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A TRAGIC VIEW OF POVERTY LAW PRACTICE

Paul R. Tremblay*

INTRODUCTION

Poverty lawyers, we are told, can do as much harm as good for their clients. This humbling theme has been a fixture in the literature and research surrounding the role of lawyers for the poor for some time. The theme captures several deep truths about poverty law. It reminds us that lawyers for the poor can, and do, exclude their clients in the work that they do, view the lives of clients through the distorted prism of law training and law practice, and tend to expend their energies on remedies and processes, largely litigation oriented, which are unlikely to lead to meaningful change in the lives of the poor. Well-intentioned lawyers for the disadvantaged tend to reproduce with their clients the subordination from which clients seek to escape.

This article attempts to offer a preliminary critique of a vision of practice that has emerged in recent years in response to the theme just described. In light of the contradictions, paradoxes, and "antinomies" of lawyering for the disadvantaged, several writers have begun to craft a method of practice that emphasizes and fosters the goal of empowerment of clients. This emerging vision, which I will refer to in this article as the Critical View (while acknowledging that the various authors upon whom I draw do not speak with one voice), hopes to transform poverty law and render it less paradoxical, and less disempowering. It is a valuable, appealing, and instructive vision. In its expression of a radical method of interacting with dependent people, it compels those who work with the poor to reconsider in fundamental ways the assumptions and biases of their practice.

For this vision to be truly transformative, however, it must offer realistic possibilities of altering the day-to-day life and practice of poverty lawyers. Critical View adherents would appear to agree with this normative construct. Their vision takes the form of a "Theory of Practice," with the *Practice* perspective as essential. This article, expressing what I might call the Tragic View, questions the likelihood of a true transformation of poverty law practice

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within the street level bureaucracy characteristic of a typical legal services office, where the most significant poverty lawyering occurs. I disagree very little with the critique propounded by the Critical View, but I suggest that its proposals to restructure this kind of lawyering rest on insufficiently developed theories of autonomy, and neglect in important ways the conflicting pressures upon the lawyers who encounter the daily struggles of the poor. A transformative model of poverty lawyering may indeed be possible along the lines suggested by the Critical View, but we ought to remain fairly skeptical until we are satisfied that adequate means exists for confronting the individual crises that are inevitable in legal services practice.

This article will proceed as follows. Part I will describe briefly the Critical View, first in its critique of traditional poverty law practice and second in its proposals for a new vision of the poverty lawyer/poor client interaction. Part II will highlight my concerns about the proposed new vision of practice. It will offer my Tragic View of this landscape, a view that confronts the informed consent and triage considerations which ineluctably limit our hopes for a more perfect lawyering world.

I. THE CRITICAL VIEW

A. *The Critique of Traditional Poverty Law Practice*

The concerns that inspire the Critical View have been with us at least since Jean Cahn and Edgar Cahn published their pioneering article on poverty law in 1964.¹ The Cahns' proposed "civilian perspective" on the War on Poverty was intended as a rebellion against the centralized, comprehensive, and professionalized poverty programs that they observed being established under President Johnson's noble campaign to eradicate economic inequality. They correctly noted that professional poverty programs excluded the voice of clients in their structure and design.² The Cahns suggested that programs for the poor "amplify[] not [only] the voices of dissent but the voices of silence."³ To demonstrate their thesis, the Cahns described in some detail a poverty law

1. See Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964)[hereinafter *War on Poverty*].

2. *Id.* at 1332. The "one necessary characteristic" of an effective poverty program is that "it voice the concerns of individuals in their capacity as citizens."

3. *Id.* at 1333.

practice that might incorporate this civilian perspective.⁴ Their practice vision was democratic and participatory in spirit,⁵ but its design could not resist the divisions between a professional perspective and a community-based perspective.⁶ The Cahns' poverty law firm tends to look rather conservative from existing perspectives, with its reliance on conventional lawyering as a base on which to develop community power.⁷

The Cahns opened the debate about the proper role of professionals in aiding the dependent and disadvantaged by calling to our attention the propensity of professionals to ignore the perspectives of those whom they seek to help or serve. In the 28 years since the Cahns wrote their article, the level of discourse on this issue has grown in sophistication and in breadth of perspective. The Critical View that I will describe here is of more recent vintage, and rests largely on the recent contributions of Tony Alfieri,⁸ Lucie White,⁹ and Jerry

4. *Id.* at 1334-52.

5. The proposed "university affiliated, neighborhood law firm" was to "stimulate leadership among the community's present inhabitants." *Id.* at 1334. The Cahns saw the law firm as responsive to the needs of the community members, as empowering those members in ways that might be more immediately effective than would community organizing, and as effecting an increased "responsiveness of officials and private parties to the equitable demands of the community's members." *Id.* at 1346. A theme that persists in the Cahns's discussion is one of responsiveness to the agendas that the community presents, rather than a more professional-directed practice.

6. For instance, the authors struggled with an endemic dilemma of community-based lawyering, the problem of "sacrificing an individual client to a 'greater cause,'" *Id.* at 1348, and recognized the difficulties presented by allowing the lawyers to decide whether to turn away clients whose cases were unpopular. *Id.*

7. *Id.* The Cahns argue that lawyers can serve community organizations by offering their technical skills to aid community members in "implementing the civilian perspective." *Id.* at 1336. I refer to their view as "conservative" because it accepts fundamentally the benefits offered by the existing legal regime, even as it rebels against that regime. That view resembles what Lucie White has termed "first-dimensional" lawyering. White, *To Learn and Teach: Lessons from Driesfontein on Lawyering and Power*, 699 WISC. L. REV. 755 (1988) [hereinafter *To Learn and Teach*].

8. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) [hereinafter *Antinomies*]; Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2105 (1991) [hereinafter *Reconstructive Poverty Law Practice*]; Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEG. ETHICS 619 (1991) [hereinafter *Speaking Out of Turn*].

9. 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) [hereinafter *Mobilization on the Margins*]; White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990) [hereinafter *Sunday Shoes*]; White, *Goldberg v. Kelly and the Paradox of Lawyering for the Poor*, 56 BROOKLYN L. REV. 861 (1990) (hereinafter *Paradox*). See also *To Learn and Teach*, *supra* note, at 7.

López¹⁰ to this colloquy. Other writers have contributed significantly to the development of the critique.¹¹ I choose to focus on these three authors and their recent scholarship because they seem to express a most direct exhortation for a new vision of the day-to-day practice of lawyering with the disadvantaged. Their critique is complex, deep, and intricately developed, and I am able only to highlight here two central themes that best capture their vision. I can only apologize for my attempt at such simplification.

The first theme is one which I will call "client voice." The three authors appear to share a largely coincident perspective on this theme, which echoes—but also differs from—the Cahns' "civilian perspective."¹² The Critical View "suggests a practice of lawyering which would continually cede to 'clients' the power to speak for themselves."¹³ In existing poverty lawyering, "[v]oices are silenced and stories are forgotten. The voices silenced are the voices of clients. The stories forgotten are the stories of client self-empowerment."¹⁴ Lawyers, according to this view, exclude client voice in their endeavor to "re-present" clients.¹⁵ This exclusion of voice is both literal,

10. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaborator*, 77 GEO. L.J. 1603 (1989) [hereinafter *Rebellious Collaboration*]; López, *Training Future Lawyers to Work with the Politically and Socially Disadvantaged: Anti-Generic Legal Education*, 91 W.VA. L. REV. 305 (1989) [hereinafter *Anti-Generic Legal Education*]; López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

11. I cannot do justice in this footnote to the scholars and practitioners who have served to develop the empowerment perspective, but certain significant contributions do warrant note here, and I will allude to their contribution in this article. See, e.g., Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) [hereinafter *Visions of Practice*]; Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOCIAL CHANGE 369 (1982-83); Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987); Sarat, "The Law Is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUM. 343 (1990); Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413.

12. The Cahns were directly concerned with client voice in their development of the civilian perspective, but their incorporation of client perspectives was more indirect than that proposed by the Critical View. The Cahns viewed lawyers as more directive of the disputes that poor clients encounter, and they saw litigation and traditional lawyering as more central to those disputes than does the more recent literature. See Cahn & Cahn, *supra* note 1.

13. White, *Paradox*, *supra* note 9, at 863.

14. Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 8, at 2119.

15. Several authors have opted to hyphenate the term "represent" to stress the word's basic thrust of "presenting anew" another person's story, typically through translation of some sort. See Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); López *Lay Lawyering*, *supra* note 10, at 11-13; Ashe, *Bad Mothers and Good Lawyers*, (unpublished manuscript on file with author) (each discussing "re-presentation").

as clients actually speak less, either in meetings with their lawyers¹⁶ or in public proceedings,¹⁷ and figurative, as lawyers employ advocacy strategies that distort client stories, and replace them with stories that more often reflect lawyer perspectives instead.¹⁸ As Jerry López writes, "Too often, especially when working with the politically and socially subordinated, lawyers presume that theirs is the only voice that counts. Clients, particularly those that are relatively disempowered, frequently acquiesce in rather than challenge this presumption."¹⁹ Poverty law practice ought to shift the storytelling from the lawyer to the client; the critical measure of success of a practice will be the faithfulness of the re-creation of client narrative.²⁰

I see also a second theme in the Critical View literature, one which is perhaps more subtle, diffuse, and difficult to articulate, but nonetheless plays a central part in the construction of a true client-centered, empowerment-based practice. This theme is also a more radical one. It questions the role of conventional lawyering as an approach to the disputes that subordinated clients bring to poverty lawyers.²¹ Lawsuits are notoriously poor means by which to empower clients. Lawyers, nevertheless, are trained to see lawsuits as a preferred, and at times the only, avenue for resolving disputes. The critics point out that not only are lawsuits alienating for clients, separated as they are from ordinary meaningful client experience and dominated as they are by lawyer thought, but they also make very little difference to client circumstances in any larger sense. Courts on occasion may offer temporary relief for isolated injustices, but the economic and political structures causing the injustices remain unaffected.

Better, argues the Critical View, that lawyers work in a way which Jerry López calls "rebellious":

16. See Sarat, *supra* note 11, at 361.

17. See Alfieri, *Speaking Out of Turn*, *supra* note 8, at 631; White, *Sunday Shoes*, *supra* note 9, at 49.

18. See Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 8, at 2119.

19. López, *Rebellious Collaboration*, *supra* note 10, at 1629.

20. Cunningham, *supra* note 15—(applying the "translation" idea to lawyering generally, not just lawyering for the disenfranchised).

21. There is a question as well whether clients bring issues to lawyers, with lawyers relatively reactive, or whether lawyers bring issues to poor clients, in a more proactive role. William Simon implies more support for the latter stance, see Simon, *Visions of Practice*, *supra* note 11, at 482-86, as does Tony Alfieri, see Alfieri, *Antinomies*, *supra* note 8, at 665. The reactive/proactive distinction echoes the differing views of client individual autonomy discussed below. See notes 60-63 *infra* and accompanying text.

