

1987

The Antinomies of Poverty Law and a Theory of Dialogic Empowerment

Anthony V. Alfieri

University of Miami School of Law, aalfieri@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles



Part of the [Law and Society Commons](#)

Recommended Citation

Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 *N.Y.U. Rev. L. & Soc. Change* 659-712 (1987).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE ANTINOMIES OF POVERTY LAW AND A THEORY OF DIALOGIC EMPOWERMENT

ANTHONY V. ALFIERI*

The Tenement Act of 1869
was merciful, well-meant, and fine
in its enforcement
tore 47,000 windows out of hellhole
shelter of no light.

It must be hard to make a window.†

Introduction	660
I. Critical Consciousness	666
II. Hegemony and Tradition.....	678
A. Dominant Traditions	682
1. Direct Service	683
2. Law Reform.....	688
B. Alternative Traditions and Oppositional Continuities.....	690
C. Language	691
D. <i>Williams v. Axelrod</i>	692
III. Dialogic Empowerment	695
A. Dialogue.....	696
B. Attorney/Client Dialogue.....	698
C. Client/Client Dialogue	701
D. Client/Community Dialogue.....	704
Conclusion	711

* Clinical Associate Professor of Law, Adjunct Professor of Law, and Managing Attorney, Federal Litigation Clinic, New York Law School; A.B., Brown University, 1981; J.D., Columbia University School of Law, 1984. I am grateful to Michael Perlin, Stephen Ellmann, John Elson, William Grant, Christopher Harvie, Peter Margulies, Richard Marsico, Rudolph Peritz, Richard Sherwin, and Ellen Barker Grant for their commentary and support. I also wish to thank Susan Fiore and Christine Wilson for their research assistance, Karen Powell for her administrative aid, and the participants in the Columbia Law School Clinical Theory Workshop and the UCLA-Warwick International Clinical Conference for their constructive critique of earlier versions of this Article. This writing bears witness to the people of the South Bronx who taught me much about the value, promise, and shortcomings of the practice of poverty law.

† J. Jordan, *47,000 WINDOWS*, in *THINGS THAT I DO IN THE DARK: SELECTED POEMS* 88, 91 (1967) (emphasis in original).

INTRODUCTION

Poverty in America is a tragedy of longstanding.¹ Magnified by the cruel spread of hunger and homelessness, it is a tragedy gaining resonance in the daily lives of an increasing number of Americans.² Recognizing this growing calamity, many poverty lawyers have redoubled their efforts.³ Others, given pause for reflection, have attempted to amplify traditionally unheard client

1. See M. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986) [hereinafter *IN THE SHADOW OF THE POORHOUSE*]; M. HARRINGTON, *THE NEW AMERICAN POVERTY* (1984); M. KATZ, *POVERTY AND POLICY IN AMERICAN HISTORY* (1983); S. LEVITAN, *PROGRAMS IN AID OF THE POOR FOR THE 1980s* (1980); F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 41-95 (1977) [hereinafter *POOR PEOPLE'S MOVEMENTS*]; F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 3-79 (1971) [hereinafter *REGULATING THE POOR*]; M. HARRINGTON, *THE OTHER AMERICA* (1962).

2. The accretion of hunger in America is well-documented by the Physician Task Force on Hunger. See *PHYSICIAN TASK FORCE ON HUNGER IN AMERICA, HUNGER REACHES BLUE COLLAR AMERICA: AN UNBALANCED RECOVERY IN A SERVICE ECONOMY* (1987); *PHYSICIAN TASK FORCE ON HUNGER IN AMERICA, INCREASING HUNGER AND DECLINING HELP: BARRIERS TO PARTICIPATION IN THE FOOD STAMP PROGRAM* (1986); *PHYSICIAN TASK FORCE ON HUNGER IN AMERICA, HUNGER COUNTIES 1986 — THE DISTRIBUTION OF AMERICA'S HIGH-RISK AREAS* (1986); *PHYSICIAN TASK FORCE ON HUNGER IN AMERICA, HUNGER IN AMERICA: THE GROWING EPIDEMIC* (1985). Cf. UNITED STATES GENERAL ACCOUNTING OFFICE, *HUNGER COUNTIES: METHODOLOGICAL REVIEW OF A REPORT BY THE PHYSICIAN TASK FORCE ON HUNGER* (1986) (challenging methods of defining and measuring hunger population).

