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Impoverished Practices

ANTHONY V. ALFIERI*

Bertie Johnson sat in the waiting room all morning. She held a cane upright in her right hand and a white plastic bag in her left hand clasped against her lap. When I opened the main office door and called out her name, she looked up and answered in a loud, hoarse voice. She then propped her left hand against the seat of the chair next to her, gripped her cane with her right hand, and stood up grimacing. Pausing for a moment to steady herself, she turned, barely looking up, and hobbled through the doorway, down the hall, and into my office where, braced by her cane, she sat down heavily.

Seated stiffly, Johnson awkwardly lifted the plastic bag and with two hands placed it on my desk. She pulled off the bag and pushed forward a set of papers, stacked two inches thick, bound with brown cardboard. She stated that the papers had “come in the mail” from “Social Security.” She then reached into the pocket of her overcoat, unfolded a second set of papers, and handed them to me. She referred to the papers as a “letter,” remarking that it had “just come.”

Issued by the U.S. Department of Health and Human Services pursuant to a federal district court’s remand order, the two page “letter” notified Johnson that the Social Security Administration’s (SSA) Appeals Council had remanded her disability case back to an administrative law judge (ALJ) for further proceedings, including a new hearing.¹ Pending the hearing, the notice directed Johnson to attend a medical examination to be conducted by a SSA consultative physician.

Johnson balked at this directive. She protested that the ALJ “didn’t like” her and “didn’t believe” her. She accused him of acting “against” her and cited the adverse decision as an illustration of his “bias.” Charging that the ALJ had “already made up his mind,” Johnson asked me whether legal aid would represent her at the hearing.

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This article is dedicated to my colleagues and students for their collective generosity during an untimely illness.

1. See 20 C.F.R. §§ 404.977, 404.983-984 (1992) (authorizing Appeals Council remand).

Johnson's question is well known to poverty lawyers. Poor clients pose it daily in legal aid offices. Although the question is commonplace, the answer is elusive. By elusive, I do not mean that the answer is unavailable. Indeed, poverty lawyers answer the question routinely. Every day they accept and reject cases. Nor do I mean that the answer is indefensible. Poverty lawyers rally a number of defenses to justify decisions to accept and reject cases. The justifications invoke client-centered, community-centered, and even institution-centered theories of lawyer decisionmaking.

Instead, by elusive I mean that the answer to the question of representation is makeshift. In theory, the answer rests on formal claims of neutrality and objectivity, or in the alternative, instrumental claims of purposivism and practicality. In practice, the answer founders on its own claims. This failure is troubling. Without a coherent theoretic of practice, poverty law advocacy degenerates into a discretionary practice of lawyer moral and political judgment. This gatekeeping practice is incompatible with a vision of poverty law advocacy as a form of and forum for community education, organization, and mobilization. That incompatibility stems from modernist foundational assumptions about law and the lawyering process in impoverished communities. These assumptions will neither gain coherence nor lose their moral-political dialectic through the renewed commitment or heightened reflection of poverty lawyers. While commitment and reflection are necessary, they are insufficient. What will suffice in the end is uncertain. Yet, uncertainty is not fatal to the lawyering process. In fact, it is uncertainty that gives rise to this inquiry and to the larger project of reconstructing poverty law practice.

The roots of this project grow out of a series of case studies based in the field of poverty law.² Throughout these case studies I have sought to develop a method of internal critique forged out of the contemporary movements of critical theory within the legal academy. This storehouse of theory includes the works of interdisciplinary scholars as well as the writings of law and society, critical legal studies, feminist, and critical race scholars.

2. These studies extend over a five-year period and cover a variety of federal-state income maintenance and social insurance programs. See 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) [hereinafter Alfieri, *Antinomies of Poverty Law*] (reviewing the Special Supplemental Food Program for Women, Infants, and Children); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) [hereinafter Alfieri, *Disabled Clients*] (surveying the Social Security Act's Old Age, Survivors, and Disability Insurance and Supplemental Security Income programs); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*] (discussing state programs under the Food Stamp Act); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991) [hereinafter Alfieri, *Speaking Out of Turn*] (considering Aid for Families with Dependent Children and Medicaid programs).

The intent of culling through this expanding literature is neither to revive the custom of trashing³ nor to indulge a penchant for intellectual voyeurism.⁴ Rather, the intent of this theoretical synthesis is to construct a method of critique bridging theory and practice but tailored to the lawyering process. Here, as elsewhere, I define that process broadly to include interviewing, counseling, investigation, negotiation, trial advocacy, litigation, and ethics.⁵

Internal critique discards the pretense of unsituated criticism: the idea that we can stand outside of theory and practice and render meaningful judgments.⁶ Shedding this pretense allows the situatedness of conventional accounts of the lawyering process to be acknowledged. That acknowl-

3. For a past, much-heralded defense of trashing, see generally Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). Kelman characterizes "trashing" as a technique fashioned by the critical legal studies movement to debunk legal texts. According to Kelman, trashing entails three moves: "Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed." *Id.* at 293; see also Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230-31 (1981) (advocating trashing as a "negative, critical activity" dedicated to delegitimation and liberation).

4. For misplaced allegations of voyeurism, see Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 80 (1992) (deriding a class of interdisciplinary legal scholarship as "intellectual voyeurism"); see also Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 193-94 (1991) (claiming that legal scholars' "use" of nonlegal disciplines to establish external authority and legitimacy often results in the intellectual "abuse" of such disciplines).

5. Peggy Davis urges a similarly wide-ranging definition. She states:

The conceptualizations that determine legal outcomes begin to be formed in the process by which a matter is reduced from a situation in the world of social reality to an issue for resolution in the world of law. The thorough student of law therefore takes as texts the full range of lawyering interactions—from the intake interview, in which lawyer and client negotiate the meaning of a situation in the world to determine whether and how it translates as a legal matter, through the varieties of subsequent interactions among clients, advocates, and decisionmakers. The study of lawyering as practice becomes essential to the study of law as an evolving, socially constructed corpus.

Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1643 (1991) (footnote omitted).

6. For an elaboration of this distinction, see Susan S. Silbey, *Loyalty and Betrayal: Cotterrell's Discovery and Reproduction of Legal Ideology*, 16 LAW & SOC. INQUIRY 809, 813 (1991) (distinguishing critique from criticism); see also TERRY EAGLETON, *CRITICISM AND IDEOLOGY* 20-21 (1976); MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950*, at 41-85 (1973); Max Horkheimer, *Traditional and Critical Theory*, in *CRITICAL THEORY: SELECTED ESSAYS* 188 (M.J. O'Connell trans. 1988); Joseph B. Maier, *Contribution to a Critique of Critical Theory*, in *FOUNDATIONS OF THE FRANKFURT SCHOOL OF SOCIAL RESEARCH* 29-54 (Judith Marcus & Zoltan Tar eds., 1984); Alfred Schmidt, *The Idea of Critical Theory*, in *FOUNDATIONS OF THE FRANKFURT SCHOOL OF SOCIAL RESEARCH*, *supra* at 67-78.

edgement implies foundational allegiances to certain ways of knowing, thinking, and speaking. Disclosing such allegiances problematizes the accounts, exposing an unarticulated theoretics of practice.⁷

To be sure, the project of deconstructing and reconstructing a theoretics of practice risks error.⁸ Theory may commit materialist errors by blundering into structuralist hypotheses about discourse⁹ and history.¹⁰ Conversely, theory may inflict idealist errors by mistaking material constraint or necessity for individual choice and group consensus.¹¹ Alternatively,

7. For an introduction to the theoretics of practice movement, see generally Conference, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

8. The risk of error is enhanced by the intertwining of criticism and construction. Roberto Unger admits that "no hard-and-fast distinction separates criticism and construction." ROBERTO M. UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 143 (1987). To Unger, "[a] critical analysis of an intellectual situation incorporates a hypothesis about constructive opportunities. Conversely, our constructive ideas about better ways to explain social and historical events alter retrospectively our understanding of the present circumstance of social thought." *Id.*

9. For a rebuke of poststructuralist discourse theory, especially its Foucauldian strand, see Isaac D. Balbus, *Disciplining Women: Michel Foucault and the Power of Feminist Discourse*, in AFTER FOUCAULT: HUMANISTIC KNOWLEDGE, POSTMODERN CHALLENGES 138, 138 (Jonathan Arac ed. 1988) [hereinafter AFTER FOUCAULT] (assailing Foucauldian deconstruction for exemplifying "a classically male flight from maternal foundations"); Nancy Hartsock, *Foucault on Power: A Theory for Women?*, in FEMINISM/POSTMODERNISM 157-75 (Linda J. Nicholson ed., 1990) (condemning Foucault for failing to provide a theory of power encompassing women); Vikki Bell, "Beyond the 'Thorny Question': Feminism, Foucault and the Desexualization of Rape", 19 INT'L J. SOC. L. 83, 96 (1991) (reiterating that "power as it upholds a non-egalitarian social structure between men and women, is not explored by Foucault").

Reproof of Foucauldian discourse is not universal. Among feminists, for example, Jana Sawicki argues:

Foucauldian discourse might serve as an effective instrument of criticism for feminists who have experienced the oppressive dimensions of claims to know based on the authority of male-dominated sciences; the inhibiting effects of radical social theories that privilege one form of oppression over another and thereby devalue feminist struggle; and the multiplicity of subtle forms of social control which are found in the micro practices of daily life.

Jana Sawicki, *Feminism and the Power of Foucauldian Discourse*, in AFTER FOUCAULT, *supra*, at 161, 176.

10. For a cogent analysis of structuralist errors in Marxist history, see generally E.P. THOMPSON, *The Poverty of Theory or An Orrery of Errors*, in THE POVERTY OF THEORY AND OTHER ESSAYS 1 (1978) (assailing Louis Althusser's reading of Marx).

11. See, e.g., Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 352 (1993) ("Radin's work reveals a characteristic common to much contemporary legal theorizing: a politics informed by an instinct for consensus and an aversion to conflict."); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1561 (1991) ("The rhetoric of choice stems from liberal imagery of autonomous individuals making choices in their own self-interest.").

theory may wreak paradigmatic errors by restricting the supply of permissible beliefs, values, and techniques (e.g., analogies¹² and metaphors¹³) available to assay a particular field.¹⁴ As a result, the field may become less accessible to analysis, understanding, and change.

It is premature to conclude whether recent efforts to develop an internal critique of poverty law have left the field more or less accessible to scholars, practitioners, decisionmakers, or clients. If progress is discernible, credit is owed to early expositors¹⁵ and their descendants' studies of bureau-

12. For a sympathetic account of analogical reasoning, see Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746-48 (1993) (cataloguing four main features of analogical reasoning: principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction).

13. On the ambit of metaphor, see Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 759 (1992) (reviewing THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991)) (configuring metaphor "as a cognitive function—that is, as the imaginative means by which we conceive the multiple relations of a complex world"); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1492 (1988) (asserting the reconstructive necessity of "employ[ing] multiple metaphors to establish meaning"); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1222 (1989) [hereinafter Winter, *Transcendental Nonsense*] (illustrating how metaphors "structure our concepts of law and legal rights").

14. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 60, 174-210 (2d ed. 1970) (discussing the inner workings of beliefs, values, and techniques in field paradigms).

15. Prominent among these are Derrick Bell, Gary Bellow, Stephen Ellmann, Joel Handler, Howard Lesnick, Gerald Lopez, Carrie Menkel-Meadow, Bea Moulton, Austin Sarat, William Simon, and Lucie White. See generally GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988); Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413; Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Austin Sarat, ". . . The Law Is All Over: Power, Resistance, and the Legal Consciousness of the Welfare Poor", 2 YALE J.L. & HUMAN. 343 (1990); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) [hereinafter Simon, *Homo Psychologicus*]; William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) [hereinafter Simon, *Visions*]; Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961 (1993); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Subordination*].

crazy,¹⁶ deconstruction,¹⁷ gender,¹⁸ language,¹⁹ and race.²⁰ The spirit of this historical interchange is tempered by wariness. Expressed in admonitions of caution,²¹ doubt,²² and reproach,²³ many warn of mislaid promises of resolution.

16. On bureaucracy, see generally Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990) [hereinafter, Tremblay, *Toward a Community-Based Ethic*].

17. On deconstruction, see generally Marie Ashe, *Inventing Choreographies: Feminism and Deconstruction*, 90 COLUM. L. REV. 1123 (1990) (reviewing ZILLAH ELSENSTEIN, *THE FEMALE BODY AND THE LAW* (1988)); Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987).

18. On gender and feminism, see generally Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1 (1991); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) [hereinafter, Cahn, *The Looseness of Legal Language*]; Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992) [hereinafter Cahn, *Styles of Lawyering*]; Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992).

19. On language, see Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) [hereinafter Cunningham, *The Lawyer as Translator*]; Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) [hereinafter Cunningham, *A Tale of Two Clients*].

20. On race, see generally Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 HASTINGS L.J. 1147 (1992); Margaret M. Russell, *Entering Great America: Reflections of Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992).

21. In a note of caution, Robert Dinerstein advises:

I believe the theoretics of practice movement has much to offer thoughtful practitioners and writers about legal practice. Yet if the movement is to fulfill its potential, it must confront honestly the difficulties that inhere in writing about the open-textured world of law practice; it must speak plainly to those practitioners who most need its insights; it must strive to capture the authentic voices of clients.

Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 988-89 (1992); see also Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187, 1191 (1992) ("In the growth of this new clinical scholarship two basic problems seem immanent: communication or the comprehensibility of language, and the testing of theories.").

22. For an elegant expression of doubt, see Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123, 142 (1992) (questioning "how the ideals of the Critical View [of practice] might be reconciled, even if they indeed will be compromised, with the street-level bureaucracy of most poverty law practices.").

23. Reproaching my own "imperial" style of theorizing, Lucie White asserts:

[Alfieri] seems to envision theoretical work as the bringing of static, prepackaged insights to poverty lawyers from a perspective that is curiously freed from the concrete engagement, the partiality, and hence the ambiguity of its own vantage-point. In doing this kind of theory, Alfieri seems driven by a sense of impatience. . . . [H]e seeks, singlehandedly, to produce a body of prescriptive

In deference to such warnings, I confess that the instant inquiry neither promises nor delivers resolution. My purpose is descriptive not prescriptive. I investigate a set of assumptions which afford poverty lawyers the epistemological confidence to answer Bertie Johnson's question.²⁴ But I do not answer the question. For the moment, I leave the answer to others.

My unwillingness to interpose an answer to Bertie Johnson's question, and thereby, reenter the debate over poverty law case triage regimes²⁵ enacts an unintended betrayal. The subjects betrayed are those deserving of the highest loyalty: impoverished clients and communities.²⁶ Although poor clients and communities daily construct new and valuable forms of practice in their struggle against poverty, these constructions and their attendant meanings must await reconciliation in future research. The betrayal of alternative social constructions is an inherent aspect of rebuilding a theoretic of poverty law practice. Even when patiently assembled, theory suffers the infirmities of partiality and exclusion.²⁷ Both infirmities plague this inquiry. The subject of the inquiry is the modernist lawyer practicing in the context of poverty. To isolate the properties of modernism, I distill out the discourse, institutions, and relations of practice. What

knowledge that might jar poverty lawyers out of their old routines. This kind of "theory"—impatient, imperative—conceals or represses at the same time that it appears to enlighten and enable.

Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853, 855 (1992).

24. Similar investigations are in progress. See, e.g., Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1, 3 (Robert L. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS/LAWYERS' PRACTICES] (investigating how "professional ideologies of lawyers shape and reflect the decision-making processes of the legal institutions and organizational contexts in which they practice").

25. The triage debate often centers on the complexity of institutional or programmatic application. See Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 2, at 2122-25. Although this practical complexity is real, construing the debate at the level of practice obscures the theoretical incoherence of the concept itself. I will return to this larger controversy in a future work.

26. On loyalty and betrayal in the process of critique, see Silbey, *supra* note 6, at 814 ("[C]ritique depends not on accurate, disinterested yet self-reflective reporting but on loyalty to subordinate persons and groups and, in particular, the acknowledgement and recognition of the critic's social location and identity.").

27. Both Silbey and White warn against slippage toward totalizing theory. See *id.* at 814-15 ("While critique seeks to explore social practices and to identify the structures of subordination in order to engage them for liberatory purposes, it must not, however, submerge fractured identities and multiple experiences in an effort to create a unitary account of social life." (footnote omitted)); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 863 (1990) (rejecting "unitary argument" to embrace "the paradox inherent in the advocate's role[]" and "cede to 'clients' the power to speak for themselves").

is left in the aftermath of these exclusions is a local, lawyer-positioned construction of ideology.²⁸

The modernist poverty lawyer is an ideal type, a heuristic figure invented to cast the lawyering process in bas-relief.²⁹ The modernist ideal inspires two visions of practice I shall call formalism and instrumentalism. Both visions are animated by the same cluster of assumptions. The assumptions are foundational. They provide the epistemological framework for lawyer decisionmaking. Stripped of its theoretical pretense, the framework shapes a discretionary practice of moral and political judgment. Discretionary judgment is intrinsic to the poverty lawyer's gatekeeping role in the modern welfare state.

Formalist and instrumentalist practice visions derive from four general assumptions. The first is the assumption of autonomy. The second is the assumption of cognitive capacity. The third is the assumption of communicative rationality. The fourth is the assumption of juridical stability. These assumptions generate two correspondent series of claims. In the formalist series, the claims of neutrality, objectivity, empathy, and determinacy predominate. In the instrumentalist series, the claims of purposivism, practicality, translation, and indeterminacy prevail.

The assumption of autonomy elicits claims of neutral and purposive discretion. In the poverty law context, discretion refers to the ability to choose among clients in case selection and strategy. The formalist advocates a neutral exercise of discretion. The instrumentalist champions a purposivist exercise.

The assumption of cognitive capacity evokes claims of objectivity and practicality. Poverty lawyers differ in estimates of their own capacity to perceive and conceptualize the sociolegal world. The formalist declares the capacity to discover objective truth. The instrumentalist doubts this capacity, endorsing a provisional sense of truth ascertained through practical reasoning.

28. Here, my focus is on professional ideology. See Nelson & Trubeck, *supra* note 24, at 22 (defining professional ideology as "the body of thought and practices through which a profession (or its constituent groups) develops and promulgates ideas about the nature of its work and the identities of its practitioners"). See generally *Special Issue: Law and Ideology*, 22 *LAW & SOC'Y REV.* 623-823 (1988).

29. No doubt in sketching this figure I reveal my own crypto-normative stance toward the modern-postmodern practice disjunction. See Pierre Schlag, *Normativity and the Politics of Form*, 139 *U. PA. L. REV.* 801, 811 (1991) (rejecting "the routine objectivist habit of legal thinkers to 'apply' or 'posit' 'models,' or 'ideal types,' or 'definitions'"). To propose, in the alternative, a nonnormative descriptive stance—that is, a neutral stance—is to defy the postmodern axiom that description necessarily implies normative commitments. See Francis J. Mootz, *Postmodern Constitutionalism as Materialism*, 91 *MICH. L. REV.* 515, 524 n.26 (1992) ("[O]ur descriptions are always symptomatic of normative commitments.").

The assumption of communicative rationality leads to claims of empathy and translation. The formalist proclaims a belief in empathy as a means of understanding the world of others. The instrumentalist augments this faith with a belief in translation as a method of normatively enlightening others.

The assumption of juridical stability provokes claims of sociolegal determinacy and indeterminacy. Sociolegal contexts encompass discourse (e.g., doctrine, statutes, regulations, case law), private and public institutions, and social relations. The formalist argues that these contexts are relatively determinate. They operate in a predictable, regularized fashion in which choice is tightly constrained. The instrumentalist contends that the same contexts are relatively indeterminate. They function in a more unstable, variable manner in which choice is loosely constrained.

In this article, I examine both formalist and instrumentalist versions of the modernist canon. The examination is spurred by Bertie Johnson's question of representation. Again, my purpose is only to investigate the foundational assumptions that enable the modernist lawyer to mount the moral and political conviction to answer that question, not to provide a correct answer. The investigation is implicitly guided by postmodern theory.³⁰ Among current jurisprudential movements,³¹ none offers a more thoroughgoing nonfoundational critique than postmodernism.³² An express goal of postmodern jurisprudence is to reinterpret foundational habits of description and prescription in order "to reveal practice in a way that energizes it."³³ The hope is that such interpretive ventures will infuse

30. An exhaustive summary of postmodern theory is well beyond the scope of this inquiry. For helpful openings into the substantial literature of postmodernism, see generally STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY* (1991); COSTAS DOUZINAS ET AL., *POSTMODERN JURISPRUDENCE* (1991); JANE FLAX, *THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, AND POSTMODERNISM IN THE CONTEMPORARY WEST* (1990); FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991); JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984); *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed., 1990).

31. Others have called for a turn to jurisprudence in the analysis of practice. Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES*, *supra* note 24, at 230, 238 ("The task of applying jurisprudence to the lawyering role is relatively undeveloped and should be on the agenda of teachers of professional responsibility.").

32. Mootz, *supra* note 29, at 522 ("Postmodern jurisprudence questions the received wisdom about how law is practiced and offers instead a nonfoundational, critical account of all understanding, including legal understanding, that describes practice in an attempt to influence it." (footnote omitted)).

33. *Id.* at 522 (footnote omitted). Mootz contends: "[J]urisprudential critique of legal practice occurs when we reinterpret habitual thematizations, not from the privileged perspective of observer, but from the frontline perspective of one who shares in the labor of articulating these thematizations." *Id.*

legal practice with “critical bite.”³⁴

Like my initial exploration of the modern-postmodern practice disjunction,³⁵ I do not undertake this investigation merely to enliven debate. Already, the debate is charged with acute criticism.³⁶ That criticism has not passed without postmodern rejoinder, especially the complaint of errant modernist fidelity.³⁷ No doubt postmodernists will echo that complaint here, pointing out traces of the modernist canon in this very endeavor.³⁸ Their scorn, fueled by the emerging critique of normativity,³⁹ is well targeted given my own slippage into modernist sentiment.

Modernist impulses notwithstanding, I proceed by dividing the article into three parts. In Part I, I present a case study of Bertie Johnson’s application for Social Security disability benefits. In Part II, I put forward formalist and instrumentalist visions of modernist lawyering. In conclusion, I note the contradictions of postmodern rumination in modernist surroundings.

I. BERTIE JOHNSON

Bertie Johnson is a composite figure gleaned from the litigation records of a sample group of Social Security disability cases.⁴⁰ The cases reveal a

34. *Id.* Mootz adds: “Postmodern thought is significant for law because it opens the possibility that legal practice might embody the critical bite that is always embedded, but often unrecognized, in legal dialogue.” *Id.*

35. Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992).

36. See, e.g., Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC’Y REV. 697, 698 (1992) (deploring postmodern deconstruction as a “disabling” form of politics); Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325, 2336 (1992) (denouncing the “thin normativity of the leftist . . . critique of comprehensive normative rationality”).

37. For a forceful reply to Handler and Tushnet, see Steven L. Winter, *For What It’s Worth*, 26 LAW & SOC’Y REV. 789, 790 (1992) (“Both [Handler and Tushnet] presuppose a deep attachment to rationalism and to the foundational status of their own normative commitments.”).

38. The modern-postmodern quarrel encompasses the field of evaluation. Compare Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 891, 910-40 (1992) (proposing a theory of scholarly evaluation grounded on the phenomenological experience of the individual evaluator and the criteria of clarity, persuasiveness, significance, and applicability) with Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CAL. L. REV. 965, 977 (1992) (criticizing Rubin’s theory of evaluation for presuming “that the currently dominant practice of legal thought—namely, normative legal thought—has some redeeming social or intellectual value”).

39. For an introduction to the critique of normativity, see Richard Delgado, *Norms and Normal Science: Toward A Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 936 (1991) (“[T]he critique of normativity may help bring about a recognition of the way in which complacent and self-satisfied normative reasoning obscures important political and social issues.”); Schlag, *supra* note 29, at 932 (“[T]he rhetoric of normative legal thought establishes the identity and polices the bounds of legitimate legal thought.”); Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 970 (1991) (“Persuasive normativity cannot be understood apart from its prescriptive dimensions; in an important sense, every act of persuasion has its origin and end in prescription.”).

40. Each claimant in the group retained a neighborhood legal services office or a law

variety of factual and substantive controversies. Often the focal point of these controversies is the procedure applied by the modern welfare state to determine disability. The concept of disability is a socially constructed mix of fact and law. Bureaucratic procedure governs the determination of that mix.

The Johnson case presents an "easy" case for the conventional analysis of disability representation. By easy, I mean that the case provides a set of material facts and a cluster of legal issues favorable to a determination of disability. My analysis of such factual and legal elements is arranged in six sections. Section A reviews Johnson's administrative and judicial proceedings. Section B introduces her personal history. Section C traces her employment history. Section D catalogues her medical impairments. Section E documents her medical history. Section F chronicles her daily life.

A. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Bertie Johnson is a fifty-eight year old black woman. On September 31, 1987, she filed an application⁴¹ for disability insurance (DI)⁴² benefits

school clinical program to serve as her legal representative. For each, I was charged with the primary duty of representation, though colleagues and students frequently contributed to the lawyering process. In parsing the records of litigation, I have deliberately altered or omitted details, such as names and dates, that might threaten the privacy of clients or prejudice their claims of entitlement.

41. HHS regulations establish a four-step administrative process to review applications. 20 C.F.R. § 404.900 (1992). The first step is the initial determination. 20 C.F.R. § 404.902-.906 (1992). See Eileen P. Sweeney, *Representing Individuals with Disabilities in Securing Social Security and Supplemental Security Income Disability Benefits*, 25 CLEARINGHOUSE REV. 860, 862 (1991) ("State disability determinations services (DDSs) make most of the initial disability determinations for the [Social Security Administration]." (footnote omitted)). The second step is reconsideration. 20 C.F.R. § 404.907-.922 (1992); see Sweeney, *supra*, at 862 ("At the reconsideration level, the DDS will conduct a paper review of the file. In most cases, the result will be a decision upholding the original denial of benefits." (footnotes omitted)). The third step is an ALJ hearing. 42 U.S.C. § 405(b)(1) (1988); 20 C.F.R. § 404.929-.961 (1992); see Sweeney, *supra*, at 862 ("The chances of prevailing at the ALJ stage are dramatically higher than at the reconsideration level." (footnote omitted)). The fourth step is Appeals Council review. 20 C.F.R. § 404.967-.982 (1992); see Sweeney, *supra*, at 862 ("In the past two years, partially in an attempt to prevent so many remands and reversals by the courts, the Appeals Council has been somewhat more responsive to the issues raised on appeal.").

42. Under the Social Security Act, an individual wage earner is considered to be disabled if she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1988). The Act defines a physical or mental impairment as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3) (1988). The Act provides:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experi-

under the Old-Age, Survivors, and Disability Insurance (OASDI)⁴³ program of the Social Security Act. After the U.S. Department of Health and Human Services (HHS)⁴⁴ denied the application at an initial determination and upon reconsideration,⁴⁵ she requested a de novo administrative

ence, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A) (Supp. 1991). According to the Act, the determination of medical severity is to "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." 42 U.S.C. § 423(d)(2)(B) (Supp. 1991). Additionally, the determination of whether work "exists" in the national economy contemplates "work which exists in significant numbers either in the region where [the] individual lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A) (Supp. 1991).

43. 42 U.S.C. §§ 401-33 (1988 & Supp. 1991). The OASDI program furnishes income support to economically vulnerable populations. Women are especially vulnerable to economic impoverishment. See Mary Corcoran et al., *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, in *WOMEN AND POVERTY* 7, 22 (Barbara C. Gelpi et al. eds., 1983) ("Women and children have a much lower and more unstable per capita family income over time—and a higher risk of falling into poverty—than do white men."); Judith Resnik, *Visible on "Women's Issues,"* 77 *IOWA L. REV.* 41, 47 (1991) ("Without [social security disability] benefits, many recipients who are already economically marginal become desperately poor."). In 1992, women comprised approximately 36 percent of DI recipients. *SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT* 214 (1993).

For a comparative analysis of British social security programs and their treatment of women, see Sharon Turner, *Back to the Future: Women and Social Security*, in *LAW, SOCIETY AND CHANGE* 134-52 (Stephen Livingstone & John Morison eds., 1990). Turner writes:

Social security laws . . . [in Britain] have traditionally ignored women, focusing instead on interruptions in men's capacity to provide. Such laws have successfully marginalised and stereotyped women for decades. Discrimination within the social security system is also part of a broader ideology of family responsibility and women's role in society in which differential treatment is expected to be accepted as part of a "natural social order."

Id. at 134 (footnote omitted).

44. The OASDI program is administered by the Social Security Administration (SSA) of the U.S. Department of Health and Human Services.

45. HHS determines disability entitlement pursuant to a five-step sequential evaluation process. 20 C.F.R. § 404.1520 (1992). Step one reviews whether the claimant is working and, if so, whether the work constitutes substantial gainful activity. 20 C.F.R. § 404.1520(b) (1992). Step two evaluates whether the claimant suffers any impairment or combination of impairments that significantly limit her physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c) (1992). Step three considers whether the claimant's impairment meets the twelve month duration statutory requirement and the listed body system medical criteria or equals such criteria. 20 C.F.R. § 404.1520(d) (1992). Step four assesses the claimant's residual functional capacity and the physical as well as mental demands of her past work. 20 C.F.R. § 404.1520(e) (1992). Step five considers whether the claimant's residual functional capacity, age, education, and past work experience demonstrate the ability to perform other work. 20 C.F.R. § 404.1520(f) (1992).

For recent discussions of the disability determination process, see Alfieri, *Disabled Clients*, *supra* note 2, at 806-08; Sweeney, *supra* note 41, at 861-63.

law judge hearing.⁴⁶ The hearing was held on June 10, 1988. On August 5, 1988, the ALJ issued a decision finding Johnson “not disabled.”⁴⁷ Johnson next requested Appeals Council review of the hearing decision. On February 10, 1989, the Appeals Council denied her request for review.⁴⁸

Subsequently, Johnson commenced a pro se civil action in the U.S. District Court for the Southern District of New York, seeking judicial review⁴⁹ of the HHS decision denying her application for disability benefits.⁵⁰ Finding that the ALJ failed to weigh properly the opinion of Johnson’s treating physician in deciding disability, the district court held that HHS misapplied⁵¹ the U.S. Court of Appeals for the Second Circuit’s

46. In 1990, SSA employed approximately 800 administrative law judges to adjudicate over 250,000 cases. Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1346 n.18, 1354 (1992).

47. In a brief decision, the ALJ found that Johnson suffered from “minimal” osteoarthritis of the hands, knees, and spine; hypertension; and bronchial asthma. Moreover, he found that she could “move her arms and fingers” and “perform fine and gross hand movements.” He observed that she “handled the bottles from her purse with normal grasping and holding and showed no impairment.” He also noted that she “prepares food and cooks.”

Further, the ALJ found that Johnson retained the ability to perform a “substantial amount” of walking and standing, to use her hands for grasping and manipulation, and to lift and carry up to twenty pounds. He rejected the contrary functional assessment of Johnson’s primary treating physician on the ground that it was “not compatible with a preponderance of the evidence.”

On these findings, the ALJ determined that Johnson “does not have an impairment, singly or in combination, that meets or equals a listed impairment and that her allegations of experiencing severe pain and of being unable to function are not consistent with a preponderance of the evidence.” He additionally determined that Johnson “has the capacity to perform light work and does not have a nonexertional impairment which significantly impairs her ability to perform light work, except for work involving heavy lifting and carrying.” Reasoning that Johnson’s “past relevant work as a sewing machine operator did not require the performance of work-related activities precluded by her limitations,” the ALJ concluded that she “has the residual functional capacity to do her past relevant work.” Therefore, he decided that she was “not disabled.”

48. For an assessment of Appeals Council review mechanisms, see generally Charles H. Koch & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration’s Appeals Council*, 17 FLA. ST. U. L. REV. 199 (1990).

49. On judicial review in disability cases, see Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193 (1992). Bruff explains:

After the SSA’s Appeals Council makes the agency’s final decisions, judicial review begins in the district courts, and now totals about 7500 cases per year. These cases are spread around the nation. As the statistics reveal, judicial review touches only a tiny fraction of SSA orders. Frequently the issue is the case-specific one of whether substantial evidence supports the agency decision; no programmatic question arises. Nor is there any way for a court to inform the particular bureau within SSA whose decision it overturns that an error has been made or to provide incentives to change the bureau’s behavior.

Id. at 1210 (footnotes omitted).

50. Under the Social Security Act, individuals may obtain judicial review of HHS final decisions. 42 U.S.C. § 405(g) (1988); 20 C.F.R. § 404.981 (1992).

51. Advocates contend that such misapplications illustrate the injurious consequences of

“treating physician” rule.⁵² Accordingly, the court reversed the decision and remanded for further administrative proceedings.⁵³

On remand, the Appeals Council ordered the ALJ to convene a supplemental hearing and to issue a recommended decision.⁵⁴ Additionally, the Council directed Johnson to attend a consultative medical examination⁵⁵

HHS policies of intracircuit rule nonacquiescence. See Sweeney, *supra* note 41, at 866 (“Ongoing tensions exist in the way in which SSA uses evidence secured from nontreating sources to undermine the evidence received from treating sources. These problems are likely to continue in the future.” (footnotes omitted)).