In this idea—what I call the rebellious idea of lawyering against subordination—lawyers must know how to work with, not just on behalf of, subordinated people. ... In short, the rebellious idea of lawyering demands that lawyers (and those with whom they work) nurture sensibilities and skills compatible with a collective fight for social change.²²

According to the Critical View, existing practice privileges lawyer views of dispute resolution technique, excludes client voices as irrelevant or interfering with that technique, and as a result focuses lawyer and client energies on litigation-based remedies²³ that perpetuate and reinforce client powerlessness.²⁴ To claim that these poverty lawyers are benefitting their clients in this endeavor is at best misleading, and at worst simply wrong. Tony Alfieri, at least, appears to argue that poverty lawyers conducting such a practice begin to take on characteristics of oppressors.²⁵

B. *The Reform of Practice.*

The Critical View does not only critique existing poverty law practice; it suggests the outlines of an alternative practice, focused on the goal of

22. *Id.* at 1608. *see also Anti-Generic Legal Education, supra* note 10.

23. This critique differs from a corresponding criticism of poverty law practice which complains that lawyers for the poor, notably legal services lawyers, take their clients' legal claims *less seriously* than they ought to. *See Bellow, supra* note 11, at 56-57 (challenging current practice of mass processing client disputes in legal services offices, and suggesting more trials, fewer quick settlements); Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 416-17 (noting "perfunctory service"); Sarat, *supra* note 11, at 352-55 (legal services clients perceive their lawyers as not pressing claims with great zeal and commitment). My suspicion is that both phenomena, contrary as they may seem, are driven by the same "practice ideology" of the legal services setting. *See Tremblay, Toward a Community-Based Ethic of Legal Services Practice*, 37 UCLA L. REV. 1101, 1108 (1990); *see also* discussion *infra* at notes 71-75 and accompanying text.

24. The Critical View sees two related reasons for this perpetuation of powerlessness. First, the client's relationship with the lawyer is a dependent one, and thus reproduces the hierarchy that otherwise dominates the client's existence. Second, the use of a lawsuit (or even a shadow lawsuit device, such as negotiation or administrative proceedings) exercises status quo power relations, accepts that status quo, and in doing so siphons off energies that might have greater long term benefit focused on organizing for political and economic power.

25. "[T]he habits of perception and interpretation dominant in the practice of poverty law . . . reify and reproduce myths of legal efficacy, and inherent indigent isolation and passivity which sustain and reinforce relations of power oppressive to the poor." Alfieri, *Antinomies, supra* note 8, at 661. *See also* White, *Paradox, supra* note 9, at 861 (conventional lawyering reproduces subordination).

empowerment. Critical View practice will incorporate client voice "continually," to employ Lucie White's term.²⁶ One important method of that incorporation is to ensure that the client's narrative is re-presented in the lawyerly work product emerging from the attorney-client relationship. The legal storytelling that occurs in pleadings, argument, negotiation, publicity, and so forth ought to be the client's story, not the lawyer's reconceptualization of that story.²⁷ Rather than "tailoring" the narrative the lawyer hears to fit preexisting legal categories—a process which leaves clients mute—poverty lawyers ought to engage in dialogue with clients to ensure as faithful a translation of client story as possible.

Inclusion of client voice also implies more meaningful methods of collaborating with clients on lawyering activity. Even politically sensitive and client-centered²⁸ lawyers tend to work in isolation in developing work product, even if their intent is to craft that product to accomplish goals determined and directed by the clients. The Critical View argues against this separation of function, and against this isolation. Tony Alfieri offers an example of what this might mean. He is quite self-critical in his description of his earlier client representation in a class action lawsuit challenging food stamp regulations for his failure to include his client in the legal strategies underlying the litigation:

I did not fully include her in discussions regarding the constitutional and statutory bases of her case or the strategy of litigation designed to attack the food stamp regulations. Nor did I provide her with legal materials (e.g., statutes, regulations, legislative history, case law) to explicate my case theory and strategy.²⁹

26. White, *Paradox*, *supra* note 13.

27. "The intent is . . . to understand and rectify the loss of client narratives in lawyer storytelling." Alfieri, *Reconstructive Poverty Law*, *supra* note 8, at 2119. See also *Speaking Out of Turn*, *supra* note 8, at 620-633; White, *Sunday Shoes*, *supra* note 9, at 49; Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1, 15-18 (1991); Cunningham, *supra* note 15.

28. Client-centeredness is the rather accepted phrase for a view of the lawyer/client relationship that argues for decisionmaking processes encouraging development of client values and client-chosen remedies. It derives from the David Binder and Susan Price text on legal interviewing and counseling. D. Binder & S. Price, *Legal Interviewing and Counseling* (1978). See also, Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

29. Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 8, at 2128. Jerry López offers a similar example in his fictional account of Martha and Jesse. Martha, the lawyer, develops a terrific plan for beginning to explore multidimensional tactics in response to Jesse's apparent racial discrimination, and López, while lauding the plan, criticizes Jesse's absence from that process. López, *Rebellious Collaboration*, *Supra* note 10, at 1657.

These suggestions serve both *process* and *substance* goals.³⁰ More meaningful, actual participation in the lawyering process empowers clients, in ways which having their case handled by an attorney will not. In addition, however, this participation may also have the benefit of increasing the likelihood of achieving the goal of the representation, of "winning."³¹ Jerry López describes his fictional lawyer discussing her responsibilities to her clients in a civil rights dispute as follows:

With respect to Jesse [the client], I imagine this would involve maximizing his role in decisionmaking and seeking to portray, represent and characterize in the lawsuit his and Sylvia's [his wife] life experience, not only because this effort might be more politically satisfying but *because it's likely to generate a far more effective legal product.*³²

I also read this same message in Lucie White's *Sunday Shoes* story and her reflections upon it.³³ White tells a powerful story of the struggle between a legal services lawyer and her client to fashion the most appropriate presentation of the client's welfare hearing. The client rebels at the hearing and tells her story, in her own voice, in a way not anticipated by the lawyer in her collaboration with the client, and ultimately prevails. White does not pretend to offer us a neat "moral" for her story, as the characters and their histories are complex and in flux, but it appears important to her telling of the story that the client ultimately "won" the matter for which she sought the aid of the lawyer.³⁴

30. For a discussion of the distinction between intrinsic and extrinsic values in the attorney-client relationship, see Cunningham, *supra* note 15; Cahn, *supra* note 27, at 16-19.

