

## “THE IMPORTANCE OF FAMILY DEFENSE”

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*This is a transcript of a speech given by Professor Fraidin at the N.Y.U. Family Defense Clinic’s 25<sup>th</sup> Anniversary Celebration Symposium, held on April 7, 2016.*

This is the life of a family defense lawyer:

A 17-year-old boy gets in a fight at a group home and yells at the other kid, “I’m going to kill you!” So the child welfare agency locks him up in a psychiatric ward because, they say, he is a threat to others. Quickly, the doctors say he is most definitely *not* a threat to anyone; he said what 17-year-olds say in the heat of passion. The doctors say the boy is ready for discharge. His parents ask, “Fine, where are you going to send him? Back to the group home, or to a foster home?” The social worker says, “Sorry, we don’t have a bed available for him, so he’ll have to stay locked up in the psychiatric ward.” The lawyer says to the judge, “They *have* to find him a bed if he isn’t a threat to himself or others. The statute says<sup>1</sup> –” And the judge interrupts him, “Oh!” she says. “Oh! *You* want to go down the *statutory* road...!”

Another case: An emergency removal hearing. The judge does the usual number, saying, “The social worker says I should remove the child, so I’m going to remove the child.” The lawyer says, “Well, your Honor, the statute says ‘first you have to make *this* determination about the child’s *safety*, and then you have to make *this* determination about whether there is a relative who can take care of the child.’”<sup>2</sup> And the judge rears back and says, “In *this* courtroom, we don’t *do* statutes, we do PRACTICE!”

University of Pennsylvania Professor Kara Finck, formerly a lawyer at The Bronx Defenders, once wrote a searing essay in which she insisted that judges and social workers stop calling her clients by the impersonal, anonymized placeholder, “Mom.” “I’m glad to see ‘Mom’ here today. How have ‘Mom’s’ classes been going? ‘Mom,’ do you have any questions?” Professor Finck wrote, “My client has a name – you will refer to her by name!”<sup>3</sup>

And the government takes three children from their mother because the mother had back surgery and was taking medication that made her drowsy; and because

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1. D.C. CODE § 21-521 (2016).

2. D.C. CODE § 16-2310(b) (2016).

3. Kara Finck, *Gathering of Grassroots Family Advocacy Organizations*, NYU School of Law (September 2008) (text of remarks on file with author).

the children's immunizations were not up to date; and because the mother had outstanding bills; and because the mother "failed to ensure that [her] child regularly arrives on time for [what the government acknowledged were] non-mandatory pre-kindergarten classes."<sup>4</sup>

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Why do these things happen in our world? It's easiest to understand, I think, by taking a moment to think about the way the rest of the legal world operates.

Outside our arena, litigation resolves the question of *whether something happened*. In criminal cases, defendants are accused of having done something wrong: did the defendant commit the forbidden act? In tort, contracts, and civil rights cases, the litigants debate whether one litigant breached a statutory, common-law, or constitutional duty to the other. Did something happen, or didn't it? Most litigation, then, is about events. Did it happen or didn't it?

In contrast, child welfare cases are *about humans*. And not merely about what a human did or didn't do, but much more pointedly, about *who the human is*. To be clear, our clients are humans who are accused of *being bad humans*. Our clients are charged with an inability to accomplish the most basic of human functions. A dependency petition alleges that our client cannot care for her offspring, and that she cannot love properly. When the government alleges that our client is "unfit," it is an explicit, unabashed attack on her viability as a human being.

The world in which others locate our clients is, very literally, black and white. Humans on one side and Others—our clients—on the other side. To many outside this room, our clients are nothing other than the worst thing they've ever done. They are the worst one-dimensional story anyone can conjure up. The stories others tell about our clients are simplistic, Manichean, and brutal.<sup>5</sup> These are stories of separation, distinction, and distancing.<sup>6</sup>

But we can do things differently:

4. *In re Ang. P.*, 71 A.3d 713, 717 (D.C. 2013).

5. Barbara J. Nelson found that the vast majority of child welfare news stories depict children who have been victimized by such acts as:

[B]eating . . . [or] burning—with matches, cigarettes or electric irons, or by holding the child's hands, arms or feet over an open flame . . . Others are strangled, thrown, dropped, shot, stabbed, shaken, drowned, suffocated, sexually violated, held under running water, tied upright for long periods of time, stepped on, bitten, given electric shocks, forced to swallow pepper or buried alive.

BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 60-61 (1984). See also John M. Johnson, *Horror Stories and the Construction of Child Abuse*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 17 (Joel Best ed., 2d ed. 1995).

6. See, e.g., DALE KUNKEL, STACY SMITH, PEG SUDING & ERICA BIELY, COVERAGE IN CONTEXT: HOW THOROUGHLY THE NEWS MEDIA REPORT FIVE KEY CHILDREN'S ISSUES 7 (2002) (five percent of stories about child abuse and neglect include contextualizing information; seventeen percent of child abuse and neglect stories include information about policy issues).