A comparable uptrend in homelessness is reported from many quarters, notably among families and the mentally disabled. See Marcin, *Homelessness: A Commentary and a Bibliography*, 4 J. CONTEMP. HEALTH L. & PUBLIC POL'Y 203 (1988); J. KOZOL, *RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA* (1988); Hombs, *Social Recognition of the Homeless: Policies of Indifference*, 31 WASH. U.J. URB. & CONTEMP. L. 143 (1987); Kanter, *Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind*, 3 N.Y.L. SCH. HUM. RTS. ANN. 331 (1986).

The confluence of these factors, coupled with age, disability, gender, race, and more common economic variables, may account for the tenacity of poverty. See Sawhill, *Poverty in the U.S.: Why Is It So Persistent?*, 26 J. ECON. LIT. 1073 (1988); A. DEHAVENON, *THE TYRANNY OF INDIFFERENCE AND THE RE-INSTITUTIONALIZATION OF HUNGER, HOMELESSNESS AND POOR HEALTH* (1987); A DEMOCRATIC STAFF STUDY PREPARED FOR THE JOINT ECONOMIC COMMITTEE UNITED STATES CONGRESS, *THE GROWTH IN POVERTY: 1979-1985* (1986); NATIONAL SOCIAL SCIENCE AND LAW CENTER, *PROFILES OF THE POVERTY POPULATION 1970-1980* (1984). See also *Papers and Proceedings: The Feminization of Poverty*, 78 AM. ECON. REV. 81 (1988); Quinn & Linden, *Social Science Support and Legal Services*, 21 CLEARINGHOUSE REV. 970 (1988); Caro & Wicks, *Quantitative Research on Poverty Issues: A Review of National Social Science and Law Center Analytic Casework*, 19 CLEARINGHOUSE REV. 970 (1986); O'Hare, *Measuring Poverty*, 15 CLEARINGHOUSE REV. 648 (1981).

For an oral history documenting the manifold experience of poverty, see L. DUNBAR, *THE COMMON INTEREST: HOW OUR SOCIAL-WELFARE POLICIES DON'T WORK, AND WHAT WE CAN DO ABOUT THEM* (1988); S. TERKEL, *HARD TIMES: AN ORAL HISTORY OF THE GREAT DEPRESSION* (1970); J. AGEE & W. EVANS, *LET US NOW PRAISE FAMOUS MEN* (1939).

3. See Hayes, *Litigating on Behalf of Shelter for the Poor*, 22 HARV. C.R.-C.L. L. REV. 79 (1987); Blasi, *Litigation on Behalf of the Homeless: Systematic Approaches*, 31 WASH. U.J. URB. & CONTEMP. L. 137 (1987); Woodward, *Homelessness: A Legal Activist Analysis of Judicial and Street Strategies*, 3 N.Y.L. SCH. HUM. RTS. ANN. 251 (1986); Langdon & Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305 (1985). See also Bassuk, *Redefining Transitional Housing for Homeless Families*, 6 YALE L. & POL'Y REV.

voices.⁴ Still others have fallen silent, succumbing to resignation and abandoning the enterprise altogether.⁵

I submit that the best of these responses are inadequate. While reflection, diversity, and heightened commitment are essential to combat poverty, without more these efforts are destined to fail. To prevail, even to progress, in the battle against poverty, lawyers must *rethink* their efforts. By rethinking, I do not mean simply a methodological inquiry concerning litigation tactics — individual versus class relief — and strategy — direct service versus law reform. That inquiry, though legitimate, patently illustrates the crisis in the definition of the subject of poverty law itself.⁶

By definition, the subject of poverty law is the poor. It is the poor who experience the objective force of poverty and the deprivation of powerlessness. Yet, the poor are not empowered by the dominant traditions of poverty law, nor are they liberated from the desperate conditions of poverty. This historical quandary warrants a recasting of our conceptual and methodological understanding of poverty law.⁷ Recasting is an ideological project.

