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The Criminal Defense Lawyer's Reliance on Bias and Prejudice

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ARTICLES

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> The dominant culture has established certain criteria for theories, for legal arguments, for scientific proofs — for authoritative discourse. These established criteria are the governing rules. If we want to be heard — indeed, if we want to make a difference in existing arenas of power — we must acknowledge and adapt to them, even though they confine what we have to say or implicate us in the patterns we claim to resist.[1]

INTRODUCTION

Criminal defense lawyers are frequently required to utilize legal strategies that are morally repugnant because they perpetuate racial, gender, or cultural stereotypes. They know that legal and factual argument often persuades to the degree it piggybacks on the existing prejudices of a listener. A lawyer may, for example, explain or mitigate a client's conduct by attributing it to cultural factors or to post traumatic stress[2] or pre-menstrual syndrome.[3] It may be necessary to discredit witnesses by accentuating

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1. Martha Minow, *Feminist Reason, in* FEMINIST LEGAL THEORY, READINGS IN LAW AND GENDER 360 (Kathleen T. Bartlett & Rosanne Kennedy eds., 1991).

2. *See generally* Michael J. Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415 (1988).

3. *See* James W. Lewis, *Premenstrual Syndrome as a Criminal Defense*, 19 ARCHIVES SEXUAL BEHAV. 425 (1990) (discussing the history of and psychological theories behind the use of premenstrual syndrome as an affirmative defense to a criminal charge).

conduct that draws upon stereotypes. Lawyers also may enhance their chances, by invoking discriminatory strategies such as striking female jurors during jury selection on the theory that women are intolerant of their own sex.[4] Although such discriminatory practices may be harmful to individuals or groups[5] and do appear to conflict with efforts to achieve justice and equality in the courts,[6] criminal defense lawyers usually understand zealous

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4. *See, e.g.*, Commonwealth v. Whitehead, 379 Mass. 640 (1980) (ordering direct appellate review in a rape case of a woman by two lesbians, where the defense counsel had excluded all women from the jury). For a discussion of the history of women's service on juries, see generally Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986) (arguing that debate over service of women on juries provides important background to current debate on difference feminism). It is common for lawyers to have gender preferences in jury trials, and the litigation manuals reflect this. *See, e.g.*, Lisa A. Blue, *Jury Selection in a Civil Case*, 21 TRIAL LAW. Q. 11, 16-19 (1991). Blue explains, under the heading "Housewives," that "The best way to judge whether a housewife will be a good juror for the plaintiff or defendant is to determine the occupation of the spouse. Most housewives take on the philosophy and thoughts of their spouse." *Id.* at 17. Under the heading, "Sex," Blue states, "Generally, women jurors are more critical of women witnesses, but good if the plaintiff is an attractive male. However, women are better at understanding pain and suffering when compared to men. It is generally thought that women do not think in large figures. However, this can be greatly influenced by a skillful presentation." *Id.* at 19. *But see* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (prohibiting peremptory challenges based on gender). The Court reversed a lower court that had allowed the state to use its peremptory challenges to exclude nine men so as to get a female jury more sympathetic to the paternity claim. *Id* at 100. *See also* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that prosecutors could not exercise peremptory challenges solely on the basis of a prospective juror's race). It appears that *Batson* gave trial consultants the additional task of disguising the use of racial stereotypes when eliminating potential juries. *See, e.g.*, Anthony Flint, *Simpson's Consultants: Yet-to-be-picked Trial Strategists Will Have Wide Ranging Mission*, BOSTON GLOBE, July 25, 1994, at 1, 4. Flint states: "In the Simpson case, race is expected to be a primary factor in the makeup of the jury, but neither side can openly cite race in accepting or rejecting jurors. The consultants will help camouflage those preferences." *Id.* at 4.

5. *See* Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 431 (1988). In criticizing the legal system for its diminution of black lives, Carter says "It is dangerous to suggest that racial categorizations, even oppressive ones, might be acceptable as long as a case can be made for rational fit between ends and means." *Id.* at 431.

6. These efforts include court-sponsored gender and race bias studies. *See, e.g.*, *Final Report of the Massachusetts Gender Bias Study: Gender Bias in Courthouse Interactions*, 74 MASS. L. REV. 50 (1989) (reporting to the Supreme Judicial Court on the extent, nature and consequences of sex discrimination in the Massachusetts courts); COMMITTEE FOR GENDER EQUALITY, COURT CONDUCT HANDBOOK (1990). The Handbook advises on the role of stereotypes as follows:

> Stereotypes have no place in the treatment of people or the handling of cases in the court. . . . Everyone entering the court must be given equal treatment regardless of gender, racial or ethnic background, disability, sexual orientation, age or ability to speak English. Be careful not to make assumptions about people's roles in the courts based on these factors.

Id. at 3-4. While applauding these efforts, one must be wary of some of the results because criminal defendants are rarely the beneficiaries of reform efforts, and sometimes they are harmed as a result. For example, recent amendments to Massachusetts bail laws, *see* MASS. GEN. L. ch. 276, § 58 (1993), provided preventive detention based on "dangerousness," a term left undefined by the drafters. Although one of the aims of this reform measure was to detain prior to trial those accused of spousal abuse, its effect was to detain defendants on ambiguous findings of "dangerousness." *See* Aime v.

advocacy to require pursuit of their client's cause even if it has deleterious consequences to third parties.[7]

The ethical issues raised by such practices are complicated enough for practicing lawyers, but many additional issues arise in the law school clinical context, where students assume the role of lead counsel.[8] Students question a role that seems to demand protecting some clients from systemic bias (found in pretextual arrests, criminal profiles, and searches of minorities) while exploiting that bias on behalf of other clients (such as challenging female jurors in a rape case).[9] They may have far more enthusiasm for current efforts to redress gender and racial discrimination — restrictions on racist exercise of peremptory challenges, increased use of restraining orders in domestic violence cases, or hate crime statutes — than for defense tactics which may be harmful to already-oppressed people. Moreover, clinical teachers are concerned about giving students conflicting messages about values at a time when problems of racism and social justice are more acute than ever and when greater attention to these issues is being urged on educators by the organized bar, law teachers' associations, and commentators.[10]

Commonwealth, 611 N.E.2d 204, 206 (Mass. 1993) (holding the amendments unconstitutional because they violated the due process rights of the defendant).

7. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1969) [hereinafter MODEL CODE] (stating that a lawyer must "represent his client zealously within the bounds of the law"). *See also* STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, Standard 4-1.2 (Am. Bar Ass'n, 3d ed. 1993) [hereinafter DEFENSE FUNCTION] (guiding defense counsel "to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation"). For often cited commentaries on lawyer advocacy, see generally Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951) and Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983).

8. It may be more difficult for students to find their way in this sea of conflicting views than for practicing lawyers because students are unfamiliar with the norms of practice. In a university setting, students have both the luxury and the burden of considerable questioning of and reflection upon their actions.

9. Studies have shown that there may be gender-associated differences in attitudes among jury members. *See, e.g.*, REID HASTIE, ET AL., INSIDE THE JURY 140-41 (1983) (noting that "female[s] appear to be somewhat more conviction-prone than male jurors" in rape cases, while males "were more inclined to think that a rape victim made a casual contribution to the rape, attributed more fault to the victim, and characterized her more negatively" than did females). Moreover, it may be that men and women do not view justice in the same way. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). This point has been raised recently in light of noted gender differences in jury decisions. *See, e.g.*, Adam Pertmann, *Split Decisions*, BOSTON GLOBE, Feb. 11, 1994, at 1 (discussing the different ways men and women view accounts of criminal cases, focusing particularly on the Menendez trial).

10. *See, e.g.*, Jane M. La Barbera and John A. Sebert, A.A.L.S. Memorandum 91-25 (Mar. 8, 1991) (on file with the author) (regarding the A.A.L.S. Workshop on Clinical Legal Education); Emma Coleman Jordan, *The President's Message: Race, Culture and Access to Educational Opportunity*, A.A.L.S. THE NEWSLETTER, Nov. 1992 at 1; Notes from the Executive Director, Consorting, Newsletter of the Inter-University Consortium on Poverty Law, January 1994; Society of American Law Teachers (S.A.L.T.) Conferences Agendas for several years including 1994 (on file with the

Many clinicians teaching criminal defense courses may agree that at least some reliance on bias is obligatory. Yet, that should begin, not end, the inquiry into the lawyer's role. It is important that students address hard questions concerning the use of prejudice and stereotyping in criminal cases: Should lawyers ignore something that they know is likely to help their client's legal interests? Is it permissible to rely on some stereotypes but not others? If so, does it make a difference who gets hurt? Is it up to the student, clinician, client, or court to decide? Should there be a rule to limit what lawyers may do as they veer close to exploiting bias? Is there a risk that undesirable stereotypes will influence fact-finders to the detriment of our clients and if so, does this provide a reason to "fight fire with fire?"

In a clinical course, it is permissible for students to see that they can engage in practices they disagree with, while at the same time, work to eradicate bias from the legal system. Furthermore, they can do so with their morality intact. Representation of clients demands the highest commitment, one that does not allow the lawyer to take on all of the conflicting moral concerns arising from the job. One of the challenges for the clinical teacher is to facilitate this insight. Law schools encourage students to consider how clients, witnesses, and issues are represented, in order that students confront bias. In so doing, students address an array of social and cultural issues that may not be accessible elsewhere in legal training.[11]

This Article is divided into three parts. Part I examines both the many contexts in which criminal defense lawyers and clinical students encounter bias and prejudice,[12] and the commonly-raised objections to its exploitation.

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author); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1512 (1991) (commenting on how to recognize more explicitly race in the law school's core curriculum); Peter M. Shane, *Why Are so Many people Unhappy? Habits of Thought and Resistance in Legal Education*, 75 IOWA L. REV. 1033 (1990).

11. In fact, talking about issues of what is meant by "representation," particularly ethical, tactical, and client autonomy considerations, has been a way of bringing diversity into the classroom. Students are more comfortable discussing difference when they can link it to a professional task they must consider.

12. Prosecutors' reliance on bias and stereotypes, as opposed to their encounters with it in the legal system, goes beyond the scope of this Article. *See, e.g.*, Commonwealth v. Clary, 447 N. E.2d 1217, 1221 (Mass. 1983) (concluding prosecutor's overreaching comments to appeal to jurors' prejudice was highly improper where, after a witness testified that the defendants were lesbians, the prosecutor argued that "we . . . all have different hangups . . . ."). For a discussion of the continued abuse of peremptory challenges, even after *Batson* and progeny, see Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993) (discussing racial discrimination in the context of jury selection); James S. Wrona, Note, *Hernandez v. New York: Allowing Bias To Continue in the Jury Selection Process*, 19 OHIO N.U. L. REV. 151 (1992) (concluding that peremptory challenges have become instruments of racial prejudice and serve only to undermine legitimacy of criminal trials); *see also* Batson v. Kentucky, 476 U.S. 79 (1986). Prosecutors continue to exclude jurors on the basis of their lack of education or unemployment — factors which are often correlated with race and which may be merely pretextual. *See, e.g.*, U.S. v. Ferguson, 935 F.2d 862 (7th Cir. 1991) (upholding prosecutor's use of peremptory strikes to remove

Part II looks at the way the tactical use of bias relates to a lawyer's duty of zealous advocacy. Here, the Article focuses on whether existing ethics rules provide guidance for a lawyer's use of bias and whether proposed rules aimed at eliminating such advocacy would improve or diminish justice. This article argues against such efforts because they impinge on legitimate lawyering, and they may distract the bar from the more serious ethical problem of under-zealousness, particularly in the representation of poor people. In short, any restrictions on lawyer advocacy provide a rationalization for less aggressive advocacy. Finally, Part III considers the clinical teacher's unique role in addressing these issues. As illustrations, two cases handled by students in the Boston University Criminal Clinic are examined. These cases demonstrate the pervasiveness of bias in the criminal justice system, the opportunities this provides for exploring the innate conflicts of lawyering, and the impact of these lessons in forging identities for new lawyers.

I. BIAS AND STEREOTYPES IN THE COURTS

A. PERVASIVENESS IN THE LEGAL SYSTEM

The word "stereotype" can be defined as a shared, over-simplified meaning given to a group from which inferences are made about members of that group.[13] Some stereotypes are true (i.e., roughly accurate generalizations) and some are false. This Article generally uses the terms bias, prejudice and stereotypes interchangeably to include a broad range of inferences, evaluations, and assumptions about behavior.[14]

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blacks and Hispanics from jury on the basis of their youth and unemployment); Berry v. State, 435 S.E.2d 433 (Ga. 1993) (finding a prosecutor's use 9 of 10 peremptory challenges to strike black jurors citing age as a decisive factor); Commonwealth v. Burnett, 36 Mass. App. Ct. 1 (1994) (holding that youth-services occupation was a pretext for race where prosecutor used peremptory challenge to strike the only two blacks). *See* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes,* 46 STAN. L. REV. 781, 794–803 (1994) (arguing against admission of race-based evidence even if statistically correct, so that courts do not give their imprimatur to racism. It will be interesting to see how race plays a role in jury selection for the O.J. Simpson trial. *Cf.* Murray Kempton, *Blind Faith in a Jury Has Its Rewards; It's Impossible to Know the Minds of 12 Ordinary People; It's Elitist to Presume the Worst,* LOS ANGELES TIMES, Jul. 22, 1994, at B7 ("It is becoming a given that black jurors cannot be trusted to believe the worst about O.J. Simpson").

13. For example, the belief that young black males are more likely to be criminals than their white counterparts leads to the factually improper inference that a particular black person committed a particular theft. *See* Jewelle T. Gibbs, *10 Myths About Young Black Males,* BOSTON GLOBE, Nov. 17, 1991 at 77.

14. For example, this Article discusses prejudices that are not stereotypes per se, but that involve misconceptions and beliefs based on bias. These include:

(a) Moral devaluation of the person — e.g., the desire to rule against a gay person in favor of a heterosexual solely because of a belief that a homosexual is an immoral person or to rule against a black person in favor of a white because a white is thought to be a superior moral being;

Most people reach adulthood with a staple of stereotypes by which they navigate the social world. Stereotyping and prejudice are unavoidable because none of us is free of beliefs, observations, experiences, and unstated assumptions.[15] Our observations conjure up animosities based in part on innate discomfort with difference. In defining themselves, people tend to categorize their perceptions of difference into three groupings: pathology, sexuality, and race.[16] Such categorizations lead to the most odious forms of bias based on race, gender, ethnicity, sexual orientation, disability, and other unchosen characteristics. As bell hooks has written, stereotypes are "a fantasy, a projection onto the other that makes them less threatening. Stereotypes abound when there is distance. They are an invention, a pretense that one knows when the steps that would make real knowing possible cannot be taken or are not allowed."[17] It is not merely that we find another's actions threatening because the other is different or unfamiliar. We need to be able to explain away that person as different in order to assure ourselves that harms associated with her will not befall us.[18] Stereotypes persist in narrowly defining racial and ethnic groups even when richer, truer descriptions are available.[19] New religions, therefore, may be interpreted as "Jonestowns" or "Wacos;" Muslims may be viewed as terrorists or at least fanatics.