31. "Winning" in this context instrumental goals—e.g., influencing a decisionmaker, negotiating a satisfactory resolution to a dispute, etc. I use the term in contrast with process goals, which are intrinsic, and which may be independent of substantive instrumental goals. Every representation has both elements. I read the Critical View to argue (or perhaps to assume) that client collaboration assists the accomplishment of both.

32. López, *Rebellious Collaboration*, *supra* note 10, at 1710 (emphasis added).

33. White, *Sunday Shoes*, *supra* note 9.

34. See *id.* at 47. The lawyer had tried to "collaborate" with Mrs. G. in devising an advocacy plan. Yet the terms of that "dialogue" excluded Mrs. G.'s voice. Mrs. G. was a better strategist than the lawyer—more daring, more subtle, more fluent—in her home terrain. Tony Alfieri, similarly, tells the story of Josephine V., his client who "speaks out of turn" at her public assistance hearing, boldly and unconventionally so, giving life to the voice that the lawyering had so suppressed. Alfieri, *Speaking Out of Turn*, *supra* note 8, at 643. She, like Mrs. G., also won the hearing at which she spoke out. *Id.*, at n.128.

Martha Fineman writes of the "morals" that audiences draw from the stories they hear. Fineman,

Implementing what I have called the client voice theme in Critical View practice would mean involving clients in lawyering activities in a fashion which, it is fair to assume, greatly exceeds that of conventional lawyer/client collaboration presently. In doing so, the Critical View asserts that the clients' success on the matters for which they have consulted the lawyer will be enhanced.

The Critical View's transformed vision of practice also stresses the importance of community organization and collective activity. It understands clients not as isolated victims, but as actors in a broader social fabric. It argues for a professional duty of poverty lawyers to strive to form connections among clients and among other disadvantaged people. This duty, which Tony Alfieri calls the "ethic of resistance,"³⁵ is central to the Critical View's thesis.³⁶ Alfieri writes that "recognizing collective networks of resistance is indispensable to recapturing the omitted stories of clients."³⁷ Jerry López's account of rebellious lawyering insightfully questions the effectiveness of litigation to deal with the community tensions which his civil rights story represents, while acknowledging at the same time the leverage the courts do (sometimes) offer to the disempowered. The lawyer in his account offers this possibility of a strategy that might prevail for her clients:

[M]y present conception of the ideal ultimate solution to the problem is a collective, nonadjudicated discussion and negotiated end to police harassment and forced exclusion of Latinos from Zalaipa. In order to move toward such a solution, we are going to need time to help mobilize the Latino community and to convince the Anglo leaders to listen and bargain.³⁸

Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 HARV. L. REV. 727 (1988). While implicit, the meaning we derive from the stories of Jesse, Mrs. G., and Josephine V. is that success in lawyered disputes is more likely if lawyers can learn to "cede" the voice to their clients.

35. Alfieri, *Speaking Out of Turn*, *supra* note 8, at 622.

36. It is fair to say that each of the authors cited in notes 8-12 *supra*, has relied on collective efforts as essential to a truly radical poverty law practice.

37. Alfieri, *Speaking Out of Turn*, *supra* note 8, at 646. Alfieri's earlier writing contains an even more vocal call for development of communities of clients to empower them to confront the oppression which they have faced individually and in isolation. See *Antinomies*, *supra* note 8, at 704-710.

38. López, *Rebellious Collaboration*, *supra* note 10, at 1668.

Lucie White is also explicit in suggesting a rethinking of conventional litigation strategies on behalf of the poor:

What, indeed, can advocates do? Rather than seeking any more remedies *for* the poor, we might hesitate for a moment before filing another lawsuit, even if we know exactly how to frame a winning claim. Instead, we might look around us for spaces where poor people can talk among themselves about what they want to do.³⁹

The sentiments of the Critical View on the benefits of assisting the poor to organize for collective action are not new, of course.⁴⁰ They deserve our close attention, however, even if they echo themes expressed before. The more recent efforts to advocate a collective orientation to poverty law emerge from a more sophisticated base, relying as they do on critical left philosophers, critical race theory, and feminist notions of contextual and connected visions. These efforts are therefore powerful, both in evocative and intellectual force. The efforts appear to comprise a more coherent paradigm of radical practice, and to offer suggestions which transcend the prior distinctions between individual casework, impact litigation, and community bonding efforts. That coherence adds to the force of the Critical View, and at the same time necessitates increased, if still appreciative, scrutiny.

II. THE CRITICAL VIEW ASSESSED: A TRAGIC PERSPECTIVE

The vision of practice I have just described has great attraction. It captures and builds upon values I share, and that most poverty lawyers ought to, and likely will, embrace. It is descriptively correct. Lawyering for the poor as

39. White, *Paradox*, *supra* note 9, at 887. See also White, *Mobilization on the Margins*, *supra* note 9, at 546 (conceding that the ends of that collective conversation would not be to effect judicial change, but to accomplish the "broader goal[]" of "a momentary experience in the exercise of power"). Howard Lesnick offers a similar view of lawyering which he terms "radical," as contrasted with "liberal" or "conservative," which would "communalize the representation of a client . . . in the more fundamental sense of enabling [the client] to see that the problem presented to him by [the client's adversary] is one that he has in common with others, and that one route to his empowerment is for him to seek solutions as part of a community." Lesnick, *supra* note 11, at 438.

