vision had been largely realized. The Thomas & Mack Legal Clinic included a child welfare clinic representing children and adults in abuse and neglect proceedings, a juvenile justice clinic representing children charged with criminal behavior in delinquency proceedings, and a capital defense clinic, in which students worked collaboratively researching and investigating a state petition for post-conviction relief in a capital case. Four students earning a master's degree in social work were placed in the Thomas & Mack Legal Clinic as the field work component of their academic program, and they worked in teams with the law students on cases from all three clinics under the supervision of a full-time social worker employed by the Clinic. In addition, the Clinic benefitted from the participation of a professor from the Department of Special Education, who regularly consulted on clinic cases and who now holds a joint appointment in the law school. In the fall semester of 2003, the Thomas & Mack Legal Clinic expanded further by adding both an immigration clinic and special education students, who will continue and expand the consultation work on educational issues as part of their course work in the School of Education.

5. See Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405 (2002) (arguing that involving students in larger scale projects beyond representation of individual clients in small manageable cases can meet the traditional pedagogical goals of clinical education while providing expanded opportunities for teaching about social justice issues).

This Article begins with a review of the Aiken & Wizner and Smith Articles, pointing out the themes that are common to both and the tensions in their competing visions of justice and professionalism. The second part of the Article explores the tensions between the professional perspectives of lawyers and social workers, as reflected in their differing conceptions of social justice, and analyzes how those differing visions affect issues of systemic role and relationships with clients. The third part turns to a discussion of how these tensions have played out in the field of juvenile justice, in which law and social work have historically interacted. The Article concludes by affirming the traditional adversarial ethical role of lawyers, while further suggesting ways in which the work of lawyers can be broadened and enhanced by embracing some aspects of the social work perspective.

## I. SOCIAL JUSTICE AND ADVERSARY ETHICS

### *A. Contrasting Views of the Lawyer's Professional Role*

#### 1. Aiken & Wizner: Social Justice Work as a Central Task of Lawyering

Aiken & Wizner begin their Article by re-examining their customarily defensive reaction to the all-too-common complaint from clinical law students and private practitioners that what poor people's lawyers do "isn't law, it's social work."<sup>6</sup> Rather than arguing against the characterization of their work as "social work," Aiken & Wizner explore the reasons that lawyers should embrace the social worker's professional commitment to understanding the systems within which a client operates,<sup>7</sup> to empowering the client as a partner in problem-solving,<sup>8</sup> and to "challenging injustice and working for social change."<sup>9</sup>

Aiken & Wizner first consider the passion for justice that characterizes heroic Hollywood film images of lawyers, which, they

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6. Aiken & Wizner, *supra* note 1, at 63.

7. *Id.* at 65-67.

8. *Id.* at 76.

9. *Id.* at 73.

say, “converge into a single image: the lawyer as social hero who advocates for the marginalized and the disadvantaged.”<sup>10</sup> They note that these images of lawyers with a passion for justice “consciously or unconsciously[] inspire many law school applicants,”<sup>11</sup> who enter law school only to find a “curriculum [that] is designed to neutralize that passion by imposing a rigor of thought that divorces law students from their feelings and morality.”<sup>12</sup> They contrast the professional education of lawyers with the professional education of social workers, which is grounded in an examination of the power dynamics of societal oppression, as well as in self-examination by students of their “own values, beliefs, prejudices, and how they influence their interactions with clients.”<sup>13</sup> Aiken & Wizner then propose a vision of “the lawyer as social worker [who] looks remarkably like the celluloid heroes” that populate the Hollywood version of the legal profession.<sup>14</sup> In short, their message is that by incorporating some of the professional values of social work, the legal profession can return to its roots, or at least its ideals, of achieving social justice through legal advocacy.

Aiken & Wizner’s “lawyer as social worker” blends the professional ideals of law and social work in three important respects. First, like social workers, who have made a moral and professional commitment to working for poor and underprivileged clients,<sup>15</sup> the “lawyer as social worker” “has chosen her field of practice because she sees it as instrumental in achieving justice for her clients.”<sup>16</sup>

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10. *Id.* at 70. Aiken & Wizner arrive at this image by considering the cinematic portrayals of lawyers in such films as *To Kill a Mockingbird*, *A Few Good Men*, *Class Action*, and *Murder in the First*. *Id.* at 68-70.

11. *Id.* at 71.

12. *Id.* at 73.

13. *Id.*

14. *Id.* at 74.

15. *Id.* at 81. See also NATIONAL ASS’N OF SOCIAL WORKERS, CODE OF ETHICS, Ethical Principles (1996) [hereinafter NASW, CODE OF ETHICS] (“[S]ocial workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people.”).

16. Aiken & Wizner, *supra* note 1, at 74. Aiken and Wizner note:

Another fundamental difference between the legal and social work professions is that the students who come to law school differ in their expectations of the role they will play in working toward social justice. . . .

Second, the “lawyer as social worker” breaks out of the “narrowly legal and individualistic professional role”<sup>17</sup> that lawyers typically occupy, striving to understand her client’s problem in its wider context and to address it holistically.<sup>18</sup> This effort entails looking beyond purely legal solutions, and involves the lawyer in analyzing “root problems,” identifying opportunities for systemic reform and empowering the client through education, investment in problem-solving, and coalition-building within the client’s communities of interest.<sup>19</sup>

Finally, and most starkly in contrast to Abbe Smith’s model of legal professionalism, the “lawyer as social worker” takes responsibility for the “moral content” of his or her work.<sup>20</sup> Aiken & Wizner note, “[L]awyers, unlike their social work counterparts, can hide behind the adversarial nature of the law.”<sup>21</sup> Because lawyers operate within narrowly defined, result-driven legal contexts, which “culminate with winners and losers,” they are trained to defer the obligation for securing social justice to third-party decision makers and to measure the content of social justice by “the efficiency of the adversary system.”<sup>22</sup> In contrast, because social workers operate

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It is not a prerequisite for law students to have embraced a commitment to social justice, though some of them do (more when they begin law school than when they graduate). However, the range of choices of how one might want to be a lawyer is so broad that one cannot make generalizations about the kind of moral commitments that a law student will make. Lawyers make no effort to identify the content of social justice.

*Id.* at 81.

17. *Id.* at 65.

18. *Id.* at 74-76.

19. *Id.* Aiken and Wizner write:

The lawyer [as social worker] recognizes that unless the client is a partner in problem solving, the best that the lawyer can do is obtain a “legal solution” to a narrowly defined problem, a problem often defined by the lawyer as being limited to the solutions provided within existing law. Such a response may isolate the client and insulate the problem from its context. It may thus imply that the legal problem is idiosyncratic, and will dissuade engagement in the larger dialogue about justice.

*Id.* at 76.

20. *Id.* at 80.

21. *Id.*

22. *Id.*

“within realms in which results are often intangible or progressive,”<sup>23</sup> they must constantly evaluate the effects of their actions in achieving or undermining social justice.<sup>24</sup> Recognizing that “the vast majority of legal cases . . . are either settled or pleaded out,”<sup>25</sup> Aiken & Wizner note that lawyers “play a much more direct role in affecting social justice than we are willing to acknowledge.”<sup>26</sup> Hence, they advocate training “law students as social workers” to consciously confront and conscientiously wield the power that they possess to advance, rather than undermine, social justice. In Aiken & Wizner’s words, law students must be trained to “recognize that the legal education that offers them the keys to the court house is a privilege that they must accept and use responsibly.”<sup>27</sup>

## 2. Abbe Smith: The Criminal Defense Archetype as Professional Role Model

In her essay, *The Difference in Criminal Defense and the Difference It Makes*, Abbe Smith positions herself, and the criminal defense ethic to which she subscribes in the camp of her intellectual mentor Monroe Freedman, an “unabashed supporter of adversarial advocacy.”<sup>28</sup> In the criminal defense paradigm she describes, “the maintenance of client confidence and trust are paramount” and “zeal and confidentiality trump most other rules, principles, or values.”<sup>29</sup> Smith takes this statement about as far as it can go. Although she accepts that defense lawyers must “act within the bounds of the law,”<sup>30</sup> she admits that her conformity to this dictate is “primarily

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23. *Id.*

24. *Id.* at 80-81.

25. *Id.* at 81.

26. *Id.*

27. *Id.* at 82.

28. Smith, *supra* note 3, at 87. Indeed, in a section of her Article entitled “A Brief Interlude to Acknowledge Monroe Freedman,” she pays homage to Freedman’s “traditionalist view of the lawyer’s role in an adversary system that is rooted in the Bill of Rights.” *Id.* at 86 (quoting MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS*, at ix (1990)) (emphasis omitted). She notes, “As a defense lawyer, I have often derived comfort and support from Freedman’s writings on legal ethics, and on more than one occasion from Monroe Freedman himself by cell phone in the thick of trial.” *Id.* at 91.

29. *Id.* at 89.

30. *Id.* at 89-90 (internal citation omitted).

pragmatic,”<sup>31</sup> and suggests that both unjust laws and laws that are applied unjustly should be challenged, in the words of Clarence Darrow, to “save [the criminal] defendant *from* the law.”<sup>32</sup> In her view, the ethical defense attorney “should engage in advocacy that is as close to the line as possible, and, indeed, should test the line” if doing so is in the client’s interest.<sup>33</sup>

Smith’s defense of traditional adversary ethics is advanced primarily in response to a critique within legal scholarship that seeks to soften the lawyer’s professional devotion to zealous advocacy and to require lawyers to take into account the interests of third parties, the interests of the public, and considerations of justice and morality.<sup>34</sup> Although this critique has generally been aimed at lawyers for the rich and powerful by theorists who exempt criminal defense,<sup>35</sup> Smith identifies and challenges the views of theorists who would include criminal defense lawyers in their critique of adversarial ethics.<sup>36</sup>

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31. *Id.* at 90 n.28.

32. *Id.* (citing J. ANTHONY LUKAS, *BIG TROUBLE* 325 (1997)) (emphasis added).

33. *Id.* at 90-91.

34. *Id.* at 93-94.

35. *Id.* at 94 (internal citation omitted). For an early example of this criminal defense exemption, see David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 83, 91-93 (David Luban ed., 1983) [hereinafter Luban, *The Adversary System*] (arguing that zealous advocacy is justified in the criminal context because the purposes served by the adversary system differ in criminal and noncriminal contexts). See also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 63-66 (1988) (expanding the exemption to some noncriminal cases that fit the “criminal defense paradigm” of protecting the individual against the state or other similarly powerful institutions); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 150, 152 (David Luban ed., 1983) (“I shall limit the scope of the discussion, this time by not disputing that the Principle of Non-accountability applies to criminal defense lawyers.”).

36. Smith, *supra* note 3, at 95-107. Smith’s primary target is William Simon. *Id.* at 95 (describing Simon as “[c]hief among those who reject the criminal defense exemption”). Simon argues against the “Dominant View” that the “only ethical duty distinctive to the lawyer’s role is loyalty to the client.” WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 8 (1998) [hereinafter SIMON, *THE PRACTICE OF JUSTICE*]. Instead, he argues that lawyers should abandon adherence to categorical professional norms like confidentiality and loyalty in favor of a “Contextual View,” in which lawyers exercise discretionary judgment about the morality of their actions on a case-by-case basis, taking only those actions that, “considering the relevant circumstances of the particular case, seem likely to promote justice.” *Id.* at 9. Simon explicitly refuses to exempt criminal defense from his contextual moral scheme of professional ethics. *Id.* at 170-94. See also William H. Simon, *The Ethics of Criminal Defense*, 91 *MICH. L. REV.* 1703, 1707-08 (1993) [hereinafter Simon, *The Ethics*].

In response to these theorists, Smith examines two types of justification for unmitigated zeal in criminal defense: arguments from the “outside in” and arguments from the “inside out.”<sup>37</sup> Arguments from the “outside in” justify a higher standard of zeal for criminal defense lawyers based upon the procedural differences between criminal and civil cases, the interests at stake, and the imbalance of power between the state as plaintiff and the individual as defendant.<sup>38</sup> Noting that the arguments from the “outside in” have been well presented by others,<sup>39</sup> Smith focuses primarily on the arguments from the “inside out,” which examine the lawyer-client relationship and the role the ethical duties of zeal and confidentiality play in helping the

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Smith also provides a critique of arguments by Harry Subin, Smith, *supra* note 3, at 100-05, and Fred Zacharias, *id.* at 105-07. Harry Subin is included in the camp of those refusing to recognize a difference between criminal and civil contexts on issues of professional responsibility because of his 1987 article, in the inaugural edition of the *Georgetown Journal of Legal Ethics*, on the subject of whether criminal defense attorneys have a different ethical duty than do lawyers in civil cases when it comes to arguing a theory of the case that they know to be false, as well as his reply to responses from other commentators in the same volume. See Harry I. Subin, *The Criminal Lawyer's “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988). Fred Zacharias joined the club in a 1996 article. See Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165 (1996).