The crisis in poverty law therefore is at bottom ideological. It is a crisis of the legal imagination uprooted from history, an imagination blind to culture and society. Fundamentally, the crisis in poverty law lies in its politics. Bereft of social theory, it is a politics of historical entropy empowering neither

309 (1988); Mascari, *Homeless Families: Do They Have a Right to Integrity?*, 35 UCLA L. REV. 159 (1987).

Commentators have urged tying these efforts explicitly to community empowerment, see Dorsey, *Survival v. Excellence*, 22 CLEARINGHOUSE REV. 113 (1988); Ratliff & Calhoun, *Use of Last Resort Housing Benefits and Redevelopment Powers to Preserve a Low-Income Community Threatened with Displacement: A Case History*, 22 CLEARINGHOUSE REV. 442 (1988); Sparer, *Gordian Knots: The Situation of Health Care Advocacy for the Poor Today*, 15 CLEARINGHOUSE REV. 1, 22-23 (1981); Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1 (1980). Cf. JOINT REPORT OF COALITION FOR THE HOMELESS, COMMUNITY ACTION FOR LEGAL SERVICES, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, *STEMMING THE TIDE OF DISPLACEMENT: HOUSING POLICIES FOR PREVENTING HOMELESSNESS* (1986) (policy proposals couched in traditional poverty law framework).

4. See National Center on Women and Family Law, *Challenges Facing Legal Services in the 1990s: Perspectives of Women and Family Law Advocates*, 22 CLEARINGHOUSE REV. 457 (1988); National Legal Aid and Defender Association and Project Advisory Group, *Future Challenges: A Planning Document for Legal Services*, 22 CLEARINGHOUSE REV. 628 (1988); Dooley & Houseman, *Legal Services in the 80's and Challenges Facing the Poor*, 15 CLEARINGHOUSE REV. 704 (1982); *A Discussion of Key Questions Facing Legal Services Programs*, 15 CLEARINGHOUSE REV. 2 (Special Issue, July 1981); Krakow, *Bleeding the Poor Again*, 14 CLEARINGHOUSE REV. 1031 (1981).

5. See M. WALZER, *RADICAL PRINCIPLES: REFLECTIONS OF AN UNRECONSTRUCTED DEMOCRAT* 175-85 (1980) (commenting on movement from political to community organizing); Katz, *Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Program*, 12 L. & SOC'Y REV. 275 (1978) (studying incidence of lawyer attrition in poverty law programs).

6. For a comparative analysis of crisis theory from literary and sociological perspectives, see T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 194-96, 214 (1983); J. HABERMAS, *LEGITIMATION CRISIS* 1 (1975).

7. See R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 7 (1976) (proposing recasting of social theory in response to societal crisis).

individual transcendence nor collective solidarity.⁸

By rethinking, therefore, I mean an ideological inquiry regarding the

8. By social theory, I mean an alternative method of interpreting societal roles and identities pushing beyond logical and causal explanation and seeking deeper structures of meaning and unity in the shared human experiences of everyday life. See R. UNGER, *supra* note 7, at 19. See also Gordon, *Review Essays: An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 169-86 (1988) (defending historical work of Critical Legal Studies scholars). Unger finds this alternative in the method of common meaning or of interpretive explanation where he discovers semantic wholeness. R. UNGER, *supra* note 7, at 246-62.

The possibility of semantic unity or wholeness, experienced as truth, is central to the arts. In his poem *To Elsie*, William Carlos Williams writes:

The pure products of America
go crazy—
mountain folk from Kentucky
or the ribbed north end of
Jersey
with its isolate lakes and
valleys, its deaf-mutes, thieves
old names
and promiscuity . . .

* * *

will throw up a girl so desolate
so hemmed round
with disease and murder
that she'll be rescued by an
agent—
reared by the state and
sent out at fifteen to work in
some hard-pressed
house in the suburbs—
some doctor's family, some Elsie—
voluptuous water
expressing with broken
brain the truth about us—

* * *

and we degraded prisoners
destined
to hunger until we eat filth
while the imagination strains
after deer
going by fields of goldenrod in
the stifling heat of September
Somehow
it seems to destroy us
It is only in isolate flecks that
something
is given off
No one
to witness
and adjust, no one to drive the car

W.C. WILLIAMS, *SELECTED POEMS* 54-55 (C. Tomlinson ed. 1985).

political object of poverty law and the strategic methods of achieving that goal. Ideological inquiry seeks to reveal the particular assumptions, expectations, and values concealed in dominant habits of perception and interpretation. Once these value-laden underpinnings are exposed, ideological inquiry seeks to ascertain the relation between dominant habits of mind and the maintenance and reproduction of dominant political and socio-economic power.⁹ At each stage of the inquiry, focus is placed on the nature of particular beliefs — covert and overt, conscious and unconscious — and their relation to particular formations of power.

