



2017

The Transposition of Power: Law, Lawyers and Social Movements

Michael R. Diamond

Georgetown University Law Center, diamondm@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1990>
<https://ssrn.com/abstract=3021299>

ARTICLES

The Transposition of Power: Law, Lawyers, and Social Movements

Michael Diamond *

I. INTRODUCTION

Various groups of people have been the victims of oppression throughout time and across national borders and cultures. Many forms of oppression continue to exist all over the world today, including in the United States. I have been particularly concerned with oppression on the basis of race.¹ The responses to oppression have taken many forms, ranging from passivity and acquiescence to rebellion. Much of the response, however, takes place between these extremes, often in the form of ongoing collective action by more or less organized groups. Broadly speaking, these actions have come to be known as social movements, and they have been the subject of a great deal of scholarly examination.² Through this scholarship, we have learned much about the nature of social movements, who joins them, and how they have been able to succeed. We have not learned as much about how the law and lawyers affect such movements and how, if at all, law and lawyers contribute to their success. I would like to examine these issues in an effort to elucidate the relationship between law, lawyers, and social movements and to better understand how lawyers can be helpful (or detrimental) to such movements.

My own interest in this field is somewhat more narrowly confined. For example, I have been skeptical of movements and lawyers who set as their goal the establishment of new or expansion of existing legal rights. New rights do

* Professor of Law, Georgetown University Law Center. An earlier version of this paper was presented at a symposium on Law, Lawyers, and Social Movements held at Georgetown Law, Fall 2016. I want to express thanks to my friends and colleagues, Gerry Spann and Mike Seidman, for their very useful comments on drafts of this essay. © 2017, Michael Diamond.

1. By oppression, I am referring to the restraint, mistreatment, exploitation, and/or restriction of opportunities of people on account of their race or ethnicity. The oppression may be the result of governmental policy, social norms, or a combination of both.

2. To be clear, social movements may operate for any number of causes, not merely on behalf of the oppressed. There are, for example, movements in support of the Second Amendment and against gun control, against reproductive choice, and in favor of populist presidential candidates and their policies. I am focusing solely on those that deal with racial and ethnic oppression in this essay.

not seem to have much social or political impact on subordinated groups, unless the holders of those rights have the power to enforce them. As an alternative to the rights discourse, I have been interested in the acquisition and utilization of power by marginalized and oppressed groups in the United States. Even more narrowly, my research has focused primarily on issues affecting the urban poor. Historically, there has been a significant intersection connecting social movements to urban poverty. The Civil Rights Movement, the Welfare Rights Movement, the Affordable and Fair Housing Movements, the Affordable Health Care Movement, and the Black Lives Matter Movement, among others, have had significant impetus from and impact on the urban poor.

Many of these movements succeeded in creating new rights for various groups. Many were successful in changing, to some extent, individual lives and social environments. Nevertheless, we see today a society where wealth and well-being are even more polarized,³ often on the basis of race,⁴ and groups of people who remain subject to the same forms of intergenerational oppression as those faced by their long departed ancestors. These groups continue to exist on the wrong side of what I have previously called the “power deficit.”⁵ If this assertion is correct, the dedicated and well-intentioned efforts of lawyers have had only marginal results. Thus, I take the position, as do several others, that lawyers who work with oppressed groups must assist them in gaining and using power rather than pursuing rights as an end in themselves.

That being said, there is little consensus among social scientists, philosophers, and lawyers on the meaning of power and virtually no legal literature on how it can be obtained and used (although a fair amount exists on the need to obtain and utilize it). “Of all the concepts used by sociologists, few are the source of more confusion or misunderstanding than power.”⁶ My intention in this paper is to dispel some of that confusion and to attempt to illuminate some issues concerning power in relation and as a response to oppression.

For many years, I have attempted to understand the concept of “power” as applied to social and political interactions. There has been a great deal of literature concerning the application of power upon subordinated groups in the United States and about the effects of that application.⁷ There is literature

3. This is not to say that all members of racial minorities are worse off now than they were at the beginning of the Civil Rights Movement. It is to say that the progress achieved by large segments of minority populations has been slower and less substantial than for most of their majority counterparts, and, in some cases, there has been little to no progress at all.

4. For a discussion of the statistics and economics of the position of minorities in the United States, see generally BRENDAN O’FLAHERTY, *THE ECONOMICS OF RACE IN THE UNITED STATES* (2015).

5. Michael Diamond, *Community Economic Development: A Reflection on Community, Power, and the Law*, 8 J. SMALL & EMERGING BUS. L. 151, 160 (2004).

6. GERHARD E. LENSKI, *POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION* 50 (1966).

7. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); SETHARD FISHER, ED., *POWER AND THE BLACK COMMUNITY: A READER ON RACIAL SUBORDINATION IN THE U.S.* (1970); HERBERT J. GANS, *THE WAR AGAINST THE POOR* (1995); DOUGLAS S. MASSEY & NANCY A. DENTON,

discussing the “empowerment” of subordinated populations,⁸ but it does not really define “power” as it is utilized against such groups, or “empowerment” as a way to rectify existing wrongs done to them. Many groups in the United States can realistically claim to have been (and continue to be) the objects of power and to be disadvantaged or even oppressed by it.⁹ However, my particular concern is with power in relation to those who are beset by subordination and urban poverty, particularly people of color. More specifically, I am concerned with long term and intergenerational poverty as opposed to *temporary or voluntary poverty*.¹⁰

In previous attempts to put my concerns on paper, I have explored, I hope with an increasing level of sophistication, the sources and uses of power.¹¹ The previous explorations have progressed from one that examined a behavioral approach concerning the definition and exercise of power to one that considered a more nuanced understanding of power and the roots of the power imbalance. In this article, I sought to flesh out the latter approach, an approach that Antonio Gramsci, in reconstituting a Marxian concept, called the “hegemonic” aspect of power.¹² I also sought in this article to identify and discuss the means by which lawyers might assist the poor in reducing the power deficit.

This inquiry is highly relevant in a discussion of social movements, because there has been a widespread and deep, albeit not always well coordinated, movement against poverty and oppression for well over half a century. Lawyers have been significantly involved in this movement and have often assisted in the achievement of important improvements in the circumstances of those subjected to poverty and discrimination. Part of what I argue here is that the lawyers and, to some extent, the movements themselves, often mistake legal victories for ultimate success. While that position has largely been discredited, remnants of it persist among lawyers and non-lawyers alike. As an alternative view, I would like to focus attention on the issue of power, its definition, accumulation, and use. It is by accumulating and using power that social movements achieve goals. Lawyers and, occasionally, the law are parts of that accumulation and use, but, in my view, hardly of their essence.

AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); AMON N. WILSON, *BLUEPRINT FOR BLACK POWER: A MORAL, POLITICAL AND ECONOMIC IMPERATIVE FOR THE TWENTY-FIRST CENTURY* (1998).

8. See generally Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

9. Consider, for example, the situation of women, racial minorities, gay, lesbian, or transgendered people, children, or the elderly.

10. By the term “voluntary poverty,” I mean people who have chosen to live without means. Two typical examples are members of the clergy and the so-called “starving artist.”

11. See, e.g., Diamond, *supra* note 5; Michael Diamond, *Community Economic Development and the Paradox of Power*, 1 IRISH REV. COMMUNITY ECON. DEV. L. & POL’Y 5 (2012) [hereinafter *Paradox*].

12. ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 12 (Quintin Hoare & Geoffrey Nowell Smith trans., 1971).

As I have suggested, the definition and exploration of social power is not new. In fact, social power has been a topic of scholarly examination for centuries. As early as the sixteenth century, when Machiavelli published *The Prince*,¹³ theoreticians, including Spinoza,¹⁴ Hegel,¹⁵ Weber,¹⁶ and many other, more contemporary, theoreticians,¹⁷ have devoted substantial thought and contributed substantial content to the discourse. Until the 1960s, most of the prominent commentators defined power as the ability of the powerful to cause the non-powerful to do what the powerful party desires despite opposition from the non-powerful party.¹⁸

This conceptualization implicates the idea of what has been called “power over” one by another. This aphoristic expression may have been a generally accurate description of the function of power at one point in history. While it is still accurate in some situations today, for some time it has been less descriptive of how power operates in the modern world. More contemporary contributors to the public discourse on power have considered the concept of “power to” rather than “power over.” Perhaps an even larger change in thinking about power has come from many modern theorists who have argued that the situs of power has become opaque and, in many cases, unidentifiable. I believe that both of these modern views more correctly situate the source and nature of power. I discuss these issues more fully in Section 2, *infra*.

While there are some identifiable sites in which the acquisition and emanation of power takes place, there is also a body of power that emanates from less discernible or even indiscernible or non-existent sites. Such opacity, if accurately describing modern forms of power, makes efforts to combat it fundamentally different from combating traditional power emanating from observable sources. In this paper, I wish to explore these modern views of social

13. NICCOLO MACHIAVELLI, *THE PRINCE* (Harvey C. Mansfield trans., Univ. Chi. Press 2d ed 1998) (1532).

14. BARUCH SPINOZA, *TRACTATUS POLITICUS* (Michael Silverthorne & Jonathan Israel trans, Cambridge Univ. Press 2007) (1677).

15. See, e.g., GEORG WILHELM FRIEDERICH HEGEL, *LECTURES ON THE HISTORY OF PHILOSOPHY* (E. S. Haldane & Frances H. Simson trans., Univ. Neb. Press 1995) (1840).

16. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 53 (Guenther Roth & Claus Wittich eds., 1978).