On the disputed legitimacy of agency nonacquiescence, compare Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735 (1989) (justifying agency intracircuit nonacquiescence as an “interim measure” permitting uniform statutory administration following an adverse appellate decision pending the agency’s reasonable pursuit of national policy validation) with Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 803 (1990) (arguing that Estreicher and Revesz’s “proposal upsets the balance between agencies and courts by rendering the judiciary essentially powerless to enforce congressional limitations on agency conduct for long periods of time”).

52. See *Schisler v. Bowen*, 851 F.2d 43 (2d Cir. 1988). In *Schisler*, the United States Court of Appeals for the Second Circuit announced:

The treating source’s opinion on the subject of medical disability—i.e., diagnosis and nature and degree of impairment—is (1) binding on the fact-finder unless contradicted by substantial evidence and (2) entitled to some extra weight, even if contradicted by substantial evidence, because the treating source is inherently more familiar with a claimant’s medical condition than are other sources. Resolution of genuine conflicts between the opinion of the treating source, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder.

Id. at 47; see also George Szary, *The Treating Physician Rule: Morgan Presumption in Social Security Disability Insurance and Supplemental Security Income Cases*, 17 N.Y.U. REV. L. & SOC. CHANGE 303, 323 (1989-90) (proposing that a treating physician’s finding of disability should create a presumption “add[ing] evidentiary weight to the individual’s claim throughout the proceeding, thereby increasing the burden of proof to be met by SSA and shifting a burden of persuasion to SSA to disprove the existence of the disability where . . . a conflict between [treating and consultative] physicians exists” (footnote omitted)).

53. On the remedial import of federal court remands, see Richard E. Levy, *Social Security Claimants with Developmental Disabilities: Problems of Policy and Practice*, 39 KAN. L. REV. 529, 579-80 (1991) (“Even if a claimant is successful before the courts, the normal remedy is for the court to remand the case to the SSA for further consideration, which may lead to a renewed denial of benefits. . . . [I]n many cases, claimants must be extraordinarily persistent in order to secure benefits.” (footnotes omitted)).

54. 20 C.F.R. § 404.983 (1992).

55. Commentators argue that “many claims for disability are denied on the basis of consultative examinations” even though “the thoroughness of the examination and the zeal with which it is undertaken may be less than adequate.” Szary, *supra* note 52, at 333 (footnotes omitted).

In 1991, HHS promulgated a new regulation governing the relative evidentiary weight to be accorded treating physician and consultative examiner reports. 20 C.F.R. §§ 404.152(d)(2), 416.927(d)(2) (1992). Advocates have expressed trepidation about the doctrinal implications of this action, fearing that courts may construe the regulation to supersede the

prior to the hearing.⁵⁶

B. PERSONAL HISTORY

Johnson was born on April 29, 1931 in North Carolina, where she attended elementary school until the seventh grade. When she reached her early twenties, Johnson moved to New York.⁵⁷ In New York, she married

widely-adopted "treating source" rule. See National Senior Citizens Law Center, *The Law of the Elderly Poor in 1992*, 26 CLEARINGHOUSE REV. 1245 (1993).

The troubling parts of the regulation relate to the "treating physician" rule. The treating physician's opinion will be treated as controlling if it is "well supported" and not inconsistent with other evidence in the record. If the report is not entitled to controlling weight, it may still receive some weight depending on whether a variety of factors is met. In contrast, the case law in most circuits requires that the treating physician's opinion control or be given "special weight" if "supported" and even if inconsistent with other evidence in the record. With this definitional terminology, SSA has changed the relative weight of the reports so that the opinions of the nonexamining DDS physician are accorded greater weight. This is done by defining these opinions as "findings" rather than as "evidence." An important but troubling statement in the regulation is that certain issues are reserved for [HHS], including whether the person's impairments meet or equal the listing, the final residual functional capacity determination, and determinations regarding vocational factors.

Id. at 1261-62. Thus far, federal courts are split in their application of the regulation. See *Nelson v. Sullivan*, 966 F.2d 363, 367-68 (8th Cir. 1992) (finding that the new regulation codifies the Eighth Circuit's treating physician rule); *Black v. Sullivan*, 793 F. Supp. 45 (D.R.I. 1992) (holding that the new regulation is retroactive in application); *Aldrich v. Sullivan*, 800 F. Supp. 1197, 1202 (D. Vt. 1992) (upholding HHS's right to instruct adjudicators in the use of the new regulation); *Schisler v. Sullivan*, No. 80-CV-572E, 1992 WL 170736, at *6 (W.D.N.Y. July 8, 1992) (holding that the new regulation does not preempt the Second Circuit's treating physician rule).

56. HHS regulations provide for the government payment of a consultative physical or mental examination of the claimant by an independent source. 20 C.F.R. § 404.1519 (1992). Payment for such an examination is a matter of administrative discretion reserved to circumstances "when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on [the applicant's] claim." 20 C.F.R. § 404.1519a(b) (1992).

57. For sociohistorical examinations of black northern migration, see CAROLE MARKS, *FAREWELL—WE'RE GOOD AND GONE* (1989). Marks advances three propositions explicating black migration:

First, a majority of the migrants of the Great Migration were urban, nonagricultural laborers, not the rural peasant usually assumed. Second, black migrants left the South not simply to raise their wages but because they were the displaced mudsills of southern industrial development. Third, much of the mobilization of the migration was orchestrated in the board rooms of northern industrial enterprises.

Id. at 3; see also DERNORAL DAVIS, *Toward a Socio-Historical and Demographic Portrait of Twentieth-Century African-Americans*, in *BLACK EXODUS: THE GREAT MIGRATION OF THE AMERICAN SOUTH 1-19* (Alferdteen Harrison ed., 1991) (assessing demographic and socio-economic structures of black population); GEORGE W. GROH, *THE BLACK MIGRATION: THE JOURNEY TO URBAN AMERICA* 47 (1972) (emphasizing economic necessity and population pressure as root causes of black urban migration); DANIEL M. JOHNSON & REX R. CAMPBELL, *BLACK MIGRATION IN AMERICA* 124-51 (1981) (charting the activating forces of black

and raised two children. She now resides with her sixty-one year old husband in a three and one-half room apartment in the South Bronx. Their sole source of income is public welfare. Their resources are meager.⁵⁸

C. EMPLOYMENT HISTORY

Johnson worked as a "piecework" sewing machine operator⁵⁹ for thirty-six years, devoting an average of seven to eight hours per day and thirty-five to forty hours per week to the manufacturing of wool, cotton, dacron, acetate, and silk garments.⁶⁰ At the ALJ hearing, Johnson described the

migration during the 1950s); JACQUELINE JONES, *THE DISPOSSESSED: AMERICA'S UNDERCLASS FROM THE CIVIL WAR TO THE PRESENT 157-65* (1992) (tracing the intrarural, rural-urban, and south-north migrations of black populations); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991) (compiling oral histories of black migration).

58. See U.S. General Accounting Office, *Elderly Americans: Health, Housing, and Nutrition Gaps between the Poor and the Nonpoor*, GAO/PEMD-92-29 at 16 (June 24, 1992) (finding elderly blacks three times as likely as elderly whites to be poor or near poor in 1990).

59. In addition to operating sewing machines, Johnson handled scissors and tweezers. On technological developments within the garment industry, see Ava Baron & Susan E. Klepp, "If I Didn't Have My Sewing Machine . . .": *Women and Sewing Machine Technology*, in *A NEEDLE, A BOBBIN, A STRIKE: WOMEN NEEDLEWORKERS IN AMERICA* 20, 45 (Joan M. Jensen & Sue Davidson eds., 1984) ("The greatest change in the occupational structure of the garment industry after the development of the sewing machine was the creation of another unskilled category—the sewing machine operative.") [hereinafter *A NEEDLE, A BOBBIN, A STRIKE*].

60. Johnson's employment history reflects the "disadvantaged position" of women in the labor force. See Diana M. Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, in *WOMEN AND POVERTY*, *supra* note 43, at 146-47. Pearce comments:

Despite dramatic increases in the number of women working and in the sectoral shifts of economy over the last four decades, women continue to be highly concentrated in a few areas of employment. Forty percent of them are still found in ten traditionally female occupations: secretary, retail trade sales worker, bookkeeper, private household worker, elementary school teacher, waitress, typist, cashier, *sewer/stitcher*, and registered nurse. The decrease in some service-sector job categories has been matched by increases in white-collar clerical jobs, but with no net improvement in the pattern of concentration and segregation of women workers in sex-stereotyped occupational ghettos.

Id. at 147 (footnotes omitted) (emphasis added).

For studies of women's labor and wage disparity, see MARY H. STEVENSON, *DETERMINANTS OF LOW WAGES FOR WOMEN WORKERS* 25 (1984) ("In the clothing industry [in 1890] male sewing-machine operators earned \$8.00 a week, and women earned only \$4.00." (footnote omitted)); PAUL E. ZOPF, JR., *AMERICAN WOMEN IN POVERTY* 123 (1989) ("Women always have been much more likely to be underemployed and unemployed and to receive less than their fair share of unemployment insurance, which was created largely for male householders and full-time workers." (footnote omitted)); Roslyn L. Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, in *WOMEN AND POVERTY*, *supra*, at 163, 164 ("The low wages paid for women's work set one of the basic parameters of women's poverty."); Joan Smith, *The Paradox of Women's Poverty: Wage-Earning Women and Economic Transformation*, in *WOMEN AND POVERTY*, *id.* at 121, 122 ("Although central to economic expansion, [women] still receive the lowest pay and are subject to the least desirable employment practices.").

operation of the machines. She testified:

[Y]ou have to open it up with your foot, your two feet, you have to use your left foot to open it up and use your right hand to put the button in, and use your right foot to sew the button on; then you pull it out with both hands. And the buttonhole machine, you have to use both feet and you have to use both hands. A Singer sewing machine, you have to use both hands, but you have to lift the material this way and that way. And on a merrow machine you have five needles on the machine. It carries a lot of whatever you're making, and you have to do a lot of reaching. And the machine, you have a bottom, you're making a bottom, and you have to use your hands to go around the long ways, you have to lift it up or hold it up, and you have to use both feet, because that machine has a lever on the side, and you have to use a lever to open it up, to close it up, that way.

Piecework production required Johnson to sit at her sewing machine for seven to eight hours each day. She stated: "You would have to sit there hours to work because that's piecework."⁶¹ Production also required Johnson to stand, walk, bend, lift, and carry. She explained that raw material in twenty to twenty-five pound bundles would "pile up on a table" eight to twelve feet from her work station depending upon "how fast [she] finished the first bundle." She continued: "When you've finished what you're working on, you have to go over, bend from the waist down, pick up the work from the floor, and get the work for yourself. This is piecework."

Piecework production also required Johnson to reach and grasp. She testified: "You have to reach to get the work and you have to be reaching when you're making it on different machines. You have to hold it with your hands when you're working to keep it from running under the machine."

61. In her economic history of the garment industry, Elizabeth Faulkner Baker points out that the piecework (i.e., payment per garment) system "often induced serious overstrain because the operators could control output by controlling the machine." ELIZABETH F. BAKER, *TECHNOLOGY AND WOMAN'S WORK* 26 (1964) (footnote omitted). Workload intensification is characteristic of capital-labor conflicts in the domestic and international textile industry. See generally Mary H. Blewett, *Manhood and the Market: The Politics of Gender and Class among the Textile Workers of Fall River, Massachusetts, 1870-1880*, in *WORK ENGENERED: TOWARD A NEW HISTORY OF AMERICAN LABOR* 94-95 (Ava Baron ed., 1991); see also FIONA WILSON, *SWEATERS: GENDER, CLASS AND WORKSHOP-BASED INDUSTRY IN MEXICO* 6 (1991) ("Producing firms need to respond quickly to orders: labor is hired or laid off at short notice; intensive work over long hours alternates with periods of little work."); Elizabeth Weiner & Hardy Green, *A Stitch in Our Time: New York's Hispanic Garment Workers in the 1980s*, in *A NEEDLE, A BOBBIN, A STRIKE*, *supra* note 59, at 278, 283 ("[Sewing machine operators] say the nonstop pressure to keep up pace with faster workers, or just to make enough money, is oppressive.").

During the early 1980s, Johnson experienced a high rate of absenteeism and a high incidence of early departures. In December 1986, complaining of daily arthritic pain and shortness of breath, she ceased her employment altogether. Twice, in May and November 1987, she attempted to return to work but failed due to her pain—"I had my hands swollen up on pain and arthritis"—and to her functional limitations—"I tried other places, a couple of other places; they said I was too slow."⁶²

In her testimony, Johnson described how pain rendered her unable to return to work. She stated: "I was in too much pain and I couldn't do the job. I was unable to work." When questioned by the ALJ about "other gainful work in the economy," Johnson answered: "I don't know about any other job because that's the only thing I've ever done in my life." She added: "I would love to work."

D. MEDICAL IMPAIRMENTS

Johnson suffers from a combination of physical impairments including degenerative osteoarthritis of the hands, wrists, knees, left foot and ankle, and lumbar sacral spine; lateral epicondylitis⁶³ of the elbows; hypertension; angina pectoris; obesity; and bronchial asthma. Her symptoms include numbness, tenderness, swelling, and stiffness; dizziness and headaches; weakness and fatigue; wheezing, hoarseness, shortness of breath, and productive coughing; depression and pain. The pain affects Johnson's hands, fingers, wrists, elbows, right arm, left leg, left foot and ankle, knees, and lower back. Her hand and knee pain are marked by limited flexion and deformity.

Johnson's exertional and nonexertional pain restricts her range of motion. She is able to stand for twenty to forty-five minutes, sit "maybe one to two hours," and rise only by "pushing up from a chair." Commenting on her ability to walk, she testified:

I can walk approximately half a block. I have to stop three or four times before I can walk it, but I try walking it everyday. I get out of breath and I have to stop three to four times before I can walk half a block. I use a cane because my right leg gives way on me. The doctor says that I should carry it.

62. It is uncertain whether the provision of transitional and supported employment services or reasonable workplace accommodations would have enabled Johnson to continue her employment. For a discussion of such alternatives, see Frederick C. Collignon, *The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry*, in *DISABILITY AND THE LABOR MARKET* 196-241 (Monroe Berkowitz & M. Anne Hill eds., 2d ed. 1989); Craig Thornton & Rebecca Maynard, *The Economics of Transitional Employment and Supported Employment*, in *DISABILITY AND THE LABOR MARKET*, *supra*, at 142-70.

63. Epicondylitis is an infection or inflammation above or upon a rounded articular surface at the extremity of a long bone. *STEDMAN'S MEDICAL DICTIONARY* 521 (25th ed. 1990).

Johnson's pain also limits her ability to lift and carry. At the hearing, she asserted: "Yesterday I carried a five pound bag of sugar and that was as much as I could handle and I couldn't cross the street with it without stopping two times." Johnson's pain additionally hampers her ability to reach, grasp, and handle objects. It also hinders her ability to bend, climb, and kneel. She attested that she cannot bend her knees, climb stairs "without stopping every two steps," or kneel in church.

E. MEDICAL HISTORY

The medical history of Johnson's impairments spans a fourteen year period. The history is documented by outpatient clinic notes, treating physician reports, and consultative examiner reports.

1. Outpatient Clinic Notes

Johnson's first signs of illness appeared in 1974 when she visited a community health clinic complaining of dizziness, headaches, joint pain, wheezing, and "asthmatic bouts" sometimes continuing "all week," accompanied by hoarseness and a phlegm-producing cough. Clinic physicians diagnosed asthma and chronic bronchitis. Johnson revisited the community clinic in 1977, complaining of muscle ache and joint pain, particularly in the shoulders and knees.

Beginning in 1978, Johnson attended her union health center.⁶⁴ Over a ten year period, she received treatment for hypertension, bronchial asthma, generalized arthritis, pain, and physical deterioration. She entered prescribed physical therapy in 1985 and 1987 for treatment of her hands and lumbar sacral spine. In February 1986, union physicians diagnosed arthritis of the knees marked by pain, stiffness, swelling, and limited flexion, as well as bronchitis and obesity.

64. The center's likely union affiliates include the International Ladies Garment Workers Union (ILGWU) and the Amalgamated Clothing Workers of America (ACWA). For ILGWU and ACWA histories, see BAKER, *supra* note 61, at 153-56 (discussing national founding); Elizabeth Faue, *Paths of Unionization: Community, Bureaucracy, and Gender in the Minneapolis Labor Movement of the 1930s*, in WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR 296-319 (Ava Baron ed., 1991) (examining local organizing battles); PHILIP S. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT 80, 175, 281-83 (1980) (studying union and labor force composition); Joan M. Jensen, *The Great Uprisings: 1900-1920*, in A NEEDLE, A BOBBIN, A STRIKE, *supra* note 59, at 185, 191 (analyzing union conservatism); Joan M. Jensen, *Inside and Outside the Unions: 1920-1980*, in A NEEDLE, A BOBBIN, A STRIKE, *supra* note 59, at 83, 88-92 (comparing mass organizing tactics); Roger Waldinger, *Another Look at the International Ladies' Garment Workers' Union: Women, Industry Structure and Collective Action*, in WOMEN, WORK AND PROTEST 86 (Ruth Milkman ed., 1985) (evaluating union growth and transition).

In March 1987, Johnson complained of pain affecting her hands, right knee, and lower back with corresponding tenderness, as well as wheezing and coughing. Physicians diagnosed bronchitis and possible osteoarthritis of the hands and knees. A radiographic report showed degenerative changes in both hands. Johnson again complained of pain in her hands, knees, and lower back in April 1987. Physicians discovered swelling of the elbows and tenderness of the hands, knees, and lumbar sacral spine.

In June 1987, Johnson complained of radiating pain and numbness of the arms, fingers, and elbow. Physicians found her left arm swollen and fat. Johnson reiterated complaints of wheezing, pain, swelling, and numbness in her hands, fingers, arms, and joints in August 1987. Physicians observed disfigurement of the arms and fingers and diagnosed minimal osteoarthritis of the hands as well as bronchial asthma.

In September 1987, Johnson reasserted multiple joint and elbow pain, especially of the right arm. Physicians noted that she also suffered from bronchitis and nervousness. In October 1987, Johnson complained of pain and stiffness of the fingers and left ankle. She stated that the pain interfered with her ability to operate machinery and to engage in hand-finishing work. Physicians attributed the pain to arthritis. In addition, they diagnosed bronchitis.

In November 1987, Johnson complained of asthma attacks and joint pain with swelling and tenderness of the left foot. Physicians diagnosed bronchial asthma, bronchitis, and arthritis. They mentioned that Johnson's medication was "not relieving symptoms" and that she could not go back to work.

In March 1988, Johnson renewed complaints of pain in her hands, right thigh, and lumbar sacral spine. Physicians diagnosed arthritis of the hands. In April 1988, Johnson also complained of coughing, wheezing, and chest pain. Physicians diagnosed angina pectoris and bronchial asthma.

2. Treating Physician Reports

On September 29, 1987, a community health clinic treating physician submitted a letter diagnosing Johnson's hypertension, asthma, and osteoarthritis. The letter affirmed Johnson's complaint of a "worsening" arthritic condition during the previous six months.

In April 1988, a union health center treating physician furnished a report rediagnosing Johnson's hypertension, bronchial asthma, and generalized arthritis. The report concluded that Johnson's "worsened" conditions left her disabled.

In March 1988, a community health clinic treating physician provided two reports reviewing Johnson's fourteen years of continuous treatment. The first report, dated March 8, 1988, diagnosed hypertension, arthritis, and bronchial asthma characterized by shortness of breath and chest pain

caused by years of bronchial spasms connected to weather changes, dust, pollens, trees, grasses, smoke, and fumes. The report noted expiratory wheezes of both lungs and joint pain of the hands, knees, and back due to degenerative joint disease.

The second report, dated March 28, 1988, echoed the above diagnosis of bronchial asthma, hypertension, and arthritis. Likewise, it cited Johnson's shortness of breath caused by bronchial spasms, high blood pressure, headaches, and degenerative joint disease denoted by joint pain in her hands and back. The report concluded that Johnson was "unable to work."

On June 2, 1988, the same treating physician furnished a third report. This six page report reassessed Johnson's impairments and her capacity to perform work.⁶⁵ Tracking her monthly, biweekly, and sometimes weekly treatment from July 1, 1974 to June 2, 1988, the report enumerated the following symptoms: shortness of breath, hypertension, and degenerative osteoarthritis of the back and wrists.

The report corroborated this symptomatology through clinical, laboratory, and x-ray studies establishing tenderness of Johnson's back and wrist, limitation of flexion and extension, and degenerative changes in her back and hands. Based on these studies, the report concluded that Johnson's impairments had lasted or could be expected to last at least twelve months. The report offered a "guarded" prognosis of recovery.

3. Consultative Examiner Reports

On December 19, 1987, an HHS consultative examiner filed a report reviewing Johnson's seven to eight year history of hypertension, bronchial asthma, and osteoarthritis. The examiner's report recited Johnson's claim that her bronchial asthma required monthly emergency room treatment, particularly in the winter when the cold aggravated her condition. Moreover, the report recounted her complaints of extensive arthritic pain and her reliance on a cane to walk due to weakness of her right leg. The report found "deformities" of Johnson's hand and right knee. On January 8,

65. The treating physician report estimated that Johnson's combined impairments limited her to two hours of continuous sitting and a total of four hours of intermittent sitting, twenty minutes of continuous standing, and one half block of walking during an eight hour work day. The estimate delineated partial restrictions in her ability to lift and carry (i.e., up to five pounds occasionally), and to bend and reach (i.e., occasionally), and total restrictions in her ability to squat, crawl, climb, repetitively grasp with the right hand, repetitively push and pull arm controls with both hands, and repetitively push and pull leg controls with the right or left foot. The report noted similarly extensive restrictions in Johnson's ability to tolerate workplace environments involving exposure to unprotected heights, moving machinery, marked changes in temperature and humidity, and dust, fumes, or gases.

1987, a second HHS consultative examiner issued a report verifying deformity of Johnson's right knee.

F. DAILY LIFE

Johnson's impairments limit the scope of her daily life and compel her to rely on the aid and care of her husband and neighbors.⁶⁶ Her reliance extends to the most intimate details of her life.⁶⁷ With regard to bathing and dressing, for example, Johnson testified: "When I have to take a bath I need [my husband's] help, and when I'm putting on my clothes, I have to have him help sometimes with my shoes or buttoning up my coat or clothes, blouses or whatever, if they have buttons on them."

Johnson's husband performs nearly all household cleaning. In her testimony, Johnson stated: "He vacuums the rug, he scrubs the floor, he washes the dishes, and he also cooks." Johnson's range of physical activ-

66. For a discussion of informal support networks in black communities, see Dennis P. Hogan et al., *Race, Kin Networks, and Assistance to Mother-Headed Families*, 68 SOC. FORCES 797, 810 (1990) (adducing evidence "that black families receive substantial assistance from support networks and that this support is tied to extended family patterns"); see also Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 700-03 (1991) (discussing elderly social support networks). Frolik and Barnes observe:

Both formal and informal networks provide support for the elderly. The need for a formal network is great when an elderly individual is functionally impaired, has numerous health problems, and is without informal network resources. Formal resources are provided by institutions, agencies, and their representatives. . . . Informal networks typically are comprised of spouses, relatives, and friends. For many elderly, informal networks provide the primary means of support. As individuals age, they generally rely on their marital partner for both instrumental and psychological support.

Id. at 701-02 (footnote omitted); see also Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 729 (1991) ("Most home care services in the United States are provided today on an informal, non-paid basis by family members (chiefly wives, daughters, and daughters-in-law) and friends of the older long-term care consumer.") (footnotes omitted).

67. Empirical studies report that the deterioration in the health of a spouse encourages the other spouse to reorganize the division of "household production," decreasing participation in the labor market and increasing household work. Mark C. Berger, *Labor Supply and Spouse's Health: The Effects of Illness, Disability, and Mortality*, 64 SOC. SCI. Q. 494, 494 (1983) ("Increases in household work could take the form of caring for the person in poor health or undertaking tasks formerly performed by the ill or disabled family member."). Berger concludes:

The empirical evidence shows that after controlling for differences in nonlabor income, the [labor market] participation probabilities and annual working hours of women increase in response to the poor health or death of the husband, while men reduce both their participation and hours of work when the wife dies or suffers a deterioration in health.

Id. at 507.

ity, with respect to shopping, cooking, and laundering, is equally circumscribed. She is able to shop once a week but must be escorted by a neighbor. She is able to cook "occasionally," perhaps "twice a week," but prepares "mostly TV dinners." Additionally, she is able to "put laundry in the machine" but her husband "takes them out and takes them to the dryer."

Just as Johnson has been forced to relinquish her household chores, she has been compelled to abandon her hobbies and curtail her outdoor activities. The following colloquy reveals the extent of her surrendered activities.

Q. What kind of hobbies do you enjoy?

A. I love to sew, but I can't sew now. I can't because I cannot function with my hand. My right hand is my main hand to sew with and I can't function with it because of the pains in it.

Q. Do you go outdoors very often?

A. I go outdoors every day when I feel up to it. Some days I have an asthma attack and I cannot go out because I'm too sick from the medicine.

Q. How far do you walk when you go out?

A. I go maybe a block around or half a block and come back slowly walking because I'm out of breath. I cannot walk too far.

G. SUMMARY

Johnson's disability case history establishes that she suffers impairments which compromise her physical ability to carry on a fully independent, self-sufficient life. Without the aid of her husband and neighbors,⁶⁸ she might require home care services⁶⁹ or, if unavailable, out-of-home institutional placement. These circumstances, though sympathetic, fail to resolve the threshold question of representation. To call the case easy is of no help. Resolution hinges on lawyer-centered assumptions about the sociole-

68. For a review of state legislative "family support" initiatives to prevent out-of-home placement, see H. Rutherford Turnbull III et al., *A Policy Analysis of Family Support for Families with Members with Disabilities*, 39 KAN. L. REV. 739, 741 (1991) ("In the disability field, family support refers to any policy that enables families to keep the member with a disability at home, supports their efforts to do so, increases their caregiving capacities, and is centered on the family's needs, not solely the members' needs." (footnote omitted)).

69. See Kapp, *supra* note 66, at 729 ("Many older persons do not have family or friends to assist them in day-to-day living. For this population sub-group, the availability of professional home care services may be particularly crucial in avoiding or postponing institutionalization." (footnotes omitted)).

gal world. These assumptions fuel descriptive and prescriptive claims about that world, especially claims of moral and political desert. Such claims, here mixing fact and law, decide whether a client presents an easy or hard case for representation. Before addressing the ultimate question of representation, therefore, it is vital to retrace a sequence of antecedent theoretical moves. For the modernist lawyer, these moves lead to both formalist and instrumentalist positions.

II. MODERNIST PRACTICES

The modernist vision⁷⁰ of poverty law practice is historically situated in the enclosure of liberal legalism. In its current situation, the modernist vision arouses images of a sociolegal world in which law and the politics of the state are separate. This imagined separation opens space for the foundational assumptions of legal advocacy. Both formalist and instrumentalist claims occupy this “free” space. Absent an unencumbered juridical space for objective and rational forms of persuasion,⁷¹ the practice of poverty law advocacy breaks down into discretionary judgments of morality and politics.⁷²

70. Modernism encompasses both philosophical and aesthetic traditions. For philosophical treatments, see Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 CARDOZO L. REV. 291, 298, 308 (1985) (recognizing the “hallmark of modernity” as the belief in the autonomous subject independent of social role); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1208 n.62, 1213-17 (1989) (associating philosophical modernism with Hegel, Marx, Freud, and Nietzsche); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 517 (1986) (classifying critical legal studies as “the form that modernism takes in legal thought”); Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 587 (1983) (noting the modernist background of “cultural-revolutionary politics”); cf. Joan C. Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713 (1990) (examining traditional and pragmatic approaches to modernist legal history).

For aesthetic treatments, see Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992) (describing the cultural tendencies of high modernism); Nathaniel Berman, “*But the Alternative is Despair*”: *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1804 n.51 (1993) (distinguishing high modernism and the avant-garde); David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1656 (1986) (comparing critical legal studies to “an artistic avant-garde” form of legal modernism).

Like Schlag’s, my account centers on the epistemological and cognitive underpinnings of modernism.

71. On forms of persuasion in legal advocacy, see Peter Goodrich, *Critical Legal Studies in England: Prospective Histories*, 12 OXFORD J. LEGAL STUD. 195, 223 (1992) (“[L]aw cannot escape its history of advocacy, of polemic and argumentation; nor can it deny that even at the level of doctrine its functions have been institutional and didactic and have therefore incorporated an ineradicable element of dialogue, even if the motive of such address has often been that of silencing the auditor through the structures and uses of objective or rational forms of persuasion.” (footnote omitted)).

72. Cf. Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 485 (1985) (asserting “the inescapably political nature of legal aid”).

To preserve the integrity of the advocacy project, the modernist poverty lawyer avows faith in the rule of law. This avowal resounds most powerfully in the claim of juridical stability. Although formalists and instrumentalist differ in their assessments of stability, their differences lie at the periphery of the determinacy-indeterminacy debate. At the core, their differences dissolve into consensus regarding the relative stability of legal discourse, institutions, and relations.⁷³

In this way, the modernist faith in the rule of law, manifested in the claim of juridical stability, implies a cohesive theory of law, politics, and the state upon which practice may be built. The logic of that practice is derived from the liberal notion of autonomy. For the modernist, autonomy is both structural and subjective. Structural autonomy refers to the independence of law from politics and the state. Subjective autonomy alludes to the independence of the lawyer-as-subject from her institutional role of advocate.

The structural autonomy thesis evokes E.P. Thompson's "middle ground" historiography.⁷⁴ Standing on the middle ground dividing idealism and materialism,⁷⁵ Thompson decries "highly schematic" Marxist⁷⁶ renditions of the law as merely "a part of a 'superstructure' adapting itself to the necessities of an infrastructure of productive forces and productive relations."⁷⁷ Under these crude sociolegal renditions, Thompson opines,

73. *But see* Steven L. Winter, *Confident, But Still Not Positive*, 25 CONN. L. REV. 893, 920 n.111 (1993) (attacking the viability of the conventional core-periphery distinction absent a satisfactory account).

74. The phrase belongs to E.P. Thompson. *See* E.P. THOMPSON, *WHIGS AND HUNTERS* 258 (1975) (discussing British legal historiography).

75. For an enlightening exchange with Thompson, *see* E.P. Thompson, in *VISIONS OF HISTORY* 5-25 (Henry Abelove et al., eds., 1983).

76. Thompson concedes that "the Marxist tradition is in the process of splitting apart into several traditions and fragments." E.P. THOMPSON, *WRITING BY CANDLELIGHT* 181, 183 (1980); *see also* John Comaroff, *Re-Marx on Repression and the Rule of Law*, 15 LAW & SOC. INQUIRY 671, 672 (1990) ("[I]t is hardly necessary, after Thompson, to point out that there no longer is a single, canonical Marxism—only marxisms." (footnote omitted)). He notes that "very ancient philosophical, ethical and political arguments are now being conducted within a common Marxist vocabulary and that incompatible positions (from terrorists to statist bureaucrats to determined libertarians) have got entangled in a common network of categories and terms." *Id.* at 182-83. Significantly, he laments the orthodox tilt of such categories. *See* E.P. THOMPSON, *WILLIAM MORRIS* 763, 786 (1977) (discussing Marxist orthodoxy, and especially "tendencies towards determinism and positivism").

For an inquiry into the relationship between Marxism and the rule of law, *see* Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 645-46, 652 (1990) (noting Thompson's earnest, albeit controversial, defense of the rule of law). *But see* Richard L. Abel, *Capitalism and the Rule of Law: Precondition or Contradiction?*, 15 LAW & SOC. INQUIRY 685, 696 (1990) (dismissing Krygier's argument as "trite and discredited").

77. THOMPSON, *supra* note 74, at 259.

the law serves as an “instrument” of the ruling class.⁷⁸

[I]t both defines and defends these rulers’ claims upon resources and labor-power—it says what shall be property and what shall be crime—and it mediates class relations with a set of appropriate rules and sanctions, all of which, ultimately, confirm and consolidate existing class power. Hence the rule of law is only another mask for the rule of a class.⁷⁹

Like Thompson, the modernist poverty lawyer accepts “some part of the Marxist-structural critique,” particularly the “class-bound and mystifying functions of the law,”⁸⁰ which inflict hardship on poor clients (e.g., tenants) despite a ritual of proceduralism. But she rejects the reductionist excesses of structuralism. In place of reductionism, she finds ideological contest⁸¹ (e.g., landlord-property versus tenant-community) and internal logic (e.g., case precedent).⁸² These conceptions construe legal forms and definitions as arenas of conflict,⁸³ rather than as “the institutionalized procedures of the ruling class.”⁸⁴ Indeed, the modernist asserts that it is “*through the forms of law*”⁸⁵ that the dominant-subordinate relations of social hierarchy—class, disability, gender, race, sexuality—are mediated and legitimated.

The modernist’s admission that the law serves mediating and legitimating functions⁸⁶ in society does not discredit the strategy of using legal forms. For the modernist, the law retains “its own characteristics, its own independent history and logic of evolution.”⁸⁷ This evolution⁸⁸ is discern-

78. *Id.*

79. *Id.*

80. *Id.* at 260.

81. *Id.* (“The law may also be seen as ideology, or as particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) to social norms. . . .”); see also Thompson, *supra* note 75, at 20 (identifying the mediating role of culture and morality in certain modes of production and productive relations).

82. THOMPSON, *supra* note 74, at 260 (“[The law] may be seen simply in terms of its own logic, rules and procedures—that is, simply *as law*.”).