The first purpose of this Article is to pursue an ideological inquiry with respect to the habits of perception and interpretation dominant in the practice of poverty law. As I hope to show, these habits reify and reproduce myths of legal efficacy, and inherent indigent isolation and passivity which sustain and reinforce relations of power oppressive to the poor. To explode those myths, I shall critique the dominant traditions of poverty law: direct service¹⁰ and law

In contrast, Wallace Stevens appears more skeptical of unity outside the world of the imagined self. In the *Final Soliloquy of the Interior Paramour*, Stevens writes:

Light the first light of evening, as in a room
 In which we rest and, for small reason, think
 The world imagined is the ultimate good.
 This is, therefore, the intensest rendezvous.
 It is in that thought that we collect ourselves,
 Out of all the indifferences, into one thing:
 Within a single thing, a single shawl
 Wrapped tightly round us, since we are poor, a warmth,
 A light, a power, a miraculous influence.
 Here, now, we forget each other and ourselves.
 We feel the obscurity of an order, a whole,
 A knowledge, that which arranged the rendezvous,
 Within its vital boundary, in the mind.
 We say God and the imagination are one . . .
 How high that highest candle lights the dark.
 Out of this same light, out of the central mind,
 We make a dwelling in the evening air,
 In which being there together is enough.

W. STEVENS, *THE PALM AT THE END OF THE MIND: SELECTED POEMS AND A PLAY* 367-68 (H. Stevens ed. 1972).

9. See T. EAGLETON, *supra* note 6, at 15, 197-212. Eagleton defines ideological habits to include "modes of feeling, valuing, perceiving and believing." *Id.* at 15.

10. By direct service litigation, I mean litigation focused solely on individual client representation in either administrative or judicial proceedings. Of necessity, this focus concentrates on the particular problem of the individual client and dictates an approach tailored to specific resolution. See Failinger & May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 6-18 (1984) (identifying direct service litigation as the case selection strategy favored by proponents of the equal access model). This individualized problem-solving approach was articulated by Thomas Ehrlich, a former president of the National Legal Services Corporation (NLSC), in testimony before a subcommittee of the House Committee on Appropriations in 1978. Commenting on the NLSC's "three-year plan to provide minimum access to civil legal assistance for all poor people in the United States," Ehrlich stated:

The Corporation was established to ensure that those who are otherwise unable to

reform¹¹ litigation. My thesis is that poverty cannot — indeed should not — be remedied by these traditions. Remedial litigation¹² should not be mounted, even where altruistic¹³ relief is possible, without the activization of class consciousness among the poor, nor without the political organization and mobilization of the poor.

Implicit in this thesis is the view that the poor are historical actors waging a day-to-day class struggle to assert control over their lives and communi-

afford legal assistance are provided both access to justice and equal justice under the law. Legal services lawyers act as civil law enforcement officers to ensure that the laws are carried out on behalf of poor people. The mandate of the Corporation . . . is to support "high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel." . . . After reviewing many alternatives, the corporation developed the "minimum access plan" — an approach to provide a basic level of [legal] resources to all poor communities . . . to provide resources that would support the equivalent of at least two lawyers per ten thousand poor people.

Ehrlich, *Giving Low-Income Americans Minimum Access to Legal Services*, 64 A.B.A.J. 696, 696-97 (1978).

11. By law reform litigation, I mean litigation fashioned broadly to modify institutional policies and practices or to revise common law, statutory, and regulatory rules. See Failing & May, *supra* note 10, at 6-18 (describing group impact litigation as the case selection strategy favored by defenders of the law reform model). This larger systemic focus was espoused by E. Clinton Bamberger, Jr., the first National Director of the Legal Services Program, in remarks before the National Conference of Bar Presidents in 1966:

We cannot be content with the creation of systems of rendering free assistance to all the people who need but cannot afford a lawyer's advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal, and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.

Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 340 (1980) (quoting C. Bamberger, Address to the National Conference of Bar Presidents (Dec. 19, 1966)). See also Bamberger, *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME LAW. 847, 851-52 (1966).

12. My discussion of remedial litigation is confined to the field of welfare rights. For a broad review of social welfare reform litigation, see J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 155-89 (1978). These rights derive from constitutional, statutory, and regulatory sources of federal and state law. See Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367-88 (1988) (surveying development of welfare rights doctrine); Michelman, *The Supreme Court 1968 Term Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 740-47 (1969) (considering constitutional sources of welfare protection). For an expansive analysis of welfare rights jurisprudence, see Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985); Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) [hereinafter *Legality, Bureaucracy, and Class*]; Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270 (1983).

Because I explicate welfare rights solely for the purpose of illustrating the concept of empowerment, my treatment of the subject is necessarily limited. In the litigation considered below, I address welfare rights with reference to only a single statutory base, the cooperative federal-state Special Supplemental Food Program for Women, Infants and Children (WIC). See 42 U.S.C. §§ 1786-1789 (1982).

13. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717-22 (1976) (positing altruism as a counter-ethic reflecting solidarity).

ties. The battle against poverty and oppressive welfare systems is their common historical struggle.¹⁴ By relying on direct service and law reform litigation, poverty lawyers negate the poor as an historical class engaged in political struggle, thereby decontextualizing,¹⁵ atomizing, and depoliticizing that struggle. Moreover, by reifying the dissociated¹⁶ category of ingrained indigent isolation and passivity, poverty lawyers reproduce isolation and passivity in the attorney/client relationship, thus inhibiting the potential for political struggle. Because these contradictions plague the practice of poverty law, the best hope for combating poverty lies not with lawyers, but with the poor themselves. It follows that empowering the poor should be the political object of poverty law.

Having established the goal of poverty law, I shall turn to my second purpose and endeavor to demonstrate that poverty can be soundly attacked only by applying an integrated theory of empowerment combining the elements of critical consciousness and discourse, the strategic methods of direct service and law reform litigation, and the collective force of clients acting together in local, state, and national political alliances.¹⁷ To begin the hard practice of theory, I counsel poverty lawyers to apply critical consciousness, engage in dialogue, and redirect their efforts towards client empowerment, i.e., the activation of liberating class consciousness and the organization and mobilization of grass roots client alliances in local, state, and national communities.¹⁸ My hope is that client and community empowerment may serve as a strategic weapon in the continuing war against poverty.

14. See F. BLOCK, R. CLOWARD, B. EHRENREICH & F. PIVEN, *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* 3-43, 161-95 (1987) (on historical conflict over social welfare programs).

15. For a demonstration of contextual analysis, see MacKinnon, *Sexuality, Pornography, and Method: "Pleasure under Patriarchy,"* 99 ETHICS 314 (1989); Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 11 (1988).

16. C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1 (1962). Dissociation falsely constructs an "abstract universality" of indigent human nature. Cf. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986) (on gender constructs).

17. For an historical overview of such alliances, see POOR PEOPLE'S MOVEMENTS, *supra* note 1, at 264-361.

18. On the methods of community organization, see F. PIVEN & R. CLOWARD, *THE POLITICS OF TURMOIL: POVERTY, RACE, AND THE URBAN CRISIS* 69-170 (1975); D. O'BRIEN, *NEIGHBORHOOD ORGANIZATION AND INTEREST-GROUP PROCESSES* (1975); R. BAILEY, *RADICALS IN URBAN POLITICS: THE ALINSKY APPROACH* (1972); S. ALINSKY, *RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS* (1971); S. KAHN, *HOW PEOPLE GET POWER: ORGANIZING OPPRESSED COMMUNITIES FOR ACTION* (1970); S. ALINSKY, *REVEILLE FOR RADICALS* (1969).

I.

