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# Context, Continuity, and Difference in Poverty Law Scholarship

Ruth Margaret Buchanan

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# Context, Continuity, and Difference in Poverty Law Scholarship

RUTH MARGARET BUCHANAN\*

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## I. INTRODUCTION

More than three decades ago, the War on Poverty ushered in a wave of thinking and activity about the problem of poverty in America. It gave birth to a new set of institutions and practices, which included a significant number of innovations concerning the provision of legal services to the poor. The government-funded Legal Services Corporation, a nonprofit, public-interest law firm and the practice of "impact" litigation are among the now familiar legacies of this period. It was a time of significant success and even greater optimism concerning the instrumental use of the law to bring about social change on behalf of the poorest segments of American society.

More recently, after a decade in which the gap between rich and poor in America has widened dramatically and practitioners of poverty law have encountered repeated setbacks, one may see in an emerging wave of literature the elements of a nascent rebirth of the practice of law for poor people.<sup>1</sup> Although this emerging literature cannot be described as a movement, there are important elements that are common to the approaches that have been variously described as "critical lawyering,"<sup>2</sup> "rebellious lawyering,"<sup>3</sup> "the theoretics of practice,"<sup>4</sup> and "the new public interest law."<sup>5</sup> In their focus on the practice of lawyering over legal doctrine, their emphasis on narrative over exposition, and their attempts to reinscribe the client as an active participant in lawyer/client decision-making, these new scholars call for a dramatic departure from much of the "traditional" poverty law practice and scholarship.

The subject of this Article is the evolution over the last thirty years of the theories of the practice of poverty law.<sup>6</sup> This Article examines that evolution through the prism of contemporary scholarly debates in which the critiques of the new scholars are pitted against the experience and commitment of the older practitioners.<sup>7</sup> These debates are mislead-

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1. See *infra* notes 2-5.

2. Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991).

3. GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

4. Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

5. Lois H. Johnson, *The New Public Interest Law: From Old Theories to a New Agenda*, 1 B.U. PUB. INT. L.J. 169 (1991).

6. While the title of this article specifically refers to poverty law, it is not meant to exclude other aspects of disempowerment which often affect poor clients, as well as clients who are not poor. Issues of race, gender, sexual orientation, age, and nationality all intersect with, and are an important part, of the practice of lawyering on behalf of disempowered groups. See Trubek, *supra* note 2, at 54.

7. For two reasons, the focus of this article is on scholarship, rather than the practice of lawyering for the disadvantaged. First, discourses about poverty lawyering, both within the

ing for two reasons. First, they are constructed upon an artificial dichotomy between “new” and “old” lawyering approaches, which overlooks or minimizes the ongoing struggles among practitioners and scholars. Second, the process of comparing abstract models of lawyering removes lawyering practices from the socio-historical and discursive contexts that give them their meaning and utility. This Article is an attempt to deepen the scholarly debate over different approaches to poverty lawyering by examining in detail social, historical, and political conditions during the two periods of scholarly proliferation on the subject. This Article also explores constitutive struggles among scholars within each period. In part, this is the continuation of a project that was begun with Louise Trubek in an earlier paper, which will further articulate and contextualize what is called the “critical lawyering” vision.<sup>8</sup> This Article, however, will attempt to take a more objective and nuanced view of both the “old” approaches that are being critiqued and the “new” perspectives that have generated these critiques.

The more “objective” view of this Article does, however, originate from a particular place. I write primarily from the perspective of a scholar, not a practitioner, and of a member of the generation which came of age in the eighties, not the sixties. My view of these debates is necessarily reflected through the prism of these important features of my own historical and disciplinary location.<sup>9</sup> Influenced by a general shift in social theory away from hard and fast distinctions between subjects and objects, structures and agents, theory and practice,<sup>10</sup> I was originally attracted to the new scholarship by its claims to challenge the theory/practice divide in legal scholarship. Reading and reflecting on these texts, I came to the conclusion that both the new and the old approaches to poverty law theory are framed by oppositional ways of thinking about

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lawyering community and in society at large, are a powerful force in shaping how poverty lawyers, policy makers, and poor clients conceive of the possibilities and limitations of this type of lawyering work, and consequently how it is practiced. Second, while there has recently been a proliferation of writing that thoughtfully addresses many of the difficult issues inherent in the practice of poverty law, the relationship between academic work and poverty law practice has remained a largely unexplored and contentious terrain.

8. Ruth M. Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. 687 (1992).

9. Pierre Bourdieu emphasizes the importance of subjecting the position of the observer to the same critical scrutiny as the object of study. He calls this process “reflexivity.” A good discussion of Bourdieu’s notion of “reflexivity” is contained in PIERRE BOURDIEU & LOIC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY, 36-46 (1992).

10. A further elaboration of the theoretical orientation of my approach is found in the Postscript, *infra* part V. On the effects of “harmful antinomies,” see Pierre Bourdieu, *Vive la Crise! For Heterodoxy in Social Science*, 17 THEORY & SOC’Y 773 (1988). On a general epistemic shift, see Sherry B. Ortner, *Theory in Anthropology Since the Sixties*, 26 COMP. STUD. SOC’Y & HIST. 126 (1984).

structures and agents, society and individuals, subjects and objects, theory and practice. While there is important reconstructive potential for poverty law scholarship in mounting a challenge to these old dichotomies, I now recognize that this task is much more complex, and must take into consideration one's place in an evolving tradition of interconnected theories and practices regarding social change through law.

This perspective informs my understanding of what lawyers do as a set of culturally constitutive practices. To say that lawyering is cultural means simply that it is embedded in a panoply of interconnected social and cultural practices. The legal arguments and strategies that are the putative "objects" of the study of poverty lawyering cannot be disembedded from their context in the intentions and self-understandings of the agents who deploy these objects. The legal arguments themselves may bear traces of their use from a particular time and place, as the well worn grooves on an old axe or butter churn reveal their pattern of use in a different era. We must look beyond the tools themselves to their deployment in a broader web of social relations in order to develop a notion of the "practice" of lawyering, chopping wood, or churning butter in a particular era.

I use the notion that law is *constitutive* in a dual sense, to describe both a terrain or site in which social relations are produced and the agent or instrument of that production and reproduction.<sup>11</sup> First, the constitutive concept suggests that legal phenomena prefigure and determine the landscape or terrain on which society effects social change. In this sense, the notion of law as constitutive suggests that "the law is all over."<sup>12</sup> We cannot escape the myriad ways in which legal norms and institutions have figured in our discourse and our practices, even and especially when we are trying to transform that discourse and those practices. The second, related aspect of this idea is that law is a mechanism for the production of social relations. Legal rules do not merely limit the range of available actions, they also are a means for reproducing norms, institutions, and relationships in society. For example, a particular set of legal rules and norms operate together to produce what is commonly described as the "free" market, although the rules themselves function to constrain some types of market activity while enabling others. The practice of law, which largely consists of interpreting and applying legal rules in particular circumstances for the benefit of clients, both reproduces and subtly transforms the larger norms and institutions

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11. See generally ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* (1993).

12. Austin Sarat, ". . . *The Law is All Over*": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 *YALE J.L. & HUMAN.* 343 (1990).

of which those legal rules are a part. In this way, lawyering practices are both a mechanism for the reproduction of social institutions, and a site where they may be transformed.

Finally, the notion of lawyering as practice also conveys an important duality. On one hand, it emphasizes the corporeality of lawyering; lawyering always takes place in a particular location and point in time. It is invariably contextual and specific. The tactics and strategies that might work for one client with a particular legal problem may be very different from those that were successful for a different client the week before. Lawyering as practice also suggests that lawyering involves skills that can be developed through experience. This provides for a degree of deference to those who have accumulated knowledge about poverty law, while at the same time it subverts the idea that there can be one "right" way of lawyering.

This way of thinking about poverty lawyering acknowledges its role as a meaning-making activity. It attempts to reinscribe the meaning of a client's experience of disempowerment upon the structure of acceptable legal arguments and strategies. Because of its experimental and practical qualities, its contextualized and improvisational nature, lawyering is more akin to cooking than to mathematics, more art than science.

This discussion concerning the cultural, constitutive, and meaning-making aspects of lawyering practice provides the basis for this Article's thesis concerning the importance of "context" in debates about the usefulness of law for social transformation. Social change lawyering is not static; it changes over time. Whether certain lawyering practices are enabling or disempowering, or whether they transform or reinforce the status quo, are not questions that can be discussed meaningfully without reference to a complex web of social, political, and cultural norms that situate and give meaning to a set of practices in a particular place and time. Therefore, the study of lawyering practices reveals a site in which the meaning and usefulness of legal strategies is constantly being reproduced and redefined. While closely connected to the numerous debates regarding the connections between legal and social change, ranging along a spectrum that includes the CLS critique of legal ideology,<sup>13</sup> the social science challenge to the utility of litigation strategies as a mechanism for social change,<sup>14</sup> and more radical, postmodern approaches

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13. See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

14. See *infra* note 29.

which reject the transformative potential of legal discourse altogether,<sup>15</sup> the critique of legal practice is a relatively uncharted territory. The discovery and exploration of this realm is both the particular accomplishment and the challenge of poverty law scholarship.<sup>16</sup>

## II. THE OLD AND THE NEW: A DEBATE

This Section addresses a debate within the poverty lawyering community concerning a perceived shift in the nature and emphasis of our scholarship. The debate contrasts new poverty law scholarship with more familiar approaches from an earlier period of poverty advocacy and lawyering. Joel Handler's 1972 Presidential Address to the Law and Society Association<sup>17</sup> is an example of one way that discussions over the use of law for social change have been framed. Handler questions the value of "postmodern" approaches to theorizing for a transformative politics. Although he is imprecise about what he includes under the rubric of "postmodern,"<sup>18</sup> at least some of the new poverty lawyering scholarship clearly falls within the category with which he is concerned.<sup>19</sup>

Handler frames his discussion as a comparison of a number of stories of "protest from below" dating from the 1950s and 1960s with stories from what he calls the "postmodern era." On the basis of this comparison, he criticizes the "postmoderns" for at least three moves that he thinks are inconsistent with the needs and aims of a "progressive

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15. See, e.g., Kristen Bumiller, *Body Images: How Does the Body Matter in the Legal Imagination* (June 1993) (unpublished manuscript on file with author).

16. The study of social practices poses a unique challenge for theory, which has commonly been confined to the analysis of discourse. See MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven F. Rendall trans., 1984).

A particular problem arises when, instead of being a discourse on other discourses, as is usually the case, theory has to advance over an area where there are no longer any discourses. There is a sudden unevenness of terrain: the ground on which verbal language rests begins to fail. The theorizing operation finds itself at the limits of the terrain where it normally functions, like an automobile at the edge of a cliff. Beyond and below lies the ocean.

*Id.* at 61.

17. Joel Handler, *Postmodernism, Protest and the New Social Movements*, 26 *LAW & SOC'Y REV.* 697 (1992). Handler is by no means the worst offender, or the best example of this resistance. These issues have also been debated at the Interuniversity Consortium on Poverty Law. See Gary Blasi, *What's a Theory For? Notes on Reconstructing Poverty Law Scholarship*, 48 *U. MIAMI L. REV.* 1063 (1994); Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 *U. MIAMI L. REV.* 983 (1994).

18. For a serious indictment of this failing, see Steven Winter, *Cursing the Darkness*, 48 *U. MIAMI L. REV.* 1115 (1994).

19. See, e.g., Handler, *supra* note 17, at 712 (discussing Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990)).

politics.” According to Handler, the new theories: 1) celebrate the subversion of dominant discourse and resist the construction of alternative meta-narratives that might animate progressive social action; 2) focus on isolated and individualized stories of resistance rather than collective struggles; and 3) are disabled by pessimism about the possibility for wide-scale social transformation.

Handler contrasts this view of the “new” approach with selected examples from the 1950s and 1960s that focus on collective struggles, and speak optimistically about community building, cooperative networks of resistance and institutional transformation. Handler measures the old approaches against the new approaches on the basis of the scale of their social analysis, their instrumentalism, and the degree of optimism that they inspire. He finds the postmoderns to be lacking on all counts.

Handler’s critique of the new approaches exemplifies a particular type of resistance that is being encountered by the new generation of poverty law scholars as they try to make their work known beyond their immediate colleagues and outside the walls of their law school clinics. This resistance presumes that the new approaches, because they are critical of aspects of traditional poverty lawyering practice, fail to acknowledge the value of what poverty advocates have done for the past thirty years. Rather than confronting the new scholars’ observations about the limitations of traditional advocacy approaches in dealing with contemporary issues, Handler and others have issued a nostalgic call for renewed optimism in instrumental approaches and large-scale social transformation. Rather than acknowledging that the changing social, economic, and intellectual climate demands new responses from poverty lawyers, these scholars want to return poverty lawyering to an idealized model of its 1960s heyday.

On the other hand, proponents of the new approaches have not spent much time acknowledging their debts to the generation of advocates that preceded them. The critiques of traditional poverty lawyering, which began to proliferate in the 1980s, rarely reflexively situated themselves at a particular historical and social juncture. The critics rarely observed that useful and appropriate advocacy approaches will vary with the circumstances, or they failed to apply those observations specifically to the poverty advocacy of the previous generation. A narrow focus on professional norms and legal discourse too easily obscures the influence of the larger social context in which they are embedded. In this way, the criticisms of Handler and others that new poverty advocates have lost sight of the forest for the trees appear to have some degree of truth. Articles that focus on the dismantling of lawyer/client hierarchies rarely



discuss larger-scale strategies for social transformation;<sup>20</sup> those that discuss “interpretive violence” obscure the severity and commonality of real violence in poor peoples’ lives;<sup>21</sup> and those that examine poor people’s consciousness of the law as a mechanism of their disempowerment are unlikely to provide suggestions about the use of law as a tool for social change.<sup>22</sup>

As I suggested in my introduction, I think that the new versus old debate, exemplified by Handler, is misleading in the way that it frames the difficult issues faced by poverty law scholars. That debate leads advocates of both the old and new approaches to speak about lawyering practices as if they were severable from the social, political and institutional discourses and practices within which they are embedded. This acontextual and ahistorical approach has led to an impoverished view of theory on both sides. The limitations and discontinuities between the new and old approaches have been overemphasized, while many significant matters of congruence and continuity have been obscured.

There are three challenges presently facing poverty law scholarship: to study and understand the tradition of theory and practice concerning lawyering for the poor in all of its complex and sometimes contradictory aspects; to identify the new challenges for poverty law practitioners and scholars that arise out of the significant social and cultural transformations that have occurred in the past three decades; and to provide creative suggestions for addressing specific problems and issues in the future, drawing on a reconstructed understanding of the tools at hand.

This Article addresses the first two of those aims. It explores important elements of both continuity and difference in poverty law scholarship by reconnecting theories about poverty law to the contexts in which they were developed.<sup>23</sup> While I see this Article as engaging in a process of “excavation” by unearthing suppressed perspectives and overlooked similarities among two generations of poverty law scholars, I also hope that it will provide the basis for reconstruction, by providing a broader historical and theoretical foundation upon which to build future approaches to thinking and writing about poverty lawyering and practice.

A number of enduring themes can be identified in poverty lawyering scholarship since the early sixties. They are the issues and dilemmas

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20. See Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); White, *supra* note 19.

21. Lucie E. White, *Paradox, Piecework and Patience*, 43 HASTINGS L.J. 853 (1992).

22. See, e.g., Sarat, *supra* note 12, at 343.

23. For a discussion that expands on the theoretical significance of “context,” see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

over which the constitutive struggles of this field of scholarship have been fought. Those themes concern the need to confront disempowerment both at the level of institutions and individuals, the need to appreciate the law's double role as a tool for social change as well as for the reproduction of hierarchies, and the need for belief in the possibility of change through law as well as an understanding of its serious limitations. I have framed these issues in terms of three constitutive tensions: in analysis, between scope and specificity; in strategy, between the identification of law as tool or terrain; and in outlook, between the need for hope and humility.

### A. *Scope/Specificity*

Scope, as used in this Article, refers to approaches and methods of analysis that help us to "get at" institutionalized regimes of power, for example large scale social subordination like racism, sexism, and bureaucratic disenfranchisement. Scope refers to collective experiences of disempowerment and collective struggles. Specificity refers to individual moments of resistance. It emphasizes the need to be attentive to particular instances of disempowerment, which may too easily be erased by or subsumed into the larger stories of oppression. Specificity is the counterweight to the simplifying and reductive tendencies of macro-level theories of social transformation; it is the countervailing tendency to scope.

While they produce very different outlooks, it is also important to recognize the extent to which scope and specificity are interrelated. Broad-based mechanisms of power are composed of many particularized instances of oppression; conversely, these larger forces are also inherent in any particular instance of social subordination.

The scope/specificity theme reveals one of the enduring dilemmas of poverty lawyering: how to design one's advocacy to bring about social change that is both meaningful, in the sense that it may change the lives of some poor people, and significant, in that it may also bring about changes in the social institutions that create and reproduce poverty.

The scope/specificity dilemma is also at the heart of a central debate in public policy toward the poor. The issue of where to attribute blame for the misfortune of poor people, whether on themselves or on society as a whole, has long been an obsession of social policy and a battleground for debates over the "deservingness" of the poor to the benefits, including legal services, to which they are entitled in the welfare

state.<sup>24</sup> This debate over whether poor people are lazy and immoral or merely lack social opportunities is an example of how complex social dilemmas are misleadingly reduced to a simple question of structural versus individual responsibility. This type of simplistic dichotomizing makes for unproductive, and sometimes harmful, discourse.<sup>25</sup> Acknowledging that both specific and large-scale forms of disempowerment need to be understood at the same time, and as part of the same social phenomenon, ends the argument over blame while giving rise to a new, multi-dimensional way of looking at these problems.