83. THOMPSON, *supra* note 10, at 96 (“[Law] afforded an arena of class struggle, within which alternative notions of law were fought out.”).

84. THOMPSON, *supra* note 74, at 261.

85. *Id.* at 262.

86. *Id.* at 266 (“It is true that in history the law can be seen to mediate and to legitimize existent class relations.”).

87. *Id.* at 262 (“It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity.”).

88. I use the term “evolution” not to evoke the mainstream idea of “*an objective, determined, progressive social evolutionary path*” of historical development, but to capture the critical notion of the “relative autonomy” of legal forms and practices. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61 (1984).

Within the critical tradition of American legal historiography, the relative autonomy thesis

ible in the “forms and traditions”⁸⁹ of procedural and substantive law. Although “complex and contradictory,”⁹⁰ these legal forms regulate state power, inhibiting but not eradicating violence and partiality.⁹¹ Moreover, the forms manufacture an ideological “infrastructure” or medium that molds identity and conflict.⁹² Thompson adverts to this infrastructure as an aspect of ideology:

[T]he rules and categories of law penetrate every level of society, effect vertical as well as horizontal definitions of men’s rights and status, and contribute to men’s self-definition or sense of identity. As such law has not only been imposed *upon* men from above: it has also been a medium within which other social conflicts have been fought out.⁹³

is notable in the work of Morton Horwitz. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* xiii (“Law is autonomous to the extent that ideas are autonomous, at least in the short run.”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 271 (1992) (asserting the “complex interrelationship between law and politics”); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399 (1988) (“[I]t seems to be part of the indeterminate nature of rights discourse that it can be deployed with equal logic to protect the existing structure of privilege as well as to challenge and delegitimize that structure.” (footnote omitted)); Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review) (“[The rule of law] undoubtedly restrains power, but it also prevents power’s benevolent exercise.”). But see Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019 (1993) (book review) (criticizing Horwitz’s structuralist historiography).

For a background on the relative autonomy thesis, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 250 (1987) (reiterating the cls proposition “that legal decision makers do feel constrained even in times of disorder to follow existing procedures, even at the cost of some loss of control”); THOMPSON, *supra* note 10, at 97 (“Certainly, ‘relative autonomy’ is a helpful talisman against reductionism—against collapsing art or law or religion abjectly back into class or ‘economics’; but, without substantial addition, and substantive analysis, it remains as nothing more than a warning-notice.”); Isaac Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 LAW & SOC’Y REV. 571, 573 (1977) (“[T]he relative autonomy of the legal form from the will of social actors entails at the same time an essential *identity* or homology between the legal form and the very ‘cell’ of capitalist society, the commodity form.”); Gordon, *supra*, at 101 (“[R]elative autonomy means that [legal forms and practices] can’t be explained completely by reference to external political/social/economic factors.”); David Jabbari, *From Criticism to Construction in Modern Critical Legal Theory*, 12 OXFORD J. LEGAL STUD. 505, 521 (1992) (“To overcome instrumentalism, critical legal theorists have employed a position known as ‘the relative autonomy of law’ whereby law can be viewed as influenced by economic forces, but still possessing such a degree of autonomy in relation to those forces that it may in turn be able to influence them.”).

89. THOMPSON, *supra* note 74, at 264.

90. *Id.*

91. *Id.* at 266 (“The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.”).

92. *Id.* at 267.

93. *Id.*

To the modernist, therefore, the practice of poverty law is a “struggle about law” undertaken “within the forms of law.”⁹⁴ It is a practice of logical intricacy and rhetorical strategies bounded by formal rules and procedures.⁹⁵ Despite the inequalities of legal rules and procedures, it is a practice where law “matters.”⁹⁶

The subjective autonomy thesis extends Thompson’s structural analysis to the study of the legal profession. Robert Nelson and David Trubek spearhead this sympathetic extension.⁹⁷ Echoing Thompson, they admit to an interpretive stance that “straddles” the line between subjectivity and structuralism.⁹⁸

To brace this precarious stance, Nelson and Trubek fasten upon a concept of agency derivative of Thompson’s. On the strength of this concept, they contend “that the actions of lawyers reflect choices that are neither totally unconstrained nor totally determined structurally.”⁹⁹ Before evaluating this contention, it is important to revisit Thompson’s concept of agency. Intended to serve as a theoretical bulwark against totalizing sociohistorical accounts of law and totalitarian political regimes’ contempt for law, the concept is surprisingly modest. Indeed, Thompson makes the claim of situated, rather than transcendent or radical subjectivity.

Against this background, Nelson and Trubek’s contention may be understood as a fairly modest attempt to reinvigorate the concept of agency to permit the interplay of lawyer subjectivity and sociolegal structure. Like Thompson, Nelson and Trubek revile structural accounts for the tendency to overlook “actors or specific mechanisms of change” and “to concretize structural features as immutable and beyond the control of human agents.”¹⁰⁰ Also, like Thompson, they berate unsituated “interpretive or phenomenological accounts” for the tendency to “ignore deeper patterns that shape and explain the frame of conscious action.”¹⁰¹

94. *Id.* at 266.

95. *Id.* at 266-69.

96. *Id.* at 268. While crediting Thompson’s observation, Richard Abel quarrels with the inference “that because some can invoke law as a shield against state power others can wield it as a sword to alter fundamental class relations.” Abel, *supra* note 72, at 593. Abel points out, for example, that poverty lawyers “can require the welfare system to grant benefits mandated by law, to desist from unconstitutional discrimination, and to observe due process, but they cannot determine the amount and content of welfare entitlements.” *Id.* at 610.

97. Nelson & Trubek, *supra* note 24, at 1-27.

98. *Id.* at 23.

99. *Id.* at 22 (“The choices lawyers make within their professional field, as that field has been shaped by exogenous political and economic forces, are influenced by the ‘objective’ options presented in the current moment and the historically constructed repertoire of ‘legitimate’ or ‘permissible’ professional responses.”).

100. *Id.* at 22.

101. *Id.*

Endeavoring to escape these tendencies, Nelson and Trubek provide an account of professionalism in which lawyer ideals,¹⁰² though originally molded by the deep structures of sociolegal knowledge and discourse, nonetheless break free, propelled by a “logic partially independent” of those structures.¹⁰³ On this logic, Nelson and Trubek contend, ideals marked by “heavy traces” of sociolegal structure “become the object of competition among individual or collective actors who seek to appropriate (or perhaps accommodate) elements of a professional tradition in order to advance a particular mode of professional organization or pursue other objectives.”¹⁰⁴ Out of this competition flow “multiple visions” of lawyer professionalism.¹⁰⁵ Each vision reflects the institutional arena constructed by law and the lawyering process.¹⁰⁶

The vision of professionalism in the poverty law arena is implanted in the assumption of subjective autonomy. This assumption encircles the spheres of economics and politics. In the economic sphere, autonomy pertains to the workplace¹⁰⁷ and to the market.¹⁰⁸ Workplace and market autonomy are realized in the pursuit of law as a craft. For the lawyer craftsman, law promises independence not only from the regulation of the workplace, but also from the discipline of the market. In the political sphere, autonomy relates to the client¹⁰⁹ and to the state.¹¹⁰ Client and state autonomy are basic ingredients of discretion. They ensure that the lawyer can defy the demands of client representation and the imperatives

102. *Id.* at 23 (envisioning “professional ideals partly as formed within the workplace and partly as designed, consciously or unconsciously, by lawyers for the promotion of their economic . . . power, and status goals”).

103. *Id.*

104. *Id.*

105. *Id.* at 177, 179.

106. *Id.* at 179.

107. See Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES*, *supra* note 24, at 215, 219 (“Professionalism . . . revolves around the central principle that the members of a specialized occupation control their own work.” (footnote omitted)); Nelson & Trubek, *supra* note 24, at 177, 181 (“Autonomy means control of one’s own work processes.”); see also Richard L. Abel, *Taking Professionalism Seriously*, 1989 *ANN. SURV. AM. L.* 41, 57 (endorsing the “ideal of autonomy in work”).

108. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES*, *supra* note 24, at 144, 166-68 (citing lawyer “autonomy over the market (monopoly control) and autonomy from the profit motives of the market”).

109. *Id.* at 155, 168 (designating political autonomy to mean independence of the lawyer from the client); see also Nelson & Trubek, *supra* note 24, at 181 (“Independence means freedom from the client’s definition of the situation and the client’s desire for a favored outcome.”); cf. Gordon & Simon, *supra* note 31, at 230, 236 (associating professionalism with the ethical orientation of reflective—i.e., complex and autonomous—judgment).

110. Solomon, *supra* note 108, at 162, 168 (defining state autonomy in terms of the separation of law and partisan politics).

of state politics. Poverty lawyers draw on both economic and political spheres of autonomy to exercise gatekeeping discretion, and hence, to decide who to represent. These spheres intersect in formalist and instrumentalist modes of poverty law practice.¹¹¹

A. FORMALISM

Formalism constitutes a weak version of modernist lawyering.¹¹² The modernist canon presupposes lawyer autonomy and cognitive capacity, lawyer-client communicative rationality, and juridical stability. These abstract assumptions inspire claims of neutrality, objectivity, empathy, and determinacy in legal reasoning. The claims describe a general theory of lawyering that is process-oriented and value-free. The adoption of a procedural orientation shields lawyer judgments from political assault. Thus shielded, poverty lawyers are free to judge the merits of a case as a natural and necessary part of the lawyering process. With the separation of law and politics, lawyer discretionary judgment acquires ethical legitimacy, even when that judgment is steered by moral evaluation.

1. Neutrality

The formalist claim to neutrality pertains to the poverty lawyer's judgment of merit in case selection and strategy.¹¹³ Under this claim, lawyer

111. On the intersection of practice, ideology, and material reality, see Nelson & Trubek, *supra* note 24, at 212. ("Practices that reflected the ideology of earlier generations, once embedded in institutional structure, may appear as given or inherent in the nature of the work or the organization itself. Ideological product thus becomes material reality.")

112. On the interconnection of formalism and modernism, see Richard Hyland, *The Spinozist*, 77 IOWA L. REV. 805, 817 (1992) (noting the "modernist pedigree" of formalist jurisprudence reflected in the work of Ernest Weinrib).

113. In a prior work, I argued that poverty law case triage is accomplished covertly without institutional or community participation. Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 2, at 2122-25.

Adoption of th[e triage] method had been covert. There had been no internal debate within the office regarding its appropriateness or efficacy. Nor had there been external, public debate within the client community concerning its necessity. There had been only weary assent, spurred by an implicit acknowledgement of limits. Brokered under desperate circumstances, triage was seized as a permanent stopgap method of allocating scarce institutional resources.

Id. at 2123; see also Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 348 (1978) ("Within whatever broad limits a board may establish, the managing or chief attorney of the program, or the lawyers themselves, have full discretion to make intake and case-handling decisions and, unlike the board, may do so on a case-by-case basis." (footnote omitted)); James F. Smurl, *Eligibility for Legal Aid: Whom to Help When Unable to Help All*, 12 IND. L. REV. 519, 528 (1979) (noting the "considerable discretionary power" of the legal aid staff director and attorneys in local resource allocation decisions (footnote omitted)); Tremblay, *Toward a Community-Based Ethic*, *supra* note 16, at 1136 ("The preference that a lawyer exercises

judgment is process-oriented and value-free. At the institutional level of case selection, judgment is purportedly guided by the demands of client access and eligibility. At the interstitial level of case strategy, judgment is professedly channeled by the routines and standards of practice. At both levels, so the argument goes, lawyer discretion is constrained.

The formalist poverty lawyer's claim to the exercise of neutral, nondiscretionary judgments in selecting cases and plotting strategy is bound up in the tenets of liberal pluralism, especially the notion of evenhanded interest group representation. The poverty lawyer embroiders these tenets to fashion the doctrine of "equal access to law."¹¹⁴ Under this doctrine, the poor are treated as an interest group entitled to equal representation before the law. By now, the trope of "equal access" is familiar. Formalists employ it in designing case intake systems on a "first-come, first-served" basis.¹¹⁵ Alan Houseman explains the operation of these systems. He states:

[U]nder "first-come, first-serve," resources were allocated by who walked in the door. Who walked in the door depended on: (1) where the office was located; (2) how the staff members were viewed by the community; (3) whether the people recognized a legal problem; and (4) whether they could seek help because they lacked transportation, resided in an institution, were disabled or elderly, or had cultural, ethnic or language barriers.

among prospective clients is clear and direct—some become clients, the remainder do not.”).

My argument in no way precludes overt forms of participation in triage rationing schemes. *See, e.g.,* Bellow & Kettelson, *supra*, at 343-44 (posing an institutional reform litigation model of triage); Tremblay, *supra* note 22, at 139-42 (evaluating a collective reform model of triage); Tremblay, *Toward a Community-Based Ethic*, *supra* note 16, at 1129-49 (describing a community-based model of triage).

The driving force behind such rationing schemes here and abroad is cost. *See* Brice Dickson, *Legal Services and Legal Procedures in the 1990s*, in *LAW, SOCIETY AND CHANGE* 167, 174 (Stephen Livingstone & John Morison eds., 1990) (mentioning the British government's complaint that legal aid schemes were "costing too much"); Alan W. Houseman, *Legal Services: Has It Succeeded?*, 1 *D.C. L. REV.* 97, 108-17 (1992) (noting the "severe financial limitations" affecting the delivery of legal services).

114. *Compare* Abel, *supra* note 72, at 487 (mentioning that "[t]he image of legal aid as equal access to law (embodied in courts) probably is the dominant conception today" (footnote omitted)) and Alfieri, *Antinomies of Poverty Law*, *supra* note 2, at 663-64 (citing the "minimum access" rhetoric associated with the "individualized problem-solving approach" of direct service litigation) with Marshall Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 *N.C. L. REV.* 282 (1986) (proposing a nonutilitarian, client-oriented theory of procedural access rights to legal assistance) and Mortimer Getzels, *Legal Aid Cases Should Not Be Limited*, 27 *LEG. AID BRIEFCASE* 203, 206 (1969) (insisting that "the objective of legal aid must be to make it impossible for any man, woman, or child in the United States to be denied the equal protection of the laws simply because he or she is poor").

115. *See* Houseman, *supra* note 113, at 114 (1992) ("[Office of Equal Opportunity] priorities were set either on a first-come, first-serve basis, or by the staffing and program structural decisions made by program legal staff and boards.").

Because there were limited resources, extensive waiting lists were created, and many with serious legal problems were not being served. In short, who was served depended on who was in line first and what, if any, resources were then available to those at the end of the line.¹¹⁶

Although well-meant, these open-ended legal service systems are undermined by a scarcity of institutional resources.¹¹⁷ Gary Bellow and Jean Kettleson report that the institutional consequence of scarcity is a decline in the "quality" of legal service.¹¹⁸ They illustrate the path of decline in a typical legal services office.

Faced with a choice of reducing service to each client in order to increase volume, or turning clients away to maintain present case and service levels, the office decides to try to help in some way anyone who asks for and is otherwise eligible for assistance. Because there are so many people in need, and no one can say that any one group "deserves" service more than another, most of the staff and board think this is preferable to turning people away, even if the quality of service suffers.¹¹⁹

The quality of poverty law advocacy under a formalist, equal access intake regime suffers in two respects. First, advocacy is routinized. In a previous work, I described routinization as "a formulaic and mechanical convention devised to process individual cases on a mass scale."¹²⁰ I

116. *Id.* at 114-15.

117. See Bellow & Kettleson, *supra* note 113, at 353 ("The same problem of scarcity that produces decisions to turn clients away also results in efforts to take more cases than can be properly handled.").

118. *Id.* at 354; see also Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 342 (1980) (asserting that lawyers' desire to "increase the number of cases they can handle" generates "self-imposed pressures to reduce the amount of care and energy given to any particular case").

119. Bellow & Kettleson, *supra* note 113, at 354; see also Abel, *supra* note 72, at 569 ("It is extremely difficult, of course, both morally and practically, to close the doors of a legal aid program and to turn people away because they have the wrong problem." (footnote omitted)); Gary Bellow, *Reflections on Case-Load Limitation*, 27 LEG. AID BRIEFCASE 195, 195 (1969) ("The implications of promulgating rules or standards that will necessarily turn away people in need—people who have, in fact, nowhere else to go for legal help—have been too difficult to face . . ."); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1055 (1970) ("Turning people away is difficult: The values which made a lawyer want to help poor people will make it hard to turn away a person with a problem; the professional ethic is full of talk about representing all who need representation . . .").

120. Alfieri, *Antinomies of Poverty Law*, *supra* note 2, at 685 (footnote omitted); see also MARJORIE GIRTH, *POOR PEOPLE'S LAWYERS* 21 (1976) (observing that New Jersey publicly funded poverty law programs "developed heavy concentrations of routine matters"); Abel, *supra* note 72, at 570 (noting that "[l]egal aid lawyers handle their cases in a routine fashion,

traced the genesis of routinization to the “dominant traditions and institutional economics of poverty law.”¹²¹ It is the epistemic content—our habits of thinking about the poor and poverty—of these modernist traditions, and not simply institutional economics, that makes routinization inevitable.¹²²

Second, advocacy is standardized. As I have argued previously, standardization occurs when “individual cases are *slotted* into standard patterns of advocacy and resolution—notably settlement[.]”¹²³ Slotting instills a work ethic of “reasonableness.”¹²⁴ In his sociohistorical account of the evolution of Chicago legal services organizations, Jack Katz documents the adoption of “reasonableness” as a work ethic.¹²⁵ Katz observes that the ethic allowed legal aid lawyers to “translate the procedural, day-in-court jurisprudence into a means for personally accepting everyday professional and moral limitations.”¹²⁶

The formalist claim to neutrality in the exercise of case intake and strategy judgments is undisturbed by the practices of routinization and standardization. To the formalist, routine and standard advocacy practices

with the least possible expenditure of effort”); Bellow, *supra* note 119, at 196 (remarking that “[t]here are just too many cases to give any one of them the time and attention it deserves; the individual case is necessarily secondary to the demands of the mass-production processing that envelops the office”); Gary Bellow, *The Legal Aid Puzzle: Turning Solutions into Problems*, 5 WORKING PAPERS FOR A NEW SOC’Y 52, 60 (1977) (condemning “the tendencies toward routine, constricted service in legal aid practice”); Bellow, *supra* note 15, at 108 (asserting that “[p]roblems presented by clients in legal services offices by and large are dealt with routinely and perfunctorily”); Carol R. Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217, 226 (1969) (commenting that the legal services “lawyer is limited to taking only those cases that do not require more than a minimum of thought, effort, time, and skill”).

121. Alfieri, *Antinomies of Poverty Law*, *supra* note 2, at 686; *see also* Abel, *supra* note 107, at 56-57 (“Lawyers whose clients or employers are passive and endowed with limited resources . . . must cope with an excessive caseload; consequently, they do the minimum that will get the client out of the office, often falling back on routine.”).

122. *Cf.* JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION 18 (1982) (“Routine treatment is not inevitable in legal assistance, but pressure to treat legal problems without making much of their differences is systematically implied by the social meaning of poverty. However important as a political or moral issue, poverty is presented to legal assistance offices in a stream of individual problems, each of which already has been defined as insignificant in its social ramifications.”).

123. Alfieri, *Antinomies of Poverty Law*, *supra* note 1, at 686 (footnotes omitted); *see also* Bellow, *supra* note 119, at 196 (commenting that “[c]ases handled by legal aid offices are compromised far sooner than they ought to be, and with far less benefit to the client”); Silver, *supra* note 120, at 227 (asserting that the burden of administering heavy caseloads “militates against any interest in solving any more than the most immediate problem at the lowest level of controversy”).

124. KATZ, *supra* note 122, at 51.

125. *Id.* at 56.

126. *Id.*

are an outgrowth of the commitment to equal access. This commitment and the corollary principle of “first-come, first-served” case selection, applied in accordance with mandated eligibility criteria,¹²⁷ establish the

127. The enabling legislation and implementing regulations of the Legal Services Corporation (LSC) mandate minimum levels of institutional and community participation in establishing case priorities at intake and on appeal. See 42 U.S.C. § 2996f(a)(2)(C)(i) (1988 & Supp. 1992). The statute mandates that LSC

insure that (i) recipients, consistent with goals established by the Corporation, adopt procedures for determining and implementing *priorities* for the provision of [legal] assistance, taking into account the relative needs of eligible clients for such assistance (including such outreach, training, and support services as may be necessary), including particularly the needs for service on the part of significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems (including *elderly* and *handicapped* individuals).

Id. (emphasis added); see also 42 U.S.C. § 2996f(a)(7) (requiring “recipients to establish guidelines . . . for a system for review of *appeals* to insure the efficient utilization of resources and to avoid frivolous appeals (except that such guidelines or regulations shall in no way interfere with attorneys’ professional responsibilities)” (emphasis added)).

LSC regulations supply procedures for determining and implementing the above-mentioned “priorities.” 45 C.F.R. § 1620.1-.5 (1992). The regulations provide:

The governing body of a recipient shall adopt procedures for establishing *priorities* in the allocation of its resources. The procedures adopted shall: (1) Include an effective *appraisal* of the needs of eligible clients in the geographic areas served by the recipient, and their relative importance, based on information received from potential or current eligible clients solicited in a manner reasonably calculated to obtain the attitude of all significant segments of the client population. The appraisal shall also include input from the recipient’s employees . . . (2) Insure *an opportunity for participation* by all significant segments of the client community and the recipient’s employees in the setting of *priorities*

Id. § 1620.2(a)(1)-(2) (emphasis added). This mandate buttresses income and resource eligibility guidelines. 42 U.S.C. § 2996f(a)(2)(A)-(B) (1988 & Supp. 1992).

Additionally, the statute requires LSC to establish “maximum income levels (taking into account family size, urban and rural differences, and substantial cost-of-living variations) for individuals eligible for legal assistance.” 42 U.S.C. § 2996f(a)(2)(A). Specifically, the statute directs LSC to establish “guidelines” to insure that client eligibility is determined on the basis of particular “factors.” The factors include:

- (i) the liquid assets and income level of the client,
- (ii) the fixed debts, medical expenses, and other factors which affect the client’s ability to pay,
- (iii) the cost of living in the locality, and
- (iv) such other factors as relate to financial inability to afford legal assistance, which may include evidence of a prior determination that such individual’s lack of income results from refusal or unwillingness, without good cause, to seek or accept an employment situation

42 U.S.C. § 2996f(a)(2)(B). LSC regulations supplement statutory eligibility factors enumerating maximum income levels, not to exceed 125% of the current HHS Federal Poverty Income Guidelines, and asset ceilings. 45 C.F.R. § 1611.1-.9 (1992). For a family size of two, HHS determines 125% of the poverty income level to be \$11,488. 45 C.F.R. § 1611, Appendix A (1992) (Legal Services Corporation Poverty Guidelines).

groundwork for the formalist's general theory of process-oriented and value-free lawyering. The crux of this theory is the denial of ethical discretion.

The formalist contends that her case judgments, both at intake and in advocacy, are dictated by considerations of access, eligibility, and routine. These considerations allegedly curb discretion by limiting the poverty lawyer's ability to choose among clients. Critics seeking to refute this contention note the "practical exclusions" effected at intake.¹²⁸ Bellow specifies these exclusions in demonstrating the formalist's "choice" of case priorities. He explains:

The standards of financial eligibility, the hours an office is open, its geographical location, the way people are treated, all become methods by which some cases are taken and others are turned away or discouraged. In most offices, cases are taken on a first-come, first-served basis—with the delays, waiting time, and office hours serving as an effective way to discourage excessive demand. Decisions on these matters clearly involve a choice of priorities.¹²⁹

Although effective, Bellow's rebuttal of the formalists' "denial of ethical discretion" contention is incomplete. As it stands, the rebuttal addresses only lawyer judgments at intake. Full rebuttal requires evidence sufficient to counter the formalist's claim to neutrality with respect to lawyer judgments in advocacy as well. In an early work, Carol Silver outlined the rough form of this rebuttal.¹³⁰ Silver probed lawyer decisionmaking in the contexts of intake and advocacy, highlighting "decisions which reallocated time from some clients to those clients whose cases eventually went to court."¹³¹

Subsequent empirical studies of professional autonomy and decisionmaking in poverty law practice have shown that legal services lawyers develop

128. Bellow, *supra* note 119, at 199.

129. *Id.*; see also Silver, *supra* note 120, at 224 (recognizing "that every program for the distribution of legal (and other) services to the poor has some such [caseload limitation] method, whether or not it is articulated; whether or not it is recognized by those who operate it"); Wexler, *supra* note 119, at 1055 (arguing that "[a] seemingly neutral policy of 'first-come, first-served' cuts against the least informed, the least mobile, and the most oppressed").

Eligibility guidelines are especially subject to manipulation. See, e.g., GIRTH, *supra* note 120, at 19 (noting that OEO attorneys "interpreted [income eligibility] guidelines in an individualized fashion and managed to justify a finding of eligibility for anyone whom he or she wished to serve"); KATZ, *supra* note 122, at 64 (stating that "Legal Aid's eligibility rules functioned less certainly to impose uniformity on staff behavior than as a politically defensible face to outsiders and as a precondition for the exercise of the power to make exceptions, which was a treasured daily ritual").

130. Silver, *supra* note 120, at 225, 232.

131. *Id.* at 225.

“highly personalized” methods of advocacy.¹³² Robert Meadow and Carrie Menkel-Meadow link such methods to a model of “*personalized justice*.”¹³³ Essential to this model is the ability of lawyers “to decide on their own what and how much service to provide and to tailor the service provided to particular clients, attorney notions of justice, or individual attorney preferences.”¹³⁴ Based on an assessment of that ability, Meadow and Menkel-Meadow conclude that “[t]he professional autonomy of the legal services attorneys resides not so much in what they perform or who their clients are, but how they *choose* to perform.”¹³⁵

Silver maintains that the poverty lawyer *chooses* to perform “as judge as well as advocate.”¹³⁶ In spite of her role as advocate, the lawyer passes normative judgment on her client.¹³⁷ This judgment is shrouded in strategic decisionmaking. The lawyer, for example, “decid[es] that where a defense to a debt is little more than colorable it should not be raised, that where a procedural or technical nicety would vindicate an otherwise lost cause it may not be employed”¹³⁸ The normative judgment that drives lawyer ethical decisionmaking at intake and in advocacy is the judgment of moral character: the judgment of the “undeserving” poor.¹³⁹

132. See Robert G. Meadow & Carrie Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociolegal Ambivalence in the Delivery of Legal Aid for the Poor*, 9 LAW & HUM. BEHAV. 397, 411 (1985) [hereinafter Meadow & Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services*]; Carrie Menkel-Meadow & Robert G. Meadow, *Resource Allocation in Legal Services*, 5 LAW & POL'Y Q. 237, 240 (1983) [hereinafter Menkel-Meadow & Meadow, *Resource Allocation*].

133. Meadow & Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services*, *supra* note 132, at 400.

134. *Id.* at 400-01.

135. *Id.* at 411 (emphasis added); see also Menkel-Meadow & Meadow, *Resource Allocation*, *supra* note 132, at 252 (finding support for the theory of “professional rather than client dominance of legal services attorneys resource decisions”).

136. Silver, *supra* note 120, at 232; see also GIRTH, *supra* note 120, at 21 (disclosing that “individual applicants do not face a consistent screening process, but are subject to the individualized criteria of the ‘intake attorney’”).

137. Normative judgment is a fixture of modernism, providing the poverty lawyer with both a philosophy and rationalization of practice. Cf. Menkel-Meadow & Meadow, *Resource Allocation*, *supra* note 132, at 240 (noting that “legal services attorneys know they have more legal work than they can possibly handle, so in addition to making either tacit or purposeful decisions about what to work on, they may also develop an individual philosophy or rationalization of resource allocation”).

138. Silver, *supra* note 120, at 232.

139. *Id.* (asserting that “caseloads are reduced by eliminating service to the ‘undeserving’ poor”); see also Houseman, *supra* note 113, at 99-100 (“Pressures from members of the boards of directors of legal aid societies, particularly those with traditional moralistic or religious backgrounds, were successful in prohibiting legal assistance for many types of cases. Those not ‘deserving’ were excluded, and various legal services, often including divorces, were considered luxuries and not offered.” (footnote omitted)).

The imposition of the poverty lawyer's judgment of client moral character at intake and in advocacy discredits the formalist claim to neutrality. The exercise of that judgment constitutes a covert method of institutional and interstitial triage. Institutionally, moral judgment commissions the poverty lawyer to choose among prospective clients. Interstitially, moral judgment authorizes her to allocate resources (e.g., time and energy) among represented clients.

The poverty lawyer's wielding of moral judgment summons a vision of professionalism William Simon calls Progressive-Functionalist.¹⁴⁰ On Simon's account, the Progressive-Functionalist model operates on two premises: normative integration and functional differentiation. Normative integration underscores the importance of socialization and honor in a social order. Functional differentiation highlights the specialized training, knowledge, and skills acquired in connection with a professional role.¹⁴¹ For the formalist poverty lawyer, professionalism entails the deployment of her legal training, knowledge, and skill to achieve the moral integration of her client into the social order.

Under the Progressive-Functionalist model, the poverty lawyer is devoted to client moral integration and, by extension, public morality.¹⁴² The logic of this devotion is unadorned: client morality promotes the common morality of the general public.¹⁴³ This logic is related to the demand-driven legal services market prevalent in impoverished communities.¹⁴⁴

140. See William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 565-66 (1985); see also Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 265 (1990) (outlining a vision of the "Progressive lawyer-statesman"); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 725 (reclassifying the Progressive-Functionalist model as "progressive professionalism").

141. My analysis follows Simon's exposition. See Simon, *supra* note 140, at 566-67.

142. *Id.* at 568, 576-77.

143. David Luban ascribes this logic to the "New Wave of progressive professionalist lawyers" who molded public interest law practice in the late 1960s and early 1970s. Luban, *supra* note 140, at 731 (1988). Pointing to this logic, Luban asserts that "New Wave lawyers would never have doubted that their own talents were devoted to the pursuit of the common good." *Id.* at 732-33. As an example, he cites the liberal-Christian and Marxist New Wave lawyers who "viewed their clients' interests as universal interests within society." *Id.* at 733. On this view, "lawyers could advance the public interest simply by pursuing their clients' interests." *Id.*

144. Bellow and Kettleson mention the elastic tendency of demand curves in low income legal services markets. Bellow & Kettleson, *supra* note 113, at 380. They assert:

[D]efinitions of legal need are not static; they are elastic and have a tendency to expand as potential beneficiaries see lawyers as capable of responding to their problems. As has been demonstrated in legal services to the poor, demand for services will increase to the limits of the available supply.

Id.

There the poverty lawyer is insulated¹⁴⁵ from labor commodification.¹⁴⁶ Like the Progressive lawyer ideal inspired by Louis Brandeis,¹⁴⁷ the poverty lawyer is immune¹⁴⁸ to the disciplining forces of the market where clients shop for legal services.¹⁴⁹ This scarcity-based immunity reproduces the Progressive-Functionalist ideal of the lawyer working in the service of clients to advance “a vision of the general social good.”¹⁵⁰

The Progressive-Functionalist vision of the lawyer acting in the service of the public displaces the client’s private interest with the lawyer’s conception of the public good.¹⁵¹ Fundamental to this conception is moral character.¹⁵² The formalist conflates client moral character and the public good. On this calculus, elevating client morality enhances the public good.

The formalist constructs client moral character, erecting a metaphorical universe of “good” and “bad” qualities.¹⁵³ This assignment of character is performed in the context of the lawyering process.¹⁵⁴ Because the mean-

145. *Id.* at 340-41. Bellow and Kettleson explain:

[E]conomic incentives and disincentives are not dominant factors in the ways relationships and obligations are defined. Prospective clients have much less influence on who will get what kinds of service than in other areas of practice. It is not client demand, but program defined, non-economic criteria that generally determine the content and character of representation.

Id. at 340-41 (footnotes omitted).

146. See Simon, *supra* note 140, at 581 (alluding to “the Progressive-Functionalist premise that lawyers do not regard themselves as commodities”).

147. See Louis D. Brandeis, *The Opportunity in the Law*, in BUSINESS—A PROFESSION 313 (1914); see also DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 237-38 (1988) (applauding the “Brandeisian vision of moral activism”); Luban, *supra* note 140, at 720, 734 (classifying Brandeis and New Wave public interest lawyers within the tradition of progressive professionalism).

148. See Bellow & Kettleson, *supra* note 113, at 341 (“[T]he ability of clients who are being represented to keep their attorneys accountable is limited by their lack of economic leverage.”).

149. For an examination of the professional labor market for lawyers and the demand for legal services, see Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215 (1992).

150. Simon, *supra* note 140, at 585.

151. See Bellow & Kettleson, *supra* note 113, at 343 (“[Public interest lawyers] may risk subordinating client interests to their own conceptions of the public or general good.”).

152. The focus on moral character combines the Brandeisian technocratic vision of progressive professionalism, particularly the belief that the lawyer possesses a special quality of mind enabling him to render a “good judgment of people,” with the New Wave progressive professionalist sensibility of authenticity. See Luban, *supra* note 140, at 725-26, 731-32.

153. On metaphor and truth, see GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 159-84 (1980).

154. Steven Winter exposes the linkages of context, meaning, and performance. He notes:

The message lies not in the substance, but in the form. Words are not containers of meaning but material substances—the forces and elements of palpable practices. This reversal in which the manifest message of the content is supplanted and superseded by the contextual meaning of its performance is what postmodernists mean by *performativity*.