The criminal justice system contains the prejudices of the larger society. Bias is rampant where all participants rely on stereotypes, consciously or unconsciously, to persuade others or to give shape to the vast array of personalities, fact-situations, and emotions that are found within the court-

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(b) Popular moral evaluation of an act inconsistent with the lawyer's views — e.g., the belief that it is okay for a man to force sex on a woman if he has spent money on a date or for a husband to beat up an unfaithful wife;

(c) Popular factual evaluation of an act inconsistent with the lawyer's view — e.g., the belief that the wearing of provocative underwear indicates consent (or at least a desire reasonably interpreted as consent) to have sex.

15. This Article avoids discussion of the origins of commonly held stereotypes. For an interesting analysis of the genealogy and psychology of stereotypes, see SANDER L. GILMAN, DIFFERENCE IN PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS (1985) and Charles R. Lawrence III, *The Id the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987).

16. GILMAN, *supra* note 15, at 23.

17. BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 165, 170 (1992).

18. This phenomenon is seen when people encounter a violent crime. We seek explanations of the crime in the behavior of the victim. Was she out alone late at night? Was she where a sensible woman wouldn't venture? Was she wearing something provocative? Did she carry a purse? Stereotyping often presents itself as a need to categorize in order to feel safe.

19. GILMAN, *supra* note 15, at 29. Gilman illustrates this point with a quotation from Konstantyn Jelenski: "Poles have never come out against Jews 'because they are Jews' but because Jews are dirty, greedy, mendacious, because they wear earlocks, speak jargon, do not want to assimilate, and also because they do assimilate, cease using their jargon, are nattily dressed, and want to be regarded as Poles." *Id.* at 29.

house. One need not wait long to hear someone associate African-Americans with crime,[20] the Irish with drinking, Latinos with car theft, and Italian-Americans with the mob. Rape victims are said to have "asked for it," victims of domestic violence are deemed responsible for their injuries because they remained in the abusive relationship, and men who wear earrings are considered abnormal. Recent clinical courtroom experience is illustrative of blatant stereotyping where, for example: a court officer, upon seeing two young black children leave the courtroom, said under his breath to students "there go two future defendants;"[21] a Latino client admitted that he was repeatedly called "nigger" by arresting officers; court personnel time and again refer to male prisoners as men and female prisoners as girls; a judge spoke Japanese to Asian students who were Chinese; and another judge assumed that a transsexual client was a prostitute and ordered her to enter an AIDS awareness program (even though the charges against the defendant were unrelated to sex or drugs).[22]

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20. For a study on this point, see A. Leon Higginbotham, Jr., *Racism in American and South African Courts*, 65 N.Y.U. L. REV. 479, 529 (1990) (describing the nature of racially discriminatory courtroom treatment resting on derogatory myths about African-Americans). For a discussion on the media's role in perpetuating negative stereotypes about black people, see generally Adeno Addis, *Hell Man, They Did Invent Us: The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 553 (1993); ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993). In discussing whether the issue of crime is a problem for black people to solve, Cose also makes the point about the protean nature of stereotypes, saying that stereotypes about black people existed in this country long before there was an underclass like the one that exists today. *Id.* at 107.

21. This observation, and others in this Article, are based on the author's personal recollections during recent clinical experience, both in court and in class room setting [hereinafter author's clinic experience]. Comments like this are shocking not only for their content but for the inherent brashness that assumes both truth and shared perception between court officials and law students.

22. *Id.* The following provide more examples of the ways lawyers rely on the existence of stereotypes:

(a) Crimes with a Female Victim

Counsel may attack a female victim's credibility by offering negative character evidence that invokes common stereotypes. For instance, by portraying the victim as naggy, bitchy, promiscuous, or careless about her children, a lawyer can make a victim appear less worthy of belief, to have gotten what she deserved, or to at least be blameworthy for the defendant's behavior. Consider how an attorney could trigger stereotypes if the fact-finder was aware that the female victim had AIDS, raising the possibility that she was sexually promiscuous or a drug addict, and therefore, lacked credibility. An attorney attempted this in a recent rape case, where the judge would not allow evidence of the victim's AIDS condition. *See* Paul Langner, *Rape Charges Against 4 Men Go to Lowell Jury*, BOSTON GLOBE, Sept. 28, 1993, at 24. Counsel raised the same issue later at sentencing, presumably to suggest that the defendants were less blameworthy because the victim was a prostitute with AIDS.

Conversely, cultural stereotypes may make more credible a victim's story of rape, a point not overlooked by prosecutors. For example, a prosecutor may implicitly ask a jury whether it is plausible that this white woman would agree to have sex with that black man. For the historical roots of this stereotype as embodied in legal doctrine, see Jennifer Wriggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983). The pervasiveness of related viewpoints is apparent in both media reports and studies in which respondents say it is acceptable to force sex on someone upon whom one has spent money on a date. *See* Lynn Hecht Schafran and Carol Stuart, *War on Women*, 75

MASS. L. REV. 46 (1990); Nancy Gibbs, *When Is It Rape?*, TIME MAGAZINE, June 3, 1991, at 48 (noting a large percentage of rapists believed a woman who is raped is partly to blame). For a more detailed view of myths and stereotypes of rape victims in the criminal justice system, see Lynn Hecht Schafran, *Writing and Reading about Rape: A Primer*, 66 ST. JOHN'S L. REV. 979 (1992).

(b) Bias Crimes

Bias or hate crimes are acts of aggression motivated by bias based on race, ethnicity, religion, or sexual orientation. These cases are often, by their nature, loaded with stereotyping. For instance, in a gay-bashing case, defense counsel may be tempted to exploit anti-gay sentiments. In a recent murder case involving men in the U.S. Navy, the defendant's original story was that he killed the victim because of provocation based on the victim's sexual advances. His willingness to tell this story, which he later recanted, may have been in part due to his perception of its acceptability by command personnel. *See* James Sterngold, *Sailor Admits He Killed Shipmate in Case that Reflects Gay Debate*, N.Y. TIMES, May 4, 1993 at A1. *See generally* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

(c) Race

(i) In *People v. Powell*, No. BA 035498 (Super. Ct. Los Angeles Cty. 1991) (the first Rodney King beating case), police-officer defendants used wild animal imagery to portray the victim's actions. *See Sergeant Says King Appeared to Be on Drugs*, N.Y. TIMES, Mar. 20, 1992, at A20. It would be interesting to know whether this was invented or encouraged by defense counsel. Such invidious portrayals of black men have deep historical roots in literature, social science, and case law. *See* GILMAN, *supra* note 15, at 135-40. Similarly, in another case, the press and the prosecution referred to an attack on a white female jogger in Central Park by African-American men as a "wilding." *See* Michael T. Kaufman, *Park Suspects: Children of Discipline*, N.Y. TIMES, Apr. 26, 1989, at A1. This imagery was undoubtedly reinforced during the trial. Use of words like "inner city," "projects," and references to "gangs" and "drug deals" may kindle community fears for personal safety. Similarly, shared ethnic or cultural identities may provide empathy based on prejudice that can be utilized by the lawyers. *See generally* Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993).

(ii) It is not uncommon at a sentencing of a man who assaulted his wife to argue that it is customary, though not commendable, in the particular ethnic or racial culture, for men to hit their wives, and that women both encourage and expect it.

(d) Sex Roles

"Boys will be boys" arguments are used in sex-related crimes such as prostitution, lewd behavior, and rape. My law school clinic class recently discussed this approach with regard to a case where a male client and a group of friends were charged with soliciting an undercover female police officer for sex. Author's Clinical Experience, *supra* note 21. The client was Brazilian and, in addition to sex-typing him, we considered raising, with either the prosecutor or the judge, the "Latin lover" or "machismo" stereotype as mitigation for the conduct. *Id.*

In California's "Spur Posse" case, parents of teen age boys charged with raping classmates boasted of the sexual prowess of their children. *See* Jane Gross, *Where 'Boys Will Be Boys' and Adults are Befuddled*, N.Y. TIMES, Mar. 29, 1993, at A1.

In the Mike Tyson rape case, the defense presented the black male defendant in a highly stereotyped manner, i.e. as violent, dumb, highly sexual, and insensitive. Regardless of whether this was an apt portrayal of Tyson, it constituted an attempt to present him to the jury as the victim must have seen him when she accepted his invitation to escort him to his hotel room; in other words, she knew what to expect and chose it. Portrayals such as these hearken back to and reinforce images of black men that most would prefer to forget. *See* Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males about the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997 (1991).

(e) Class stereotypes

Class stereotypes may have played a role in the defense of the Menendez brothers' case, where

It is because bias is so pervasive in the criminal justice system that lawyers rely on it to help win cases. Stereotypes based on gender,[23] disability,[24] and sexual preference[25] are commonly exploited. In a case charging a man with assaulting his estranged wife, for example, the defense may be based in large part on the victim's lack of credibility. May defense counsel impeach the victim through a previous history of hitting the defendant, with testimony of previous beatings or neglect of her children that resulted in social service officials threatening to take the children from the home, with evidence of sexual promiscuity or generally intemperate character, or with a cross-examination implying promiscuity or failure to perform wifely or motherly roles in a traditional manner? Should the attorney seek to have the case heard before a judge or jury likely to be impressed by those facts? If not clearly relevant, should the lawyer try to make this evidence relevant on some theory, or at least plan to place it before the court at sentencing in mitigation where the rules of evidence don't apply? Even if never used in court, it has not escaped defense lawyers that fear of pain-inducing lawyers' tactics leads some victims to abandon prosecution.[26]

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two young men were accused of murdering their wealthy parents. For an interesting and highly critical view of the defense, see Dominick Dunne, *Menendez Justice*, VANITY FAIR, Mar. 1994, at 108.

23. Lawyers frequently rely on gender stereotypes despite the success of the women's movement in shattering some of the traditional views. This author's observations are that current social volatility surrounding gender may solidify the old views for some. Typical fact patterns presenting gender stereotypes occur: (1) when gender is related directly to the defense, as in a battered woman's defense; (2) when defending a female defendant who passively went along with the male's criminal conduct; or (3) when defending a man charged with beating a wife or children who says cultural factors provided a supportive climate for his acts.

24. Disabilities, physical and mental, are another source of stereotypes used by lawyers. Our culture is laden with deeply-held views about disability. The exact form of the prejudice may depend on the nature of the disability. For instance, if a person has become disabled as a result of service to his country, he is viewed differently from a retarded person. Similarly, an AIDS victim for some may be seen as a person in need of compassion and help, while for others, the same person is a pariah whose behavior led to a deserved illness. An interesting example of this contrast is portrayed in the film *Philadelphia* (Tri-Star Pictures 1993). A concern raised by disability-rights advocates arose dramatically in a New Jersey case, the Glen Ridge rape trial, where four young men were accused of raping a retarded classmate. *See* Sonya-LIVE (CNN television broadcast, Mar. 17, 1993) (interviewing advocates for rights of mentally retarded on Glen Ridge rape case). While the main defense was consent, the prosecution's theory was that the victim's retardation prevented her from consenting. Advocates feared that disabled people would suffer from a jury verdict based on a belief that the victim's retardation made her unable to control her sexual impulses. *Id.*; *see also* Catherine S. Manegold, *Glen Ridge Message: Law is Not Ethics*, N.Y. TIMES, Mar. 17, 1993 at Metro 42.

25. Recent cases involving child abuse by priests may lead to the view that gay men are likely to be child molesters. *See, e.g.*, James L. Franklin & Linda Matchan, *Porter Gets 18-20 Years;* James L. Franklin & Linda Matchan, *22 Describe Ex-priest's Abuse, Impact on Their Lives*, BOSTON GLOBE, Dec. 7, 1993, at Metro 1. *See Study Disputes Claim on Homosexual Abuse*, NY TIMES, Jul. 12, 1994, at A14 (citing a Colorado study which reviewed one year of molestation cases at Children's Hospital of Denver and was completed after an anti-homosexual group asserted that open homosexuals are responsible for 50 percent of child molestation cases).

26. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1162-63 (1986) (noting that under-reporting of rapes has been subject of substantial controversy).

Bias and stereotyping are frequently relied on in plea bargaining. The defense sometimes seeks ways to bond with the prosecutor in order to obtain information or a favorable deal. The lawyer may highlight factors, for example, that set her and the prosecutor apart from the client or the victims, such as school, sports, politics, work stress, and background similarities. Counsel may jointly disparage unsympathetic, annoying, or unattractive victims, or the client may be compared favorably to past or future clients because he is educated, middle class, or white. Stereotypes can play a subtle role during these private conversations, especially because everything is off the record and much is communicated by use of code words, glances, or shrugs.[27] Students unprepared for this may not know whether to take advantage of an opportunity to help their clients or to withdraw in disgust from advantages suggested during such discussions.[28]

This is not to say that blatant appeals to prejudice are the rule. Subtle approaches are far more common, drawing upon unconscious or silent prejudices. An example of this may be seen in a study of the *Goetz* case, involving a white man charged with shooting four black men on the New York Subway.[29] Race was never mentioned explicitly during the trial,[30] but it was exploited covertly with great success.[31] A sophisticated mini-play before the jury reenacted the shooting, with four black actors surrounding the witness who was a white ballistics expert. The ostensible purpose of this demonstration was to show Goetz's version of the shooting. The unstated purpose, and certainly the result, was to appeal to the predominantly white jurors' racial fears.[32] In the first Rodney King case,[33] the lawyers for the

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27. For a provocative discussion of how lawyers compromise values for a defendant's gain in a civil context, relying on "stock theories," see Gerald P. Lopez, *Law Lawyering*, 32 U.C.L.A. L. REV. 1 (1984) (examining storytelling as the method for problem-solving for non-lawyers).

28. Student-teacher discussions before and after negotiations reveal how students feel about this false bonding. Most are appalled that they so easily succumb to this behavior. For some, the discussion of what was previously barely conscious lawyering activity is enlightening and provocative. For student response to the stress of law practice, see Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248 (1975) (suggesting methods to teach students how to act professionally in a manner commensurate with their role as lawyers); *see generally* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978) [hereinafter *Ideology of Advocacy*].

29. People v. Goetz, 501 N.Y.S.2d 326 (A.D. 1 Dept. 1986), *rev'd*, 497 N.E.2d 41 (N.Y. 1988).

30. Unquestionably, race was an issue insofar as the defendant was white and the victims were black. What is of interest here is the way lawyers chose to exploit the issue both in the press and at the trial.

31. Race was featured as a predominant factor in this case by the press. *See, e.g., Death Wish Vigilante Gives Himself Up*, NY POST, Jan. 1, 1985, at 2-5; Phillip Messing, *Bitter Dad: He'll Get Off Easy*, NY POST, Dec. 26, 1984, at 2; Ruben Rosario, et al., *Subway Rider Shoots Tough*, NY DAILY NEWS, Dec. 23, 1984, at 3. It is impossible to measure what effect, if any, this media coverage had on the jury directly.