37. Smith, *supra* note 3, at 107-08.

38. *Id.* at 107. The procedural differences include the government's burden of proof beyond a reasonable doubt, the presumption of innocence, the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to counsel. *Id.* at 108-09. As Smith notes, these differences are well recognized and relatively uncontroversial because they are deeply rooted in the constitutional framework of the United States. *Id.* at 108. The more contested arguments involve the interests that are at stake and the power differentials between the parties in criminal cases. *Id.* at 110-11. Smith devotes an entire section of her Article to describing the realities of incarceration to counter the view expressed primarily by Fred Zacharias that “prison is no big deal for communities with high rates of incarceration,” and thus that the threat of incarceration does not justify a higher standard for zealous advocacy than the threat of civil sanctions does. *Id.* at 105-07, 130-35. See also Zacharias, *supra* note 36. Smith also takes pains to counter the argument put forth primarily by William Simon, who questions the dominant view of criminal defendants as relatively powerless individuals facing off against the vast and unchecked power of the state, and instead characterizes the “the state” as a bunch of “harassed, overworked bureaucrats.” Smith, *supra* note 3, at 96-97 (citing William Simon, *The Ethics*, *supra* note 36, at 1707-08).

39. Smith, *supra* note 3, at 107-08, 108 n.133 (describing Luban's response to Simon on these issues as “close to perfect”). For Luban's response, see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).



criminal defense lawyer to establish and maintain an appropriate professional relationship with clients.<sup>40</sup>

More than any other legal scholar, Abbe Smith has written about how it feels to be a criminal defense lawyer.<sup>41</sup> In her previous work, she has often cited the rewards of the relationship between criminal defense lawyers and their clients.<sup>42</sup> In this most recent Article, Smith focuses on the burdens that criminal defense lawyers bear in entering the field of criminal defense;<sup>43</sup> in establishing relationships of trust with their clients;<sup>44</sup> in maintaining their zeal in the face of professional isolation,<sup>45</sup> moral conflict,<sup>46</sup> and the institutional pressure of high caseloads coupled with low resources;<sup>47</sup> and in the “enormous responsibility of ‘saving clients’” from the devastating consequences of incarceration.<sup>48</sup> In cataloguing these burdens, Smith relies heavily on the realities of criminal defense practice. Noting that “most criminal defendants are guilty of something, if not the precise charges they face,” she argues that “[n]o other field of practice is so

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40. See Smith, *supra* note 3, at 112-35.

41. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000) [hereinafter Smith, *Defending the Innocent*]; Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999); Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523 (1998); Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869; Abbe Smith, *Carrying on in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLINICAL L. REV. 723 (1995) [hereinafter Smith, *Carrying*]; 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 (1993) [hereinafter Smith, *Rosie O’Neill*].

42. Smith, *Defending the Innocent*, *supra* note 41, at 517-21 (describing the particularly and unusually intense personal relationship that developed between Smith and a client whom Smith believed to be innocent and whom she represented on a clemency petition); Smith, *Carrying*, *supra* note 41, at 731 (“I loved every part of life as a defender: the clients, the colleagues, the court battles . . . I left the Defender Association . . . to become a clinical law teacher for many of the same reasons that drew me to become a public defender. I like the clients and I like the students.”); Smith, *Rosie O’Neill*, *supra* note 41, at 51-52 (listing “I like the clients” as one of the reasons Smith chose to be a public defender); Smith & Montross, *supra* note 41, at 533 (“[C]onnection with others’s clients is the key to sustaining a career as a public defender, just as connection with others is the key to a full and rich life in general.”).

43. Smith, *supra* note 3, at 115-19.

44. *Id.* at 119-22.

45. *Id.* at 123-25.

46. *Id.* at 116-17, 126-27.

47. *Id.* at 128-30.

48. *Id.* at 127, 130-35.

fraught . . . [with] moral dilemmas.”<sup>49</sup> She cites statistics about the payment schemes for indigent defense that seem intentionally designed “to process the maximum number of defendants at the lowest cost.”<sup>50</sup> She decries the fact that “most criminal lawyers do not engage in zealous advocacy and too often betray client confidences, sometimes for so-called ‘moral’ reasons, but mostly out of institutional expedience or laziness.”<sup>51</sup> And in an anecdote from her own practice, she illustrates the painful consequences of losing for the client, and the effect it has on the lawyer to bear personal responsibility for that loss.<sup>52</sup>

In Smith’s view, the ethical requirement of zealous criminal defense is a necessary incentive if lawyers are to provide client-centered representation in a field of practice replete with these institutional, moral, and market disincentives to effective representation.<sup>53</sup> It provides would-be defenders with a “comfortably simple”<sup>54</sup> answer to what has been called “The Question” of “how can you defend those people?”<sup>55</sup> It allows criminal defense lawyers to assure distrustful clients, in the words of a cinematic public defender, “I’m *your* lawyer. I don’t give a [expletive deleted] about anyone else.”<sup>56</sup> Given the realities that Smith describes, it is no wonder that so many criminal defense lawyers find that Monroe Freedman’s

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49. *Id.* at 116.

50. *Id.* at 129 (emphasis omitted). Smith includes a particularly sobering quotation from Richard Posner, in which he argues that, although his experience as a judge confirms that “criminal defendants are generally poorly represented,” this “bare-bones system for defense of indigent criminal defendants” reflects the “optimal” level of criminal defense: good enough to “reduce the probability of convicting an innocent person to a very low level,” while not good enough to either acquit many guilty people or else require society to devote too many resources to their prosecution. *Id.* (quoting RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163-64 (1999)).

51. *Id.* at 92 (internal citation omitted).

52. *Id.* at 83-86.

53. *Id.* at 128.

54. *Id.* at 118.

55. *Id.* at 115 (citing Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177 (1983-84)).

56. *Id.* at 122 (quoting CRIMINAL JUSTICE (Home Box Office 1990)) (brackets in original). Smith argues that criminal defense lawyers must be able to offer this assurance “more than any other type of practitioner,” *id.*, because the client cannot typically choose his or her defender, is likely to be legally unsophisticated, and may have reason to distrust a lawyer provided “by the very system that has taken his liberty.” *Id.* at 119.

theoretical endorsement of adversarial ethics “emboldens and ennobles” their work.<sup>57</sup>

Although Smith devotes most of her Article to discussing the uniqueness of criminal defense work, the reference in her title to the “difference it makes” in legal ethics is somewhat of a misnomer. In the end, she concludes that, despite the differences between criminal defense work and civil litigation, the consequences of lowering the standard of zealous advocacy for lawyers in the civil context are simply too great to risk. Smith’s main concerns are political and pragmatic. Though targeted at the excesses of large firm practice, she notes that the critique of “‘adversarial excess’ invariably spills over into the criminal system” to affect those politically vulnerable clients who need zealous advocacy the most.<sup>58</sup> The reality, she argues, is that big-firm lawyers representing wealthy clients are the ones who have the political clout to protect the professional ideals of loyalty and zeal; they protect their own zealous representation by invoking justifications for the adversary system, which arise from the criminal defense paradigm.<sup>59</sup> To keep the ideals of loyal and impassioned advocacy alive for criminal defense, Smith argues, the archetype of the zealous criminal defender must remain the standard for legal professionalism.<sup>60</sup>

### *B. A Shared Ideal: The Adversarial Lawyer as Champion of Social Justice*

The professional visions articulated in the Aiken & Wizner and Smith Articles intersect in an idealized image of the adversarial advocate as champion for social justice. To exemplify this ideal,

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57. *Id.* at 91-92.

58. *Id.* at 137. Smith also recognizes that both “inside out” and “outside in” arguments for adversarial zeal are strongest when “the stakes are high, the adversary powerful, and the level of trust between the lawyer and client low,” *id.* at 136, and that it is difficult to draw categorical lines that adequately capture these contextual factors, which are also present in a host of civil cases. *Id.* at 137. Smith cites many examples of civil cases that closely approximate the stakes and power differentials of criminal cases, including mental health commitments, immigration proceedings, termination of parental rights proceedings, environmental cases, and domestic abuse cases. *Id.* at 135-37.

59. *Id.* at 138.

60. *Id.*

Aiken & Wizner discuss a collection of lawyer-heroes in literature and film, who also embody Smith's ideal of zealous partisan advocacy. Most notable among these is criminal defense lawyer Atticus Finch, in *To Kill a Mockingbird*.<sup>61</sup> Finch epitomizes the "lawyer as social worker" for Aiken & Wizner because, in defending his client, he uses his privilege and power as a white man in a racially segregated society in order to side with a young black man wrongfully accused of raping a young white girl. Atticus Finch also personifies the adversarial hero, championed by Smith as the ethical ideal for criminal defense lawyers, by using the skills of zealous advocacy to uncover the truth.<sup>62</sup> The ideals of lawyer as social justice advocate and as adversarial hero converge in Atticus Finch, at least in part, because he is a product of a fiction in which everyone knows that the version of events he so vigorously seeks to establish through zealous advocacy on behalf of his client is the *truth*. In the world of Hollywood defense lawyers, zealous adversarial advocacy coincides with social justice precisely because the clients are either innocent or else are portrayed as otherwise worthy.<sup>63</sup>

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61. HARPER LEE, *TO KILL A MOCKINGBIRD* (Perennial 2002) (1960). See also Aiken & Wizner, *supra* note 1, at 68.

62. As Smith has written, Atticus Finch inspired her own career as a criminal defense lawyer, as well as the careers of countless other would-be public defenders, and is a role model whom she continues to endorse:

I chose to be a public defender for all of the reasons that have ever been offered by anyone else, and a few of my own. I like the clients, I like the work, something funny happens everyday, something poignant happens everyday, and I read *To Kill a Mockingbird* too many times as an impressionable child.

Smith, *Rosie O'Neill*, *supra* note 41, at 51-52 (internal citations omitted). Smith goes on to discuss the importance of holding onto those ideals, as follows:

For students and others embarking on a new career path, it is important to figure out in *words* why you might want to be a public defender. You will need to refer to something concrete in later, leaner times. It is important to know the reasons, and it is important for the reasons to fit. Somebody else's reasons won't do.

*Id.* at 52. Smith affirms her continuing affection for Atticus Finch ("both the man and the myth") in the Article under discussion. See Smith, *supra* note 3, at 86 n.12.

63. Interestingly, two of the remaining three lawyers discussed in detail by Aiken & Wizner are also criminal defense lawyers. Daniel Kaffee, portrayed by Tom Cruise in *A Few Good Men*, defends two Navy soldiers accused of causing the death of a peer during a "code red" procedure ordered by their superior officer. *A FEW GOOD MEN* (Castle Rock Entertainment, Columbia Pictures Corp. 1992). Kaffee pursues the truth relentlessly, exacting an admission under cross-examination of the superior officer, and thus, in Aiken & Wizner's

Aiken & Wizner and Smith agree that law students should be challenged by the ideal of the lawyer as champion of social justice to choose legal careers that promote social justice objectives.<sup>64</sup> Smith's argument that the realities of criminal defense practice invest the ethical ideal of zealous advocacy with particular psychological importance applies to other social justice contexts as well. Social justice work is rarely easy, clean, or pretty, and society will seldom endorse or financially reward the work of those who challenge inequities within the status quo. Lawyers as social workers, like criminal defense lawyers, may need to envision an audience of the voiceless and downtrodden rising in approval as they enter the courtroom, if only in their minds' eyes, because reality will rarely provide such validation for their work.<sup>65</sup>

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analysis, using his legal power to challenge the military hierarchy and to equalize the power differential between his clients and the military establishment. *Id.*; Aiken & Wizner, *supra* note 1, at 68-69. The second is the lawyer portrayed by James Stamphill in *Murder in the First*, which tells the story of a new public defender assigned to Henri Young, an inmate at Alcatraz, portrayed by Christian Slater. MURDER IN THE FIRST (Warner Studios 1994). Young is initially incarcerated for a relatively minor offense and who suffers cruel treatment in prison, which eventually caused a psychotic breakdown, leading to his fatal assault on another prisoner. *Id.* In *Murder in the First*, Stamphill rebels against the lowered expectations of a jaded public defender office, which expects him to "dispos[e] of the case in a quick and efficient manner," Aiken & Wizner, *supra* note 1, at 69-70, and then forms a friendship with his client and forces the system to hear his client's story. MURDER IN THE FIRST (Warner Studios 1994).

64. Aiken & Wizner's model of training "lawyers as social workers" includes helping students to explore their values and to choose a career in the law that reflects those values, as well as to hone the skills of critical analysis that will allow them to assess the social justice content of their work. Aiken & Wizner, *supra* note 1, at 77-79. For more on this vision of social justice education, see Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287 (2001); Jane Harris Aiken, *Striving to Teach "Justice, Fairness and Morality,"* 4 CLINICAL L. REV. 1 (1997); Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001). Smith shares the pedagogical goals of Aiken & Wizner, admitting to what she calls the "recruitment allegation": that she wants to "turn students on to the work of the public defender" because she believes that "without criminal justice there can be no social justice." Smith, *Carrying*, *supra* note 41, at 735. As a legal ethicist, Smith agrees:

[T]he lawyer's choice of client can properly be subjected to the moral scrutiny and criticism of others, particularly those who would seek on moral grounds to persuade the lawyer to use her professional training and skills in ways that the critics consider to be more consistent with personal, social, or professional ethics.

MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 59 (2d ed. 2002).

65. Although Atticus Finch is ultimately unable to convince the all-white jury of his client's innocence, in what Aiken & Wizner describe as "perhaps the most moving scene of [*To Kill a Mockingbird*], all of the blacks who are seated in the segregated balcony of the courtroom

Aiken & Wizner and Smith differ primarily in the way that they negotiate the space between their shared ideal and the reality that adversarial tactics can be used just as easily to undermine social justice as it can to champion it. The difference is highlighted by their disagreement over the propriety of those with entrenched power deploying the ideal of the adversarial hero to defeat the interests of the poor and underrepresented. Aiken & Wizner criticize lawyers who hide behind the hollow rhetoric of the adversary system as a way to avoid critical analysis of their use of power. They exhort lawyers to measure the use of their power against the ideal of the lawyer as champion for social justice, seeking to bridge the distance between the ideal and the reality of adversarial practice one lawyer at a time.

Smith has a different strategy. Her goal is to keep the adversarial ethic vibrant and uncompromised for the lonely and politically unpopular criminal defendant, whom she views as too easily lost under the landslide of a slippery slope, in the rush to correct the morals of big-firm lawyers. Smith is thus willing to offer up the criminal defense paradigm as an empty ideal to civil lawyers representing moneyed interests because they have the power to protect it for everyone.

The difference in their willingness to condone the “adversary system excuse”<sup>66</sup> for selling out the social justice ideal, though primarily strategic in nature, nonetheless reflects a deeper tension between the professional culture and orientation of lawyers’ and social workers’ visions of social justice. A lawyer who seeks to follow Aiken & Wizner’s exhortation to be “more like a social worker” will need to confront and resolve this tension. In the following section, I will make the differing perspectives on social justice embodied in legal and social work professional norms more explicit and will explore their implications for social justice advocacy.

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rise to their feet when Finch, the lawyer as fair-minded champion of justice, enters the courtroom.” Aiken & Wizner, *supra* note 1, at 68.

66. David Luban coined this phrase. Luban, *The Adversary System*, *supra* note 35.

## II. TENSIONS BETWEEN ZEALOUS ADVOCACY AND THE SOCIAL WORK PERSPECTIVE

A basic underlying tension exists between the adversarial lawyer's legal frame of reference and the social worker's perspective on issues of social justice. The adversarial lawyer views social justice in legal and procedural terms, while the social worker adopts a more substantive and contextualized view. This section will explicate the differing social justice perspectives as they are embedded in the professional ethical codes of lawyers and social workers. It will then demonstrate how these differing visions of social justice create tensions between a traditional vision of zealous legal advocacy and an approach that seeks to incorporate social work values and perspectives into legal advocacy in four areas. These are: (1) the extent to which lawyers should dampen adversarial tactics to avoid injustice in particular cases; (2) the extent to which the lawyer-client relationship is framed by the client's legal interests; (3) the ways in which "relevant information" is defined and acquired; and (4) the extent to which lawyers should defer to their clients' wishes, even when they conflict with the clients' best interests.

Different lawyering theorists have addressed the questions raised in these four areas in several ways, arguing for lawyers to mitigate zealous adversarial advocacy in favor of an approach that takes third-party concerns into account, and seeking to broaden the lawyer's legal-centric focus with a more holistic client-centered approach. Because these differing and sometimes conflicting approaches could all fall within a more general description of incorporating social work values and perspectives into lawyering, they pose a challenge for the conceptualization of the "lawyer as social worker." In addition, these four "problem areas" give rise to many of the issues that lawyers and social workers who collaborate in interdisciplinary practice settings must negotiate between their differing professional perspectives and sensibilities.

*A. Lawyers and Social Workers: Differing Perspectives on Social Justice*

The professional standards of lawyers spell out a largely procedural view of social justice, defined by adherence to the lawyer's proper role in the adversary system. Lawyers are directed to promote their clients' legal interests through competence, diligence, communication, confidentiality, and the avoidance of any conflicts of interest that would interfere with partisan advocacy.<sup>67</sup> The only real limits come from the lawyer's duty to ensure the fair operation of the adversary system by falsifying or obstructing access to material with legal or evidentiary value.<sup>68</sup> While lawyers are also urged to pursue larger justice objectives, these goals are phrased in terms of improving the quality of, ensuring access to, and furthering the public's confidence in "the rule of law and the justice system," and appear only in the non-binding and aspirational language of the Preamble to the rules of conduct, rather than in the rules themselves.<sup>69</sup>

The zealous advocacy perspective is rooted in a legal due process model that views adversarial advocacy as a procedural protection against governmental overreaching, reflecting the same basic distrust of bureaucratic decisionmaking that forms a central component of

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67. These duties are codified from Rules 1.1 to 1.9 of the ABA Model Rules of Professional Conduct. The duties to clients might be summarized by language in the comment to the rule on diligence:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

MODEL RULES OF PROF'L. CONDUCT R. 1.3 cmt. [1] (2002).

68. For example, lawyers are expected to press only non-frivolous legal claims, *id.* at R. 3.1, and to avoid the presentation of false evidence, *id.* at R. 3.3, and the obstruction of another party's access to "evidence or other material having potential evidentiary value," *id.* at R. 3.4. Significantly, in dealing with others, lawyers are not required to be completely honest, but only to avoid making "false statement[s] of material fact." *Id.* at R. 4.1 (emphasis added).

69. *Id.* at pmb., para. 6. The closest that the rules come to codifying this concern for the system of justice is in its voluntary duty of pro bono service and in heightened standards for declining representation of clients when requested by the court. *Id.* at RR. 6.1, 6.2.



political philosophy in the United States.<sup>70</sup> For “unabashed supporters” of adversarial advocacy, the essential good in the adversary system lies not in its ability to achieve just outcomes, but rather in its embodiment of “a core of basic rights that recognize, and protect, the dignity of the individual in a free society.”<sup>71</sup> Zealous and single-minded partisan advocacy provides a procedural check against the concentration of government power, and operates as a systemic deterrent to bureaucratic excesses.<sup>72</sup> In this view, watered-down or mediocre advocacy poses a greater threat to social justice than the deviation from social justice outcomes that occurs in particular cases. Because the zealous advocate defines social justice largely in procedural terms, it makes sense to assign paramount importance to maintaining the ethic of professional zeal, lest the procedures collapse and lawyers be co-opted into a “justice bureaucracy.”

The professional ethical principles and standards governing a social worker’s professional commitments reflect a more substantive vision of social justice, which exhorts practitioners to critically analyze the social justice content of their actions and relationships, rather than relying on systemic justifications. Social workers’ ethical principles state a dual function as their primary goal: “to help people in need and to address social problems.”<sup>73</sup> This is followed by a further broad ethical principle directed toward “challeng[ing] social injustice”<sup>74</sup> and a whole set of ethical standards addressing the social worker’s “ethical responsibilities to the broader society.”<sup>75</sup> These responsibilities include the duty to “promote the general welfare of society, from local to global levels”<sup>76</sup> and to “engage in social and political action” toward social justice ends of ensuring equal access to resources,<sup>77</sup> expanding choice and opportunity for “vulnerable,

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70. FREEDMAN & SMITH, *supra* note 64, at 45.

71. *Id.* at 13 (emphasis omitted). Freedman and Smith would argue (and have argued), however, that in the long run the adversarial system is the most effective alternative for arriving at the truth. *See id.* § 2.10, at 35.

72. *See id.* § 2.04, at 22 (discussing John B. Mitchell, *The Ethics of the Criminal Defense Attorney*, 32 STAN. L. REV. 293 (1980)).

73. NASW, CODE OF ETHICS, *supra* note 15, at Ethical Principles.

74. *Id.*

75. *Id.* §§ 6.01-6.04.

76. *Id.* § 6.01.

77. *Id.* § 6.04(a).

disadvantaged, oppressed and exploited people and groups,”<sup>78</sup> and combating exploitation and discrimination.<sup>79</sup>

### *B. Injustice in the Particular Case*

The tension between the law and social work visions of social justice are particularly acute when the zealous lawyer’s execution of adversarial duties creates injustice in particular cases. Situations like these have been the subject of extensive commentary by ethical theorists writing about the morality of the lawyer’s adversarial role. These arguments, which aim to dampen adversarial zeal in favor of justice in the particular case, are the main target of Smith’s defense of criminal defense ethics.<sup>80</sup> Lawyers who seek to incorporate a social work perspective into their practice will encounter an inherent tension between their professional role, as defined in a legally framed procedural view of justice, and the constant challenge posed by the social worker’s more contextualized vision, which would condone the tactics of zealous advocacy only to the extent that they are employed toward larger goals of substantive justice. Although Aiken & Wizner exhort “lawyers as social workers” to take responsibility for the “moral content” of their work, the means by which lawyers ought to take this responsibility are not clear. Therefore, it is helpful to briefly visit the writings of other “ethical lawyering” theorists in order to help delineate the different approaches that a “lawyer as social worker” might take to balancing the systemic justice of advocacy against unjust results in a particular case.

The reflections of disillusioned criminal defense lawyer Seymour Wishman, discussed in Smith’s Article, provide one example that pits systemic procedural justifications for zealous advocacy against the injustice of the results in a particular case. Wishman recounts being angrily confronted by the complainant in a gang rape case whom he had discredited in cross-examination, thereby successfully convincing the jury that she was a willing participant in group sex.<sup>81</sup>

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78. *Id.* § 6.04(b).

79. *Id.* § 6.04(c).

80. For examples of the literature discussing the conflict between the lawyer’s professional morality and personal morality, see the sources cited *supra*, notes 35-36.

81. Smith, *supra* note 3, at 126 (quoting SEYMOUR WISHMAN, CONFESSIONS OF A

Faced with the reality of the pain he had visited on the rape victim, he reflected on the ignobility of his criminal defense work as a whole, having seen a “chilling glimpse” of himself as someone who had “used all [his] skill and energy on behalf of a collection of criminals . . . many [of whom] had been monsters,” and he had worked “to keep them out of jail, keep them out on the street.”<sup>82</sup>

Most commentators would agree that the morality of Wishman’s cross-examination of the truthful rape victim bears only superficial resemblance to the morality of Atticus Finch’s discrediting of the lying rape victim in *To Kill a Mockingbird*, and that it poses a difficult ethical question for defense attorneys.<sup>83</sup> What makes it hard is that cross-examining the *truthful* rape victim feels like a particularly cruel form of bullying, an irresponsible wielding of power that works the injustice of re-victimizing someone who has already been brutalized in order to achieve the unjust result of setting free the person who brutalized her.

How would the “lawyer as social worker” balance the social justice considerations that this thorny issue poses? Legal ethicist David Luban argues that adversarial zeal must give way in the case of the criminal defense lawyer’s cross-examination of a rape victim, whether truthful or not.<sup>84</sup> Luban looks to the underlying theory of the

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CRIMINAL LAWYER 3-6 (1981) [hereinafter WISHMAN]).

82. *Id.* (quoting WISHMAN, *supra* note 81, at 16). Reflecting on issues of power and privilege, Wishman continues with a “lawyer as social worker” type of critique of criminal defense work: “[s]ome of them might have been guilty of crimes made inevitable by poverty, but their victims hadn’t caused their poverty, and most of the victims were equally poor.” *Id.* (quoting WISHMAN, *supra* note 81, at 16). *Cf.* Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (discussing the “social worker’s reason” for criminal defense advocacy, as centering around an analysis of the inequities of the criminal justice system).

83. Monroe Freedman, who defends vigorous cross-examination of truthful rape victims, calls it one of the “three hardest questions” for criminal defense attorneys pursuing the ethic of adversarial zeal. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Reflecting on the tensions between being a feminist and being a public defender, Abbe Smith has said “the question is not merely a close call, it is painfully close.” Smith, *Rosie O’Neill*, *supra* note 41, at 43.

84. *See* Schwartz, *supra* note 35, at 150-52. Schwartz’s line-drawing would hold even in cases where the woman has made a false accusation. He asserts that “balancing the defendant’s rights against the rape accuser’s rights in order to determine the moral bounds of zealous advocacy must be done without considering either the defendant’s guilt or the accuser’s innocence. What’s good for the gander is good for the goose.” *Id.* at 152.

adversary system, and finds that it is generally a weak excuse for perpetuating injustice in particular instances.<sup>85</sup> He contends that the arguments in favor of the adversary system justify zealous advocacy in only limited circumstances, such as when an individual confronts the power of a socially entrenched institution.<sup>86</sup> Employing a structural power analysis worthy of the “lawyer as social worker,” he agrees that the criminal defendant is usually entitled to zealous advocacy by virtue of facing off against the state, but reasons that the rape victim is “confronted by the millennia-long cultural tradition of patriarchy,” the stereotypes of which the criminal defense lawyer is invoking merely as an adversary tactic.<sup>87</sup> Because the power differential, which usually justifies unmitigated zeal on the part of the criminal defendant against the state, is countered by the more pernicious power differential between the woman and the patriarchal system that puts her on trial in a rape case, he would redraw the “moral boundaries of zealous criminal defense . . . short of allowing cross-examination that makes the victim look like a whore.”<sup>88</sup>

William Simon’s “contextual lawyer,” who judges the professional ethics of each action based on whether it contributes to or undermines justice, might also provide a role model for the “lawyer as social worker.”<sup>89</sup> Simon’s contextual ethics would remove the idealized image of the adversarial advocate as a categorical justification for pursuit of any unjust end in the name of professional zeal.<sup>90</sup> In place of appeals to ethical rules or standards, he would force lawyers to question in each case, with each client, and under each circumstance, whether justice was being achieved.<sup>91</sup> Simon’s

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85. *Id.* at 104-27.