Winter, *supra* note 37, at 795 (footnote omitted).

ing of character is constructed, the process of naming “good” and “bad” qualities is unstable.¹⁵⁵ In the criminal context, for example, “good” character corresponds to guilt as well as innocence.¹⁵⁶ In the civil context, “good” character conforms to reductive categories of legal reasoning and remedy.¹⁵⁷ To be “good,” the client must *fit*—conceptually and experientially—the structure of these categories.¹⁵⁸ Those structures may demand a particular factual profile (e.g., a disabled woman of color) or a specific remedial design (e.g., injunctive relief or monetary damages). The client who fits the appropriate “misery” profile or design is judged “good.”¹⁵⁹

Implicit in these constructs is the concept of moral desert. The formalist aspires to find the client morally deserving of representation.¹⁶⁰ The

155. Given the use of metaphorical concepts, this instability is unsurprising. See LAKOFF & JOHNSON, *supra* note 153, at 41-45 (exploring metaphorical coherence and contradiction).

156. See, e.g., Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178-79 (1983-84) (presenting a “black, poor, and ugly” female heroin addict guilty of drug possession as “good”); Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15 (1951) (maintaining the ethical neutrality of “defending the guilty”); Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 741 (1991) (celebrating the “politically-motivated lawbreaker”); John T. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1487 (1966) (discussing the client who is a member of the Ku Klux Klan); Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011, 1011 (1986) (book review) (asserting that “some illegal acts—civil disobedience at certain times—may be judged morally worthy”).

157. Homer La Rue offers a student-lawyer’s version of the “good” client taken from a law school clinic setting. He explains:

The client is a “good client,” . . . if she can articulate the facts of her problem, preferably without emotion, and if she seeks an outcome which fits into the definition of a legal remedy. Such behavior by the client comports with the traditional definition of the lawyer’s role, which emphasizes dispassionate assessment of the problem to determine if it is recognized by the law.

La Rue, *supra* note 20, at 1152-53; cf. Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 715 (1992) (attacking misguided visions of the “good client”).

Steven Winter refers to this standard analysis as “the reductive approach.” Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 332 (1992). Winter states: “Conventional legal reasoning attempts . . . to reduce a complex legal problem to a principle, a set of propositional rules, or some other necessary and sufficient criteria. In theory, these definitional criteria allow professionals to delineate legal categories with greater precision and then to draw appropriate distinctions.” *Id.* at 331 (footnote omitted).

158. See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2270 (1989) (“Thus, to tell a story that will be both meaningful and compelling, the judge or other legal storyteller must make use of preexisting cultural knowledge in ways that will seem natural to those subject to the legal rule because already grounded in social experience and mediated by existing cultural models.”).

159. See Wexler, *supra* note 119, at 1062 (describing the experience of “[r]eveling in the misery of one’s clients”).

160. Thomas Shaffer defines the “good” client in terms of moral goodness. Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 329 (1987) (claiming that the client “is capable of being and of becoming a good person, and is therefore worth *my*

evaluation of moral worth is an act of perception¹⁶¹ linked to the investigation of a client's grievances and claims.¹⁶² This act of moral "prefiguration"¹⁶³ occurs throughout the lawyering process. Its predictive power hinges on the "reflexivity of its social meaning"—the extent to which a community shares the meaning of moral worthiness.¹⁶⁴

The Johnson case demonstrates a strong reflexivity of social meaning, and hence, correspondence of moral judgment within the poverty law community. The record of Johnson's administrative and judicial proceedings easily establishes the requisite facts—physical impairments, medical history, and functional limitations—to survive institutional and interstitial triage. The facts of Johnson's disability, though persuasive, contribute to but do not compel a judgment of moral worthiness. That judgment rides on additional factors such as Johnson's race, gender, and personal history of migration, family, and work. The poverty lawyer's evaluation of those factors occurs behind the gloss of objectivity.

2. Objectivity

The formalist claim to objectivity bears directly upon the evaluation of Johnson's moral worth as a client. To appraise Johnson's moral character, the formalist engages in fact finding. Facts constitute "descriptive claims"¹⁶⁵ about the sociolegal world. For the formalist, they are the constituent elements of objective truth.

giving *him* moral advice" (footnote omitted)); cf. LUBAN, *supra* note 147, at 306 (mentioning moral respect and stigmatization as a factor in triage justification).

161. On the influence of perception in the representation of the disabled, see Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161, 167 (1982) ("Because a [psychiatric] patient's appearance, manner, dress, or speech may be 'different,' the lawyer may feel somewhat foolish or awkward representing his client's views to the court."); Bruce D. Sales & Lynn R. Kahle, *Law and Attitudes Toward the Mentally Ill*, 3 INT'L J. L. & PSYCHIATRY 391, 393 (1980) (contending that the "pejorative labelling of mentally ill people" may generate "perceptions of behavior and negative attitudes").

162. On the function of grieving and claiming in dispute generation and processing, see generally Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81).

163. Winter, *supra* note 37, at 799 (explicating prefiguration as a process "in which the very act of perception already entails a transfiguration and assimilation of the idea or event in terms of an existing conceptual framework") (footnotes omitted).

164. Winter, *supra* note 157, at 337 ("[T]he predictive power of . . . [a] concept is contingent on the reflexivity of its social meaning—that is, on the assimilation of that meaning both by the observer and by the actor under observation.") (footnote omitted)).

165. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992) ("[Conventionally defined] propositions of law and fact may describe different *kinds* of facts, whose discovery might require somewhat different modes of inquiry, but that does not alter their epistemological equivalence as descriptive claims about some feature of the physical, mental, or moral world.").

The formalist pursues fact finding in search of truth. Enacting the role of trial judge, her "paramount objective" is factual truth.¹⁶⁶ The formalist, however, is a partisan truth-seeker. Her partisanship is epistemological: she seeks to discover¹⁶⁷ truth through a theory of knowledge¹⁶⁸ that posits the cognizability of moral identity.¹⁶⁹ Before representation may commence,¹⁷⁰ therefore, Johnson's moral identity must be ascertained.¹⁷¹

Ascertaining Johnson's moral character in the context of her disability case entails "reasoning towards conclusions of fact."¹⁷² The ultimate fact in controversy is disability itself. Reasoning involves "blame" and "responsibility" attributions.¹⁷³ To be found morally worthy, Johnson must be

166. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975); cf. Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 133 (1987) ("How closely [adversary trial] 'truth' comports with the 'real truth,' whatever that might be, is indeterminable.").

167. The metaphor of discovery regarding "truth" receives wide usage in the literature of lawyering and ethics. See, e.g., Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 810 (1977) ("The purpose of testimony is to permit the fact-finder to discover the truth.").

168. The formalist is unmoved by Monroe Freedman's epistemological demurrer that "knowledge is always uncertain in nature." MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 57 (1975); cf. Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1064 (1992) (bemoaning the academic "denigration of the search for truth").

169. Jurisprudentially, this proposition presumes the lawyer's commitment, openness, and cognitive competency to recognize the meaning and value of human good. See DAVID GRANFIELD, *THE INNER EXPERIENCE OF LAW* 257-62 (1988); MICHAEL PERRY, *LOVE AND POWER* 33, 99 (1991).

170. On the lawyer's exercise of moral judgment at the commencement of the lawyer-client relation, see Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 664-65 (1986).

171. Kent Greenawalt makes a similar claim concerning cultural morality in the judicial realm. See KENT GREENAWALT, *LAW AND OBJECTIVITY* 196 (1992).

172. WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* 279 (3d ed. 1991).

173. See Isaac M. Lipkus, *A Heuristic Model to Explain Perceptions of Unjust Events*, 5 SOC. JUST. RES. 359, 379 (1992). Lipkus's study of attributional models explores the cognitive perception of moral character. Illustrating "the belief in a just world" principle of attribution, he explains:

[I]nnocent victims are blamed so that the observer can feel relief that negative outcomes only happen to individuals who deserve it. Consequently, the poor and the ill are often viewed disparagingly. The implication this has for the self is that assuming responsibility for a negative outcome implicates him/her as an unworthy person. After all, only "bad" people deserve negative outcomes.

Id. 361-62 (footnotes omitted). On sociolegal applications of attribution theory, see Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655, 659 (1980-81) ("Attribution theory holds that people prefer to find order and meaning in the world, and usually develop explanations for why events happen and why people behave as they do." (footnote omitted)); see also William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 641 (1980-81) ("Attribution theory asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious.")

blameless. She must be excused of responsibility for her impairments. Blame must be assigned elsewhere: to the garment industry, to her employer, or to piecework production. These attributions create the "illusion" of a valid disability.¹⁷⁴ The illusion of a rationally validated disability instills overconfidence¹⁷⁵ in the lawyer's judgment¹⁷⁶ of Johnson's moral character. Overconfidence is boosted by the well-documented record of her impairments: osteoarthritis, hypertension, and bronchial asthma. Alone, these impairments are not dispositive of moral character. When combined with her thirty-six year work history, North Carolina migration, intact family household, race, and gender, Johnson attains a virtuous moral character.

The objectivist categorization of a disabled client's moral identity indicates the use of an idealized cognitive model of disability.¹⁷⁷ The formalist

(footnote omitted)); Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 17-18 (1990) ("[A]tribution theory teaches that, once a person adopts a stereotype, a wide variety of information will be seen by that individual to reinforce that stereotype." (footnote omitted)).

174. Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 345 (1992) ("The illusion of validity occurs when decisionmakers make stereotypical predictions, and the evidence on which they make their predictions 'is scanty, unreliable, or outdated.'") (footnote omitted)); Perlin, *supra* note 173, at 15 ("We tend to make intuitive predictions by selecting an outcome most similar to a pre-existing stereotype and express extreme confidence in such predictions, even where we are given scanty, outdated, or unreliable information about an unknown." (footnote omitted)).

175. Overconfidence is a problem-solving heuristic used in complex decisionmaking and probabilistic judgment. See Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 LAW & SOC'Y REV. 122, 143 (1980-81) ("People tend to be overconfident in their judgments. Not only do individuals tend to overestimate how much they already know, but they also tend to underestimate how much they have just learned from facts presented in a particular context." (footnote omitted)); see also Perlin, *supra* note 173, at 16 ("We tend to overestimate how much we already know and underestimate how much we have recently learned." (footnote omitted)).

176. There is a wide social science literature on the heuristics of judgment. See, e.g., Paul J.H. Schoemaker, *The Expected Utility Model: Its Variants, Purposes, Evidence and Limitations*, 20 J. ECON. LIT. 529 (1982) (examining expected utility model of individual decisionmaking, particularly principle of utility maximization); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (describing judgmental heuristics used to assess probabilities and to predict values); Amos Tversky et al., *Contingent Weighting in Judgment and Choice*, 95 PSYCHOL. REV. 371 (1988) (identifying the heuristics and computational schema of choice and preference); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. 251 (1986) (proposing a descriptive model of choice).

177. Steven Winter introduces the concept of an idealized cognitive model (ICM) to elucidate the mistaken assumptions of legal reasoning and judicial decisionmaking. Winter explains: "An ICM is a 'folk' theory or cultural model that we create and use to organize our knowledge. It relates many concepts that are inferentially connected by means of a single conceptual structure that is experientially meaningful as a whole." Winter, *Transcendental Nonsense*, *supra* note 13, at 1152 (footnote omitted); see also GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND

utilizes this idealized model in fact finding, for example, when investigating impairments and pain.¹⁷⁸ Under this model, the formalist wants to see pain and disfigurement. She wants to see Johnson grimace and hobble. She wants to hear her complaints of pain and functional limitation. When such evidence is not visible or announced, she fixates on a belief in objectivity,¹⁷⁹ overlooking the difficulties of client articulation¹⁸⁰ and blaming the client for factual inconsistencies or omissions.¹⁸¹

The properties, duration, and etiology of disability, however, defy objectivist categorization.¹⁸² Physical¹⁸³ and mental¹⁸⁴ impairments are not

68-77 (1987); Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 699 (1989) (presenting a paradigmatic approach to classification "focus[ing] on the way in which [a communal] tradition is defined and expressed through concrete exemplars which serve as models and as problem-solving devices"); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 n.1 (1984) (labeling the knowledge structures of lawyer problem-solving as "stock stories").

178. On the nexus of impairments and pain, see Resnik, *supra* note 43, at 47 ("The questions in disability cases often involve finding 'facts' about the relationship between an individual's described experience of pain and her or his capacity to obtain gainful employment." (footnote omitted)).

179. On theory construction and "belief fixations," see BRIAN ELLIS, TRUTH AND OBJECTIVITY 169 (1990) (contending that belief fixations prevent appropriate inferences).

180. See Resnik, *supra* note 43, at 47 ("Not only are [social security disability] cases often filed by litigants who lack lawyers, but the claims themselves may be exceedingly difficult to articulate.").

Factual inconsistencies or omissions sometimes may be attributable to the SSA's failure to provide adequate bilingual services to non-English-speaking claimants at the application stage, at consultative physician examinations, and at administrative law judge hearings. See Kim Savage, *Lack of Bilingual Services at Social Security Offices: Why Non-English-Speaking Clients Are Not Getting Help*, 26 CLEARINGHOUSE REV. 911, 911 (1992) ("Nationwide, non-English-speaking persons who are poor, are elderly, or have disabilities are denied access to benefit programs because the Social Security Administration (SSA) fails to provide translated written notices and bilingual staff or interpreters.").

181. For a discussion of the social and ethical construction of client narrative inconsistencies, see Naomi Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993).

182. The framework of this analysis is taken from Steven Winter's discussion of the "constituent features" of an idealized cognitive model. Winter, *Transcendental Nonsense*, *supra* note 13, at 1153; see also LAKOFF & JOHNSON, *supra* note 153, at 122 ("On the standard objectivist view, we can understand and hence define an object entirely in terms of a set of its inherent properties.").

183. On the social construction of physical disability, see CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT 19-106 (1988) (examining the social, political, and normative construction of disability in the legislative treatment of physically impaired people); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT 78-94 (1990) (clarifying the ideological influences at play in the social construction of disability).

184. On the social construction of mental disability, see THOMAS J. SCHEFF, BEING MENTALLY ILL 190 (1984) (exploring labeling theory to demonstrate that "'mental illness' may be at least as much a social fact as it is a physical fact"); Phil Brown, *The Name Game: Toward a Sociology of Diagnosis*, 11 J. MIND & BEHAV. 385 (1990) (outlining a sociology of clinical diagnosis); Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 660-61 (1992)

right triangles conforming to a Pythagorean Theorem.¹⁸⁵ Unlike Euclidean geometry,¹⁸⁶ medical impairments may frustrate objective investigation.¹⁸⁷ The truth of disability is neither metaphysical¹⁸⁸ nor mathematical.¹⁸⁹ In Johnson's case, the truth of her disability is contingent on the poverty lawyer's overlapping sociolegal judgments concerning the nature of disability, the scope of statutory entitlement, and the content of moral desert.

The plasticity¹⁹⁰ of disability permits the formalist poverty lawyer to sanctify a client's moral character. Without recourse to moral character, the formalist resorts to a kind of "soft conventionalism"¹⁹¹ of community norms and practices. The key to actualizing these norms and practices is

(noting the value-laden politics of clinical diagnosis, diagnostic categories, and treatment protocols); cf. ROBERT ENDLEMAN, *DEVIANCANCE AND PSYCHOPATHOLOGY: THE SOCIOLOGY AND PSYCHOLOGY OF OUTSIDERS* 133-55 (1990) (denigrating the labeling sociology of mental illness in favor of psychoanalytic theory).

185. On the Euclidean measurement of right triangles under the Pythagorean Theorem, see John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 998 (1992).

186. For an exposition of Euclidean geometry and the significance of the rise of non-Euclideanism in law and the social sciences, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 47-73 (1973); see also GERALD HOLTON, *THEMATIC ORIGINS OF SCIENTIFIC THOUGHT: KEPLER TO EINSTEIN* 437 (1975); LAKOFF, *supra* note 177, at 219-28.

187. Cf. Rogers & Molzon, *supra* note 185, at 998 ("In Euclidean geometry it was possible to test certain theorems for truth by checking them against objective reality.").

188. On metaphysical truth, see Lawson, *supra* note 165, at 866 ("The bedrock, or metaphysical, conception of truth is correspondence with a reality that exists independently of its acknowledgment by the conscious mind of a perceiver; and a (metaphysical) truth claim is warranted or justified when it identifies some feature of that reality beyond a rational doubt." (footnote omitted)).

189. On mathematical truth, see Rogers & Molzon, *supra* note 185, at 998 ("Truth may just mean 'consistent with all other axioms and proven and provable theorems.'").

190. On the genesis of plasticity, see PURCELL, *supra* note 186, at 54, 69-70 (showing the non-Euclidean inception of the concept of plasticity); see also ROBERTO M. UNGER, *PLASTICITY INTO POWER: VARIATIONS ON THEMES OF POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* 153, 206-12 (1987) (discussing plasticity of socioeconomic arrangements); Alfieri, *Disabled Clients*, *supra* note 2, at 837 (describing plasticity of institutional roles).

191. For treatments of "soft conventionalism," see RONALD DWORKIN, *LAW'S EMPIRE* 124 (1986) ("[S]oft conventionalism insists that the law of a community includes everything [e.g., moral and political convictions] within the implicit extension of [legal] conventions."); Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 533, 583-84 (1992) ("[S]oft conventionalism provides a plausible account of how ideology and moral argument can permeate legal debate while at the same time playing a subordinate role limited by the facts of social practice."); cf. Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 186, 191 (1985) (noting the conventionalist's emphasis on situated practice and professionalism); Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 966 (1990) (contending that practices "function as conventions"); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 203 (1982) (insisting that "law rests at its foundations on a complex set of conventions regarding proper law-identifying and law-applying activities of both officials and citizens").

lawyer-client empathy. In impoverished communities, the judgments of empathic understanding are no less socially constructed than the categorizations of objectivism.¹⁹²

3. Empathy

The formalist claim to empathy stems from the modernist experience of exile.¹⁹³ The poverty lawyer experiences exile in the disjunctions of client difference (e.g., class, gender, and race). These disjunctions separate the lawyer and client, partitioning their respective worlds. The “exile-motif”¹⁹⁴ is a recurrent feature of current poverty law scholarship.¹⁹⁵ Its emergence signals a crisis of “epistemological confidence”¹⁹⁶ marked by the slow renunciation of the traditional lawyer-client, subject-object dichotomy of legal objectivism.¹⁹⁷ The formalist evades this crisis by propounding the claim of empathy.

192. Lucy Williams traces such constructed judgments to a fundamental ambivalence about the poor. See Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 721 (1992) (“The United States has always been ambivalent about assisting the poor, unsure whether the poor are good people facing difficult times and circumstances or bad people who cannot fit into society.” (footnote omitted)).

193. See David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1667 (1986) (“Who we are, according to the modernist, are exiles.”).

194. *Id.*

195. See generally Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 2, at 2110 (describing an Hispanic female foster parent-welfare client); Alfieri, *Speaking Out of Turn*, *supra* note 2, at 637 (depicting a twenty-seven year old Hispanic female welfare client); Cahn, *The Looseness of Legal Language*, *supra* note 18, at 1429 (discussing a black female battered welfare client); Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1311 (discussing black male client); Dinerstein, *supra* note 21, at 972 (recalling a black female West African immigrant client); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 1 (1989) (recounting an Hispanic female welfare client); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991) (portraying a sixty-five year old black female lower middle class client); White, *supra* note 27, at 861 (chronicling a group of welfare clients); 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) (picturing rural disability recipients and urban homeless people); White, *Subordination*, *supra* note 15, at 5 (sketching a black female welfare client).

The upshot of exile is “arrogant perception.” See Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 199 (1991-92) (“A key aspect of arrogant perception is the distance between ‘me’ and ‘the other.’ The ‘I’ as arrogant perceiver is a subject to myself with my own perceptions, motivations, and interests.”).

196. Thomas McCarthy, *Doing the Right Thing in Cross-Cultural Representation*, 102 ETHICS 635, 637 (1992) (book review) (probing the crisis of representation in anthropology).

197. On the import of the subject-object dichotomy, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1450 n.24 (1990) (“[T]he underlying assumption of the subject/object dichotomy is what unites objectivism and subjectivism.”).

The concept of empathy is pivotal to the formalist lawyering process. Canonized in the works of David Binder, Paul Bergman, and Susan Price,¹⁹⁸ empathy is the “stabilized matrix”¹⁹⁹ of lawyer-client interviewing and counseling.²⁰⁰ Steven Winter derives the notion of a “stabilized matrix” from Thomas Kuhn’s philosophy of science, specifically his conception of a “disciplinary matrix.”²⁰¹ Under Kuhn’s terms, disciplinary “refers to the common possession of the practitioners of a particular discipline;” matrix points to the “compos[ition] of ordered elements of various sorts, each requiring further specification.”²⁰²

Kuhn notes four main components of a disciplinary matrix. The first he labels “symbolic generalizations.”²⁰³ Expressed in symbolic form and words,

198. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 40-41, 53 (1991); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 14-15 (1977); see also John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. L.J. 505, 510-17 (1983) (endorsing and testing empathy skills). For an astute analysis of empathy and the client-centered approach, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 556-84 (1990) [hereinafter Dinerstein, *Client-Centered Counseling*]; Dinerstein, *Clinical Texts and Contexts*, *supra* note 157, at 707-11; Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 733-39 (1987); Simon, *Homo Psychologicus*, *supra* note 15, at 506-25 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 130-44 [hereinafter Simon, *The Ideology of Advocacy*].

199. Winter, *supra* note 197, at 1452-53.

200. In the lawyer-client context, many scholars treat empathy as a formalist skill consisting of nonjudgmental listening, understanding, and acceptance. See, e.g., BINDER ET AL., *supra* note 198, at 40-41, 53 (denoting the empathic ideals of nonjudgmental listening, understanding, and acceptance); ROBERT M. BASTRESS & JOSEPH HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING* 116-18 (1990) (defining empathic reflection as a set of subskills involving listening to, understanding, and communicating the client’s feelings); THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING* 73-83 (1987) (characterizing “empathic regard for the client’s feelings” in terms of active listening and acceptance).

Cf. Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 993-94 (1992) (arguing that the “positive judgment latent in empathy” should sometimes extend to explicit “approval” of the client’s world view); Diana T. Meyers, *Social Exclusion, Moral Reflection, and Rights*, 12 LAW & PHIL. 217, 227-28 (1993) (reviewing MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990)) (“Empathic thought takes into account the agent’s strengths and weaknesses along with that individual’s moral ideals, and it commends action that responds to others in a manner that is consonant with that self-concept.”).

For applications beyond the lawyer-client context, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (examining empathic narrative and understanding in legal discourse and decisionmaking); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989) (reconciling formalist and empathic models of judicial decisionmaking); cf. Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (examining difference and judging); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (discussing feminist ethics and judging).

201. Winter, *supra* note 197, at 1453.

202. KUHN, *supra* note 14, at 182.

203. *Id.*

these “formal” or “readily formalizable” generalizations serve both “legislative” and “definitional” functions.²⁰⁴ The second component he describes as a “shared commitment” to particular heuristic and ontological “models,” including the supply of “preferred or permissible analogies and metaphors.”²⁰⁵ The third component he denotes as “values,” especially concerning standards of prediction and judgment.²⁰⁶ The fourth he identifies as “exemplars,” contemplating the concrete and technical “problem-solutions” acquired in education and applied in practice.²⁰⁷

Informed by Kuhn, Winter argues that, within the stabilized matrices of law, “the epistemic and the political are already mutually entailed in a manner that is likely to be imperceptible to the participant.”²⁰⁸ The formalist denies the mutuality of epistemology and politics, rejecting the intersection of knowledge and power. For her, empathic understanding is apolitical both in purpose and operation.

Binder, Bergman, and Price contend that the purpose of empathy is to “give[] clients feelings of trust and confidence in an attorney-client relationship and thereby motivate[] clients to participate fully in conversations.”²⁰⁹ Encouraging these feelings enables the lawyer “to receive information that clients might not otherwise disclose,” and incites clients “to participate actively in the solutions to their problems.”²¹⁰ The operation of empathy, Binder, Bergman, and Price continue, involves the lawyer’s exhibition of “nonjudgmental understanding.”²¹¹

The formalist principle of nonjudgmental understanding is contingent on a priori claims to neutrality and objectivity. Without such claims, the formalist stands situated in a context that is “simultaneously constituting and constituted.”²¹² It is constituting because it entangles the lawyer and client in contested social practices that are partisan and subjective.²¹³ It is constituted because its constructed conditions—class, disability, gender, race—antecedently enter into the lawyer-client relationship.²¹⁴

Envisioning context in this “double sense”—as simultaneously constituted and constituting—locates the lawyer as a situated subject imbued

204. *Id.* at 182-83.

205. *Id.* at 184.

206. *Id.* at 184-85.

207. *Id.* at 187.

208. Winter, *supra* note 197, at 1452.

209. BINDER ET AL., *supra* note 198, at 40.

210. *Id.* at 41-42.

211. *Id.* at 41.

212. Winter, *supra* note 197, at 1486.

213. *Id.* at 1486 (“We are *constituting* because meaning arises in the imaginative interaction of the human being with the environment.” (emphasis added)).

214. *Id.* (“We are *constituted* because the situated quality of human existence means that both the physical and social environment with which we interact is already formed by the actions of those who have preceded us.” (emphasis added)).

with the “imaginative, social constructions” of meaning and category.²¹⁵ The accretion of these imaginative constructions—objectivist categories of “good” and “bad” moral character—produces both cognitive and normative “sedimentation.”²¹⁶ Winter explains:

Sedimentation is the “deposit” of the subject’s past interactions with its physical and social situation. It operates as a gestalt that, once integrated, can be invoked without being fully reactivated. Once a meaning is sedimented, it can become self-reinforcing. Sedimentation is another way of describing the process by which we form, internalize, and then operate by means of idealized cognitive models.²¹⁷

The sedimented context of poverty law entrenches normative categories “good” and “bad” moral character, and thereby, undermines the formalist claim to empathy and its core principle of nonjudgmental understanding. The collapse of this claim and its corollary deprives the formalist lawyer of a consensual, intersubjective theory of meaning.²¹⁸ Absent voluntary consensus, meaning must be coerced; in a sense, it must be “outed.” Ritualized coercion occurs when the poverty lawyer prods the client to confess to a litany of pain, impairments, and functional limitations.

215. Winter, *Transcendental Nonsense*, *supra* note 13, at 1157.

216. Winter, *supra* note 197, at 1487 (“[T]he concept [of sedimentation] expresses the way meanings and assumptions build up within the subject and, once internalized, operate without the subject’s conscious awareness.” (footnote omitted)).

217. *Id.* at 1488.

218. The collapse of the formalist claim to empathy may be slowed by reflection on lawyer-client difference. *Cf.* Meyers, *supra* note 200, at 227. Reasoning from the premise of difference, Diana Meyers imagines empathic thought as “an interactive model of moral reflection.” *Id.* at 228. She explains:

To think empathically, one must ask, “Who are you?” and “How can I best respond to your needs?” Empathic thought requires people to attend to others in order to learn to see the world from their point of view . . . to apprentice themselves to others. One’s own point of view may ultimately prove to be a permutation of another group’s basic interest profile, but it may not Although empathic thought relies on the deliberator’s accumulated experience of people and human relations, it assumes no standard case. Rather, it pays attention to individuals and seeks to understand and respond to each individual’s distinctive ensemble of strengths and weaknesses, hopes and fears. Difference is presumed to be the norm (every person is unique), and the task of moral reflection is to devise action that is gauged to particular persons. Thus, making allowance for difference carries no connotations of favoritism or exploitation. Rather, empathic thought relishes and honors difference.

Id. at 227; *see also* ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* 178 (1988) (“I cannot provide here an account of what I take real knowledge [of the oppressed] to be, but I do want to say here that the acquisition of such knowledge requires a kind of apprenticeship; and making oneself an apprentice to someone is at odds with having political, social, and economic power over them.”).

The metaphor of “outing,”²¹⁹ borrowed from the literature of gay and lesbian sexuality, is illuminating. Like disability, sexuality is socially constructed.²²⁰ Like people with disabilities, gay and lesbian people are often labeled deviant.²²¹ Further, like the outing of disability, the outing of sexuality is an act of power, albeit punitive rather than benevolent.²²² The exercise of that power deprives the individual—whether gay, lesbian, or disabled—of an opportunity to “come out” as an act of self-determination. William Eskridge describes the “coming out process” as “central to gay consciousness.”²²³ To compromise that process is to sever the connection

219. The term “outing” is conventionally used to describe “the exposure of prominent ‘closet’ homosexuals for politically progressive ends.” John P. Elwood, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 747, 750 (1992). These ends may include “greater public acceptance of homosexuals, more sympathetic civil rights legislation, and increased funding for AIDS research.” *Id.* at 747. Elwood distinguishes two types of “outing.” The first type, called “gratuitous” outing, “merely identifies an individual as gay, and does not attempt to imbue this fact with greater significance or relate it to some greater controversy.” *Id.* at 770 (footnote omitted). The second type, called “political” outing, “discloses a person’s sexuality in the context of a controversy in which he is involved.” *Id.*; see also RUTHANN ROBSOMN, *LESBIAN (OUT)LAW 75* (1992) (“The outing controversy captures important issues for lesbians, such as passing, heterosexism, and the boundaries of lesbian identity.”); Larry Gross, *The Contested Closet: The Ethics and Politics of Outing*, 8 CRITICAL STUD. MASS COMM. 352 (1991) (explicating the underlying conceptual and political bases of outing); Jon E. Grant, Note, “Outing” and Freedom of the Press: *Sexual Orientation’s Challenge to the Supreme Court’s Categorical Jurisprudence*, 77 CORNELL L. REV. 103, 104 (1991) (“‘Outing’ is the intentional exposure by gay people of the sexual orientation of public figures.” (footnote omitted)); Ronald F. Wick, Note, *Out of the Closet and into the Headlines: “Outing” and the Private Facts Tort*, 80 GEO. L.J. 413, 413 (1991) (defining “outing” as the act of “making public allegations of homosexuality in an effort to force the subject to ‘come out of the closet’ and go public with his lifestyle” (footnote omitted)).

220. See William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s SEX AND REASON: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 366 (1992) (book review) (claiming that “sexuality is socially constructed and historically contingent”). To Eskridge, “social constructionism posits that the concept of and content of sexual orientation is not a natural category, biologically or otherwise fixed across time and space.” *Id.* at 366-67. On the contrary, “each society creates its categories [sic].” *Id.* at 367.

221. *Id.* at 369 (citing the historical creation of “homosexuality as a deviate form of personhood”); see also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 537-633 (1992) (probing the pernicious consequences of the “sex-as-lifestyle assumption”).

For historical portraits of sexual deviance, see generally JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980); 3 MICHEL FOUCAULT, *THE CARE OF THE SELF: THE HISTORY OF SEXUALITY* (1986); DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988); JONATHAN N. KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* (1992).

222. This distinction—benevolence and punishment—is significant. Outing disability, though frequently demeaning, is materially beneficial: the party will enjoy public benefits. Outing sexuality, by comparison, is punitive: the party will suffer public or private sanction.

223. Eskridge, *supra* note 220, at 373 (“Coming out involves, first, recognition that one’s sexuality profoundly involves feelings toward people of the same gender, and that these

of the body—disability, gender, race, sexuality—to identity.²²⁴ The poverty lawyer's act of coercing a confession of the meaning of disability from the client severs the connection of the body to identity, thus undermining the claims to empathic, nonjudgmental understanding and intersubjectivity.

4. Determinacy

The formalist claim to determinacy rises from the assumption of juridical stability. This assumption accords predictability and regularity to legal discourse, institutions, and relations. The poverty lawyer emphasizes the discursive stability of legal rules and reasoning. In this regard, stability is characterized by immanent rationality, determinacy, and apolitical decision-making.²²⁵ Immanent rationality implies the internal coherence and intelligibility of legal discourse.²²⁶ Determinacy suggests the deduction of legal solutions²²⁷ from positive or natural norms.²²⁸ Apolitical decisionmaking

feelings are important to one's identity; second, knowledge that this self-recognition links one to many others with similar feelings and identity; and, third, acknowledgement to others of these discoveries and conclusions about oneself." (footnote omitted)); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 212 ("For gay people, leaving the closet is a difficult and profoundly important act of self-affirmation of their identities and core human relationships."). For commentary on the "coming out" process, see generally Barry M. Dank, *Coming Out in the Gay World*, 34 PSYCHIATRY 180 (1971); Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 J. HOMOSEXUALITY 47 (1982).

224. Eskridge, *supra* note 220, at 374; see also Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 932-63 (1989) (exploring the formation of homosexual identity).

225. These characteristics are symbolic of formalism. See, e.g., Michael Corrado, *The Place of Formalism in Legal Theory*, 70 N.C. L. REV. 1545, 1555 (1992) (proffering a "genuine" version of formalism entailing "the autonomy of the law and the existence of a specifically legal realm of investigation."); Ken Kress, *Formalism, Corrective Justice and Tort Law*, 77:2 IOWA L. REV. iii (1992) ("[I]f formalism is correct, law is coherent and internally intelligible, autonomous and distinct from politics, economics, moral philosophy, history, and social science."); Frederick F. Schauer, *Formalism*, 97 YALE L.J. 509, 546 (1988) (sketching a theory of "presumptive formalism"); Frederick F. Schauer, *Rules and the Rules of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 664 (1991) (focusing on formalism as "a style of decisionmaking in which the decisionmaker denies having made a choice when in fact the decisionmaker did so"); Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of the Law*, 97 YALE L.J. 949, 953-57 (1988) (describing formalism in terms of rationality, immanence, and normativity).