32. *See* GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE, BERNARD GOETZ AND THE LAW ON TRIAL 127-29, 208 (1988). In the Goetz case, the defense counsel did not overtly rely on race in jury

police officers used a map that depicted both the Los Angeles intersection, where the arrest and beating occurred, and Simi Valley where the jurors lived. One commentator suggested that this may have been a subtle appeal to jurors to think about the police officers as gatekeepers, insuring the continued tranquillity of their neighborhoods.[34] It is important to note here that whether or not the lawyer chooses to rely on a particular set of stereotypes or assumptions, they are likely to have an impact on the case.[35]

B. ADVERSE CONSEQUENCES

Reliance on bias and prejudice in court results in damage to both individual targets and to the larger society.[36]

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selection since he made no effort to eliminate the two black jurors, one of whom proved to be an early advocate of acquittal. However, George Fletcher points out that the use of black men as court room props may have won the case by allowing jurors to vote on their racial fear without any explicit mention of race. If that fear had been brought to the surface, the jurors may have been in the position to denounce it, or they might have been offended by lawyers prying into sensitive areas. *Id.*

33. People v. Powell, BA 035498 (Super. Ct. Los Angeles Cty. 1991).

34. *See* Vogelman, *supra* note 22, at 577.

35. Much has been written on the inevitability of stereotyping, particularly about the ways lawyers overlook this phenomenon as they advise and represent their clients. *See, e.g.*, Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 1 (1987); Clark Cunningham, *Lawyer as Translator*, 77 CORNELL L. REV. 1298 (1992). Their concern is that lawyers' preconceptions cause them to assume falsely a particular knowledge of the client and of what constitutes the most suitable course of representation. My vantage point is different. I am concerned with the ethics of the strategic use of bias and stereotypes. I agree with Sanders Gilman that not only do we need stereotypes, but that in a given community there is a great deal of agreement about them. Gilman notes,

> [w]e need crude representations of difference to localize our anxiety, to prove to ourselves that what we fear does not lie within. The images we generate are also associated for us in a meaningful manner and thus present a closed system. Although this system is built upon our special, private needs, the fact that those around us have the same needs and are therefore likely to have the same perceptions lends it an appearance of legitimacy and self-evident truth.

GILMAN, *supra* note 15, at 240.

A related issue, not covered in this Article, is the effect of imagery, signs, and symbols on reconstructing reality for the jury. The criminal trial, as a media event, may reinforce stereotypes and prejudices for some as it educates and politicizes others. *See generally* BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988); Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75 (1987). The belief in the strength of symbols has led some lawyers to send their clients to "charm schools for the accused" where defendants learn how to appear more lovable to the jury. Sharron Churcher, *Charm School for Rapists*, THE MAIL ON SUNDAY, Oct. 31, 1993, at 37. These schools teach defendants how to look, act, and dress. One recently cited lesson by an image consultant to an accused rapist and his parents was: "The judge is a real family man. Ma'am, if you could just lean on your son's arm as we walk over to the court. Sir, could you try talking to your son? Get some interaction going here." *Id.* Lawyers have always been concerned with how their clients are represented in court, and though these consultants may seem extremely manipulative, woe to the criminal lawyer who does not tell her client how to dress before coming to court.

36. This argument is based on the view that both conscious or unconscious racial slights are harmful. For an interesting discussion of this harm, see Peggy C. Davis, *Law as Microaggression*, 98

1. Harm to Individuals

Criminal defense lawyers have long been criticized for inflicting painful cross-examinations on victims and witnesses.[37] Two aspects of this issue have plagued commentators, students, and teachers of legal ethics. First, must the lawyer attack the credibility of a witness believed to be telling the truth? Second, how far must the lawyer go in raising issues that arguably relate to credibility but that clearly cast the witness in an unfavorable light?[38] When such tactics reinforce racial and cultural stereotypes, they raise additional concerns, such as whether lawyers are compounding scars the witness accumulated over a lifetime? For example, the lawyer may question a female victim in ways intended to bring out facts related to the crime charged, but that cast her in a stereotype,[39] particularly regarding her active sex life.[40] This tactic has the dual effect of rattling the witness to

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YALE L.J. 1559, 1565 (1989) (describing the harmful effects on African-Americans' self esteem as a result of discriminatory non-verbal exchanges termed "microagressions") (citing Chester M. Pierce, *Stress in the Workplace, in* BLACK FAMILIES IN CRISIS: THE MIDDLE CLASS 27, 31-32 (A. Coner-Edwards and J. Spurlock eds., 1988)); Davis also discusses harm caused by the criminal justice system's greater valuing of white lives which was exposed in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding evidence inadequate to demonstrate "a constitutionally significant risk of racial bias affecting Georgia's capital sentencing-process"). *See also* Lawrence, *supra* note 15, at 330 (describing courts as partly responsible for creating and legitimizing cultural symbols, including racism). In a different context, bias crime laws raise the issue of harm for both victims and the accused. One of Davis' points is that subtle acts based on stereotype cause significant harm. Davis at 1565-68. *See also* Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 886 (1992) (discussing psychic cost of bias crime and suggesting that bias crime laws affect the poor disproportionately because they have fewer censors against acting them out). In one case, a black man was charged with violating the civil rights of a woman he assaulted while using racial epithets. *See* John Ellement and Doris Sue Wong, *Beating Victim "Couldn't Believe It,"* BOSTON GLOBE, Sept. 23, 1993, at 29. Because evidence indicated that the victim called the defendant a "nigger" prior to the beating, the jury acquitted the defendant of the hate crime, though it convicted him of the assault and battery. *Id.*

37. For a discussion by someone who has struggled to find his own position on this difficult issue, see Harry Subin, *The Criminal Defense Lawyer's Different Mission*, 1 GEO. J. LEGAL ETHICS 125, 150 (1987) (stating that he no longer would subject a victim who he knew to be telling the truth to vigorous cross-examination).

38. See a discussion of this problem in James R. Elkin, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 764-68 (1992).

39. One example of such a direct tactic occurred in a clinic case in which the male client was charged with harassing a woman. Student investigation revealed that the victim was a convicted prostitute. Author's clinical experience, *supra* note 21. The client admitted knowing her but denied any unlawful conduct. The victim's record was legally relevant to her credibility and thus admissible. *Id.* The real benefit, however, was not its logical relevance; rather, the complainant's prior conviction for prostitution tends to blemish her credibility. Suppose she had several arrests for prostitution but that these cases eventually were dismissed. While prior arrests would not be admissible at trial, they would be useful to counsel during discussions with the prosecutor or judge in the pre or post trial stages. In another clinic case, it became known that the victim had her children taken away by the state because of drug addiction. *Id.* This raised the possibility of discrediting her based on "good" and "bad" mother stereotypes.

40. As some stereotypes become less commonly held over time, attorneys consider the backfire

increase her feelings of self-blame and doubt, and of transferring the blame from the defendant to the victim.[41] It capitalizes on a well documented psychological fallacy called "the prime attribution error," which is "the tendency to explain actions or occurrences with respect to an individual by assuming that these were caused by a property of that individual rather than by the circumstances in which the individual found herself."[42] The most frequently discussed example of this phenomenon concerns rape victims, who are often asked questions about their clothing, words, and actions leading up to the encounter with the defendant. The questions suggest or insinuate that factors under the woman's control led to the attack.[43] Another related example that frequently arises in criminal cases centers on questions intended to suggest aggressive behavior by the victim that may have driven the defendant to commit the violent act.

Racial stereotyping can take subtle forms and yet powerfully negate a person's humanity, authority, and autonomy, thereby rendering her invisible. Consider research on "microaggression" in the jury deliberations of the murder trial of Robert Chambers, who was white and whose defense was that he accidentally strangled the victim during consensual rough sex. Peggy Davis reported that "[t]he stereotyped thinking of white jurors caused both a different evaluation of the evidence and an inability to credit

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risk of overt reliance on them. For instance, in the area of rape, lawyers are less likely to argue that the victim's provocative underwear is evidence of her consent to have sex. *Cf.* Florida v. Smith, 91-005482CFA02 (Circuit Court of the 15th Judicial Circuit in and for Palm Beach County Florida Criminal Division 1992) [hereinafter Kennedy-Smith trial]. In the Kennedy-Smith trial, in addition to the issue of provocative underwear, issues surfaced in the press about the victim's mental health and her prior sexual activity. Fox Butterfield with Mary B.W. Tabor, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance,* N.Y. TIMES, Apr. 17, 1991, at A17. It was not unnoticed that the victim was an unaccompanied mother drinking and dancing in a bar late at night. Defense attorney Roy Black did not use any of this to support his client's defense of consent overtly, although some of it undoubtedly seeped into the jury's view of the facts. However, Black did use the stereotype of the "stranger rape" victim in his cross-examination and juxtaposed that with the victim's conduct in this "date rape" case. *See generally* Steven Brill, *How the Willie Smith Show Changed America*, AM. LAW., Jan./Feb. 1992, at 3. This tactic is similar to attacking a battered woman's credibility based on the fact that she failed to leave the battering relationship. In both instances, the lawyer is relying on what she believes are commonly held views. Lawyers may test, among other things, the viability of stereotypes by giving an account of the events at issue to the press. For an interesting discussion of the cultural and legal significance of erotic clothing, see Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309 (1992).

41. It should be noted that the defense lawyer does not use such tactics in a legal vacuum. A prosecutor will object to questions designed merely to harass her witness. Also, a judge will rule on the relevance of questionable tactics.

42. For an interesting discussion of how stereotypes about women are used, see Sarah E. Burns, *Clinical Law Perspective: Teaching Students to Handle Sexual Harassment Cases*, ADDRESS BEFORE THE A.A.L.S. WOMEN & THE LAW PROJECT (JAN. 1993) (ON FILE WITH THE AUTHOR). *SEE ALSO* Bumiller, *supra* note 35 (discussing the way rape victim's testimony is tailored by the defense).

43. *See* Estrich, *supra* note 26 (discussing rape victims' experiences and how "male standards" are used to judge the conduct of women victims).

the competing views and perspectives of the black jurors. As a result, the black jurors were rendered ineffective in the deliberative process."[44] They believed that, unlike the white jurors, they were not culturally bound in their views of what a defendant with Chambers' background and a victim of Jennifer Levin's background would normally do. But their views were not welcomed by other jurors in the deliberations. They were effectively excluded from the process, even though their exclusion was not accomplished by the lawyers. There is evidence that such exclusion or discounting of perspective is stressful because it exacerbates the scars of many similar harms experienced over a lifetime.[45] Similar distress may be experienced by jurors excluded by use of peremptory challenges,[46] by witnesses who are questioned in ways that draw on stereotypes, and by witnesses who are neglected or insulted in pre-trial and post-trial proceedings.[47]

2. Group and Societal Harm

By relying on stereotypes, defense lawyers may legitimate the bias that courts and others are trying to eliminate and that they personally may abhor.[48] Courts have acknowledged the harm suffered by groups whose members are discriminated against in jury selection on the basis of race[49]

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44. Davis, *supra* note 36, at 1570. Based on an interview with a black juror on the Robert Chambers case, Davis explains,

> Robert Chambers did not fit the white jurors' stereotype of an intentional killer. From [the black juror's] perspective, their inability to conceive of Chambers as an intentional killer combined with an inability to credit the views of black jurors to produce intransigence and deadlock. He concluded that 'beyond a reasonable' meant one thing for white defendants and another for blacks.

Id. at 1569.

45. *See Id.* at 1566; Daniel Goleman, *Anger Over Racism is Seen as a Cause of Blacks' High Blood Pressure*, N.Y. TIMES, April 24, 1990, at C3 (noting that supporting evidence has grown to build a plausible scientific explanation for the higher incidence of hypertension among blacks).

46. Whether stricken jurors experience harm at all is questionable. Many are relieved not to serve because of conflicting work and family responsibilities. Also, in my experience in jury pools, most jurors have no idea why they are excused. They know that the jury is composed of twelve persons plus a few alternates and that most will not sit on a particular jury. They are also dismissed with others in the panel.

47. *But see* CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 255, 345-53 (1978) (discussing small number of cases that actually get to stage of requiring witnesses to testify).

48. Racial and cultural biases are so pervasive in the courts that it is difficult to know whether lawyers' tactics make a difference. Criminal defense lawyers are relatively powerless and their tactics, even when seeming to cause harm may have little impact on systemic evils. *See, e.g.*, Norval Morris, *Race and Crime: What Evidence is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111 (1988) (discussing the statistical disparity between blacks and whites within the criminal justice system). It also must be remembered that criminal defendants are the most subordinated group in the system.

49. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (holding that statute denying black citizens participation in jury service on account of race violates equal protection of the Fourteenth

and have found that defense attorneys who engage in this practice are state actors guilty of legitimating stereotypes.[50] Not only are vulnerable groups further damaged, but the community as a whole is demeaned.[51] Where minorities are systematically excluded, jury verdicts may be suspect.[52] This is particularly important at a time when so many minority defendants are convicted and jailed. Similar arguments are made against excluding jurors based on gender. In a recent Supreme Court case, attorneys for the petitioner, with strong support from a coalition of national women's groups, argued that gender-based peremptory challenges harm women and harm the justice system.[53] They argued that such exclusion "gives life to the myth that women's contributions to civic life are unimportant, and that women should not contribute to defining morality . . . . Moreover, when women or men as a class are regarded as a homogeneous group who all think and act the same, it becomes easy to use gender as a proxy for generalizations and

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Amendment); Batson v. Kentucky, 476 U.S. 79, 87 (1986) (stating that "[r]acial discrimination in selection of jurors harms not only the accused" but "undermine[s] public confidence in the fairness of our system of justice"); Georgia v. McCollum, 112 S. Ct. 2348, 2353 (1992) (excluding jurors not only harms the dignity of the individual juror but of the entire community).

50. *McCollum*, 112 S. Ct. at 2354-56. For a discussion on the risks to criminal defendants from this expansion of *Batson*, see the dissent in *McCollum* in which Justice Scalia complained, "In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that this is what underlies all of this), we use the Constitution to destroy the age-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair." *Id.* at 2365 (Scalia, J., dissenting). Defense lawyers argue that the peremptory challenge is necessary to insure an impartial jury. As one commentator states,

> [the peremptory challenge] complements a challenge for cause, which permits exclusion of jurors on narrowly specified, provable, and legally cognizable bases of partiality, by sanctioning exclusion for either a real or imagined partiality that is less easily detected or demonstrable. . . . The appearance of justice requires that both parties be free to exercise peremptory challenges in light of their experiences as to the likely receptivity of the jurors to the nature, posture, and tenor of evidence which will be presented at the trial.

Barbara L. Horwitz, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by its Demise?*, 61 U. CIN. L. REV. 1391, 1393-94 (1993).

51. Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL. 81, 82, 98 (1991).