### B. *Tools/Terrain*

The question of whether the law is a tool of social change or a terrain of struggle occurs primarily in the realm of strategies and tactics to be deployed by poverty lawyers. On one hand, it is possible to view the law as a tool—a weapon—something that can be wielded on behalf of the poor as well as the powerful. This metaphor spawned many famous legal campaigns for social change,<sup>26</sup> including the civil rights struggle which resulted in *Brown v. Board of Education*<sup>27</sup> and the abortion rights campaign which led to *Roe v. Wade*.<sup>28</sup> This metaphor also has given rise to an entire body of literature devoted to assessing, measuring, and debating the usefulness of law as an instrument of social transformation.<sup>29</sup>

Despite the obvious power of the idea of the law as a weapon in the fight for social change, this idea has also been the subject of much criticism. Many have pointed out the tendency of the legal weapon to backfire, leading to co-optation, stasis, and even a greater reinforcement of social inequities. Instead, these critics tend to emphasize the nature of law as a preexisting aspect of all social relations, a fundamentally skewed playing field or terrain of struggle. They see social relations and social subjects as constructs of pre-given social contexts. Legal ideas and legal categories are a fundamental part of this ongoing process of social

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24. See generally MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

25. For an expanded discussion of how these ways of thinking about poverty have informed our social and legal rhetoric, see Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

26. These two examples are discussed at length in GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

27. 347 U.S. 483 (1954).

28. 410 U.S. 113 (1973).

29. See, e.g., JEROLD S. AUERBACH, *LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (NEW YORK 1976); MICHAEL W. McCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* (1986); ROSENBERG, *supra* note 26; STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

construction. Of course, the problem with the "social constructivist" view is that it does not provide a way of thinking about how things might change, or how agents might act to change them, outside of their socially constructed natures.

### C. *Hope/Humility*

The attitude with which advocates approach their work is represented by the final category, hope/humility. Hope is simply one's belief in the efficacy of social change through law. Without hope, it is difficult to imagine any poverty lawyering at all. It seems necessary for advocates to maintain their faith in the usefulness of their work, to connect their everyday experiences with some vision of a better world, in order to maintain energy and commitment. When advocates lose faith in the possibility of change, we describe it as "burn-out."<sup>30</sup> The 1980s was a period of high burn-out, and correspondingly low faith in the possibility of change through law. On the other hand, too much hope on the part of public interest lawyers can lead to lawyer-driven decisions made by advocates unable or unwilling to learn from their clients or other advocates.

Humility is a necessary counterweight to the hubris to which enthusiastic "social engineers" can too easily fall prey.<sup>31</sup> The quality of humility allows an appreciation for the limitations of one's own perspectives, efforts, and ability to accomplish the changes sought. It encourages practitioners to collaborate with others, to listen, and to learn as they go along. It allows advocates to be encouraged by, and to build on, incremental changes and isolated moments of resistance. Humility allows more space for the empowerment of clients within the advocacy process, even as it limits expectations about outcome.<sup>32</sup>

As Patricia Williams reminds us, "[t]hat life is complicated is a fact of great analytic importance."<sup>33</sup> Poverty lawyering scholarship needs

30. For a phenomenological account of "burn-out" among public interest lawyers of the 1980s, see Peter Gabel, *Dukakis's Defeat and the Transformative Possibilities of Legal Culture*, 4 *TIKKUN* 13 (1989).

31. Anthony Cook invokes the notion of humility in a parallel effort at reconstructive theory which seeks to build upon the work of Dr. Martin Luther King, Jr. See Anthony E. Cook, *Reflections on Postmodernism*, 26 *NEW ENG. L. REV.* 751, 771 (1992) ("We are in need of the humility that tempers our encounter with others even as it inspires our vision for all.").

32. Cornel West described a similar tension when he spoke of the need to "carve out a democratic left in the space between the Scylla of upbeat liberalism that harbors excessive hopes for the law and the Charybdis of downbeat leftism that promotes exorbitant doubts about the law." Cornel West, *The Role of Law in Progressive Politics*, in *THE POLITICS OF LAW* 468, 468 (David Kairys ed. 1991).

33. PATRICIA WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* 10 (1991). The remainder of the paragraph eloquently completes the insight:

Law too often seeks to avoid this truth by making up its own breed of narrower,

stories that account for the richness and multiplicity of poor people's experiences as well as broad-ranging narratives of social power and transformation. We need to think strategically about how the law can be used as a tool for social change while recognizing its role in the marginalization and disempowerment of certain groups of people. We also need to think about how to approach the tasks of social transformation with both hope and humility. These dilemmas illuminate the enormous difficulties at the center of poverty lawyering in any era, and should complicate the following discussion of the two generations of poverty law scholarship.

### III. POVERTY LAW IN THE SIXTIES REVISITED

While the notion of legal aid for the poor has been around almost as long as the legal profession, the decade of the 1960s marked a period of substantial invigoration and of the flourishing of efforts to use law to transform society on behalf of the disadvantaged. While some of the innovations of the period, like the law communes, have failed to survive, many of the ideas and institutions that now form the basis for the provision of legal services to the poor and for the use of law to address social inequities originated during the 1960s.<sup>34</sup> The story of the development of ideas about law and social change, from the early work of the National Association For the Advancement of Colored People (NAACP) and the Legal Defense Fund (LDF) to the establishment of the Office of Economic Opportunity (OEO) Legal Services program and the innovation and spread of the free-standing public interest law firm, is beyond the scope of this Article. In my review of this decade's poverty law scholarship, I am mostly interested in elements from poverty law's past which continue to shape the thinking and writing about the practice of poverty lawyering today, as well as those perspectives that seem to have been lost or submerged in the intervening decades.<sup>35</sup> My analysis is

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simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these as rhetorical gestures is, it seems to me, necessary for any conception of justice. Such acknowledgement complicates the supposed purity of gender, race, voice, boundary; it allows us to acknowledge the utility of such categorizations for certain purposes and the necessity of their breakdown on other occasions. It complicates definitions in its shift, in its expansion and contraction according to circumstance, in its room for the possibility of creatively mated taxonomies and their wildly unpredictable offspring.

*Id.*

34. A description of some of the law communes, as well as a number of popular and lesser known radical lawyers, is found in MARLISE JAMES, *THE PEOPLE'S LAWYERS* (1973).

35. I make no attempt to provide an institutional history of poverty lawyering, although such a history needs to be written. Rather, this article is a conceptual "history of the present" in poverty lawyering scholarship. See MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, in

based on a small but representative sample of frequently cited scholarship by and about poverty law advocates published during that time.<sup>36</sup>

### A. Social Context

My review of the scholarship has led me to two distinct "stories" that seemed greatly significant both in the 1960s, when new ideas and practices were created for using the law to benefit the economically disadvantaged, and in contemporary thought and practice in the field. The events focused on here are the creation of the Legal Services Corporation in the first part of the 1960s as a part of the War on Poverty, and the Welfare Rights Movement, which began in the second half of the decade and continued into the 1970s.

#### 1. THE WAR ON POVERTY

Commentators have observed that social attention to questions of equity and the problems of the poor in this country has been cyclical. The War on Poverty marks one point at which poverty was rediscovered as a social problem, an "episode in the recurring dialectic of reform and reaction that punctuates American history."<sup>37</sup> In 1964, Congress passed the Economic Opportunity Act, which was the cornerstone of this multifaceted governmental attack on the economic disenfranchisement of a

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LANGUAGE, COUNTERMEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS (Donald Bouchard ed. 1977).

36. My sources are drawn from among the numerous articles on poverty lawyering published in the 1960s and 1970s. I have endeavored to select authors and pieces that were instrumental in shaping the perspectives and attitudes toward poverty lawyering at the time. I realize, however, that my assessment of this may differ from others'. The articles on which I have relied in piecing together this brief genealogy are: Edgar S. Cahn & Jean C. Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965); Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles A. Reich, *The New Property*, 73 YALE L.J. 771 (1964); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A. L. REV. 361 (1965); Harry P. Stumpf, *Law and Poverty: A Political Perspective*, WIS. L. REV. 694 (1968); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970). Several books were also of assistance: JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); JAMES, *supra* note 34; FRANCES F. PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* (1977); RADICAL LAWYERS (J. Black ed. 1971). I have drawn upon recent sources including Rand Rosenblatt, *Legal Entitlement and Welfare Benefits*, in *THE POLITICS OF LAW 202* (David Kairys ed. 1982), and the articles in Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOK. L. REV. 729 (1990).

37. KATZ, *supra* note 24, at 4; see also JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

significant segment of the American population. The Act's introduction states:

The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. It is, therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity . . . to live in decency and dignity.<sup>38</sup>

The Act created federally-funded antipoverty programs, such as Head Start, the Job Corps, and Community Action Programs. In addition, preexisting, redistributive social programs such as Social Security, Medicaid and Medicare, Aid for Families with Dependant Children (AFDC), and food stamps (which are not covered by the OEO) were expanded dramatically. Their limitations notwithstanding, those programs initiated by the War on Poverty went a long way toward alleviating the suffering of the least fortunate in the United States.

Despite these significant achievements,<sup>39</sup> the War on Poverty ended in conflict and disappointment. In a sense, the efforts of the Johnson administration did not so much fail, as collapse under the weight of their own rhetoric.<sup>40</sup> Declaring "unconditional war" on poverty may have been an effective public rallying cry at the program's outset by responding to the needs of a country still reeling from the assassination of President Kennedy. Nonetheless, it led to trumped-up expectations of a program that never was intended to receive the large infusions of government money necessary to accomplish the goals that had been set for it.<sup>41</sup>

One could argue that defeat was inevitable, due to the administration's embrace of internally contradictory rhetoric.<sup>42</sup> On one level, the

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38. Economic Opportunity Act of 1964, 42 U.S.C. § 2701 (1964 & Supp. II 1965-66).

39. For example, Chafe reports that the number of families living in poverty went from 40 million in 1959 to 25 million in 1968. WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* 242 (1986).

40. Chafe observed that "[i]n the end, instead of being 'an unconditional war,' the antipoverty effort was more like a *sitzkrieg* or 'phony' war." *Id.* at 243.

41. The Vietnam War may have been one major cause of the "failure" of the Great Society programs by massively diverting funds away from the programs after the first several years. *See, e.g.*, MICHAEL HARRINGTON, *THE NEW AMERICAN POVERTY* 21-22 (1984).

42. CHAFE, *supra* note 39, at 242.

[T]he conflicts that overtook the poverty program reflected the confusion and contradictions inherent in the assumptions of those who initiated it. Failing to address the problem of maldistribution of income, and emphasizing individual opportunity instead of a massive program of employment, the Johnson administration, almost by definition, eliminated the possibility of achieving the goals it had announced.

Johnson administration attributed the problems of America's poor to large-scale "structural" matters such as income distribution and employment patterns, while at the same time, the Equal Opportunity Act spoke in the language of individual opportunity and self-improvement, and focused on programs in education and job training.<sup>43</sup> The "equal opportunity" focus folded nicely into the American liberalism of the time, which rested on an image of the self-reliant individual, a tendency to attribute poverty to individual laziness, and a faith in the skill of government experts as social engineers.<sup>44</sup>

Although the "equal opportunity" strand eventually dominated, the War on Poverty also contained a more controversial component, in Title II of the Act, which provided federal funds for community action programs (CAP) in local communities.<sup>45</sup> The community action section incorporated a requirement of "maximum feasible participation" from the poor themselves in designing and administering the local programs.<sup>46</sup> The idea that the poor could be empowered by giving them a central role in community-based programs intended to address their problems was an important component of the initial years of the War on Poverty, and had some adherents among legal activists at the time as well.<sup>47</sup> The community action programs did become the sites for much effective organizing and much activist work in the turbulent years that followed the passage of the Act. They made organizers, poverty workers, and even lawyers available as resources for the various social movements of the time, including the welfare rights movement, which is discussed in more detail below.<sup>48</sup>

Ultimately, the CAPs sparked conflicts that broke apart the political

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*Id.*

43. Thomas Ross expands on the contradictory rhetoric of poverty, which deploys both the notion that the poor are somehow responsible for their own situation (immorality), and that the problems of the poor are "structural" and beyond the reach of legislators or judges (helplessness). *See generally* Ross, *supra* note 25.

44. KATZ, *supra* note 24, at 92.

The CEA [Council of Economic Advisors] report revealed the hallmarks of American liberalism in the early 1960s: an uneasy mix of environmental and cultural explanations of poverty; a continuation of the historic American reliance on education as a solution for social problems; trust in the capacity of government; and faith in the power of experts to design effective public policies.

*Id.*

45. Economic Opportunity Act of 1964, Pub. L. No. 88-452 § 202(a)(3), 78 Stat. 508 (1964).

46. *Id.*

47. The Cahns were clearly advocates of a community-oriented approach. *See* Cahn & Cahn, *supra* note 36.

48. At least some VISTA workers, who were affiliated with the community action offices, were lawyers. Because they were not part of legal services, they had less restrictions on the kind of work that they were able to do. Personal communication from John Sayer, former VISTA lawyer.



consensus that President Johnson had crafted in support of his anti-poverty efforts.<sup>49</sup> In 1967, as a result of their direct and confrontational actions on behalf of poor people against many branches and levels of governmental authority, control of these organizations was given to municipal and local authorities, and much of their political edge was lost.<sup>50</sup> When the two rhetorical strands of the War on Poverty, equal opportunity and community action, collided with one another, rhetoric had to give way to political expediency. The community action programs, despite their relatively brief success, have continued to provide an important model for poverty advocates.

## 2. THE BIRTH OF THE OEO LEGAL SERVICES PROGRAM

The incorporation of a legal services component into the Johnson administration's attack on poverty came somewhat as an afterthought, prodded by Edgar and Jean Cahn's 1964 article, *The War on Poverty: A Civilian Perspective*.<sup>51</sup> The article proposed a "university affiliated, neighborhood law firm" which could "plac[e] at the disposal of a community the services of professional advocates and by providing the opportunity, the orientation, and the training experience to stimulate leadership amongst the community's present inhabitants."<sup>52</sup> Cahn and Cahn's proposal was not without precedent. As Auerbach observed, "suggestions for federally subsidized legal services and neighborhood law offices were at least 25 years old; its novelty lay in their fusion at a propitious moment."<sup>53</sup> The moment was ripe to create a federally funded legal services program. In May, 1964, Attorney General Robert Kennedy gave a speech which acknowledged lawyer complicity in the development of "two systems of law—one for the rich, one for the poor" and called on the profession to address that problem:

In the final analysis, poverty is a condition of helplessness—of inability to cope with the conditions of existence in our complex soci-

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Some deference to "citizen participation" has always been important in legitimizing governmental action in America. But the Great Society programs went beyond token representation. They gave money to ghetto organizations that then used the money to harass city agencies. Community workers were hired to badger housing inspectors and to pry loose federal welfare payments. Later the new community agencies began to organize the poor to picket the welfare department or to boycott the school system. Local officials were flabbergasted; one level of government and party was financing the harassment of another level of government and party!

Francis F. Piven, *quoted in* KATZ, *supra* note 24, at 98.

50. Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1714 (1993).

51. *Supra* note 36.

52. Cahn & Cahn, *supra* note 36, at 1334.

53. AUERBACH, *supra* note 37, at 270.

ety. . . . The inability of a poor and uneducated person to defend himself unaided by counsel in a court of criminal justice is both symbolic and symptomatic of his larger helplessness.

But we, as a profession, have backed away from dealing with that larger helplessness. We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits.

To the poor man, “legal” has become a synonym simply for technicalities and obstruction, not for that which is to be respected.

The poor man looks on the law as an enemy, not as a friend. For him the law is always taking something away.

It is time to recognize that lawyers have a very special role to play in dealing with this helplessness. And it is time we filled it.<sup>54</sup>

Kennedy’s account of the importance of providing access to legal services fits in perfectly with the “equal opportunity” branch of the War on Poverty rhetoric. Other poverty advocates, however, had not forgotten the lesson that law reform is useful as a mechanism for bringing about wide scale social change, which had been demonstrated by the great success of the NAACP’s legal strategy culminating in the decision of *Brown v. Board of Education* a decade before. The rhetoric of the plan that that administration ultimately adopted incorporated both of those influences.<sup>55</sup>

The Cahns’ proposal, which influenced the formulation of the plan, described the “civilian” perspective as one which would include opportunities for dissent and criticism from poor people and their allies.<sup>56</sup> According to the Cahns, “[a] lawyer need not be apologetic for being

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54. Attorney General Robert F. Kennedy, Address at the University of Chicago Law School’s Law Day (May 1, 1964), *quoted in* Cahn & Cahn, *supra* note 36, at 1336 n.27.

55. According to Harry Stumpf, the Department of Health, Education and Welfare, the Department of Justice, and the Office of Economic Opportunity sponsored two three-day conferences in 1964-65 on topics relevant to a federally funded legal aid program. By the fall of 1965, “the Legal Services Program had been formally established as a semiautonomous unit within the Community Action Program.” Stumpf, *supra* note 36, at 696. For a more extensive history of the formation of the legal services program, see EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974).

56.

The civilian perspective requires that the promotion of neighborhood dissent and criticism be an avowed goal of the War on Poverty, that its organizational structure make provision for the establishment of groups and institutions with the independence, power, and express purpose of articulating grievances, that the natural incentives to absorb, stifle or undermine dissenters be countered with the creation of incentives to nurture, promote, and heed criticism, and that the elimination of poverty be understood as comprehending spiritual values as well as physical subsistence and as involving the assurance of civic as well as economic self-sufficiency.