17. Dennis H. Wrong has said, “Power is the capacity of some persons to produce intended and foreseen effects on others.” DENNIS H. WRONG, *POWER: ITS FORMS, BASES, AND USES* 2 (Transaction Publishers 5th ed. 2009) (1979). Amitai Etzioni has defined power as the “capacity to overcome part or all of the resistance, to introduce changes in the face of opposition.” AMITAI ETZIONI, *THE ACTIVE SOCIETY: A THEORY OF SOCIETAL AND POLITICAL PROCESSES* 314 (1968). Other definitions have also been suggested by other social scientists. Many of these have been compiled by Paul Mott. He quotes, among others, “Goldhammer and Shils: A person has power to the extent that he influences the behavior of others in accordance with his own intentions.” Weber: Power is the probability that one actor within a social relationship will be in a position to carry out his own will, despite resistances, regardless of the basis on which this probability rests. Biersted: Power is latent force.” Paul E. Mott, *Power, Authority and Influence*, in *THE STRUCTURE OF COMMUNITY POWER* 3, 5 (Michael Aiken & Paul E. Mott eds., 1970). For further discussion on historical examinations of social power, see, e.g., Diamond, *supra* note 5, at 158.

18. See *infra* Section II.

power, particularly views that address the more ethereal sources and forms of power, with which I substantially agree. The results of such an exploration will, I hope, help to inform the strategies and actions of movement leaders and the lawyers who assist them.

In pursuing this examination of social power and its use, I would initially like to set some limiting parameters. First, I propose to eliminate from this discussion the ideas of coercion and physical force as sources of power. While the threat of force, particularly by the State, often underlies the exercise of social power, there is also a body of thought to the effect that, if force is required to induce compliance, there is, in fact, an *absence* of real power. In this view, the use of force implicates a failure of power.¹⁹ Regardless of one's view of force in relation to power, the use of direct force or coercion is sufficiently unobvious as to make its use as a foundation for a discussion of power significantly less interesting or desirable. Moreover, it is more likely that force or coercion will be observable and, potentially, resisted. The other forms of power I consider in this essay are far more covert and, therefore, less easily identified and resisted.

Second, as I have mentioned, while the State and various centralized institutions have traditionally been thought to be the situs of power, I will discuss a decentralized and somewhat more elusive view of power, one in which an identifiable source of emanation is lacking or, perhaps more precisely, non-existent. If this description of power, its source, and its exercise is largely accurate, this should have significant implications for the role and activities of strategists and lawyers who participate in movement struggles against oppression and subordination. For example, depending on the way one conceives of power, there will be significant variation in what lawyers and other activists do and in the target of their activities. I hope, in this paper, to elucidate some of these differences.

In laying out my position, I will, in Section II, briefly trace the modern treatments of the concept of power, particularly those that fall within the behaviorist school of thought, the structuralist school, and, finally, the post-structuralist school. In Section III, I will address the question of power in relation to the problem of urban poverty in the United States. In Section IV, I will revisit the strategies by which the poor and their allies might resist the impositions of power against them and increase their ability to use power productively, thereby reducing the power deficit they confront. I will conclude, in Section V, with some final thoughts on the nature and use of power.

II. THE POWER DISCOURSE IN MODERN HISTORY

Since the middle of the twentieth century, several influential writers have re-examined the meaning and operation of power. These writers may be

19. HANNAH ARENDT, ON VIOLENCE (1969), reprinted in *POWER: A READER* 132, 137 (Mark Haugaard, 2002).

grouped into three broad but distinct schools of thought about social power: behavioral/conflict; false consciousness; structuralist; and post-structuralist.

A. *The Three Faces of Power*

1. The First Face of Power: The Behaviorist School

One of the most prevalent theories of power during the mid-twentieth century derived from Weber's view of power which involved a person, "A", being able to cause another, "B", to do what A wishes despite B's resistance.²⁰ This model of power relies on the conflict between A and B, and provides the basis for the position of Ronald Dahl, one of the major writers about power in the mid-late twentieth century. Dahl's formulation of Weber's theory is "A has power over B to the extent that he can get B to do something that B would not otherwise do."²¹

Dahl's view of power was highly empirical.²² He claimed that there must be an observable cause and effect relationship between the acts of the powerful and the response of the target.²³ Therefore, Dahl distinguished between *power* and the *potential for power*.²⁴ Merely having access to resources does not make a person powerful. That person must marshal and successfully utilize those resources to cause others to act in order to be said to have or to have exercised power.²⁵ Dahl goes on to argue that power is not the domain of any particular person or group of people.

This is in contrast to the position taken by C. Wright Mills, in his book *The Power Elite*.²⁶ Mills theorized that there existed a group of elites in particular fields (such as the military, political institutions and major participants in industry) who make decisions that, consciously or unconsciously, affect national and international policy.²⁷ Dahl criticized Mills' elitist view, arguing that there existed a fluid set in interests that competed for supremacy on any particular point. He posited a pluralistic society and believed that the ability to acquire and utilize power is distributed widely and is unstable. Thus, those who may be powerful in one area of activity may be without power in another.²⁸ Nevertheless, Dahl maintained that the element of power depended upon the existence of an observable conflict between these competing groups with the successful group on any issue having "power" in connection with that issue.

20. See WEBER, *supra* note 16.

21. Robert A. Dahl, *The Concept of Power*, 2 SYS. RES. AND BEHAV. SCI., 201, 202-203 (1957).

22. Robert A. Dahl, *Power*, in POWER: A READER 9, 16 (Mark Haugaard ed., 2002).

23. Robert A. Dahl, *Power as the Control of Behavior*, in POWER 37, 51 (Steven Lukes ed., 1986).

24. *Id.* at 52.

25. *Id.*

26. C. WRIGHT MILLS, *THE POWER ELITE* 4 (Oxford Univ. Press 1956).

27. *Id.*

28. Dahl, *Power*, *supra*, note 22, at 12.

2. The Second Face of Power: Behaviorism with a Twist

While Dahl made several valuable contributions to the understanding of power, he was also heavily criticized for his empirical stance, one that required an observable causality between the efforts of the powerful actor and the response of the less powerful target. Thus, some overt conflict between the parties concerning the issue in question was a necessary feature of Dahl's approach. Through examinations of such overt conflicts, proponents of this view of power claimed to be able to discern who typically succeeded, and thus to observe in which group political power lies.

Peter Bachrach and Milton Baratz were among the early critics of Dahl. In their article, *Two Faces of Power*,²⁹ they challenge Dahl's view of power as being too limited, since it deals only with decisions made in the face of observable conflict concerning the policy preferences between various elements of society. While they agree that such decisions surely involve the exercise of power they ask:

[H]ow can one be certain in any given situation that the 'unmeasurable elements' are inconsequential, are not of decisive importance? Cast in slightly different terms, can a sound concept of power be predicated on the assumption that power is totally embodied and fully reflected in 'concrete decisions' or on activity bearing directly on their making?³⁰

Bachrach and Baratz answer their question in the negative.³¹ They argued that not all power issues involve overt conflict between contesting parties. They pointed out how the ability to limit which items are open to public discourse, the ability to control the agenda, was also an exercise of power.³²

Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A devotes his energy to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to consideration of only those issues which are comparatively innocuous to A.³³

They cite E. E. Schattschneider, who refers to this as the "mobilization of bias."³⁴ While "Dahl assumed a pluralistic society, in which all the community

29. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962).

30. *Id.* at 948.

31. *Id.*

32. *Id.* at 948, n.11.

33. *Id.* at 948.

34. *Id.* at 949. They quote Schattschneider stating "All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization

interests were represented by means of open processes,³⁵ Bachrach and Baratz argue, presaging in some ways Foucault, Bordieu, and others, that the institutional structure of a society determines, to a great extent, the nature, content, and outcome of public discourse. They claim that a researcher inquiring into the nature of power and who wields it must begin by:

[I]nvestigating the particular ‘mobilization of bias’ in the institution under scrutiny. Then, having analyzed the dominant values, the myths and the established political procedures and rules of the game, he would make a careful inquiry into which persons or groups, if any, gain from the existing bias and which, if any, are handicapped by it.³⁶

Thus, they expand the definition offered by Dahl and the behaviorists by including the unseen structural biases built into a political system by those in power. The fact that these biases are unseen suggests that rules and norms represent a broad-based and democratic exercise of community power when, in fact, the range of issues subject to democratic determination has been heavily circumscribed so as to exclude many issues that the dominant groups do not wish to have discussed. This structural element of power has many forms and, regardless of form, it plays a major role in discussions of power and domination.

3. The Third Face of Power: False Consciousness

There was a good deal of criticism of Dahl’s approach, but also of that of Bachrach and Baratz’s second face of power. Many commentators thought their view to be equally based on cause and effect, albeit on a substantially less observable cause—the *absence* of a decision. One of those critics, Steven Lukes, in his influential book, *Power: A Radical View*,³⁷ began a significant transformation of the power discourse. Lukes seeks to go beyond the empirical, behavioristic approach of Dahl, but he also argues that Bachrach and Baratz’s approach, while an improvement over Dahl’s, still suffers from a strong empirical and behavioral bent that limits its efficacy.

Lukes attempts to solve this problem by positing a third dimension of power.

is the mobilization of bias. Some issues are organized into politics while others are organized out.” ELMER E. SCHATTISCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 71 (1960).

35. ELISHEVA SADAN, *EMPOWERMENT AND COMMUNITY PLANNING: THEORY AND PRACTICE OF PEOPLE-FOCUSED SOCIAL SOLUTIONS* 36 (Richard Flantz trans., 2004) (e-book), http://www.mpow.org/elisheva_sadan_empowerment.pdf.

36. Bachrach & Morton, *supra* note 29, at 952.

37. STEVEN LUKES, *POWER: A RADICAL VIEW* (2d ed. 2005) (1974). Lukes published a second edition in 2005 in which he added two chapters to his original work. It is to the second edition that I refer throughout this essay.