52. Some have urged progressive lawyers are wary of using cultural stereotypes to excuse their clients' conduct because this practice encourages deeper recognition and acceptance of group stereotypes and may be used against the group in another case. *See* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 743 (1992). But, as Phyllis Goldfarb notes, there may be less legitimation by lawyer's practices than one might think. She explains,

> True, the rituals of criminal processes, such as plea hearings and adversarial trials, must have some legitimating effect . . . . Yet the need for the bureaucracy to churn the cases quickly leads to speeding through rituals in a disinterested fashion. Pro forma compliance may undermine some of the legitimating power that ritual can have.

Id. at 743-44.

53. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994).

stereotypes and to discount the individual qualities that each person possesses."[54]

Some critics argue that when lawyers defend or seek leniency based on cultural stereotypes, they may succeed on that front only to fail on another. For example, potential employers may be less willing to hire a retarded person who has persuaded the court that he cannot control his impulses, reinforcing beliefs that these people should be in institutions rather than in the community.[55] Similarly, women who rely on a battered woman's defense when they harm or kill their abusers may find that, by portraying themselves as weak, passive, and dysfunctional, they have lost the ability to assert rights in another forum regarding children or property.[56] A recent instance of these high stakes, tactical choices may have occurred when the Reproductive Freedom Project allegedly objected to the ACLU's opposition to a juvenile death penalty based on juveniles' reduced capacity for responsible decision-making because espousing such a view would dilute the ACLU's argument that juveniles were mature enough to choose whether or not to have abortions.[57]

There are also the less subtle racial arguments that arise in identification cases where a question, such as "all Asians look alike to you, don't they?," might be relevant.[58] It is difficult to measure harm inflicted by tactics that rely on bias. Successful exploitation of bias leading to an acquittal may invite cynicism among members of excluded groups in the community and deter victims from reporting crimes. Whether subtle or overt, appeals to bias may harm the recipients and may inform society that prejudice is still acceptable in the halls of justice.

As the preceding discussion demonstrates, lawyers encounter and sometimes use to their advantage prejudice and stereotyping — so do police officers, prosecutors, judges, and citizens. There is no way to measure the harm caused to either defendants or other parties in criminal cases by its

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54. Brief of National Women's Law Center, as Amici Curiae in support of Petitioner at 10, J.E.B. v. Alabama *ex rel* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239).

55. Concern about the implications of raising retardation in the prosecution of a rape case are discussed in Catherine S. Manegold, *A Rape Case Worries Advocates for the Retarded*, N.Y. TIMES, Mar. 14, 1993, at A3.

56. *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 46 (1991) (noting evolution of a dysfunctional portrait of battered women occurred simultaneously with the charges wrought by no-fault and joint custody); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 550 (1992) (noting battered women may lose custody of their children because they are portrayed as victims).

57. *See* Ira Glasser, *The ACLU's Undiluted Concerns*, WASH. POST, Mar. 24, 1990, at A19 (denying assertion to that effect in op-ed letter).

58. *See* Vogelman, *supra* note 22, at 573-74 (discussing how ethnic and racial stereotypes play out in the courtroom).

tactical use by lawyers. What is clear, though, is that lawyers are trained to consider their client's interest over the interests of third parties.

II. ZEALOUS ADVOCACY AND PROPOSED LIMITS

A. STANDARD CONCEPTION

The lawyer is bound to the client by a duty of loyalty. A lawyer is not to be deterred from carrying out that duty by personal distaste or moral qualms about a goal or tactic. As Charles Wolfram has said, "Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer's virtual total loyalty to the client and the client's interests."[59] Under this view, the lawyer's personal moral autonomy does not extend to the attorney-client relationship.[60] She is not allowed to refrain from lawful advocacy simply because it offends her. This standard conception is often phrased as a "duty of zealous advocacy." What this means is not apparent from either the text of the 1969 *Model Code of Professional Responsibility* (*Model Code*) or its proposed successor, the 1983 *Model Rules of Professional Conduct* (*Model Rules*).[61] Under the pre-*Model Code* and *Model Code* views, lawyers were told to pursue the client's goals so long as these were lawful, without regard to incidental harm against individuals or society. This paradigm combines the principles of partisanship and nonaccountability whereby, in representing a client, a lawyer is not legally, professionally, or morally accountable for the means used or the ends achieved, so long as she acts within established legal constraints.[62] The drafters of the *Model Rules* addressed concerns about limits on lawyering practices in part by refusing to adopt the "zealous advocacy" language of

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59. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146 (1986).

60. *See* Charles Fried, *The Lawyer as Friend: Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1084 (1976) (arguing that a lawyer is morally entitled to act formally on behalf of his client even if the result is injustice, "because the legal system which authorizes both the injustice . . . and the formal gesture for working it insulates him from personal moral responsibility").

61. MODEL CODE EC 7-1 (stating the lawyer must "represent his client zealously within the bounds of the law"). *But see* MODEL CODE EC 7-25 (providing that a lawyer cannot use tactics to merely harass a witness); MODEL CODE DR 7-106(C)(2) (providing that a lawyer shall not "ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person"). The *Model Code* uses a subjective test to gauge lawyer's unethical conduct whereas the *Model Rules* use an objective test. Another requirement is that under most circumstances, the lawyer must not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means." MODEL CODE DR 7-101(A)(1). *Compare with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983) [hereinafter MODEL RULES] ("a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued").

62. *See generally* Curtis, *supra* note 7, at 3 ("The lawyer's official duty, required of him indeed by the court, is to devote himself to the client").

Model Code DR 7.[63] The *Model Rules* incorporate concern for third parties, although there are no explicit limitations on defense counsel's tactics so long as they are lawful.[64] Since the adoption of the *Model Rules*,[65] the debate continues about the limits of zealous advocacy, and it now occupies an important place in law school ethics courses.[66]

Critics charge that the standard conception results in an untenable and undesirable "role differentiated morality."[67] Lawyers separate their personal morality from their professional morality, becoming amoral technocrats,[68] doing whatever the job requires, perhaps protecting their psyches and reputations by this role separation. Critics are troubled not only by the personal costs of role differentiation but also by its effects on third parties, such as plaintiffs, witnesses and victims.[69]

This view of lawyering portrays a false dichotomy, however, with lawyers

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63. *Model Rule* 1.1 requires "competent and diligent representation." MODEL RULES Rule 1.1. The comment on the duty of diligence states: "A lawyer shall act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES Rule 1.3 cmt. However, "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." *Id.* In addition, the Comment to Rule 1.2 states, "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the . . . concern for third persons who might be adversely affected." MODEL RULES Rule 1.2 cmt.

64. *Model Rule* 4.4, Respect for Rights of Third Persons, provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." MODEL RULES Rule 4.4. However, the comment points out that these third-party interests are subordinate to those of the client. MODEL RULES Rule 4.4 cmt.

65. Thirty-six states have adopted the *Model Rules*, in whole or in part, while the remaining states continue to abide by the *Model Code* or state amalgams of it. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (1993). As an example, although Massachusetts continues to abide by the *Model Code*, the state's highest court is beginning to set limits on zealous advocacy. *See In re* Neitlich, 597 N.E. 2d 425 (Mass. 1992) (drawing line between zealous advocacy and deceit and clarifying lawyer's duty as an officer of the court).

66. *See* Subin, *supra* note 37, at 143; *see also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) (noting "law school instruction clearly has some effect in installing professional norms and attitudes and is credited by substantial numbers of practitioners with assisting later resolution of ethical issues").

67. Richard S. Wasserstrom, *Lawyers as Professionals; Some Moral Issues*, 5 HUM. RTS. REV. 1, 13 (Fall, 1975); *see generally* DAVID LUBAN, LAWYERS AND JUSTICE at App. 1 (1988); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 501-02 (1980) [hereinafter *Homo Psychologicus*] (celebrating trust and care within lawyer-client relations as end in itself).

68. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) (arguing that a "good lawyer" is amoral).

69. These issues are explored in depth in Simon, *Ideology of Advocacy, supra* note 28 and Simon, *Homo Pyschologicus, supra* note 67; *see also* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter *Ethical Discretion*] (suggesting legal ethical issues arising from conflicts between the interests of the client, of third parties, and of the public are better understood in terms of competing legal ideals); *see also* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 642 (1986) (disagreeing with defense of lawyer's

saying to themselves "I wouldn't do anything to hurt a person like this witness in my private life, so how can I do so in my professional life?" To describe lawyering this way — by highlighting a role separation between the personal and the professional — overlooks both the complexity of the role and the importance of context. The near absolute loyalty owed the client is not blind loyalty nor that of a hired gun. The duties flow from the attorney-client relationship.[70] Along with the promise of representation comes the duty to faithfully adhere to the task. Rules of ordinary morality are not very helpful guides. Defense counsel's duty is to the client above all else. There is no one else at the courthouse to do this job. In a successful attorney-client relationship, lawyer and client speak with one voice.[71]

Critics of the "standard conception" of good lawyering cite the conduct of some of the least honorable members of the bar.[72] It is a mistake, however, to assume that most lawyers routinely engage in sharp practices. Rather, such practices are not the norm, and lawyers who go beyond the boundaries of zealous advocacy to the level of misconduct are subject to the condemnation of the bench and bar.[73]

Until recently, the criminal defense lawyer has been bracketed out of much of the above discussion for several reasons. First, the right to counsel guaranteed by the Sixth Amendment has been held to mean the right to a loyal advocate.[74] Second, there is a nearly universal view that the adversary system places one accused of a crime in such a weak position vis-a-vis the state that he deserves every protection possible against governmental

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amoral roles because lawyers' autonomy should allow him to exercise "Lysistration prerogative" to withhold services from those of whose projects he disapproves).

70. The U.S. Supreme Court decided that the Sixth Amendment does not confer on defendants the right to a meaningful attorney-client relationship. *See* Morris v. Slappy, 461 U.S. 1, 23 (1983). However, the rules of the profession mandate such a role for counsel. *See, e.g.*, DEFENSE FUNCTION Standard 4-3.1 ("Defense counsel should seek to establish relationship of trust and confidence with the accused"); MODEL CODE DR 4-101 (instructing that a lawyer shall not knowingly "[u]se a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure"); MODEL CODE EC 4-1 ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system"); MODEL RULES Rule 1.2(c), 1.6, 1.14 (establishing lawyer-client guidelines in the scope of representation, confidentiality of information, and client under disability respectively).

71. For a further elaboration of the lawyer as "representing" the client, see Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459, 2461 (1989).

72. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 575-76 (1991). She refers to lawyers in the Dalkon Shield products liability case and other "hardball" practitioners as uncharacteristic of accepted legal practice. *Id.*

73. *See* Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 231 (1993) (stating that one purpose of ethics rules is to establish ideals or practice norms for the profession). *Cf.* Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1767 (1993) (arguing that neither norms nor rules constrain use of racial imagery in criminal cases, while focusing primarily on prosecutors' conduct).

74. *See* U.S. v. Cronic, 466 U.S. 648, 656 (1984) (noting that if counsel is a reasonably effective advocate, he meets his constitutional standards).

overreaching.[75] This view stems from a societal commitment to an individual's right to liberty against the power of the state. The balance of power in the criminal justice system is strongly tilted toward the state because of the resources available to the prosecution, including, most significantly, those of the police. A further imbalance is created by the extraordinary discretion the prosecution has regarding who to arrest, what to charge, and what evidence to present.[76] Prosecutorial power is even greater as mandatory sentences turn the charging decision, to some extent, into a sentencing decision. In *Herring v. New York*,[77] the Supreme Court stated: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[78] Defense counsel is free to devote herself exclusively to her client's cause. The desire to win motivates the parties in an adversary system.[79]

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75. *See, e.g.*, Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 (1966) (citing maintenance of an adversary system, presumption of innocence, prosecution's burden to prove guilt beyond a reasonable doubt, right to counsel, and obligation of confidentiality between lawyer and client as reasons to be a zealous advocate on behalf of a criminal defendant); ALAN H. GOLDMAN, THE MORAL FOUNDATION OF PROFESSIONAL ETHICS 117 (1980) (stating "[t]his protection of individual dignity and autonomy, even at the expense of collective public welfare, is pervasive in our legal system, as that institution reflects our deeper rights-based moral framework"). *See generally* Murray L. Schwartz, *The Zeal of the Civil Advocate, in* THE GOOD LAWYER 150 (Luban ed., 1984). Professor Rhode agrees that the criminal defense paradigm presents the most compelling case for undiluted partisanship. Rhode, *supra* note 66, at 605. She states, "When individuals' lives, liberties, or reputations are so immediately at risk, our constitutional tradition has sought to guarantee that they have advocates without competing loyalties to the state." *Id. See also* MODEL RULES Rule 3.3 cmt. (differentiating the roles of criminal defense lawyer from that of civil lawyers).

76. *See* John B. Mitchell, *Reasonable Doubts are Where You Find Them*, 1 GEO. J. LEGAL ETHICS 339, 346-49 (1987) [hereinafter *Reasonable Doubts*]; John B. Mitchell, *The Ethics of the Criminal Defense Attorney-New Answers to Old Questions*, 32 STAN. L. REV. 293, 321-22 (1980) [hereinafter *New Answers*] (noting that our courts are more frequently unjust when dealing with the most powerless of defendants — the poor and the minorities). *See generally* Andy Court, *Rush to Justice*, AM. LAW., Jan./Feb. 1993, at 56 (discussing Detroit Recorder Court's system which pays court appointed defense counsel a flat fee per case); Nicholas Varchaver, *Sentence Before Trial*, AM. LAW., Jan./Feb. 1993, at 48 (discussing Indiana's inadequate public defender system). *Cf.* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) [hereinafter *Criminal Defense*] (voicing skepticism at imbalance in power between defense and prosecution).

77. 422 U.S. 853 (1975).

78. *Id.* at 862. Whether or not the adversary system meets this goal, at least in theory it motivates each side to muster the best case possible. *See* Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System* 37 MERCER L. REV. 647 (1986). Salzburg does not agree that the adversary system is a search for truth. Rather, it is a competition to win, governed by rules allocating the burden of proof based on the strength of the parties. The state, as the stronger party, has the burden of proof against the lone defendant. *Id.* at 676. *See also* ALAN M. DERSHOWITZ, THE BEST DEFENSE (1982). Stating that "[c]riminal defendants, and their lawyers, certainly do not want justice; they want acquittals, or at least short sentences. Prosecutors are supposed to be interested in justice . . . [b]ut . . . many . . . believe that justice is done whenever the government wins its point"). *Id.* at xvi.

79. *See* United States v. Wade, 388 U.S. 218, 250 (1967) (White, J., joined by Harlan and Stewart,

The principle of zealous advocacy has been incorporated into the ABA *Standards for Criminal Justice, The Defense Function* (*Defense Function*).[80] These Standards delineate the defense lawyers' obligations, combining ethical considerations with procedural and strategic direction. They are the bar's expression of the minimal duties owed clients. They emphasize that criminal defense lawyers, particularly those who represent the poor, have the highest duties to insure that the legal system works as it should. The *Defense Function* confirms the dominant view that the defense role in an adversary system is to test whether the state can meet its burden of proof in every case, and that as long as the lawyer acts within the bounds of the law, the client's interests are privileged above all others.[81]

B. PROPOSALS FOR CHANGE

Some of those who accept the criminal defense paradigm do so only up to a point.[82] They balance the duty of zealous advocacy with duties owed to third parties. The restrictions most often discussed are in the defense lawyer's cross examination of a witness who she knows is telling the truth.[83] In this circumstance, it is argued, lawyers should exercise moral autonomy — that is — separation from their clients.[84] They can still be more zealous than lawyers in civil practice, just not as zealous as was previously believed necessary.[85] In this way, lawyers will not be mere "mouthpieces" for clients who propose morally problematic tactics in order to win their cases.