40. Jean and Edgar Cahn were concerned with collective efforts in their early writing about poverty law practice. See *War on Poverty*, *supra* note 1, at 1351. See also Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

presently constituted *is* disempowering for poor clients. It is normatively attractive as well. A practice that serves to begin to empower clients (or even to disempower less), and that might effect the beginning changes in the political landscape for disadvantaged persons warrants serious attention. Poverty lawyers need to engage consistently in self-reflection about how their practice impacts on their client community, including ways in which their work and their ideologies impact on clients in ways that may be ignored or overlooked. The Critical View represents that reflective stance at its best.

While I am seduced by the Critical View, at the same time I find myself questioning several of its suggestions, and this section of this Article will begin to sketch out my concerns. My limited purpose here is to pose questions about how the Critical View vision can *work*. A Theory of Practice perspective must be vigilant on that score. The questions will revolve around two notions—the role of autonomy in the new vision of practice, and the reconciliation of the triage function with the teaching of the Critical View.

These two concerns seem to reflect my bias that the Critical View ought to acknowledge more satisfactorily the context of legal services practice: the high volume, perpetual crisis, “emergency room” milieu of the neighborhood office.⁴¹ This bias contains within it at least two assumptions. It assumes that a Theory of Practice for poverty law ought to account for *legal services* practice. While the Critical View clearly applies to lawyering for subordinated clients outside the legal services setting,⁴² by far most lawyering for the poor will occur within the subsidized legal aid milieu. My bias also assumes that the legal services offices where the poverty law takes place will in fact resemble “emergency room” settings, and because of that will be bound, in some fashion, by triage principles. This second assumption seems to me less self-evident. The Critical View could argue for a design of legal services practice that does not become bound by triage considerations. As I discuss

41. I suppose I am now confirming the prophesy of Tony Alfieri, who wrote, “The joining of theory and practice [which he was espousing] may disenchant some in the poverty law community. They may fairly object that theory is too remote from the upheaval of daily practice to be of use.” Alfieri, *Reconstructive Poverty Law*, *supra* note 8, at 2120. Alfieri’s prediction is close to the mark. I do not find the theory to be of no use, but I do believe that its neglect of the “upheaval” is a failing.

42. See, e.g., López, *Rebellious Collaboration*, *supra* note 10, (private counsel litigating civil rights matter). Jerry López points out that much of the civil rights work that occurs emanates from private law offices, *see id.* at 1611, but that should not imply that most lawyering activity for poor persons is handled by non-public sources.

below,⁴³ I find this possibility unlikely, and therefore I take my two assumptions to be reasonable ones.

Let me first explore the autonomy issues I see as critical here, and the first of those attaches to the "client voice" theme. The argument that client voice be taken more seriously has several consequences, some of which appear to be without any foreseeable drawbacks. For instance, it is hard to disagree with the proposition that lawyers ought to be faithful to the stories clients bring to the interaction, be empathic to the needs, feelings, and values of the clients, and not substitute lawyer goals for client goals.⁴⁴ This lesson, which is contained within the Critical View, merely reflects current ethical teaching.⁴⁵ I see the Critical View as far more than a sophisticated version of Binder & Price, however. The "client voice" theme I have described calls for a level of collaboration and a view of the attorney-client relationship that *does* raise intriguing consequences.

The collaborative suggestions seem to impact on the *intrinsic* goals in the representation (the storytelling function—ensuring that clients are heard), as well as the *instrumental* goals in the representation (accomplishing the results sought when the client consulted a lawyer). As Naomi Cahn notes, it may be as significant for a client to have her story heard in a meaningful way as it is to win her case on the merits.⁴⁶ Clark Cunningham's stories remind us of the same thing.⁴⁷ What must be addressed, however, is the *tradeoff* that may result in any given lawyer/client encounter between intrinsic and instrumental ends. The Critical View largely elides this question.

The Critical View literature implies that intrinsic and extrinsic goals are not in conflict and may even dovetail. For instance, Lucie White and Tony Alfieri tell stories of clients who expose their own voices, contrary to the strategy judgment of their respective lawyers. In doing so, each client is empowered

43. See note 71, *infra* and accompanying text.

44. As Carl Hosticka, among others, has shown, lawyers, and particularly legal services lawyers, often do not meet this ethical standard of practice in fact. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBLEMS 599 (1979).

45. See, e.g., D. BINDER, P. BERGMAN & S. PRICE, *LAWYERS AS COUNSELORS* (1990); D. BINDER & S. PRICE, *supra* note 28.

46. Cahn, *supra* note 27, at 17.

47. Cunningham, *supra* note 15, at 2492.

by the process *and prevails* on the merits.⁴⁸ But the question remains: What if, in those stories, the client had lost? What if the lawyer's judgment, limited in scope and vision as it was, and focused as it was on regulatory arguments and advocacy technique, had been correct in its predictions about the conduct of the decisionmaker?