86. *Id.* at 58-66, 157.

87. *Id.* at 151.

88. *Id.*

89. *See supra* notes 36-39 and accompanying text.

90. SIMON, THE PRACTICE OF JUSTICE, *supra* note 36, at 10. Simon describes “[t]he preference for categorical norms and decisions in the lawyering context” as “nothing more than a failure to carry through to the lawyering role the critique of formalism, mechanical jurisprudence, and categorical reasoning that has long been applied to the judicial role.” *Id.*

91. *Id.* at 138-69. Simon’s conception of “contextualized judgment” is much more complex than merely weighing the justness of the client’s goals against the injustice to third parties. Under his analysis, lawyers engage in a sophisticated analysis of justice that is quite sensitive to the power dynamics between the players and the fairness of the overall system. For example, contextual ethical lawyers must judge the relative capacities of other system players

contextual lawyer would have to engage in an analysis of the dynamics of power and oppression, making a judgment call about justice each time he or she cross-examined a witness or presented the jury with a scenario illustrating reasonable doubt.<sup>92</sup>

Luban's approach of changing the rules to account for social justice concerns might be made consistent with maintaining the lawyer's systemic role as the zealous advocate. For example, a "lawyer as social worker" might maintain zealous advocacy and also push for changes to legal or procedural rules, such as changing the legal definitions of "consent" or "force," or arguing for the passage of rape shield laws to help cure the injustice caused by free-ranging cross-examination of rape victims.<sup>93</sup> However, Simon's contextual approach is fundamentally at odds with the professional commitments of the "lawyer as zealous advocate." Asking lawyers to exercise discretionary judgment about what is just or unjust in a particular case is tantamount to asking them to abandon the

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like judges and opposing counsel, *id.* at 139-40, the reliability of the relevant procedures and institutions, *id.* at 140, whether the lawyer's proposed actions undermine the purpose of relevant procedural rules, *id.* at 145, and whether a question of justice ought to be framed broadly or narrowly based on the relative power and access to information between the parties, *id.* at 150-51.

92. Although Simon does not discuss the example of cross-examining the truthful rape victim specifically, he suggests that it would not be justified by a contextual ethical analysis. In discussing the contextual view's general preference for purpose over form, he notes, "[w]hen the lawyer impeaches a witness she knows to be truthful . . . she takes advantage of procedural rules designed to promote accurate, efficient decisionmaking in ways that frustrate this purpose." *Id.* at 144. He refers back to this discussion in elucidating the operation of the principles in the criminal defense context by asserting "[t]he issues of aggressive defense typically arise because the lawyer has information relevant to whether the tactic is justifiable that she withholds from the trier." *Id.* at 173. If the client has given her information "credibly but confidentially," then she is in a position to judge whether it is just to invoke procedural protections to question that information. *Id.*

93. Although it is clear that unlike Simon, Luban calls for categorical changes in rules, he is ambiguous between changing the professional ethical rules governing the limits of zealous advocacy or procedural and/or substantive legal changes. It is apparent that Smith would support the latter, but not the former. See Smith, *Rosie O'Neill*, *supra* note 41, at 43-44.

To the extent Luban's position is an endorsement of rape shield acts, which prohibit cross-examination on the prior sexual history of rape complainants, I agree with him. A woman's sexual conduct, whether deemed to be 'promiscuous' or not is simply not relevant in determining whether a rape occurred and whether the defendant is the one who did it.

*Id.* See also FREEDMAN & SMITH, *supra* note 64, at 217.

professional role they play as checks on the excesses of government power, and to join a justice bureaucracy devoid of checks and balances other than those imposed by the lawyer's own interpretation of what justice requires.

### *C. Defining the Client Relationship*

The tensions between the viewpoints of the "lawyer as zealous advocate" and the "lawyer as social worker" also manifest themselves through lawyers' framing of the boundaries of their relationships with clients. Legal professional training teaches law students to extract legal issues from sets of facts. While this process is crucial to lawyering, viewing a client's situation protectively through the lens of legal interests can too narrowly frame the ways in which lawyers define and conduct their relationships with clients. By contrast, social workers learn to contextualize information expansively within the multiple and interacting systems that surround their clients.

Lawyers tend to define the lawyer-client relationship in terms of adherence to legal professional norms. For example, loyalty to clients is defined in large part by lawyers' diligent pursuit of client interests and conscientious avoidance of conflicts of interest.<sup>94</sup> Client trust is thought to rest largely on lawyers' assurances of and adherence to the duty of confidentiality.<sup>95</sup> The idea is that lawyers' adherence to legal professional obligations of confidentiality, zeal, and avoidance of conflicts of interest are the most important aspects of the relationship

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94. See MODEL RULES, *supra* note 67, at R. 1.7, cmt. [1] (explaining that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client" underlying the conflict of interest rules).

95. *Id.* at R. 1.6 cmt. [2] (explaining the "fundamental principle in the client-lawyer relationship . . . that . . . the lawyer must not reveal information relating to the representation . . . contributes to the trust that is the hallmark of the client-lawyer relationship"). Interestingly, the notions of loyalty and trust appear nowhere in the comment following the professional rule on fees, despite the ABA's recognition that lawyers' practices in charging fees are primary in undermining the public's trust and confidence in lawyers. See *id.* at R. 1.5. See also ABA Comm. On Ethics and Prof'l Responsibility, Formal Opinion 93-379 (1993) (citing "the billing practices of some of its members" as "[o]ne major contributing factor to the discouraging public opinion of the legal profession" despite the fact that the "legal profession has dedicated a substantial amount of time and energy to developing elaborate sets of ethical guidelines for the benefit of its clients").

privileges the lawyer's perspective on the relationship and seems almost locked within that perspective.<sup>96</sup>

While assurances of zeal, confidentiality, and loyalty in both word and deed are doubtless important in obtaining and maintaining a client's trust, responsiveness to the client's "non-legal" concerns within a broader conception of "client-centeredness" may be at least as important, if not more important, to achieving these goals.<sup>97</sup> According to the authors of the leading text on client-centered lawyering, clients do not separate the legal from the non-legal aspects of their problems when seeking assistance from lawyers.<sup>98</sup> The legal dimension of a client's problem may constitute a relatively minor part of the overall problem, or the non-legal consequences of a course of action may predominate the client's thinking and decisionmaking process.<sup>99</sup> Thus, client-centered lawyers are urged to understand problems as much as possible from their clients' perspectives, and to

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96. Smith's explication of the burdens of practice for the criminal defense lawyer provides an unwitting example of a lawyer's narrow legal framing. Her observations are grounded in reality, but center almost exclusively around the way the lawyer experiences the interpersonal challenges of the lawyer-client relationship in the criminal defense context. In formulating solutions to these interpersonal challenges, Smith focuses on the lawyer's ability to assure the client that the lawyer is committed to zealously protecting the client's legal rights and scrupulously maintaining the client's confidences. Although Smith refers to Monroe Freedman as the original "client-centered" lawyer, Smith, *supra* note 3, at 88, Freedman's version of client-centeredness also focuses narrowly on zealous devotion to the client's legal interests. Smith and Freedman summarize their version of client-centered representation in the words of the original ABA Canons of Professional Ethics: "[E]ntire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights, and the exertion of [the lawyer's] utmost learning and ability." FREEDMAN & SMITH, *supra* note 64, at 79 (quoting ABA CANONS OF PROF'L ETHICS 15 (1908)). Freedman and Smith describe the "ethic of zeal" as "pervasive" because it "infuses all of the lawyer's other ethical obligations." *Id.*

97. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH passim* (1991).

98. Binder et al. write:

[L]awyers' principal societal role is to help clients resolve problems, not merely to identify and apply legal rules. Nonetheless, too often lawyers conceive of clients' problems as though legal issues are at the problems' center, much as Ptolemy viewed the Solar System as though the Earth were at the center of the universe. But legal issues may be no more the essence of a client's problem than, perhaps, religion might be its essence if a troubled client chose to talk to a minister rather than to you, a lawyer. Whatever the legal aspects of a problem, nonlegal aspects frequently are at the heart of a client's concerns.

*Id.* at 5.

99. *Id.* at 10-15.

allow that understanding to guide and control the course of representation.<sup>100</sup>

However, a lawyer who pursues a more holistic approach to its logical conclusion may run into tensions between serving the client's needs and staying true to the professional norms that define the traditional lawyer-client relationship. To really address a client's problems holistically may require working with or on behalf of persons with whom the client has important relationships, such as parents, children, spouses, or employers, even though doing so would threaten the single-minded loyalty and trust defined by the legal professional standards of diligence, confidentiality, and avoidance of conflicts of interest. Because of their differing perspectives on how to establish and maintain loyalty and trust in relationships with clients, lawyers and social workers are likely to have divergent attitudes toward the benefits and risks of proceeding holistically in situations that might pose a conflict of interest or threaten disclosure of client confidences.

#### *D. Defining and Retrieving "Relevant" Information*

Lawyers are socialized to define relevant information in terms of what can be introduced into evidence and proven in court. Although lawyers are, of course, also interested in more amorphous information, such as how a potential witness presents himself or herself, their primary focus in gathering information is on organizing what people or documents say into legally relevant categories and determining what can be inferred or further developed from those "facts."<sup>101</sup> The social worker brings a different perspective to defining

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100. *See id.* at 16-24.

101. For example, authors of one influential lawyering skills textbook describe the process of fact gathering as engaging "in a thought process akin to a computer search" in which you (the lawyer) "begin with a set of facts provided by the client; you then plug in the information in your bank of legal and nonlegal knowledge and scan all potential theories; after identifying the potential theories, you pursue additional information to either confirm or reject their application." ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 199 (1990). The authors further suggest that lawyers should have a "fact-gathering plan" that takes into consideration "the full range of discovery and investigative tools" and targets facts falling into categories such as "facts establishing the existence or nonexistence of the substantive elements entitling the plaintiff to relief"; "facts corroborating the client's version"; "facts constituting the adversary's



relevant information. The social worker is interested in gathering information about the entire context in which the client is situated, including information about how the client interacts with others in the multiple systems affecting the client's life. The information that the social worker seeks is therefore more dynamic; and often can be found in the nature and quality of the relationships surrounding the client, rather than being located within the fixed boundaries of what the client or others say.

A lawyer's sensitivity to the client's legal interests may also circumscribe the type of information that a lawyer wants to acquire. Lawyers know that their possession of certain information may not be in their clients' legal interests because their professional duties as "officers of the court" might force its disclosure. The ABA Model Rules of Professional Conduct prohibit lawyers from knowingly making false statements of fact to a tribunal or from offering evidence that the lawyer knows to be false.<sup>102</sup> Similarly, lawyers may not knowingly make "false statement[s] of material fact" in the course of representing clients.<sup>103</sup> One way for a lawyer to avoid the duty to reveal client perjury, avoid the concern about misrepresentation in negotiation, or preserve the ability to present questionable evidence is simply not to probe the circumstances deeply enough to know the truth.<sup>104</sup> Lawyers learn to identify "red flags" that signal when clients are treading into dangerous territory, which may discourage them from proceeding, consciously choosing neither to ask follow-up questions nor to investigate certain facts, for fear that the answers will hobble their ability to advocate fully and effectively. This practice of protective ignorance is in tension with

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version"; and "facts contradicting the adversary's version." *Id.* at 199-200. *See also* STEFAN H. KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 111-52 (1999) (discussing different models for lawyers to use in organizing facts, including the "legal elements model," "chronology model," and "story model").

102. MODEL RULES, *supra* note 67, at R. 3.3(a)(1), (a)(3).

103. *Id.* at R. 4.1(a).

104. For a discussion of the heightened standard that "knowledge" takes in these circumstances, see Monroe H. Freedman, *But Only If You "Know"*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 135 (Rodney J. Uphoff ed., 1995). *See also* Stephen Ellmann, *Truth and Consequences*, 69 *FORDHAM L. REV.* 895 (2000).

the broader, more holistic information-gathering in which social workers want to engage.<sup>105</sup>

### *E. Deference to Client Wishes*

In addition to viewing “interests” and “relevant information” in fundamentally different ways, lawyers and social workers approach deference to client wishes through substantially different frames of reference. While lawyers tend to prioritize client autonomy and to defer to client wishes, social workers place a premium on client well-being and on helping clients to overcome the shortcomings that keep them from fully realizing objectives in their best interests. The tension between the lawyer’s respect for client autonomy and the social worker’s concern for client well-being echoes the divergence between the lawyer’s procedural and the social worker’s substantive definitions of social justice, as discussed earlier.<sup>106</sup> The lawyer’s concern that the client be permitted to make decisions about the representation in an atmosphere free of undue intrusion is consistent with the lawyer’s social justice concern for maintaining procedures that will afford individuals the basic dignity of due process. The social worker’s focus on client well-being reflects the concern about good results inherent in a more substantive definition of social justice.