The first dimension tracks the overt conflict model put forward by Dahl and others while the second deals with the less observable control of agendas identified by Bachrach and Baratz. Lukes then adds his third dimension, which incorporates the descriptions of power found in the first two dimensions but goes on to argue that in the third dimension:

[P]ower may operate to shape and modify desires and beliefs in a manner contrary to people's interests. In consequence, neither revealed preferences [as in the first dimension] nor grievances and inchoate demands [as in the second dimension] will always express them.³⁸

This idea harkens back to Antonio Gramsci's notion of hegemony,³⁹ which will be discussed more fully later in this section. The manipulation of "desires and beliefs contrary to people's interests" raises the Marxist concept of false consciousness, a concept that proves problematic for Lukes in that it requires him to identify one's "true" interests, which would prevail but for the manipulation.⁴⁰

B. De-Facing Power

A second major problem for Lukes was somewhat surprising, given his view of the manipulation of norms. This involves his insistence on the concept of human agency as an essential element of power. This is in contrast to a structural view of power, which suggests that the dominant norms and practices of a society are built in to the very fabric of that society and are accepted and internalized by the overwhelming majority of its members. Lukes's requirement that power must involve human agency, that is, that it must involve the action or inaction of individuals or collectivities, has been contested by many. One of these critics, Clarissa Hayward, in her book *De-Facing Power*, argues for an understanding of power "not as an instrument some agents use to alter the independent action of others, but rather as a network of boundaries that delimit, for all, the field of what is socially possible."⁴¹ Her position is that all actors in society are limited by these boundaries, although the limitations on some actors are far greater than the limitations on others. The mechanisms that comprise these boundaries "include laws, norms, standards, and personal and social group identities. They demarcate fields of action."⁴² Thus, she argues, those who critically analyze how agents "enable and constrain" one's "capacity to help

38. *Id.* at 10. For a comprehensive critique of Lukes on this point see T. Benton, "Objective" *Interests and the Sociology of Power*, 15 *SOC.* 161 (1981).

39. GRAMSCI, *supra* note 12, at 12. We will see shortly, however, how Gramsci's view was considerably different from Lukes's in several ways.

40. LUKES, *supra* note 37, at 144-45.

41. CLARISSA RILE HAYWARD, *DE-FACING POWER* 3 (2000).

42. *Id.* at 8.

shape the terms of one's life . . . must reject this assumption that power wears the 'face' of agents who use and direct it."⁴³

While Lukes recognizes the structural aspects of subordination, he resists attributing the effects of such structures on subordinated people to an exercise of power. He states that "there is a link between power and responsibility: that part of *the point* of locating power is to fix responsibility for consequences held to flow from the action, or indeed inaction, of specifiable agents."⁴⁴ The problem with this approach, of course, is that, as Hayward points out, there are many social ills that cannot be attributed to the actions or inactions of any person or group. Lukes might respond that these effects are not the results of the use of power. This, however, begs the questions: from what source do they result, and in what way can they be addressed?⁴⁵

The de-facing of power plays out in several theoretic models. In the next sections, I will concentrate on two of them: the structural and the discursive. While each of these models provides a theory of power without a face, they are distinct from each other. However, it seems to me that there is an origin that they may share. Through the examination of that origin, I hope to bring theories of power based on agency, structure, and discourse closer together and, ultimately, to suggest a method of resistance to power and a basis for social change.

1. Beginning with Gramsci

Antonio Gramsci, borrowing from Marx and Lenin, believed in the concept of hegemony. He was particularly interested in the idea of cultural or social hegemony by which subordinated groups (for him, the proletariat) were controlled because they accepted and internalized the norms and values of those who sought to control them. Gramsci observed that "social hegemony" is accomplished through a two-part process: the "spontaneous" consent" given by the masses "to the general direction imposed on social life by the dominant" group (this is based on the internalization of the dominant group's norms) and "[t]he apparatus of state coercive power which 'legally' enforces discipline on those who do not 'consent.'"⁴⁶ As Thomas Bates points out, "[t]he concept of hegemony is really a very simple one. It means political leadership based on the

43. *Id.* at 10.

44. Clarissa Hayward & Steven Lukes, *Nobody to Shoot? Power, Structure, and Agency: A Dialogue*, 1 J. POWER 5, 7 (2008) (emphasis in original).

45. Hayward describes Lukes's position concerning social effects by claiming, [S]ome are caused by agents who are able to act in ways that predictably and significantly affect other agents, while some are the unplanned net effect of the actions of multiple actors who could not—not through their individual choices, not through their coordinated efforts—control and direct the outcomes that, together, their actions produce. The former are powerful, because responsible, says Lukes. The latter are not.

Id. at 9.

46. GRAMSCI, *supra* note 12, at 12.

consent of the led, a consent which is secured by the diffusion and popularization of the world view of the ruling class.”⁴⁷

For Gramsci, the idea of hegemony existed in a sphere above the economic and political structures of a given society. It existed in the realm of ideology, and it influenced the institutions of civil society. Bates notes,

Civil society is composed of all those “private organisms”—schools, churches, clubs, journals, and parties—which contribute in molecular fashion to the formation of social and political consciousness The ruling class exerts its power over society on both of these “floors” of action, but by very different methods. Civil society is the marketplace of ideas, where intellectuals enter as “salesmen” of contending cultures. The intellectuals succeed in creating hegemony to the extent that they extend the world view of the rulers to the ruled, and thereby secure the “free” consent of the masses to the law and order of the land. To the extent that the intellectuals fail to create hegemony, the ruling class falls back on the state’s coercive apparatus which disciplines those who do not “consent,” and which is “constructed for all society in anticipation of moments of crisis of command . . . when spontaneous consensus declines.”⁴⁸

As I mentioned in the earlier discussion of Lukes’s third dimension of power, the influence of Gramsci on Lukes is unmistakable. Nevertheless, the idea of hegemony leaves open the question of how it functions in society. As an ideological concept, it certainly functions on a much broader level than powerful agent A asserting her authority over subordinate agent B. But how is the hegemonic ideology created, and how is it propagated? The main contenders in this debate are those who favor an agent-centric explanation of subordination (Dahl, Bachrach and Baratz, Lukes, et al.) and those who favor a structural or discursive/post-structural one (Gramsci, Hayward, Young, Foucault, et al.).

2. A Structural Digression

I begin the discussion of structure in society with an example I have previously written about,⁴⁹ and which, coincidentally, is one discussed in the Hayward and Lukes essay discussed earlier.⁵⁰ We see today in the United States

47. Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 *J. HIST. IDEAS* 351, 352 (1975).

48. *Id.* at 353.

49. Michael Diamond, *De-concentrating Poverty: De-constructing a Theory and the Failure of Hope*, in *COMMUNITY, HOME, & IDENTITY* 47, 47 (Michael Diamond & Terry Turnipseed eds., 2012).

50. See Hayward & Lukes, *supra* note 44.

a widespread pattern of racially segregated housing.⁵¹ There are many views about why this should be true in the face of significant current federal legislation aimed at eliminating discrimination in housing.⁵² A possible answer lies in older federal housing policies first formally established in the 1930s.

In 1933, Congress enacted the Home Owners' Loan Act,⁵³ which created the Home Owners' Loan Corporation (HOLC).⁵⁴ HOLC was to provide government funds to purchase home mortgages that were in default or otherwise in difficulty and to refinance those loans to help homeowners keep their homes. Among the explicit policies of HOLC was to refrain from making loans in black neighborhoods (or, for that matter, in any mixed-race neighborhood, neighborhood of immigrants, or neighborhood of others thought to be racially or ethnically problematic).⁵⁵ In addition, HOLC steered funds away from African-American applicants regardless of their credit-worthiness. These policies were explicitly continued by the Federal Housing Administration, HOLC's successor agency.⁵⁶

Housing policies such as these were exacerbated, directly or indirectly, by other explicit federal policies, including: the placement of public housing projects on a segregated basis;⁵⁷ the Urban Renewal Program,⁵⁸ which demolished many neighborhoods that were home to low-income black residents and caused them to move to other already densely-populated and racially-segregated neighborhoods; and the Federal Highway program,⁵⁹ which had the dual effect of increasing the possibility for "white flight" by offering easy

51. *But see* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1358–59 (2016) (arguing that segregation has been decreasing in the United States for decades, though "no comparable progress is being made" in other areas of discrimination).

52. In particular, see the Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2012).

53. Home Owners' Loan Act of 1933, Pub. L. 43–73d, 48 Stat. 128 (1933).

54. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 195–218 (1985).

55. See *id.*; see also Diamond, *De-concentrating Poverty: De-constructing a Theory and the Failure of Hope*, *supra* note 49.

56. For an interesting history of these federal programs, see JACKSON, *supra* note 54, at 195–218. Charles Abrams, a noted political thinker of the time, said,

A government offering such bounty to builders and lenders could have required compliance with a nondiscrimination policy Instead, FHA adopted a racial policy that could well have been culled from the Nuremberg laws. From its inception FHA set itself up as the protector of the all-white neighborhood. It sent its agents into the field to keep Negroes and other minorities from buying houses in white neighborhoods.

CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* 214 (1955).

57. For a discussion of this policy, see *Hills v. Gautreaux*, in which the Court said "Uncontradicted evidence submitted to the District Court established that the public housing system operated by [Chicago Housing Authority] was racially segregated, with four overwhelmingly white projects located in white neighborhoods and with 99.5% of the remaining family units located in Negro neighborhoods and 99% of those units occupied by Negro tenants." *Hills v. Gautreaux*, 425 U.S. 284, 287–88 (1976).

58. See Housing Act of 1949, 42 U.S.C. §§ 1441–1490 (2012).

59. Established by Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956).

access to the newly developed suburbs for whites while also creating significant physical barriers, such as multi-lane, high-speed highways, that cut off minority neighborhoods from the rest of the city, particularly from white neighborhoods.