Some commentators have tried to separate the issues of "what the lawyer

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JJ., dissenting in part and concurring in part). Here, Justice White says that the defense counsel is to be unfettered by a search for truth: "If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course . . . (his task) is to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." *Id.* at 256-58 (footnotes omitted).

80. DEFENSE FUNCTION Standard 4-1.2(b) (describing a defense counsel's duty to "advocate with courage and devotion and to render effective, quality representation).

81. *See* DEFENSE FUNCTION Standard 4-1.2 cmt. *See also* Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993). In his article, Luban defends the standard conception supporting the necessity for an aggressive defense in criminal cases against William Simon's revised views on the subject. *See* Simon, *Criminal Defense*, *supra* note 76 (criticizing the "criminal lawyer exception" at least as it has been defended previously and suggesting that grounds for aggressive criminal defense may still be based on prevalence of excessive and discriminatory punishment). These are views that have fueled the zeal of many public defenders. However, Simon's suggestions that aggressive lawyering be done selectively raise issues beyond the scope of this Article.

82. Luban, *supra* note 81.

83. *Id.* at 1756; Subin, *supra* note 37, at 150 (stating that he no longer would subject a witness he knew to be truthful to vigorous cross-examination). Their criticisms assume an easily discernible line of testimony when in fact a witness may be telling the truth about some things and not others. A witness may have motives to lie which must be explored. Also, there are problems in ascertaining exactly what the defense lawyer "knows" is the truth.

84. Simon, *Ideology of Advocacy*, *supra* note 28, at 130-44.

85. This appears to be Luban's current view. *See* Luban, *supra* note 81, at 1756.

must do" from "what the lawyer may do." Thus, it is argued that lawyers may consider the impact of their lawyering on third parties and society and may evaluate goals and tactics accordingly.[86] A variation of this view appears in Charles Fried's article *Lawyer as Friend*.[87] He endorses the traditional conception of the professional role. Fried's "sporting theory of justice" holds that lawyers are allowed to "cause injustice" if, in doing so, they are merely taking advantage of the "rules of the game." Thus, a lawyer may take advantage of another lawyer's failure to comply with a legal rule by asserting that an action is barred by the statute of frauds or statutes of limitations; or she may prevail because of another lawyer's failure to comply with a technical requirement of a rule, such as to file a written memorandum. But Fried distinguishes these "system-created" harms from so-called "attorney harms," such as vicious cross-examination, which he says are not simply skillful manipulations of the rules but rather are harms to be blamed on the attorney personally.[88] For example, when a lawyer embarrasses a witness by exploiting gender stereotypes, the lawyer has gone out of bounds. He says that it is permissible to "expose a witness to the skepticism and scrutiny envisaged by the law," but not to engage "in a personal attack on the witness" implying by tone or style that the "lawyer believes the witness unworthy of respect."[89]

Fried's distinction is not convincing. Consider an identification case in which defense counsel knows that the complainant has a substance abuse problem, that medical records show that she admitted to drug use immediately before the alleged assault, and that her blood test showed positive for alcohol and cocaine. This witness' credibility needs to be tested, and the questioning will be painful for the victim. Although Fried is bothered by the means and not the ends, it is the lawyer's duties toward those ends that may require aggressive means. As the ethics rules now stand, the criminal defense lawyer is not only permitted but is required to cross-examine a witness, even if the witness suffers, provided the issues on which the lawyer is questioning are important to the defense. The ethical rules commanding zealous advocacy are institutional tools like any other rules.[90]

Another commentator has proposed that lawyers engage in dialogues

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86. It should be noted here that the *Defense Function* Standards provide that even though tactics are primarily a lawyer's concern, not a client's, counsel should defer to the client's wishes regarding concern for third persons who might be adversely affected by the tactics. *See* DEFENSE FUNCTION Standard 4-3.2 cmt.

87. Fried, *supra* note 60.

88. *Id.* at 1086.

89. *Id.*

90. Whether practicing under the *Model Code*, the *Model Rules*, or a combination of both, a duty equivalent to zealous advocacy is the norm for criminal lawyers.

with clients over morally troubling issues.[91] While such a dialogue may be appropriate occasionally, it must be attempted gingerly in order to maintain the client's confidence in the relationship. The primary concerns of most criminal clients are to win at trial and to stay out of jail. It is the lawyer's job to try her best to achieve those goals. A bias laden tactic that troubled the lawyer would not necessarily trouble the client.[92] Could the lawyer forego the arguably winning but objectionable tactic and simply not mention it to the client? Probably not.[93] Most commentators discussing the defense lawyer's duties in difficult situations do so as if there is a clear line demarcating when a lawyer goes too far. It is rarely so simple. Rather, lawyers often have competing moral or ethical beliefs; they understand their client's motivations and actions, feel loyalty to their clients, feel a desire to vindicate them, feel a tremendous responsibility for what happens to them, and at the same time, they do not want to cause harm to others.[94]

Some have proposed that the ethical rules be strengthened to prevent

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91. Simon, *Ethical Discretion*, *supra* note 69. It is clear that some morally troubling issues need to be discussed because they demand resolution. For example, the client might give a false name to the court or some evidence that appears to be perjured, and the attorney must discuss with the client the proper way to proceed. *See* MODEL CODE DR 7-102(B)(1) and MODEL RULES Rule 3.3 (regarding the lawyer's duty to persuade clients to correct fraud or other potentially unlawful conduct).

92. While in most cases a suggestion to engage a criminal client in a moral dialogue about the use of bias or prejudice to help his case seems impractical, there have been occasions when my clinical students did this. One client alleged self defense in the assault of his drunken father, while the other alleged self defense in an assault on his mentally-ill and estranged wife who desperately "wanted him back." In the first case, the student discussed with the client attacks on the victim's credibility based on his alcoholism. In the second case, the student and client considered attacking the victim's credibility by raising the issue of how she relentlessly pursued her former mate, that she had assaulted him several times, and that she was mentally unbalanced. In both cases, we discussed how these tactics depended on playing to prejudices about women, alcoholics, and mental illness. In both instances, the clients advised against their use, preferring instead a fair fight with family members for whom they held complex feelings.

93. *Model Code* EC 7-8 recommends:

> In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."

MODEL CODE EC 7-8. Stephen Salzberg suggests that though the lawyer need not avail herself of every possible tactic, she should discuss forbearance with the client because the client has the right to know whether she is scrupulously declining to do something that another lawyer might do without a problem. He suggests that doing nothing might be tantamount to lying to the client. *See* Salzberg, *supra* note 77, at 664.

94. Ted Schneyer provides a thoughtful view of the lawyer's struggle with conflicting values. *See* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1561 (1984). He states: "The lawyer-client relationship has moral value as a relationship; each party should therefore accept the risk that some actions taken in the name of the relationship will conflict with the moral principles he would apply if acting independently." *Id.* at 1564.

harmful use of stereotypes.[95] Such a rule is now being considered by the ABA as a revision to *Model Rule* 8.4,[96] the rule defining attorney misconduct. The proposed rule states:

> It is professional misconduct for a lawyer to: (g) manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not preclude legitimate advocacy with respect to the foregoing factors.[97]

A number of states have already adopted similar rules.[98] Another proposed ethical rule states that "a lawyer shall not ask questions or behave in a manner which *intentionally emphasizes* or relies upon sex, race, or national

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95. *See* Vogelman, *supra* note 22, at 576 (supporting such a rule).

96. ABA House of Delegates, Reports with Recommendations to the House of Delegates, Nos. 101 & 104 (1994).

97. *Id.*

98. For example, the Massachusetts Rule states:

> In appearing in his professional capacity before a tribunal, a lawyer shall not . . . . Engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel or other person. This Disciplinary Rule does not preclude legitimate advocacy when race, sex, national origin, disability, age, or sexual orientation, or another similar factor, is an issue in the proceeding.

MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES DR 7-106(C)(8) (1972) [hereinafter MASSACHUSETTS CANONS] and MODEL CODE DR 7-106(C)(8) (amended June 8, 1992). *See also* COLORADO RULES OF PROFESSIONAL RESPONSIBILITY DR 1.2(f) (1984); NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1984). Cf. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 2-400 (prohibiting discrimination accepting or terminating representation of any client). Additionally, the proposed changes to the federal Crime Control Act contain a provision prohibiting lawyers from engaging in conduct "that has no substantial purpose other than to distress, harass, embarrass, burden, or inconvenience another person." It further states, "A lawyer shall not offer evidence that the lawyer knows to be false or attempt to discredit evidence that the lawyer knows to be true." S.8, 103rd Cong. 1st sess. § 824 (1993).

Commentators support these and other changes, including greater judicial intervention. *See* Ellen Yaroshefsky, *Balancing Victim's Rights and the Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 153 (1989) (proposing rule similar to rule under consideration by the ABA); *see generally* Gordon Van Kessell, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 527-31 (1992); Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L. REV. 445 (1990). There is a risk that these restrictions might discourage attorneys from pursuing legitimate tactics due to fear of overstepping ethical bounds. Furthermore, some restrictions will not succeed in limiting so-called "attorney excesses" because the relevancy exception will swallow the rule. *See* MASSACHUSETTS CANONS DR 7-106(C)(8) (stating qualification that Rule "does not preclude legitimate advocacy when race, sex, national origin, disability, age, sexual orientation, or another similar factor is an issue in the proceeding"). *Compare with* MODEL RULES Rules 1.1, 1.2, and 2.2 (establishing guidelines on competence, scope of representation, and lawyer as intermediary respectively); MODEL CODE EC 2-2, DR 1-102, DR 7-101, EC 7-2, and DR 7-102 (establishing guidelines on recognition of legal problems, trial conduct, representing a client zealously and within the bounds of the law). I find that students often are cynical about the value of rules for solving ethical dilemmas. Others tend to rely on them unquestioningly and assume that if conduct is not specifically prohibited, it is permissible.

origin stereotypes when the question or behavior is *designed to mislead* a jury or unfairly prejudice a witness or party."[99] Note that the focus of this rule is on the *intent of* the lawyer, and not the *effect on* the witness. It appears to be designed for conservative application against lawyers who are conscientiously doing their job.

These proposed rules raise a number of concerns. First, their efficacy may be questioned. Most reliance on bias does not occur in the highly public setting of cross-examining a witness, truthful or otherwise. Most of what happens to a case inside or outside a courtroom does not involve the direct confrontation of a witness. Cases are resolved by dismissals or guilty pleas. Sentencing is often the main issue. Bias plays a role in very subtle ways in most of these situations and may be inherently resistant to regulation.

Second, there may be constitutional problems with attempts to limit attorney speech or conduct and intrusions into the right to counsel. Legitimate advocacy may be chilled by the vagueness of such rules.[100] What exactly is covered by the words "bias or prejudice?" When is conduct "designed to mislead?" The language "manifest by words or conduct" could include a glance or facial expression brought about in the heat of trial. Does "legitimate advocacy" mean that, as long as the lawyer can give a reason for the words or conduct, she will not be violating the rule? Is it meant to be similar to a *Batson*[101] test, where facially neutral explanations must justify apparent discriminatory behavior in the selection of jury members? One problem is to determine when an issue is relevant and therefore legitimate.[102] Arguably, one such case arose recently in New York where the

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99. Yaroshefsky, *supra* note 98, at 153 (emphasis added). Yaroshefsky proposes a rule designed to limit defense counsel's use of stereotypes. Compare this proposed rule with the recently enacted Massachusetts amendment to the ethics rules. *Id.*

100. See Massachusetts Bar Board of Overseers (BBO) FILE NO. B1-93-0622J for a complaint that was dismissed by a judge against a lawyer for, inter alia, zealous questioning of female victim, including questions about clothing and street activities that he believed were relevant to her credibility.

101. Batson v. Kentucky, 476 U.S. 79 (1986). In *Batson* the Court held that the defendant must establish a prima facie case of discrimination by demonstrating that: (1) he or she is a member of a cognizable racial group, (2) the prosecution has exercised peremptory challenges to exclude members of that group, and (3) relevant facts and circumstances raise an inference of purposeful discrimination. *Id.* at 96. So long as lawyers can come up with a neutral reason or, in this case, a reason related to legitimate advocacy, the rule is not violated.

102. Clearly, willingness to date a man does not indicate consent to have sex. Is this equally true for the decision to wear provocative underwear? Is it at all probative of the issue, and even if so, does its prejudicial impact outweigh its probativeness? What if the victim wore no underwear or wore underwear that was not stretched or torn even though she claimed strong resistance to the assault? Under these facts, underwear may be relevant. *See Why Willie's Pinning His Hopes on a Bra*, STAR, Nov. 19, 1991, at 42 (discussing tabloid treatment of this issue in the William Kennedy Smith rape trial). As Yaroshefsky notes, "Relevance is often the silver thread upon which biases in the culture are mirrored in the courtroom, and a good lawyer uses the mirrors with finesse." Yaroshefsky *supra*, note 98, at 151.

defense in an inter-racial gang rape case was precluded from offering evidence of the white victim's prior group sex with black men under the rape shield law.[103] Defense attorneys representing black defendants argued that the jury might not believe the consent defense because of racist doubts that any white woman would voluntarily have intercourse with a group of black men.[104] The defense, therefore, sought to admit evidence of her prior sexual conduct with a group of black men. The prosecution prevailed in its objections that the true reason defense counsel wanted this evidence before the jury was to debase the victim, showing her propensity for such activity, and that the rape shield law was enacted to prevent such inferences.[105] Whether the proposed rule would prohibit such a tactic depends on whether a judge or bar counsel saw it as an attempt to *exploit* prejudice or to *counter* prejudice.[106] Criminal lawyers would probably view this as legitimate advocacy that should not be prohibited by a rule.[107] A rule that bars reliance on racial and cultural factors, unless they are part of legitimate advocacy, is unavoidably vague.

Ironically, the intent of these proposals may be simply to fortify restrictions on outrageous and improper conduct that already violates the rules of ethics as currently written.[108] Yet the effect of such proposals is likely to

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103. People v. Williams, 81 N.Y.2d 303 (1993), *see also* Tamar Lewin, *Rape and the Accuser: A Debate Still Rages on Citing Sexual Past,* N.Y. TIMES, Feb. 12, 1993, at B16.

104. *Id.* at 311.

105. *Id.* Here, defense counsel, prosecutor, and judge were vigilant in carrying out their respective duties. One could argue either that the system worked, or that there was an injustice to the defense because it was unable to make an offer of proof to the court so that the court could make a decision with all facts before it.

106. *Id.*; *see* Court of Appeals briefs (on file with author).