Cahn & Cahn, *supra* note 36, at 1331.

partisan, for identifying. That is his function."<sup>57</sup> Ed Sparer, another influential individual during the formative period, also argued that welfare clients required not merely legal advice but militant advocacy.<sup>58</sup> Some hoped that the use of the OEO legal services plan would extend to the "use of legal means to reallocate political and economic power."<sup>59</sup> Unfortunately, neither the Legal Service Program nor the Legal Services Corporation achieved the radical aspirations of these early legal activists.

Just as the community action programs eventually met with resistance from the bureaucratic structures that they were set up to challenge, this reformist edge among those influential in the development of the legal services program encountered resistance both from within the legal profession and outside of it.<sup>60</sup> Expanding access to legal services for the disadvantaged was a much less controversial goal than broad-scale political and social transformation. Expanding services also fit more closely into the dominant "opportunity" strand of the War on Poverty, as well as the traditional conceptions of the lawyer's role as politically and morally autonomous from their clients and narrowly confined to advising the client on formal, "legal" issues. A narrower conception of the lawyer's role may have proved attractive to overburdened legal services attorneys, who from the start were wrestling with the difficult issue of meeting a demand for legal service that greatly exceeded the supply.<sup>61</sup> These norms of autonomy and moral independence have only recently been subjected to a sustained critique.<sup>62</sup> Legal services became an important site for the struggle over the nature of the lawyer's role and the transformative potential of legal representation of the disadvantaged.

### 3. THE WELFARE RIGHTS MOVEMENT

The rise of a broad-based movement for the expansion and extension of welfare benefits in the mid-1960s is an important corollary to the

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57. *Id.* at 1335.

58. Sparer, *supra* note 36.

59. AUERBACH, *supra* note 37, at 271.

60. The Legal Services Corporation, the successor to the OEO Legal Services Program, encountered significant hostility and diminished levels of funding from the Nixon, Reagan, and Bush administrations. Regarding the Nixon administration, see AUERBACH, *supra* note 37. Regarding spending cuts under Reagan and Bush, see Rebecca Arbogast et al., *Revitalizing Public Interest Lawyering in the 1990's: The Story of One Effort to Address the Problem of Homelessness*, 34 *How. L.J.* 91, 93-94 (1991).

61. Carol R. Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 *J. URB. L.* 217 (1969).

62. Much recent scholarship has emerged that examines these assumptions. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed. 1983); William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083 (1988).

story of the early years of the OEO legal services program, in part because many of the important victories of legal services in those years related to welfare entitlements, culminating in the Supreme Court's 1970 decision of *Goldberg v. Kelly*.<sup>63</sup> The legal assault on a host of widespread illegal welfare bureaucracy practices (including midnight raids, unannounced terminations, and unexplained and improper denials of benefits) and the growing movement of individuals who were asserting their entitlement to public support, complimented and reinforced each other. Even so, the welfare rights movement was relatively short-lived as a national phenomenon, beginning in the second half of the 1960s and ending in the early 1970s. The circumstances of its inception, its brief flourishing, and its precipitous decline were necessarily closely bound to the fate of poverty lawyers, both at that time and subsequently.<sup>64</sup>

Beginning in the first part of the decade, public attention began to turn to the industrial cities of the North, where growing civil unrest and riots announced the growing problems of poverty among African-Americans who had moved from the South but had been unable to find well-paying jobs. The increased awareness of economic issues and the increased programs offered through the OEO encouraged growing numbers of these impoverished families to apply for and receive some type of governmental support. Organizers and activists turned their attention from issues of racial equality to those of economic security, encouraging greater and greater numbers of eligible families to apply for aid. The community action programs facilitated this process by providing a large supply of antipoverty workers, to educate and encourage people to obtain assistance, and legal services attorneys to challenge adverse eligibility decisions and restrictive regulations in court.

The rapid expansion of the welfare rolls in the mid-1960s also has been attributed to a significantly liberalized administration of the welfare programs themselves. Fewer families who applied were turned away and fewer "audits" of recipients were done, resulting in very few terminations or reductions of benefits. Part of this can be attributed to a simple overtaxing of the system, and part to the atmosphere of civil unrest that reigned at the time. Welfare officials were hesitant to institute policies that might aggravate the already tense situation in many Northern cities.

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63. 397 U.S. 234 (1970).

64. In outlining the history of the welfare rights movement itself, I have relied heavily on the account provided by Piven & Cloward in *POOR PEOPLE'S MOVEMENTS*, *supra* note 36. Piven and Cloward, however, make almost no references to the legal strategies and developments of the time. *Goldberg v. Kelly* is not even mentioned in their index. A recent book that explores the legal strategies of the welfare rights movement, is MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993).

In 1966, Frances Piven and Richard Cloward published an article entitled *A Strategy to End Poverty* in *The Nation*, which provided data supporting the assertion that for every family that was then receiving welfare, another eligible family was not. Along with George Wiley, who had formerly been the associate director of CORE (Congress of Racial Equality), they were instrumental in forming the National Welfare Rights Organization (NWRO), which officially began at a convention in August of 1967. From the outset, opinions differed regarding the nature of and strategies which should be adopted by the organization. While Piven and Cloward supported a "crisis strategy" designed to mobilize as many poor people as possible to apply for welfare, Wiley and others favored a membership-based approach which would link membership in the organization to assistance with the resolution of welfare grievances. NWRO quickly became a national organization with a great deal of visibility and perceived legitimacy. It was credited with the massive expansion of people on welfare in the latter half of the 1960s, and the resulting crises in parts of the country, particularly New York and California.

According to Charles Reich, author of *The New Property*,<sup>65</sup> this expansion of the numbers of people receiving welfare benefits was accompanied by an increasing acknowledgement of the idea that people might have a right to welfare. Reich argued for a new conception of property rights that incorporated interests in such non-traditional "property" as government benefits.<sup>66</sup>

Reich's article laid the groundwork for a new way of thinking about welfare, not as a privilege, but as an entitlement, which individuals could not be deprived of without procedural fairness. The Supreme Court explicitly adopted this way of thinking six years later in the decision of *Goldberg v. Kelly*,<sup>67</sup> which held that an AFDC recipient was entitled to a fair hearing before benefits were terminated. Reich and

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65. Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 735 (1990).

66. *Id.*

I argued that the function of property was to confer power on the individual—power to control one's own life and to provide for one's own survival. . . . But I also pointed out that traditional property was no longer serving its function. It was being replaced by non-traditional interests, such as government benefits, which represent the individual's share in a society where value derives from relationships with organizations more than it derives from separate ownership of land and other assets. Accordingly, these non-traditional, relational interests should be treated as "new property."

*Id.* Reich's original article, *The New Property*, *supra* note 36, was the most cited article ever published in the Yale Law Journal. Fred Shapiro, *The Most Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1462 (1990-91).

67. 397 U.S. 254 (1970).

other commentators at the time, however, had hoped that the Court would establish a much more substantial right to welfare benefits than it did in *Goldberg v. Kelly*. Reich argued that the poor ought to “own” their entitlements to welfare. For him, the rights to life, liberty, and property protection which are protected by the Due Process clause must imply the right to personal survival.

Frank Michelman argued something quite similar with respect to the Equal Protection clause; he suggested that the “judicial equality explosion . . . has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value or claim which might better be called ‘minimum welfare.’”<sup>68</sup> Joel Handler observed that at that time “[t]here was heady talk among the poverty law community of a constitutional ‘right to life’ that would finally move America toward the fulfillment of the social rights of citizenship.”<sup>69</sup> Welfare rights became a new idea in American social policy through the joint efforts of legal philosophers, poverty lawyers, welfare rights activists, and hundreds of thousands of poor people who had mobilized to demand their entitlements.<sup>70</sup>

While the theoretical and grassroots aspects of the welfare rights movement came together perfectly in the *Goldberg v. Kelly* decision, it marked a climax from which there would be a relatively quick decline. By the early 1970s, the movement’s leaders seemed to have lost their connection to the grassroots, as evidenced by the diminishing membership of their organization. Of course, the political climate was changing and, as one commentator observed, by 1969, “[t]he American public was sated beyond endurance with protest, no matter how legitimate the grievances that inspired it, or how violent the resistance applied to repress it.”<sup>71</sup> What had been an active and militant national organization of and for welfare recipients turned into just another Washington lobby group. A few years later, crippled by internal disagreements, the national organization went bankrupt and the office was closed.<sup>72</sup>

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68. Michelman, *supra* note 36, at 9.

69. Joel Handler, “Constructing the Political Spectacle”: *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 *BROOK. L. REV.* 899, 900 (1990).

70. The idea of a property entitlement to welfare is controversial even among scholars on the left. See William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *YALE L.J.* 1198 (1983); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 *MD. L. REV.* 1 (1985). This debate is taken up in some detail in Handler’s *Social Welfare History*, *supra* note 69.

71. AUERBACH, *supra* note 37, at 288.

72. Although the national organization went bankrupt in 1974, welfare activism at state and local levels in other parts of the country survived. In Houston, for example, the welfare rights movement did not start until around 1970, and was active until around 1977. Personal communication with John Sayer, former VISTA and Legal Service lawyer, in Houston, Texas.

By the early 1970s, a popular movement outside of the courtroom no longer existed to lend legitimacy and a sense of social relevance and urgency to the poverty lawyers' arguments inside the courtroom. This was also a period of substantial retrenchment in the Supreme Court's welfare rights decisions.<sup>73</sup> As Charles Reich observed, "the road opened by *Goldberg v. Kelly* has not been taken. Instead there has been retreat."<sup>74</sup> After a certain point in the 1970s, it no longer seemed possible to argue a right to welfare. As a result of this shift, which was itself intertwined with the decline of the grassroots welfare rights movement, the practice of lawyering for the poor was dramatically altered.<sup>75</sup>

### B. *Theories of Lawyering Practice*

The discussions of both the War on Poverty and the welfare rights movement begin to reveal the extent to which the social and legal fields have permeated the public discourse of poverty.<sup>76</sup> This Section, expands upon that argument by examining several ideologies underlying much of the poverty lawyering practice of the period. To this end, I have identified three distinct lawyering approaches: liberal legalist, radical, and critical. These categories are intended as ideal types, rather than depictions of the actual practices of particular lawyers.

#### 1. LIBERAL LEGALISM

If one considers the law as a tool of social change, one could

73. The Supreme Court limited the principle enunciated in *Goldberg v. Kelly* to AFDC recipients in the subsequent case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), by holding that an evidentiary hearing was not required prior to the termination of disability benefits. Other cases that reflected a more general post-1970 welfare backlash are *Dandridge v. Williams*, 397 U.S. 471 (1970) (refusing to force states to match grants to living needs); *Wyman v. James*, 400 U.S. 309 (1971) (allowing states to require home visits by case workers as a condition of welfare); *Jefferson v. Hackney*, 407 U.S. 535 (1972) (permitting states to reduce AFDC benefits more than assistance programs despite disparate racial impact). For a full and careful discussion of the Court's post-*Goldberg v. Kelly* retreat, see DAVIS, *supra* note 64, chs. 9-10.

74. Reich, *supra* note 65, at 731.

75. By the mid-1970s, according to Alan Houseman:

No longer could poverty law advocacy successfully create new rights or remedies or rely primarily on federal courts. The work evolved into a much more complex framework involving regulatory and legislative bodies and greater use of state courts. Instead of creating new rights, Legal Services became the chief law enforcer of existing rights of the poor.

Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 837 (1990).

76. For a discussion of the concept of the "legal field," see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814 (1987). For a recent development of Bourdieu's conception, see David Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 49 CASE W. RES. L. REV. 407 (1994).

describe liberal legalism as the default setting. Building upon a democratic, pluralist model of social organization, liberal legalists sought incremental and procedural changes through the administrative system and the courts.<sup>77</sup> The liberal legalists believed that procedural changes allowing underrepresented groups access to bureaucratic decision-making processes would result in substantive changes in the content of those decisions.<sup>78</sup> Ultimately, they thought that changes in representation and substantive decisions would eventually redistribute power and create a more just and democratic society.<sup>79</sup>

While liberal legalists recognized the existence of substantive inequities in society, they envisioned law reform as an incremental adjustment to an otherwise just system. As Justice Thurgood Marshall put it, "public interest law seeks to fill some of the gaps in our legal system" by "broadening the flow of information" to decisionmakers.<sup>80</sup> In this way, liberal legalism merged the ideal of "equal opportunity" with the notion that law reformers could effectively "tinker with" the legal system to more closely align it with the ideal of a just and democratic society.

It should be clear that liberal legalism envisions a social and legal system that is coherent, identifiable, and predictable. The adjustments that liberal legalists envisioned were large in scope yet procedural in nature; substantive redistribution of social benefits would not be required in a society with a properly functioning legal system. Liberal legalists were also quite hopeful about their ability to change society through law. For them, the law was a relatively precise and accurate "tool" for the type of social engineering they considered possible.

Law reform eventually emerged as the predominant technique of the liberal legalist model. Through "impact" or "test case" litigation, law reformers sought changes to laws or policies that they saw as adversely affecting the low income public. Law reform activity soon gained greater prestige and legitimacy than it could through the "mere" provision of legal services to the poor. Reformers received more funding, more attention, and greater status, and attracted the interest and services of better educated lawyers.

When the War on Poverty's legal services program (the OEO) was

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77. See generally JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

78. See Lois H. Johnson, *The New Public Interest Law: From Old Theories to a New Agenda*, 1 B.U. PUB. INT. L.J. 169, 175 (1991); also Louise G. Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* (M. Cappelletti ed. 1981).

79. HANDLER, *supra* note 77, at 222.

80. Ford Foundation and ABA Special Comm. on Public Interest Practice, *Forward to Public Interest Law: Five Years Later* (1976).



started, its law reform aspects were modeled on the successful litigation tactics of the LDF and the NAACP.<sup>81</sup> Later, when numerous public interest law firms emerged in the 1970s, many also assumed a law reform focus. Impact litigation has become a widely understood formula for accomplishing particular kinds of social changes. The typical strategy involves identifying a policy issue or government practice that exhibits some degree of injustice, finding an individual or group of individuals who had been harmed by the practice and who have a good ("winnable") case, devising a litigation strategy to target the practice in question, and attempting to establish a broad legal precedent against that practice's future use. This strategy, to be done well, requires the work of theoreticians who could develop new constitutional arguments and theories of interpretation, national coordination to select and manage cases to bring before the right courts, and skillful advocates to successfully persuade courts to adopt those new and innovative arguments.<sup>82</sup> The extent to which a successful bid to extend new constitutional rights might depend on the broader social and political context, and particularly the presence of an active and militant social movement, although conceded to be relevant, is rarely considered as a central part of law reform strategies, which tend to privilege the work of skilled advocates and legal technicians.<sup>83</sup>

## 2. RADICALISM

Radicalism is the second "ideal type" for conceptualizing poverty lawyering approaches in the 1960s. Radical lawyers are best known for challenging legal authority through high-profile political trials as a route to social transformation.<sup>84</sup> The political trials of the Chicago Seven, the

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81. Institutionally, law reform activity was located in a number of regional "back-up centers" while the local offices were primarily responsible for service work. This institutional split played into the service/reform division that has been a key aspect of LSC work since its inception. See William McCalpin, *Individual Representation versus Law Reform: A False Dichotomy*, in *LEGAL SERVICES FOR THE POOR* 85-88 (Douglas Besharov ed. 1990).

82. For a call to a return to old-style impact litigation during a period of severe retrenchment in legal services, see John Dooley & Alan Houseman, *Legal Services in the 80's and Challenges Facing the Poor*, in *CLEARINGHOUSE REV.*, Jan. 1982, at 704.

83. For two studies that contain critiques of liberal legalist approaches to reform, see MICHAEL McCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* (1986) and SHERENE RAZAK, *CANADIAN FEMINISM AND THE LAW: THE WOMEN'S LEGAL EDUCATION AND ACTION FUND AND THE PURSUIT OF EQUALITY* (1991).

84. See, e.g., *RADICAL LAWYERS* (Jonathan Black ed. 1971). Important differences exist among radical lawyers as to the appropriate role of the lawyer. Some "movement lawyers" who also espouse critical Marxist perspectives explicitly downplay the lawyer's role. See, e.g., Steve Bachmann, *Lawyers, Law, and Social Change*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 1 (1984-85). For another more recent example of radical lawyering scholarship, see 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).

Black Panthers, and Wounded Knee are the most well-known examples of an approach to lawyering that refused to comply with the hierarchies of the court system, that explicitly politicized the legal process, and that believed in the need for a fundamental overhaul of our liberal/capitalist system of governance.<sup>85</sup>

Unlike the liberal legalists, radical lawyers saw their legal work as subordinate to the political work of “movement” activists in the streets and communities. While radical lawyers sought dramatic social transformation, and argued that the existing capitalist order could be neither legitimated nor sustained, few believed that those transformations would occur primarily through legal means. Rather, radical lawyering was an attempt to politicize the legal system. Radical lawyers endeavored to reveal what they saw as the unjust and arbitrary exercise of power, both inside the courtroom and throughout society as a whole. Some dismissed other types of public interest work, law reform and legal services, for having sold out to the existing power structures. Others were more willing to strategically utilize whatever tactics seemed useful, including legal work. Like the liberal legalists, radical lawyers emphasized large-scale structural change as a mechanism of social transformation, although the two groups differed on whether lawyers and legalism were central to that process of change.