Because they prioritize client autonomy, lawyers give significant deference to a client’s preferences on questions not relating directly to the lawyer’s legal expertise. The ABA Model Rules of Professional Conduct codify the division of decisionmaking authority between lawyer and client by requiring that the lawyer “abide by the client’s decisions concerning the objectives of representation” and “consult with the client as to the means by which they are to be

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105. Ironically, the strategies for mediating these tensions may come from the zealous advocates themselves. Monroe Freedman is notably on record as opposing an “intentional ignorance” strategy on the part of lawyers, arguing that the lawyer’s duties as “officer to the court” should be subordinate to the protection of confidentiality for the very reason that failure to protect client confidences impairs the client’s ability to share fully his situation with his lawyer and to receive the benefit of her advice. See Freedman, *supra* note 83; FREEDMAN & SMITH, *supra* note 64, at 155.

106. See *supra* notes 67-79 and accompanying text.

pursued.”<sup>107</sup> Lawyers are permitted to go outside the bounds of technical legal expertise to include “moral, economic, social and political factors” in carrying out their duty to “render candid advice.”<sup>108</sup> However, this advice is presented within a larger framework of explanation and consultation designed to “permit the client to make informed decisions regarding the representation.”<sup>109</sup>

Lawyering theorists who argue strongly against lawyer interference with autonomous client decisionmaking often cite the inherent power differential between lawyers and clients. They express further concern that lawyers may improperly manipulate their clients to suppress their true interests in favor of the lawyers’ conception of what is best for the client.<sup>110</sup> The concern is so extreme that at least one lawyering theorist has found it necessary to defend lawyers’ expression of approval for their clients’ decisions against the concern that such positive reinforcement might inappropriately interfere with the client’s autonomy.<sup>111</sup>

Social workers are exhorted to give primacy not to client autonomy, but to client “well-being”<sup>112</sup> and client “self-determination.”<sup>113</sup> “Self-determination” is understood as a client’s

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107. MODEL RULES, *supra* note 67, at R. 1.2(a). Significantly, the comment to this rule suggests that when a disagreement arises about the means by which the client’s objectives are to be pursued, “[c]lients normally defer to the special knowledge and skill of their lawyer . . . particularly with respect to technical, legal and tactical matters.” *Id.* at R. 1.2 cmt. [2].

108. *Id.* at R. 2.1.

109. *Id.* at R. 1.4(b).

110. See generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) (analyzing and defending the client-centered approach against a number of arguments both for and against it); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987) (evaluating how even client-centered techniques can result in client manipulation); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing for a model of client decisionmaking based on principles of informed consent). But see H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719 (2000) (arguing for a much broader and more paternalistic role for counsel in the decision-making process when the client is inclined to act against his or her own interests).

111. This defense of expressions of approval against the concern that they violate client autonomy is made in Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992).

112. NASW, CODE OF ETHICS, *supra* note 15, § 1.01 (“Social workers’ primary responsibility is to promote the well-being of clients.”).

113. *Id.* § 1.02 (“Social workers respect and promote the right of clients to self-determination and assist clients in their efforts to identify and clarify their goals.”).

“capacity and opportunity to change and to address [his or her] own needs.”<sup>114</sup> Rather than deferring to the client’s stated wishes and strategizing about how to implement them, social workers are more likely to attempt to understand the deficiencies of the client’s view of the problem, to understand the ways in which the client’s perspective needs to change, and to strategize about how to move the client in the direction of fulfilling his or her best interests. In addition to caring about their clients’ well-being, social workers are also directed to be sensitive to cultural issues and power dynamics at work in their relationships with clients.<sup>115</sup> They are generally committed to client empowerment as the primary way to move the client forward, which helps to alleviate some of the concerns on which lawyers’ regard for autonomous client decisionmaking are founded. Nonetheless, the paternalism that the social work ethic entails remains in tension with the deference to client autonomy inherent in the zealous advocate’s construction of what it means to act in a client’s interest.

#### *F. Summary*

Significant tensions between the professional norms of zealous advocacy and the vision of the “lawyer as social worker” emerge from the foregoing discussion. Underlying these tensions is a basic difference between the narrower legalistic standpoint of the zealous advocate—who defines justice procedurally and frames the lawyer-client relationship in terms of the pursuit of legal interests—and the broader perspective of the “lawyer as social worker”—who analyzes justice substantively and structurally, attends holistically to a client’s problem as embedded within the context of multiple systems, and views client interests in terms of the client’s well-being.

These differing professional viewpoints have implications for lawyers seeking to incorporate social work values and perspectives into legal work, both in how they view their role as advocates within

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114. *Id.* at Ethical Principles.

115. *Id.* § 1.05 (Ethical Standard: Cultural Competence and Social Diversity); *Id.* at Ethical Principles (“Social workers treat each person in and caring and respectful fashion, mindful of individual differences and cultural and ethnic diversity.”). *See also* NASW, STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE (approved by the NASW Board of Directors June 23, 2001).

the adversary system, and in how they structure their interpersonal relationships with clients. On the systemic level, the zealous advocate sacrifices outcomes to procedure, preferring to preserve the lawyer's role in the adversary system rather than compromise it to appease the interests of justice in any particular case. The social work perspective would strive toward substantive justice, attempting to achieve this goal situation by situation, perhaps at the cost of zealous partisanship in the individual case; perhaps by using the insights gained in individual cases to reform the legal parameters within which the zealous advocate operates; or perhaps by employing both of these social justice strategies.

On the interpersonal level of the lawyer-client relationship, the zealous advocate brings the narrower legal focus to bear by defining the client's problems and addressing the interpersonal concerns of trust and confidence through legal categories. The broader contextualized viewpoint of the social worker allows a more truly client-centered definition of problems to emerge, which carries with it both the promise of more holistic efforts to solve the client's problems and a more paternalistic view of what is in the client's interests.

The following section will discuss ways of integrating these perspectives within the particular context of representing children in juvenile delinquency cases, an area of practice that, both historically and in modern practice, has sought to import the more holistic and "best interests" perspective of social work into criminal proceedings.

### III. RECONCILING THE TENSIONS: LESSONS LEARNED FROM THE JUVENILE JUSTICE SYSTEM

While the previous section focused on the tensions confronting the project of incorporating social work values and perspectives into lawyering, this section will propose a way to reconcile those tensions by drawing on lessons learned from juvenile justice, informed by both the legal history of the juvenile court and the experience of teaching in an interdisciplinary collaboration with social workers in a juvenile justice clinic. As illustrated by the history of the juvenile court in the United States, there are significant dangers when the lawyer's role as a zealous advocate in the adversary system is co-

opted by the social work perspective, even with the most benevolent intentions. Heeding this lesson, I argue that it does not serve the interests of social justice for lawyers to abandon their systemic role as zealous advocates in advancing and protecting their client's legal interests. Nonetheless, my experiences teaching in an interdisciplinary clinic with law and social work students illustrate how quickly even fledgling law students have been socialized into a relatively narrow legal perspective of their clients' lives and situations, and how incorporating a more contextualized and holistic social work perspective can enhance the lawyer's advocacy role by broadening the lawyer's perspective beyond its narrow legal categories. On the other hand, my experiences also illustrate the importance of not abandoning the legal perspective entirely. They also show how the lawyer's role as an advocate for the client's legal interests can and should define the larger framework for the representation and provide a check on the broader-ranging social work approach.

Hence I propose to reconcile the tensions between the legal and social work perspectives on advocacy and client relationships by positing the lawyer's zealous advocacy role as a framework within which a more holistic and contextual approach can be implemented. I hope that this theoretical model of "social work within the framework of legal interests" can provide a tool to help analyze and resolve tensions between law and social work as they arise in particular situations in interdisciplinary practice. The discussion of concrete examples will help demonstrate the interplay between the legal and social work approaches and show how the theoretical model of social work advocacy, framed within the constraints of legal interests, can help inform practical choices. Before turning to those examples, however, I will first examine the history of the juvenile court in the United States to illustrate the danger of substituting "law as social work" for legal advocacy at the macro-level and to defend the importance of lawyers retaining their traditional systemic role as zealous advocates.

*A. History as Allegory: The Danger of Law as Social Work*

The establishment and eventual due process reform of the juvenile court in the United States provides fascinating material illustrating the interplay between the traditions of the adversary system of justice and law as social work. The juvenile court was established at the turn of the twentieth century to operate as an informal court embodying the values and methods of social work. Even today, after nearly a half-century of due process reform, many of these informal elements remain, and there is considerable pressure on lawyers in juvenile court to behave more like social workers than like adversarial advocates. This section examines the history of the reforms that brought the juvenile court into existence, the vision and motivation of the Progressive reformers that worked to establish it, and the eventual re-introduction of legal advocacy into juvenile court proceedings based on procedural due process concerns. This history teaches an important lesson about the dangers inherent in substituting a social work bureaucracy for the more traditional model of adversarial representation, precisely because the reformers manifested some of the best social work intentions.

In 1899, the first juvenile court was established in Cook County, Illinois, providing a model that spread rapidly throughout the United States.<sup>116</sup> The juvenile court was created to be a special civil court, where dependent, neglected, and delinquent children could be diagnosed and individually treated by experts employing social-scientific methods that addressed their “best interests.” Rather than being perceived as miniature versions of adult criminals, delinquent children were grouped together with neglected

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116. ARNOLD BINDER ET AL., *JUVENILE DELINQUENCY: HISTORICAL, CULTURAL AND LEGAL PERSPECTIVES* 213-17 (3d ed. 2001). The authors report that by 1912, twenty-two states had juvenile court laws; by 1928, all but two states maintained some form of juvenile court system, though, they note, these systems “were not uniform throughout the states.” *Id.* at 217. In a 1927 study of the juvenile court system, Herbert Lou wrote:

The spread of the juvenile-court movement is one of the remarkable developments in the field of jurisprudence during the last quarter-century. The movement which had its inception in Chicago has been extended throughout the country and to most parts of the world. In principle at least, almost everywhere the child has emerged from the domination of the ideas and practices of the old criminal law.

HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 23 (1927).

and dependent children to be treated by the state in the same manner “as a wise and merciful father handles his own child.”<sup>117</sup> In the words of Julian Mack, one of the first Cook County Juvenile Court judges, the emphasis in the juvenile court shifted from “Has this boy or girl committed a specific wrong?” to “What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career?”<sup>118</sup>

Proceedings in the juvenile court were intentionally kept informal, as “[g]enerally, juvenile court reformers regarded juries and lawyers as unnecessary restraints upon the flexible pursuit of the best interests of the child.”<sup>119</sup> The informality of the proceedings in juvenile court, though subject to early legal challenge, were justified by the argument that the State need not afford due process rights to children whom it sought to “save” from lives of criminality.<sup>120</sup>

The creation of the juvenile court was an experiment in law as social work. Describing the juvenile court system as it existed in 1927, Herbert Lou wrote that in its administration, the juvenile court “has endeavored to conduct its investigations and the supervision of children as far as possible in accordance with the principles of social case work.”<sup>121</sup> This included broad-ranging investigation of the

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117. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909). *See also* LOU, *supra* note 116, at 20.

The only new and very important thing [about the law enacting the Cook County Juvenile Court in Chicago] was the concept that the child who broke the law was not to be regarded as a criminal . . . . The delinquent child was to receive practically the same care, custody and discipline that were formerly accorded the neglected and dependent child and which, as the act stated, should approximate as nearly as might be that which should be given by his parents.

*Id.* at 20.

118. Mack, *supra* note 117, at 119-20.

119. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 39 (1978). For example, Julian Mack urged juvenile court judges to forgo the “ordinary trappings of the court-room” such as “[t]he judge on a bench, looking down upon the boy standing at the bar.” Mack, *supra* note 117, at 120. Instead, he envisioned the juvenile court judge “[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him.” *Id.*

120. *See* Mack, *supra* note 117 (tracing the jurisdictional roots of the juvenile court movement to the courts of chancery in England). *See also* LOU, *supra* note 116, at 10-12 (tracing the language of child “saving” through several early cases challenging the juvenile courts on constitutional due process grounds).