There is some reason to suppose that powerless people may benefit, in (short term) instrumental terms, from having their stories translated by lawyers into "logic of the law." The Critical View authors themselves teach us why this risk is ever present. Lucie White's rich discussion in two of her articles⁴⁹ of the political implications of language educates us that "patterns of talk which socially powerless people typically use in informal courts may not 'articulate' well with the logic of the law."⁵⁰ Similarly, Jerry López's article on lay lawyering demonstrates that effective advocacy will employ "stock stories" which take into account the decisionmaker's view of the world.⁵¹

That there are serious costs in intrinsic terms (as well as in long term instrumental terms) in the translation of client stories by lawyers is an insight we often overlook, and the Critical View is impressive in reminding us of that consequence. Once having recognized those costs, however, an autonomy perspective would argue that the matter must be addressed in terms of informed consent. In other words, if there is a chance of instrumental gains at the expense of intrinsic, one would expect that—everything else being equal (which

48. White, *Sunday Shoes*, *supra* note 9; Alfieri, *Speaking Out of Turn*, *supra* note 8. See notes 30-34 and accompanying text. Mrs. G. in Lucie White's narrative opts, to the surprise of her lawyer, to justify her spending of a lump sum recovery on items such as "Sunday shoes" for her children. White indicates that such an expense did not qualify as appropriate under the applicable regulations, and the client's surprise testimony did not comport with the legal theory developed by the lawyer (with actively if perhaps unsuccessfully invited input from the client). Josephine V. in Tony Alfieri's story speaks "out of turn" at her welfare hearing, and offers an impassioned account of her strength amid oppressive poverty. Her speaking out is described by Alfieri as against the judgment of her lawyer, whose legal theory unwittingly suppressed her narrative. As noted, both Mrs. G. and Josephine V. won their welfare hearings.

49. White, *Mobilization on the Margins*, *supra* note 9, at 543 n.35; *Sunday Shoes*, *supra* note 9, at 14-19.

50. White, *Mobilization on the Margins*, *supra* note 9, at 543 n.35, citing O'BARR & CONLEY, RULES VERSUS RELATIONSHIPS IN SMALL CLAIMS DISPUTES, IN CONFLICT TALK (A. Grimshaw ed.) (1989).

51. López, *Lay Lawyering*, *supra* note 10, at 9, 29, 45.

Intelligibility demands that Son tell a story that Man can see and hear as one of his own stock stories. To do that most effectively, Son must understand what it means to tell a story that Man would be willing to adopt as his own version of his relationship to Mom in the circumstances.
Id., at 29.

it may not be in a legal services context, if one adopts a triage ethic⁵²)—a client will decide which is preferred.

The Critical View does not *reject* client-centeredness on this score. It tends not to capture the choice at all, in that it sees client collaboration as instrumentally effective as well as intrinsically effective.⁵³ Again, it is important to distinguish the Critical View's collaboration lesson from more traditional notions of client-centeredness. The latter model has been justified as producing "better results," since the client is the only true judge of what is most important to him.⁵⁴ Client-centeredness permits clients to make "unwise" decisions once fully informed about consequences. The Critical View's collaboration method also sanctions such client-directed decisionmaking, and in doing so is consonant with the existing ethical model. But the Mrs. G. and Josephine V. stories are qualitatively different in their teaching, if I read them correctly. They redefine the lawyer's role in the counseling process. Rather than ask the client to choose among options as defined by the lawyer's legal analysis, these stories rely more directly on the client's assessment of strategy, aiming both to achieve empowerment goals and instrumental, success-related goals at once. My sense, and my reasons for wanting to think more carefully about the Critical View lesson, is that in many cases that reliance may be subject to some more or less substantial risks to the merits of the case, in which case those risks must then be processed according to informed consent standards.

Saying that informed consent needs to be factored into the discussion merely introduces two additional complex considerations. The first is that many clients who come to a legal services office, if faced with the choice, will opt

52. The triage obligations of a legal services office might create very difficult choices on this score. See discussion below, *infra* at notes 70-71 and accompanying text.

53. Lucie White does consider in her discussion of the three "ideal types" of activist lawyers the possibility that, in impact litigation contexts, a "lawyer and client may choose to . . . sacrifice a favorable outcome precisely in order to make the litigation speak most effectively to public consciousness," White, *To Learn and Teach*, *supra* note 7, at 759. Her discussion there, however, assumes a joint goal of political change, and she does not address the process by which a client is confronted with the initial question of defining the ends of the representation.

54. The "better results" argument was first posed by Mark Spiegel. Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 85 (1979). See also DINERSTEIN, *supra* note 28, at 544-46.

for instrumental ends over intrinsic ends when they are in conflict.⁵⁵ Because clients come to legal services lawyers when they are in crisis (with income, housing, health, or safety in rather immediate jeopardy), we are not surprised by this choice. The second is that those clients who do opt for intrinsic ends at the expense of instrumental ends will force poverty lawyers to confront very difficult triage questions. These triage considerations will be developed below.⁵⁶

If client-centeredness and autonomy concerns inform (and complicate) the storytelling notion, they also achieve significance in the Critical View's proposals about creative, empowering lawyering methods. Consider the following lesson from Tony Alfieri:

My thesis is that poverty cannot—indeed should not—be remedied by these [conventional lawyering] traditions. Remedial litigation should not be mounted, even where altruistic relief is possible, without the activation of class consciousness among the poor, nor without the political organization and mobilization of the poor.⁵⁷

Alfieri's plea is persuasive, given his premises (poverty lawyer's mandate is to empower the poor; empowerment only can be achieved by collective efforts). Other Critical View writers have expressed similar sentiments.⁵⁸ What seems missing from this plea, however, is the client's participation and engagement in the *choice of goals*.⁵⁹

The methods I shall term "collective" promise substantial long term benefit but at some recognizable cost—the foregoing of short term gain. To argue that

55. For instance, if "speaking out" at a welfare hearing is likely to decrease the chances of obtaining a successful ruling from the administrative law judge, then the client must decide whether the participatory benefits of speaking out will outweigh the risk that doing so will lead to a loss of the welfare benefits at issue in the proceeding.