The prior Sections of this Article stressed the connections among the theories of lawyering, the other discourses in circulation at the time, and social events. It can be observed that the emphasis on large-scale institutional change (scope), the instrumental approach to law and the legal system (tools), and the optimism concerning the possibility for change (hope) were all elements common to the radical and liberal legalist approaches of the 1960s and 1970s. This story, however, does not yet describe all of the poverty lawyering scholarship at that time. Liberal legalist and radical approaches comprised the dominant discourse about lawyering, but within both legal scholarship and poverty lawyering practices, “critical” perspectives also proliferated. By recovering these subordinated discourses, one can discover the important links between two generations of poverty law scholarship.

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85. There were important differences among the approaches taken by these three. Criminal defense lawyers in the Chicago Seven and Panther trials saw their primary task as securing the defendants' liberty, then returning to their important movement work on the streets. The lawyers in the Wounded Knee trials combined this type of criminal defense work with civil suits against the government in a more broadly legalistic attempt to attain their clients' goals of securing rights to their land. John Sayer, *Social Movements in the Courtroom: The Wounded Knee Trials 1973-75* (1991) (unpublished Ph.D. dissertation, University of Minnesota).

## 3. CRITICAL PERSPECTIVES

Even during the heyday of the liberal legalist and radical approaches poverty lawyers questioned both of those concepts. Their critiques, questions, and concerns comprised a side of the old poverty lawyering literature that is usually omitted from the "old" versus "new" debate. Handler's nostalgia for the scope, instrumentality, and optimism of the old approaches overlooks the critique that the submerged perspective provided. This "oversight" is really an exercise of power, which erases critical perspectives existing at the margins of the dominant literature of the time.<sup>86</sup>

The interstitial critical literature from the 1960s and 1970s prefigured the new approaches in a number of important respects. Both emphasized the importance of community-organizing strategies and warned against the dangers of restricting advocacy to test case litigation. "A decision to go beyond test case litigation characterizes virtually all the lawyers we interviewed," claimed the editors of a 1970 article *The New Public Interest Lawyers*.<sup>87</sup> One of the lawyers interviewed, Marian Wright Edelman, reflected on her brief stint with the NAACP Legal Defense Fund in Jackson, Mississippi: "The thing I understood after six months there was that you could file all the suits you wanted to, but unless you had a community base you weren't going to get anywhere."<sup>88</sup> Like a number of the new scholar/advocates,<sup>89</sup> these lawyers emphasized the importance of "working with organized groups of poor people, working with organizers, and occasionally even organizing itself."<sup>90</sup>

Fundamental questions about the problematic nature of the poverty lawyer's role and the power dynamics of lawyer/client relationships were also raised:

There are, after all, significant dangers when middle class lawyers get intimately involved in the task of organizing the poor. More articulate, better educated, aggressive by nature and training, some lawyers tend to dominate newly formed groups, even when they try not to; such dominance, even if the middle class lawyer has been able to internalize the perspective of the poor, will generally result in the same dependence on the lawyer which a strategy of test case litiga-

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86. Examples of dissenting perspectives include: Cahn & Cahn, *supra* note 36; Steven Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049 (1970); Comment, *The New Public Interest Lawyers*, 79 *YALE L.J.* 1069 (1970).

87. Comment, *supra* note 86, at 1079.

88. *Id.* at 1081.

89. See, e.g., LÓPEZ, *supra* note 3, at 331-79; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 535 (1987-88).

90. JAMES, *supra* note 34, at 1078.

tion inevitably means for the poor.<sup>91</sup>

Many practitioners in the 1960s shared a focus on client empowerment, a critique of lawyer driven decision-making, and a concern for integrating lawyering strategies with community organization and mobilization. These were important aspects of the Cahns' original vision for legal services, but they soon took a back seat to the dominant liberal legalist vision.<sup>92</sup> Indeed, the Cahns' description of how the "demands of war" function to suppress critique is a remarkably prescient account of the marginalization of the critical lawyering approach. According to the Cahns, the perspective "of dissent, of critical scrutiny, of advocacy and of impatience" is something which is customarily suppressed or disregarded in times of war, when the necessity for direction and focus are allowed to prevail.<sup>93</sup>

While the Cahn's observation was made in the context of President Johnson's War on Poverty, it also seemed to ring true in the context of poverty law's fight for survival in the hostile environment of the early 1980s, when critical perspectives were marginalized even further. The retrieval and reexamination of older critical perspectives at this particular juncture may help to highlight the important points of continuity among old and new poverty advocates, and to deepen the debate over appropriate contemporary approaches to poverty lawyering.

#### IV. REREADING THE NEW POVERTY LAW SCHOLARSHIP

The new poverty law scholarship is a literature that started to emerge in the late 1980s and has gained momentum throughout the nineties. It is not a comprehensive or coherent literature, but is defined by a loosely linked group of central concerns.<sup>94</sup> Those concerns emerge from

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91. Comment, *supra* note 86, at 1091 (footnotes omitted).

92. Consider, for example, John Flym. *Id.* at 1093.

93. Louise Trubek has suggested that another reason for the erasure of the older critical perspectives was the bureaucratization and professionalization of the legal services corporation which occurred in the mid-1970s. Interview with Louise Trubek, Clinic Director, University of Wisconsin-Madison Law School (May 11, 1993).

94. Louise Trubek and I have identified those concerns in the following terms:

**HUMANIZE:** Resist reduction of client stories to legal categories; frame issues in human terms. **POLITICIZE:** Use critical legal theory to provide insight into the contingent nature of client disempowerment; apply feminist and anti-racist analysis to help resist marginalization of clients' voices. **COLLABORATE:** Encourage clients and client groups to participate in practice decisions; attempt to dismantle the lawyer/client hierarchy. **STRATEGIZE:** Seek to access client experiences regarding strategies for struggle and resistance; develop a healthy skepticism regarding traditional advocacy arenas; continually re-evaluate advocacy effectiveness from a client perspective. **ORGANIZE:** Encourage clients to organize and use collective efforts; work with existing social movements and client groups.

See Buchanan & Trubek, *supra* note 8.

a common critique of the professional hierarchy and the disinterestedness embedded in traditional lawyering approaches. Its methodological and political starting point is the reinscription of clients as empowered subjects into lawyering practices by unearthing suppressed client narratives.<sup>95</sup> The new scholars reject the search for overarching theories of class struggle and oppression, and instead look to the everyday lives of subordinated people for moments of dignity and resistance.<sup>96</sup> The stories embedded in this literature detail the ways in which poor people are constantly enacting moments of resistance and devising strategies of survival in their everyday negotiations with the legal system.<sup>97</sup>

The new scholarship emerged from a critique of the old structural approaches to embrace new post-structural notions of power, resistance, and social change. The greater flexibility and fluidity of this poststructural approach allowed the poverty lawyers and scholars to rethink their own advocacy efforts in nonhierarchical ways. Simple changes in the way that lawyers greet their clients, set-up office waiting rooms, and solicit client input were all suggested as ways in which lawyers could transform their practices to create "nonhierarchical communities of interest" with their clients.<sup>98</sup> The fundamental difference between "reg-  
nant" (traditional) lawyering practice and "rebellious" practice<sup>99</sup> is situated in the myriad, daily, incremental effects which serve to produce and reproduce social relations of power. Armed with these insights, the new scholar/advocates were optimistic about the potential for future, self-reflective alliances between themselves as professionals and the subordinated groups with which they worked.<sup>100</sup>

Additionally, the new scholarship, in its effort to reinscribe the cli-

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95. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2120 (1991) ("Although divergent, the literature advances a common project of constructing an alternative vision of the client as a self-empowering subject."). See also Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (exploring the experience of Baltimore's housing court from the perspective of poor tenants).

96. See, e.g., White, *supra* note 19.

97. Among articles that attempt to reconstruct poor people's experiences of the legal process are: Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) [hereinafter Alfieri, *Disabled Clients, Disabling Lawyers*]; Alfieri, *supra* note 20; Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992).

98. For a marvelously "thick" description of some of those alternatives, see LÓPEZ, *supra* note 3.

99. See generally LÓPEZ, *supra* note 3, ch. 1: "The Rebellious Idea of Lawyering Against Subordination."

100. Stacy Brustin, *Expanding Our Vision of Legal Services Representation—The Hermanas Unidas Project*, 1 AM. U. J. GENDER & L. 39 (1993); White, *supra* note 19, at 1504.

ent as a subject, takes seriously the multiplicity and individuality of client identities. Different trajectories of marginalization and oppression pose unique questions of advocacy and require particularized responses. In the new poverty lawyering scholarship, multiple, partial, conflicting, and shifting stories of oppression have replaced the old systemic notions of the bureaucratic state as oppressor. The new advocates problematize the older myths about collective struggle and the commonality of work done by poverty lawyers in different regions and on behalf of different groups.

Notwithstanding its postmodern emphasis on multiplicity, specificity, and difference, the new scholarship has also maintained a firm belief in the efficacy of transformative legal work and the potential for positive social transformation. The literature seems to depend on an implicit vision of social justice, transformation, and reconstruction. Although the normative vision is the motivating force behind the literature, it is usually absent in the text. The need for a normative vision of social justice, and a degree of optimism regarding the possibility for transformative social action through law, are fundamental points of commonality between the old and new approaches to poverty lawyering. In the new approaches, however, the scope of the normative vision is tempered by an acknowledgement of the differences among specific trajectories of disempowerment, and its optimism is accompanied by a greater appreciation of the limits of purely legal strategies.

#### A. *Social Context*

At first blush, some startling similarities exist between aspects of the new poverty scholarship and the submerged critical discourse of the early 1960s. There are also many important differences. As I observed with respect to the Handler debate, it can be misleading to compare theories of social change lawyering which have been abstracted from their historical and social contexts. In this Section, I examine the "mode of production" of the new scholarship in order to evaluate both its critique of traditional social change lawyering and its debt to that tradition.<sup>101</sup> Thus, the next Section explores the social and intellectual struggles in three arenas important to the emerging new scholarship: public policy discourse, the legal profession, and legal education.

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101. "Mode of production" refers to the material and discursive conditions in which this scholarship was written, which includes the current political and intellectual debates, their likely influence on the authors, and their institutional position. I have adapted this approach from socio-legal examinations of the modes of production of law. See Boaventura de Sousa Santos, *On Modes of Production of Law and Social Power*, INT'L J. SOC. L. 299 (1985); see also David Trubek et al., *supra* note 76.

## 1. THE CONSERVATIVE REVIVAL AND THE REAGAN YEARS

The decade of the 1980s presented a very different set of challenges for poverty advocates than did the 1960s. Yet, theoretical approaches to poverty lawyering practice often fail to account for its interpenetration with current public discourse about the poor or, more broadly, with the changing social, political, and economic contexts in which poverty advocacy takes place. A powerful discourse of "entitlement" surrounded discussions of welfare recipients in the 1960s. By the mid-1970s, however, it was no longer possible to argue for policy innovations like a guaranteed minimum income, which had been discussed widely and favorably only a few years before. By the early 1980s, as people realized that America's long era of increasing prosperity had come to an end, things were looking bad for society's neediest segments.<sup>102</sup> Reagan's election as President in 1980 inaugurated the conservative restoration which had been spawned in part by America's growing economic insecurity in an increasingly international marketplace. The Reagan Administration's neoconservative domestic agenda drastically cut programs for disadvantaged groups, severely constrained the federal government's regulatory scope, and pursued a right wing "social values" agenda that sought to roll back many of the preceding decades' gains in civil, women's, environmental, and consumer rights.<sup>103</sup>

Welfare recipients became a major target of the new conservatism, held up as symbols of the "fat" that had led to the American economy's "stagflation" in the late 1970s.<sup>104</sup> The conservative attack on the poor consisted roughly of three stages, although the public rhetoric of the era often mixed and matched them rather indiscriminately. First, there were attempts to redefine the poor out of existence.<sup>105</sup> Second, conservatives attacked welfare benefits for "causing" poor people's problems. Finally, they moralistically called for the attachment of "workfare" obligations to social programs. The 1970s and 1980s saw a proliferation of books and articles focusing on the negative effect of increased levels of public expenditures for increasingly unpopular social programs.<sup>106</sup> The con-

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102. See generally HARRINGTON, *supra* note 41; KATZ, *supra* note 24.

103. NAN ARON, *LIBERTY AND JUSTICE FOR ALL* 14-21 (1989).

104. For a discussion of the attack on welfare, see Barbara Ehrenreich, *The New Right Attack on Social Welfare*, in *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* (Fred Block et al. ed. 1987).

105. E.g., MARTIN ANDERSON, *WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES* 15 (1978) ("The 'war on poverty' that began in 1964 has been won. The growth of jobs and income in the private economy, combined with an explosive increase in government spending for welfare and income transfer programs, has virtually eliminated poverty in the United States.").

106. Two of the most well-known and influential books of this genre were GEORGE GILDER,

servative argument was simple: poor people, especially African-Americans, were voluntarily withdrawing from the labor market in increasing numbers to live on the generous welfare benefits that had been made available to them since 1965. Black unemployment, increasing numbers of single female head-of-households, and increasing crime were all attributed to the perverse effect of increased societal generosity. The argument that increased welfare benefits actually caused millions of workers to exit the job market in the 1980s overlooked longer term trends that have become increasingly obvious in the American labor market. For example, more low wage and part-time jobs accompany inexorable reductions in unionized and skilled positions in the "rustbelt" industries.<sup>107</sup>

The new rhetoric of welfare was accompanied by a drastic decrease in most types of benefits by 1982, just when a serious recession was driving more people out of jobs and into unemployment lines. Virtually all federal programs providing benefits for the poor were modified significantly or reduced by the Omnibus Budget Reconciliation Act of 1981.<sup>108</sup> Notwithstanding the rhetorical and real attack on allegedly bloated benefit levels, the real value of benefits such as AFDC, not indexed for inflation, had been decreasing for some time.<sup>109</sup> Income disparity increased during the 1980s, not only because of the drastic reduction in benefits for the poor, but also because the tax burden of the very rich was reduced.<sup>110</sup> The middle class also experienced a serious decline in what has been called the "decade of greed." Despite the increasingly obvious signs of economic distress—resulting in the emergence of two new categories of extreme poverty, the homeless and the "underclass"—few liberal responses were able to marshal the public imagination as effectively as the conservative antipoverty discourse had.

In addition to its assault on redistributive social programs, the Reagan Administration took aggressive steps within government bureaucracies and the judiciary to reverse liberal gains made in the 1960s and

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WEALTH AND POVERTY (1981), which has been described as the "Bible of the Reagan Administration," and CHARLES MURRAY, LOSING GROUND (1984). Michael Harrington described Murray as "a latter day Malthusian who holds that helping the poor often promotes poverty." HARRINGTON, *supra* note 41, at 144.

107. See generally BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA (1988).

108. For an overview of these changes and how they were perceived to effect the task of legal advocates for the poor, see Dooley & Houseman, *supra* note 82, at 101.

109. Welfare benefits have been falling steeply since 1972. The real dollar value of the average AFDC grant for a family of three fell by 41% between 1972 and 1991. If food stamps, which are indexed, are considered, the drop is 27%. Edelman, *supra* note 50, at 1722.

110. *Id.* at 1721 ("[O]nly the top twenty percent of American earners had an increased share in the pie by the end of the decade.").



1970s. Reagan committed himself not simply to cutting-back, but to eliminating entirely the Legal Services Corporation. Every year during his administration, President Reagan submitted budget proposals which contained zero level funding for the Legal Services Corporation in an ongoing battle with Congress, which continued to appropriate money for the Corporation, albeit at reduced levels.<sup>111</sup> Reagan appointed new leaders to the Legal Services Corporation, the Civil Rights Commission and the Environmental Protection Agency, all of whom were essentially hostile to the organizations' missions. Additionally, Reagan undertook an ambitious attempt to entirely reshape the federal judiciary, appointing over half of the federal judges during his two terms in office. His goals were relatively transparent: to encourage a retreat from the judicial activism of the 1960s and 1970s, and to find judges who would support his social agenda, which included as its key issues school prayer, the death penalty, and the elimination of abortion and affirmative action.<sup>112</sup> By the end of Reagan's second term, the terrain in which poverty lawyers found themselves operating had been dramatically and uncomfortably transformed.<sup>113</sup>

Indeed, by the late 1980s, prospects seemed worse for poverty lawyers than ever before. The collapse of communism in Eastern Europe bolstered the neo-liberal economic consensus of the Reagan/Bush era to near political unassailability.<sup>114</sup> At home, conservative appointees who were unsympathetic to poverty lawyers' creative arguments gradually filled the bench and fewer law school graduates were attracted to the diminishing number of public interest positions.<sup>115</sup> Homeless people filled the streets and subways of not just Los Angeles, Washington, and New York, but of smaller cities as well. Increasing numbers of previously employed people found themselves relying on dwindling and overtaxed social programs. Racial problems in urban centers increased rather than diminished. Growing problems coupled with diminishing

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111. One former Senator described Reagan's attack on the Legal Services Corporation as follows:

There are three ways to kill a program, and the President with respect to Legal Services has tried all three. One way is to kill it outright. That didn't succeed. Another is to fund it at such a low level as to make it inoperative. From Reagan's point of view he made a little progress on that, he got the budget cut. And the third way is to put the management and the oversight of the program in unfriendly hands.

ARON, *supra* note 103, at 14.

112. *Id.* at 18.

113. *Id.* at 18-19; *see also* Arbogast et al., *supra* note 60, at 94; Gabel, *supra* note 30.

114. *See, e.g.*, FRANCIS FUKAYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

115. On the diminishing numbers of law school graduates entering public interest jobs, *see* ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 5 (1992) ("[t]he last decade and a half has seen a steady decline of student willingness to enter public interest law") (footnote omitted).

resources undermined poverty lawyers' efforts to work effectively within their old lawyering strategies. Frustrated with their inability to bring about enduring social change, and facing the apparent bankruptcy of the conventional understandings that had emerged from the activism of the 1960s and 1970s, some poverty lawyers looked for opportunities to rethink their advocacy efforts.