121. LOU, *supra* note 116, at 44.



child's psychological, economic, and social situation on the theory that "the child, the individual and his environment are necessarily interrelated and interwoven and the total situation must be viewed as an integral whole."<sup>122</sup> The reformers included an influential group of college-educated women operating at the cusp of the movement that organized traditional philanthropic volunteer work into the profession of social work, including Jane Addams and Julia Lathrop of Chicago's Hull House.<sup>123</sup>

The backdrop for the work of the Progressive reformers was an influx of Eastern European immigrants into Chicago in the late nineteenth century, who lived in crowded and unsanitary slums.<sup>124</sup> The women of Hull House were part of a larger "settlement house" movement, premised on the idea that "well-educated, middle-class young people should set up residence in slum neighborhoods and, by living among the poor as neighbors, be in a better position to help them."<sup>125</sup> The women at Hull House drew from their social scientific

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122. *Id.* at 123. Lou continues, capturing the social worker's holistic and systems-sensitive perspective in his description of juvenile court investigations:

No feature of the situation should be left out or considered separately. All factors in the case, biological, psychological, social, economic, and pathological, must be viewed in the whole situation. Behavior is always the result of an interplay of forces between the individual and his environment, social, physical, and mental, present and past. Therefore, one must correlate and consider together the social, physical, and mental findings in order to understand the child's delinquency and to form a basis for treatment.

*Id.*

123. See generally ELIZABETH J. CLAPP, *MOTHERS OF ALL CHILDREN: WOMEN REFORMED AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE AMERICA* (1998) (describing the coalition between "traditional" and "professional" maternalists who were instrumental in establishing the first juvenile court in Chicago and promulgating its spread throughout the United States). See also ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 83-98 (2d ed. 1977) (profiling and contrasting Chicago child-saver Louise De Koven Bowen, a conventional philanthropist, with Jane Addams, a new professional social reformer); David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 47-50 (Margaret K. Rosenheim et al. eds., 2002) (contrasting Chicago reformer Lucy Flower, who embodied the older philanthropic tradition, with her friend and fellow Chicago reformer Julia Lathrop, who embodied the new college-educated woman opting for "social work as a full-time career").

124. PLATT, *supra* note 123, at 36-43; VICTORIA GETIS, *THE JUVENILE COURT & THE PROGRESSIVES* 10-11 (2000).

125. CLAPP, *supra* note 123, at 52.

study of conditions in the urban slums to inform and motivate their reform efforts, differentiating themselves from the less sophisticated and more paternalistic contemporary charitable women's movement of "friendly visiting," which offered "uplift" to the worthy poor.<sup>126</sup>

The Progressive vision of the juvenile court was both innovative and also deeply influenced by the nineteenth-century perspectives of the reformers. The Progressive reformers who pressed for the creation of the juvenile court in Chicago were united by "their faith in the ability of government to bring about positive social change and their faith in the ability of science to solve social problems."<sup>127</sup> The intellectual milieu of the reformers included cutting edge views of criminology that located the causes of crime in environmental conditions, rather than either in the free will of the criminal offender or in biologically determined defects.<sup>128</sup> This view of crime as a natural response to a negative social environment supported the Progressives' belief that the degrading conditions of urban life were responsible for breeding crime, and fueled their interest in social justice reforms as the solution to criminality.<sup>129</sup> Their reforms were also shaped by contemporary middle-class views of child-rearing, which idealized the family home—especially its capacity for maternal and emotional nurture—as crucial in the development of morally upright citizens.<sup>130</sup>

The Progressives' faith in government intervention based on social-science principles, and their preference for home nurture, came together in the notion of juvenile probation as an alternative to the

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126. GETIS, *supra* note 124, at 14-17.

127. *Id.* at 4. Getis elaborates that the Progressives faith in science embraced the more general methodology or "idiom" that united scientific inquiry: the "careful observation and classification of facts." *Id.* at 20. The Progressives believed that through the application of this scientific method, the environmental causes of criminality could be understood, and that this understanding could pave the way for governmental intervention that would address social problems. *See generally id.* at 9-27 (Chapter 1, *The Progressive Vision*).

128. RYERSON, *supra* note 119, at 16-27. *See also* PLATT, *supra* note 123, at 15-36 (discussing the reliance of reformers on strains from various criminological theories in the nineteenth and early twentieth centuries).

129. *See* RYERSON, *supra* note 119, at 20-27.

130. STEVEN L. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920*, at 49-54 (1977); CLAPP, *supra* note 123, at 9-14; RYERSON, *supra* note 119, at 27-34.

removal and institutionalization of wayward children.<sup>131</sup> Echoing the sentiments of the “friendly visitors,” juvenile court probation officers were envisioned by some as middle-class envoys sent out to befriend the poor (and often immigrant) delinquent and his family, and to educate them into better patterns of living.<sup>132</sup> The more social science-minded Hull House reformers fought to establish merit systems for the hiring of probation officers, both to avoid political patronage and “to professionalize the court by hiring only those persons trained in the latest theories of social work.”<sup>133</sup> It was these probation officers, insiders in the justice bureaucracy, who were expected to represent the interests of the children in juvenile court.<sup>134</sup>

The vision of the Progressive reformers was never fully realized,<sup>135</sup> and their reform efforts eventually gave way to a second due process revolution launched by lawyers, culminating in a series of cases in which the United States Supreme Court rejected the justification for the informality of juvenile court proceedings and established several procedural protections, including the right to counsel.<sup>136</sup> In *In re Gault*, the Court noted that, although

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131. Writing in 1927, Lou states: “The success of the juvenile court depends mainly upon a well organized probation staff, for, in a larger sense, most of the work of the court is probation work.” Lou, *supra* note 116, at 85. Mack agreed, dubbing probation “the keynote of juvenile-court legislation.” Mack, *supra* note 117, at 116.

132. See RYERSON, *supra* note 119, at 50. “The theory that the cause of delinquency lay in lower-class environments, physical and cultural, translated into the practice of probation as uplifting contact between the delinquent and his social betters.” *Id.* Mack’s description of the role of juvenile probation, penned at the close of the first decade of the juvenile court, supports this view:

Most of the children who come before the court are, naturally, the children of the poor. In many cases the parents are foreigners, frequently unable to speak English, and without an understanding of American methods and views. What they need, more than anything else, is kindly assistance; and the aim of the court in appointing a probation officer for the child, is to have the child and the parents feel, not so much the power, as the friendly interest of the state . . . .

Mack, *supra* note 117, at 116-17.

133. Tanenhaus, *supra* note 123, at 54.

134. It is interesting to note that one of the arguments offered by the Arizona Supreme Court to defend its denial of counsel to Gerald Gault in the landmark case establishing the due process right to counsel in juvenile court, was that the juvenile court provided probation officers to protect the interests of the children. *In re Gault*, 387 U.S. 1, 35 (1967).

135. For accounts organized around comparing the vision of the juvenile court to its implementation, see RYERSON, *supra* note 119, and SCHLOSSMAN, *supra* note 130.

136. *Kent v. United States*, 383 U.S. 541, 557 (1966) (holding that juveniles are entitled to

“benevolently” motivated by the “most enlightened impulses,” the juvenile court had failed to live up to its ideals of providing “careful, compassionate, individualized treatment.”<sup>137</sup> It rejected the argument that the presence of probation officers was sufficient to protect the child’s interests,<sup>138</sup> and insisted that the child needed the “guiding hand of counsel” to “make skilled inquiry into the facts, to insist upon the regularity of proceedings, and to ascertain whether he has a defense and prepare and submit it.”<sup>139</sup> The Court lauded due process as the “primary and indispensable foundation of individual freedom” and as the “best instrument[] for the distillation and evaluation of essential facts . . . which enhance the possibility that truth will emerge.”<sup>140</sup> The Court capped its discussion with a rhetorical flourish, declaring: “Procedure is to law what ‘scientific method’ is to science.”<sup>141</sup>

Despite its rhetoric, the Supreme Court’s extension of procedural due process protections in juvenile court proceedings was limited in

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due process protections, including the right to counsel, in proceedings to waive the juveniles into adult court); *Gault*, 387 U.S. at 33, 41, 55, 57-58 (holding that due process guarantees the right to notice of charges, the right to counsel, the right against self-incrimination, the right to confront witnesses, and the right to appellate review in juvenile court proceedings). Within the next five years, the Court decided two other major cases defining due process rights in juvenile delinquency cases. See *In re Winship*, 397 U.S. 358, 368 (1970) (holding that due process requires proof beyond a reasonable doubt in both criminal and juvenile proceedings); *McKiever v. Pennsylvania*, 403 U.S. 528 (1971). For an account of the litigation leading up to these decisions, see CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* (1998).

137. *Gault*, 387 U.S. at 17-18. The Court relied on significant empirical and social scientific research to back up this claim. See *id.* at 22-23, 22 n.30. For further discussion of the impetus for this research and how it shaped Court opinion, see MANFREDI, *supra* note 136, at 32-52.

138. *Gault*, 387 U.S. at 35-36. See also *Fare v. Michael C.*, 442 U.S. 707, 719-22 (1979).

139. *Gault*, 387 U.S. at 36. In support of this conclusion, the Court cites the report of the President’s Crime Commission, which recommended appointment of counsel “without requiring any affirmative choice by child or parent,” and explained:

[N]o single action holds more potential for achieving procedural justice for the child in the juvenile court than the provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires.

*Id.* at 38 n.65. Cf. Mack, *supra* note 117, at 116 (calling juvenile probation the “keynote of juvenile-court legislation”).

140. *Gault*, 387 U.S. at 20-21.

141. *Id.* at 21 (internal citation omitted).

nature and scope. The Court opened its opinion in *Gault* with the clarification that its ruling applied *only* to that part of juvenile proceedings in which delinquency is actually determined, and neither to the informal and discretionary “pre-judicial” stage nor to the “post-adjudicative or dispositional process” in juvenile court.<sup>142</sup> Rather than relying on the Sixth Amendment right to effective representation in criminal cases, the Court grounded the juvenile’s right to counsel in the Due Process Clause, allowing the characterization of juvenile courts as “civil” to stand.<sup>143</sup> Although the Court has since ruled that due process requires other protections in juvenile court (such as proof beyond a reasonable doubt), it has stopped short of requiring a trial by jury.<sup>144</sup>

The tentative embrace of procedural rights in the majority opinion in *Gault* was grounded on a fundamental optimism that the “legal scientific method” of procedure was reconcilable with the more holistic, treatment-oriented, social-scientific approach of an enlightened juvenile court. More than once, the Court took pains to argue that the introduction of due process protections need not hamper the juvenile court’s ability to deliver the kind of appropriately individualized and benevolent dispositions envisioned by the original juvenile court reformers.<sup>145</sup> In fact, the Court argued that the

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142. *Id.* at 13.

143. In this respect, the right to counsel in juvenile delinquency hearings differs from that in criminal cases. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (establishing the constitutional right to provision of counsel in state criminal felony cases based on the Sixth and Fourteenth Amendments); *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that the right to counsel includes the right to *effective* assistance of counsel, and not merely to the provision of counsel). These differences could justify a more limited adversarial role for counsel in juvenile proceedings. See Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 298 (2003) (noting that some courts have used the difference to argue for diminished constitutional protections for children in juvenile court, and that the argument can also be used to justify the employment of a guardian ad litem). *But see* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 650 (2002) (“By adopting the due process approach, the Supreme Court set the stage for recognition of rights and protections for juveniles that are not extended to adults, for the very reason that in order for juveniles to obtain access to due process, they may need more protection than adults.”).

144. See cases cited *supra* note 136.

145. *Gault*, 387 U.S. at 25, 27 (“[T]here is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide and to improve provision for the confidentiality of records . . . relating to juveniles.”). “While due process requirements will, in

therapeutic benefits of fair treatment in adversarial proceedings might even bring the realities of the juvenile court more closely in line with its ideals.<sup>146</sup>

This optimism was not shared by all members of the Court. In a dissenting opinion, Justice Stewart recognized that “the performance of [juvenile justice] agencies has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them.”<sup>147</sup> However, he viewed the introduction of the “inflexible restrictions” of the Constitution into juvenile court as “a long step backwards into the nineteenth century.”<sup>148</sup> Three years later, Chief Justice Burger authored a dissent in *In re Winship* (a case establishing the “proof beyond a reasonable doubt” standard for juvenile adjudications) opining, “[W]hat the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive . . . .”<sup>149</sup>

The Court’s jurisprudence reflects a continuing ambivalence on the part of participants in the juvenile court system, including lawyers, between informality and adversarial process; this is further reflected in conflicting views of the role that counsel should play. One of the leaders in the due process revolution that led to the provision of counsel requirements in *Gault* was Charles Schinitzky, a lawyer who led an investigation of the juvenile court system in New York in 1960, and later headed the first office responsible for providing representation to children in the New York Family Court.<sup>150</sup> Schinitzky’s office rejected a model based on representing

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some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency . . . nothing will require that the conception of the kindly juvenile judge be replaced by its opposite. . . .” *Id.* at 27.

146. For this proposition the Court cites a 1966 study of juvenile delinquency by the Russell Sage Foundation for the proposition that “the appearance as well as the actuality of fairness, impartiality and orderliness—in short the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned [than the informality of the *parens patriae* approach]” *Id.* at 26 n.37 (citing RUSSELL SAGE FOUNDATION, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 35, 85 (1966)).

147. *Id.* at 79 (Stewart, J., dissenting).

148. *Id.*

149. *Winship*, 397 U.S. at 376 (Burger, C.J., dissenting).