56. See notes 70-71 *infra* and accompanying text.

57. Alfieri, *Antinomies*, *supra* note 8, at 664.

58. White, *Paradox*, *supra* note 9, at 885; López, *Rebellious Collaboration*, *supra* note 10, at 1669, 1709.

59. In this regard this criticism recalls Stephen Ellmann's observation that the Binder & Price counseling and interviewing models were paternalistic in their instruction to lawyers to impose a model of conversation (client-centeredness) upon clients without the latter's input into that choice. Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987).

lawyers possess a professional duty⁶⁰ to adopt collective remedies is to assume some consent on the part of clients to engage in those remedies, or to assume some basis for foregoing that consent. A traditional autonomy perspective would suggest a process of dialogue leading to client-centered decisions on how to proceed.⁶¹ The emphasis in Critical View literature on faithfulness to client voice implies acceptance of this view of autonomy. There is another view of autonomy, captured best perhaps by the writing of William Simon,⁶² which argues in favor of less reliance on client description and reporting of values, interests, and judgments, and instead cedes to the lawyer greater responsibility for effecting (and affecting) the development of client self-determination.⁶³ I sense disagreement of the Critical View with the Simon perspective, but I may be wrong in that assessment, and the Critical View writers may not agree among themselves on how to approach that issue. What does seem evident is that this autonomy configuration as it applies to the Critical View practice suggestions needs much greater exploration.

Having said this, I will note that the conventional autonomy principle appears to interfere somewhat with the Critical View's collective emphasis. The Critical View must recognize the possibility that poor clients, facing a choice between the long term, speculative rewards of collective, organizing efforts and the short term, less speculative (if perhaps more illusory) benefits of individual dispute resolution technique, often will opt for the latter, based on the urgency of their circumstances. A Theory of Practice that *compels*⁶⁴ collective efforts must confront the client role in the adoption of that ethic. If, on the other hand, one argues that lawyers must encourage clients to become empowered, and to engage collectively, and not rely on client initiative on that

60. The literature often employs language of duty in its discussion of collective, empowering lawyering methods. See, e.g., Alfieri, *Antinomies*, *supra* note 8, at 664 (remedial litigation "should not be mounted" without empowerment measures). Lucie White and Jerry López describe the duty more in process terms, arguing that lawyers for the poor have an obligation to *understand* and to *consider* collective remedies. See White, *Paradox*, *supra* note 9, at 887; López, *Rebellious Collaboration*, *supra* note 10, at 1608.

61. See, e.g., BINDER, BERGMAN & PRICE, *LAWYERS AS COUNSELORS* 16-23 (1991); Dinerstein, *supra* note 28, at 512-16.

62. See Simon, *Visions of Practice*, *supra* note 11, at 488 (lawyer's role is to enhance client's ability to express interests, and "to consider that people have interests of which they are not aware"); Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1125 (autonomy is not self-evident trump of other values); Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

63. For a critique of the Simon view, see Dinerstein, *supra* note 28, at 556-66.

64. See Alfieri, *Antinomies*, *supra* note 8, at 664.

front, one must then reconcile that activism with the notably anti-activist tone of the Critical View in its reliance on client voice.

The other response to the autonomy question is an institutional one. A legal services *program* might opt to focus its efforts only on those clients who agree to participate in collective reform efforts. Having done so, the institution will have defined away this informed consent question, as is its presumptive institutional right.⁶⁵ Whether an office possesses ethical justification for doing so, or whether the program might also choose to deprive clients of an informed consent choice regarding individual, intrinsic remedies, requires some thought about *triage*. The triage implications of the Critical View's teachings are significant.⁶⁶

There are two ways in which the Critical View's ideas impact on the triage function. The first observation is that the Critical View's long view, its empowerment view approaching a professional obligation, will face very tangible obstacles at the street level. The more that a legal services office assumes the role of the community's legal emergency room, the more difficult it will be to stress, as the Critical View does, a focus on long term remedies. In a perfect world the poor would have the legal equivalent of both emergency rooms and public health planning resources. In our imperfect world the poor have but one institution, the legal services office. It is unlikely, given its assignment as savior of last resort, that the institution will be capable of adopting the long view, particularly that suggested by the Critical View. A long view that still seeks institutional change within the system (Lucie White's "first-dimensional" (or even "second-dimensional") lawyering⁶⁷) offers some concrete expectation to clients in need; a long view that seeks more substantive, structural change outside the existing system (White's "third-dimensional lawyering") might be more difficult for programs to justify ethically if clients are suffering presently.⁶⁸

65. Several writers have explicated the justifications for an institutional legal services program to focus on long term change for the benefit of many, at the expense of short term, individual efforts. See Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978); LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 306-310 (1988).

66. I have addressed the triage implications of legal services practice elsewhere. Tremblay, *supra* note 23. The discussion that follows in the text builds on the ideas I expressed there.

67. White, *To Learn and Teach*, *supra* note 7, at 755-57.

68. The difference in attractiveness seems grounded in the degree of *speculation* inherent in each route. Collective efforts will continue to feel more speculative than, say, a class action lawsuit. This is partly because the lawyers are the decisionmakers, see Tremblay, *supra* note 23, at 1138-39, but partly because we have less experiences upon which to draw to make firm predictions in the collective realm. Only if the Critical View persuades us that intra-system efforts make *no real difference* will this inequality in speculation

Institutionally, much pressure will exist to confront the immediacy of the crises of clients' lives. The emergency room model of legal services practice will justify an ethical triage process that prioritizes immediate need, and deprioritizes the long term benefit of empowerment. The Critical View challenges this choice of priorities, but wanes in influence on this question by the inherent speculativeness of the benefits which it offers. That is not to say that it is wrong in its prediction; rather the Critical view poses an argument that is difficult to sustain among the actual decisionmakers in the face of immediate pain among clients asking for assistance.⁶⁹

What I have just outlined is a *descriptive*, psychological view of the poverty law context. It is not necessarily a *normative* view. The normative question is whether a triage process favoring the short term and immediate over the long term and less immediate is an ethically justifiable one. That question must be left for another day.⁷⁰ My point here is that the Critical View tends not to incorporate in its critique the context that demands such a triage. I do not read the Critical View as defining triage out of the picture. One might seek to implement the Critical View's practice models in a way that minimized triage, but that structure would then violate, it seems, many of the important values expressed by the Critical View. Triage seems avoidable only by structural limitations on representation, which limitations would descend from above, from the institutional hierarchy. The inclusion of client narrative, client life experience, and client voice plainly implies much individual contact, and individual contact plainly implies triage.⁷¹

evaporate. While some may argue that extra-systemic methods are in fact as ordered and predictable as intra-systemic methods, *see* Simon, *Visions of Practice*, *supra* note 11, at 496 n.68, it will call for substantial education to overcome the *feeling* that intra-system work is less speculative.