## 2. COUNTERVAILING FORCES WITHIN LEGAL EDUCATION AND THE PROFESSION

The hostile climate in which poverty lawyers operated in the 1980s was counterbalanced by several important struggles within legal education and the legal profession over the nature and legitimacy of the lawyer's professional project. The professionalization of public interest law, the continuing growth of law school clinics, and the development of powerful leftist critiques within the law schools (particularly those being made by women and people of color) created new spaces within the debate about law and social change. They provided an ongoing commitment, an institutional location and an emerging and vigorous intellectual framework for the development of new approaches to poverty lawyering and scholarship.

Public interest law, by the 1980s, had become a permanent part of the American social and political landscape. Notwithstanding difficulties in obtaining government funding and in declining foundation support, public interest law firms representing consumer, environmental, women's, civil liberties, and poverty concerns continued to be a visible and active force in their respective policy and advocacy arenas.<sup>116</sup> A number of conservative "public interest" organizations also sprang up, which demonstrates the extent to which legal advocacy had become an established mode for the pursuit of social change. In the 1980s, the debate within the profession's governing body over the extent of its public service obligation reemerged and new calls were made for commitment to public service from leaders of the profession.<sup>117</sup> The belief that the law can and ought to be deployed to benefit disadvantaged groups in society continued to persist in the hostile 1980s, despite criticisms mounted from both the left and the right. It was also an important precondition for the emergence of the new poverty law scholarship.

Clinical legal education, which had its origins in the early 1960s,

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116. See ARON, *supra* note 103, at 63-74.

117. Commission on Professionalism, American Bar Ass'n, ". . . In the Spirit of Public Service": *A Blueprint for the Rekindling of Lawyer Professionalism* (1986); see also articles discussing the report collected in Rayman L. Solomon, *Five Crises or One*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al. eds. 1992).

now has been included in over half of the 174 law schools in the United States, employing over 400 clinicians.<sup>118</sup> The debates within clinical education in the 1980s have in one sense paralleled the broader debates within the profession and within legal education over the obligation to provide public service.<sup>119</sup> While the primary motivations for the creation of the early clinics were service and pro bono representation, many clinics in the 1980s focused on skills training for future lawyers. Simulations and role-playing replaced live clients in many clinics, reflecting both the changing political and financial realities within law schools.<sup>120</sup> At the same time, clinics have served as petri dishes in which nascent critiques of traditional lawyering and early experiments with alternative approaches have been encouraged to grow.<sup>121</sup> As increasing numbers of formerly marginalized clinical professors have gained legitimacy and status for their specialty,<sup>122</sup> they have reached beyond traditional doctrinal approaches to poverty law scholarship and drawn on insights from critical scholars both inside and outside of the legal academy to produce an increasingly complex body of scholarship.

Many of the insights that have made their way into the new scholarship, mostly produced by scholar/advocates affiliated with clinics, have come from Critical Legal Studies (CLS), Feminist Legal Theory, Critical Race Scholarship, and the sources on which these legal academic traditions draw.<sup>123</sup> The critique of liberal legalism contained within that

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118. Louise G. Trubek, *U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES (1994).

119. One contribution to this debate, in the context of Canadian legal education, argued persuasively that law schools are structured to preserve and reproduce status quo hierarchies. Jamie Cassels & Maureen Maloney, *Critical Legal Education: Paralysis with a Purpose*, 4 CAN. J. L. SOC'Y 99 (1989); see also DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

120. See Steven F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 MINN. L. REV. 619, 621 (1991); Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187, 1189 (1992); Association of American Law Schools Committee Report, *The Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1992).

121. The Ford Foundation-funded Interuniversity Consortium on Poverty Law has brought together a number of these types of clinics (although the Consortium is not limited to clinical projects). For reports on a number of these efforts, see Howard Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199 (1993). See also the articles collected in the Interuniversity Poverty Law Consortium Symposium, 42 J. URB. & CONTEMP. L. 57 (1992).

122. On the marginality of clinical legal education, see Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272 (1984).

123. These literatures are too vast and diverse to cite here. On CLS, however, see generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed. 1991); Boyle, *supra* note 13; Peller, *supra* note 13; *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). For critiques from a feminist and minority perspective, see generally CATHARINE A. MACKINNON, *FEMINISM*

scholarship has important implications for public interest practitioners, because it assails the foundations of the paradigm that had provided them with an important source of legitimacy. Critical scholars assaulted the primary distinction between law and politics, revealing the extent to which legal rhetoric and legal institutions maintain and reproduce existing class, race, and gender hierarchies. Clinical scholars then turned this critique onto the lawyer/client relationship itself.<sup>124</sup>

Both critical and clinical scholars saw themselves as creating an intellectual and social environment more favorable to progressive social change. Yet by the late 1980s, the CLS movement (as distinct from minority and feminist scholarship) had exhausted much of its energy as a political and intellectual force in law schools.<sup>125</sup> One explanation for the declining political influence of CLS has been its focus on mandarin legal materials and its analysis of doctrine, at the expense of a broader engagement with the interpenetration of legal and social phenomenon.<sup>126</sup> One way to describe the project of some of the new poverty law scholars is as applied critical scholarship. Whether this is an accurate description of the new scholarship, and, if so, the extent to which its goals have been accomplished, can only be determined through a detailed examination of the models of lawyering embedded in the new scholarship.

### B. *Theories of Lawyering Practice*

Throughout this section, I have spoken about the new poverty lawyering scholarship as if it were a coherent and unified body of writing. Although a number of important resemblances exist among the various scholars who are affiliated with this group, there are many points of difference and divergence as well. This Section attempts to explore the range and particularity of this literature. For this purpose, I have organized my reading of the new scholarship into four categories: assumptions about the relationship between theory and practice, the nature of legal representation, the lawyer/client relationship, and the question of

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UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1992); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R./C.L. L. REV. 323 (1987).

124. Discussions of the usefulness of critical scholarship for new poverty scholars are contained in Erlanger & Lessard, *supra* note 121; Johnson, *supra* note 5; Trubek, *supra* note 2; see also Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992).

125. The ten-year anniversary of the Conference on Critical Legal Studies, held in 1987, might be considered the end of its formal existence as a political and intellectual movement, although numerous CLS-style scholars have continued to produce valuable legal scholarship since that time.

126. See David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

client empowerment.<sup>127</sup> Not surprisingly, in each of these areas I have found substantial ambiguity and dissimilarity among the views expressed in the literature. For each category, I have identified a pair of related but distinct models of the lawyer's role. As in the preceding Section, the models represent ideal types rather than the practice of any particular lawyer. While I intend the models to illustrate the points of difference among the theorists that I have identified with the new poverty law scholarship, they also represent the paradoxical nature of the project of lawyering on behalf of the poor.<sup>128</sup> An acute appreciation of the ambiguities at the core of this scholarship is integral to the task that these scholar/practitioners have undertaken, and to which I hope to contribute in this Article.

#### 1. THE REFLECTIVE PRACTITIONER AND THE PRACTICING THEORIST

As I have already observed, one major point of convergence within the new literature on poverty law is the intersection of theory and practice.<sup>129</sup> Reflections on theory and practice, however, can take many forms.<sup>130</sup> While some have argued that practitioners of poverty law ought to be informed by the insights of recent developments in legal theory, particularly its critical, race, and feminist strands,<sup>131</sup> others suggest that theories used by, and useful, to poverty lawyers arise out of and are informed by the ongoing process of lawyering itself.<sup>132</sup> Both perspectives are well represented in the new literature on poverty law, but

127. Although I am aware of the hierarchical assumptions embedded in the use of the terms "lawyer" and "client," I have found myself unable to come up with an alternative to concisely express the same thing without such "baggage."

128. See Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990).

129. See generally Symposium, *Theoretics of Practice*, *supra* note 4.

130. See Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 981-88 (1992) (describing several aspects of theory and practice).

131. Alfieri, *supra* note 95, at 2120.

Theoretical analysis of practice is commanded by the historical failure of poverty law traditions to countenance the values and to design effective methods of client and community empowerment, and moreover, by the import of critical theory in the domains of power, gender, and race. Distilled here by the writings of continental, feminist, and critical race scholars, critical theory assails the interpretive paradigm central to the practice of poverty law, a paradigm that conjures the image of the client as a dependent and inferior object.

*Id.* (footnote omitted); see also Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 751 (1992) (exploring "the relevance of insights from the emerging field of race theory to an analysis of problems experienced . . . by members of racially subordinated groups").

132. See LÓPEZ, *supra* note 3, at 66 ("Theoretical work fluidly interacts with practical thought: Careful observation, generalization across situations, and the invention and deployment of strategies lead to continued observation, reassessment and perhaps revision of generalizations, and a newly informed strategic ensemble.").

their paradoxical relationship is rarely remarked upon.<sup>133</sup> In distinguishing between applying theory to the practice of poverty law, and deriving theory from practice, through the use of ideal types of the “practicing theorist” and the “reflective practitioner,” I reveal the significance of each of these strands to the new poverty lawyering project.

The Reflective Practitioner<sup>134</sup> engages in what Lucie White has called “situated theoretical practice.”<sup>135</sup> In this view theorizing is a necessarily partial, provisional, and perspectival activity.<sup>136</sup> It is an approach that acknowledges the manner in which subjects are socially constructed,<sup>137</sup> and acknowledges particularly how the differing social and cultural understandings of lawyers and clients complicate their interactions.<sup>138</sup> Reflective practice is a bottom-up, rather than a top-down, approach to knowledge.<sup>139</sup> In contrast to older, more static and more authoritative approaches to theory-building, the Reflective Practitioner

133. The Editors' Forward to the Hastings Symposium, *supra* note 4, provides an example. The Forward specifies as its primary goal “the reciprocal integration of insights between progressive legal theories and the teaching and practice of law” but goes on to claim that “only through critical self-reflection situated in active practice contexts can lawyers, who must be both thinkers and actors, sensitize themselves to the differences of experience and viewpoint between themselves and their clients, and among their clients.” Symposium, *supra* note 4, at xix. The Editors appear to assume, rather unproblematically, that these projects are complementary.

134. While I have borrowed the term from Donald Schön, and owe much to his analysis, I make no attempt to conform my use to his. See generally DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

135. Lucie White's definition of “situated theoretical practice” can hardly be improved upon and, therefore, is worth restating in full:

[S]ituation theoretical practice [is] the slow learning that comes from multiple, partial perspectives, from uncertain readings by advocates of their own day to day work. In this view, the project of doing theory is itself “reconstructed” into a collective practice. Rather than a task reserved to scholars, theory becomes a habit of ongoing conversational reflection about how to describe the problems, make alliances, devise strategies, and thus move together toward a better world. Theory is the ongoing practice of reflection among the communities of poor people and their allies that are constituted by the work they come together to do.

White, *supra* note 21, at 855 (footnotes omitted).

136. LÓPEZ, *supra* note 3, at 65-66 (“Unlike many theoreticians, though, rebellious lawyers . . . aren't out to find some ‘truth’ that makes sense of everything in this world. Nor do they pretend to settle things once and for all. Instead, they try to develop stock ways of seeing and talking about situations useful for specific purposes.”).

137. “[R]ealities experienced by the subject are not in any way transcendent or representational, but rather particular and fluctuating, constituted within a complex set of social contexts.” Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 877-78 (1990).

138. Anthony Alfieri describes this interaction as a “violent” interpretive struggle. Alfieri, *supra* note 95, at 2118.

139. See LÓPEZ, *supra* note 3.

What may distinguish these lawyers from many other theoreticians is that they build their theories from the ground up. They pay close attention to what people do and say, to the commingling of ideas and actions in daily life; they then try to capture in thought the order of these observed patterns.

*Id.* at 65.

continually engages in the humble process of revising and reinterpreting her understandings and strategies in accordance with the new situations and experiences that she encounters in her practice.<sup>140</sup>

Donald Schön likens this project to that of “a researcher in the practice context.”<sup>141</sup> Although that analogy is instructive, the Reflective Practitioner in poverty law is both more and less than a researcher. She engages in the collaborative construction of understandings, goals and strategies with clients. The Reflective Practitioner’s process of constructing knowledge, therefore, really cannot be explained independently of a particular set of understandings about the nature of lawyer/client discourse, legal representation, and the politics of a poverty law practice. The notion of reflective practice, in itself, is normatively empty. It does not show us what a “good” poverty lawyering practice would look like because it is independent of content derived from particular lawyering experiences. Nor does it show us how to link those experiences together into a broader understanding of social mechanisms of marginalization and disempowerment.

In contrast, the Practicing Theorist looks to broader normative insights to inform and make sense of her practical experiences. Most frequently, contributors to the new literature on poverty lawyer-

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140. Striking similarities exist between this model and the feminist methodology of consciousness-raising. For example:

Consciousness-raising as feminist method is a form of praxis because it transcends the theory and practice dichotomy. Consciousness-raising groups start with personal and concrete experience, integrate this experience into theory, and then, in effect, reshape theory based upon experience and experience based upon theory. Theory expresses and grows out of experience but it also relates back to that experience for further refinement, validation, or modification.

Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602 (1986) (footnotes omitted).

141. SCHÖN, *supra* note 134, at 68.

When someone reflects-in-action, he becomes a researcher in a practice context. He is not dependent on the categories of established theory and technique, but constructs a new theory of the unique case. His inquiry is not limited to a deliberation about means which depends on a prior agreement about ends. He does not keep means and ends separate, but defines them interactively as he frames a problematic situation. He does not separate thinking from doing, ratiocinating his way to a decision which he must later convert to action. Because his experimenting is a kind of action, implementation is built into his inquiry.

*Id.*

ing have turned to continental philosophy,<sup>142</sup> critical legal studies,<sup>143</sup> feminism,<sup>144</sup> and critical race scholarship<sup>145</sup> in their search for insights into the complexities and dilemmas that are inherent in working to improve the situation of disadvantaged groups. Lucie White has criticized this approach as “impatient” or “imperative” theorizing, because it seems to claim for itself “a perspective that is curiously freed from the concrete engagement, the partiality, and hence the ambiguity of its own vantage-point.”<sup>146</sup> While White’s critique is compelling, the possession of a vantage point brings a baggage of theories and ideas that do not all emerge from the practitioner’s specific experience.<sup>147</sup> These broader social discourses and understandings necessarily inform our lawyering practices, as they are part of the terrain in which poverty lawyers operate. Because we are all historically and discursively situated, we must work with the tools at our disposal. We must take the discourses as we find them and accommodate them to suit our own local situations and problems.

The model of the Reflective Practitioner does not supply any content for our musings. Some of that content must come, at least in part, from the theories that this literature draws upon, particularly those theories that are concerned with oppositional narratives and counter-hegemonic struggles. In short, one must also become a Practicing Theorist, strategically deploying theories about how those who have been traditionally excluded and marginalized can work toward reinscribing themselves as subjects of social institutions and discourses. Nevertheless, the Reflective Practitioner warns us against becoming overly invested in the correctness of any particular theory, and encourages us to continuously scrutinize our working presumptions. The tension between these two models—between the imperative of theory and the improvisation of

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142. The most frequently cited is Foucault, although references to the work of Antonio Gramsci, Hans-Georg Gadamer, Friederich Nietzsche, Jurgen Habermas, and Paul Ricoeur are not uncommon. See, e.g., Alfieri, *supra* note 95, at 2120 n.46; see also Marie Ashe, *The “Bad Mother” in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 *passim* (1992) (discussing contributions of French theorists Foucault, Derrida, and Kristeva to the “narrative” turn of scholarship in the United States).

143. E.g., Alfieri, *Disabled Clients, Disabling Lawyers*, *supra* note 97 (relying on Roberto Unger’s “critical framework”); see also Gilkerson, *supra* note 97, at 870 (encapsulating the CLS critique of “liberal legalism”).

144. See generally White, *supra* note 19. See also Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991).

145. See Russell, *supra* note 131.

146. White, *supra* note 21, at 855.

147. Nor does White avoid it herself. See, e.g., Lucie E. White, *To Learn and to Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WISC. L. REV. 699, 747 (1988) (using Steven Luke’s tripartite analysis of power).



practice—is one of the constitutive struggles of poverty lawyering scholarship.

## 2. THE TRANSLATOR AND THE SHADOW

The nature of representation is another important subject of reexamination and critique in the new poverty law scholarship. The act of representing the views of others is a deeply contradictory aspect of the lawyer's role. By taking on the obligation and the power to speak on their clients' behalf, lawyers necessarily reenact the subordination that their clients experience in the world, for the purpose of overcoming it.<sup>148</sup> A major goal of the new scholarship is to innovate new lawyering approaches that clients will experience as "empowering."

Two distinct models of empowerment through representation are embedded in the new scholarship. One model holds that, although perfect understanding is never possible, the lawyer's role is to act as a mediator between the client's world and the legal world. Through empathy, ethnography, and experience, the poverty lawyer-as-translator is able to act as a reasonably effective go-between on behalf of his clients. The second model focuses on the inevitable transformation of meaning which attends all acts of translation.<sup>149</sup> It describes the lawyer as engaged in an interpretive struggle with the client over the meaning of his or her experience.<sup>150</sup> In this second model, client empowerment can only mean the literal coming to voice of the client by allowing her to retain the power to name her own experience. It frames the lawyer's role as a shadow figure, ensuring from the sidelines that the client's voice is heard.