150. Even before *Gault*, in the early 1960s, dissatisfied states were studying, and in some cases revising, their juvenile court procedures. See BINDER ET AL., *supra* note 116, at 221-23.

the “best interests of the child,” reasoning that “when it comes to determining what really *is* a child’s ‘best interests,’ everyone’s an expert.”<sup>151</sup> Rather than being just one more expert in the room, Schinitzky thought counsel ought to fulfill its role as “the primary check on abuse of judicial power” by articulating what the child wanted and defending the child’s rights.<sup>152</sup> However, there has been resistance in practice to this vision of fully adversarial representation of children in juvenile court. Recent studies show that juveniles are not provided counsel on a uniform basis, nor are they permitted to waive counsel under relaxed procedural standards.<sup>153</sup> Even when present, lawyers representing children in juvenile court are often less-than-zealous adversarial agents, taking on the role of guardian *ad litem* and advising the court about their own views of what is best for their clients.<sup>154</sup>

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During World War II and continuing through the 1950s, increasing attention was paid to issues of juvenile delinquency. *Id.* at 220-21. In 1960, at the request of the New York City Bar Association, the New York Legal Aid Society commenced a study of the need for lawyers in juvenile court. PETER S. PRESCOTT, *THE CHILD SAVERS: JUVENILE JUSTICE OBSERVED* 59 (1981). Charles Schinitzky, a former Legal Aid lawyer, headed up this study, which observed more than a thousand juvenile court cases. *Id.* at 59-60. In response to this study, in 1962, the New York legislature established a statewide Family Court system, included the right to counsel for juveniles in delinquency and dependency proceedings, and established a system of law guardians to represent indigent juveniles in court. BINDER ET AL., *supra* note 116, at 223.

151. PRESCOTT, *supra* note 150, at 65 (emphasis in original). Another early and vocal proponent of this view was Stephen Wizner. *See, e.g.*, Stephen Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUM. RTS. L. REV. 389 (1972).

152. *Id.* In an amicus brief that Schinitzky’s Legal Aid Society filed in *Gault*, it argued for a more expanded role of defense counsel than the Court ended up endorsing. Relying on the benefits of adversary counsel that they had observed in the disposition or “sentencing” stage, they noted: “[I]n amicus Legal Aid’s experience, the child’s attorney participates in the disposition phase—often considerably more than an attorney at a criminal sentencing—questioning statements in probation or psychiatric reports, adducing additional background facts, or suggesting treatment possibilities.” Brief of Amici Curiae Legal Aid Society & Citizens’ Committee for Children of New York, Inc. at \*17, *In re Gault*, 387 U.S. 1 (1967) (No. 116), available at 1966 WL 87673.

153. BARRY C. FELD, *JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS* (1993) (comparative study of the provision of counsel in juvenile cases in six states); Berkheiser, *supra* note 143 (study of opinions in ninety-nine waiver-of-counsel cases in state juvenile courts).

154. *See* Marrus, *supra* note 143, at 326-27. Studying the operation of the juvenile court in Chicago in the wake of *Gault*, Platt observed:

In Chicago, the juvenile court public defender maintains two seemingly conflicting definitions of his job. As an “officer of the court,” whose prevailing ethic is child saving, he sees himself as a social worker with a law degree. As a social worker, he

To complicate matters, in the decades since *Gault*, there has been a hardening of public attitudes against juvenile “criminals,” and pressure to balance or override the needs of the offender with the need to protect the public. This has led to “get-tough” policies such as lowering the age for, and in some circumstances mandating, the waiver of children into adult court.<sup>155</sup> The result, according to leading critic Barry Feld, has been the transformation of the juvenile court “from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young offenders that provides them with neither therapy nor justice,”<sup>156</sup> and whose harsh excesses fall disproportionately on minority youth.<sup>157</sup>

Allegories are stories told to make a point, and the story of the juvenile court as a failed “law as social work” experiment supports multiple interpretations. One lesson that might be drawn is “not enough social work”: the juvenile court invested inadequate resources in services and personnel to achieve its goals, and the experiment failed as a result of this neglect.<sup>158</sup> However, I suspect that even with resources, the vision of the juvenile court truly functioning as a “kind and just parent” would remain illusory for two reasons. First, the century following the Progressive reforms has seen an erosion of faith in the rehabilitative ideal, and faith in the ability of social science in alliance with government, to “solve” the problems of crime

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must acknowledge that juveniles are naturally dependent and require supervision by mature adults. At the same time, however, he is a defense attorney who takes pride in the craft of advocacy.

The public defender resolves this dilemma by doing “what is best for a kid.” If he considers his client a “good kid,” he will do everything to have the charge dismissed or will plead guilty in return for a warning or light sentence, such as probation. “Bad kids” are given up on. The public defender assumes, along with all juvenile court functionaries, that little can be done to “help” these clients. He pleads them guilty and cooperates to process them into reformatories.

PLATT, *supra* note 123, at 168.

155. Barry C. Feld, *The Honest Politician’s Guide to Juvenile Justice in the Twenty-First Century*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 15-16 (1999).

156. *Id.* at 11.

157. *Id.* at 17. See also Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, in READINGS IN JUVENILE JUSTICE ADMINISTRATION 267 (Barry C. Feld ed., 1999) (analyzing disproportionate confinement of minority youth in Florida).

158. This is the lesson that Justices Stewart and Burger drew in the dissents they authored in *Gault* and *Winship*, respectively. See *supra* notes 147-49 and accompanying text.



and poverty, upon which the juvenile court was founded,<sup>159</sup> as well as changing conceptions of children in the formulation of public policy.<sup>160</sup> The disagreements among social scientists (not to mention juvenile court judges, prosecutors, and probation officers) about how to effectively address juvenile delinquency provide ample opportunity for contests between competing visions, as well as exploitation by those with vested interests in particular programs or approaches.<sup>161</sup> Second, and more insidiously, the history of the juvenile court provides support for the argument that underlying the benevolence of the juvenile court reform was a desire for social control of the “deviant” immigrant classes by members of the social elite,<sup>162</sup> concerns which are still evident in juvenile justice policies today.<sup>163</sup>

The lesson drawn from the history of the Juvenile Court is that on the systemic or macro-level, lawyers should be lawyers, not social

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159. The loss of faith in the rehabilitative ideal reached its zenith in 1975 with the publication of the Martinson Report, a survey of correctional programs in New York, which concluded that no program had any appreciable effect on recidivism. Carter Hay & Mark Stafford, *Rehabilitation in America: The Philosophy and Methods, from Past to Present*, in PUNISHING JUVENILES: PRINCIPLE AND CRITIQUE 67, 77 (Ido Weijers & Antony Duff eds., 2002). This skepticism is captured by Victor Streib who, reflecting in 1978 on the “design flaws” of juvenile justice as a socio-legal system, noted that it was built on the assumption that “‘treatment of delinquency’ is within human knowledge and capabilities,” when in fact our knowledge about how to control delinquency is in its “embryonic stages” and is supported by only “very thin” empirical evidence. VICTOR L. STREIB, JUVENILE JUSTICE IN AMERICA 55-56 (1978). The more current view has been summarized as follows:

Generally speaking, the discussion of rehabilitation is no longer dominated by two entirely contradictory positions: one insisting that rehabilitation is uniformly good and one insisting that it is uniformly bad. Instead, there is greater recognition that some rehabilitation or prevention programmes are effective (under some circumstances and with some populations), and that others are ineffective.

Hay & Stafford, *supra*, at 81.

160. See Elizabeth S. Scott, *The Legal Construction of Childhood*, in A CENTURY OF JUVENILE JUSTICE 113 (Margaret K. Rosenheim et al. eds., 2002).

161. STREIB, *supra* note 159, at 56 (“It seems clear that each person promoting one treatment program or another does so primarily out of faith, hope, and perhaps a desire to stay employed or increase his empire of funds and employees.”).

162. See generally PLATT, *supra* note 123. See also Anthony Platt, *The Triumph of Benevolence: The Origins of the Juvenile Justice System in the United States*, in READINGS IN JUVENILE JUSTICE ADMINISTRATION 20 (Barry Feld ed., 1999).

163. The impetus for the “get tough” juvenile justice policies of the 1980s and 1990s can similarly be traced to politically motivated efforts to control poor urban black youth. See Feld, *supra* note 155, at 15-16.

workers. There are profound dangers in substituting a system of social work values and perspectives on social justice for the lawyer's procedurally-based vision. Looking back, it is easy to see how the most well-intentioned and forward-thinking of the nineteenth-century juvenile court reformers were limited in their vision by the prevailing social-scientific views, and the race and class biases of their day. However the lens of history does not reveal the limitations of our current thinking as clearly. Humility dictates that twin dangers—misguided altruism and masked malevolence—will inevitably haunt the implementation of any social justice mission. The promise of adversarial advocacy is that no one's social justice mission will go unchallenged by those who bear the consequences of its reforms.<sup>164</sup>

Yet, the question remains as to how this lesson can inform the day-to-day micro-level practice of lawyers representing children in juvenile delinquency cases. Though history teaches that lawyers should take seriously their adversarial role and not permit that role to be subordinated to a social justice bureaucracy, experience demonstrates that by incorporating the social worker's perspective within limits defined by the client's legal interests, lawyers can nonetheless enhance their work. It is to the lessons of experience that the next section is addressed.

### *B. Experience as Teacher: The Benefits and Limits of a Social Work Approach*

In this section, I will illustrate the benefits, and some of the limitations, of adopting a social work perspective in legal representation by analyzing a series of examples drawn from my experience teaching in the Thomas & Mack Legal Clinic at UNLV, in

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164. I do not mean to imply that a lawyer attempting to incorporate social work values and perspectives would miss this point. In fact, Stephen Wizner has contributed consistently to the debate over the role of counsel in juvenile cases by arguing forcefully and eloquently for the traditional advocacy role. See Wizner, *supra* note 151, at 399 ("If counsel limits the defense of the child because of *parens patriae* assumptions that the court and child are not adversaries . . . [c]ounsel becomes part of the problem instead of part of the solution . . . He or she must speak unequivocally for the child's legal rights. The child's right to be heard demands no less"); Stephen Wizner, *The Defense Counsel: "Neither Father, Judge, Probation Officer or Social Worker"*, Sept./Oct. 1971, at 30, 31 ("The lawyer's role is to try to achieve the result which his client wishes—not to play father, judge, probation officer, or social worker.").

which law students, social work students, and other professionals collaborate on juvenile delinquency cases. These examples are drawn from my first semester of teaching in an interdisciplinary clinic that was itself experiencing the first year in which law students and social work students collaborated on cases. Because of the freshness of the encounters between law and social work, and because the encounters occurred in an educational setting that allowed exploration and discussion, the differences between the attitudes and approaches of the two professions were rendered palpable. During this time, the boundaries between the law and social work approaches to representation were actively and reflectively negotiated in case work. My expectations and preconceptions of social work were in a state of perpetual revision, and aspects of legal professional culture that had blended into the background of my thinking suddenly stood out in sharp relief. The views expressed here about the interaction between law and social work will no doubt evolve into greater maturity with greater experience, but there is nonetheless a certain irreplaceable value in the early learning of first encounters, which is what I share in this section.

One lesson that my analysis of these experiences teaches is that lawyers have a lot to learn from social workers in adopting a more holistic, contextual approach to understanding and responding to their clients' needs. The social worker's holistic and systems-sensitive approach to identifying and approaching a client's situation can help to check the lawyer's somewhat hubristic tendency to view the client as a walking cluster of legal issues, and to define the relationship in terms of adherence to the norms of legal professionalism. Although lawyering theory, most notably the development of client-centered lawyering theory, has emphasized the importance of lawyers being able to understand and appreciate their clients' legal needs within the context of the clients' values, goals and preferences regarding "non-legal" concerns,<sup>165</sup> legal professional training does little to equip lawyers to seek and identify broadly contextualized "non-legal" information. Moreover, the deference to client autonomy valued in legal professionalism tends to discourage the kind of searching

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165. See *supra* notes 97-100 and accompanying text.

inquiry that would question or challenge a client's stated wishes, further hampering the ability to define and understand the "bigger picture" of a client's situation. Observing the different approaches taken by law students and social work students in collaboration on the same cases helped illustrate both why lawyers might want to be more like social workers and how they might accomplish that goal.

However, experience also shows that the lawyer's sensitivity to the legal risks that clients face and the lawyer's commitment to the role of legal advocacy provide an important framework for and limitation on the social work approach to decisionmaking, choice, and action in the representation. Although the lawyer's macro-level systemic role as a client advocate and the lawyer's choices at the micro-level of the lawyer-client relationship are theoretically distinct, they are also inextricably intertwined. In practice, what one does within the lawyer-client relationship can affect the performance of one's systemic role by hampering one's advocacy or compromising the client's legal interests. While incorporating the social work approach and perspective can benefit lawyering, it must also be constrained within the limits that the lawyer's systemic role as client advocate provide.

These observations suggest that the task of incorporating a social work perspective into lawyering involves a delicate balancing or negotiation of perspectives. To accomplish it, lawyers must both push against some of the received limitations imposed by their lawyer perspective, which is defined by their clients' legal needs and interests, while at the same time remaining cognizant of the limitations that their clients' legal interests place on their actions and decisions. The following examples will illustrate how some of that negotiation between perspectives did and can occur.