Imagine a net that is suspended in the air. The net is infinite, and stretches in all directions. In every node of the net, every hole, is a diamond.<sup>7</sup>

Every single one of those diamonds represents a piece of information about a client's life. Every single diamond is part of who she is, where she's been, whom she's met, what she's done. Every piece is part of the infinite story of her life.

Moreover, when you touch one diamond in the net, the entire net ripples, like the surface of a lake. You can't touch one diamond without affecting all others, and likewise, as each one is affected, it responds by affecting all the others.

And, when you look at one diamond, you see that one, but you also see the reflection of all the other diamonds. We can't see just one diamond, then; when we see one, we see the reflection of all, and the reflection in turn is made of the reflections of all others.

This metaphor, adapted from the story of *Indra's Net* in the Hindu and Buddhist traditions, helps us understand what we do and in turn, why what we do is indeed important for justice, for clients, and for ourselves.

The infinity of diamonds representing pieces of information reminds us that the story we tell of our client can always be built out. It can always be lengthened and extended. There is always more that is relevant and connected; the diamonds stretch infinitely. We can always learn more.

As lawyers for parents in child welfare cases, we are confronted with stories of un-connectedness, of acts and omissions that are considered especially blameworthy because those acts and omissions are, in others' telling, our clients' *entire, finite* world.

But we know that the blank spaces left in those stories are far greater than the minimal content. We know that humans' acts and omissions *never* stand in isolation, never exist in a vacuum. No one is *only* evil. No diamond can be truly seen without also seeing all of the others. We are all made up of *many, many* yesterdays, a today, and tomorrows. If each of us can be represented by an infinite blanket of interdependent diamonds, we know that no aspect of a client's story stands alone.

Knowing this, we must tell the stories of our clients' lives as contextualized and connected. We seek to situate the charges against our client realistically, which is to say, as merely one jewel in that infinite net, knowable only by its relation to the entire net of our client's life and the lives around her.

Folksinger Michelle Shocked wrote of the inhabitants of a small town in East Texas, "Their lives ran in circles so small/They thought they'd seen it all."<sup>8</sup> She knew that everyone's vision is limited by biases, stereotypes, assumptions, and

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7. The story is reproduced in FRANCIS H. COOK, *HUA-YEN BUDDHISM: THE JEWEL NET OF INDRA* 2 (Pa. St. Univ. Press 1977); *see also* DAVID MUMFORD, CAROLINE SERIES & DAVID WRIGHT, *INDRA'S PEARLS: THE VISION OF FELIX KLEIN* xvii (Cambridge Univ. Press 2002).

8. MICHELLE SHOCKED, *Memories of East Texas*, *on* SHORT SHARP SHOCKED (Mercury Records 1988).

fears. For our clients, however, the tunnel vision of child welfare decision-makers has devastating, unjust results.

We must try, then, to make visible the glittering diamonds that are the net of our clients' lives. How do we tell stories of complication, rather than simplicity? How do we learn about our clients so we can depict a world of warmth and context, connectedness and interdependence, rather than the cold world in which our client is the nameless "Mom?"

The very nature of our litigation means that we have to learn about the ecological systems of which our clients are a part. By absorbing ourselves in our clients' reality and by appreciating that reality as an infinite net of jewels, we can retell the harsh, stereotype-laden stories spun by the government. We listen and learn.

If our client's goal is to prevent the removal of her child, or to achieve the child's return home, our task is to persuade a judge that the client is human enough to be trusted. To retell her story, we learn about her strengths, her accomplishments, and her internal assets. We keep searching the blanket of diamonds for more and more, to help us understand the facts and the linkages of our client's life. By engaging in ongoing exploration, we can provide context and vibrant, shimmering, full-color life to the standard-issue, one-dimensional tale of depravity and woe offered by the government.

What does it look like to be a lawyer as if one's client is an infinite blanket of diamonds? I knew two students who visited their client in jail every week. Sometimes there was news, sometimes not. Just touching base, just saying hi. When they sent her a letter, they signed off—every time—"Felecia, we will fight for you." They could say this honestly because they knew they would never reach the end of the journey across Felecia's infinite net. For them, the journey to know Felecia would never be finished. There would always be a tomorrow with her, always more to learn, more with which to engage, more to process.

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Again, why is this important? That's the question we started with. What does this kind of lawyering mean for justice, for our clients, and for ourselves?

Good results we can live with. Every once in a while, we prevent a removal, or win a shaken-baby trial. Incredible!

But when we describe an infinite net of reflective, interconnected, interdependent diamonds, we tell stories that make no sense to many listeners. And stories that create fear in some listeners – the fear of the unexpected, the fear that arises when one's worldview is challenged.

So fortunately, it is also important for justice that we *lose* in family defense work. It means we're fighting, which means we're winning. Richard Wexler, Director of the National Coalition for Child Protection Reform, told my students, "Keep hitting your head against the wall, because someday it will move." My late colleague, Professor William McLain, said, "Relish the losses. Treasure them,

celebrate them. There is no other route to change.” Losses mean you’re trying to make a difference.