226. See Dennis Patterson, *The Metaphysics of Legal Formalism*, 77 IOWA L. REV. 741, 744 (1992) ("'Immanent' to law means 'inside' legal discourse.").

227. On formalist modes of legal reasoning, see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 38 (1960) (describing the "Formal Style" of legal reasoning where "[o]pinions run in deductive form with an air or expression of single-line inevitability"); Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983) (defining formalism as the "belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice").

228. Anita Allen and Maria Morales offer a view of formalism "as inherently conservative." Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L.

indicates that law is separate from politics.²²⁹ On this account, legal judgment obtains justification independent of consequentialist concerns.²³⁰

The poverty lawyer discerns the immanent rationality of legal discourse from the “ensemble of authoritative materials” deployed in practice.²³¹ The authoritative principles of poverty law practice in the context of disability largely consist of statutes, regulations, and case law. These principles shape the necessary²³² form and content of disability. To “mediate” legal decisionmaking,²³³ the meaning of a principle (i.e., its form and content) must correspond to the external world.²³⁴ For the formalist, that unity of meaning—whether over or under inclusive²³⁵—provides a “sufficient basis for deciding any case that arises.”²³⁶

REV. 713, 735 (1992). They explain:

[Formalism] instructs those who reason about law and decide legal cases to look to established positive or natural norms. Members of politically powerless, disadvantaged groups who cannot accept that there could be legitimate legal barriers to empowerment and welfare may be inclined to balk at positivistic formalism.

Id. at 735.

229. See, e.g., John Stick, *Formalism as the Method of Maximally Coherent Classification*, 77 IOWA L. REV. 773, 774 (1992) (reciting the formalist claim that “legal analysis is determinate and apolitical”); see also Patterson, *supra* note 226, at 742 (“From the point of view of epistemology, formalism presupposes that one universe of discourse, here law, can be demarcated from competing normative enterprises, most especially the political.”).

230. See Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851, 851 (1992) (“Legal justification involves the working out of principles that are immanent in the law, rather than looking to the instrumental realm of politics.”).

231. George Brencher, *Formalism, Positivism, and Natural Law in Ernest Weinrib's Tort Theory: Will the Real Ernest Weinrib Please Come Forward*, 42 U. TORONTO L.J. 318, 319 (1992) (noting the formalist's tendency to gather “an ensemble of authoritative materials” as a “text” from which to draw understanding); see also Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Uses*, 66 CORNELL L. REV. 861, 867 n.4 (1981) (noting the formalistic tendency to trace law to “an authoritative source”).

232. See Allan C. Hutchinson, *The Importance of Not Being Ernest*, 34 MCGILL L.J. 233, 235 (1989) (defining immanence as “the idea of law as the rational embodiment of an indwelling necessity”).

233. On formalist mediation, see Winter, *Transcendental Nonsense*, *supra* note 13, at 1110 (“The traditional approach assumes that principles ‘mediate.’ But mediation is possible only if two conditions are met: (1) the principles must accurately correspond to our social world; and (2) there must be a logical, propositional trajectory from principle to concrete application.”).

234. On the foundational entailment of formalism, see Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 793 (1989) (“‘Formalism’ is the view that there exists a mind-independent reality consisting of certain first principles either of fact or value.”); Alicia Juarrero-Roque, *Fail-Safe Versus Safe-Fail: Suggestions Toward an Evolutionary Model of Justice*, 69 TEX. L. REV. 1745, 1758 n.100 (1991) (“The first requirement [of formalism] is that principles not only be value-free in their mirroring of the world, but that they also be ‘objective,’ i.e., out there, not of our doing.”).

235. Cf. Robert S. Summers, *Theory, Formality and Practical Legal Criticism*, 106 LAW Q. REV. 407 (1990) (formulating constitutive grounds for over and under formality).

236. David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981).

The poverty lawyer claims to deduce determinate substantive meaning, and thus, legal solutions from the logical application of principle to fact.²³⁷ This claim of determinacy is asserted in the context of practice.²³⁸ The application of principle to fact in order to obtain the “right” answer²³⁹ in selecting a case or a strategy is experienced as a routine part of poverty law practice.²⁴⁰

The poverty lawyer contends that her method of selecting cases and strategies is apolitical.²⁴¹ To her, poverty law is a practice separate from politics. In a sense, it is a “rule-following game”²⁴² located “outside the battleground of ideology.”²⁴³ Within this game the rule is an end-in-itself, a self-generated constraint on the power of the state.²⁴⁴

In Johnson’s case, the legal principle at issue is the treating physician rule. The poverty lawyer views the rule as internally coherent and intelligible. The rule governs the evidentiary weight to be accorded treating physician opinion. She believes not only in her ability to apply that rule, but also that application of the rule to the facts of the Johnson case—multiple treating physician reports supported by clinical, laboratory, and x-ray studies—will produce determinate results. The results, in turn, will dictate whether Johnson is disabled, notwithstanding the regulatory poli-

237. On the interconnection of modernity and formalist deduction, see Juarrero-Roque, *supra* note 234, at 1757-58 (“Modernity’s insistence on deduction as the only legitimizing process finds its counterpart in law in the traditional objectivist of formalist approach, according to which law is constituted by a set of ideals and principles that are applied to specific cases in the process of adjudication.”).

238. Cf. Hutchinson, *supra* note 232, at 254 (“Determinacy and indeterminacy are polarities on the plain of praxis.”).

239. See Radin, *supra* note 234, at 793 (“Traditionally, legal ‘formalism’ is the position that a unique answer in a particular case can be ‘deduced’ from a rule, or that application of a rule to a particular case is ‘analytical.’”).

240. Cf. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 543 (1992) (“Formalist writers stress the law contains a good many rules, and that in many contexts, the application of those rules requires little more than a grasp of English usage.”).

241. This contention may be set forth self-consciously for reasons of institutional preservation. Abel, *supra* note 72, at 575 (“[Legal aid] lawyers may anticipate political attack and seek to neutralize it by appearing apolitical.”).

242. James Penner, *The Rules of Law: Wittgenstein, Davidson, and Weinrib’s Formalism*, 46 U. TORONTO FAC. L. REV. 488, 517 (1988) (“The essential claim of formalism . . . is that law is a rule-following game, which can only be understood completely as a thing in itself—to be mastered by practicing it until one can do it.”).

243. On the neutrality of formalism, see Thomas Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 415, 416 n.174 (1986) (“One could easily construct a formalistic model which advance leftist political principles.”); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 458 (1985) (asserting doctrinal formalism to be “more or less politically neutral”).

244. For a discussion of formalism as a constraint on the “exercise of coercive social power,” see Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1519 (1985).

tics of the Social Security Administration. Thus, the process of analyzing and applying the treating physician rule is deemed apolitical.

B. INSTRUMENTALISM

Instrumentalism comprises a strong version of modernist lawyering. As before, the modernist canon presupposes lawyer autonomy and cognitive capacity, lawyer-client communicative rationality, and juridical stability. Unlike the cohort of formalism, these abstract assumptions incite claims of purposivism, practicality, translation, and indeterminacy in legal reasoning. The claims denote a general theory of lawyering that is result-oriented and value-laden. The embrace of a consequentialist orientation exposes lawyer purposive judgments to political assault. The assault is ignited by the merger of law and politics. With this merger, lawyer discretionary judgments in case selection and strategy veer toward ethical illegitimacy.

1. Purposivism

The instrumentalist's claim to purposivism springs from the assumptions of structural and subjective autonomy. On these assumptions, the law—legality and justice—and its advocates *matter*. Because law matters, the instrumentalist sits in judgment of its exercise. That judgment extends to state action and client conduct. The act of judgment implies autonomy. By definition, autonomy requires discretion. The coupling of autonomy and discretion in the lawyering process yields the model of “ethical discretion.”²⁴⁵ In this model, the lawyer is cast as a post-Realist “hero” who acts independently of the client and state to advance legality and justice.²⁴⁶

245. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988).

246. Gordon, *supra* note 88, at 67 (“[T]he Realist hero is the social engineer who masterfully wields law as an instrument of policy.” (footnote omitted)).

The model of “ethical discretion” approved explicitly by Simon and implicitly by Gordon presents a curious genealogy. Both Simon and Gordon look upon “lawyers’ work as ideology.” Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 72, 78 (Gerald L. Geison ed., 1983) [hereinafter Gordon, *Legal Thought and Legal Practice*] (describing the lawyer’s crafting of legal forms and structures “as ideological activity”); Simon, *The Ideology of Advocacy*, *supra* note 198, at 36-38 (delineating the principles of the “Ideology of Advocacy” as neutrality, partisanship, procedural justice, and professionalism).

Like Simon, Gordon spots ideology in the conduct of advocacy, particularly in the attitudes, behavior, and discourse of lawyering. Gordon, *Legal Thought and Legal Practice*, *supra*, at 36. For example, Gordon argues:

when a lawyer helps a client arrange a transaction so as to take maximum advantage of the current legal framework, he or she becomes one of the army of agents who confirm that framework by reinforcement and extend it by interpretation into many niches of social life. The framework is an ideological one, i.e., a set of assertions, arguments, and implicit assumptions about power and right.

The “discretionary” approach to ethical decisionmaking is defended by William Simon.²⁴⁷ Simon holds that “[l]awyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims.”²⁴⁸ Reasoning from this principle of discretion, Simon deduces “a professional duty of reflective judgment.”²⁴⁹ His notion of judgment is multi-dimensional. At one level, it involves “an assessment of the relative merits of the client’s goals and claims and those of other people who might benefit from the lawyer’s services.”²⁵⁰ At another level, it entails “an attempt to reconcile the conflicting considerations that bear on the internal merits of the client’s goals and claims.”²⁵¹ On both levels, Simon argues, “the basic consideration should be whether assisting the client would further justice.”²⁵²

Simon’s argument in defense of “ethical discretion” follows from a traditional premise: “the ideal of direct participation by the individual lawyer, independent of both client and state, in the elaboration and implementation of legality and justice.”²⁵³ Simon praises this Brandeisian

Id. at 110. Moreover, both Simon and Gordon search for ways to devise a “socially responsible law practice.” Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 1 n.** (1988) [hereinafter Gordon, *The Independence of Lawyers*]; Gordon, *supra* note 140, at 290 (discussing legal training for “socially responsible practice”); Simon, *Visions*, *supra* note 15, at 469, 485 (sketching a critical vision of practice animated by “an ideal of practice as an activity that constitutes and transforms the actors and the system in which they act and that thus implies both personal responsibility and political commitment”).

Yet both Simon and Gordon endorse a practice regime they seem to find ideologically discomfiting. See, e.g., Gordon, *Corporate Law Practice*, *supra*, at 288 (“Now I am well aware that many people who share my implicit political agenda will think I have chosen a weird way to promote it.”); Simon, *supra* note 245, at 1084 n.1 (“I now think that I was mistaken to argue in an earlier article that the critique of conventional advocacy presented there required abandoning the lawyer’s professional role.”). The reasons for their unease are too complex to be fully explored in this space.

247. Although Simon’s masterly piece is widely cited, it has garnered little sustained critical attention. For instructive criticisms, see Cahn, *Styles of Lawyering*, *supra* note 18, at 1064-65 (“[T]he very process of judging a client’s worthiness involves the application of universal principles in a broad context.”); Dinerstein, *Client-Centered Counseling*, *supra* note 198, at 556, 558 (“Simon fails to explain adequately how lawyers can responsibly limit the autonomy of all but the most powerful clients without imposing their values on them and denying them the opportunity at least to seek vindication of hypothetically legal interests.” (footnote omitted)); Serena Steir, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 581 n.114 (1991) (“Simon . . . empties the [ethical] standards even further by claiming they do not even permit discretion but only openings for the exercise of private norms which are standardless and nonreviewable.” (footnote omitted)).

248. Simon, *supra* note 245, at 1083.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1144.

ideal as “the most basic of the traditional ambitions of lawyers.”²⁵⁴ His purpose in proposing the discretionary approach is not only “to redeem the traditional ideal,” but also “to vindicate legal merit and justice.”²⁵⁵

Simon’s redemption bid begins with a basic maxim: “The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”²⁵⁶ He intends this “seek justice” maxim to connote the “discretionary norms” of “flexibility and complexity” employed in judicial decisionmaking.²⁵⁷ Engrafting²⁵⁸ this discretionary style of decisionmaking onto the lawyer’s role²⁵⁹ requires judgments concerning the relative and internal merits of the client’s goals and claims.²⁶⁰

To judge relative merit, a lawyer must assess “the extent to which the [client’s] claims and goals are grounded in the law, the importance of the interests involved, and the extent to which the representation would contribute to the equalization of access to the legal system.”²⁶¹ The point of this assessment is to address the unequal distribution of legal services in society.²⁶² For Simon, the maldistribution of such scarce resources dictates “that the lawyer try in good faith to take account of relative merit in her decisions.”²⁶³

254. *Id.*

255. *Id.* at 1084, 1144.

256. *Id.* at 1090.

257. *Id.*

258. *Id.* at 1091. Simon may quarrel with my use of the term engraft, specifically the implication that discretionary judgment is extrinsic, rather than intrinsic to ethical decisionmaking. *Id.* at 1090. Contrary to this implication, Simon seems to suggest that discretionary judgment is an immanent part of ethical decisionmaking. My usage is not indifferent to this claim. As Simon mentions: “The preference for categorical reasoning in the lawyering context reflects nothing more than a failure to carry through to the lawyering role the critique of formalism, mechanical jurisprudence, and categorical reasoning that has been applied to the judicial role throughout this century.” *Id.*

259. Simon denies “collapsing the lawyer’s role into the judge’s,” maintaining that the proposed lawyer’s role “complements the generally accepted understanding of the judge’s role.” *Id.* at 1102.

260. *Id.* at 1091.

261. *Id.* at 1093.

262. Simon’s factual supposition is that “most people are unable to enforce most of their rights most of the time.” *Id.* at 1092. On state welfare rights enforcement, see John Carrier & Ian Kendall, *Law and the Social Division of Welfare*, 20 INT’L J. SOC. L. 61, 85 (1992) (“[T]he legal system could be a key arbiter in defining the welfare of populations, pronouncing on questions of eligibility, rights, standards, access and the regulatory and resourcing roles of the state.”).

263. Simon, *supra* note 245, at 1094. Simon analogizes the judgment of relative merit to the judgments of pro bono practice. He observes: “Lawyers who do pro bono work usually choose cases in accordance with some estimate of the relative merits of the claims competing for their services.” *Id.*

By comparison, to judge internal merit, a lawyer must assess the “conflicting legal values implicated directly in the client’s claim or goal.”²⁶⁴ Simon finds these conflicts “in the form of overlapping tensions between substance and procedure, purpose and form, and broad and narrow framing.”²⁶⁵ The assessment of legal value requires the confrontation and resolution of such tensions.

Simon declines to hold the lawyer fully responsible for “proper” normative resolution, apportioning a measure of responsibility to presumptively reliable state decisionmakers.²⁶⁶ His presumption of reliability, however, is rebuttable. When rebutted by evidence of bias or incompetence, the reliance interest falls. When unrebutted, the reliance interest survives backed by a “more flexible and demanding” lawyer duty to “facilitate” the state decisionmaking process.²⁶⁷

The heightened duty requirement of the discretionary approach evinces Simon’s competing proceduralist tilt: “the strongest assurance of a just resolution is the soundness of the procedure that produced it.”²⁶⁸ This tendency reinforces the lawyer’s facilitative duty “[to take] reasonably available actions to make the procedure as effective as possible and to forego actions that would reduce its efficacy.”²⁶⁹ Moreover, it bolsters the lawyer’s interventionist duty to “assume direct responsibility for the substantive validity of the decision” when procedures prove to be deficient.²⁷⁰

The lawyer’s discretionary duty to facilitate or intrude upon the state’s decisionmaking process requires complex judgments about procedural rules, especially consideration of the purpose and form of the relevant legal procedures.²⁷¹ According to Simon, “the clearer and less problematic the relevant purposes, the more the lawyer should consider herself bound by them.”²⁷² Conversely, “the less clear and more problematic the relevant purposes, the more justified the lawyer is in treating the relevant norms formally.”²⁷³

264. *Id.* at 1096.

265. *Id.* (footnote omitted).

266. Simon’s notion of institutional competence and reliability loosely encompasses decisional accuracy, procedural fairness, and democratic legitimacy. *Id.* at 1097 n.36.

267. *Id.* at 1097.

268. *Id.* at 1098.

269. *Id.* at 1097-98 (“[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution. . .”).

270. *Id.* at 1098 (“[T]he less reliable the procedures and institutions, the more direct responsibility [the lawyer] need assume for substantive justice.”).

271. *Id.* at 1102-03.

272. *Id.* at 1103.

273. Formalism, in this sense, operates “to permit any client goal not plainly precluded by . . . [rule specific] language.” *Id.* at 1103-04.

Discretionary judgments of procedural purpose and form rest on definitional frameworks, both broad and narrow. Simon points out that the framing of an issue influences the perception and resolution of a dispute.²⁷⁴ Hence, he “gives individual lawyers substantial responsibility for determining whether broad or narrow framing is appropriate in the particular case.”²⁷⁵ Furthermore, he enunciates “general standards of relevance”²⁷⁶ to guide the framing of issues. Those standards include interpretive plausibility,²⁷⁷ practical impact,²⁷⁸ knowledge, and institutional competence.²⁷⁹

Simon’s commitment to legal values—relative and internal merit, substance and procedure, purpose and form, broad and narrow framing—grounds his proposed discretionary approach to ethical decisionmaking. By delimiting a protected range of “ethical autonomy,”²⁸⁰ this approach enables the modernist lawyer to make “good faith” judgments about legality and justice in the context of advocacy.²⁸¹ In the absence of a “shared” client “commitment” to the norms of legality and justice, Simon calls for a minimum “coincidence of the client’s goals with such norms.”²⁸² The search for lawyer-client agreement adumbrates two principles of consensus: a first order principle of normative sharing and a second order principle of normative-goal coincidence.

Simon’s portrait of shared or coinciding lawyer-client normative commitments to legality and justice depicts a weak version of the republican vision of the “public”²⁸³ lawyer acting in the service of the “common good.”²⁸⁴ Under a strong version of republicanism,²⁸⁵ the meaning of the common

274. *Id.* at 1107. Simon explains: “If we define an issue narrowly in terms of a small number of characteristics of the parties and their dispute, it will often look different than if we define it to encompass the parties’ identities, relationship, and social circumstances.” *Id.*

275. *Id.* at 1108.

276. *Id.*

277. *Id.* (“[A] consideration is relevant if it is implicated by the most plausible interpretation of the applicable law.”).

278. *Id.* at 1109 (“[A] consideration is relevant if it is likely to have a substantial practical influence on the resolution.”).

279. *Id.* (“[K]nowledge and institutional competence will affect the appropriate framing.”).

280. *Id.* at 1128 n.97; cf. Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1228 (1992) (criticizing relational feminists for the “devaluation of autonomy”).

281. Simon, *supra* note 245, at 1134.

282. *Id.* at 1138.

283. Gordon, *The Independence of Lawyers*, *supra* note 246, at 14-16 (describing the “traditional ‘republican’ ideal of the lawyer’s public role”); Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Clinical Legal Education*, 88 NW. U. L. REV. (forthcoming 1993) (noting “civic republicanism’s reclaiming of the public realm”).

284. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 250, 250-58 (1992) (examining the republican ideals embodied in legal ethics codes and the lawyer’s role).

285. For studies of the historical antecedents of republicanism, see generally BERNARD

good is determined through communal dialogue²⁸⁶ and deliberation.²⁸⁷ Emphasis is placed on the “selection rather than implementation of ends.”²⁸⁸

Simon’s discretionary approach reflects the republican emphasis on the shared selection of ends, albeit within the confines of the lawyer-client relationship. His commitment to the legal values of internal merit underlines the importance of claim and goal selection. Because that commitment is mitigated by a counterposing commitment to the ends-oriented values of relative merit²⁸⁹ and justice, the discretionary approach emulates republican norms in only a weak sense.

Two affinities between Simon’s approach and republicanism are noteworthy: client autonomy and lawyer-client consensus. Simon seems to take a dim view of client autonomy.²⁹⁰ Anticipating objections to the curtailment of client autonomy in opposition to lawyer power, Simon asserts that “the discretionary approach does not increase lawyer power because any increase in the lawyer’s capacity to frustrate client goals is *exactly balanced* by a reduction in the lawyer’s capacity to frustrate goals of third parties and the public.”²⁹¹

Simon’s balancing of the lawyer’s public and private capacities serves to justify the lawyer’s infringement on the client’s autonomy. This move reveals Simon’s instrumental rationality. Balancing is an instrumental methodology rooted in realist jurisprudence.²⁹² It generates outcomes by

BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-87* (1969).

286. Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 719 (“[T]he meaning of the common good remains always in question, open to the communal dialogue.”).

287. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555 (1988) (“The republican position is not that every issue is subject to political resolution; it is instead that some questions can yield general agreement through deliberation.”).

288. *Id.* at 1548.

289. Simon may fairly dispute the classification of relative merit as an ends-oriented value. To fend off this classification, however, he must deal with two aspects of relative merit that insinuate an ends-oriented calculus: cost efficiency and resource distribution.

290. Steven Gey attributes such a general view to the community focus of civic republican theory. Steven C. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 802-03, 831 (1992); cf. J. Wagona Makoba, *On the Use and Application of Legal Concepts in the Study of Non-Western Societies*, 20 INT’L J. SOC. L. 201, 220 (1992) (contending that the study of comparative legal anthropology in non-Western societies “show[s] that rights and obligations do not only exist between individuals but between them and groups or the entire community”).

291. Simon, *supra* note 245, at 1127 (emphasis added); cf. Abel, *supra* note 107, at 58 (“Increasing the autonomy of lawyers to choose their clients will further increase the autonomy of clients.”).

292. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 958 (1987) (“Balancing openly embraced a view of the law as purposeful, as a means to an end; and it demanded a particularized, contextual scrutiny of the social interests

an ad hoc “identification, evaluation, and comparison” of legal interests.²⁹³ Simon does not purport to repair balancing methodology. Nevertheless, he tenders an argument rationalizing balancing as an *exact* utilitarian solution, even though his own “empirical premises” elude verification.²⁹⁴

Even if Simon’s empirical premises of counterbalanced lawyer power survived verification, they lack intuitive force. To the extent that autonomy is a categorical norm, it thwarts noncategorical judgment. Acknowledging the incomparability of categorical²⁹⁵ and noncategorical²⁹⁶ styles of judgment, Simon seems to suggest that third party, public, and systemic interests are the categorical equivalents of autonomy.²⁹⁷ Further, he implies that balancing affords the only pragmatic method of resolving the tension spawned by competing categorical claims of privilege. Simon insists that lawyers are capable of making effective balancing decisions, citing their possession of “a serviceable conception of normative judgment.”²⁹⁸

In practice, the lawyer’s instrumental balancing of discretionary norms depends upon the client’s shared commitment to the norms of legality and justice, or on the correspondence of client goals and such norms. The key

at stake in a constitutional controversy.”); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 507 (1986) (“The third element in the Realists’ constructive program was a method of legal analysis, the method of balancing. Once the precise interests at stake have been identified and their relation to the broad social values understood, decision-makers should balance the interests to arrive at an appropriate decision.”).

On the current application of balancing jurisprudence, see Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 26-40 (1988) (defending a form of balancing marked by “openness and specificity”); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987) (presenting a three-fold typology of judicial balancing divided into representative, administrative, and zero-sum models).

293. Aleinikoff, *supra* note 292, at 982.

294. In an analogous situation of confidentiality, Simon concedes that his “rhetoric might strike some as excessively utilitarian.” Simon, *supra* note 245, at 1142, 1143 n.131. And yet he persists in his defense of balancing. *Id.* at 1143 (“Reduced confidentiality would probably entail some costs to clients, but the important issue is whether these costs *outweigh* the costs to third parties and the legal system from the prohibition of disclosure.” (footnote omitted) (emphasis added)).

295. Simon argues that conventional models of ethical decisionmaking—“libertarian” and “regulatory”—exhibit a common “categorical” style of reasoning. *Id.* at 1086. This style is marked by “the practice of restrictively specifying the factors that a decisionmaker may consider when she confronts a particular problem.” *Id.* The factors are rule-based. In application, the decisionmaker bears “no discretion to consider factors she encounters that are not specified or to evaluate specified factors in any way other than that given in the rule.” *Id.*

296. Simon assigns a discretionary or pragmatic meaning to noncategorical judgment. *Id.* at 1090.

297. *Id.* at 1088-89.

298. *Id.* at 1122.

to the joinder or coincidence of lawyer-client normative commitments is consensus. Under republican theory, consensus is reached through reasoned, noncoercive, and inclusive deliberation.²⁹⁹ Simon impliedly adopts the republican view of cooperative consensus.³⁰⁰ Unfortunately, his adoption makes no mention of denaturalized views of consensus that stress the suppression of minority voices.³⁰¹

Simon's omission problematizes the notion of consensus, uncovering the republican tendencies towards coercion and exclusion in consensus formation. These tendencies dilute the conceptual integrity of consensus. Admittedly, the model of ethical discretion does not require consensus in a strong sense. Recall, for example, Simon's second order principle of normative-goal coincidence. This principle demands consensus, however, at least in a weak sense. Neither an incoherent nor a false sense of consensus satisfies the demand for normative-goal coincidence.

Simon's republican faith obscures the strains of coercion and exclusion embedded in the instrumentalist notion of consensus. Coerced consensus permits the modern poverty lawyer to overreach her ethical autonomy under the pretext of shared or coinciding client ends. The consequence of overreaching is unfettered, rather than guided, discretion.

The Johnson case provides ample opportunity for the modernist lawyer to pursue instrumental discretion. In her case, lawyer discretion will be channelled by political principles of legality and justice, rather than by lawyer-client consensus. For purposes of ethical decisionmaking, these principles may promote efficient, egalitarian, communitarian, redistribu-

299. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) ("[R]epublican constitutional thought is not indissolubly tied to any such static, parochial, or coercive communitarianism; . . . indeed, reconsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom.").

300. Simon's adoption of the republican consensus thesis locates him within a romantic tradition of dissent. See Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1671-72 (1988) (asserting "the continuous presence throughout the history of American dissent of the rhetoric of a commonwealth of cooperation and civic virtue.").

301. See, e.g., Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610-11 (1988). Bell and Bansal explain:

Republicanism, through its faith in the existence of shared values and the possibility of a common good, assumes at base that a social consensus will emerge from "reasoned" deliberation by individuals who think "rationally" and who are capable of abstracting from their private experiences. For centuries in this country, however, blacks have served as the group whose experiences and private needs have been suppressed in order to promote the "common good" of whites.

Id. at 1610-11 (footnotes omitted); see also Feldman, *supra* note 286, at 700 ("To facilitate reaching a consensus about the common good . . . some voices might be silenced—especially the voices of minorities and others who sometimes tend to experience and to perceive the world differently from the majority."). See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992).

tive, or rights-based solutions. Efficiency principles, here of a redistributive sort, focus on disability benefits as an income transfer to Johnson, and thus, as a means to maximize her satisfaction or wealth.³⁰² Egalitarian principles direct attention to the racial animus³⁰³ and discrimination³⁰⁴

302. See Gary Lawson, *Efficiency and Individualism*, 42 DUKE. L.J. 53, 57, 92-96 (1992) (examining alternative conceptions of efficiency).

Principles of institutional efficiency also favor Johnson. A legal aid program may procure state subsidies for disability advocacy by participating in Disability Advocacy Projects (DAPs). DAPs are state-administered programs that fund private attorneys and legal services providers to supply legal representation to public assistance recipients "who are unable to work because of long-term disabilities and who are likely to become eligible for SSI disability." Jane Hardin, *Disability Advocacy Projects: Programs that Assist Low-Income Clients and Ease State Government Fiscal Problems*, 26 CLEARINGHOUSE REV. 776, 777 (1992); see also Michael B. Glomb & Jane Hardin, *Alternative Funding Mechanisms for Legal Services Providers*, 25 CLEARINGHOUSE REV. 484, 488 (1991) ("Typically, the state funds legal services programs to help state-funded GA recipients to establish their eligibility for federal disability benefits."). The representation may occur at both preappeal and appeal stages of disability determination.

Moreover, a legal aid program may obtain attorneys' fees awards for disability representation on judicial review under the Equal Access to Justice Act. 28 U.S.C. § 2412 (1992). For studies of different forms of economic incentives affecting advocacy in underserved communities, see Richard E. Levy, *Social Security Claimants with Developmental Disabilities: Problems of Policy and Practice*, 39 KAN. L. REV. 529, 580-81 (1992) ("Attorneys fees are also a factor affecting the ability to pursue, and the likely success of, judicial review."); Jill Norgren, *Lawyers and the Legal Business of the Cherokee Republic in Courts of the United States, 1829-1835*, 10 LAW & HIST. REV. 253, 313 (1992) ("For political and economic reasons, attorneys made their services available [to the Cherokee Nation].").

303. A recent federal study found evidence of de facto racial animus in the disability determination process. See U.S. General Accounting Office, *Social Security: Racial Difference in Disability Decisions Warrants Further Investigation*, GAO/HRD-92-56 at 14 (Apr. 21, 1992) ("In the 30 years since 1961 for which applicants' race has been examined, blacks under the DI program have had a lower allowance rate than whites in initial as well as appeals decisions. Available information, within the past 5 years, on initial disability decisions under the SSI program shows a racial difference in allowance rates comparable with those under the DI program." (footnotes omitted)); see also Stephen Labaton, *Benefits Are Refused More Often To Disabled Blacks, Study Finds*, N.Y. TIMES, May 11, 1992, at A1 ("While the Social Security Administration questioned the study of the two Social Security programs for people with severe disabilities, the Disability Insurance and Supplemental Security Income programs, it said the report had already prompted it to begin an investigation to make sure its decisions were not motivated by race.").

For a discussion of gender bias in the disability determination process, see Linda G. Mills, *A Calculus for Bias: How Malingered Females and Dependent Housewives Fare in the Social Security Disability System*, 16 HARV. WOMEN'S L.J. 211, 213 (1993) (illustrating "manifestations of unequal treatment based on gender in Social Security disability hearing transcripts and decisions" (footnote omitted)). Mills detected an ALJ tendency to essentialize women's biological differences, personality traits, and behaviors. *Id.* at 226. As a consequence, Mills concluded, "the very outcomes of disability cases reflect sexual stereotypes." *Id.* at 227; cf. Selina Redman et al., *The Effects of Gender on Diagnosis of Psychological Disturbance*, 14 J. BEHAV. MED. 527 (1991) (documenting the tendency of medical practitioners to overestimate the diagnostic prevalence of psychological disturbance among female patients).

304. Discrimination is also associated with differential mortality rates. See Frolik &

infecting the disability determination process. Communitarian principles address the group,³⁰⁵ community,³⁰⁶ and institutional³⁰⁷ dimensions of disability programs. Redistributive principles concentrate on altering the impoverished status of disability applicants and shifting their necessary reliance off of various forms of public welfare.³⁰⁸ Rights-based principles³⁰⁹ operate to vindicate procedural and substantive norms, in controversy in Johnson's case over the application of the treating physician rule

Barnes, *supra* note 66, at 692. Frolik and Barnes observe:

[T]he shorter life expectancies of African Americans and Hispanics mean that benefit programs for the elderly disproportionately favor whites. For example, although all employees regardless of their race or gender pay Social Security taxes, because of their higher death rates, many minorities will not live long enough to collect retirement benefits.

Id.

305. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988) (arguing "for a conception of politics as the interaction of groups that are more than simple aggregations of individual preferences, but less than components of a single common good"); see also Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 658 (1992) ("It is within groups that constitutive narratives (cultures) are produced and through groups that sense is made of the social world."); Pamela J. Smith, *We Are Not Sisters: African American Women and the Freedom to Associate and Disassociate*, 66 TUL. L. REV. 1493 ("Associating with those who share common experiences also serves a rehabilitative and political function.").

306. Compare Steven Fishbach, *Connecting Organizing and Litigation to Preserve Public Housing*, 49 GUILD PRAC. 104, 104, 109 (1992) (describing the "Tenant Advocacy and Litigation" approach employed by public housing tenants in conjunction with community organizers and local legal services lawyers in Providence, Rhode Island to "improve conditions in public housing, and to prevent the demolition of viable public housing units") with Gey, *supra* note 290, at 806 ("[C]ivic republicans argue that the constitution provides the framework for an organic community composed of socially constructed individuals, who join together in government to identify and pursue civic virtue.").

307. See Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1605 (1988) (noting the potential contribution of local political institutions to the "development of a self-conscious, normatively-based, deliberative popular politics").

308. Public welfare benefit levels fail to overcome the forces of impoverishment, especially for women. See, e.g., Martha F. Davis, *The New Paternalism: Welfare's War on Women*, 45 GUILD PRAC. 97, 103 (1992) ("[T]he only effective way to combat poverty, for women as well as men, is to improve services, increase job opportunities, improve transitional benefits, enhance child support enforcement and increase income supports to a livable level."); Richard McIntyre & Michael Hillard, *Stressed Families, Impoverished Families: Crises in the Household and in the Reproduction of the Working Class*, 24 REV. RADICAL POL. ECON. 17, 22 (1992) ("Because of the pre-existing inadequacy of women's wages and of income levels under existing transfer programs such as AFDC and food stamps, and the low levels and widespread non-collection of child support, the rapid growth of female-headed households with children has been synonymous with the growth of poor and near-poor households.").