While these policies had come to a formal end by 1970, the effects of the policies live on today, almost fifty years later. In fact, one could easily argue (although it is beyond the scope of this paper to do so) that although the housing policies put in place beginning in the 1930s by the federal government were reinforcing rather than establishing social norms, it is fairly certain that such policies institutionalized discriminatory practices on a national basis. Further, even if one could assume that the people who envisioned, created, and implemented these early policies were power-wielding agents in a Lukesian sense, it is highly unlikely that those who left the city for the suburbs in 1974 were such agents. This is true despite the fact that white flight exacerbated segregation and the poverty rate in the cities the movers left behind. Those cities were increasingly populated by low-income minorities and were hard-pressed to provide the funds necessary to meet the increased demands for government services while simultaneously dealing with a diminished tax base. Hayward characterizes this issue by saying,

Most people would hold a discriminating landlord morally responsible for the adverse effects of her actions on the housing choices of others, but most would *not* hold responsible for her unintended role in producing such effects someone who moves her family out of a city in order to live in its suburbs.⁶⁰

So, if there are not any people or groups to whom one could ascribe responsibility for the housing plight of poor people of color, if there are none who can be said to have caused this effect, should power no longer be considered an element of the resulting situation? The structuralists and post-structuralists each have a response.⁶¹

3. A Structural View: Social Relations as Conduits

Social order involves a series of relationships that have been built into, have been created by, and have endured within a society.⁶² According to structural theorists, these relationships have embedded within them a series of norms that

60. Hayward & Lukes, *supra* note 44, at 10 (emphasis in original). See also *infra* pp. 339–40 and note 112.

61. There are differences and similarities in these models of critiques. Structuralism is based primarily on language and linguistics while post-structuralism is based on knowledge systems that, of course, are transmitted through language. My goal here is not to delve deeply into the epistemology of these theories but to discuss in rather broad strokes some of the thinking of those denominated as of one or the other of the schools of thought.

62. See, e.g., MILLS, *supra* note 26, at 4 (arguing that there is a body of people who, due to their non-representative positions in industry, finance, the military, etc., are able to make decisions “having major consequences”).

order interactions between participants in any relationship. These norms largely regulate how the parties in the relationship will behave toward one another. They also take us beyond the “power over” analyses of the behaviorists and include a “power to” component that is thought by many commentators to be both the lubricant that allows society to function, as well as the catalyst for the creative expansion of the public good.⁶³

In examining how structure works in society, Jeffrey Isaac has analogized viewing social structure to the way scientists study the properties of various elements in nature, for instance the conductivity of copper:

In the realist [structuralist] view, social science would be similarly concerned with the construction of models of the social world and its lawful structure. The primary object of theoretical analysis would not be behavioral regularities [as were, according to Isaac, of the power-related studies of Dahl, Bachrach and Baratz, and Lukes], but the enduring social relationships that structure them.⁶⁴

This does not mean that social relations are completely reified. In fact, many structuralists, led by Anthony Giddens, believe in a “duality of structure.”⁶⁵ Giddens explains that:

We should not conceive of the structures of domination built into social institutions as in some way grinding our “docile bodies” who behave like the automata suggested by objectivist social science. Power within social systems . . . presumes regularized relations of autonomy and dependence between actors or collectivities in contexts of social interactions.⁶⁶

Isaac expands on this view by saying,

The major point of this approach is that purposive human activity has social preconditions, which are relatively enduring relations (e.g., husband/wife, capitalist/worker, citizen/representative) that constitute the complexity of any given society. Individuals and groups participate within these

63. See, e.g., Mark Haugaard, *Reflections on Seven Ways of Creating Power*, 6 EUR. J. SOC. THEORY 87, 89 (2003).

64. Jeffrey C. Isaac, *Beyond the Three Faces of Power: A Realist Critique*, 20 POLITY 4, 18 (1987).

65. ANTHONY GIDDENS, *NEW RULES OF SOCIOLOGICAL METHOD* 121 (1976). I should mention here that Giddens has also been associated with the discursive, post-structuralist school, and we shall return to a discussion of Giddens later in this section.

66. ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 16 (Polity Press 1984).

conditions, reproducing and *transforming* them in the course of their ordinary lives.⁶⁷

Isaac provides an example of the structural aspects of a social relationship—that between teachers and students. He maintains that the essence of this relationship is not one between “two parties who happen to engage in interaction.”⁶⁸ It is, instead, “an historically enduring” one that both creates well-defined roles between the participants in any such relationship but also creates a mutual interdependence.⁶⁹ Each party to such a relationship possesses certain “powers” that are inherent in the structure of student-teacher relationships.⁷⁰ Isaac distinguishes these structural allocations of power from the behavioristic cause and effect analyses of Dahl, Bachrach and Baratz, and Lukes, et al., in that the student-teacher interactions are part of the very relationship and are distinct from the “regularities” of expected behavior that derive from an individual agent exerting power over an individual subject.⁷¹

Within a structural relationship, each party may depart, intentionally or unintentionally, from his or her structured role; a teacher might miss a class or a student might fail to study or be unruly. This, according to Isaac, does not change the powers assigned to the particular role, although the regular existence of such deviations might make one a poor teacher or a bad student. “The possession of these powers in the performance of social activities is necessary to these activities, but the successful exercise of these powers is contingent.”⁷² Isaac goes on to “define social power as *the capacities to act possessed by social agents in virtue of the enduring relations in which they participate.*”⁷³ This is an example of Giddens’s duality of structure, the structure establishing the broad parameters of a relationship (the structure) and the ability of participants within that relationship to engage in a range of activity (the agency) that may confirm the structure or reject or modify it. The structure, not the acts of the teacher, for the most part, cause the student to act as he or she does and vice-versa. Because there is room, even within structured relationships, for the contingencies of human agency, structures are not immutable. They may change, and, in fact, power relationships may be reversed. I will return to this thought in Section IV, *infra*.

67. Isaac, *supra* note 64, at 19 (emphasis added).

68. *Id.* at 22.

69. *Id.*

70. *Id.*

71. *Id.* at 22.

72. *Id.*

73. *Id.* (emphasis in the original).

4. Discipline and the Panopticon: A Discursive, Post-Structuralist View

"A society without power relations can only be an abstraction."

– Michel Foucault⁷⁴

Prior to the eighteenth century, discipline was exercised by the sovereign upon the body of the subject. By the eighteenth century, however, a change in the nature of discipline was emerging such that Jeremy Bentham, in the late 1780s, had begun developing his idea of the Panopticon.⁷⁵ The Panopticon was a device intended to create a more effective and less expensive form of prison. It was to consist of a circular outer rim, which was divided into prison cells, the fronts of which could be seen through. At the center of the outer rim was a guard tower with windows devised so that the guards had a 360-degree view of the cells but the prisoners could not see in. Thus, while all prisoners could always potentially be observed, the prisoners were not able to observe the guards or ascertain whether they, the prisoners, were being observed by the guards at any particular time.

As with any prison, there were certain rules of conduct for those who were incarcerated. Violations of these rules would result in some form of discipline. Because the prisoners were subject to constant observation, the fear of that discipline led them to conform their conduct to the requirements of the prison rules. Since they did not know whether, in fact, they were being observed at any particular time, they conformed their conduct all the time. Thus, they were, effectively, self-disciplining.

Michel Foucault extrapolated from Bentham's original conception and applied the notion of the Panopticon,⁷⁶ metaphorically, to other major elements of modern society such as the school, the workplace, and the hospital. He argued that the reduction in corporal discipline that took place during the 18th century was replaced by disciplining the "soul" of the object of the discipline.⁷⁷ Thus, the rules of behavior associated with these and other societal institutions and activities were internalized by those who were subject to the rules.⁷⁸ The rules became part of their everyday life, became part of the fabric of the society in which they functioned.⁷⁹ These systems of behavior were constructions of the society and, as they became internalized, were called *epistemes* by Foucault.⁸⁰

74. Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 791 (1982).

75. JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Miran Bozovic ed., 1995).

76. For Foucault's description of the Panopticon, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 200–02 (Alan Sheridan trans., Random House 1977).

77. *Id.* at 16 ("The expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.")

78. *Id.* at 202.

79. *Id.*

80. MARK OLSEN, *MICHEL FOUCAULT: MATERIALISM AND EDUCATION* (1999), explains *epistemes* by saying that Archaeology (a term Foucault used to describe a method of his research) describes "rules that undergird ways of looking at the world. These rules are regularities that determine the systems of possibility as to what is considered as true and false, and they determine what counts as

These were the regularities of understanding and behavior that allowed for both domination and productive cooperation in society. The epistemes play a major role in Foucault's view of power, which differs markedly from that of the behaviorists and, to some extent, from that of the structuralists. For Foucault and others there is a dynamic relationship between power and knowledge, although Foucault went beyond many of the others in his analysis,

[I]n a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise [sic] and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse.⁸¹

Foucault distinguishes the power of the sovereign of several centuries ago with the disciplinary power which he argues operates today. His view of power is highly decentralized and functions in all the techniques and apparatuses of everyday life (through the epistemes). Thus, the study of power should, according to Foucault, focus not on the centralized "legitimate" (meaning law and sovereignty) forms of power, but on "power at its extremities, in its ultimate destinations, with those points where it becomes capillary."⁸² He is more interested in how power acts on the people who are subjected to its effects than on the formal statement of rules. Thus, Foucault is interested in trying "to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts, etc. We should try to grasp subjection in its material instance as a constitution of subjects."⁸³

This hearkens back to my earlier comments about Hayward and her "network of boundaries"⁸⁴ and Isaac's "enduring relations"⁸⁵ in that Foucault believes that power is not possessed by anyone but rather circulates and is "employed and exercised through a net-like organization."⁸⁶ Power creates the subject and, in turn, uses the subject to propagate power. Thus, power is a function of bodies of "knowledge," which are constructed "truths," that are created through

grounds for assent or dissent, as well as what arguments and data are relevant and legitimate. These 'structures of thought' are termed *epistemes*. An 'episteme' refers to 'the total set of relations that unite, at a given period, the discursive practices The episteme is not a form of knowledge . . . or type of rationality. . . it is the totality of relations that can be discovered for a given period, between the sciences when one analyzes them at the level of discursive regularities.' *Id.* at 10-11.

81. Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* 78, 93 (Colin Gordon ed., Colin Gordon et al. trans., Random House 1980).

82. *Id.* at 96.

83. *Id.* at 97.

84. See text accompanying note 41-43.

85. See text accompanying notes 68-71.

86. Foucault, *Two Lectures*, *supra* note 81, at 98.

science and social interaction and then are reproduced by people acting on the basis of these social constructions.⁸⁷

Others have devised similar views of social construction. One, Pierre Bourdieu, has developed a concept of *habitus* that has many similarities with Foucault's epistemes. In the editor's note to Bourdieu's *Language and Symbolic Power*, John B. Thomson defines habitus as, "a set of *dispositions* which incline agents to act in certain ways. The dispositions generate practices, perceptions and attitudes which are 'regular' without being consciously co-ordinated or governed by any 'rule.' The dispositions which constitute the habitus are inculcated, structured, durable, generative and transposable."⁸⁸

Bourdieu himself describes the habitus as, "[t]he structures constitutive of a particular type of environment (e.g. the material conditions of existence characteristic of a class condition) produce *habitus*, systems of durable, transposable *dispositions*, structured structures predisposed to function as structuring structures, that is, as principles of the generation and structuring of practices and representations."⁸⁹

The habitus, therefore, is generated by long-standing social interaction and becomes the way that individuals (or groups) understand the world, and by acting in accordance with that understanding, they reproduce and extend it. Thus, even groups disadvantaged by one or more social practices may accept the disadvantage because it is in accord with their view of how the world and social interaction works.

Neither Foucault nor Bourdieu think that epistemes or habitus must be the result of some conscious effort by the powerful. Each believes that individual interactions create a power relationship that, through repeated interactions between the original parties and with others, becomes generally recognized and internalized. I will have more to say about this in Section IV, *infra*.

The final commentator on power that I will address in this section is one mentioned earlier, Anthony Giddens.⁹⁰ Giddens's "duality of structure" straddles the behaviorist and structuralist/post-structuralist thinking about power. He developed a theory of *structuration* that involves both societal structures (which would include epistemes and habitus), but also includes significant room for agency. Structuration theory involves the structuring of human relations across time and space.⁹¹ It involves the creation and reproduction of norms and practices that make social life possible. The predictability that is produced by structuration allows people to act in concert to

87. Neither Foucault nor the other post-structuralist theorists eliminate the possibility of resistance to the societal constructions. I will develop this thought further in this and subsequent sections.

88. PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 12 (1981).

89. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 72 (Ernest Gellner et al. eds., Richard Nice trans., 1977) (footnote omitted). Bourdieu defines "disposition" as "the result of an organizing action," which he likens to a word such as "structure." *Id.* at n.1. "[I]t also designates a way of being, a habitual state . . . and, in particular, a predisposition, tendency, propensity, or inclination." *Id.*

90. See *supra* text accompanying notes 65-66.

91. See GIDDENS, *THE CONSTITUTION OF SOCIETY*, *supra* note 66, at 376.

accomplish things they would not have been able to accomplish by acting separately.⁹²

Giddens distinguishes between *structures* and *systems*. Structures are ephemeral and exist only at the moment in time in which a particular interaction takes place. They are based upon the actors' understanding of the meaning, the appropriate behavior, under particular circumstances. This is the element of structuration. But, as Haugaard points out,

[T]he reproduction of meaning is not a personal affair While it is true that the reproduction of structure presupposes structuration by an actor A, it *also* presupposes the recognition of that action as ordered, or meaningful, by an actor B (structuration is a necessary but not sufficient condition for the reproduction of social structure).⁹³

Thus, for the structure to be reproduced, there needs to be an act of "confirm-structuration" to the original act of structuration. Haugaard uses as an example of this actor A offering a five-Euro note in exchange for an object. Actor A is offering to reproduce a structure, the value of the note being in excess of its value merely as a piece of paper, but the reproduction is not complete until actor B confirm-structures by taking the note for the object.⁹⁴ Thus, while there is a generally recognized structure in society (in Haugaard's example, the value of a five-Euro note), that structure is not reproduced unless a second actor confirms the structure. This leaves room for individual agency to interact with structures, which allows those structures to be modified or even nullified. Of course, for a modification or nullification to take effect, the de-structuration must occur across numbers of people and over time; it does not occur through a single, or even a number of isolated incidents.

For a structure to have the predictability that society requires to maintain order, both actor A and actor B need to have knowledge of the structure.⁹⁵ For Giddens, an actor's knowledge is broken down into two parts: *practical consciousness knowledge* and *discursive consciousness knowledge*.⁹⁶ Practical consciousness knowledge is that knowledge that is internalized and accepted without critical assessment.⁹⁷ This harkens back to Gramsci's hegemony and, perhaps, to Lukes's false consciousness. Discursive consciousness knowledge is

92. "[A] society gives actors a capacity to do things which they could not otherwise accomplish if they were not members of society." Haugaard, *supra* note 63, at 89.

93. *Id.* at 90.

94. *Id.* at 91-92.

95. "[T]he creation of power through the reproduction of social order in general presupposes a consensus upon the recreation of meaning which is realized through structuring and confirm-structuring practices." Haugaard, *supra* note 63, at 93.

96. *Id.* at 100.

97. Practical consciousness knowledge is "[w]hat actors know (believe) about social conditions, including especially the condition of their own action, but cannot express discursively." GIDDENS, *THE CONSTITUTION OF SOCIETY*, *supra* note 66, at 375.

that knowledge which is brought into discursive focus and which is able to be critically evaluated.⁹⁸ The confirming structuration that Haugaard believes is required for the reproduction of a structure is usually the reflexive response provided by one's practical consciousness knowledge. However, actor B also has the option of *destructuring* an offered structuration, which, if widely repeated, would create instability in the social system. The deconstruction would be the result of actor B bringing into discursive focus the structuration offered by A.

By virtue of this brief sojourn through the vast and varied modern literature on power, one sees the complexity of establishing a working definition of power. It is at least as complex as attempting to apply such a definition in a real world struggle against subordination and powerlessness. Yet that is the task activists have set for themselves in their struggle against such societal ills. In the next section, I will lay the framework of the societal subordination that oppresses the poor and people of color in today's United States.

III. RACE AND SUBORDINATION IN AMERICA

America's history of racial discrimination and the subordination of blacks goes back to the early colonies and has gone through several iterations over the centuries, including, even in modern times, the use of physical violence. The oppression runs from slavery, through Jim Crow laws, to voting restrictions, associational restrictions (including the separate but equal doctrine of *Plessy v. Ferguson*),⁹⁹ and to restrictive covenants and explicitly legalized governmental discrimination in mortgage lending (both of which led to massive segregation of housing and lower homeownership rates among blacks).¹⁰⁰

For much of our history, politicians, commentators, and many people in society have blamed the poor, particularly poor people of color, for their own situation. Because of this belief, there appeared a variety of pejoratives used publically to describe and disparage the poor. In the nineteenth and early twentieth century, we distinguished between those who were poor due to conditions beyond their control and all other poor people. The former group included infants, the elderly, and the sick or disabled, who were said to be the "deserving" poor. The others were said to be lazy, unambitious, drunkards, or criminals and were designated as the undeserving poor and largely cut off from public compassion and from assistance.¹⁰¹ More recently, disparaging terms

98. Discursive consciousness knowledge is "[w]hat actors are able to say, or give verbal expression to, about social conditions, including especially the conditions of their own action; awareness which has a discursive form." *Id.* at 374.

99. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

100. *See, e.g.*, JACKSON, *supra* note 54, at 195-218.

101. For an interesting historical view of distinguishing and labeling the poor, see HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* 11-26 (1995). *See also* MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

such as the “culture of poverty” and the “underclass” have been used to describe poor people, but tended to be particularly identified with urban African-Americans.¹⁰²

This history underwent a symbolic change¹⁰³ with the Supreme Court’s decision in *Brown v. Board of Education*.¹⁰⁴ Ten years after *Brown*, Congress passed the Civil Rights Act,¹⁰⁵ followed by the Voting Rights Act the next year,¹⁰⁶ and then the Fair Housing Act in 1968.¹⁰⁷ These statutory deviations from existing discriminatory norms and rules accompanied the “War on Poverty”¹⁰⁸ as the federal government took largely unprecedented action to combat the existence and effects of legalized discrimination. Many state laws followed these efforts.¹⁰⁹ They sought to curb much of the overt discrimination seen in the public sphere. With the advent of the War on Poverty and the Great Society, one might have thought that the era of discrimination had ended. It had not!¹¹⁰

Putting aside the current legal retrenchment (both legislative and judicial) on federal and state anti-discrimination law,¹¹¹ American society today remains

102. The term, “the underclass,” started as an academic concept but was transformed into a popular and pejorative label for urban African-Americans. GANS, *supra* note 101, at 27. The sociologist Gunnar Myrdal coined the term “under-class” to “describe the victims of deindustrialization.” *Id.* However, the term went through a definitional transformation when the August 29, 1977 issue of *Time* magazine did a cover story entitled *The American Underclass: Destitute and Desperate in the Land of Plenty*. The article described, in particularly negative terms, the personal attributes of poor, urban, African-Americans. *The American Underclass: Destitute and Desperate in the Land of Plenty*, *TIME*, Aug. 29, 1977. Thus, the term entered the popular consciousness as a pejorative label for poor blacks.