Both the Translator and the Shadow start from similar assumptions about the relation between experience, language, and knowledge. "Knowledge is neither independent of nor simply dependent on experience; rather, the conceptual world is constituted out of the elements of experience. In this model, language plays a central role in the constitution of knowledge as experience."<sup>151</sup> Because the life experiences of lawyers and their clients are different, so too are the conceptual catego-

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148. White, *supra* note 128, at 861.

149. See generally JAMES B. WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

150. Alfieri, *supra* note 95, at 2112.

151. Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2474 (1989); see also Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PENN. L. REV. 1105 (1989).

ries by which they name those experiences. The communication gap<sup>152</sup> between lawyers and clients is a starting point for analyzing the representation by both models.<sup>153</sup>

Professor Clark Cunningham described the metaphor of lawyering as translation as both an acknowledgement of the inescapable limits on the lawyer's ability to accurately represent what his client is saying to him and as "a model for recognizing and managing the inevitable changes in meaning in a way that may empower rather than subjugate the client."<sup>154</sup> Yet, Cunningham gave no clear prescription for accomplishing this second goal of managing the inevitable changes in an empowering way. He acknowledged the problem of silencing, but attributed it mostly to the personal failings of the lawyers involved.<sup>155</sup>

Professor Gerald López has contributed to the lawyering as translation view by expanding upon the mechanisms, the everyday processes of persuasion, and the problem-solving by which this translation takes place. López emphasizes the continuity between professional and lay lawyering not only to de-mystify professional lawyering, but also to alert us to the complexities of our everyday practices.

The nature of *practice* is even more enigmatic than the nature of law. In large part, this is true because the practice of law, like the practice of living, evolves without an adequate language to describe it, at least without a way of talking specifically about the remarkably subtle and complex thinking expressed in practical action. Legal and lay practice both bore and astound us; they strike us as at once too little and too much for words.<sup>156</sup>

By acknowledging the interpenetration of lay and legal culture, and

152. See Cunningham, *supra* note 151, at 2483.

If language is intimately bound up with the way we think about experience, then talking about experience in a different language entails knowing that experience in a somewhat different way. Thus the translator must give new meaning in the process of translation, yet at the same time the translator strives to speak not as herself, but as another. The translator is faced by the same kind of gap as the lawyer, a gap marked by language.

*Id.*

153. It is easy, however, to mistake this common starting point for a method of doing poverty law. Gilkerson provides one example. "Drawing strength from the disempowered client's own previously silenced voice, translated client narratives hold possibilities for empathic understanding not normally available in authoritative legal discourse." Gilkerson, *supra* note 97, at 926. While it is possible for some aspects of the client's story to survive its translation by the lawyer, it can only be either the client's voice that is speaking or the lawyer/translator's.

154. Cunningham, *supra* note 151, at 1300 (footnote omitted).

155. "[O]ne can understand much of the silencing of the client's voice as the lawyer's failure to recognize and implement the art and ethic of the good translator—a translator who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these shifts." *Id.*

156. LÓPEZ, *supra* note 3, at 44.

the continuities between lay and legal problem-solving strategies, one may de-mystify the lawyer's translation role, but not eliminate it. According to López, lawyers must still be bicultural (capable of translating in two directions), "creating both a meaning for the legal culture out of the situations that people are living, and a meaning for people's practices out of the legal culture."<sup>157</sup> López provides an important corollary to the lawyer-as-translator metaphor without changing the basic argument that a poverty lawyer's effectiveness depends upon acquiring some set of skills or qualities that will improve her ability to translate for clients.

The narratives that Professor Cunningham and other new poverty law scholars have carefully assembled from their own advocacy experiences often seem to cut against the implied optimism of the translation metaphor.<sup>158</sup> The point of stories like Professor Cunningham's Dujon Johnson (or White's Mrs. G) is that even the most empathetic and subtle advocate cannot avoid misunderstanding her client during the process of representation, because lawyers and clients have widely divergent conceptual schema. The lawyer-as-translator metaphor breaks down in the experiential gulf between most lawyers and clients.

The lawyer-as-shadow emerges at this point to radically critique the nature of legal representation. This model deploys a Foucaultian appreciation of the myriad ways that power relationships in society are inextricably bound up with and reproduced through language.<sup>159</sup> For example, Lucie White has explored the ways in which the rules governing the use of speech in legal rituals have functioned, and continue to function, as gatekeepers which exclude the speech of women and other subordinate groups.<sup>160</sup> White's meticulous focus on the language used in the hearing room itself, which demonstrates the ways in which Mrs. G's speech was literally constrained, vividly illustrated the ways in which legal discourse operates as an instrument of power to exclude, silence, and oppress. In contrast to the Translator's promise of empowerment through access to legal discourse, the Shadow focuses on how legal discourse functions as an instrument of subordination.

A second point of divergence between these models concerns the

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157. *Id.* at 71.

158. Professor Cunningham's client, Dujon Johnson, addressed these comments to him:

You're the kind of person who does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and answers. Oversensitivity. Patronizing. All the power is vested in you. I think you may go too far, assuming that you know the answer.

Cunningham, *supra* note 151, at 928.

159. For a more developed discussion of Foucault's idea of "power/knowledge", see *infra* part V.

160. White, *supra* note 19.

agency of the client. While the Translator assumes that the client is relatively powerless within the alien language of the legal realm, the Shadow acknowledges that the client may have a role as a strategist and manipulator of language that is opaque to the lawyer. The Shadow acknowledges that the gap between lawyer and client is ultimately unbridgeable. Only the client can truly formulate and represent her own interests. This model of lawyering is problematic because it writes the lawyer out of the script. It is difficult to envision what lawyering would look like if this radical critique of representation were followed to its logical endpoint.

The differences between those two models of representation may be categorized as falling into the hope/humility trajectory.<sup>161</sup> Although the Translator preserves the role of the lawyer, the Shadow displaces the lawyer altogether. The former emphasizes the potential for empowerment by deploying legal discourse on the client's behalf, while the latter emphasizes the dangers of that course of action. The former stresses the continuity between lay and legal problem-solving strategies; the latter stresses the unbridgeable gap between lawyers and clients. The tension between these models, which is likely to resonate strongly with advocates engaged in the ongoing struggle of representing subordinated people, emerges from the paradoxical nature of legal representation itself.

### 3. THE CO-EMINENT COLLABORATOR AND THE HUMBLE HANDMAIDEN

An important and related issue also taken up by the new scholarship is the lawyer's appropriate role in formulating problems, strategies, and goals for (or with) the client. The models of the "co-eminent Collaborator" and the "humble Handmaiden" offer contrasting views of the lawyer's role. The Handmaiden adheres to the old-fashioned distinction between law and politics by maintaining that advocates ought not to intervene in the "political" decisions of clients.<sup>162</sup> The Collaborator rejects the idea that lawyers can or should remain independent of their client's political or moral positions.<sup>163</sup> While both the Collaborator and the Handmaiden appreciate the fundamentally unequal distribution of

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161. See *supra* part II.

162. E.g., Bachmann, *supra* note 84; see also Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88). "The poverty lawyer's role in political confrontation is limited. . . . In no circumstance should she participate in [direct] action. Nor should she assume the role of political counsel on matters of tactics and strategy. Rather she should cabin her activities to the ken of legal knowledge." *Id.* at 709.

163. See LUBAN, *supra* note 62; Simon, *supra* note 62, at 1083; see generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

power in the lawyer/client relationship, they differ on its implications for the lawyer's role.

The Handmaiden argues that, because the lawyer cannot avoid unduly influencing her client's decisions, given the ways in which internal and external forms of oppression lend her greater authority and credibility, she should confine her role as much as possible.<sup>164</sup> For the Handmaiden, the possibility that her involvement, however well-intentioned, may function to distort or co-opt the client's political struggle outweighs her potential to contribute.<sup>165</sup> The Handmaiden believes that the focus on legal mechanisms and legal fora that occurs when lawyers take on too large a role in social movements limits their transformative potential.<sup>166</sup> In this view, which strongly echoes the position taken by the previous generation of radical lawyers,<sup>167</sup> it is the social and political struggles of the poor, rather than the legal struggles, that are (and should be) the primary engine of social change.<sup>168</sup>

164. As Lucie White cautioned, the poverty lawyer cannot escape her status as a double agent.

Though the lawyer had worked hard to identify with Mrs. G., she was also sworn, and paid, to defend the basic constitution of the status quo. When Mrs. G. "misbehaved" at the hearing, when she failed to talk on cue and then refused to keep quiet, Mrs. G. pointed to the ambiguity of the legal aid lawyer's social role. Through her defiant actions, Mrs. G. told the lawyer that a conspiracy with a double agent is inevitably going to prove an unstable alliance.

White, *supra* note 19, at 47.

165. White, *supra* note 128, at 886-87.

In order to negotiate the risks of tailoring—of shaping the law to respond to the needs of subordinated groups—the *power* to tailor must shift to those that the tailoring seeks to help. Those who have been diagnosed as different, as disabled, must assume the power to describe their own circumstances, discover their own "capacities," and define their own "needs." The society must free them to locate their own safe social spaces where they can explore their injuries, feel their own fluency, and recast their "difference" as the very ground of their power.

*Id.*

166. White, *supra* note 147, at 741.

[T]he fundamental problem [with the attempt to use law as a means of resolving conflict and promoting social justice] is that inherent in this approach is the acceptance as given of a system of law which may itself be the source of the conflict and injustice. The result may be that the lawyer ends up unintentionally promoting the use of the legal system as a means of accommodating the conflict rather than promoting social justice. . . . [T]he legal process may obscure the true nature of the dispute and even obstruct its just resolution.

*Id.* at 741-42 (quoting G. Budlender, *Lawyers, Conflict, and Social Justice* (unpublished manuscript on file with Lucie E. White)).

167. *E.g.*, JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

168. Bachmann, *supra* note 84.

The primary motor of social change is social struggle, not legal struggle. The question thus becomes: to what extent can lawyers and the law have an impact in this "extra-legal" arena? The answer is that lawyers can play meaningful roles in actual social struggles, though their role relates more to the preconditions for social

On the other hand, the Collaborator recognizes that the Handmaiden may attribute a false essentialism to the client's struggle.<sup>169</sup> Recognizing that the client's interests may be too indeterminate and fluid to play the role assigned to them in more traditional views of representation, the Collaborator seeks to create a "nonhierarchical community of interest" with his clients.<sup>170</sup> The Collaborator and her client work together as allies toward the deployment of strategies for the transformative use of law in a common struggle.<sup>171</sup> As collaborators, they must consider and respect each other's judgements, but must be equally free to occasionally challenge the views of the other.

The struggle to maintain the balance between respecting the clients' knowledge and falsely essentializing it is an enduring dilemma of poverty lawyering. That struggle, in part, turns on the belief in a firm law/politics distinction, which is also a central feature of the tension between the liberal legalist and radical models contained in the old lawyering scholarship. The reproduction of this dilemma between the Handmaiden and Collaborator models within the new scholarship highlights one of the important points of continuity, as well as one of the enduring paradoxes, of the poverty lawyers' project.

#### 4. THE FACILITATOR AND THE STRATEGIST

Finally, two models of empowerment are intertwined with each of the above dualities in the literature. I have dubbed these models the Facilitator and the Strategist. The Facilitator sees client empowerment as embedded within the lawyering process itself, by giving the client power to make decisions about what should be done and to speak out against injustice. The Strategist views empowerment more instrumentally; it is something that happens when the lawyer/client team is able to manipulate the legal/political system to obtain advantages for disempowered and subordinated people. The contrasting models of the Strategist and the Facilitator represent a dichotomy similar to that repre-

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mobilization than to substantive issues. The lawyer's role is more the oiler of the social change machine than its motor; the motor of this machine remains masses of people. From a democratic perspective, this is the way it should be, and from a historical perspective, the only way it can be.

*Id.* at 21.

169. Dinerstein, *supra* note 130, at 985. "The theoretics movement must also avoid its own form of essentialism in which poor clients are seen as all-powerful individuals awaiting only their lawyer's assistance to unleash their potency." *Id.*

170. William H. Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469, 485 (1984).

171. For examples of strategies for the transformative use of law, see Gabel & Harris, *supra* note 84, and White, *supra* note 89.

sented by the law as tool versus law as terrain metaphor.<sup>172</sup> The Strategist views legal knowledge as a thing that can be used by poor communities to obtain some advantages; the Facilitator views the law as a thing that has constructed the landscape of power and knowledge to the disadvantage of certain groups of people.

The model of the lawyer as Facilitator draws upon the critical pedagogy of Paulo Freire,<sup>173</sup> as well as the feminist methodology of consciousness-raising.<sup>174</sup> Each presents a view of how an active, critical consciousness can emerge among members of oppressed groups when they have an opportunity to reflect together, in the right circumstances, about their individual and collective subordination. The process requires disempowered individuals to first reclaim a safe space in which they can come together in a nonhierarchical, small group for discussions. Then, members of the group share their experiences with each other. Through the process of sharing and reflecting, an awareness of shared conditions of oppression emerges. As the group continues to reflect, they are collectively able to identify problems that need to be addressed and to devise strategies for dealing with them.

The model of the Facilitator purposely does not contain a privileged leadership role. Lucie White, however, has maintained that the lawyer, as an outsider, can play a part in this dialogic process of empowerment.

The outsider helps to bring people together, sets a tone in which collective learning can take place, and teaches a practice of critical reflection by leading the group through its first sessions and helping it plan its first actions. In contrast to the conventional professional, however, the outsider—the lawyer working in the third dimension—does not claim to possess privileged knowledge about politics or reality.<sup>175</sup>

At its most extreme, this model equates the lawyer's role to that of an organizer, while minimizing or eliminating the need for a reliance on the lawyer's specialized legal knowledge. One must consider the effects of this radical abandonment of the lawyer's traditional role on the lawyer's legitimacy and credibility, and consequently her ability to gain access to communities of disempowered clients. Thus, there may be a significant downside, both practically as well as conceptually, to this wholesale retreat from a belief in the utility of specialized legal knowledge.<sup>176</sup>

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172. See *supra* part II.

173. PAULO FREIRE & ANTONIO FAUNDEZ, *LEARNING TO QUESTION: A PEDAGOGY OF LIBERATION* (1989); PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1970).

174. Bartlett, *supra* note 137; Schneider, *supra* note 140.

175. White, *supra* note 147, at 762.

176. My own experiences as a participant-observer at a nascent community legal clinic in

In contrast, the Strategist model affirms the utility of legal knowledge and legal action as one type of social change strategy among others. Without excluding subordinated groups and communities as sources of valid knowledge about the circumstances of their struggles, the Strategist values legal knowledge and strategies for what they may be able to achieve on behalf of disadvantaged groups. The Strategist views empowerment as external, rather than intrinsic to the process of struggle. This view of empowerment is usually linked with a belief in the possibility of a genuine, nonhierarchical dialogue between lawyer and client that can give rise to effective collaborations.

For example, Gerald López suggested that both lay and legal understandings of the world, which he views as “continuous practical knowledges,” might be usefully and strategically combined to more effectively achieve goals that one or the other working alone might not have managed as well. López’s view is strategic to the extent that he claims that:

appreciating the relationship of lay to legal know-how—and of lay to professional lawyering—can pay off, even in the short run. Concerned lawyers better the chances of identifying [with both clients and their allies] what moves would support and *not negate* potentially effective lay strategies that have already been put into motion.<sup>177</sup>

López’s concern is practical and instrumental. It is focused on moving the world in a desired direction. López’s vision of rebellious lawyering does not address the concern of Freire, Feminists, and Facilitators that subordinated groups might first require liberation from forms of internalized oppression to be empowered to struggle against their own subordination. For López, the clients are always already rebellious. It is the lawyers who need to have their consciousnesses raised.

One can also see the tension between these two approaches in Professor Anthony Alfieri’s “theory of dialogic empowerment.”<sup>178</sup> Alfieri speaks of dialogic communities of the subordinated in the Freirian sense, as well as the “dialogic point of connection” between poverty lawyers and the poor. His focus on remaking the lawyer’s role makes it clear that Alfieri believes that lawyers can usefully contribute to the poor’s class struggle in some nontrivial way, yet he does not waver from attributing to the poor themselves a role as agents of history.<sup>179</sup>

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South Madison attest to this potential downside. See Ruth Buchanan, South Madison’s Community Legal Outreach Clinic: Some Provisional Observations (unpublished manuscript on file with the author).

177. LÓPEZ, *supra* note 3, at 51 (emphasis added).

178. Alfieri, *supra* note 162, at 695.

179. *Id.* at 711 (emphasis added).

Only by redressing this reductionism, restoring the fullness of historical experience, and recovering the oppositional continuities of alternative traditions, can poverty



As the above examples illustrate, there is no easy reconciliation of these two approaches in the new poverty lawyering literature. The contrast between prioritizing empowerment through representation or through its results reveals yet another basic dilemma at the heart of the poverty lawyer's project. Like each of the preceding pairs of competing models, the contradictory nature of the poverty lawyer's attempt to empower subordinated groups in society cannot be reduced to a single formula, but must be confronted by the lawyer in the process of the day to day representation of disadvantaged groups and individuals.

### C. *Recognizing Continuities/Negotiating Differences*

My analysis of two generations of poverty lawyers gives rise to a double-edged critique. On one hand, it insists on the social and political specificity of the task of poverty lawyering and rejects abstract and ahistorical comparisons of various "approaches." On the other hand, it demonstrates a number of dilemmas common to the poverty lawyer's project and illustrates ways in which each generation has attempted to grapple with these central paradoxes. My analysis also reveals the divisions and ambiguities within each of those literatures, and highlights the partial and incremental nature of poverty law work.