107. *Cf.* Stier, *supra* note 72, at 561-62 (arguing that the lawyer's duties arise out of the legal function); Virginia Held, *The Division of Moral Labor and the Role of the Lawyer, in* THE GOOD LAWYER 60, 67 (David Luban ed. 1983) (discussing the different moral role of the advocate within society). Consider the hypothetical example of the rape victim who, at the time of the alleged rape, was under a doctor's care and had been prescribed a daily dosage of thorazine. Due diligence and zealous advocacy would seem to require an exploration by counsel of her psychiatric records and her history on thorazine. Both issues arguably relate to her credibility as to identification, the act itself, and consent. Suppose an investigation reveals that the victim leads a completely productive, normal life as long as she takes her medication. If the lawyer learns that the victim was taking the drug at the time of the incident, her condition may not be relevant to her credibility. Should the lawyer drop the issue here and go on to something else? The ethics rules do not require her to do more than what is legally relevant. However, some defense lawyers would say that she should go further here and try to find ways to make the mental condition and drug-taking relevant, especially if the lawyer learns that a person taking thorazine suffers either memory or judgment impairment if she fails to take the drug for some period of time. Even if her records show no lapse in following doctors orders regarding taking her medication, the lawyer could raise the issue by a series of "what if . . .?" questions that plant the seed of doubt about the witness' reliability. Another approach could be to wear down the witness by raising the issue before trial and holding extensive hearings on the witness' competence to testify. The rationale for this could be the same as above, such as solid evidence or a reasonable inference, with each raising ethical considerations.

108. Examples abound in fact and fiction of improper or biased questioning. *See, e.g.,* HARPER

chill vigorous representation — a serious concern because the quality of representation for criminal defendants is woefully inadequate.[109] The real problem in the criminal justice system is under-zealous and not overzealous advocacy.[110] Moreover, there is a risk that this rule may encourage judges and others to bring undeserved charges against "overly aggressive" or politically unpopular lawyers.

III. THE CLINICIAN'S DILEMMA IN TEACHING ABOUT STEREOTYPES

A clinical teacher assumes the dual responsibility of providing competent representation to clients and teaching students about lawyering. It is a challenge to remain true to both. Sometimes, the best lesson for the student, such as trial experience, does not equal the best outcome for the client, where a negotiated plea for a light sentence might be more appropriate. We teach that all clients are entitled to zealous advocacy. Yet students may not be ready to accept this professional norm once they realize it may entail taking advantage of bias or prejudice. They may see themselves as progressive on social justice issues;[111] their cultural background may have made them highly sensitive to the harm caused by stereotyping;[112] or the circumstances of the case may raise these difficult issues in particularly egregious ways. Their teacher may also experience difficulty embracing the dictates of zealous advocacy where it appears to be exploitative. For example, she may be persuaded by the growing commitment within legal education to competing issues of social justice, or perhaps she may never have been socialized

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LEE, TO KILL A MOCKING BIRD 209-10 (1960) (detailing how in cross examination of Tom Robinson, a black man accused of raping a white woman, Gilmer, the prosecutor, repeatedly calls him 'boy,' refers to him as a young buck, and reminds him of his lowly status compared to that of the alleged victim).

109. *See, e.g.*, *Poor Man's Justice*, AM. LAW., Jan./Feb. 1993 (Special Issue); STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 3 (Am. Bar Ass'n 3d ed. 1993); Robert L. Spangenberg, *We Are Still Not Defending the Poor Properly*, 4 CRIM. JUST. 3, 11 (Fall 1989); SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, CRIMINAL DEFENSE IN CRISIS 9 (Nov. 1988).

110. See Luban, *supra* note 81, at 1734, 1757 (discussing under-zealousness in the criminal justice system).

111. In my class recently, the minority students were more likely to reject the adversarial system justification. For a discussion of possible differences in moral reasoning, see Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go to Law School,'* 38 J. LEGAL EDUC. 61 (1988). For instance, some may view the lawyer's obligations under an "ethic of care," which includes reckoning with harmful consequences of representation.

112. An issue that is frequently eye-opening in class is the effect a student's race, gender, ethnicity, or sexual orientation has on her experience in the clinic. For example, one student commented, "Not only were Minh and I the same age, but, like me, he immigrated to the United States from an Asian country during the mid-1970's. I'm not sure if these factors contributed to my affinity to Minh, but I imagine they did. In some ways, it is difficult to understand why our lives have brought us to the point where one of us is a defendant and the other an attorney in the American criminal justice system." Clinical Student Journal (unpublished journal entry on file with author).

into the norms of criminal practice. Even if she once were, she may have changed her views, and may not be certain whether this change is for good or ill. Even a clinician, who believes that criminal clients are entitled to a defense that is unaffected by the beliefs of appointed counsel, may be wary of advocating reliance on prejudice.[113]

In spite of these difficulties, it is important for teacher and student to understand fully the criminal lawyer's obligation to pursue every lawful advantage on behalf of her client. As previously discussed, in criminal cases, the legal system privileges this moral and legal relationship above the interests of third parties.[114] There are times when students may be required to consider eliciting or drawing upon harmful stereotypes because they are important to the defense. In my experience, these dictates of zealous advocacy are more difficult to accept in the abstract than they are after the students form relationships with their clients.

Clinics offer a unique opportunity to examine how stereotypes play out in the legal system. Often our cases present competing stereotypes such as those presented by the white police officer defendants and black victim in the Rodney King case.[115] Sometimes, we are forced to see victims in ways that stereotype them along race and gender lines. With a critical eye on the parties, evidence, judges, and court personnel, students develop their skills, learn how to critique the system, and become professionally responsible. Consider the following cases, drawn from the author's clinic's caseload.

CASE 1

The client was charged with possession of hypodermic needles. He was a black Vietnam veteran in a wheelchair with a long-standing heroin problem. From those facts alone, a stereotypical (but false) story might appear: while serving his country in Vietnam, the defendant became addicted to drugs after he was seriously wounded. Thus, his record and this minor drug charge

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113. *See* Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992); *see also* Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992) (discussing the identification and deconstruction of "neutral" institutional practices that exclude minorities and foster divisions between minorities and whites). For a thoughtful discussion of the difficulties of moral decision-making in lawyering, see Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990).

114. My arguments rely on the extraordinarily high duties of loyalty and zealous representation owed the criminal defendant based on the fact that his adversary is the state; the duties may be different in some civil cases. *See* Simon, *Criminal Defense supra* note 76; Luban *supra* note 81.

115. People v. Powell, No. BA 035498 (Super. Ct. Los Angeles Cty. 1991) (change of venue allowed, 283 Cal. Rptr. 777). On this point, Kristin Bumiller said, "In the formal realm of the trial, the participants are intensely subjected to legal ways of thinking and acting. This experience leads to a two-sided construction of the victim and criminal not only as adversaries in the legal sense, but as individuals embedded within ideologies that grant their freedom of action and create their disempowerment." Bumiller, *supra* note 35, at 91.

resulted directly from his Vietnam experiences. This story might support mitigation of sentence, or even provide a long-shot legal defense (i.e., defense of necessity because his drug problem was acquired incident to his painful injury in Vietnam and clean needles are necessary to prevent AIDS).

Although this story was a powerful one, it was not true. His injuries occurred in Boston when he fell from a building while high on drugs. He claimed that the needles were not his but had been handed to him by an acquaintance. In fact, he had become addicted to drugs *after* returning from Vietnam.

The question for the student was how to represent this client. Could we salvage any of the stereotypical story, place it in the sentencing memorandum, and argue it to the court in mitigation of punishment? Just stating the salient facts (Vietnam, heroin problem, paraplegic) would probably lead the judge to see the case the way we originally saw it, with little need of embellishment by the student. Would this be misleading the court?[116] Would this tactic portray disabled people as unable to obey the law? Should it matter that no individual would suffer direct harm if we or the court relied on the stereotypes? Should the nature of the charges weigh in the calculation about how to present the case? The student thought the possession of hypodermic needles by a man who might have a drug problem should not be criminal, and that it was relevant that the statute in question existed in only a few states. In Massachusetts, legislation was pending to decriminalize this conduct. But the student also thought the client had often relied on his disability as an excuse and felt she was being manipulated by a con man. At the same time, she was white and her client was black. Did race play a part in her mistrust of him, in his candor with her, or in her view of what the legal system owed the client? She had to grapple with these feelings. At the same time, she knew she had to give him the best representation possible. The client advised the student to "play up" the disabilities, and it became clear that he had no qualms about garnering sympathy from court officials, police, and prosecution witnesses.[117]

My concerns were that the student examine representations that might have constituted misrepresentations to the court. Also, I wanted her to consider whether her personal views were interfering with advocacy for her client. She discussed everything with me and had difficulty discussing any of

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116. In addition to issues of stereotyping, this case presented concerns about candor to the court, about what constitutes misrepresentation, and about the attorney-client privilege. As a general observation, reliance on bias, prejudice, and stereotypes to some extent is misleading. For that reason, it is on the same continuum as counseling clients on how to dress for court.

117. For example, at one point a probation officer expressed sympathy for the client, lamenting his persecution for this charge when he had flown missions over Vietnam and had lost his legs in service to his country. We never learned how the probation officer reached these false conclusions about our client's history.

these concerns with the client. She did discuss with the client her unwillingness to engage in gross misrepresentation of the facts. In the end, she listed the bare bones facts in a sentencing memorandum, argued the client's hardship and pain, and skirted around most of her concerns. The court accepted her recommendations for leniency.[118]

CASE 2

The client and his friend were young black men charged with assault and battery and with civil rights violations. The victims were two young white men who said that the defendants started a fight with them, beat them up, and called them names like "honkey" and "faggot." The client said that while coming out of a store with his friend, he was confronted by the victims who called him and his friend "nigger" and other insults.[119] He said that the two alleged victims were stretching their bodies across the sidewalk after a bike ride, thus blocking passage for the client and his friend. He insisted that the alleged victim threw the first punch, after which the encounter became a free-for-all between evenly matched groups. The incident occurred in the South End of Boston, a racially and ethnically mixed neighborhood with a high concentration of gay men. The victims told the police that they were not gay.

At arraignment, the client and his friend were adamant that they were the real victims in this case. Our client had bandages and medical reports to prove that he suffered the worst injuries in the fight, and he wanted to pursue complaints against the victims for assault and battery. He was angry, swearing, and seemed ready to get into another fight. The victims were white professionals in their early 30's, well-dressed, educated, and appeared with their own lawyer. Their apparent outrage matched that of our clients.

Although my preliminary assessment led me to believe the alleged

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118. The issue of how one represents a client before the court is interesting from a number of perspectives, implicating ethics, client autonomy, and strategy. For example, activist clients might look at the trial as a way to make a political statement. Similarly, transsexuals may wish to appear as women and to be referred to as female. It also may be of strategic benefit to overplay their femininity. Recently, this happened in a murder trial. *See* Tom Coakley, *Judge Quizzes Murder Trial Jurors on Defendant Clad as a Woman*, BOSTON GLOBE, Jan. 15, 1993, at 21. A colleague related another case where a transsexual defendant was acquitted of assault and battery because the defense successfully moved to preclude any reference to the defendant's true gender. After the trial, jurors said they were surprised to learn the defendant was a man, and several said they would have voted to convict if they had known.

119. The client resented the term "nigger" because of its negative connotations and also because he does not think of himself as black. His father is Jamaican and his mother is white. He repeatedly told us that he couldn't wait to see those jurors take special notice of him when they saw that his mother was white. This raised for us the issue of the higher value given to white victims generally in the criminal justice system. Because our client believed he was victimized, he expected to be given more credence or sympathy because he was half white. *See* Carter, *supra* note 5, at 430 (discussing how stereotypes affect perceptions of victimization).

victims, the student did not waiver in believing our client. We discussed the reasons for our varied interpretations and decided that I was persuaded by the apparent characters of those involved. The client seemed to have a chip on his shoulder. He was angry the first few times I saw him, and I imagined that little provocation would draw him into a fight. Why would the victims interrupt their professional lives to come into court numerous times on a false complaint? But the student presented me with facts that changed my opinion about the client and his guilt. His anger, she said, was indignation at his injuries and his wrongful arrest. He was on a Peace Corps waiting list. He had support from neighborhood leaders. His brother, a well-known local musician, had been killed accidentally in a "drive-by" shooting while he was playing basketball in the park. Rather than seeking revenge, our client had assumed the role of peace-keeper in the community — a fact corroborated by several newspaper stories.

As for the victims, their story began to sound less convincing. Their testimony at a hearing on our cross-complaint revealed a contemptuous attitude toward our client and his friends. One of them admitted to throwing a vase at the back of our client's retreating head. This conduct did not fit my stereotypes about the victim.[120] He again emphasized that neither he nor his friend were homosexual and that they resented being called "faggots." They admitted to name-calling, although they denied calling our client "nigger."

The stakes were high because the case was charged not just as an assault and battery but as a bias crime, which carries a higher penalty.[121] We planned to try the case on a theory of self-defense. Given the epithets on each side and the fact that a bias crime was charged, case strategizing required extensive consideration of the role that stereotyping might play in the case. How did we want to present our client, the victim, and the police? I asked the student to think about this from both tactical and ethical perspectives. These are some of the discussion points addressed in this case and in our cases generally:

Appeal to Jury Prejudice

Although the victims denied they were gay, they both evinced what could be called a gay manner.[122] We considered whether this was something that

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120. I assumed that they were busy professionals who would not be wasting their time filing false complaints. I also thought that nicely dressed, articulate, possibly gay professionals were unlikely to be provocateurs.

121. MASS. GEN L. ch. 265, § 37 (1990) (providing that violations of Constitutional rights are punishable by up to 10 years imprisonment).

122. Both the student and I thought they might be gay. We reached this point separately based on their appearance and manner and possibly because they kept insisting that they were not gay. I realize we were relying on stereotypes.

would be to our advantage with a judge or jury at trial. Sometimes, cross-examinations about homosexuality are justified because the complainant may have a motive to lie about the circumstances of an alleged assault.[123] However, in our case, the issue was simply whether jurors would be less sympathetic to the victims if they thought they were gay, and whether we should highlight that impression. But we were uncomfortable with a tactic that exploited bias so blatantly. Homosexuality had nothing to do with this case except for the alleged expletive by our client. Under the civil rights law, it didn't matter whether the victims were gay so long as the alleged assault was motivated by anti-gay animus. If we used this tactic, we would be exploiting jury bias while also trying to show that our client had no prejudice against gays or whites.[124] That approach seemed to lead to a muddle.