103. Even Ronald Reagan formally re-established the public use of offensive designations when he used the term “welfare queen” in his 1976 presidential campaign. See “Welfare Queen” Becomes Issue in Reagan Campaign, *N.Y. TIMES*, Feb. 15, 1976.

104. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). While there were court cases prior to *Brown* outlawing certain types of discrimination, *Brown* is generally thought to have initiated the modern era concerning the legal contours of race relations in the United States.

105. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

106. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

107. Fair Housing Act, Pub. L. No. 90–284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (2012)).

108. See Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964), <http://www.presidency.ucsb.edu/ws/?pid=26787>.

109. See, e.g., D.C. Human Rights Act of 1977, D.C. CODE § 2–1402.01 *et seq.* (2017); N.Y. EXEC. LAW § 296 (McKinney 2016).

110. For a discussion of the current disparity in the distribution of various societal benefits, see Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 41 *CONN. L. REV.* 1253, 1336–47 (2011).

111. See, for example, *Shelby County, Al. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating portions of the Voting Rights Act). The Brennan Center for Justice at New York University noted after the decision that:

Starting after the 2010 election, legislators in nearly half the states passed a wave of laws making it harder to vote. These new restrictions ranged from cuts to early voting to burdens on voter registration to strict voter ID requirements. While courts stepped in before the 2012 election to block many of these laws, the Supreme Court’s 2013 decision in *Shelby County* gutting the most powerful

highly divided along racial lines. The number of black Americans in poverty, in prison, unable to find a job, or under-employed is severely disproportionate to their numbers in the population as a whole.¹¹² Why is this the case? Some of it is undoubtedly the result of personal racial animus among some people. Much of it, however, is not. Much of it is the unintended and, perhaps, undesired result of social structures and embedded norms that exist, and have existed, in the country since long before the Civil Rights Era of the mid-to-late twentieth century. To paraphrase Iris Marion Young, it is possible for a person to suffer societal harm without any social agent she has encountered to having done her any specific wrong.¹¹³

To explain this claim, Young uses as an example a single mother, Sandy, who lives with her two children in a central city apartment building, which is being converted into a condominium by its owner.¹¹⁴ Sandy has a low-wage job that requires an arduous commute on public transportation. She is willing to move and seeks an apartment closer to her job. After a diligent search, she finds only a few available units, and those are quite expensive. More affordable units are on the other side of town. Sandy then devotes some of the money she intended to use for housing to buying a car to ease her commute. She applies for a housing subsidy but is told there is a two-year wait. After continuing her search, Sandy settles for a small one-bedroom apartment (the children would use the bedroom and she would use a fold-out bed in the living room) that is a 45-minute drive from her job—unless traffic is bad. Her final hurdle is coming up with the standard three-month deposit for the unit. That is difficult since she used most of her savings for the down payment for the car. If she cannot obtain the deposit, Sandy and her family face the prospect of homelessness. Young posits throughout her example the absence of moral wrong by any of the agents Sandy has encountered.¹¹⁵ Young then says,

It is plausible . . . to find that Sandy suffers injustices but that no particular agent she encounters has done her a specific wrong. Nor can the wrong that Sandy suffers be attributed to some particular unjust law or policy that has kept her and others like her from having a home.¹¹⁶

protections of the Voting Rights Act made it even easier for states to put in place restrictive voting laws.

Election 2016: Restrictive Voting Laws by the Numbers (Sept. 28, 2016),

<https://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers>. The article goes on to provide an interactive chart of the various laws with the effect of limiting voting. *Id.*

112. See generally O'FLAHERTY, *supra* note 4 (discussing the statistics and economics of the position of minorities in the United States).

113. IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* 47 (2011).

114. *Id.*

115. *Id.* at 43–44, 46

116. *Id.* at 47.

Rather, Sandy's injuries are the result of a series of unintentional, uncoordinated, and, presumably, morally blameless actions by multitudes of people prior to the time she confronts her crisis.¹¹⁷ These actions that resulted, for example, in a lack of affordable housing, lack of effective public transit, and absence of living-wage jobs for women without higher education or technical skills, were part of a set of societal norms and practices that could be likened to Gramsci's hegemony, Foucault's epistemes, and Bourdieu's habitus. In other words, they are the result of societal structures and norms that are embedded and taken for granted by the overwhelming majority of people. They have become, in Giddens's terms, part of the practical consciousness knowledge of the society.

IV. SOCIAL MOVEMENTS AND THE PROGRESS OF POWER

"Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it's the only thing that ever has." – Margaret Mead¹¹⁸

It has long been an axiom of political resistance that oppressed people need to organize into purposive groups to achieve their goals.¹¹⁹ But even organized groups are often isolated and look only to achieve their own short-term goals regardless of their long-term needs. It is often the case in these situations, however, that when a particular goal is achieved (or even when it is not), the group disbands, leaving other grievances unaddressed. Social movements purport to be different. Many commentators have distinguished social movements from pressure groups, lobbying groups, and general community groups. But social movements themselves have been defined by commentators in various ways. Nevertheless, there is a coalescing of views around several important points in essentially all definitions of social movements.¹²⁰ Courpasson and Dany, paraphrasing Zald and Berger, say social movements are social realizations "through which collective challenges are held together by a

117. *Id.*

118. Margaret Mead, *THE YALE BOOK OF QUOTATIONS* (Fred R. Shapiro ed., 2006) (quote attributed by Rushworth M. Kidder, *Every Tourist a Diplomat*, *CHRISTIAN SCI. MONITOR* (June 1, 1989)).

119. See, e.g., ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. II, Book 2, 114 (Alfred A. Knopf 1945) ("If each citizen did not learn, in proportion as he individually becomes more feeble and consequently more incapable of preserving his freedom single-handed, to combine with his fellow citizens for the purpose of defending it, it is clear that tyranny would unavoidably increase."). See also Marvin E. Olsen, *Sociopolitical Pluralism*, in *POWER IN MODERN SOCIETIES*, 146, 147 (Marvin E. Olsen & Martin N. Marger eds., 1993) ("As elaborated by numerous contemporary writers, the theory of sociopolitical pluralism calls for a complex network of interest organizations throughout society, each of which possesses its own power base and hence can function relatively independently of the government.").

120. DAVIS A. SNOW ET AL., *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS*, 6 (2007) ("Although the various definitions of movements may differ in terms of what is emphasized or accented, most are based on three or more of the following axes: collective or joint action; change-oriented goals or claims; some extra- [sic] or non-institutional collective action; some degree of organization; and some degree of temporal continuity.").

sense of common purpose, [sic] solidarity, across time and space by relatively resilient organizational forms of contestation.”¹²¹ Sarat and Scheingold quote Charles Tilly, who defines social movements as:

[A] sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support.¹²²

The sense of sustained organizations and contestation are the common elements in most definitions of social movements. One must ask then whether—and if so, how—a social movement can make significant inroads into the issue of poverty and the economic and social oppression of poor people of color. A secondary question, but one of some importance, is: how do the law and lawyers fit into social movements and social change?

As I said earlier, the poor, particularly poor people of color, suffer from a power deficit. Given the wide-ranging definitions of power that have been advanced, the meaning of “power deficit” may need further elaboration. In the context of individual or group agents, subjects and objects of power, the meaning is fairly clear. One party has more resources, be they capital, skills, contacts, or organization, which can be deployed to defeat the wishes of the other party. In such cases, the mobilization of the objects of power has a specific target to combat. The problem is much more complicated when there is no “powerful” agent imposing its will on others but oppression stems from the ordinary operation of the social and economic institutions of the society.

1. Mobilization as a Prelude to Power

When fighting an observable enemy, mobilization has a target, and strategies can be devised that are thought to be most effective in defeating that enemy and accomplishing that particular combatant’s goals. If the goals are finite and their achievement is discernible, there is a significant risk that the mobilization will either dissipate once its goals are met or, to channel Karl Marx¹²³ and Robert Michels,¹²⁴ become the bureaucratic antithesis of its

121. David Courpasson and Françoise Dany, *Cultures of Resistance in the Workplace*, in THE SAGE HANDBOOK OF POWER, 332 (Stewart R. Clegg & Mark Haugaard eds., 2009).

122. AUSTIN SARAT & STUART A. SCHEINGOLD, *What Cause Lawyers Do For and To Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, 1, 2 (Sarat & Scheingold eds., 2006) (quoting Charles Tilly, *Social Movements and National Politics*, in STATEMAKING AND SOCIAL MOVEMENTS 305, 306 (Charles Bright & Susan Hardings eds., 1984)). One should note here that this definition is neutral as to the purpose of the movement. It applies as much to the Tea Party Movement as it does to the Feminist or Civil Rights Movement.

123. See generally KARL MARX, CAPITAL (Penguin Classics 1992) (1867).

original purpose. When fighting an unknown enemy, the nature of the struggle and the necessary mobilization is quite different from the classic battle against a known opponent.

This calls into question the validity of the statement attributed to Margaret Mead that begins this section. Can a small group of individuals “change the world?” If it is the case that oppression arises from the impersonal norms and structures of society, the strategy to combat the oppression needs to address those norms and structures and not, typically, particular individuals or groups. To construct such a strategy, a movement, in order to act appropriately, needs to understand the nature of the power it confronts. Thus, structuralist and post-structuralist ideas of power are central to this discussion.