This Article resists simply equating the old scholarship with structural approaches to theory and the new with poststructural. Yet, the significance of some poststructuralist ideas, particularly Foucault's approach to power, for isolated and disenchanting poverty law scholars in the 1980s, cannot be overlooked. As Lucie White observed:

Foucault's picture of power disrupts [the] closed circle of domination. By showing that the dominators do not "possess" power, his picture makes possible a politics of resistance. It opens up space for a self-directed, democratic politics among subordinated groups, a politics that is neither vanguard-driven nor coopted, as the politics of the colonized subject inevitably is. The Foucaultian picture of power makes insurgent politics interesting again; it brings possibility back into focus, even in apparently quiescent times when resistance is visible only in the microdynamics of everyday life.<sup>180</sup>

Critics have argued that the new scholarship has been overly enthusiastic in its embrace of post-structural theorists like Foucault, to the

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lawyers *facilitate* the unification of the poor into a class for itself consciously striving to remake the oppressive world of poverty. Remaking this world begins with the transformation of the attorney/client relation, the dialogic point of connection between poverty lawyers and the poor.

*Id.*

180. Lucie E. White, *Seeking ". . . the Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992).

detriment of its practical engagement with issues specific to poverty lawyering. Although the new scholars have selectively drawn from post-structural theory those elements that have been of use to them in wrestling with the ongoing dilemmas of poverty lawyering, they have not always been self-conscious about either the partial nature of their borrowings, nor their intellectual debt to a previous generation of poverty scholars.

The Foucaultian vision of the potential for social change is much more bleak than the vision embedded within the new poverty law scholarship.<sup>181</sup> Foucault's view of subjects as constructed by and constrained within social relations of power severely delimits his views on the possibility for social transformation. He is self-consciously antihumanist and anti-teleological. While he allows for the possibility of isolated, transitory, and shifting moments of resistance, he does not allow them to be invested with larger meanings or trajectories.

On the other hand, the new poverty law scholars have focused, at one level, on resurrecting and reinscribing client narratives into legal discourse. Although the new scholars found Foucault's ideas about power invigorating, they have replaced Foucault's antihumanist insurrection with a humanist vision of clients and lawyers who work together to fundamentally transform their advocacy. The unstated but underlying premise of the new scholarship is that the transformation of poverty lawyering, and specifically the relationship between lawyers and clients, will serve as the political basis for larger social transformations. Unlike Foucault,<sup>182</sup> the new poverty law scholars are consciously constituting themselves as engaged social theorists, creating a "theoretic of practice"<sup>183</sup> out of their own reflections upon their activist work.

The point at which the work of the new scholars diverges from the antihumanist implications of Foucault's poststructuralism is also a point of continuity with the old approaches. Both new and old poverty lawyering scholarship acknowledge the need for broader "theories" of social change and for faith in the ability of lawyers and clients to make a difference through their own actions. Both the new scholarship and the older critical perspectives share a countervailing understanding of the

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181. Many critics have charged Foucault with failing to provide a "reconstructive" vision. E.g., TERESA DE LAURETIS, *TECHNOLOGIES OF GENDER* (1987).

182. Foucault has been described as a thinker who "despite his emphasis on local struggles . . . is largely uninterested in local victories". Michael Walzer, *The Politics of Michel Foucault* (unpublished lecture, Princeton University, 1982). See also Foucault's comments on his own involvement in prison reform in France: "The ultimate goal of [our] interventions was not to extend the visiting rights of prisoners to thirty minutes or to procure flush toilets for the cells, but to question the social and moral distinction between the innocent and the guilty." MICHEL FOUCAULT, *THE FOUCAULT READER* 220 (Paul Rabinow ed. 1984).

183. See Symposium, *Theoretic of Practice*, *supra* note 4.

complexities and contradictions of the lawyer's role in addition to the shared project of social transformation through law more generally.

Yet, the old and the new scholarship also have a common blindness: the failure to acknowledge directly the paradoxical nature of the lawyering project. Despite express attempts by some new scholars to negotiate their way out of these binds,<sup>184</sup> the powerful and polarizing dichotomies of law and politics, structures and agents, and theory and practice, underpin the new scholarship as powerfully as they do the old. One measure of the value of poverty law scholarship is not its ability to resolve the dilemmas that it identifies, but the degree to which it engages them. Therefore, my main critique of both the "new" and "old" scholarship is their frequent failure to directly engage the contradictions and paradoxes of poverty law.<sup>185</sup> While a great deal of valuable work has been done, neither the "new" scholarship nor the "old" provides a satisfactory foundation for engaging the ongoing dilemmas of the poverty lawyering project—the task of "living in the contradiction."<sup>186</sup> In my final Section, I offer a partial and provisional outline for a reconstructive theory for poverty lawyering, integrating the insights gained from my review of the poverty lawyering scholarship with recent developments in social theory.

## V. POSTSCRIPT

*I am sitting in a fashionable restaurant in Washington, D.C., with my mentor, a man who has had a long and successful career in left scholarship. The occasion is my acceptance of a teaching position in a law school. We are discussing a subject we have often returned to in our three years of work together, the possibility for transformative politics in one's scholarship. He suggests that the conditions for such scholarship now may not be optimal. He is concerned for my future as a legal scholar. When he started out, he suggests, there was a "culture of rebellion" to support and sustain his efforts and those of his peers. "No such culture exists now," he says. "There seem to be no viable alternatives." I am uncomfortable with his statement and squirm in my chair. Although I recognize the shift that he has described, I know that there are important differences in how we perceive its implications. I respond by saying, "We have a different culture now. It is a 'culture of resistance.'" I am not sure exactly what I mean. He doesn't say anything. When the waiter pours the wine, we move on to more mundane topics, in tacit*

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184. *Id.*

185. Of course, there are some notable exceptions. See, e.g., White, *supra* note 128.

186. Teresa de Lauretis originated the phrase. DE LAURETIS, *supra* note 181.

*recognition of both our differences and the ongoing nature of the conversation.*

At stake in this Article's exploration of historical transformations in poverty lawyering scholarship are issues that go well beyond the concerns of poverty lawyers. Changes in poverty law scholarship and practice have taken place in the context of larger shifts in our understandings of the nature and conditions of socially-transformative practice. This Article has examined poverty lawyering as an evolving set of culturally constitutive practices. One of its aims has been to reveal the extent to which ideas and categories embedded in the ways that poverty lawyers approached their work were drawn from and fed back into the social contexts in which they were located. As the contexts shifted, so did the practices of poverty lawyers. Yet, at the same time as it makes the case for the historical specificity of poverty lawyering, my analysis reveals a persistent set of core dilemmas concerning the nature, range, and tenor of this project, dilemmas with which all poverty lawyers have to grapple.

This tension between similarities and differences between two generations of poverty law scholarship is akin to that revealed by my restaurant conversation with my mentor. While we acknowledge and are connected by our shared concerns, we are divided by a generational shift in theoretical orientation, between the "culture of rebellion" and the "culture of resistance." This final Section of the Article examines this shift in social theory as the deep structure that underlies the current debates in poverty law scholarship. In doing so, I tentatively outline the contours of a new understanding of transformative practice: the culture of resistance. In place of a conclusive set of ideas or prescriptions about the role of theory in the practice of poverty lawyering, this Postscript is intended to provide only a preliminary and subjective sketch of some relatively unexplored theoretical terrain.

The "sea change" in social theory to which I am referring can be perceived in a shift both in the methods and central concerns of disciplines from sociology to linguistics to anthropology, as well as in the emergence of cultural studies as a discrete, new discipline. The focus has moved from institutions to agents, from enduring structures to everyday practices, from rules to strategies. This shift also generated new ways of envisioning the ongoing constitution and reproduction of social meanings, relations, and institutions. A key symbol of these new theoretical orientations is the notion of "practice."<sup>187</sup> I use the phrase "prac-

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187. My use of the notion of "practice" to describe a key symbol rather than a coherent theoretical approach is borrowed from Sherry Ortner, *Theory in Anthropology Since the Sixties*, 26 *COMP. STUD. SOC'Y & HIST.* 126, 127 (1984) ("I will argue that a new key symbol of theoretical

tice theory” to describe loosely this nexus of theoretical orientations and, more specifically, to describe the approach that I have assembled from ingredients “poached” from various sources.<sup>188</sup>

### A. *The Problem of False Antinomies*

In the 1960s and 1970s, some social theorists in Europe identified a new set of problems for social theory, in part as a response to the dueling traditions of structuralist and phenomenological theories. One of the important issues to emerge at this time was a concern with the persistence of underlying conceptual dualisms or antinomies. Anthony Giddens, for example, has described his “theory of structuration” as a response to “the lack of a theory of action in the social sciences.”<sup>189</sup> Giddens identified an opposition between what he described as “voluntarist” and “determinist” approaches to theory. According to Giddens, the former fails to adequately attend to the nexus of issues surrounding “institutional analysis, power, and social change” while the latter largely ignores the possibility of human agency.<sup>190</sup> The division of the field of American sociology into micro (the study of social actors) and macro (the study of social systems) approaches, while enabling these two approaches to coexist, does not manage to resolve their basic incommensurability.

Giddens seeks to connect “a notion of human action with structural explanation.”<sup>191</sup> In his view, the opposition between voluntarist and determinist theory is built upon a fundamental problem in the way that theorists conceptualize structures and agents. This difficulty cannot be resolved by simply merging the two approaches. For Giddens, both a new theory of the acting subject that incorporates a notion of “practical consciousness” and a new theory of social structures as constituted through social practices are necessary to resituate social theory within both time and space.<sup>192</sup>

Bourdieu also describes the field of sociological thought as structured by a series of antagonistic pairs of concepts that are “profoundly

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orientation is emerging, which may be labelled ‘practice’ (or ‘action’ or ‘praxis’). This is neither a theory nor a method in itself, but rather, as I said, a symbol, in the name of which a variety of theories and methods are being developed.”)

188. “Poaching” is one of the tactics described by De Certeau in his analysis of power and resistance in everyday life. DE CERTEAU, *supra* note 16.

189. ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS 2* (1979).

190. *Id.*

191. *Id.* at 49.

192. *Id.* at 3.

harmful" to social scientific practice.<sup>193</sup> He describes these "false antinomies" as:

paired oppositions [which] construct social reality or more accurately here, they construct the instruments of the construction of social reality: theories, conceptual schemes, questionnaires, data sets, statistical techniques, and so on. They define the visible and invisible, the thinkable and the unthinkable; and like all social categories, they hide as much as they reveal and can reveal only by hiding. In addition, these antinomies are at once descriptive and evaluative, one side always being considered as the "good one", because their use is always rooted in the opposition between "us" and "them."<sup>194</sup>

For Bourdieu, the primary task of theory is to "move beyond the antagonism between these two modes of knowledge, while preserving the gains from each of them."<sup>195</sup>

The notion that misleading and falsifying oppositions underlay social and legal theory more recently gained currency in North American critical legal scholarship, which deployed the discovery of these oppositions as an effective tool for deconstructing traditional categories of legal thought.<sup>196</sup> Yet, many of the dualisms identified by Bourdieu and Giddens were replicated through divisions among CLS scholars.<sup>197</sup> It has been suggested that theories of practice could provide a resolution to this theoretical impasse.<sup>198</sup> Nevertheless, the persistence of traditional hierarchies in legal scholarship between the study of theory and practice, coupled with the discipline's preference for mandarin materials, has left the promise of practice theory for legal scholarship largely unexplored.<sup>199</sup>

### B. *Overcoming the Theory/Practice Divide*

Practice theory takes as its premise the basic inseparability of the-

193. Pierre Bourdieu, *Vive la Crise! For Heterodoxy in Social Science*, 17 *THEORY & Soc'y* 773-87 (1988).

194. *Id.* at 778.

195. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 25 (1990).

196. See sources cited at *supra* note 123, especially Gary Peller, *The Metaphysics of American Law*.

197. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1 (1984).

198. Rosemary Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 *L. & Soc. INQUIRY* 69 (1989).

199. The Femcrit and Critical Race Theory strands in legal theory are the most promising in this regard, as they attempt to negotiate, in different ways, the subjective experiences of individuals within a racist and sexist social structure. Yet, there has been remarkably little cross-fertilization between these literatures and practice theory. One notable exception is Leslie McCall, *Does Gender Fit? Bourdieu, Feminism and Conceptions of Social Order*, 21 *THEORY & Soc'y* 837 (1992).

ory and practice.<sup>200</sup> Yet, the commonsense notion of theory as separate from or outside of practice has recently come under attack, not just from practice theorists, but from thinkers in many different disciplines. The privileging of abstract, timeless, and disembodied mental work over the embodied, temporal, and everchanging requirements of everyday practices, like cooking, is deeply implicated in the patriarchal and discriminatory order that has relegated women and other marginalized groups to the performance of such practical tasks.<sup>201</sup> Undermining the hierarchy between theory and practice has been a particularly central thrust of feminist theorizing.<sup>202</sup> Recent developments in cognitive psychology have underlined the situated and contextual origins of what were once considered highly abstract and enduring concepts.<sup>203</sup> Even individuals' skills in mathematical reasoning have been shown to vary according to the circumstances.<sup>204</sup> Scholarly discussions of the reflective and contextual nature of practices as diverse as teaching, cooking, architectural design, and piano playing serve to undermine the notion that theory, in an external and objective sense, necessarily guides practice.<sup>205</sup>

These alternative conceptions suggest that if we want to use the term "theory" to describe what orders and gives meaning to our practice, it does not make much sense to think of it as something that we refer to

200. PIERRE BOURDIEU & LOIC WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* 160-61 (1992).

Theory is not a sort of prophetic or programmatic discourse which originates by dissection or by amalgamation of other theories for the sole purpose of confronting other such pure "theoreticist theories." . . . Rather, scientific theory as I construe it emerges as a program of perception and of action—a scientific habitus if you wish—which is disclosed only in the empirical work that actualizes it. It is a temporary construct which take shape for and by empirical work.

*Id.*

201. Deane Curtin, *Food/Body/Person*, in *COOKING, EATING, THINKING* 4 (1992).

There is a dynamic between those who marginalize and those whose lives are marginalized. . . . In marginalizing the lives of women, manual laborers, and persons of color (those who have been defined as responsible for food), dominant persons also marginalize the aspects of their own lives that are "ordinary" and "bodily." Attention to the experiences of marginalized persons reveals those aspects of all persons that have been marginalized.

*Id.*

202. *See, e.g.*, DE LAURETIS, *supra* note 181. "What I am suggesting is that theory is dialectically built on, checked against, modified by, transformed along with, practice—that is to say with what women do, invent, perform, produce, concretely and 'not for all time' but within specific historical and cultural conditions." *Id.* at 84.

203. GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

204. For example, women who can do complicated mathematical calculations in the grocery store cannot do much simpler figures abstracted from the demands of their everyday lives. LAKOFF, *supra* note 203.

205. Several of these examples are explored at some length by DONALD SCHÖN, *THE REFLECTIVE PRACTITIONER* (1983).

only in moments of quiet reflection.<sup>206</sup> If we begin to think of our theories in a new way, however, as being present in all aspects of our everyday practices, it becomes clear that our theories will not be static. Rather, the critics suggest, our understandings both of the world and of our own practices are necessarily partial, shift over time, and may sometimes contradict each other.<sup>207</sup> As a first step to a reconstructive way of thinking about social change, it is necessary to reject the commonsense dichotomy between theory and practice and replace it with a more flexible, strategic, and situated conception of "thoughtful practice."<sup>208</sup>

### C. *Toward a Transformative Theory of Practice*

Central to each of the "practice theory" approaches is the notion that social relations, which inevitably and everywhere involve relations of power, are constructed and reproduced through the complex minutiae of everyday practices.<sup>209</sup> This also means that changes in practices might transform social structures and institutionalized power inequities.<sup>210</sup> Thinking about social change in this way, however, first requires the rejection of dualisms such as the structure/agency divide. As Susan Silbey observed, "social structure refers to the constraints operating in situations to channel and limit the play of practice. Structure is not simply inserted into situations, it is constituted through active social practice."<sup>211</sup> Practice is the patterned play of individual agents; it is created and carried out through the myriad choices of individual actors. Social

206. Gerald López emphasizes this interpenetration of the realms of theory and practice in the practice of lawyering against subordination. LÓPEZ, *supra* note 3.

Sophie and Amos do not exit the world of theory either when they're consumed with observing the smallest detail or when they're designing and deploying strategies to change the world. They could no more operate without theories, large and small, than they could function without close observation and sensible strategies.

*Id.* at 66.

207. Lucie White has expanded on this notion, which she calls "situated theoretical practice" in *Paradox, Piecework and Patience*, *supra* note 21, at 854 ("the slow learning that comes from multiple, partial perspectives, from uncertain readings by advocates of their own day to day work").

208. See Lisa Heldke, *Foodmaking as Thoughtful Practice in COOKING, EATING, THINKING* (1992).

209. I am using the word "practice" in a very broad sense here, to incorporate all structured human activity, including discourse. Everyday practices involve activities such as walking or driving to work, preparing and consuming meals, or decorating one's home or apartment, as well as public activities such as interacting with others in work settings, shopping, or participating in cultural events. Of course, what lawyers do (which we ordinarily describe as their "practice") is also included within this definition.

210. William Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

211. Susan Silbey, *Making a Place for Cultural Analyses of Law*, 17 L. & SOC. INQUIRY 39, 43 (1992).



institutions are not abstract entities somehow above or outside the lives of individuals, but entirely made up of repeated patterns of practice, over time, and in particular locations.

This way of thinking diverges dramatically from older structural approaches. Before I outline my views on the transformative potential of practice theory for poverty lawyering, I must describe briefly three conceptual building blocks that are necessary to a transformative theory of practice: the network theory of power, the social constitution of subjectivity, and the essential connection among practice, meaning making, and power.