309. But see Joseph Allegretti, *Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers*, 25 CREIGHTON L. REV. 1119, 1130 (1992) ("[A] commitment to rights, no matter how laudable an end, can degenerate into a cruel legalism unless balanced by a concern for preserving relationships and avoiding or minimizing harm.").

in light of HHS's newly promulgated consultative examiner regulation.³¹⁰

The instrumentalist lawyer's deployment of abstract legal principles signals the universalist quality of her ethical judgment in case selection and strategy. Without meaningful reciprocal notions of client autonomy and consensus, the judgments of instrumental rationality devolve into enlightened permutations of state-sanctioned paternalism.³¹¹ These variants on paternalism—"paternalism with a legalistic face"³¹²—also infect the instrumentalist's claim to practicality embodied in the justification of winning.³¹³

310. This regulatory controversy raises larger issues regarding the relevance of the doctor-patient relationship in medically underserved communities. For discussion of medical care access and utilization in impoverished urban and rural communities, see EDITH M. DAVIS & MICHAEL L. MILLMAN, *HEALTH CARE FOR THE URBAN POOR* 86-140 (1983); KAREN DAVIS & CATHY SCHOEN, *HEALTH AND THE WAR ON POVERTY* 18-48 (1978); CHARLES J. DOUGHERTY, *AMERICAN HEALTH CARE* 3-15 (1988); U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *HEALTH STATUS OF MINORITIES AND LOW-INCOME GROUPS* 325-42 (1991); Lawrence Bergner & Alonzo S. Yerby, *Low Income and Barriers to Use of Health Services, in THE HEALTH GAP: MEDICAL SERVICES AND THE POOR* 27-39 (Robert L. Kane et al. eds., 1976); Jean L. Elliott, *Cultural Barriers to the Utilization of Health Services, in THE HEALTH GAP: MEDICAL SERVICES AND THE POOR, supra*, at 59-72; Anselm L. Strauss, *Medical Organization, Medical Care, and Lower Income Groups, in THE HEALTH GAP: MEDICAL SERVICES AND THE POOR, supra*, at 126-73; see also Amasa B. Ford et al., *Race-Related Differences Among Elderly Urban Residents: A Cohort Study, 1975-1984*, 45 J. GERONTOLOGY S163 (1990) (observing race-related differences in morbidity, disability, and service rates); Jan E. Mutchler & Jeffrey A. Burr, *Racial Differences in Health and Health Care Service Utilization in Later Life: The Effect of Socioeconomic Status*, 32 J. HEALTH & SOCIAL BEHAV. 342 (1991) (correlating differences in white and black health status and health care utilization to socioeconomic status); Jane Perkins, *Race Discrimination in America's Health Care System*, 27 CLEARINGHOUSE REV. 371 (1993) (reviewing class and racial disparities in health care delivery); Steven P. Wallace, *Race Versus Class in the Health Care of African-American Elderly*, 37 SOC. PROBS. 517 (1990) (finding "continuing racial segregation in the institutional medical care of the elderly").

311. The LSC statute grants poverty lawyers the "full freedom" of paternalistic authority "to protect the best interests of their clients." 42 U.S.C. § 2996(6) (1988 & Supp. 1992).

On state forms of disability paternalism, see Margaret G. Farrell, *Administrative Paternalism: Social Security's Representative Payment Program and Two Models of Justice*, 14 CARDOZO L. REV. 283 (1992) (exploring the SSA's policy of paternalism embodied in the representative payee program).

312. I borrow the phrase from Clive Unsworth. See Clive Unsworth, *Mental Disorder and the Tutelary Relationship: From Pre- to Post-Carceral Legal Order*, 18 J.L. & SOC'Y 254, 257 (1991).

313. Alfieri, *Reconstructive Poverty Law Practice, supra* note 2, at 2146 ("'[W]inning' may often hold a different meaning in the poverty law context. Here, outcome may extend beyond material benefits and compensation to encompass deeper ideals of political and socioeconomic progress, and affirmation of individual or group identity and dignity."); Cunningham, *A Tale of Two Clients, supra* note 19, at 2492 ("[I]t can be a mistake to assume that a client is interested only in 'winning' the case rather than in understanding both 'what happened' and what is happening."); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 916 ("'Winning the case' is not always what disempowered clients want and need—how the client's story is told and how the client's harm is named may be more important."); cf. Gordon Van Kessel, *Adversary Excesses in the American Trial*, 67 NOTRE DAME L. REV. 403, 435 (1992) ("[P]rosecutors and defense lawyers . . . generally consider themselves aggressive advocates in pursuit of that most important goal—winning the case." (footnote omitted)).

2. Practicality

The instrumentalist claim to practicality emerges in a roughhewn fashion from the jurisprudence of pragmatism.³¹⁴ The claim provides a perfor-

314. Prominent figures in American pragmatism include John Dewey, William James, and Charles Sanders Peirce. See JOHN DEWEY, *LOGIC* 487-535 (1938); JOHN DEWEY, *EXPERIENCE & NATURE* 394-437 (1929); JOHN DEWEY & JAMES H. TUFTS, *ETHICS* 212-14, 306-63 (1909); John Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17 (1924); William James, *What Pragmatism Means*, in *THE WORKS OF WILLIAMS JAMES: PRAGMATISM* 27-44 (1975); William James, *Pragmatism's Conception of Truth*, in *THE WORKS OF WILLIAMS JAMES: PRAGMATISM*, *supra*, at 95-113; Charles S. Peirce, *What Pragmatism Is*, in *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE: VOL. V* 411-37 (Charles Hartshorne & Paul Weiss eds., 1965).

For beneficial readings, see generally JOHN P. MURPHY, *PRAGMATISM: FROM PEIRCE TO DAVIDSON* (1990); PEIRCE AND LAW (Roberta Kevelson ed., 1991); R.W. SLEEPER, *THE NECESSITY OF PRAGMATISM: JOHN DEWEY'S CONCEPTION OF PHILOSOPHY* (1986); ELLEN KAPPY SUCKIEL, *THE PRAGMATIC PHILOSOPHY OF WILLIAM JAMES* (1982); CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* (1989); Catharine W. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 *NW. U. L. REV.* 541 (1988) (tracking the influence of Peirce's philosophical writings on Holmes' views); Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 *S. CAL. L. REV.* 1671 (1990) (exploring Dewey's social and moral philosophy).

The revival of American pragmatism is led by the writings of Richard Rorty. See RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); cf. STANLEY FISH, *DOING WHAT COMES NATURALLY* 342-55 (1989) (summarizing anti-foundationalism); Lynn A. Baker, *"Just Do It": Pragmatism and Progressive Social Change*, 78 *VA. L. REV.* 697, 712 (1992) (contending that "Rorty does not convincingly establish that a cultural shift to anti-foundationalism would be advantageous for realizing even his own utopian vision"); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 *MICH. L. REV.* 685, 710 (1992) (classifying Rorty as a "metaethical communitarian"); Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 *OR. L. REV.* 521, 538 (1992) (defining Rorty as "a very Holmesian kind of pragmatist democrat"); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871, 901 (1989) (describing Rorty as a "garden variety idealist metaphysician"); Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 *U. PA. L. REV.* 371, 449 n.224 (1992) (arguing that Rorty "is inconsistent in holding that ordinary language is the only language we have, while at the same time taking a skeptical and revisionary stance toward the concepts of truth and objectivity"); John Stick, *Can Nihilism Be Pragmatic?*, 100 *HARV. L. REV.* 332, 343 (1986) (chiding critical legal nihilists for their "misuse" of Rorty); Peter D. Swan, *Critical Legal Theory and The Politics of Pragmatism*, 12 *DALHOUSIE L.J.* 349, 372 (1989) (citing Rorty's "dependen[ce] on the existing state of liberal democracies for [his] social vision"); William G. Weaver, *Richard Rorty and the Radical Left*, 78 *VA. L. REV.* 729, 740 (1992) (identifying Rorty as "the first strong voice within the practice of philosophy to turn the pragmatist tradition against the projects central to his own profession"); Allan C. Hutchinson, *The Three 'Rs': Reading/Rorty/Radically*, 103 *HARV. L. REV.* 555, 558 (1989) (book review) (attempting "to show the consonance of Rorty's non-foundational arguments to a more radically democratic political theory"); Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 *DUKE L.J.* 1752, 1754 (1989) (book review) (accusing Rorty of "marginaliz[ing] the enterprise of philosophy, thereby depriving pragmatism of any critical bite"); see generally KONSTANTIN KOLENDA, *RORTY'S HUMANISTIC PRAGMATISM* (1990).

mative³¹⁵ account of legal reasoning as a “practical enterprise.”³¹⁶ This neopragmatist³¹⁷ account describes legal thought as situated and instrumental.³¹⁸

For the pragmatist, legal thought is situated in context.³¹⁹ Thus situated, the truth of a proposition (e.g., disability) is contextually contingent.³²⁰

315. On the performativity of practice, see Steven L. Winter, *Without Privilege*, 139 U. PA. L. REV. 1063, 1065 (1991) (“A practice is not a unitary, static, or invariable ‘thing,’ but a dynamic pattern of performance.”).

316. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 805 (1989).

317. The advance of neopragmatism is evident across doctrinal fields. For applications, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (proposing a model of statutory construction based on practical reasoning); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988) (demonstrating a pragmatist basis for the constitutional right to abortion); Radin, *supra* note 234, at 816 (illustrating a pragmatic normative understanding of the constitution as “not merely a document but rather that which ‘constitutes’ us as a political community” (footnote omitted)); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2589 (1992) (arguing that “[p]ragmatism may now represent the principal theoretical approach to statutory interpretation in legal scholarship” (footnote omitted)); Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 757-818 (1990) (elaborating a choice-of-law interpretive method attentive to competing versions of both party interests and relations, and multistate norms and policies); Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 791 (1992) (approving the use of “pragmatic knowledge” in constitutional discourse and theory).

318. Grey, *supra* note 316, at 802 (“Thought or inquiry is instrumental as well as situated in practice. Reflective, deliberative, even contemplative thinking originates in the practical need to solve real problems.”); Hutchinson, *supra* note 314, at 576 (“Instrumentality and situatedness are the watchwords of the pragmatic revival.”); see also Schnably, *supra* note 11, at 348 (“[P]ragmatism’ suggests, if nothing else, a focus on context and practice. . . .”).

319. Grey, *supra* note 316, at 805 (“[L]aw is constituted of practices—contextual, situated, rooted in custom and shared expectations.”); see also Swan, *supra* note 314, at 363 (denoting Singer’s view of legal reasoning as a “context dependent practical political enterprise”); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 432 (1990) (“[P]ragmatist philosophers have taken the lead in arguing that experience is never concept-free, and that thinking is always historically and culturally situated.” (footnote omitted)).

320. For Thomas Grey, contingency fosters “perspectival pluralism.” Grey, *supra* note 316, at 805.

The pragmatist recognizes that the best account of a phenomenon (such as law) from one angle, for one purpose, at one time, might not serve as well from another perspective, rooted in another temporal context, and aimed at different goals. In its mature vision, as Dewey stated it, pragmatism rejects the assumption that there must exist a comprehensive and final account of “reality” that, if attained, would bring the process of scientific and philosophical inquiry to a close.

A pragmatic legal theorist will embed questions about law in a context and address them for a purpose, and so may reach different and apparently inconsistent answers as context and purpose vary.

Id. at 804-05 (footnote omitted); cf. Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1224 (1989) (complaining of the degeneration of pragmatism into “a sort of unquestioning pluralist consciousness that surrenders to the received description and understanding of the world” (footnote omitted)); Pierre Schlag, *Stances*, 139 U.

Contingency connotes change. Truth changes in response to “human creation,”³²¹ not discovery. Accordingly, it is mistaken to speak of poverty lawyers as truthgivers. Under the rule of law, there are only truthmakers.³²²

Moreover, for the pragmatist, legal thought is instrumental in purpose.³²³ It serves as a means to an end.³²⁴ Instrumental judgments require

PA. L. REV. 1059, 1061 (1991) (“Even as it raises an intractable problem of privilege among competing positions, none of which can claim foundations, pragmatism hides from itself, its own pre-scripted, conventional answer.”); Smith, *supra* note 319, at 423 (“Legal pragmatists like to claim that their movement is antifoundational, but pragmatism itself is in one sense a kind of foundation for political and legal discussion.” (footnote omitted)); Pierre Schlag, *Contradiction and Denial*, 87 MICH. L. REV. 1216, 1221 n.14 (1989) (book review) (“So either the pragmatic invitation to look to context is a little vacant or it is an invitation to surrender to whatever customs, traditions, and values the market and bureaucracy produce.”).

321. Joseph Singer affixes pragmatic truth to human creation. Singer, *supra* note 314, at 1753.

Pragmatists . . . emphasize that truth is not something we discover that is either external to us or intuitively self-evident. Rather, truth is a human creation—what is true depends partly on our purposes and partly on how we, individually and as a society, choose to describe the world. What is true is not simply given, there for us to discover; it is, at least partly, made by people, and therefore, changeable.

Id. (footnote omitted); see also Morawetz, *supra* note 314, at 452 (asserting that “[t]ruth is nothing more than a label for the interpretive strategy that happens to persuade and prevail in the conversation”); Richard Rorty, *What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719, 723 (1992) (contending that “truth and power are linked”); Schanck, *supra* note 317, at 2540 (mentioning “two key elements of pragmatism: (1) a denial of objective truth (a rejection of the correspondence theory of knowledge, according to which we can be said to know something when our thoughts or assertions correspond to the reality ‘out there’); and (2) an instrumental conception of truth (the identification of ‘truth’ with the practical effect of a proposition or with that which ‘works’).” (footnote omitted)).

322. Margaret Radin’s pragmatic reinterpretation of the rule of law is instructive on this point. See Radin, *supra* note 317, at 814. Radin asserts:

A pragmatic reinterpretation of the Rule of Law would at least deny that law consists of formally realizable rules in the traditional sense. More controversially, perhaps, I believe such a reinterpretation would deny that law consists quintessentially of rules at all, as well as the notion that rules are separate from cases and logically pre-exist their application. Such a reinterpretation would also deny the strict division of people into rule-givers and rule-followers, and the conception of judges as rule-appliers rather than rule-makers.

Id.

323. Grey mentions the Darwinian flooring of pragmatic instrumentalism. He explains:

[T]he pragmatists regarded thinking as an adaptive function of an organism, practical in the sense that it was *instrumental*. It had evolved as a problem-solving capacity, oriented toward survival. In its most developed form, thinking functioned to help resolve, by means of conscious reflection and experimental revision, the real problems and live doubts that arose in the course of acting on unreflective and habitual practices.

Grey, *supra* note 316, at 798.

324. *Id.* at 805 (“[Law] is instrumental, a means for achieving socially desired ends, and available to be adapted to their service.”); see also Smith, *supra* note 319, at 412 (“Legal

means-ends calculations.³²⁵ Means-oriented calculation stipulates³²⁶ decision procedures in case selection and strategy. Ends-oriented computation privileges moral and political virtues.³²⁷ Both involve the “normative activity”³²⁸ of ethical judgment.

The modernist poverty lawyer is a pragmatist in two ways: first, she develops a normative theory of morality and politics “situated in and reflective upon practice;” and second, she evaluates that normative theory “as an instrument for serving human purposes.”³²⁹ Engaging in situated and instrumental rationality assumes a prophetic, problem-solving capacity. In that capacity, the lawyer performs as a kind of prophet.³³⁰

The poverty lawyer speaks prophetically about practical solutions.³³¹ Infused with the “rhetoric of practicality and compromise,”³³² the prophe-

pragmatism is frequently depicted as an instrumental, forward-looking approach to law.” (footnote omitted)).

325. Singer points to the instability of the means-ends distinction. Singer, *supra* note 314, at 1760. Singer explains:

[O]nce we get down to the political task of implementing justice, of specifying what those institutions are and how they should work, all kinds of disagreements arise, both about how to conceptualize justice and how to implement it. Moreover, these disagreements are not merely technical questions about the best way to implement shared ends; rather, they implicate the ends themselves. Indeed, the very distinction between means and ends is contentious; one person’s means is another person’s end.

Id. (footnote omitted). *But see* Swan, *supra* note 314, at 351 (suggesting that Singer’s “disavowal of any rational standards for evaluating competing positions undermines the normative basis of his own project for developing a more pragmatic legal theory”).

326. *See* Sotirios A. Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. CHI. L. REV. 1033, 1038 (1991) (discussing pragmatism in terms of “political stipulation”).

327. *See* Robert Westmoreland, *Dworkin and Legal Pragmatism*, 11 OXFORD J. LEGAL STUD. 174, 176 (1991) (matching legal pragmatism and moral theories).

328. Radin, *supra* note 234, at 813 (viewing law as a “pragmatic normative activity”).

329. This analysis follows Grey’s more general discussion. Grey, *supra* note 316, at 836.

330. Rorty distinguishes between a “good kind” and a “wrong kind” of prophet. Rorty, *supra* note 321, at 719. To Rorty, “[t]he good kind of prophet thinks of herself as just someone who has a better idea Good prophets say that if we all got together and did such and such, we would probably like the results.” *Id.* By contrast, “the wrong kind of prophet [is] the kind who thinks herself the voice of something bigger and more authoritative than the possible consequences of the application of her ideas.” *Id.*

Less ambitiously, Steven Smith imagines the pragmatist as “a kind of preacher.” *See* Smith, *supra* note 319, at 411, 446 (conjecturing about the “exhortatory function of legal pragmatism”).

331. Grey, *supra* note 316, at 802 (“For pragmatists, the capacity for reason is best suited to practical concerns because it arises from our efforts to deal with those concerns.” (footnote omitted)); *see also* Schanck, *supra* note 317, at 2569 (“[T]he substitution of concrete analyses of issues together with practical solutions in place of the traditional abstract, conceptual formulations has often been perceived by those outside academic philosophy to be the essence of pragmatism.” (footnote omitted)).

332. Simon, *Visions*, *supra* note 15, at 505.

cies contain normative prescriptions, for example, justice,³³³ utility,³³⁴ self-determination,³³⁵ and individual desert.³³⁶ These well-intentioned prescriptions conceptualize the Johnson case as the site of situated and instrumental inquiry. This conceptualization conceals the exercise of power by the modernist poverty lawyer over Bertie Johnson.³³⁷

The pragmatic inquiry—here whether to accept Johnson's case—is a patent act of power. The act embodies epistemological and discursive forms of power.³³⁸ Epistemologically, the poverty lawyer presupposes her ability to describe and evaluate Johnson's sociolegal experience of disability. This presupposition goes beyond conventional claims of rationality,³³⁹ professional competence,³⁴⁰ and "decisional maturity,"³⁴¹ to reach towards weak claims of scientific positivism.³⁴² The positivist tradition persuades

333. See Morawetz, *supra* note 314, at 453 ("Pragmatism . . . reflects the individual decision-maker's commitment to a particular stake in justice as well as her awareness of deliberation as an instrumental practice serving controversial ends.").

334. See David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 581 (1984) ("[P]ragmatists look for ways to talk about the world that are useful for specific purposes.").

335. Cf. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 739 (1992) (asserting the "individual's power of self-determination" as a base of morality).

336. Cf. Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299, 317 (1992) (discussing the tension between philosophical liberalism and notions of individual desert and responsibility).

337. On the concealment of power in conceptualization, see Singer, *supra* note 314, at 1755 ("The way we conceptualize both social relationships and moral inquiry affects legal analysis. To the extent that those conceptions conceal the workings of power, the legal system helps perpetuate social injustice."); see also Handler, *supra* note 36, at 703 ("The pragmatists are concerned about the relationship between knowledge, power, and economic organization and the ways in which discourses, whether in science, politics, or ethics are linked to structures of domination." (footnotes omitted)).

338. On categorical and discursive embodiments of power, see Singer, *supra* note 314, at 1769 ("We need to focus on the ways in which our categories, discourse, and modes of analysis reinforce illegitimate power relationships by embodying the perspectives and concerns of those who are powerful and suppressing members of oppressed groups." (footnote omitted)).

339. On the requirements of rationality, see Stephen M. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 16 (1992) ("Rationality requires a combination of aptitude, training, and appropriate skepticism. . . .").

340. *Id.* at 19 (defining professional competence as a form of rationality that is "traditional, experimental, intuitive, and pragmatic").

341. Joel J. Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239, 285-89 (1992) (defining "decisional maturity" to include the qualities of voluntariness, authenticity, awareness, and understanding).

342. Grey explains the neopragmatist attraction to positivism:

[T]he new pragmatists can be seen as still working within the scientific empiricist tradition broadly conceived. They tend to reject both the pervasive relativism and the oppositional stance toward natural science that many European philosophers and social thinkers have adopted, and they accept the spirit of scientific inquiry, in

the poverty lawyer to consider the legality and justice of Johnson's case to be empirically verifiable. Evidence supplies the factual corroboration required by legality. Prediction—whether courts will find Johnson disabled—confirms the justice of Johnson's cause. Success is measured by the accuracy of that prediction.³⁴³ Practical success is thus self-confirming.

Discursively, the poverty lawyer addresses the Johnson case unilaterally. She does not stir "cross-cultural conversations."³⁴⁴ Nor does she treat the lawyer-client relationship as an "extra-curial" site for the "republican practices of engaged deliberation and genuine participation as economic equals."³⁴⁵ At most, she seeks tacit forms of agreement.³⁴⁶

Poverty lawyers stung by charges of epistemological and discursive dominance respond that a moderate empiricism and a weak interpretivism are necessary entailments of practice. Reciting oppressive sociolegal conditions, they argue that radical antifoundationalist and dialogic notions are inapposite to the concrete demands of practice. What matters, they say, is success. In this instance, success is measured, in the short run, by the vindication of Johnson's right to disability benefits and, in the long run, by the invalidation of the HHS consultative examiner regulation.

Plainly, practical constraints impinge upon the poverty lawyer's ethical judgment in deciding to select and chart strategy in the Johnson case. The constraints need not limit her epistemological and discursive choices solely to conventional ways of thinking and speaking. The "interdependence of

which theory is tested against experience by a reflective and critical community of inquirers. Pragmatists see even natural scientific inquiry as having unavoidably interpretive and culturally conditioned aspects; at the same time they believe that humanistic and explicitly evaluative inquiry can be pursued rationally and with the reasonable hope of progress.

Grey, *supra* note 316, at 790-91 (footnote omitted).

343. *Id.* at 804 (describing "general criterion" of success gauged in terms of "helping people cope with the world").

344. Reed E. Loder, *Out From Uncertainty: A Model of the Lawyer-Client Relationship*, 2 S. CAL. INTERDISCIPLINARY L.J. 89, 92 (1993) ("Pragmatist philosophers have promoted cross-cultural conversations as a way of expressing historicity and preserving diversity, and others have applied these pragmatist images to law." (footnote omitted)); *see also* Smith, *supra* note 319, at 434 ("Pragmatists also stress the importance of 'dialogue' in evaluating experience and in constructing and criticizing theories." (footnote omitted)).

Compare Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1040 (1991) (noting the dialogist's tendency towards "overconfidence, unexamined trust, in the extent to which 'we' can all talk meaningfully, persuasively, and yet nondominatively to each other" (footnote omitted)).

345. Hutchinson, *supra* note 314, at 583.

346. Moore, *supra* note 314, at 895 ("Interpretivism and pragmatism share the view that agreement is all there is to attain with conversation, that interpreting those agreements is all there is to do, realizing that each interpretation is itself an offer of a new agreement as much as an interpretation of an old agreement.").

choice and constraint"³⁴⁷ is apparent in impoverished communities. Determining the "presence or absence of choice" in particular situations, however, is a controversial political judgment.³⁴⁸

The ethical judgment required to ascertain the range of practical choices available to poverty lawyers and their clients is burdened by contextual and instrumental complexity.³⁴⁹ To lessen complexity, poverty lawyers deploy a cluster of heuristic moves.³⁵⁰ The first move is the assertion of contextual uniformity among subordinate groups.³⁵¹ This generalized assertion decontextualizes clients and their communities, creating a mock uniformity of interests and circumstances. The second move is the presumption of instrumental consensus.³⁵² This presumption establishes the plausibility of reciprocal or mutual understanding reached through reasoned, goal-

347. Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093, 2102, 2107 (1992) (asserting that "choices are situated within constraints. . . . [A]ny evaluation of someone who has choice must involve assessing both the degree of choice left by the particular constraints and the costs incurred by exercising the actual ambit for choice").

348. See *id.* at 2105; see, e.g., Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1285 (1992) (arguing that the emphasis on agency, choice, and exit in love and work "directs attention to individual misbehavior and individual response, concealing relations of power in the family and the workplace—male domination of women, and a legal regime of work without rights in a job or protection against most forms of abuse"); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (elaborating an account of gender and work that explodes the "choice" explanation framed by conservative courts in affirming workplace sex segregation).

349. Singer anticipates this difficulty. See Singer, *supra* note 314, at 1783 (asking whether "engaging in politics and intellectual inquiry with people of multiple perspectives makes political and legal analysis too complex").

350. The "pragmatically minded critic," intoned by Margaret Radin and Frank Michelman, might condemn these moves as "characteristic kinds of errors or biases that recur when target discourses are deployed by nonideal—incompletely committed and assiduous—practitioners caught in specific cultural environments." Radin & Michelman, *supra* note 344, at 1031 (footnote omitted).

351. Subordinate groups, in fact, experience alternative visions and survival strategies. See Linda R. Hirshman, *The Book of "A,"* 70 TEX. L. REV. 971, 976 (1992) ("Linked to feminism in Radin's vision . . . pragmatism must include the viewpoints and experience of persons rather removed from the social-epistemological hegemony, who provide a much-needed source of alternative vision." (footnote omitted)); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 632 (1990) ("To further the substantive objectives that critical feminism seeks, its greatest challenge lies at the pragmatic level; its task is to design frameworks more responsive to the experiences of subordinate groups."); Joseph W. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1838 (1990) (reviewing the "complex set of strategies for community empowerment and self-determination" implemented by Native American nations).

352. The claim is that consensus follows from instrumental reasoning. See Handler, *supra* note 36, at 704 ("[Pragmatic c]onsensus is reached by discursive and argumentative practices."); Swan, *supra* note 314, at 365 ("Consensus . . . is not something which remains out there waiting to be discovered, it is something which must be created and recreated politically in continuous encounter and discourse with others." (footnote omitted)). *But see*

oriented lawyer-client deliberation. The third move is the charge of inchoate autonomy.³⁵³ This charge avers that the client lacks a fully developed or mature sense of agency and efficacy. The fourth move is the claim of immutability.³⁵⁴ This claim describes relational and institutional contexts as static and unchanging. The fifth move is the retreat to unaccountability.³⁵⁵ This retreat denies the need for elaborate schemes of ethical justification.

This battery of moves alleviates some of the complexity accompanying situated and instrumental inquiry. In the Johnson case, for example, the assumption of contextual uniformity blunts the need for situated investigation of Johnson's family, labor, and migration histories, even though each connects her to larger and potentially significant communities. Similarly, the combined assumptions of instrumental consensus and inchoate autonomy avert the need for dialogic negotiation with Johnson concerning case selection or strategy. Likewise, the assumption of immutability obviates the need for innovative case selection or advocacy practices. Even if these assumptions are deflected, the lawyer responsible for the inquiry into Johnson's case remains unaccountable for her judgment.

Although the Johnson case inquiry presents a somewhat crass instrumentalist version of pragmatism, it is sufficient to test the progressive³⁵⁶ force

Schnably, *supra* note 11, at 371 (“[A] focus on consensus simply cannot deliver what it promises: a relatively uncontroversial basis for legal rules and decisionmaking.”).

353. The contention is that autonomy is undeveloped or undervalued among subordinate groups. *But see* Rhode, *supra* note 351, at 635 (“[H]owever manipulable, the rubric of autonomy and equality have made enormous practical differences in the lives of subordinate groups.”); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1778 (1990) (“[T]he record . . . reveals that subordinated people do make history, particularly when their political practice gives them a consciousness of their position.”).

354. The argument is sometimes couched in necessitarian terms. *See, e.g.*, Simon, *Visions*, *supra* note 15, at 503 (“[P]ragmatism . . . holds that practice is constrained by ungrounded or unconscious premises about social or moral necessity. . . .” (footnote omitted)); Grey, *supra* note 314, at 801 (“The pragmatist thesis is that human thought always and necessarily arises in a situated complex of beliefs; on any given occasion, the great mass of these beliefs must be left tacit and simply used, not made explicit and subject to doubt, if thought is to proceed at all.”); Margaret J. Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409, 421 (1993) (“Some contexts must remain fast in order for others to be transcended. Some conceptions must be taken for granted in order for others to be moved.”).

355. Unaccountability discounts the need for justification. *Compare* Moore, *supra* note 314, at 904 (“Telling us we must choose and that some choices will *seem* better than others, without giving any reasons why we should choose one way or the other or why the ‘seeming-better’ should be taken to *be* better, does not engage us.”) and Swan, *supra* note 314, at 366 (“The articulation of a political vision cannot be separated from its justification.”) with Weaver, *supra* note 314, at 748 (“Pragmatism’s whole project was to overcome our felt need to philosophically justify political institutions—whether for those that exist or ones envisioned as better alternatives.”).

356. Simon expressed early optimism on this score. Simon argues:

If pragmatism connotes a style of practice that is wary of unexamined and untested presuppositions, that adopts a tentative and experimental attitude toward strategy,

of pragmatism in the entrenched field of poverty law.³⁵⁷ In the political context of advocacy on behalf of impoverished communities, good practical intentions are not enough.³⁵⁸ More practice in the theory of political judgment, vision, and justification is required.³⁵⁹ What practice or theory justifies accepting Johnson's case? I submit that something more than a lawyer's vague utilitarian³⁶⁰ or best alternative³⁶¹ ideal of legality and justice. What is the theory of that ideal and how is it to be imple-

that is willing to combine activities conventionally held apart or separate activities conventionally associated, that has an open and expansive view of the range of possibly relevant knowledge, and that is committed to learn and revise in the light of experience, then the style of political practice most compatible with Critical legal writing is a pragmatist one.

Simon, *Visions*, *supra* note 15, at 506.

But see Baker, *supra* note 314, at 697, 717 (“[P]ragmatism is of scant use for achieving progressive social change.”); Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15, 56 (1990) (“[P]ragmatism undermines the CLS challenge to the legitimacy of legal decisions by reducing critical theory to a set of objections to current theory and practice.”); Rorty, *supra* note 321, at 723 (“The left finds pragmatism disappointing and wants philosophical thought that is more ‘radical’ than that of James and Dewey, because less ‘complacent’—as if a really *powerful* philosophy could break down all the resistance to radical social change by dissolving all the old fears and prejudices.”); Swan, *supra* note 314, at 367 (“To the extent that it focuses on the formation of a procedural framework for the promotion of democratic discursive practices, contemporary pragmatism may be seen as a real alternative to the conceptions of political and legal praxis that prevail in the work of the first generation of CLS thinkers.” (footnote omitted)); Weaver, *supra* note 314, at 743 (“To the extent the radical Left argues pragmatism *necessarily* entails a particular political view, they become vulnerable to the very pragmatism they seek to employ—for necessary entailment is one of the things pragmatism argues against.”).

357. The progressive force of pragmatism in entrenched fields is disputed. *Compare* Handler, *supra* note 36, at 704 (“By emphasizing ‘common sense,’ pragmatism runs the temptation of accepting the status quo.”); Hirshman, *supra* note 351, at 976 (1992) (“[P]ragmatism, dependent as it is on real experience, is often criticized for its epistemological and normative conservatism.” (footnote omitted)) and Simon, *Visions*, *supra* note 15, at 504 (“[P]ragmatism is entirely in agreement with critical legal writing that . . . homely, common sense ‘practical’ judgments and ‘compromises’ presuppose theories about the way the society is structured and what it permits.”) with Schnably, *supra* note 11, at 404 (“There seems to be no intrinsic reason why a [pragmatist] focus on social context and practices should produce a bias toward the existing social order.”).

358. Hutchinson, *supra* note 314, at 565 (“Individuals must go beyond good intentions to transform the political contexts that translate dominant interests into neutral standards, that turn momentary ideas into naturalistic assumptions, and that transform good intentions into bad effects.”).

359. Radin, *supra* note 354, at 411 (“As a pragmatist . . . I do not think there is any methodology that can tell us a priori when dominant conceptions should be disrupted and when they should be used in other ways.”).

360. On utilitarian rationality, see Grey, *supra* note 314, at 531.

361. Gardbaum, *supra* note 314, at 709 (discussing the yardstick of the “best practical alternative”).

mented?³⁶² The absence of a pragmatic justification,³⁶³ coupled with the lack of a transitional vision of community integration,³⁶⁴ leaves only contextual³⁶⁵ discretion as a mode of persuasion.³⁶⁶ The claim to translation, offered both as a mode of understanding and persuasion, extends the instrumentalist's ethical discretion to the institutional setting (e.g., the ALJ hearing) of advocacy.

3. Translation

The instrumentalist claim to translation³⁶⁷ arises out of discontent with

362. Radin's answer is pragmatic: "We have to look and see, judging each particular case in context, deciding whether it will hurt too much to try to put the ideal into practice now, and re-deciding the particular case when circumstances change." Radin, *supra* note 354, at 413.

363. Smith, *supra* note 319, at 429 ("[P]ragmatists cannot offer any method or criterion for theorizing different from the methods and criteria already employed by nonpragmatists.").