Recall that essentially every commentator aligned with these theoretical models placed an emphasis on the knowledge that circulates within a social/political grouping. While there might once have been a person or group who originally formulated, in a more or less positivist manner, a particular rule or policy, over time many of those rules or policies became embedded in the way society functions. They become part of society’s accepted practices. There no longer would be an identifiable provenance or lineage of these practices but they became so widely accepted that they have become part of the epistemes (Foucault), habitus (Bourdieu), or practical consciousness knowledge (Giddens) of the society. Or, to put it another way, they became part of the entangled web of day-to-day existence. In order to change those embedded practices, one would have to change the knowledge base of the society. To use Giddens’s terms, practical consciousness knowledge would have to be converted to discursive consciousness knowledge, so that a Habermasian dialogue, a rational discourse, would ensue.

While there have been several examples of such transformations in modern America (the Women’s Movement and the Freedom to Marry Movement come to mind,¹²⁵ along with the Civil Rights Movement), there has also been a backlash to many of the proposed and actual changes to social norms and attitudes that have been inspired by these movements. Consider in this regard the renaissance of racially targeted speech and action that has returned to the surface during the 2016 Presidential campaign.¹²⁶

In order to achieve their goals, each successful movement was able to create discourse in the society concerning the way people thought about the movement’s central issues. Over the past half century, we have seen such a discourses emerge concerning the role of women, the rights of same sex

124. See generally ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (1962).

125. This movement achieved its most significant public victory with the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which made same-sex marriage a Constitutional right. For a discussion of the strategy leading to this decision, see *Freedom to Marry*, <http://www.freedomtomarry.org/pages/how-it-happened> (last visited on May 28, 2017).

126. See Susan Milligan, *This Race Is About Race*, U.S. NEWS & WORLD REP. (Sept. 2, 2016), <http://www.usnews.com/news/articles/2016-09-02/racial-tension-in-the-2016-presidential-election>.

couples, and the removal of many of the legal and social barriers to societal participation by African-Americans and other racial and ethnic minorities. However, as can be seen by the continued discrimination against these groups, the transformation is far from complete. In fact, what is occurring is a spate of counter-movements seeking to re-establish the former hegemonic principles of the society.

The result of these competing movements has been the creation of a more open public debate on some of the issues that have been raised. This debate has begun to raise the level of discourse from practical consciousness to a more discursive consciousness. I say “has begun to” because of a sense that the positions taken by some participants in the various debates remain mired in practical consciousness knowledge. That is, their positions are instinctual, based on embedded beliefs, rather than on a Habermasian reasoned discourse.¹²⁷ Thus, the question is “what is to be done?”

2. Mobilization for Change: The Role of the Law and of Lawyers

Shakespeare once wrote, “The first thing we do, let’s kill all the lawyers.”¹²⁸ This is a somewhat extreme solution to a problem that some perceive in relation to the role of lawyers in social movements. Nevertheless, the perception of what *has* been done in social movements often tracks very closely to a narrative of activist lawyers using the law to achieve social change. For much of the second half of the twentieth century, and up to the present time, law and lawyers have been considered by many to have been an integral part of social movements and of social change. They believe that a good deal of the changes achieved by movements came about by virtue of litigation, especially Supreme Court litigation,¹²⁹ and aggressive lobbying for changes in state and federal statutory law.¹³⁰ In addition to popular views on the subject, there was a significant amount of scholarly literature supporting this assessment of the role

127. For an explanation of Habermas’s view of rational discourse, see STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.2, <https://plato.stanford.edu/entries/habermas/#HabDisThe>. (last visited May 28, 2017) (“Habermas’s theory of communicative action rests on the idea that social order ultimately depends on the capacity of actors to recognize the intersubjective validity of the different claims on which social cooperation depends. In conceiving cooperation in relation to validity claims, Habermas highlights its rational and cognitive character: to recognize the validity of such claims is to presume that good reasons could be given to justify them in the face of criticism. *TCA* thus points to and depends on an account of such justification—that is, on a theory of argumentation or discourse, which Habermas calls the ‘reflective form’ of communicative action.”).

128. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

129. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (applying due process rights to public assistance recipients when the government seeks to terminate their benefits); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

130. For examples of federal legislation, see notes 104–07 and accompanying text. For examples of state legislative initiatives, see *Affirmative Action/Overview*, NAT. CONF. OF ST. LEGISLATURES (Feb. 7, 2014), <http://www.ncsl.org/research/education/affirmative-action-overview.aspx> (discussing various affirmative action policies and critiques); Amelia Thomson-DeVeaux, *When Abortion Was Only Legal in 6 States*, FIVETHIRTYEIGHT (Aug. 28, 2014), <https://fivethirtyeight.com/datalab/when-abortion-was-only-legal-in-6-states> (discussing pre *Roe v. Wade* state abortion laws).

of law and lawyers.¹³¹ This perception of legal involvement in social change activity has not, however, been universally extolled. In fact, the role of the law and of lawyers has been hotly debated. There emerged during this period both an internal and an external critique of this understanding of the role of law and lawyers.

The internal critique came from both the right and the left. On the right, there was a backlash against government-funded lawyers bringing suits against the government for the benefit of, primarily, poor people,¹³² as well as a critique of unelected judges overturning law developed by elected legislatures.¹³³ On the left, much of the critique came from some progressive lawyers and legal academics who were skeptical about lawyers pursuing social change through the creation or extension of legal rights.¹³⁴ My own view is that while the obtaining of formal legal rights has sometimes served a symbolic purpose, it has also served to detour and to slow down more fundamental and enduring change.¹³⁵ Too often, the achievement of new or expanded rights has been

131. See, e.g., Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY, 715 (1992); MICHAEL W. MCCANN, *RIGHTS AT WORK* (1994); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 422 (2001) (“The social movements literature does not adequately reflect the importance of law.”).

132. In real terms, the Legal Services Corporation, the organization that funds many of the local legal services offices around the country, has seen its budget plummet during the period from 2012 through 2015 to its lowest level since its inception and less than half of what it was in the early 1980s. LEGAL SERVICES CORPORATION, 2015: LEGAL SERVICES CORPORATION BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 3–13 (2016), www.lsc.gov/lsc-2015-numbers. For a good history of legal services, see ALAN W. HOUSMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* (Ctr. for Law and Soc. Pol’y 3d ed. 2013) (2007); see also Alan Houseman, *A Front-Lines Reflection on Early Legal Services: Lawyering to End Poverty*, 22 GEO. J. ON POVERTY L. & POL’Y 469 (2015).

133. Of the twentieth-century critics of “activist” judges, perhaps none was more significant than Alexander M. Bickel. See, e.g., *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962). Bickel’s position was carried forward in Chief Justice Roberts’s dissent in *Obergefell v. Hodges*, in which he said:

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.

Obergefell, 135 S. Ct. at 2612 (2015).

134. While it is not my goal in this paper to elucidate the debate, I would like to point out some of the leading literature on the subject. For an early critique of the push for rights by a non-legal academic, see STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974). See also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). For a pro-rights perspective, see MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994). Much, but hardly all, of the debate among lawyers and legal academics has been between proponents of a critical legal studies perspective and proponents of a critical race perspective. For a CLS perspective, see Gabel and Harris, *supra* note 8. For a critical race perspective, see Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-CL. L. REV. 401 (1987).

135. For another critique of the rights-creation process, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that rights

perceived by many, especially many progressive lawyers, to be the end of the struggle rather than a step, and typically a not-too-central step, in an ongoing political process.

I envision, instead, a multifaceted process whose goal would be to shift power to the advantage of those who currently suffer from a power deficit due to issues such as race, class, or gender. While this process may involve some legal issues and legal actions, it is not, essentially, a legal process. To contemplate such a process, of course, requires one also to contemplate the meaning of power and how it operates in society because how one views power will inform how one attempts to shift power. In the remainder of this section, I will discuss my view of power, how power can be acquired and used by the disenfranchised, and the role that law and lawyers can play in such a process.

a. Power Revisited

While there is little doubt that there remains in American society a level of conscious discrimination and intentional oppression, it is also likely that much of the disadvantage suffered by the poor and by people of color is the result of factors other than overt, intentional bias. In many cases the oppression results from long-standing societal norms that have been internalized by large numbers of otherwise well-intentioned people. These norms often, if not invariably, originated long ago with the conscious behavior of individuals or groups who were then exercising their agency. These intentioned behaviors and the norms upon which they were based were reproduced over time, often unconsciously, by many subsequent agents and thus became embedded in society's fabric. In other words, they became social structures within the culture. Recall, for example, Iris Marion Young's description of Sandy's ordeal. The problem, of course, is that if the problems Sandy faced are caused by structures within the society, how can those who are subject to the structures overcome or change them?

In this regard, recall Giddens's theory of structuration. Structures and their operation that have become part of the practical consciousness knowledge (or epistemes or habitus) of the culture would naturally be replicated as instinctual responses to various stimuli. In order to modify these responses, the practical consciousness from which they result must be converted to a discursive consciousness. The culture must be brought to confront its own embedded beliefs and practices so that the instinctual will be brought into discursive engagement. Of course, attempting to bring practical consciousness to a discursive state is not always (or even often) successful. There is typically a discursive rationale for the way things are such that the position of the

are created for blacks only when the interests represented by those rights converge with the interests of whites).

oppressed may not prevail. Perhaps even more likely, an attempt at rational discourse may result in a non-discursive political backlash.¹³⁶

How can disadvantaged people bring about the necessary discourse in order to change practical consciousness knowledge? The answer lies in widespread resistance to the established norms. This resistance can take various forms including lobbying and litigation seeking change but also, and more effectively, by organizing social and political resistance.¹³⁷ I have already discussed the idea of social movements and more localized pressure groups as being an important part of social change. But these vehicles for change are complex and require significant resources—people, money, and outside support—in order to have a chance for success. They also require a coherent and coordinated strategy to achieve clearly articulated goals.