And losing this way will also promote greater justice, because decision-makers will find the law an increasingly relevant, useful, and necessary framework. The law provides questions to which rich, textured stories provide the very *best* answers. If, as in my early example, a judge confronted with removing a child really does first look to make a finding about the child’s safety and also seeks to make a finding about whether there is a relative who can care for the child, the judge inevitably requires more information than that provided by the stereotype-driven stories. Our kind of stories—rich, full, and thorough—give the very best, most reliable answers to the questions posed by the law.

The more times we tell judges “You *must* follow the law, you must hear our story, you’ll be glad you did! You *must* impose the burden on the government and not on us” – the more we say this, the more it will sink in, the more it will redirect the judges’ synapses and change the conversations that go on inside their heads. We will slowly transform reality. As Richard Delgado wrote, we create the world as we tell its story.<sup>9</sup>

An unfair, unjust, sexist, racist world can’t sustain itself, and it will change. If we keep describing the jeweled net of our clients’ lives, we will retrain ourselves and those around us to assume and expect richness and complexity, rather than stereotype. And that richness and complexity is all relevant to decisions framed by the law.

For clients, too, wins come in all shapes and sizes. Wins come when we, always exploring the net of diamonds, learn about our clients, listen to them, meet their families, and can tell them honestly, “I will always fight for you.”

In words that apply to our practice, Pace Law Professor Vanessa Merton wrote about wins that come disguised as tragic, unfair losses in criminal defense work:

I came to realize that while there was no justice in what was happening, there was purpose, and meaning, because I had *been there* for those guys. I had gone through it with them, with all my heart and all my soul. They knew, whatever mistakes I made, that I had tried my hardest and done my best. Somehow, it seemed, that helped. They felt not abandoned, not alone, not unheard. Someone had tried. Someone was bearing witness.<sup>10</sup>

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9. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2439 n. 83 (1989).

10. E-mail from Vanessa Merton, Professor of Law, Pace University Elisabeth Haub School of Law, to Matthew Fraidin, Professor of Law, University of the District of Columbia David A. Clarke School of Law (on file with author).

So then, whatever the outcome, our work can *always* be important for our clients.

And the importance of family defense for *us*? Wow. It is a dream of an opportunity to find out who *we* really are. Getting *this close* to other human beings is the way we learn who *we* are. We explore our own values as we seek to understand our client's. We absorb the choices that she makes, both intentionally and involuntarily, and gain awareness of our own. As we learn what is inside another human being, as we discover and describe the diamond net of our client's life, we forge pathways to do it for ourselves.

When we see the infinite, diamond-filled net in others' lives, we can see it in our own as well. Our client's humanity becomes a model for our own. What are *my* linkages? What is *my* net of connectedness and interdependent experiences? It is a rich treasure trove for learning and growth, this human relationship we have with a client, which happens to be premised on the contours of her relationship with yet another human. Family defense lawyering is important for us, precisely because our external, professional lives so inform our own *internal, personal* lives.

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I told Professors Guggenheim and Gottlieb that I was looking forward to today's symposium as if it were a giant extended family reunion, with sunshine, barbecue, unlimited cold beer, and the Grateful Dead. (That's *my* fantasy; you can have yours!)

Indeed, in terms that, for me, describe today's events, one member of the Dead wrote in his memoir about the music scene in Darmstadt, Germany in 1961:

It's difficult to overstate what a mecca for new music it represented at the time. Like a surfer, anticipating a good wave, you could feel the momentum, the surge, the excitement of being at the edge, the *avant-garde*. The electricity was almost visceral.<sup>11</sup>

And even today, 25 years after the N.Y.U. Family Defense Clinic invented our field, family defense lawyers still are the electricity. Even after 25 years of progress, family defense lawyers still are the *avant-garde*.

"Before there's a bandwagon to hop onto," the Dead's keyboardist wrote, "shaping activities that will *in retrospect seem inevitable*, the *gathering forces* are exerting their magnetism."<sup>12</sup>

Today's attendees, and your family defense colleagues around the country, are that magnetic, "gathered force." You are, of course, gathered here in this room. And, from across the country, you remain gathered throughout the year by the American Bar Association's listserv for parents' attorneys. You gather every other

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11. TOM CONSTANTEN, BETWEEN ROCK AND HARD PLACES: A MUSICAL AUTOBIODYSSEY 35 (Hulogosi 1992).

12. *Id.* (emphasis added).

year at the ABA parent attorneys' conference. And you are linked by your part in this extended family.

By your wins and your losses, by your insistence on the framework of the law, and by your stories of nets with diamonds—an infinity of facts, all interdependent and interconnected—you are creating a new world that, in retrospect, someday will seem inevitably to have been destined. It will be a world of justice, a world in which our clients truly are respected, and a world of real family values.