364. Radin articulates a transitional vision of pragmatic politics. Radin, *supra* note 317, at 816.

In th[e] pragmatic view of politics, we are always attempting to accomplish a transition from today's nonideal world to the better world of our vision, and it is a transition that never ends. Moreover, our visions and our nonideal reality paradoxically constitute each other: what we can formulate as being better depends upon where we are now, and the way we understand where we are now depends upon our vision of what should be.

Id. (footnote omitted); see also Ruth A. Putnam, *Justice in Context*, 63 S. CAL. L. REV. 1797, 1805 (1990) (claiming that "what enables the pragmatist as judge, legislator, or plain citizen to make progress and to change her or his conceptions of justice, of oppression, of legitimate power, etc. is the fact that the world changes for the better as well as for the worse"); Radin, *supra* note 354, at 413 (contending that "theory is immanent and evolving; its development is interdependent with practice"); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1819 (1990) (noting pragmatism's standing as "a visionary tradition").

365. See, e.g., Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600 (1990) ("[W]e mean to signal with 'context' a readiness, indeed an eagerness, to recognize patterns of differences that have been used historically to distinguish among people, among places, and among problems.").

366. Both feminists and pragmatists embrace a context-based discretionary mode of persuasion. See, e.g., Grey, *supra* note 314, at 862 (citing the "important parallels between pragmatism and contemporary feminist thought" manifested in a "practical and contextual approach to law"); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699-1704 (1990) (splicing theoretical connections between feminism and pragmatism); Rhode, *supra* note 351, at 632 (asserting that "a critical feminist approach to procedural values demands contextual judgment"); Marion Smiley, *Pragmatism as a Political Theory*, 63 S. CAL. L. REV. 1843, 1853 (1990) (maintaining that "feminist theory has begun to generate a set of political questions that any responsible pragmatist should feel obliged to take into consideration before embarking on contextual analysis"); cf. Baker, *supra* note 314, at 697, 717 ("Rorty convinces one only that if highly intellectual feminists redescribe themselves and their project in anti-foundationalist terms, they might free themselves from the 'philosophical' demand for a 'general theory of oppression.'"); Radin & Michelman, *supra* note 344, at 1049 ("Like their pragmatist neighbors, feminists can be tempted into disabling radical particularism." (footnote omitted)).

367. The instrumentalist claim of translation is pressed by Clark Cunningham. See Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1299; Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2459. In pressing this claim, Cunningham draws inspiration from

the formalist vision of “lawyering as representation.”³⁶⁸ The source of that discontent is the “deeply ambiguous” nature of representation lodged in the tension between the creation and the “re-presentation” of meaning.³⁶⁹ Citing this ambiguity³⁷⁰ and its attendant silencing,³⁷¹ Clark Cunningham broaches an alternative vision of “lawyering as a form of translation.”³⁷²

the work of James Boyd White. Compare JAMES B. WHITE, JUSTICE AS TRANSLATION 254 (1990) (describing translation as “a process by which one seeks to attune oneself to another’s text and language, to appropriate them yet to respect their difference and autonomy as well”) with Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1335 (“In applying the word ‘translation’ to the practice of law, I have been influenced by James Boyd White’s presentation of translation as a complex and creative practice requiring of the translator both high art and a demanding ethic.” (footnote omitted)).

In contrast to Cunningham, White is careful to install a “proper measure” of translation. WHITE, *supra*, at 255. On this measure, success is not gauged by the full reproduction of meaning—“the setting over of meaning from one non-existent linguistic abstraction into another”—but by the responsiveness of textual composition. *Id.* at 254-55. White justifies this less radical sense of translation on the ground of textual appropriateness. He argues:

[I]f we think of translation instead as the composition of one text in response to another, as a way of establishing relations by reciprocal gesture, to be judged by criteria of appropriateness, translation can of course “succeed” and do so in ways beyond number. There is no single appropriate response to the text of another, nor even a finite appropriate set of responses; what is called for is a kind of imaginative self-assertion in relation to another. It will be judged by its coherence, by the kinds of fidelity it establishes with the original, and by the ethical and cultural meaning it performs as a gesture of its own.

Id. at 255-56.

368. Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2460 (“The central activity of lawyering is generally described as representing clients.” (footnote omitted)).

369. *Id.* at 2492. Cunningham notes:

It is easier either to just re-present or to create your own representation. If the lawyer merely re-presents, then the client’s experience may not gain legal significance. But if the lawyer “creates a representation,” the legal significance may not be rooted in the client’s own experience. Either way, both client and judge are poorly served because the failure of communication is a loss of potential new knowledge.

Id.

370. *Id.* at 2460 (pronouncing “the profound ambiguities created by describing lawyering as representation”).

371. Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1301 (“[O]ne can understand at least some 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 changes.”).

372. *Id.* at 1299 (“I offer the metaphor of the lawyer as translator as a way of both understanding and altering the ways lawyers change the meanings of their clients’ stories.”); Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2459 (“The concept of lawyering as translation is . . . presented as rising out of my actual experiences as a lawyer and being tested through a process of talking about those experiences which requires a dynamic alternation between the evocation of experience and the imposition of a conceptual structure.”).

At the “core” of Cunningham’s vision is the merger of lawyer-client identity: “the achievement of two persons somehow speaking with one voice.”³⁷³ For Cunningham, univocalism is the key to translation.³⁷⁴

Unlike “re-presentation” and “creating a representation,” the idea of translation captures that elusive sense of two persons speaking with one voice. If language is intimately bound up with the way we think about experience, then talking about experience in a different language necessarily 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.³⁷⁵

Cunningham acknowledges that “the metaphor of lawyering as translation cannot fully express the meaning of the lawyer’s experience,” especially regarding the “narrow and purposive” instrumental pursuits of advocacy and counseling.³⁷⁶ Yet, he argues, the metaphor can “help”³⁷⁷ the lawyer by enlarging her awareness “of how, in the process of representing a client to others, meaning is created and lost.”³⁷⁸

Cunningham points to two domains in which meaning is created and lost. The first is the realm of language and categorization.³⁷⁹

For an examination of the modern-postmodern strains in Cunningham’s translation thesis, see Alfieri, *supra* note 35, at 1235-41.

373. Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2461.

374. Cunningham’s later work suggests a weaker sense of univocalism. See Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1299-1300. He states:

The translator does not silence the speaker but rather seeks to enhance the speaker’s voice by adding her own. The good translator does not alter the speaker’s meaning without the speaker’s consent, and may even collaborate with the speaker to produce a statement in the foreign language that is more meaningful than the speaker’s original utterance. Thus, translation offers both an image of the constraints upon a lawyer’s ability to represent fully his client’s story and a model for recognizing and managing the inevitable changes in meaning in a way that may empower rather than subjugate the client.

Id. at 1300 (footnote omitted).

375. Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2483.

376. *Id.* at 2491.

377. Help arrives in the professional form of a translator’s “ethic.” Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1338. To Cunningham, “[t]he translator’s ethic compels a continuing cycle in which the translator must continually confront the flaws of the expression he is creating in the second language, return to the ‘other’ in the first language, and then begin the endeavor anew.” *Id.* (footnote omitted).

378. Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2491.

379. Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1332 (“[L]anguage plays a central role in the constitution of knowledge out of experience. The very process of naming reduces the particularity of experience to reveal inherent factors of form and relation, and then formalizes and stabilizes them.” (footnote omitted)).

Like more familiar forms of language, law creates knowledge by dividing up the spectrum of human experience into basic categories. But this new knowledge, like all forms of knowledge, involves a loss, a reduction of the particularity of experience and the perspectives of other understandings.³⁸⁰

To rectify this loss, “the lawyer [as translator] must identify and cross the gap between what the client says and what can be said in the language of the law.”³⁸¹

The second is the sphere of lawyer-client and client-state relations.³⁸² Cunningham urges the lawyer to engage “both the client and the law-speaking other party in dialogue that enables each to expand what they know so as to meet on common ground.”³⁸³ Doing so requires a “constant process” of education concerning the linguistic creation and loss of meaning.³⁸⁴ This education must simultaneously encompass the lawyer-self, the client-other, and the state.³⁸⁵

Cunningham’s recognition of the linguistic, categorical, and relational determinants of meaning in the lawyering process has prompted some scholars to ponder the utility of the metaphor of translation in the context of poverty law.³⁸⁶ Their work suggests that the metaphor is, in fact, polycentric, encompassing translation, narrative, voice, and storytelling.³⁸⁷

380. Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2491 (footnote omitted); *see also* Cunningham, *The Lawyer as Translator*, *supra* note 19, at 1332 (“Knowledge is neither independent of nor simply dependent on experience; rather, the conceptual world is constituted out of the elements of experience.”).

381. Cunningham, *A Tale of Two Clients*, *supra* note 19, at 2491.

382. Cunningham includes both relations in a single sphere. *See id.* at 2492 (“The metaphor of translation thus challenges the lawyer to a constant process of educating herself, her client, and the other legal actors to the ways in which both lay and legal language diminish and expand what we know about experience.”).

383. *Id.* at 2491. Cunningham imagines client representation “as a series of dialogues: both between the client and the lawyer and between the lawyer and other legal actors such as opposing lawyers and a judge.” *Id.* at 2482. To him, “[e]ach dialogue replicates the internal mental dynamic between experience and knowledge in which language both constitutes concepts out of experience and reconstitutes experience by use of concepts.” *Id.*

384. *Id.* at 2492.

385. *Id.*

386. *See, e.g.*, Gilkerson, *supra* note 313, at 911 (exploring “the interconnections between the limits of traditional representation and the possibilities of the translator approach to poverty law practice”); *cf.* White, *supra* note 195, at 544 (“The legal culture might define the attorney’s core role as that of a translator who serves to shape her client’s experiences into claims, arguments and remedies that *both* the client and the judge can understand.” (footnote omitted)).

387. The concepts of narrative, voice, and storytelling have provoked heated controversy. *Compare* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (challenging the claim of racial distinctiveness in critical race scholarship) *and* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251 (1992) (complaining that “stories may go wrong: they may reveal facts about their narrators that ought to

Christopher Gilkerson's handling of the concept of the "lawyer as translator" illustrates the polycentric view. His springboard is the metaphor of "law as narrative." Gilkerson contends that the "lawyer as translator" seeks to unravel the client's story from the silencing entanglements of universalized legal narratives.³⁸⁸ Once authentic story and dissembling narrative are disentangled, the lawyer-translator attempts rhetorically and strategically to tell the client's story "through the client's voice and narrative."³⁸⁹ This attempt elicits the metaphor of the "lawyer as storyteller."

According to Gilkerson, the client's experience, viewed through the client's narrative perspective, directs the "lawyer as storyteller."³⁹⁰ The task is to preserve narrative from the silencing language and procedure of legal advocacy.³⁹¹ Fulfilling this task demands an "equal knowledge of law's discourse and rituals" and of the "client's language, meanings, and values."³⁹²

Gilkerson's sympathetic extension of Cunningham's "translation" thesis ends with the demarcation of goals. For Gilkerson, "the goal of translation is not for lawyer and client to 'speak with one voice.'"³⁹³ To the contrary, "the goal is for the lawyer to position the client's voice within the legal proceeding, to evoke rather than re-present the client's narratives."³⁹⁴ Repositioning client voice and narrative, Gilkerson maintains, facilitates "dialogue" between the client and the legal decisionmaker—in this case, the ALJ.³⁹⁵ Abandoning the role of advocate or intermediary for the role of facilitator, the lawyer acts "to establish connection and understanding between clients and decisionmakers by confronting the latter as human beings susceptible to enlightenment."³⁹⁶ The enlightenment of translation, Gilkerson insists, is "an imperative for poverty law practice."³⁹⁷

trouble us, or they may reflect a flawed understanding of the relation between stories and law" (footnote omitted)) with Richard Delgado, *When A Story Is Just A Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (castigating Randall Kennedy's appraisal of "voice" scholarship) and Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 315 (1992) (censuring Mark Tushnet's "hostile" analysis of narrative jurisprudence).

For a cautious evaluation of narrative scholarship, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

388. Gilkerson, *supra* note 313, at 915.

389. *Id.*

390. *Id.* at 916 (footnote omitted).

391. *Id.*

392. *Id.* (footnote omitted).

393. *Id.* (footnote omitted).

394. *Id.* at 916-17 (footnotes omitted).

395. *Id.* at 917.

396. *Id.* (footnote omitted).

397. *Id.*

Under Gilkerson's revised version of translation, the opportunity for enlightenment occurs in the gap between universalized narrative and client story. He argues: "The job of poverty lawyers should be to fill that gap."³⁹⁸ The job of gap-filling, in turn, commands lawyers to challenge, rather than concede, universalized narrative.³⁹⁹ Mounting such challenges entails critique, resistance, and normative reinterpretation.⁴⁰⁰ Gilkerson's vision of "the lawyer's role as translator" instigates a process of "interpreting, understanding, and then revealing the relationship between the client's perspective and the law."⁴⁰¹

To Gilkerson, lawyer translation "expose[s] unstated assumptions in universalized narratives," thereby revealing the "dissonance of the client's narrative."⁴⁰² Narrative dissonance results from the exclusions of legal doctrine, procedure, and decisionmaking. Notwithstanding this dissonance, Gilkerson targets administrative decisionmaking as an important site of translation.⁴⁰³ He claims that within the administrative hearing "the lawyer as translator can bring client and decisionmaker together in face-to-face dialogue."⁴⁰⁴ Dialogue may enable the decisionmaker to "hear" and "learn" from the "meanings and values" of client narrative.⁴⁰⁵ In this way, dialogue fosters the substantive⁴⁰⁶ goal of informed decisionmaking and the "process" goal of empathic decisionmaking.⁴⁰⁷

398. *Id.*

399. *Id.* ("[Challenge] means examining poor clients' narrative accounts of their injuries and asking what it would mean for the law and the legal system to take those accounts seriously." (footnote omitted)).

400. *Id.*

401. *Id.* (footnote omitted).

402. *Id.* at 918.

403. *Id.* at 923 ("The hearing as a forum for translating client narratives has become increasingly important as substantive developments in poverty law in the 1980s have shifted decisionmaking from federal regulatory practice to state program, design, operation, and control." (footnote omitted)).

404. *Id.* at 922, 924-25 ("In translating client narratives, the hearing (whether formal or informal) should be neither the means nor the end of the representational strategy; rather, the hearing is the setting for bringing together client and decisionmaker in an effort to call upon the latter to take account of and learn from the former's perspective and voice.").

405. *Id.* at 923 ("[T]he lawyer's translation is an attempt to compel the decisionmaker to hear the client's voice, understand the client's perspective, and feel the client's injury."). *Id.* at 925; *see also* Eskridge, *supra* note 220, at 385-86 ("Narratives can rectify stereotypical misconceptions about us and can educate society about our legitimate concerns and needs, and the unjustified ways social mores and policies hurt us. Narratives can also help others identify with us and our concerns, creating conditions of empathy and emotional connection." (footnote omitted)).

406. The path from dialogue to substantive resolution is unclear. *See* Abrams, *supra* note 307, at 1600 ("It is not evident how one progresses from taking the viewpoint of another to agreeing on a particular resolution.").

407. Gilkerson, *supra* note 313, at 925 (footnote omitted).

Gilkerson defines the “empathic understanding” of legal decisionmakers in terms of “comprehension and identification with ‘the other’—her perspective, identity, history, motives, and purpose.”⁴⁰⁸ Richard Delgado and Jean Stefancic deprecate the belief that “we can somehow control our consciousness despite limitations of time and positionality.”⁴⁰⁹ The term they designate for this belief is the “*empathic fallacy*.”⁴¹⁰ They explain:

[T]he *empathic fallacy* consists of believing that we can enlarge our sympathies through linguistic means alone. By exposing ourselves to ennobling narratives, we broaden our experience, deepen our empathy, and achieve new levels of sensitivity and fellow-feeling. We can, in short, think, talk, read, and write our way out of bigotry and narrow-mindedness, out of our limitations of experience and perspective.⁴¹¹

To Delgado and Stefancic, empathic understanding is plausible “only to a very limited extent.”⁴¹²

To escape these limitations, Gilkerson appeals to the “*inherent* abilities of decisionmakers to hear, balance, and use discretion.”⁴¹³ This appeal is part of a wider effort, encouraged by Lucie White, to rethink the practice of administrative decisionmaking “from a ground of empathy rather than of contest.”⁴¹⁴ In this way, “the task of process, be it political or adjudicative, would be to sustain a complex, multivocal conversation.”⁴¹⁵ White contends:

Such process would encourage participants to interpret their “conflicting interests” as varying perspectives on what are ultimately common human problems. That is, the process would engage participants in reflecting on

408. *Id.* at 926 (footnote omitted).

409. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261 (1992) (footnote omitted).

410. *Id.* at 1261.

411. *Id.*

412. *Id.* Derrick Bell recapitulates this point in the context of court enforced “racial equality.” Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364 (1992) (viewing the law and courts “as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people”).

413. Gilkerson, *supra* note 313, at 926; see Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 10 (1992) (noting the “increased resort to administrative discretion as a dominant legal modality” (footnote omitted) (emphasis added)).

414. Lucie E. White, *Revaluing Politics: A Reply to Professor Strauss*, 39 UCLA L. REV. 1331, 1338 (1992). For early strands of White’s hypothesis, see Joel F. Handler, *Continuing Relationships and the Administrative Process; Social Welfare*, 1985 WIS. L. REV. 687 (exploring administrative models of cooperative decisionmaking in special education, public welfare, and social insurance programs).

415. White, *supra* note 414, at 1338.

their own positions, seeking not so much to “sell” their interests to the decision-maker, but rather to *reformulate* those interests in light of the others’ histories, the others’ passions, and the others’ needs.⁴¹⁶

White admits that “[t]hese efforts would never fully succeed.”⁴¹⁷ To Bertie Johnson, such aspirational efforts might smack of folly. Whether or not guided by the “aspirational norm”⁴¹⁸ of empathy, the supposedly herculean abilities of HHS legal decisionmakers are nowhere visible to Johnson. Johnson’s failure to appreciate the proficiency of HHS decisionmakers, especially the performance of the presiding ALJ, should not be attributed to cognitive,⁴¹⁹ affective,⁴²⁰ or depressive⁴²¹ disorders, notwithstanding medical evidence of her nervousness and depression. Although her physical impairments and functional limitations may have engendered symptoms of nervousness and depression, Johnson’s criticism of the ALJ and her opposition to the consultative examination raise credible objections to the process and substance of HHS administrative decisionmaking in her case.

Like Gilkerson’s client-other, Johnson possesses her own perspective, identity, history, motives, and purpose.⁴²² Her objections flow from the identity-making experiences of age, class, gender, labor, migration, and

416. *Id.* (footnote omitted).

417. *Id.* at 1339.

418. *Id.*

419. See, e.g., Patricia J. Dunston, *Stress, Coping, and Social Support: Their Effects on Black Women*, in HANDBOOK OF MENTAL HEALTH AND MENTAL DISORDER AMONG BLACK AMERICANS 133, 136 (Dorothy S. Ruiz ed., 1990) (“An individual’s reaction to the type and intensity of a stressor may also vary in relation to physiological change and cognitive appraisal.”); Paul Willner, *Cognitive Functioning in Depression: A Review of Theory and Research*, 14 PSYCHOL. MED. 807, 817 (1984) (“Not only are pleasant events less frequent in depression, and unpleasant events more frequent, but also the affective quality of both is biased in the aversive direction; there are also reciprocal inter-relationships between the frequency of one type of event and the affective quality of the other.”).

420. See, e.g., P.E. Bebbington et al., *Misfortune and Resilience: A Community Study of Women*, 14 PSYCHOL. MED. 347 (1984) (studying affective disorders among working class women with young children); Paul R. Jackson & Peter B. Warr, *Unemployment and Psychological Ill-Health: The Moderating Role of Duration and Age*, 14 PSYCHOL. MED. 605 (1984) (studying psychological ill-health among unemployed working class men); cf. Christina Newhill, *The Role of Culture in the Development of Paranoid Symptomatology*, 60 AM. J. ORTHOPSYCH. 176 (1990) (examining influence of cultural and societal forces on development and manifestation of paranoid illnesses).

421. See, e.g., Deborah Belle et al., *Mental Health Problems and Their Treatment*, in LIVES IN STRESS: WOMEN AND DEPRESSION 197 (Deborah Belle ed., 1982) (finding “a high rate of depressive symptoms and other mental health problems” among low income mothers); D.M. Fergusson & L.J. Horwood, *Life Events and Depression in Women: A Structural Equation Model*, 14 PSYCHOL. MED. 881, 881 (1984) (“The general and robust nature of the correlation between life events and depression strongly suggests that life events play a role in the etiology of depression[.]”).

422. See Gilkerson, *supra* note 313, at 926 (footnote omitted).

race. The nature and extent of the objections communicate Johnson's frustration with the effort to bring her story to the attention of HHS decisionmakers.⁴²³ The inability of HHS decisionmakers to hear and learn from the meanings and values of Johnson's story demonstrates the inadequacy of the dominant cognitive modality of administrative decisionmaking in the field of disability (i.e., intuitionism),⁴²⁴ and the insufficiency of the alternative modality of empathic conversationalism.⁴²⁵ Gilkerson's vision of normative dialogue is ultimately frustrated⁴²⁶ by the institutional subordination of a laboring, black, impoverished woman. The instrumentalist claim to indeterminacy, and the purposive political judgments that follow from weakening the strictures of law and legal reasoning, do not save Johnson from institutional subordination. Instead, by emphasizing and exploiting the manipulability of legal regimes, the claim enlarges the instrumentalist's gatekeeping role, extending her discretionary judgment to deciding the political purpose of such regimes.

4. Indeterminacy

The instrumentalist claim to indeterminacy emanates from the jurisprudence of legal realism.⁴²⁷ The historical mainstay of the realist critique is

423. Eskridge states: "[W]e must bring our personal stories and histories to the attention of law and society." Eskridge, *supra* note 220, at 385.

424. See Bersoff, *supra* note 174, at 350 ("[I]ncorrect intuitive judgments result from the use of simplifying heuristic strategies in all situations where decisionmakers' cognitive capacities cannot otherwise efficiently process information.").

425. See Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L.J. 1879, 1889 (1992) ("A fault of conversationalism is that we assign it the efficacy it would have if we (the right-thinking conversationalists) were to prevail in every case. But the dominant narrative changes very slowly."). Delgado's bleak assessment of conversationalism is informed by his analysis of racism. He remarks:

Racism is not merely common, it is natural and normal—the ordinary state of affairs. It informs all our preconceptions and mental pictures. It is the 'normal science' of our day, part of the baseline, the from-which-we-reason. Conversation begins with racist premises. Indeed, talking will likely just rehearse the dominant narrative, inscribing its supremacist message even more deeply.

Id. at 1880 (footnotes omitted).

426. See *id.* at 1887 ("The trouble is that highly normative talk—full of importuning, pleading, imploring, and pronouncements of this or that course of action as wrong and evil—is likely to fail, and very possibly make matters worse.").

427. This is not the place for a full-blown survey of the literature of realist jurisprudence. For historical surveys, see LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-60* (1986); WILFRED E. RUMBLE, JR., *AMERICAN LEGAL REALISM* (1968). Yet, even for this limited inquiry, two mileposts are noteworthy. The first chalks the start of the realist literature: the sociological jurisprudence of Benjamin Cardozo and Oliver Wendell Holmes. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1963); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 61 (1897); G. Edward White, *From Sociological Jurisprudence to Realism:*

an attack on formalistic or mechanical theories of judicial decisionmaking.⁴²⁸ Postrealist scholars, especially those affiliated with the critical legal studies movement,⁴²⁹ continue this attack, besieging a broad range of doctrinal judgments.⁴³⁰ A principal thrust of this attack is the charge of indetermi-

Jurisprudence and Social Change in Early Twentieth-Century America, 58 VA. L. REV. 999 (1972).

The second marks the fracturing of the late literature: the debate aligning Karl Llewellyn, and to a lesser extent Jerome Frank, against Roscoe Pound. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); see also JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

On the repercussions of the Llewellyn-Pound debate and the decline of realism, see generally N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302; N.E.H. Hull, *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921; G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 821-25 (1986).

428. Edward Purcell observes: “The rejection of the orthodox theory of judicial decision was the central point of the realist critique. . . .” PURCELL, *supra* note 186, at 89. For early and late examples of that rejection, see Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 810 (1935).

429. On the realist underpinnings of critical legal studies, see KELMAN, *supra* note 88, at 12 (mentioning critical legal studies’ “emphasis on the indeterminacy of case results and the manipulability of precedent as a continuation of the Realist project”); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 705-06 (1985) (indicating that “[l]egal realism provided critical legal scholars with many of their arguments”); Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 524 (1987) (tying legal realism and critical legal studies to a “progressive political critique” couched in a “skeptical jurisprudence”); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) (untangling the critical and constructive strands of legal realism); G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 650 (1984) (noting the “self-conscious identification of Realism as a progenitor of, or an inspiration for, the CLS movement”); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 467 (1988) (book review) (showing partial integration of legal realism and critical theory); Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1680 (1982) (citing critical legal scholars’ tendency to “employ[] the analytic techniques of the Realists at a higher level of abstraction to expose the assumptions underlying traditional legal discourse as contradictory and incoherent”).

430. See, e.g., James Boyle, *Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371 (1993) (exploring the relationship of legal realism to the rhetoric and theory of contractarian traditions); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (contract law); Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989) (labor law); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (criminal law); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (contract and tort law); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (family

nacy.⁴³¹

Postrealist jurisprudence presents strong and weak accounts of the indeterminacy charge. Each account aspires to descriptive or empirical veracity. The strong account claims that legal regimes (i.e., rules, arguments, and institutions) are radically indeterminate.⁴³² The weak account contends that legal regimes are, at most, moderately indeterminate.⁴³³

law); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393 (1991) (property law).

431. Robert Gordon's attempt to harmonize the theory of indeterminacy and the practice regularities of sociolegal regimes is well known. Gordon, *supra* note 88, at 125. Gordon claims that "there are plenty of short- and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules." *Id.* He points out, for example, that lawyers "are constantly making predictions for their clients on the basis of these regularities." *Id.* He insists, however, that "none of these regularities are necessary consequences of the adoption of a given regime of rules." *Id.* In his "critical" view, "[t]he rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time." *Id.*; see also KELMAN, *supra* note 88, at 245 ("The claim of legal indeterminacy emphasizes not so much the degree to which any set of legal practices is so inexorably internally contradictory that one would be hard pressed even to state an accurate *summary* of prevailing practice, but rather the degree to which we would find it impossible to match up prevailing practices (to the extent that we can discern them) with particular social conditions."); cf. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987) ("What I call the indeterminacy thesis goes roughly like this: the existing body of legal doctrines—statutes, administrative regulations, and court decisions—permits a judge to justify any result she desires in any particular case [T]he idea is that a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.").

432. In his exegetical study of critical legal studies (CLS), Mark Kelman explains:

Th[e] stronger CLS claim [of legal indeterminacy] is that the legal system is invariably simultaneously *philosophically committed* to mirror-image contradictory norms, each of which dictates the opposite result in any case (no matter how "easy" the case first appears). While settled *practice* is not unattainable, the CLS claim is that settled *justificatory schemes* are in fact unattainable. Efforts at norm legitimation are radically indeterminate not because the source of authority *cannot* speak clearly (though, rather incidentally, she often cannot) but because if pressed, she would not want to.

KELMAN, *supra* note 88, at 13; see also Joseph Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984) (arguing that "legal reasoning is indeterminate and contradictory" (footnote omitted)); Charles Yablon, *Timeless Rules: Can Normative Closure and Legal Indeterminacy Be Reconciled?*, 13 CARDOZO L. REV. 1605, 1608 (1992) ("[Legal indeterminacy] contends that the norms that constitute the legal system are so diverse, and so contradictory in scope, purpose, and level of generality that a skilled lawyer or judge can invariably invoke an authoritative legal rule to justify any outcome they [sic] wish in a particular case."); cf. Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 690 (1990) [hereinafter *Bull Durham*] ("[T]he relative indeterminacy of legal doctrine is complex, yielding patterns of both stability and flexibility."); Winter, *Transcendental Nonsense*, *supra* note 13, at 1195-98 (categorizing three forms of relative indeterminacy: indeterminacy of extension, indeterminacy of paradigm, and substantive indeterminacy).

433. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 336 (1989); see also Kent

Both strong and weak accounts of indeterminacy address adjudication,⁴³⁴ rather than lawyering.⁴³⁵ When lawyering is mentioned, it is cited to buttress⁴³⁶ or deflect⁴³⁷ evidence of stable legal practices. Neither

Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 29 (1990) (“I defend here a modest claim about determinacy: many legal questions have determinate answers that 1) would be arrived at by virtually all those with an understanding of the legal system and 2) are unopposed by powerful arguments, consonant with the premises of the system, for contrary results.”); Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 146 (1990) (“[I]n law metaphysical indeterminacy is at most moderate.”); John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1 (1993) (encouraging general rules of application guided by principles of fairness and flexibility); Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 216 (1984) (“The power of constructive thought can be brought to bear to hold to an acceptable minimum the instances where law is not determinate.”); Stick, *supra* note 314, at 358 (claiming that “the predictability of practical legal reasoning” arising out of “convention and common sense” shows that “legal practice is not irrational”).

434. See generally Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986-87).

435. For an exception to the postrealist preoccupation with adjudication, see Winter, *Bull Durham*, *supra* note 432, at 687 (“Competent lawyering is a constant effort at transperspectivity that requires the advocate to entertain and consider many conflicting perspectives and beliefs *simultaneously*.”). This preoccupation, I submit, has sapped the transformative potential of critical legal studies. Compare Richard M. Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 783 (1992) (“Th[e] obsession with normativity has distorted the mainstream understanding of critical scholarship in a particular and systematic way, leading many readers to conclude that the refusal of cls scholars to engage the *What would you put in its place?* question is at best an irresponsible act of naive utopianism, and at worst a strategic move designed to hide a covert commitment to some sort of Stalinist totalitarianism.”) with Note, *supra* note 429, at 1685 (“Abstract doctrinal criticism, particularly if disassociated from demonstrations of existing social injustice and unaccompanied by a substantive vision that suggests avenues for its implementation, is likely to be disregarded.” (footnote omitted)).

436. John Stick argues that “the profession is confident that a good lawyer can often be reasonably certain” about the quality of legal arguments—“whether particular arguments are good or bad”—and about the outcome of judicial judgments—“how a judge is likely to rule.” Stick, *supra* note 314, at 354. According to Stick, this professional confidence is not irrational, but firmly grounded on “legal culture, conventions, and common sense.” *Id.* at 355. Insofar as this groundwork establishes that “the law as practiced is generally predictable,” Stick maintains that “the nihilists’ claim that legal practice is indeterminate is defeated.” *Id.* at 358.

437. Joseph Singer realizes that the claim of radical indeterminacy “seems to be contradicted by the ability of experienced litigators and court watchers often to predict with surprising accuracy what judges are going to do.” Singer, *supra* note 432, at 10. To salvage this claim, he distinguishes the indeterminacy of arguments from the arbitrariness of choices. *Id.* at 20 (“The indeterminacy of arguments is logically distinct from the arbitrariness of choices.” (footnote omitted) (emphasis omitted)). For Singer, legal regimes may follow “predictable patterns of behavior and decisionmaking even though the arguments advanced to justify the choices do not determine the outcomes.” *Id.* Although arbitrary, the substance of such “considered choices” is predictable in a contextual sense. *Id.* at 20-21. The

treatment is satisfactory. What is lacking is a "systematic investigation of the effect" of the indeterminacy critique on traditional understandings of the lawyer's ethical role.⁴³⁸

Troubled by the implications of the realist critical legacy, David Wilkins launches precisely such an investigation.⁴³⁹ Wilkins argues that the indeterminacy critique undermines the traditional model of legal ethics. Under this model, the lawyer assumes both a private partisan and a public regulatory role. In her private role, the lawyer serves as "an advocate for the private interest of particular clients."⁴⁴⁰ In her public role, the lawyer stands "as an 'officer of the court' with a separate duty of loyalty to the fair and efficient administration of justice."⁴⁴¹

The contours of the traditional model of ethics are well mapped.⁴⁴² More intriguing is the "boundary claim"⁴⁴³ partitioning the lawyer's public-private⁴⁴⁴ role. Wilkins detects this boundary claim in the commands of

contextual framing of normative choices occurs within institutional settings dominated by custom, role, and ideology. *Id.* at 21. Hence, Singer reasons, "[c]ustom, rather than reason, narrows the choices and suggests the result." *Id.* at 25.

438. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 469 (1990).

439. *Id.* at 470 ("[W]e need to understand what legal realism means for lawyers and how legal ethics should respond to that reality.").

440. *Id.* at 471 (footnote omitted); see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 815 (1992) ("As an advocate, a lawyer is expected to keep the client informed, safeguard the client's secrets, provide competent and diligent services at a reasonable fee, and abide by the client's wishes concerning the purposes of the attorney-client relationship." (footnotes omitted)); see also Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 170-89 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988)) (contending that Luban's defense of client manipulation in political lawyering undercuts the principle of client control); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992) (exploring the balance of moral considerations underlying the lawyer's obligation of client loyalty); M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67 (1990) (construing the lawyer's professional obligation to the client as a strong prima facie moral obligation).