### 1. THE NETWORK THEORY OF POWER

Power must be analyzed as something that circulates, or rather as something that only functions in the form of a chain. It is never localized here or there, never in anybody's hands, never appropriated as a commodity or a piece of wealth. Power is employed and exercised through a net-like organization. . . . And not only do individuals circulate between its threads; they are simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are also the elements of its articulation. In other words, individuals are the vehicles of power, not its points of application.<sup>212</sup>

Among the most significant of the conceptual breaks with the hegemony of structuralism was Foucault's development of what I call the "network" theory of power. Instead of thinking of power as a weapon that someone wields over someone else, Foucault thought of power as fluid, dynamic, and shifting. In his view, power does not define relations between individuals, but flows through and constitutes them as points of its operation. Even relatively powerless individuals can be the points through which power may operate at any given moment.

In contrast to what he called the "repressive" hypothesis of power, Foucault posited a notion of power as a constructive force. He argued that subjects in society are constituted by the effects of power and are its points of articulation. He emphasized the basic connection between the social effects of power and the making of social subjects: "We should grasp subjection in its material instance as a constitution of subjects."<sup>213</sup> Hence, Foucault's "network" theory of power led us to examine power at the level of everyday practices as a force that produces both social institutions and social subjects.

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212. MICHEL FOUCAULT, *POWER/KNOWLEDGE* 98 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

213. FOUCAULT, *supra* note 182, at 210.

## 2. THE SOCIAL CONSTITUTION OF SUBJECTS

We should try to discover how it is that subjects are gradually, really, progressively, and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts.<sup>214</sup>

The ways in which subjects come to be constituted as such in our society have recently attracted a fair amount of attention from legal scholars.<sup>215</sup> Having debunked the liberal legalist notion of the autonomous and self-contained individual, critical scholars turned to the more difficult question of what—if we are not unified, self-knowing, independent actors—are we? The general answer, although there are important distinctions within it, is that we are “socially constituted subjects.”

At the most basic level, being socially constituted simply means that we are essentially social beings. That is, we all “find” ourselves in the context of a particular set of distinctly social circumstances, a language, a culture, a family, and so on. “The constitutive action in which the self is already situated is also the field of social interaction in which the self is always implicated. The self is a process, and culture is us and our behavior.”<sup>216</sup>

To posit subjects as being constituted in and through culture is to reject the notion that the self is essentially unified or unchanging. Societies do not contain unified cultural orders and understandings, but are sites of conflict and contradiction between numerous competing and crosscutting discourses, roles, and norms. Social subjects become the sites for these struggles. Subjects consist of many social roles, utilize multiple discourses, and may change their subject-positions according to the circumstances.<sup>217</sup> Therefore, socially constituted subjects are fragmentary, shifting, and not fully coherent.

Some postmodern theorists stop there. Feminist, race, and other scholars concerned with marginalized groups, however, attempt to develop further this notion of the situated subject. Social situated subjects also can be playful, strategic, and creative.<sup>218</sup> Important differences exist between emphasizing the constitution of subjects as merely the effects of social phenomenon, as do Foucault and some postmodern

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214. FOUCAULT, *supra* note 212, at 97.

215. James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991); Tom Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); Peller, *supra* note 13; Steven Winter, *On Building Houses: Forward*, 69 TEX. L. REV. 1595 (1990-91); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1990-91).

216. Winter, *supra* note 215, at 1607.

217. For lovely development of the notion of shifting subject positions, see Maria Lugones, *Playfulness, World-Travelling and Loving Perception*, 2 HYPATIA (Summer 1987).

218. *Id.* See also WILLIAMS, *supra* note 123.

legal scholars,<sup>219</sup> and seeing them also as creative agents in their own right. Containing individuals as both acting subjects and the subjects of and subjected to social constraints, this double-edged idea of subjectivity is necessary to the transformative potential of the new approach.

### 3. POWER/KNOWLEDGE

It's not a matter of emancipating truth from every system of power (which would be a chimera, for truth is already power) but of detaching the power of truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time.<sup>220</sup>

Foucault's approach to the study of power in society led him to posit the basic connection between regimes of power and the production of knowledge, or "truth." He argued that what is considered truth in a particular society is always the result of a struggle, of relations of power. Power produces truth, in the same way that it produces subjects. Foucault's approach to examining truth/power regimes was to ask the question, "Who or what has had to be left out in order for this regime to lay claim to truth?" Because Foucault saw this process of the production of truth as always involving a struggle, he explained that opposition and resistance could also always be found where truth was being produced. His "insurrection of subordinated knowledges" was the idea that these oppositional discourses should be reinvigorated and allowed to proliferate as a countervailing force against the increasing hegemony of totalizing (scientific) discourses.

While Foucault gave us this basic connection between power and truth, he did not attribute any role to human agency, either in the construction of these marginalized discourses, or in their resurrection. Foucault's way of thinking of subjects, as exclusively the effects of power, the points of its articulation, seemed to leave no room for the possibility of creative manipulation of discourses and practices by those constituted within them.<sup>221</sup> Therefore, it is unclear how he imagined the "insurrection" for which he called would come about. For this, we have to look

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219. Foucault, *supra* note 210, at 98.

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material upon which power comes to fasten or against which it happens to strike, and in so doing crushes or subdues individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires come to be identified and constituted as individuals. The individual, that is, is not the vis-a-vis of power; it is I believe, one of its prime effects.

*Id.*

220. *Id.* at 133.

221. One critique of Foucault along these lines is made by NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* (1989).

to feminist, critical race, and other theorists, who have devoted considerable time and energy to documenting the ways in which marginalized groups appropriate the power to constitute meanings from the dominant culture.

#### 4. CONSTRAINT VS. POSSIBILITY

While the practice theory approach reflects our experience of both constraint and independence, limit and possibility, in our socially-situated practice, there are important variations in the implications drawn by different theorists. I have relied heavily on the work of Michel Foucault and Pierre Bourdieu in providing the conceptual foundations for a practice theory approach. Yet, neither Foucault nor Bourdieu fully developed the transformative potential of their ideas. Both remain deeply attached to the conservative aspects of the reproduction of social institutions, erasing almost any possibility for agency on the part of subjects.

While Foucault's network theory of power tells us to look for resistance wherever there are relations of power, it does not provide any ways of distinguishing between resistance that is potentially transformative and resistance that serves to reproduce and maintain the status quo. Similarly, in Bourdieu's twin notions of habitus and field, we see that the habitus is merely the internalized disposition of the field of struggle of which the subject is a participant. Subjects only perform that range of available "plays" or "moves" that their habitus tells them are legitimate. In this way, the structure of the field is reproduced.

These are not the only readings available on the transformative potential of practice. Indeed, these frameworks have provoked many scholars to develop ideas about the transformative potential of everyday practices.<sup>222</sup> These writers, by focusing on what I will call the elements of "play" in practice (resistance, subversion, and poaching) create more room for subjects to maneuver in creating and recreating more just worlds.

#### D. *Resistance and Reappropriation in Everyday Practices*

The focus on everyday practice as a site where power, subjectivity, and meaning come together and are shaped enables a study of the ways in which "regular folks" remake the "products" of the dominant culture through consumption. Michel de Certeau carried out one such study.<sup>223</sup> De Certeau described the process through which the receivers of cultural

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222. James Scott, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTENCE* (1985). For a recent review of this literature, see Sally E. Merry, *Resistance and the Cultural Power of Law*, 29 *LAW & SOC'Y R.* 11 (1994).

223. DE CERTEAU, *supra* note 16, at xiv.

products colonize, appropriate, and make those products meaningful in their own lives as “ways of making do,” or bricolage.<sup>224</sup> “Users make [bricolent] innumerable and infinitesimal transformations of and within the dominant cultural economy in order to adapt it to their own interests and their own rules. We must determine the procedures, bases, effects, and possibilities of this collective activity.”<sup>225</sup>

In describing these processes of “making do,” De Certeau defined “tactics” as those strategic actions that take place on a terrain organized by another.<sup>226</sup> Tactics are the arts of the weak, for whom victories are always partial and easily reversed. The political edge to De Certeau’s cultural criticism originated in the idea that in and through everyday practices—ways of walking, dwelling, reading, dressing, and cooking—ordinary people deploy, play out, and utilize tactics in myriad ways. “The tactics of consumption, the ingenious ways in which the weak make use of the strong, thus lend a political dimension to everyday practices.”<sup>227</sup> Cultural consumption is hence understood as an active, productive form of political activity, identity formation, and meaning constitution.

The transformative implications of this notion extend beyond that of Foucault’s network theory of power, which suggests only that resistance is found wherever there are relations of power. If power and resistance are everywhere, as they are for Foucault, it is difficult to see how some acts of resistance might contain transformative potential, while others merely serve to reproduce the status quo. Building upon De Certeau, we can see how those who resist give meaning to acts of resistance. I argue that the meaning- and subjectivity-constituting aspects of resistance are essential to the politically transformative potential of the practice theory approach.

Along this vein, Rosemary Coombe has begun to examine how marginalized groups, through various means of “consumption” of culture, subvert and appropriate gender roles:

[p]eople continually engage in cultural practices of bricolage-resignifying media meanings, consumer objects, and cultural tests in order to adapt them to their own interests and make them fulfill their own purposes. These practices are central to the political practices of those in marginal or subordinated social groups who forge “subcultures” with resources foraged from the mediascape. . . . Subcultural practices involve improvisational cultural appropriations that affirm

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224. *Id.*

225. *Id.*

226. “The space of a tactic is the space of the other.” *Id.* at 37.

227. *Id.* at xvii.

emergent cultural identities for those in subordinate social groups.<sup>228</sup>

Coombe discussed three examples where marginal social groups, for the purpose of constructing their own nascent social identities, appropriate and subvert traditional gender roles as represented in celebrity culture. Those examples are gay male-camp subculture in the pre-liberation era, lesbian refashioning of pop icons like James Dean, and most notably middle class women's engagement in reading and writing Star Trek fanzines. Each of these groups reappropriates and refashions the celebrity image for a political purpose: to affirm the sexual/cultural identity of the subordinate social group, which is not affirmed in the general political/social culture. Coombe argued that these practices are a necessary and desirable aspect of contemporary democratic politics, which consist of "multifaceted struggles amongst peoples continually articulating new social identities from discursive resources."<sup>229</sup>

In the following Section, I compare two texts in which, I argue, women who find themselves in subordinate positions perform meaningful acts of resistance. The first is the character of Tita in Laura Esquivel's popular novel *Like Water for Chocolate*.<sup>230</sup> The second is Mrs G. in Lucie White's article, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Some Notes on the Story of Mrs. G.*<sup>231</sup> My purpose is to illustrate the continuities between cultural appropriations that occur in the context of everyday life<sup>232</sup> and those that may occur in the context of lawyer/client representation. Through this juxtaposition, I hope to open up the space of lawyer/client relations to the creative and democratizing practices of subversion, appropriation and reimagining.

#### E. *Rebellious Practices in the Kitchen and the Courtroom*<sup>233</sup>

The novel, *Like Water for Chocolate*, tells the story of Tita, the youngest girl in a Mexican family. Tita is born and raised in the kitchen. Her story is told through recipes for meals, home remedies, and other domestic items. In the opening paragraph of the novel, the female narra-

228. Rosemary Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS AND ENT. L.J. 365, 377 (1992).

229. *Id.* at 395.

230. LAURA ESQUIVEL, *LIKE WATER FOR CHOCOLATE: A NOVEL IN MONTHLY INSTALLMENTS, WITH RECIPES, ROMANCES AND HOME REMEDIES* (Carol Christensen & Thomas Christensen trans., 1992).

231. White, *supra* note 19.

232. See, e.g., John Fiske, *Cultural Studies and the Culture of Everyday Life*, in CULTURAL STUDIES (Grossberg et al. eds., 1992); COOKING, EATING, THINKING: TRANSFORMATIVE PHILOSOPHIES OF FOOD (Curtin & Heldke eds., 1992).

233. I borrow the notion of lawyering as a "rebellious" practice from LÓPEZ, *supra* note 3. I am using it because I think that the adjective captures well the idea both of resistance and its transformative potential.

tor alludes to the common and unhappy status of women as kitchen workers, and situates herself firmly within that position, through her description of the ordinary task of chopping onions: "The trouble with crying over an onion is that once the chopping gets you started and the tears begin to well up, the next thing you know you just can't stop. I don't know whether that's ever happened to you, but I have to confess it's happened to me, many times."<sup>234</sup> Symbolically, Tita begins her life both in tears and in the kitchen, where she "had no need for the usual slap on the bottom, because she was already crying as she emerged."<sup>235</sup> By tradition, the youngest daughter in the family was to remain unmarried in order to care for her mother until she died. When Tita falls in love with a young man named Pedro, her mother forbids the marriage and offers her oldest daughter, Rosaurio, to Pedro instead. Out of desire to be near Tita, Pedro marries Rosaurio, while Tita becomes the head cook of the family ranch.

While the kitchen is both the site and the symbol of Tita's oppression, it is also the place where she defines herself as a person. Cooking becomes the mechanism through which she expresses her identity throughout her life. Foods that Tita makes absorb and convey her inner psychological states. After Tita cried tears of disappointment into the batter of Rosaurio's and Pedro's wedding cake, all of the guests who ate it first experienced a great wave of longing, and then a severe bout of vomiting. Later, when Pedro brings Tita a bouquet of red roses to celebrate her anniversary as ranch chef, she makes a dish of quail in rose petal sauce that is so exquisite and sensual that after eating it her sister runs off with a strange horseman.

The novel's magic realism utilizes the everyday practice of cooking to embody Tita's inner life. The cooking of food is a practice which bridges our ordinary distinctions between theory and practice, of "head" work and "hand" work,<sup>236</sup> just as the novel breaks down our ordinary ideas of the distinctions between mind and body, between our thoughts and feelings and our actions. In Tita's power in the kitchen, we see the tactics (in De Certeau's sense) of the powerless at work. The kitchen is not her place, she only occupies it because of her subordinate status, and she must cook for the others on the ranch. Yet, through techniques of dissimulation and bricolage (or "making do"), Tita is able to reappropriate the recipes, skills, and tools of her oppressive mother and the kitchen to forge her own unique identity and ultimately to achieve her own goals. The book's feminist and political edge comes from its

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234. ESQUIVEL, *supra* note 230, at 3.

235. ESQUIVEL, *supra* note 230, at 4.

236. Heldke, *supra* note 208.

simultaneous identification of the kitchen as the locus of women's oppression and its powerful celebration as a site of resistance and empowerment.

In the article, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, Lucie White provides a moving account of another woman's acts of resistance and empowerment through tactics not dissimilar to those deployed by Tita in her kitchen. Lucie White tells the story from the perspective of the attorney who takes on the case of Mrs. G.'s overpayment of AFDC benefits. The lawyer asks for, and gets, a "fair hearing" on the matter of the overpayment, which was the result of an insurance award that she had received for a small accident. Her welfare officer originally had told her she could spend the money any way she liked; but later, the file was reviewed, and she received the overpayment notice. In preparing the case for the hearing, the lawyer told Mrs. G. about the two "stories" they could tell to convince the administrator that she should not have to pay the money back: either her welfare officer gave her wrong advice and should be estopped from collecting the money now, or Mrs. G. had to spend the money on necessities to avert a crisis situation in her family. They decided to go with both stories.

At the hearing, Mrs. G. chose not to recount the estoppel story. When asked what she had done with the money, she replied firmly and confidently that she had bought Sunday shoes for her girls. Mrs. G. said that they already had everyday shoes for school, but they needed new shoes to go to Church. The lawyer abandoned her necessities argument, and they lost the hearing. Three days later, the welfare officer called unexpectedly to tell the lawyer that they had decided to drop the claim for overpayment. Mrs. G.'s story had worked.

Lucie White recounts, in the balance of the article, both the various trajectories of disempowerment at work in the hostile environment of the "fair" hearing, as well as the various tactics employed by Mrs. G. She went to the lawyer, disregarded her advice, and departed from her given script to tell a story about Sunday shoes. The terrain of the hearing was not her own, but by taking all of the prescribed actors by surprise, including her own lawyer, and using her own abilities to "make do" with the materials at hand, Mrs. G. was able to prevail. White's observations about the Sunday shoes story place it squarely within the kinds of cultural and oppositional practices discussed by Coombe and De Certeau.

Subordinated groups must create cultural practices through which they can elaborate an autonomous, oppositional consciousness. Without shared rituals for sustaining their survival and motivating their resistance, subordinated groups run the risk of total domination—of losing the will to use their human powers to subvert the



oppressors control over them. Religion, spirituality, the social institution of the Black Church, has been one such self-affirming cultural practice for the communities of African American slaves, and remains central to the expression of Black identity and group consciousness today. By naming Sunday shoes as a life necessity, Mrs. G. was speaking to the importance of this cultural practice in her life, a truth that the system's categories did not comprehend.<sup>237</sup>

In bringing together the stories of Tita and Mrs. G., I hope to illustrate the powerful potential of everyday practices as a site of resistance and transformation, as well as to make the link between everyday contexts and lawyering practices. Tita's recipes have the same cultural importance and rebellious potential as Mrs. G.'s Sunday shoes. Although both are success stories, they occur on uncertain, ambiguous territory. The victories these women achieve are tenuous, partial, and subject to reversal or retaliation. Yet, they are victories nonetheless. These women's stories may well point us in a new theoretical direction with respect to the transformative possibilities for lawyering practices. In their own small ways, these stories suggest the larger potential of the "culture of resistance" to transform the way we think about law, practice, and social change.

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237. White, *supra* note 19, at 48.