The student and I also discussed the fact that blatant appeals to prejudice often backfire. In some cases, such as cross-examining a rape victim on sexual history, the risks are that the witness may "fall apart" and thereby gain sympathy, or that the judge or jury may be offended by biased insinuations. The skill and resources needed to exploit such prejudices may be available to experienced lawyers who handle highly publicized media trials, but they may be more difficult for the novice lawyer. In any event, in this case, there was no need to consider distasteful, humiliating cross-examination. The judge or jury might draw the same (possibly wrong) conclusions about the alleged victims' sexual preference that we had drawn. The victims only needed to testify. Moreover, in our view, the parties were not matched evenly because the victims were white, professional and articulate, whereas our client and his friend were black and poor. We discussed the impact of race on what happens to our clients. Often, lawyers use tactics based on bias because of the desire to even out the chances for a fair fight.[125] We needed to consider carefully all biases that a fact-finder

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123. In some cases, though not this one, cross-examination is relevant to credibility because the alleged victim may be particularly vulnerable — that is, leading a "double life" as a closeted homosexual, a fact not known by his family, friends, or employer. Such a view gained support recently from Judge Posner. United States v. Lallemand, 989 F.2d 936 (7th Cir. 1993). The court found it appropriate to increase a defendant's "base offense level" under the federal sentencing guidelines based on the vulnerability of his gay married victim. *Id.* at 938-39. The concurrence objected to stereotyping married gay people as inherently more vulnerable than other blackmail victims. *Id.* at 941.

124. The client's mother and some friends were white, and he denied harboring prejudice against gays or saying the epithets. If the victims were saying repeatedly that they weren't gay, maybe they were homophobic to the extent that they had fabricated or imagined being called "faggots."

125. The course material includes articles about racial bias in the criminal justice system. Most of our clients are black or Latino, and from them, we learn of the hidden instances of bias. As we investigate and observe, we witness the overt bias. It is difficult to speak of a defendant's right to a fair trial without considering all the obstacles to fairness. *See, e.g.*, Morris, *supra* note 48; *see* Robert Ward, *Racism in the Law*, BOSTON GLOBE, Nov. 13, 1993, at 13 (citing personal observations of how race of attorney and race of client affect outcome); Suellyn Scarnecchia, *State Responses to Task*

might have toward our client and ways to counter them. If we did not consciously address issues of stereotyping in case planning, there was a risk that stereotypes and bias would convict our client.

Judge Shopping

The bench is not free of bias. A pattern of such conduct recently came to light in Massachusetts when it was revealed that a judge routinely referred to Jewish lawyers by his code word "Canadians" and was reported to have said, "it's time to go warm up the ovens," upon hearing that a Jewish attorney was in his courtroom.[126] There are numerous examples of bias on the bench in other jurisdictions.[127] In our case, we considered whether we should take advantage of an opportunity to channel the case to a judge who might be less sympathetic to a gay victim. We were certain we did not want the case heard before one of the gay judges. We feared that these judges would be especially sensitive to issues of gay bashing and might therefore be less receptive to our client's claim of innocence. But our case never reached the point where the sitting judge played a role.[128]

Judge-shopping in this manner presents the adversarial use of stereotypes in its starkest form because it has no legitimate place in the system. Lawyers may not misrepresent the need for a continuance in order to get a case heard by a favored judge.[129] Nevertheless, a lawyer's successful reliance on this tactic is both more common and less visible than cross-examination and

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Force Reports on Race and Ethnic Bias in the Courts, 16 HAMLINE L. REV. 923 (1993) (discussing task forces formed in various states to study bias in courts and recommending sensitivity training and amendments to both judicial conduct rules and lawyers ethics rules).

126. *See* Paul G. Farrell, *A Liability that Cannot be Tolerated*, 21 MASS. LAW. WKLY. 2635 (May 31, 1993) (discussing formal charges filed against Massachusetts judge by the judicial conduct commission). The charges are contained in a formal resolution filed by the legislature asking the Governor to remove the judge from the bench and the charged judge resigned in May 1993. *Suspended Probate Judge Quits*, 21 MASS. LAW. WKLY. 2765 (June 6, 1993). Recently, Alan Dershowitz noted the appearance of such prejudices from the bench in *Bigots on the Bench*, HARV. L. REC., Mar. 19, 1993 (citing Jewish judge's intolerance toward Arab lawyer and Massachusetts judge's intolerance of Jewish lawyers).

127. *See, e.g.*, Gonzalez v. Commission on Judicial Performance, 657 P.2d 372, 382 (Cal. 1983) (noting judge's insinuation that Japanese juror would know more about the cost of fish heads and rice than about inflation).

128. Arguably, judge-shopping is different from some of the other lawyering issues discussed in this Article because, depending on the methods used, it may not constitute legitimate advocacy. Moreover, the judge's bias may not be known to the victim. The victim may have her day in court and feel vindicated even if the defendant is not convicted. She may assume there are other reasons for the outcome rather than who she is. There is no obvious infliction of harm by an attorney's conduct such as that occurs, for example, during a scathing cross examination. Thus, some lawyers may find it easier to do one than the other. David Luban lumps together both of these tactics as dirty tricks, at least as they are used to appeal to racism. *See* Luban, *supra* note 81, at 1761.

129. *See* MODEL RULES Rule 3.3 and MODEL CODE DR 7-102(A)(5) (prohibiting false statements).

arguments that appeal to bias. Continuances may be sought for many seemingly legitimate reasons in an effort to camouflage shopping for a judge with the right history or reputation. Discussion about the case may occur in chambers shielded from the view of the public or the witnesses. However, nothing in the rules of ethics requires a lawyer to employ all tactical advantages. Shopping for a biased judge may go beyond what a lawyer believes she is ethically required to do. But an attorney might justify this type of "judge-shopping" if she believes that bias is a systemic ill that more often than not hurts her client and that should, whenever possible, be exploited to her client's advantage. Under this view, loyalty to the client trumps concern for third parties. There are ways to cure these ills other than by foregoing advantages to the client, such as reporting errant judges to the judicial conduct commission or exposing them publicly. Moreover, it is unlikely that any significant legitimation will result from defense counsel's tactics because they are usually invisible. Cases move quickly, courtrooms are crowded and noisy, the language of law is not accessible to everyone in the room, and the media is rarely present to record insults or other harms to third parties.

Judge shopping, like most lawyering activities in a clinic, is not done without consultation. The need to discuss every aspect of the case forces teacher and student to justify choices. I am more likely to shun a particular course of action in my role as teacher than I would be if acting solely as a lawyer. This is partly due to my desire to be a role model for the students and partly to my need to explain and justify my actions as a teacher.

Jury Selection

The client and his friend were minorities, uneducated, and unemployed. They fit the profile of young street kids without a future. We began thinking about our chances of obtaining a jury of their peers. What kind of juror would believe that these white men would call our client "nigger" in a fight or would believe our client's version against the word of a white person? We wanted black people on our jury because we did not think our client could otherwise get a fair trial. We wanted to strike homosexuals because we thought they would be too sympathetic with the alleged victims in a case involving allegations of gay bashing.

One reason for peremptory challenges is to eliminate those jurors who will be least sympathetic to our case and thereby help produce a fair trial. However, it is becoming increasingly difficult to exercise hunches and educated guesses about juror sympathies since the Supreme Court and state courts have restricted these judgments.[130] Recently, in the prosecution of a

130. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (discussing bias in the use of peremptory challenges); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (extending constitutional

priest from Operation Rescue who blocked an abortion center, the prosecutor sought to limit the number of Catholics on the jury.[131] The prosecutor responded to a defense objection by offering neutral reasons for invoking the peremptory challenges, which were accepted by the trial court but later overturned as being pretextual.[132] Suppose the defendant was a battered woman on trial for injuring her abusive husband. Is it fair to preclude her from using her peremptory challenges to exclude men in favor of women?[133] As a teacher, how do I advise students on this issue? It is a challenge to delicately weave our way through this thicket in search of perfect, non-pretextual, and neutral challenges even while believing that race, gender, religion, and sexual orientation do indeed make a difference.[134] As Justice O'Conner stated: "We know that people do not ignore, as jurors, what they know as men or women."[135] This is an area where students often believe that criminal defendants should have a litigation advantage. The challenge is to do this within the bounds of law.

Plea Bargaining Tactics

The client risked a lot by going to trial, so one option we seriously considered was mediation.[136] I thought the prosecutor might agree to this because he was well aware of social and racial tensions in Boston's South End. Our selling point was that a successful mediation could be a model for community peace in a time of increasing social divisiveness. I liked this idea more than either the student or the client. The client felt he had been wronged and wanted his day in court. The student shared the client's

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protection to jurors peremptorily excluded on the basis of gender). Prior to *Batson*, state cases in Massachusetts and California restrained lawyers' use of peremptory challenges based on the state constitutions and included, in addition to race and gender, religion and ethnicity. *See* Commonwealth v. Soares, 387 N.E.2d 499, 517 (Mass. 1979); People v. Wheeler, 583 P.2d 748 (Cal. 1978).

131. Commonwealth v. Carleton, 629 N.E.2d 321 (Mass. 1994).

132. *Id.* at 139.

133. Justice O'Connor suggests this hypothetical in her concurrence in *J.E.B. v. Alabama ex rel. T.B.*, arguing that the holding be limited to the state and not private civil litigants or criminal defendants. J.E.B. v. Alabama *ex rel* T.B., 114 S. Ct. 1419, 1433 (1994) (O'Connor, J. concurring).

134. *See* Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 151 (1994) (arguing that in the second Rodney King trial and in the District of Columbia Mayor Marion Barry trial the defendants benefited from having juries comprised primarily of their race). One classroom exercise I use reveals that students believe these race characteristics matter and that they frequently possess stereotyped views of potential jurors. I show a tape of a Florida jury, with each member giving a brief statement of family background, employment, and whether or not they were ever victims of crime. Students are asked to rank the jurors in order of preference for selection in a hypothetical drug case. The students have diverse views about these jurors and support them with a mixture of experience, folklore and hunches.

135. *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J. concurring).

136. The client already had a prior assault and battery conviction. He was charged with two counts of assault and battery under MASS. GEN. L. ch. 265, § 13(A) (1990), and two counts of assault and battery under the bias crime statute, MASS. GEN. L. ch. 265, § 39 (1990), with possible penalties in excess of 10 years.

outrage and, as she prepared the case, she became more confident that she could win. I was less confident of a "winning" case, having lost many of these cases over the years. However, as our legal position improved, we abandoned the mediation option and aimed for an acquittal.

In the clinic, I encourage creative alternatives such as mediation when the benefits to the client are clear. The benefit to third parties and the legal system is something we stress in this context primarily because it carries weight with the prosecutor and judge. It is important to discuss the tension between viewing cases as a contest between an individual and the state and viewing them as opportunities to create a better world. Students often want to take a broader, all-encompassing approach to their cases. They look for ways to satisfy both parties and to cure the clients' social, personal, and legal problems.[137]

Client and Witness Interviews

The student located neighbors, relatives, and friends of the clients and the victims, and in so doing, traveled in two very distinct social worlds. Knowledge replaced preconceptions for both of us. Typically, as students are assigned to cases, efforts to establish a relationship with the client and with critical witnesses bring to the surface issues of stereotyping between the student and client, client and victim, and others. Teaching about interviewing techniques has expanded to include understanding and developing the complex attorney-client relationship.[138] Role-plays are created that incorporate common stereotypes.[139]

Is Guilt or Innocence Relevant?

In theory, guilt or innocence should play no part in the lawyer's willingness to give the client the best representation possible.[140] Neither the cases

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137. Such methods include devising mediation agreements, community service plans, and restitution.

138. *See* Watson, *supra* note 28, at 265-69 (discussing the intellectual and emotional issues involved in the attorney-client relationship). Students often are surprised by the depth and breadth of their relationships with clients. They are astonished and sometimes humbled by the client's willingness to accept them as lawyers. They do not expect to bond so intensely with their clients, often to the point of offering assistance in many non-legal aspects of clients' lives.

139. For a helpful assortment of background reading and scenarios about interviewing, see ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATION (1990). Use of hypotheticals in class uncovers the pervasiveness of stereotypes and leads to discussion of whether and how lawyers can harness bias for the client's benefit.

140. The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. *See also* Powell v. Alabama, 287 U.S. 45, 66 (1932) (articulating rule that guilt or innocence plays no part in lawyer's willingness to provide best representation possible).

nor the rules distinguish between innocent and guilty clients when defining the lawyer's duties. Yet it would be simplistic to say that the student's perception of the client's guilt or innocence has no effect on what she does or how she feels. In this case, the student fervently believed in her client's innocence. She worked extraordinarily hard preparing for trial. It was a difficult case that required extensive legal research, client preparation, negotiation, and witness tracking. I am unable to say that she would have done as much for a client she thought was guilty. For some students, innocence will be the factor that pushes them to try to use stereotypes to their advantage because it gives them an additional moral justification for harming third parties. Causing harm on behalf of a guilty client may be more difficult for some.[141] I reject this approach, though I understand it. It is basic to the attorney-client relationship that the lawyer not act as judge of the client's conduct.[142] Suggestions that lawyers should fight harder for clients they believe to be innocent place lawyers in an untenable position, and place clients in a perilous one.[143]

Are Consequences to Third Parties Relevant?

Many students object to tactics that disparage victims and witnesses or that may perpetuate harmful racial and cultural stereotypes. As stated above, we discussed issues of stereotyping in our conferences. We tried to humanize the victims, both to look at the case from their perspectives and to consider the harm our tactics would have on them.[144] After the first court

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141. For those who take Simon's position of greater moral autonomy for lawyers, guilt or innocence might be relevant to whether defense counsel's personal morality can justify harming a third party. *See* Simon, *Ideology of Advocacy, supra* note 28; Subin, *supra* note 37, at 150 (stating that he would not subject a truthful witness to a vigorous cross-examination). I disagree strongly with their views that the lawyer has any right to judge the client and to take actions in the client's defense based on that judgment. To do so is to alter radically the "screening function" built into the system that protects the criminal defendant. *See* Mitchell, *New Answers, supra* note 76, at 299-303.

142. For support of this view, see Mitchell, *Reasonable Doubts, supra* note 76, at 350-51; Mitchell, *New Answers, supra* note 76, at 319-27.

143. Babcock, *supra* note 7. *But see*, Simon, *Ideology of Advocacy, supra* note 28 (discussing notion of selecting particularly deprived, and perhaps clearly innocent, clients for the most zealous advocacy). It is unclear exactly what lawyering Simon would have us forego for those clients not selected as worthy of zealous representation. *See* Simon, *Criminal Defense supra* note 76, at 1756-57.

144. Often, my students are asked to represent men accused of hitting a girlfriend or spouse. Some students have been involved in victim's rights or battered women projects and believe that the women are always right and the men always wrong. Things are rarely so simple, and the process of unraveling the facts and revealing the students' preconceptions is educational. As Susan Estrich has said about rape:

> There is a debate going on in courthouses and prosecutors' offices, and around coffee machines and dinner tables, about whether Mike Tyson was guilty or not, and whether William Kennedy Smith ever should have been prosecuted; about when women should be believed, and what counts as consent. There's a debate going on in America as to what is

hearing, when it became apparent that the victims were lying, we were prepared to do whatever was necessary to help our client. But suppose we had concluded that the victims were telling the truth? We would have had to do the same thing, although it would have been more difficult. Certain harms are easier to inflict than others. For example, the harms inflicted on the Vietnam veteran in CASE 1 may be different from those that might have been inflicted on the victim in CASE 2, if the latter case had gone to trial. Students readily see that stereotyping is unavoidable. When comparing these two cases, students find that the stock stories applicable to the Vietnam veteran are less harmful than others. It is easier for students to adopt what they view as an unavoidable and helpful stereotype than to suggest a stereotype that may not be the obvious stereotype and with which they are uncomfortable.