441. Wilkins, *supra* note 438, at 471 (footnote omitted); see also Wilkins, *supra* note 440, at 815 ("As an officer of the court . . . a lawyer should not counsel or assist the client in fraudulent conduct, file frivolous claims or defenses, unreasonably delay litigation, intentionally fail to follow the rules of the tribunal, or unnecessarily embarrass or burden third parties." (footnotes omitted)); see also LUBAN, *supra* note 147, at 317-40 (examining problem of client manipulation in public interest lawyering); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990) (defending a "moral activism" conception of the lawyer's role); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990) (asserting the lawyer's duty to counsel clients on nonlegal issues—morality, psychology, and policy—and nonclient—third party and public—interests).

442. See, e.g., Simon, *The Ideology of Advocacy*, *supra* note 198, at 39-113; Simon, *Visions*, *supra* note 15, at 470-84.

443. Wilkins, *supra* note 438, at 471.

444. Wilkins abstains from the debate surrounding the public-private distinction. For an

the Model Code of Professional Responsibility, specifically the injunction directing the lawyer to represent his client within the bounds of the law.⁴⁴⁵ Under the traditional model of ethics, this injunction acts as a mediating device conciliating the “lawyer’s private duty to clients and her public commitments to the legal framework.”⁴⁴⁶

Wilkins proposes to challenge and reposition the boundary truss binding the private and public components of traditional ethics. The realist indeterminacy critique is the engine of his challenge. Mindful of the postrealist impasse on the exact reach of indeterminacy, Wilkins moves adroitly to establish that “‘lawyer’s law’ is not radically indeterminate.”⁴⁴⁷

Wilkins’s endorsement of a weak indeterminacy account is rhetorically advantageous. The weak account is generally accepted by scholars and practitioners. Moreover, the account erodes the normative foundations of traditional ethics and obviates the need to break the postrealist definitional stalemate over indeterminacy.⁴⁴⁸ Wilkins diligently parses the normative threads of the traditional claim that the “bounds of the law” properly “define the limits of the lawyer’s responsibility to clients.”⁴⁴⁹ To provide a reasonably determinate constraint on lawyer conduct, he observes that the boundaries of legal rules must be “objective, consistent, and legitimate.”⁴⁵⁰ In order to meet these conditions, the boundaries must be identifiable, external, evenhanded, and authoritative.⁴⁵¹

Wilkins topples the straw claims to determinacy of the traditional model. Tightening the indeterminacy critique, he fixes on “how lawyers experience indeterminacy in the law and how that experience either affirms or undermines the boundary claim.”⁴⁵² Even under a weak account of the realist critique, Wilkins isolates three sources of ambiguity in legal prac-

introduction to the polemics of that debate, see generally Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *BUFF. L. REV.* 237 (1987) (assessing the provinces of private and state action); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992) (examining the feminist internal and external challenges to the public-private distinction); *Symposium on the Public/Private Distinction*, 130 *U. PA. L. REV.* 1289 (1982).

445. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1993) (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.”); cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1992) (“A lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”).

446. Wilkins, *supra* note 438, at 470, 471.

447. *Id.* at 470.

448. *Id.* at 477 (“[W]e need not resolve the larger jurisprudential debate about whether the law is radically or only marginally indeterminate.” (footnote omitted)).

449. *Id.* at 472.

450. *Id.* at 474.

451. *Id.* at 472-73.

452. *Id.* at 477.

tice.⁴⁵³ The first stems from the multiple theories of law,⁴⁵⁴ overlapping legal materials,⁴⁵⁵ and alternative lines of investigation open to the lawyer.⁴⁵⁶ The second derives from the “vague, open-ended language” of legal authority.⁴⁵⁷ The third springs from the uncertainty of issue framing and rule application.⁴⁵⁸ This uncertainty extends to factual characterization.⁴⁵⁹

To Wilkins, the lawyer’s experience of ambiguity is intensified by the principle of partisanship. Wilkins argues that partisanship, a bedrock principle of the traditional model,⁴⁶⁰ compels the lawyer to “discover[] gaps, conflicts, and ambiguities in the relevant legal materials.”⁴⁶¹ This compulsion, he worries, “encourages lawyers to exploit indeterminacy.”⁴⁶²

Wilkins fears the logical expanse of the indeterminacy critique is an unbounded field where “there are no restrictions on zealous advocacy.”⁴⁶³ On that unbounded field, “argumentative nihilism”⁴⁶⁴ is free to reign. Wilkins avers two ethical consequences of nihilism: either the lawyer’s public regulatory duty will collapse into a private partisan duty, or her public regulatory duty will be subordinated to “personal moral and political discretion.”⁴⁶⁵ Both outcomes appear unacceptable.

Wilkins’s disdain of ethical regimes which privilege private partisan or morally discretionary lawyering duties requires him to cabin his indeterminacy critique. He makes two moves toward that end, but each falls short.

453. *Id.* at 478.

454. *Id.* at 478-79 (“[M]any areas of the law contain competing, and sometimes conflicting, rules that might be applied to the facts of any case.”).

455. *Id.* at 479 (“[W]ithin any particular field, a vast array of legal materials may be relevant to any given problem.”).

456. *Id.* at 478 (“Specific legal questions often present lawyers with many potential avenues of investigation.”).

457. *Id.* at 480.

458. *Id.* at 481 (“[I]ndeterminacy may result from a dispute over the level of generality at which a legal issue should be framed or the manner in which a chosen rule should be applied to a particular case.”).

459. *Id.* at 482-83 (“[F]requent ambiguity as to the proper characterization of the facts contributes to the problem of indeterminacy.”).

460. *See, e.g.,* Simon, *The Ideology of Advocacy*, *supra* note 198, at 36. Simon considers partisanship a basic principle of lawyer conduct: “Th[e] principle prescribes that the lawyer work aggressively to advance his client’s ends. The lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends. These means may involve deception, obfuscation, or delay.” *Id.*

461. Wilkins, *supra* note 438, at 483. Wilkins complains that the partisan conception of professional role actually “exacerbates the problems of indeterminacy by encouraging the lawyer to discover doctrinal gaps, conflicts, and ambiguities[.]” *Id.* at 505.

462. *Id.* at 483 (footnote omitted).

463. *Id.* at 484 (footnote omitted).

464. *Id.* at 484 n.73. Wilkins defines “argumentative nihilism” to “mean a regime in which it would be impossible for anyone to claim that any legal argument was better than any other legal argument.” *Id.*

465. *Id.* at 484.

Initially, he cites the “widespread realities” of legal practice: sound judgment⁴⁶⁶ and reasonable prediction.⁴⁶⁷ Next, he infers “some meaningful” interpretive constraints from the factors of legal culture,⁴⁶⁸ prediction,⁴⁶⁹ and practicality.⁴⁷⁰

Having reviewed the “widespread realities” of legal judgment, culture, prediction, and practicality, Wilkins confesses that these practice constraints “do not support the normative vision underlying the boundary claim.”⁴⁷¹ The constraints fail on three grounds. Cultural norms suffer from subjectivity and contextual inconsistency.⁴⁷² Prediction carries “uncertainties and biases.”⁴⁷³ And practical considerations rest on ad hoc calculations of time and money, as well as the machinations of routine.⁴⁷⁴

Wilkins’s stymied effort to bridle the indeterminacy critique, and thus avoid the slide into argumentative nihilism, leads him to recommend “abandoning partisanship as the reference point for interpreting legal boundaries.”⁴⁷⁵ Partisanship, Wilkins laments, affords lawyers “both the power and the incentive to manipulate the very boundaries that are supposed to provide an independent source of constraint.”⁴⁷⁶ In place of partisanship, Wilkins proposes “a general command to uphold the public purposes of legal rules.”⁴⁷⁷

466. *Id.* (“By all accounts, most lawyers feel quite capable of judging what constitutes a ‘good’ legal argument.” (footnote omitted)).

467. *Id.* at 485 (“[L]awyers depend on the ability to make reasonably accurate predictions about how particular legal disputes will be resolved.”); *see also* PURCELL, *supra* note 186, at 76 (“By the law, Holmes declared, he meant . . . only the ‘incidence of the public force through the instrumentality of the courts.’ The lawyer’s sole duty was to predict how the courts would use that force, and hence to advise his clients most effectively.” (footnote omitted)); Anthony D’Amato, *Pragmatic Indeterminacy*, 85 Nw. U. L. REV. 148, 181 (1990) (“‘Law’ in this view means *only* a lawyer’s prediction that on such-and-such facts a court will decide with a certain percentage probability for the client.” (footnote omitted)).

468. Wilkins, *supra* note 438, at 486 (“Legal culture undoubtedly constrains lawyer conduct. The bar’s prevailing norms and practices substantially reduce the number of interpretations that any set of legal materials can plausibly support.” (footnote omitted)).

469. *Id.* at 493 (“Prediction may . . . bring stability to the world of the practicing lawyer.”). Compare Greenawalt, *supra* note 433, at 2 (“To most lawyers, it may seem self-evident that many legal questions do have determinate answers; and that indeed is what I believe.”) with Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983) (“[T]he limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants.”) (footnote omitted).

470. Wilkins, *supra* note 438, at 493 (“Indeterminacy is . . . limited by the lawyer’s practical desire and ability to engage in the work of legal argument.”).

471. *Id.* at 496.

472. *Id.*

473. *Id.* at 497.

474. *Id.*

475. *Id.* at 498.

476. *Id.* at 497.

477. *Id.* at 498, 499-505. In making this proposal, Wilkins rebuffs conventional remedial measures—tighter rules, better guidance, and increased enforcement—to restore the coherence of the traditional model.

Wilkins's move to a public purposes⁴⁷⁸ framework—a vision of professionalism he calls “purposivism”⁴⁷⁹—recalls Robert Gordon's recent work on lawyer independence.⁴⁸⁰ Gordon's model of purposive lawyering seeks to integrate the client's interest and the purposes of the overarching “legal framework.”⁴⁸¹ This integration prompts the lawyer to unify her public and private roles.⁴⁸² Unity requires both strong and weak devotions. Strong devotions entail the commitment “to maintain the spirit of the laws both inside and outside the context of representation,” and furthermore, “to assist in carrying out their ‘essential purposes’ or ‘social functions.’”⁴⁸³ Weak devotions involve the willingness “at the very least to refrain from acting so as to subvert and nullify the purposes of the rules.”⁴⁸⁴

Gordon admits that his model of purposive lawyering necessitates “political judgments.”⁴⁸⁵ Indeed, political judgment is the nub of the purposive exercise of discretion.⁴⁸⁶ Wilkins, however, is reluctant to join in this admission. Instead, he shifts to the republican vision of lawyers as independent-minded⁴⁸⁷ public citizens.⁴⁸⁸ In that vision, the “limitations on adver-

478. *Id.* at 505.

479. *Id.*

480. See Gordon, *The Independence of Lawyers*, *supra* note 246, at 22-30. Simon's pathbreaking study of ideology set out the sociolegal attributes of purposivism. See Simon, *The Ideology of Advocacy*, *supra* note 198, at 62-91.

481. For Gordon, legal frameworks impose express practice obligations. Gordon, *The Independence of Lawyers*, *supra* note 246, at 23-24.

Purposive lawyers must repair damage to the framework done by factional interests and their advocacy-minded lawyers, assist in reforming the legal structure to meet its purposes when conditions change, and serve as an official and unofficial policy intelligentsia. They should be the social curators of the values of legalism—promoting understanding and respect for the values of human rights, due process, equal legal treatment, universal access to justice, and coming to the aid of persons injured by the deprivation of these rights.

Id. at 24.

482. *Id.* at 23 (“The purposive lawyer does not split private and public roles, but rather tries to unify them by seeking ways to harmonize the client's business plans with the purposes of the legal framework.” (footnote omitted)).

483. *Id.*

484. *Id.*

485. *Id.* at 26 (“[P]olitical judgments are virtually *inescapable*.”). Gordon's admission is somewhat obscured by his use of the term virtually. This term suggests that at least some ethical judgments elide politics, a proposition that seems untenable given Gordon's own proffered analysis.

486. *Id.* at 28-29 (“[E]very exercise of . . . [counseling] discretion entails making ‘political’ decisions.”).

487. Wilkins envisions an explicit model of professional independence. He explains:

[T]he model is of a person who has fully integrated the values of the legal system—including all of the conflicts and ambiguities—and is honestly struggling to discover and implement the approach that best effectuates its underlying purposes. Independence, therefore, is primarily an “attitude” or a habit of mind as opposed to a structural condition.

Wilkins, *supra* note 440, at 862 (footnotes omitted).

488. See also Gordon, *The Independence of Lawyers*, *supra* note 246, at 24 (discussing the “image of lawyers as ‘republican’ citizens having public duties”).

arial zeal” descend, not from an adversarial framework, but from a legal framework.⁴⁸⁹ This schematic inversion⁴⁹⁰ elevates public purposes to “a higher priority in lawyer decisionmaking.”⁴⁹¹

Although he is hesitant to confront the ineluctable political judgments of purposive lawyering, Wilkins is careful to pronounce the regulatory choices available in such an advocacy regime.⁴⁹² The choices are two: a centralized, rule-based approach⁴⁹³ or a decentralized, standards-based approach.⁴⁹⁴ The first approach relies on external rules to regulate ethical decisionmaking.⁴⁹⁵ The second approach depends upon the self-regulation of “good faith” lawyer discretion.⁴⁹⁶

Unsettled by rule-based indeterminacy, and distressed by untrammelled standards-based discretion, Wilkins grasps at a compromise: “simultaneously incorporate two ethical perspectives.”⁴⁹⁷ In this compromise, “individual discretion is acknowledged as both necessary and necessary to constrain.”⁴⁹⁸ To be meaningful, Wilkins warns, ethical constraint must be contextually, rather than univer-

489. Wilkins, *supra* note 438, at 506. Wilkins comments that the prevailing rules of professional conduct “value” both private and public modes of professional independence. In the public mode as “officers of the court,” he notes, lawyers “must independently assess whether the client’s actions are likely to contravene the bounds of the law or otherwise improperly interfere with the lawyer’s obligations to the *legal framework*.” Wilkins, *supra* note 440, at 816 (footnote omitted and emphasis added).

490. Wilkins, *supra* note 438, at 507 (“[P]urposivist reasoning reverses the traditional model’s arguable permission to exploit indeterminacy for the narrow advantage of particular clients.”).

491. *Id.* at 506 (footnote omitted).

492. Wilkins confines his choices to the conventional rule-standard dichotomy. *Id.* at 507. For opposing treatments of this dichotomy, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (detecting rhetorical correlates in the form—rules and standards—and substance—individualism and altruism—of private law categories); see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (offering an economic analysis of rules and standards); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (deconstructing conventional accounts of the rules-standards dichotomy); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (examining substantive and jurisprudential implications of rules-standards discourse).

493. The centralized, rule-based approach “consists of relatively narrow rules instructing lawyers how and under what circumstances the interests of clients should be ‘harmonize[d] . . . with the purposes of the legal framework.’ ” Wilkins, *supra* note 438, at 507 (footnote omitted) (quoting Gordon, *The Independence of Lawyers*, *supra* note 246, at 23).

494. The decentralized, standards-based approach “consist[s] of a few general standards designed to allow an individual lawyer maximum discretion to determine the requirements of ‘purposivist’ advocacy case by case.” Wilkins, *supra* note 438, at 507.

495. Wilkins equates this structure to the “rule-of-law values” rhetorically embodied in the traditional model of ethics. *Id.* at 508-09.

496. *Id.* at 508-09, 514.

497. *Id.* at 514.

498. *Id.*

sally, tailored.⁴⁹⁹

The proposed fusion of discretion and constraint pushes Wilkins to formulate “middle-level rules of professional conduct.”⁵⁰⁰ In developing these rules, he strives to accommodate difference and, at the same time, compel compliance.⁵⁰¹ Balancing those imperatives drags Wilkins into a morass of definitional⁵⁰² and jurisdictional⁵⁰³ problems. Although familiar,⁵⁰⁴ the problems of defining and applying “relevant contextual factors”⁵⁰⁵ in a clearcut fashion foil his efforts. By his own estimate, he is able only to minimize such problems.⁵⁰⁶

Wilkins’s efforts to establish a middle-level, contextual approach to ethical decisionmaking, effectively balancing private partisan and public regulatory interests, falter on both theoretical and contextual planes. On a theoretical plane, Wilkins errs in four respects. First, he diminishes the postrealist indeterminacy critique,⁵⁰⁷ particularly regarding normative discourse.⁵⁰⁸ Second, he reentrenches the public-private distinction, in spite

499. *Id.* at 515 (“Context must replace universality as the touchstone of system design.”).

500. *Id.* at 517.

501. *Id.* at 516. Wilkins concedes that “no enforcement system can ensure perfect compliance, particularly given the level of conflict and ambiguity in the current rules of professional conduct.” Wilkins, *supra* note 440, at 814. Scanning the rules, he adds that the goal of compliance is impliedly “separate” from, and perhaps secondary to, the goal of “preserving” professional independence. *Id.* at 813.

502. Wilkins creates five broad categories of contextual factors: task, subject matter, status, professional organization, and client characteristics. Wilkins, *supra* note 438, at 517.

503. *Id.* at 518 (“A complex system of specific rules inevitably generates ‘jurisdictional’ disputes over which rule should apply in borderline cases.” (footnote omitted)).

504. The definitional and jurisdictional problems with which Wilkins grapples recur partly as a function of systemic complexity. See Schuck, *supra* note 413, at 3 (defining a legal system as complex when its “rules, processes, institutions, and supporting culture possess four features: density, technicality, differentiation, and indeterminacy or uncertainty”).

505. Wilkins, *supra* note 438, at 516-17.

506. *Id.* at 519-23.

507. Wilkins wavers in his postrealist analysis. On the subject of lawyer discretion and independence, for example, he speaks of the “literal commands of clear rules.” Wilkins, *supra* note 440, at 861. At the same time, he talks of “ambiguous situations.” *Id.* at 862. Even under a weak account of indeterminacy, this distinction is suspect. The postrealist critique destabilizes the commands of rules exposing an ambiguity common to relational contexts.

508. Compare Delgado, *supra* note 425, at 1887 (“Normative discourse, in short, is indeterminate and manipulable.”) with Thomas McCarthy, *Interaction, Indeterminacy, Normativity: Comments on Gumbrecht, Yablon, and Cornell*, 13 CARDOZO L. REV. 1625, 1627 (1992) (“Whatever the sources of legal indeterminacy, one of the consequences of legal indeterminacy is that adjudication in hard cases is not unambiguously dictated by or calculable from the relevant legal materials; it is situated in a space of possibilities where moral-ethical conceptions may also be at play.”) and Michelman, *supra* note 299, at 1528-29 (“The legal form of plurality is indeterminacy—the susceptibility of the received body of normative material to a plurality of interpretive distillations, pointing toward differing resolutions of pending cases and, through them, toward differing normative futures.” (footnote omitted)).

of his own demonstration that the lawyer's public and private roles are conceptually unstable.⁵⁰⁹ Third, he reinstalls a balancing methodology,⁵¹⁰ yet underestimates the problems of categorization and incommensurability that muddle that jurisprudence. Finally, he posits a duality of "true" versus "merely articulated" client interests, appealing to the objectivist precept of independent judgment and detachment as a means to resolve the tension.⁵¹¹

On a contextual plane, Wilkins errs three times. Throughout, he understates the political nature of discretionary judgments. In the context of poverty law, political judgments are endemic to discretionary acts of case selection and strategy. Because many poor clients are repeat players, the political import of lawyer discretionary judgments accrues only gradually over a prolonged period.⁵¹² Isolated incidents of ethical discretion that Wilkins cites, therefore, do not grasp the full import of repeated judgments.

In fairness, Wilkins does not address the phenomenon of repeated discretionary judgments in poverty law. Given his analysis, he is likely to concur that the repetitive nature of individual client matters arises jurisdictionally and institutionally.⁵¹³ Jurisdictional repetition occurs when a client's

509. Wilkins uses the metaphor of "collapse" to describe the instability of the lawyer's public-private roles. Wilkins, *supra* note 438, at 484. He shows that this instability is bipolar: the private role may collapse into the public role; or alternatively, the public role may collapse into the private role. Because his concern lies "with the lawyer's public responsibilities as an officer of the legal system," Wilkins privileges the move toward the public role. *Id.* at 470.

510. *Id.* at 471 n.8 ("This Article focuses on th[e] balancing of public and private interests during the course of client representation.").

511. Wilkins's catchword for objectivity is detachment. He contends that the lawyer may employ a "somewhat detached perspective . . . to discover creative avenues for harmonizing competing concerns in a manner that accomplishes as much of the client's purposes as possible while at the same time promoting long-term legal values." Wilkins, *supra* note 440, at 862 (footnote omitted).

In the past, I condoned a similar notion of detachment. See Alfieri, *Speaking Out of Turn*, *supra* note 2, at 644-45 ("Detachment furnishes the poverty lawyer a means of separating from practices which privilege a subordinated vision of client. Discarding privileged recordings of the history of client advocacy is essential to safeguarding the potential for client autonomy. Without such revision, the self-evidence of client dependency remains a compelling memory." (footnotes omitted)). I now consider that notion far too unstable to be useful without substantial qualification.

512. See, e.g., Mark H. Lazerson, *In the Halls of Justice, The Only Justice Is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 119, 119-63 (Richard L. Abel ed., 1982) (documenting legal services lawyers' procedural strategy for opposing housing court evictions).

513. The concepts of jurisdictional and institutional repetition challenge the conventional view of poor clients as "non-repeat" players. See, e.g., Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 385 (1965) (mentioning "non-repeating character" of poor client matters); Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 107 (1974) (categorizing welfare clients as "one-shotters").

case presents claims that overspill discrete subject matter boundaries. A homeless case, for example, may raise welfare and housing claims.⁵¹⁴ Institutional repetition occurs when a client's case, as here, becomes enmeshed in ongoing litigation at recurrent stages of administrative or judicial review. Federal statutory provisions requiring a "continuing" review of program eligibility subject individual disability recipients to an additional form of institutional repetition in which lawyer intervention is needed.⁵¹⁵

Wilkins's more narrow account of poverty law-based ethical discretion causes him to underdraw the magnitude of lawyer power and corresponding professional independence in impoverished communities. In the context of poverty law, professional power is magnified with respect to both individual⁵¹⁶ and group⁵¹⁷ clients. Wilkins aptly recognizes the gap in "experience and sophistication" between corporate and individual clients.⁵¹⁸ This gap, he argues, produces differential "access to information," and therefore, an unequal ability to "understand[] and evaluat[e] lawyer conduct."⁵¹⁹

Wilkins's attempt to show that client multiformity and information discrepancy produces unevenly distributed capacities to understand and evaluate lawyer conduct proves too much. To be sure, information bears on the client's ability to understand and evaluate conduct. Human understanding and evaluation, however, are thickly layered concepts. By focusing on information as the key to understanding and evaluation, Wilkins underestimates the potential for clients and communities to understand and evaluate lawyer judgments in contexts in which information is scant.

Poverty law practice is a context in which client and community access to information is sparse. Scarcity of information need not rob an impoverished client of the capacity to understand or evaluate lawyer conduct.

514. See, e.g., Gilkerson, *supra* note 313, at 926-43 (discussing homeless families' claims to AFDC and public housing).

515. See 42 U.S.C. § 421(l) (1991).

516. See Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 2, at 2118-30 (locating the exercise of power in interpretive practices).

517. See, e.g., Bell, *supra* note 15, at 512 ("[S]ome civil rights lawyers . . . are making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community."); Ellmann, *Client-Centeredness Multiplied*, *supra* note 15, at 1106 ("[T]here is an inevitable danger that the lawyer who sets out to help disadvantaged people as members of groups may inadvertently succeed in oppressing them (or some of them) as individuals."); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1205 (1982) ("An attorney active in institutional reform class actions is subject to a variety of financial, tactical, and professional pressures that constrain his response to class conflicts.").

518. Wilkins, *supra* note 440, at 816-17.

519. *Id.*

Understanding and evaluation may occur independent of information. At issue is the scope of that understanding and the criteria of evaluation.

Wilkins seems to overlook the incentives (e.g., increasing direct service and law reform representation) to regulate client access to information that are embedded in the instrumental rationality of poverty law practice.⁵²⁰ Paradoxically, that instrumental structure resembles Wilkins's middle-level, purposive approach to discretionary ethics. Indeed, instrumental poverty lawyers are chiefly motivated by the public purposes of legal frameworks. In Johnson's case, for example, the public purposes of the Social Security Act and the legal framework of the treating physician rule—as well as procedural fairness, racial and gender equality, and social insurance—are all factors relevant to the decision whether or not to represent Johnson.

Wilkins's entreaty that lawyers exercise independence and “resist both public *and* client pressures”⁵²¹ offers little incentive to abjure the “public aspects of legal practice” that favor the poverty lawyer's purposivist gatekeeping role.⁵²² At the same time, such incentive is unlikely to come from individual clients who, as Wilkins points out, already are “doubly vulnerable” both to lawyer “self-interest and incompetence” and to lawyer controls.⁵²³ Because it is imbued with the same instrumental rationality of political judgment, Wilkins's middle-level approach reinforces, rather than decenters, the poverty lawyer's gatekeeping role⁵²⁴ in case selection and strategy.

520. See, e.g., Bellow & Kettleleson, *supra* note 113, at 341 (“Public interest lawyers have the capacity (and sometimes the motivation) to exercise considerable influence over their client's choices and objectives.” (footnote omitted)).

521. Wilkins, *supra* note 440, at 864 (“To exercise independent judgment and to act on the basis of what that judgment appears to require, lawyers must resist both public *and* client pressures.”). Wilkins proposes two forms of lawyer resistance: “client motivated” independence and “publicly motivated” independence. *Id.* at 865. Client motivated independence demands that the lawyer “sometimes resist state authority and public opinion to resolve ambiguities in favor of preserving her client's rights.” *Id.* Publicly motivated independence dictates that the lawyer “sometimes resist any public or private actor, including her client, who seeks to pressure her into resolving an ambiguous legal command in a manner that undermines its fundamental purposes or otherwise damages the legal framework.” *Id.*

522. *Id.* at 866 (footnote omitted).

523. *Id.* at 872, 879 (“[I]ndividual clients, although no less willing to press their lawyers for strategic gain, are less able to do so in the face of strong competing pressure, just as they are generally less capable of ensuring that their lawyer zealously pursue their goals in the first instance.”).

524. On the legal services gatekeeping model, see Tremblay, *Toward a Community-Based Ethic*, *supra* note 16, at 1110-16; cf. Gordon & Simon, *supra* note 31, at 230, 256 (arguing that “the most efficient regulatory regime for some contexts may be one that creates ‘gatekeeper’ obligations, one that directly conscripts the lawyers as regulatory agents by requiring them to monitor certain company transactions, investigate underlying facts, certify conditions, and disclose violations of law; and imposes liability on the gatekeepers as well as their clients for negligence and nondisclosure”).

CONCLUSION

This article extends the study of the lawyering process in the field of poverty law to an internal critique of ethical judgment in case selection and strategy. The critique is neither resolved nor final. It is ongoing and uncertain. The subject of the critique—Bertie Johnson—is betrayed. She, like other entire communities of impoverished people, is treated as an object of ethical inquiry.

The article leaves Johnson silent. It tells her story. Her story is the backdrop against which to observe the modernist lawyer. This heuristic figure acts out two visions of practice: formalist and instrumentalist. The formalist vision incorporates claims to neutrality, objectivity, empathy, and determinacy. The instrumentalist vision comprises claims to purposivism, practicality, translation, and indeterminacy. In many respects, the claims are interconnected, even supplemental, in their endorsement of lawyer moral and political discretionary judgment.

The article observes the modernist lawyer from a postmodern stance. The stance is unsteady: it tilts toward foundationalism and normativity. This tilt shadows the text. In describing Johnson's administrative and judicial proceedings, personal and employment history, medical impairments and history, and daily life, the tilt is representational. The description embodies nonsituated claims of social reality.

In examining formalist claims to neutrality, objectivity, empathy, and determinacy, the tilt is foundational. The examination shows that formalism consists of false moral constructions and deceptive objectivist practices. This showing suggests the plausibility of *true* moral constructions and *honest* objectivist practices, and thereby assumes extant foundational bases for morality, social construction, and objectivity.

In analyzing instrumentalist claims to purposivism, practicality, translation, and indeterminacy, the tilt is normative. This analysis demonstrates that instrumentalism contains inadequate notions of autonomy, consensus, and discretion and, in turn, implies the viability of autonomy, consensus, and discretion. This implication presumes the normative values of individualism, mutual choice, and independent judgment.

Paradoxically, the foundational and normative stance of the instant critique prefigures the canons of liberal legalism: structural autonomy of law and the subjective autonomy of lawyers. To the extent that modernism ratifies liberal legalism, canonical prefiguration is a byproduct of internal critique. The paradox of internal modernist critique—the collapse of subject-object positions—afflicts critical legal theory. That collapse emerges as the infirmity of privileged positions.

The privileging of epistemic and discursive practices is the central problematic of critical legal theory. To combat privilege, theoreticians of

practice must develop counterstrategies of interpretation. Kendall Thomas, working in the genre of critical race theory, proposes the strategy of “double reading.”⁵²⁵ Thomas argues that “a legal text must be subjected to a process of double reading: a reading that both scans the text for what it says and rescans it for what it says within what it leaves unsaid.”⁵²⁶

Strategic experimentation in the techniques of interpreting texts—oral, written, social, visual—is characteristic of modernism.⁵²⁷ Indeed, the procedural strategy of “double reading” is consistent with the “modern perfection” of technique.⁵²⁸ This consistency is significant. For the modernist, technique appeals to the tradition of scientific positivism and to the constitutive claims of neutrality, objectivity, universalism, and stability. Thomas implicitly challenges the representational logic and order of modernism as fictive.⁵²⁹ Yet, by reintering the elitist notion of a specialized expert, he surrenders to the modernist “authoritarian temptation”⁵³⁰ to reinscribe meaning.

This article too succumbs to the authoritarian temptation of modernist inquiry. Its internal method of critique destabilizes a range of moral and political practices only to reprivilege alternative forms of the same practices. Reprivileging preserves the rationality of liberal legalism as a totalizing account of ethical judgment in poverty law case selection and strategy, an account committed to preserving the lawyer’s gatekeeping discretion to make moral and political evaluations of client character and interest.

Neither formal nor instrumental rationality reorganizes the foundational and normative commitments of liberal legalism. Disengaging from these commitments requires emancipatory, rather than technical, forms of ethical judgment. Emancipatory rationality demands a postmodern recognition of practice as an arena of community power and resistance.⁵³¹ Inside this arena, the interpretive communities of the privileged and the

525. Kendall Thomas, *ROUGE ET NOIR Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2668 (1992).

526. *Id.* at 2668.

527. See Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351, 354 (1992) (characterizing “high Modernism” partially in terms of “innovative experimentation with the technical means specific to each cultural medium”).

528. *Id.* at 367, 369 (discussing the modernist lawyer’s “uncritical faith in procedural technique”).

529. Thomas, *supra* note 525, at 2659 (“Insofar as the historiographical representation of an event or set of events in terms of a single theme presupposes that the past possesses a unitary logic or rationality, it imposes an order on its object that is more fictive than real.”).

530. This phrase is culled from Berman, *supra* note 527, at 380.

531. See, e.g., Sally E. Merry, *Law and Colonialism*, 25 LAW & SOC’Y REV. 889, 917 (1991) (review essay) (“Law often serves as the handmaiden for processes of domination, helping to create new systems of control and regulation. At the same time, it constrains these systems and provides arenas for resistance.”).

subordinated “push” and are “pushed by the situated dialogue” of legal-political discourse.⁵³²

Postmodern inquiry of the formal and instrumental enactments of ethical judgment in the arena of practice is not a move to transcendence. On the contrary, the postmodern move in practice is a move to discursive contexts⁵³³ in which sociolegal forces may be actively engaged.⁵³⁴ Modernist practice traditions are likely to frame the terms and tools of this engagement. As Unger remarks, “the disintegrating traditions have forged many of the instruments required for their transformation.”⁵³⁵ To what extent postmodern transformation must entail foundational and normative commitments to the poverty lawyer’s gatekeeping role of moral and political prophet is the question ahead.⁵³⁶

532. Mootz, *supra* note 29, at 525. According to Mootz, “[t]here is no postmodern inquiry outside of or prior to this dialogue.”

533. On the enactment of meaning in discursive contexts, see generally Elizabeth Mertz, *Creative Acts of Translation: James Boyd White’s Intellectual Integration*, 4 *YALE J.L. & HUMAN.* 165, 175-85 (1992) (book review).

534. See Mootz, *supra* note 29, at 522 (“Practicing lawyers are no more able than legal theorists to grasp the material forces of social life from a distance; a postmodern legal practice is defined by an open comportment within legal dialogue rather than a conscious, rational seizing of the whole situation.”).

535. UNGER, *supra* note 8, at 143. Cf. Jabbari, *supra* note 88, at 507 (“[M]odern theorists attempt to show that programmes of social change may be engineered by developing the potential for such change that lies within existing legal rules and doctrines, and not by other non-legal means.”); Alessandra Lippucci, *Surprised by Fish*, 63 *COLO. L. REV.* 1, 15 (1992) (“To say that change itself is governed by conventions is merely to acknowledge that all thought departs from and is dependent upon conceptual categories initially derived from the community but alterable by praxis.” (footnote omitted)).

536. My surmise is that such commitments represent the lasting marks or traces of modernism. See also Berman, *supra* note 70, at 1903 (“[O]ur postmodernity is characterized not by our transcendence of modernism but by our ambivalent, though ineluctable, attachment to it.”).