Part of that strategy normally includes very public activities and displays that disrupt business as usual. As William H. Simon, channeling Richard Cloward and Frances Fox Piven, has pointed out, one of the important resources possessed by the poor is their ability to disrupt through boycotts, demonstrations, riots, or more conventional action such as strikes or electoral rebellion.¹³⁸ Similarly, Tomiko Brown-Nagin has said that “social movements attain leverage in the political and legal processes by engaging in disruptive protest action taken outside of institutionalized political structures.”¹³⁹ She adds, “Social movement activity is characterized by organization, cohesion, and agenda setting They commonly use direct action, such as demonstrations, marches, or sit-ins; community organizing, which typically includes community education, or ‘consciousness-raising’ sessions; and petitioning and pamphleteering to achieve the movement’s goals.”¹⁴⁰

These disruptive activities would normally be accompanied by media campaigns, activities such as teach-ins, and legal assaults on the status quo. The goal would be to call attention to the plight of the poor and to highlight desired solutions—in other words, to change the nature of the discourse relating to the issues raised. These acts of de-structuration are attempts, once again to use Giddens’s concepts, to convert practical consciousness into discursive

136. Note, for example, the coverage of President Trump’s response to the order by United States District Judge James Robart temporarily restraining the implementation of Trump’s Executive Order imposing a travel ban. Trump said, via Twitter, “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!” Yeganeh Torbati & Steve Holland, *Trump: U.S. Will Win Appeal of Judge’s Travel Ban Order*, REUTERS (Feb. 5, 2017), <http://www.reuters.com/article/us-usa-trump-immigration-idUSKBN1511CM>. This kind of response attempts to negate the discourse that might change societal views and norms.

137. See generally Wexler, *supra* note 8; Michael Diamond, *Law, the Problems of Poverty, and the “Myth of Rights,”* 1980 BYU L. REV. 785 (1980); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

138. William H. Simon, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* 59 (2001). See also Diamond, *Paradox*, *supra* note 11.

139. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1489 (2005).

140. *Id.* at 1504.

consciousness. But given a movement's need for organization and its basic strategy of disruption, how can the law and its practitioners meaningfully and effectively participate? I turn to this question in the next section.

b. Law, Lawyers, and Mobilization

As I mentioned in the previous section, social movements often operate outside of normal legal and political channels.¹⁴¹ They typically involve direct appeals to the public and to various policy makers, often through disruptive, occasionally turbulent activities.¹⁴² If this is an accurate depiction of social movement behavior, it is markedly distinct from the traditional activities of lawyers, who normally follow heavily prescribed procedures within a significantly cabined range of activities. This is particularly true in the highly formalized arenas of courts and litigation where, as Brown-Nagin points out, lawyers must translate the claims of movements into the language of the law.¹⁴³

But even more fundamentally, law is, at its heart, a conservative discipline. It is geared toward preserving the status quo and permitting only slow-moving, evolutionary change. Derrick A. Bell, Jr. has argued that even then, change in the area of civil rights will come only if it is acceptable to the white elites in whose favor the political apparatus operates.¹⁴⁴ A similar theoretical assessment could also be applied to other struggles of disadvantaged groups. Thus, if this analysis is apposite, movements supporting the claims of such groups must make the cost of opposing those claims sufficiently high so that it would be in the interest of an opposing group to accede to the demands of the insurgent group. Law plays a part, but only a small part, in increasing the cost of opposition.¹⁴⁵ Lawyers, however, might have a bigger part to play than the law itself. Even here, however, the role of lawyers is a supporting, not a starring, one.

141. See *supra* notes 123–27 and the accompanying text.

142. For a personal account of the role dissonance of a lawyer representing people within a disruptive movement activity, see Nancy D. Polikoff, *Am I My Client? The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996).

143. See Brown-Nagin, *supra* note 139, at 1509. For further discussions of a lawyer attempting to fit social or political issues into a legal context, see Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

144. See Bell, *supra* note 135, at 523. Note here that Bell is assuming a controlling group, a point that is contested in this essay. Nevertheless, the point is telling in that the group to be disadvantaged by the success of the movement will fight against that success with the resources at its disposal. Among the strategies that Bell identifies is for the elites to concede on points when it is in their interest to do so, including the possibility of concession on minor points to defuse conflict on more major points.

145. Brown-Nagin has criticized scholars of social movements and the law by stating that such “scholars overestimate the positive influence that legal rhetoric and norms have on social movements as they evolve. In the process, legal scholars perpetuate juricentrism and encourage the tendency among lawyers representing social movements to privilege constitutional litigation. But constitutional law has historically been a limited and unreliable agent of distributive justice.” Brown-Nagin, *supra* note 139, at 1489.

If the law is not (and, in my view, it should not be) a primary aspect of social movements, what is the proper role of a lawyer involved with such a movement? Lawyers certainly have skills that are relevant to the needs of social movements. They can do careful and deep analysis; they have familiarity with approaches to decision makers; they certainly can describe the parameters of current law. Some are personally connected to the movements they are attached to as professionals. This may give them added insight and sensitivity to the movement's goals and aspirations.¹⁴⁶ Lawyers, however, are not alone in offering such skills and sensitivities. In fact, the baggage that many lawyers bring with them may push movements in a more legalistic direction than might be optimal.

Nevertheless, much of social movement scholarship, and nearly all of legal scholarship that is concerned with social movements, puts lawyers and, to a great extent, litigation at the forefront of, and indispensable to, such movements. But as Brown-Nagin has said:

In ascribing such vast capacities to lawyers or constitutional text as mobilizing agents, or assigning judges the role of "necessary safety valve" "channeling" movements in "assimilative directions," legal scholarship overlooks the characteristics of social movements that make them unique. These scholars minimize the differences between the form and substance of legal processes and concepts, and the form and purposes of participatory democratic action. In fact, there are profound differences between most forms and tactics of lawyering and social movement activity Ultimately, I posit a normative vision in which social movements preserve their own social and political identities and spaces; movements approach law and lawyers deliberately and strategically, if at all By design and character, I argue, social movements are more likely to achieve their goals when they are free from the constraints imposed by law and lawyers.¹⁴⁷

While I agree with Brown-Nagin's view of law, lawyers, and social movements, I believe that her views are based on an historical view of what lawyers do and how they do it. In that view, lawyers are trained in an adversary process where the adversary is largely known. If my view of power, which is essentially a post-structuralist view, is substantially descriptive of the political and legal landscape, the adversary often will not be known. Moreover, the embedded practical consciousness knowledge of the majority in society will be a looming obstacle to significant social change. Therefore, in order for social movements to succeed, they must convert that knowledge into a discursive

146. *But see* Polikoff, *supra* note 142, for a more nuanced view of such a relationship.

147. Brown-Nagin, *supra* note 139, at 1502.

consciousness, one that requires the majority to critically examine their beliefs and understandings. People must change their views, and this is not, fundamentally, a goal that lawyers are trained to accomplish and is not one that most lawyers are interested in taking on. Again referring to Brown-Nagin,

Generally speaking, lawyers are not well positioned to mobilize communities because of their commitment to legal processes. Consequently, the ability of communities to leverage the law for social change should not be understood as a power resting with attorneys. Lawyers—litigators, in particular—must be willing to cede leadership of movements for change to nonlawyers.¹⁴⁸

The question is whether “ceding” leadership would be sufficient. Lawyers, to be useful to movements, must convert their own practical consciousness into a discursive one. They must consider jettisoning their traditional role and traditional mindset from a formal worldview in which law, with its conservative, evolutionary approach, is paramount to one in which actual change on the ground is the dominant goal. Duncan Kennedy aptly stated the nature of the problem when movement lawyers pursue rights. He said, “The rights were usually defined in terms of equality, but equality in a special sense. They did not involve the demand for equality in the distribution of income or wealth between social classes, regions, or communities, but rather ‘equal protection’ for individual members of previously subordinated social groups.”¹⁴⁹

The changes that are needed are ones that pre-date the law. They involve a reconfiguring of the social compact. This means that lawyers must come to understand how they “might intervene ‘critically’ in the field as a progressive intellectual without being either hemmed in by the limits of the professional vocabulary or consigned to play the role of outsider or gadfly.”¹⁵⁰

So, while killing all the lawyers is not the solution to formalistic, rights-driven social movements, a radical legalectomy might be appropriate.

V. CONCLUSION

Ideas about power have undergone a long, thoughtful, and varied analysis, particularly over the past half-century. Similarly, the role of lawyers, especially lawyers for the oppressed, has gone through a similar analysis. These ideas come together in a discussion of social movements. Today, it is not uncommon to discuss power as an anonymous set of social forces rather than the property of a privileged class (although that form of power is still discussed and is often observable in today’s political culture). Similarly, it is not uncommon for

148. *Id.* at 1521.

149. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 182 (Wendy Brown & Janet Halley eds., 2002).

150. David Kennedy, *When Renewal Repeats: Thinking against the Box*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 149, at 373, 373.

people to think of lawyers engaging in tasks far beyond what was their traditional domain. Today, lawyers engage in community organizing and education, strategic planning with oppressed groups, and overtly political action on behalf of clients. Bringing the changing views of power together with the changing views of the role of lawyers leaves a space for an effective collaboration between those suffering from a power deficit and the lawyers who wish to assist in that effort. It requires lawyers to give up the idea that rights creation is the only, or even the main, way of achieving progress. It also requires movement leaders, and the lawyers who assist them, to do a careful analysis of the nature of the power that is arrayed against them and to develop appropriate strategies to combat that power. Law and lawyers can have a role in this process, but it must be secondary to that of the participants and leaders of the movements themselves. It must also avoid confining the disruptive energy of movements into the cabined and energy-depleting processes of the law.