69. *See* Lesnick, *supra* note 11, at 449 (the failings of a radical perspective are that the very integrity of its critique disables it from addressing "the here-and-now of particular issues, which invariably arise out of a context that from a radical perspective is pervasively flawed").

70. I intend to continue to explore that question in a forthcoming Essay in the Hastings Law Journal's Symposium on the Theoretics of Practice. *See* Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street Level Bureaucracy*, 43 HAST.L.J.(1992) (forthcoming).

71. This issue needs to be developed at greater length, but it appears that triage will be inevitable in a legal services context unless one radically redesigned a neighborhood office (or, perhaps, eliminated the idea of neighborhood offices) to control representation decisions based upon factors *other* than triage. Those factors will inevitably be reflective of larger community needs (certain kinds of welfare or housing disputes, e.g.), and the more that the institutional mission is driven by that kind of objective, the greater the interference in the value of client voice and individual client collaboration. For further discussion of the conflict between the role of individual clients and of larger community goals, *see* Tremblay, *supra* note 23, at 1124-29.

The second triage point is one that is far more tentative and disconcerting, but one deserving some thought. For it I return to Tony Alfieri's recounting of his experience with his food stamp litigation.⁷² His self-criticism, really criticism directed to poverty lawyers generally, challenged lawyering that excluded the poor from active participation in the details of their legal work. He asserts that clients will be empowered by that participation, and, since client empowerment is the goal of poverty law practice, such active collaboration is essential.

But how does that assertion confront the reality of triage? If there is a distinction between instrumental and intrinsic needs of clients, and if we assume a single office available to all the poor in the community, it might be argued that it is not unfair for the institution to justify a preference for instrumental goals over intrinsic goals. This supposition deserves much more thought, for it has a visceral unpleasantness. But, in thinking of Alfieri's example, do we fault a legal services office for litigating a food stamp action without teaching clients about the role of regulations and statutes, if that decision is based on the principle of serving more people? Such collaboration has important benefits, but it is accomplished directly at the price of excluding other clients entirely.

In the article in which Alfieri insists on the collaborative lawyering just described, he relates that on the day that his food stamp client came to the office for assistance, 30 or 40 prospective clients were screened at the door. Of those, 10 or 12 ultimately were found "worthy" of consideration for representation.⁷³ It seems to be a fair inquiry, and an important ethical inquiry, to wonder whether the lawyers who choose to educate clients less about the complexities of their case in order to have time to offer some representation to other excluded clients are not modeling a more effective poverty law practice.

One possible, and one might say likely, consequence of the triage perspective as applied to the food stamp client is that the process will privilege instrumental concerns over intrinsic concerns where the choice between the two seems stark. An example will make this point clear. Clark Cunningham has described "The Case of the Silenced Lawyer,"⁷⁴ a prisoner whom Cunningham's office represented by appointment of the federal court. The

72. Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 8. See note 29, *supra* and accompanying text.

73. Alfieri *Reconstructive Poverty Law Practice*, *supra* note 8, at 2122 (the scare quotes are Alfieri's).

74. Cunningham, *supra* note 15, at 2465-69.

matter when referred by the court was framed as a civil rights case, and the clinical students saw immediate due process arguments, around which they developed their brief. The client's "story," however, was very different—so different that he discharged the counsel because their "translation" of his theory into more conventional doctrine violated his integrity.⁷⁵

Cunningham's narrative, while teaching several important insights, offers an example of a difference between client "voice" and lawyer "voice." The client seemingly had a chance to "win" with the lawyers' arguments, but "winning" was not what was important to him, at least not if he was deprived of his story in the process. In this way the narrative exemplifies a central theme of the Critical View—the ways in which lawyers misunderstand and distort client lives. At the same time his narrative also shows us the tragedy of triage, for in a legal services setting his need to have his ("losing") story expressed would be given, I suspect, very low priority. Client-centeredness would suggest that he craft his case as he, and not his lawyer, sees fit, but triage would interfere to say that he could not have access to a lawyer to assist him to do so.

CONCLUSION

Any real conclusion would seem out of place for this article, for it offers only questions and inquiries that deserve further exploration. My purpose has been to embrace the Critical View for its persistent defense of subordinated clients in an arena where their voices are too often suppressed. At the same time I have sought to question how the ideals of the Critical View might be reconciled, even if they indeed will be compromised, with the street-level bureaucracy of most poverty law practices. Perhaps I am too pessimistic; my inability to accept easily the improved vision of practice might reflect my entrenchment in the present system.⁷⁶ In any event, the questions I pose are real to me and a truly meaningful theory of practice will seek to address questions of empowerment in a regime characterized by great scarcity and great misery.

75. The client's theory was that the entire disciplinary system at the prison was unconstitutional. Cunningham implies that this argument was not one that the students were comfortable arguing. *Id.* at 2466-67.

76. See Lesnick, *supra* note 11, at 439-454.