### 1. The Benefits of the Social Worker's Holistic Approach

One of the primary benefits of incorporating the social work perspective into legal representation is the ability to gain and incorporate a more holistic understanding of "relevant information." The difference between the lawyer and social worker perspectives on

defining relevant information<sup>166</sup> was driven home for me in the simple decision of whether to exclude a client's parent from the client interview.

The prevailing legal view is that parents should be excluded from the lawyer's interview with a child client.<sup>167</sup> In fact, the leading practice manual for defense lawyers in juvenile cases devotes an entire section of its chapter on interviewing clients to the topic of "explaining to the family the need for counsel's meeting with the client alone."<sup>168</sup> The authors reference the client's legal interest in having the parent absent from the interview, noting that because most jurisdictions do not recognize a parent-child evidentiary privilege, the presence of the parent in the interview room could jeopardize the confidentiality of the child's communications to the lawyer. The authors also explain that parents may dominate the interview, and that clients may be reluctant to admit the full extent of their misbehavior in front of their parents.<sup>169</sup> While these legal and practical concerns are certainly justified, the authors do not recite any benefits that might ensue from the parents' *presence* in the interview that would be lost if they were excluded. This is not surprising. Viewed from the lawyer's perspective, any information the parent possesses can be gathered just as easily in a separate interview.

From the social work perspective, however, there is valuable information to be gathered from observing the clients interact with their parents, which could not be gathered by interviewing the parents separately. *What* the parent or the child say is much less informative, from the social worker's contextual view, than *how* they say it, who dominates the conversation, and what their body language indicates while the other is speaking. This is not to say that a social worker would never want to interview the client alone, or that a lawyer would never interview the client together with his parents; however, their reasons for making the decision would be different, and the social worker's reasons would be informed by the desire to observe

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166. See *supra* notes 101-05 and accompanying text (discussing the difference between the perspectives).

167. See, e.g., RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 5.03 (1991).

168. *Id.*

169. *Id.* § 5.03(a).

the client interacting with others in multiple settings to help better understand how the client affects and is affected by the multiple systems within which the client lives and operates, including the family system.

The benefits of incorporating the social work perspective on understanding and confronting the client as part of a larger family system were highlighted for me by a case in which we represented our client in a series of due process hearings relating to a school suspension. Throughout the representation, we met with the client together with his parents as well as alone. It was certainly true that we gathered more legally relevant “facts” in talking with the client alone. While present, his parents dominated the conversation. However, by observing and understanding the family dynamic, we were able to see how our client’s version of events was shaped by his desire to meet his family’s expectations of him. We were also able to see how their indignant reactions to his suspension, which were based on incomplete information, fueled his inability to confront the negative aspects of his behavior. Although we spent a lot of time alone with our client helping to prepare him for his due process hearings, the really effective preparation occurred outside our presence, after we succeeded in engaging the entire family system in our efforts. The information that we gained about the family dynamics by incorporating the broader and more contextualized social work perspective on relevant information, thus provided an important counterbalance to our lawyerly desire to protect our client’s legal interests by excluding the parents from the interview.

A second benefit of the social work method and approach is its value in helping to delve below the surface of what the client verbally expresses and to explore the client’s wishes in light of his or her well-being and best interests. Lawyers’ focus on the legal framework of their clients’ situations and their professional deference to the clients’ stated wishes regarding the objectives of representation may impair lawyers’ ability to understand and address their clients’ greater interests and the “big picture.”<sup>170</sup>

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170. See *supra* notes 106-15 and accompanying text.

The impairment of viewing the client's situation through too narrow of a legal lens was illustrated in a second clinic case, where a law student and a social work student conducted a joint interview with an eleven-year-old client in juvenile detention prior to the client's plea hearing. The law student's objectives were to hear the client's version of what had happened, to determine whether the client wanted to admit or deny the charges in the petition, and to assemble information that might be needed to argue for the client's release pending further proceedings. After hearing the child recite a very different version of events from that alleged in the petition and ascertaining that the child wished to deny the charges, the law student asked the child where he wanted to go if released from detention. Rather than saying he wanted to go home, the child mentioned the name of a shelter that serves as the county's temporary placement for children who have been removed from their homes as a result of abuse or neglect. The social work student stepped in to ask follow-up questions. What did the child remember about being at the shelter? What did the child like about the shelter? What did the child not like about living at home with his father? What would have to change at home to make him more comfortable there? The child answered that he wanted to go home, but that there was never enough food there; what he would really like was a refrigerator in his room with a lock on it so that he could be sure he could get food. The social work student was able to respond to this information by contacting local food pantries on behalf of the family so that there would be food available when the child was released from detention.

In this second example, the social work student's broader and more contextual perspective helped to elicit information about the lack of food at home that the law student, who focused on the legal question of release from detention and was carefully cognizant of respecting the client's stated wishes, might not have gathered himself. A lawyer focused too narrowly on the client's legal concerns might have concluded that it was up to the client to decide whether he wanted to go home, and thus might have failed to question the reasons behind the client's objectives. Even a lawyer who sought to question the client's objectives might not elicit the information about lack of food at home because the lawyer might lack the skills to gather information holistically.

Significantly, it was the social work student who attempted to question the eleven-year-old boy about *why* he preferred release to a temporary shelter as opposed to going home with his father. Seeing a disjunction between the client's expressed wishes and her perception of what would promote the client's well-being, she sought for the client to articulate the changes that needed to occur at home. Her concern was not to carry out the client's wish to be released to a shelter, but rather to help him to effectuate the changes that would make home a more comfortable place. In this regard, the social work perspective helped to balance some of the inadequacies that "thinking like a lawyer," through legal frames of reference, present for tasks such as interviewing and counseling that are common to both professions.

## 2. Legal Interests as Constraints on the Holistic Approach

Despite its benefits, the broader and more holistic social work approach toward gathering information from and about clients sometimes carries with it the risk of compromising the client's legal interests; an approach that abandons the framework of legal interests entirely would leave the client unprotected from those risks. For instance, in the first example, the client's legal interest in protecting the confidentiality of his communications with his lawyer was threatened by the inclusion of his parents in the interview room. Although the risk of forced disclosure of his confidences was relatively slim in that particular case, and the benefit of the information gained by involving other family members probably outweighed it, other cases pose a more costly tradeoff. A case in our juvenile justice clinic illustrates the dangers of holistic information-gathering that is unconstrained by the lawyer's sensitivity to legal interests. Our client, who had recently moved to Nevada from California, was facing his first juvenile delinquency petition in Nevada. We understood that the client had been on probation in California, but that the paperwork associated with that probation had not yet been transferred interstate. Both the client and his mother were vague in describing his prior juvenile record.

The question of whether to pursue information from California occasioned interesting discussion of the differing perspectives of the



law and social work student involved. The law student, attuned to the client's legal interests, raised the concern that seeking more specific information about the client's prior record might interfere with her ability to advocate for a lenient disposition in Nevada. The social work student, concerned with the client's overall well-being, was more concerned with properly assessing and addressing the client's needs, and recognized the importance of knowing what the client had done in California, what services had been provided, and how the client had responded to those interventions. This information was important to her, not just for legal advocacy, but also for assessing the client's expressed wishes and helping to move the client in the direction of accepting help that he might need.

The decision about whether to pursue information that, if verified would militate against the pursuit of the client's objectives, recurs in many types of legal settings. A lawyer might conclude solely from the perspective of legal professionalism that effective representation requires lawyers not to "circumscribe [their] search for the facts."<sup>171</sup> However, the interests and concerns that a lawyer would balance in determining how deeply to probe for potentially damaging facts would be informed by the lawyer's understanding of the legal consequences for the client; whereas the social worker's unconstrained pursuit of background information would go unchecked. The lawyer's perspective thus provides important additional information against which the benefits of the social work approach must be balanced.

Additional risks haunt full disclosure in interdisciplinary work between lawyers and social workers because of the differing scopes of their respective professional duties of confidentiality. For example, if the child in the second case discussed above had disclosed that the reason he wanted to be released to a shelter rather than to return to his home was because of abuse by his father, then the social worker might have been professionally obligated to report the abuse even contrary to the client's wishes. The lawyer, on the other hand, might have been required to keep the information confidential unless authorized by the client to reveal it. The bare potential that

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171. See, e.g., Ellmann, *supra* note 104, at 905 (discussing the selective ignorance strategy in the context of an asylum claim in an immigration case).

representation would be infected by such conflicts may cause proponents of zealous advocacy to shy away from interdisciplinary work, concluding that it puts the client at too much risk; lawyers working in interdisciplinary settings have used their sensitivity to the client's legal concerns to structure their work with other professionals to protect client confidences from disclosure.<sup>172</sup>

In addition to the constraints that sensitivity to a client's legal interests place on information-gathering, the lawyer's role as advocate can place limits on the exploration and pursuit of the client's best interests in opposition to the client's stated wishes. There is a particularly delicate balance to be struck in representing children in juvenile cases, where the "best interests" standard defines an important part of the legal issue at stake. As demonstrated above with regard to the history of the juvenile court, lawyers should not abandon their advocacy role on behalf of their clients in favor of a "client best interest" bureaucracy. In a legal context where the "best interests of the client" define the legal issue to be decided, the line between the client's legal right to representation and the lawyer's concern for the client's best interests are blurred, and the lawyer's pursuit of the client's best interests within the lawyer-client relationship poses a particularly acute danger of obscuring the lawyer's adversarial role.<sup>173</sup>

### 3. Summary

These examples illustrate some concrete ways in which Aiken & Wizner's exhortation for lawyers to be "more like social workers" can enhance zealous advocacy by expanding the way lawyers think about relevant information beyond the relatively narrow constraints of legal categories. The social worker's perspective can help the

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172. For examples of some of these strategies, see Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001); J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics be in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337 (2002).

173. For further discussion of the lawyer's role in representing children in juvenile delinquency cases, see Wallace J. Mlyniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 105 (Rodney J. Uphoff ed., 1995).

lawyer to understand how legal frames of reference may be limiting the lawyer's view of the client's situation. The social work perspective may also help the lawyer to appreciate the benefits of pursuing information that the lawyer might otherwise categorically protect, perceiving only the legal risks involved in its acquisition without counterweight.

The lawyer's sensitivity to the client's legal interests, however, creates an important framework within which the social worker's more holistic approach to information-gathering and exploration of client interests must operate. It is not always possible to predict whether a particular action will in fact compromise the client's legal interests, and often decisions, such as whether to pursue a client's prior probation record in California, rest on a risk-benefit analysis. By bringing their sensitivity about legal risks to these decisions, lawyers can help social workers (as well as clients) to understand the importance of placing constraints on the holistic approach. However, by listening to social workers, lawyers better appreciate the benefits to be gained, and communicate these benefits to their clients, rather than opting narrowly for the most risk-averse means of protecting the client's legal interests.

#### IV. CONCLUSION

This Article has argued that Aiken & Wizner's model of the "lawyer as social worker" and Smith's adversarial hero share the ideal of the zealous advocate as champion of social justice, and that they would agree that law students should aspire and be held accountable to that ideal. Tensions arise between the zealous advocate's narrower procedural vision of justice and the broader, substantive definition favored by the "lawyer as social worker." These tensions have implications both for how the legal and social work perspectives would balance duty toward client against harm toward third parties, and in how they would define and negotiate the lawyer-client relationship. I propose that these tensions can be resolved at the theoretical level by thinking of systemic issues separately from interpersonal issues. As the history of the juvenile justice system demonstrates, there are dangers in allowing the social justice perspective to co-opt the lawyer's adversarial role at the

systemic level. However, leaving intact the broader framework of the client's legal interests, the social work perspective can do much to expand the lawyer's sometimes narrow framing of both the lawyer-client relationship and the approaches to representing clients that are based on legally circumscribed categories of relevant information and autonomous client decisionmaking.

Among the greatest rewards of working and teaching with law students and social work students in an interdisciplinary clinic are the opportunities to explore issues of professional role and identity. After teaching in law school clinical programs for many years, I too have often encountered the reaction from law students reported by Aiken & Wizner, that "this isn't law, it's social work."<sup>174</sup> The students always seem so disappointed to find out how much time they spend on the phone trying to hunt down elusive social service providers, as compared with how little time they spend arguing disputed legal issues in court. I have always tried to explain, in a not-too-discouraging way, that practicing law is really quite often about facts that are messy and law that is clear, rather than the other way around.

Last semester, just as I was preparing to launch into my standard reply, I was interrupted by a different response, not from me, but from the social work students in the clinic. "You've got to be kidding!" they said. From their perspective, everything that the law students had talked about and done all semester had been framed by the law and legal concerns, most of which were completely foreign to the social work students. "That wasn't social work," they insisted, "it was law." It is from encounters like these, which interdisciplinary clinics uniquely afford, that law students can perhaps better learn not only about the social work perspective and what it can add to legal representation, but also about the value and meaning of being a lawyer.

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174. Aiken & Wiener, *supra* note 1, at 63.