It is here that I bring into the discussion the possibility and probability of default stereotyping. That is, students are encouraged to think about "default" stereotypes that may determine a judge or juror's view of the evidence unless the lawyer counters them. Defense lawyers are not presented with a situation where they decide whether stereotypes enter the criminal case. If "helpless victim" stereotypes are not addressed, "nasty defendant" stereotypes may be employed.[145] The lawyer's job includes helping the jury structure reality. The prosecutor will try to make a complex story seem simple. The defense will introduce the complexity and nuance that was omitted and, in doing so, create a different reality for the jury.[146]

Do the Rules of Professional Responsibility Govern Any of the Above Decisions?

The rules are the starting point for examining any ethical dilemma. They tell us that we owe our clients a strong duty of loyalty and that we must represent them zealously. We dig deeper into the *Model Code* and *Model Rules* to find meaning for these terms to ascertain whether our duties encompass the use of stereotypes. We learn that "we may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor," but that we "are not bound to press for every advantage."[147] We

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> reasonable when it comes to sex . . . . To silence that debate in the classroom is to remove the classroom from reality, and to make ourselves irrelevant.

Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 515 (1992).

145. Jackson, *supra* note 35, at 63. *See generally* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 169-83 (1981).

146. The Kurasawa film *Rashomon* provides a superb example of this phenomenon of multiple truths. For a discussion of how he has used the film *Last Tango in Paris* to illustrate this in class, see Robert Garcia, *Rape, Lies and Videotapes*, 25 LOY. L. REV. 711 (1992). For an interesting discussion of diverse interpretations of the same facts, see BENNET & FELDMAN *supra* note 145, at 176-79.

147. MODEL RULES Rule 1.3.

also learn that we may not "in trial, allude to any matter that [we do] not reasonably believe is relevant or that will not be supported by admissible evidence," or in other words, we may not ask questions "intending to degrade a witness or other person."[148] We must respect the rights of third persons to the extent that we "shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."[149] We learn that the bounds of the law limiting zealous advocacy are difficult to ascertain, and that these limits are affected by changing constitutional interpretations, statutes, and public and judicial attitudes.[150] In discussing with the client which legal means may lead to his desired end, we learn that we may bring our moral concerns to bear but that we must "always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for (us)."[151] Most important, in Massachusetts and in those other states that have adopted anti-bias rules, we can look to *Model Code* DR 7-106(8) and decide whether what we are considering manifests bias and whether it is legitimate advocacy because of an issue in the case.[152] As these citations suggest, ethics rules lead us to introspection about our choices, but they do not dictate the choice.

Our interpretations of the rules are affected by the knowledge we bring to their study. Students have spent two years in law school and have taken an ethics course before entering the clinic. Many come with skepticism about looking to ethics rules for answers to difficult questions.[153] They tend to adopt the view that unless conduct is specifically prohibited by the rules, it is permissible for a lawyer to do it. Most have not thought about the ethical implications of exploiting stereotypes before coming into the clinic. They learn that knowing the rules is only the first step in learning how to be responsible lawyers.[154] Proposed rule changes designed to limit so-called attorney excesses by prohibiting conduct manifesting bias or prejudice illuminate discussions on zealous advocacy. Students know that the rules can only be understood from within practice and not from the outside.

Students initially think of their relationship with the client as a contrac-

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148. MODEL RULES Rule 3.4.

149. MODEL RULES Rule 4.4. Although these are *Model Rule* references, they substantially cover provisions also found in the *Model Code*. At the time of this writing, Massachusetts is a *Model Code* state.

150. MODEL CODE Canon 7, EC 7-2.

151. MODEL CODE EC 7-8.

152. MASSACHUSETTS CANONS DR 7-106(C)(8).

153. This skepticism increases as students become familiar with local norms which seem far more salient to their case work than knowledge of rules. They are astonished by the vast discretionary powers throughout the system and must be continuously reminded that rules do matter.

154. For a discussion of specificity and its absence in ethics rules see Zacharias, *supra* note 73, at 283. *See also* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (providing a skeptical view of relying on rules to regulate professional conduct).

tual or legal one. As they come to know their clients, however, the barriers of class, race, ethnicity and gender begin to break down while the students' reasons to win begin to multiply. What began for some as an abstract commitment to the adversarial system, or even an opportunity for ego gratification usually develops into a concern for the client for a variety of reasons: (1) the arrest was unlawful; (2) the client suffers from addiction or other physical or mental problems; (3) the client's life represents a history of deprivation; or (4) the student believes she can help the client even if she cannot win the case. As Charles Ogletree notes, the opportunity for empathy and heroism is seductive.[155] Against this background, it is enlightening to raise broader moral aspects of the duty of loyalty,[156] and to compare the obligations with those of other relationships, such as doctor-patient, priest-parishioner, social worker-patient, parent-child, or friend-friend.[157]

In their relationships with clients, many students have their first opportunities to address ethical dilemmas. Common dilemmas such as client perjury and candor to the court are easy to spot and fruitful to address, but they arise in only a small percentage of our caseload. The opportunity to address stereotypes, on the other hand, appears in nearly all our cases. It can be so subtle that students may not notice or grasp its significance. Students admit to *using* certain tactics, including exploiting stereotypes, without really thinking about it; they simply fall into patterns of lawyer behavior.[158] Bringing these issues to consciousness forces students to think hard about what lawyers do and to question how the legal system operates. In this way,

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155. Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

156. *See* Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992). In his discussion of the costs of disloyalty to clients, McChrystal states, "the duty and presumption of loyal conduct should insure moral qualms. A lawyer should doubt the rectitude of her decision to be disloyal; and a moral universe that recognizes moral ambiguity, especially in the face of competing moral claims, is not upside down at all." *Id.* at 424.

157. *See* Stier, *supra* note 72; Held, *supra* note 107.

158. Increasingly, as the clamor for justice intensifies, students question the continued validity of the criminal defense paradigm. Some believe that no one oppressed group, in this case criminal defendants, is more deserving of social justice than another. Clinicians need to do more than give traditional answers to such questions. McChrystal points out that scrupulous disloyalty is sometimes justified. McChrystal, *supra* note 156. Even Monroe Freedman argues that preserving a life would be one such justification for disloyalty. Freedman, *supra* note 75. For Fried, the competing moral claim is humiliating a witness. Fried, *supra* note 60. Students may find themselves in situations where competing moral claims arise, as did a homosexual student of mine who said he could never exploit homophobia.

Students examine their own views when pushed. Often my students exhibit surprise that their homeless clients are intelligent and that their clients who have homes have clean and tidy ones. They do not hesitate to compare one client unfavorably with another based on educational or employment factors. They often find that their clients who are charged with abusing a spouse are caring, troubled people. By discovering their own prejudices, they are better able to understand those of everyone else.

students combine ideals with practice and participate in creating the ethical norms of their profession.

Attorney (Student) vs. Client Decision-Making

In CASE 2, the student raised the issue of mediation with the client, not because she wanted to mediate the case, but because she felt that the client ought to be given the option. He was not interested in mediating the case, and she was relieved. However, without sitting in on student-client conferences, I cannot judge whether her own views influenced how she presented this option to the client.

When a student asks for guidance about critical client decisions such as whether to appeal a judge's decision on a motion or bail, or whether to take a case to trial or to plead guilty, I always ask, "what does the client want to do?" The answer I hear most often from students is, "he wants to do whatever I think is best." As a class, we discuss the possible meanings of this response. We consider how readily poor clients relinquish control of some of the most important decisions of their lives to people they hardly know and who are not yet out of law school. We compare this with the tremendous control that wealthy and corporate clients routinely exercise over the progress of their cases.[159] Poor clients are accustomed to having decisions made for them, particularly when they face a bureaucracy such as the criminal justice system. However, students attempt to involve their clients in crime scene investigations, getting their help locating witnesses, and in considering sentencing options that will greatly effect their futures, such as drug and alcohol programs. Sometimes, clients choose going to jail rather than entering a rehabilitative program. This particular example of bowing to client autonomy is difficult for students to accept.

As noted earlier in the discussion of client decision-making, there are times when we elicit the client's views on trial tactics. One such case arose recently when a black defendant was charged with assault and battery against two white men. He was a tow truck driver who had lawfully towed the alleged victims' illegally parked car. They encountered him later in the evening at the tow scene, as he made his rounds, and verbally and physically attacked him. He responded in self defense and was the only one arrested. In planning for trial the student considered the issue of race. We discussed whether race was something to build into discussions with the district

159. Much has been written on this topic. *See generally* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jone's Case*, 50 MD L. REV. 213 (1991); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COL. L. REV. 1004 (1990); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

attorney and into general trial preparation. The student asked the client if he thought the attack was racially motivated. The client was adamant in his view that it was not, and he did not want us to "bring race into the case."[160]

Student vs. Teacher Decision-Making

I have found considerable differences of opinion within even a small group of students about how and when lawyers should take advantage of stereotypes. Discussion of the issue with students individually and as a group is rich and provocative.[161] But when the decision must be made, should the teacher's views trump those of the students? In both the Vietnam veteran's case and the bias crime case, I deferred to the student's judgment on tactics. In most instances, where there is no clear answer, the students' views prevail because they have superior knowledge of the case. But if the student questions, on moral grounds, a tactic that I believe is necessary to the client's representation, I make the decision. If such issues surface in the early stages of representation, the student may request to be taken off the case. I do not treat the clinic as simply a public defender's office where students must take whatever cases come their way.[162] However, once we have agreed to represent a client, someone in the clinic must complete the representation. It enhances students' knowledge of lawyering if they understand their choices and understand that lawyers do not always have a choice.[163]

In the end, our client in CASE 2 was vindicated. Through dogged investigation, my student found witnesses who told her that, although our client was drunk and making crude comments to passersby, the victims had started the fight both verbally and by throwing the first punch. Later, we

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160. The client believed that the race issue distorted the facts. We accepted his decision, but all agreed that it would still be desirable to have a few black people on the jury.

161. Recently, a very diverse group was particularly challenging. Many of them found it difficult to consider relying on stereotypes. Their own experiences, as members of minority groups, made it too painful. Despite these general views, when cases called for *consideration* of tactics using stereotypes, they were able to do so.

162. Public defenders often adopt an institutional ethos that accepts the broadest interpretation of zealous advocacy. The reasons for this have been explored elsewhere. *See* Babcock, *supra* note 7; RANDY I. BELLOWS, NOTES OF A PUBLIC DEFENDER, PUBLICATION OF HARVARD LAW SCHOOL'S PROGRAM ON THE LEGAL PROFESSION (1983). Is it incumbent on a public defender to have this view but not so for a private lawyer? The consequences of less than zealous advocacy are obvious. Luban agrees that a lawyer's moral choice, although it may seem right in a single case, would be disastrous when the cases are taken collectively. David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 449 (1990). Charles Fried argues along with others that, even if one is the "last lawyer in town," one must exploit the system even when its consequences work injustice on others. Fried, *supra* note 60, at 1086.

163. Recently, a student said he could not continue to represent a client who told him at the bail interview that he had an active case of AIDS. I replaced him with another student and used this experience as an opportunity to discuss a number of related issues with the student.

received a last-minute phone call from one of the alleged victims, confessing that our client's version of events was the truth. He said his friend verbally started the fight because our client was obnoxious and drunk. His friend also threw the first and the last punch. The man said he felt ashamed and sorry for all the trouble he had caused. We demanded justice and received an agreed-upon "not guilty" without a trial. From the beginning, stereotypes influenced the case, and in the end, the honesty of one person assured that our client's future was not imperiled.

CONCLUSION

Law schools are assuming a leadership position in the national effort to insure equal justice in the courts. They are in a unique position to do so. Curricular changes, seminars, and conferences herald the significance of both the lawyer's and the law teacher's role in this mission.[164] Because of the law school clinic's direct connection to the courts, clinical students understand both the impact and the shortcomings of such efforts better than if they were studying them in a more traditional curriculum.[165]

Courts and legislators are attempting to insure justice and equality to those previously ignored by the legal system. These groups include racial and ethnic minorities, women, gays and lesbians, and the physically and mentally challenged. While affording rights and recognition to these groups, courts and legislators are more punitive than ever toward criminal defendants, who count among their members many of the disadvantaged. Ethics commentators are joining this movement on both fronts when, out of concern for victims of discrimination, they argue that lawyers ought to withhold zealous advocacy when it hurts someone. Rules limiting advocacy

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164. An unexpected benefit of teaching about stereotypes is that it opens the classroom to discussion of diversity issues. Raising bias and stereotyping through lawyering tasks in clinical cases provides a comfortable forum for students to begin expressing their views about potentially painful and often divisive issues. This is an area where there are no experts and where all perspectives are welcome and equally valuable.

165. Clinical students are quickly caught up in their cases and learn that criminal justice issues and their solutions are complex. Often, statutes are passed with laudable goals and under great political pressure, but the system is imperfect and abuse at all levels is not uncommon. Examples of legislative efforts to help certain classes of victims and problems raised include: (a) The Abuse Prevention Act, MASS. GEN. L. ch. 265, § 37 (1990), enacted in response to concerns about domestic violence, (b) Amendments to Bail Statute, MASS. GEN. L. ch. 276, § 58 (1990), designed to protect women by detaining without hearing men charged with abuse or anyone else deemed to be dangerous based on highly discretionary "dangerousness" determination, and (c) Bias Crimes, MASS. GEN. L. ch 265, § 37 (1990), adding civil rights charges to simple assault and battery. For a sensitive discussion of some of the problems generated by these laws, see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985). She writes about the "manner in which the anguish of victims has been reformulated or mistranslated into support for a particular ideology. The co-opting of victim's concerns by crime control proponents has created a new mythology of victimization that fails to hear those concerns." *Id.* at 1020.

are very risky to criminal defendants. When we teach ethical lawyering, we must teach our students that justice for one group need not be achieved at a high cost to another. Furthermore, we must remind ourselves that we may not pursue political agendas at the expense of our clients.

We demand much of our students when we ask them to assume the moral role of advocate. We demand too much when we ask them to embrace all moral issues that arise in the universe of their cases. They can critique and confront the demands of zealous advocacy without abandoning them.

Law school clinics offer students an opportunity to consider seriously their own portrait of lawyering. They learn to struggle with their sometimes conflicting desires for systemic justice. They get to try out their theories of ethical lawyering and adopt new ones as they apply them to hundreds of lawyering tasks. In doing this, they gain a deeper understanding of the legal system and themselves. For the clinician, the dual role of lawyer and teacher hovers over all that she does. It is unrelenting in its demands of loyalty, reflection, modeling, questioning, decisiveness, and responsibility. The performance of professional duties sometimes hurts, and through law school clinics, students and teachers are able to learn this together.