CRITICAL CONSCIOUSNESS

Empowerment demands critical consciousness.¹⁹ In his pioneering work on literacy in Third World countries, the Brazilian educator Paulo Freire envisions critical consciousness as a learning process encompassing perception of economic, political, and social contradictions, and engagement in remedial action.²⁰ Consistent with this process, poverty lawyers must learn to perceive the contradictions in their traditional ways of seeing the poor and in their standard methods of practicing law.²¹ Learning to perceive contradictions enables poverty lawyers to transform their imagination and acquire a new vision of the poor and legal practice.²²

The threshold of critical perception is seeing the poor not as a mythologized amalgam of isolate, passive individuals, but as an historical class engaged in a daily active process of making and remaking human relationships.²³ The British historian E.P. Thompson posits the notion of class as an "historical phenomenon, unifying a number of disparate and seemingly unconnected events, both in the raw material of experience and in consciousness."²⁴ For Thompson, the notion of class entails an "historical relationship" embodied in individuals acting in the context of daily life.²⁵ In this historical sense, "class happens" when the common experiences of individuals forge an articulated identity of common interests counterposed against different and usually opposing interests.²⁶

19. See P. FREIRE, *PEDAGOGY OF THE OPPRESSED* 19 (1968).

On the sensibility of subversion and transcendence, see H. MARCUSE, *AN ESSAY ON LIBERATION* 23-91 (1969); H. MARCUSE, *ONE-DIMENSIONAL MAN* 219-57 (1964).

Unger contends consciousness cannot be "grasped by a strictly sequential, necessary, and objective knowledge." R. UNGER, *supra* note 7, at 41. Instead, he argues "[c]onsciousness requires distance, the capacity to imagine oneself outside a circumstance and to wonder how one ought to deal with it." *Id.* at 172.

20. P. FREIRE, *supra* note 19, at 19 n.1. For an elaboration of Freire's theories of dialogue, empowerment, and critical pedagogy, see P. FREIRE & D. MACEDO, *LITERACY: READING THE WORD AND THE WORLD* (1987); P. FREIRE, *PEDAGOGY IN PROGRESS: THE LETTERS TO GUINEA-BISSAN* (1978).

21. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 4, 111-35 (2d ed. 1970). Kuhn's analysis of the nature of scientific revolutions, particularly his emphasis on perceptual categories, anomalies, and shifts in vision, is helpful in understanding the potential transformation of the legal imagination. The twin failure of direct service and law reform litigation to alleviate poverty or empower the poor suggests the traditional paradigm of poverty law is askew. *Id.* at 121. See also J. BERGER, *WAYS OF SEEING* 1-34 (1972) (cultural distortion represented in artistic images); J. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (1971) (photographic histories of the poor); Howell, *Jenny Holzer: The Message Is The Medium*, *ART NEWS* 122-27 (Summer 1988) (on language art); Gill, *Sue Coe's Inferno*, *ART NEWS* 110-15 (Oct. 1987) (on political imagery).

22. To Unger, this transformation calls on the deepest levels of consciousness addressing the perception of facts and the choice of values. R. UNGER, *KNOWLEDGE & POLITICS* 109 (1975).

23. See E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 9 (1963).

24. *Id.*

25. *Id.*

26. *Id.*

Like Thompson's English working class, the American poor are an historical phenomenon of disparate and seemingly unconnected elements unified by the experience and consciousness of besieged survival in an advanced industrial society. But, for the American poor, the raw material of experience and consciousness is no longer shaped primarily by historical relation to the forces of industry, but by relation to the welfare state²⁷ and by poverty itself embodied in individuals in common communities. This historical relationship is the starting point of critical consciousness.²⁸

Consciousness of the historical relationship between poverty, the state, and society as a whole cannot be bestowed willy-nilly on the poor.²⁹ The poor must feel and articulate the identity of their own interests. Class consciousness is the way experiences are translated into cultural terms and thereby "embodied in traditions, value-systems, ideas, and institutional forms."³⁰ The operative logic in Thompson's notion of class consciousness is discernible in the responses of similar groups undergoing similar experiences. This logic is reflected "in different times and places, but never in *just* the same way."³¹

The poor in America share the common experiences of state sanctioned poverty. In the main, these experiences are characterized by governmental regulation³² and surveillance.³³ The concept of surveillance put forward by the French social theorist Michel Foucault is strikingly applicable to welfare systems.³⁴ As Foucault explains:

[T]he system of surveillance . . . involves very little expense. There is no need for arms, physical violence, material constraints. Just a gaze. An inspecting gaze, a gaze which each individual under its weight will end by interiorising to the point that he is his own overseer, each individual thus exercising this surveillance over, and against, himself. A superb formula: power exercised continuously and for what turns out to be a minimal cost.³⁵

The exercise of power in the forms of coercion and domination applied

27. In this sense, the class relationship has assumed the "anonymous, unpolitical form" of welfare rather than wage dependency. See J. HABERMAS, *supra* note 6, at 26. See also L. Friedman, *Legal Culture and the Welfare State*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 13-27 (G. Teubner ed. 1986) (on relation between legal culture and the state).

28. See G. LUKACS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 223-55 (1971) (on historical materialism).

29. *Id.* at 50-82. See also M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977* 1-36, 62 (1980) (on popular justice and anti-judicial struggle).

30. E.P. THOMPSON, *supra* note 23, at 10. See also G. LUKACS, *supra* note 28, at 46-82.

31. E.P. THOMPSON, *supra* note 23, at 10 (emphasis in original).

32. *REGULATING THE POOR*, *supra* note 1, at 3-42, 183-99, 222-348 (disclosing forms of social regulation).

33. M. FOUCAULT, *supra* note 29, at 155, 166-82.

34. See, e.g., *King v. Smith*, 392 U.S. 309 (1968) (invalidating Alabama AFDC "substitute father" regulation). See generally *Legality, Bureaucracy, and Class*, *supra* note 12, at 1204-13.

35. M. FOUCAULT, *supra* note 29, at 155.

through welfare regulation and surveillance is well recognized.³⁶ Deploying an analysis drawn from Foucault's critique, the German sociologist Jürgen Habermas asserts that the translation of power into forms of social welfare regulation is not secured through passive, propertyless means.³⁷ Like Foucault, he views the medium of translation to be connected with a praxis characterized by the isolation of facts, the normalization of judgment, and surveillance.³⁸ The active components of this regulating praxis deform the welfare client-recipient while shifting social conflict from the external material world to the internal psychic world.³⁹

Foucault extends this view, claiming the "discourse and techniques of right" central to the protection of the poor ensnared in welfare systems to be themselves an instrument of domination.⁴⁰ Foucault contends that "right (not simply the laws but the whole complex of apparatuses, institutions and regulations responsible for their application) transmits and puts in motion relations . . . of domination."⁴¹

36. For enhanced detail, see REGULATING THE POOR, *supra* note 1, at 248-338; M. FOUCAULT, *supra* note 29, at 78-133. See also B. MANDELL, WELFARE IN AMERICA: CONTROLLING THE "DANGEROUS CLASSES" (1975); S. SHEEHAN, A WELFARE MOTHER (1975).

37. J. HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 362 (1987).

38. *Id.*

39. *Id.*

40. M. FOUCAULT, *supra* note 29, at 95-96.

41. *Id.* at 95-96. For theoretical development, see Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOC'Y REV. 11 (1985); Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 LAW & SOC'Y REV. 39 (1985); Spitzer, *The Dialectics of Formal and Informal Control*, Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, in THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 167-205, 207-48, 249-66 (R. Abel ed. 1982).

Legal scholarship is in upheaval over the metamorphosis of Foucault's thesis into a full blown critique of rights. See Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-1403 (1984); Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984); Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1482-91 (1984); Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541, 1553-61 (1984); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1569-99 (1984).

See also Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

For sympathetic extensions, compare Binder, *Commentary: On Critical Legal Studies As Guerrilla Warfare*, 76 GEO. L.J. 1 (1987); Rosenblatt, *Legal Entitlement and Welfare Benefits*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 262-70 (D. Kairys ed. 1982).

That critique has spawned a storm of protest from feminist, minority, and activist scholars. See Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Dalton, *The*

Foucault's contention poses an intractable dilemma to poverty lawyers engaged in the process of welfare rights advocacy. As Habermas shows, rights advocacy within the structures of welfare state regulation constitutes the "legal means for securing freedom" for the poor.⁴² Yet, at the same time, the structures of welfare state regulation "endanger the freedom" of the poor.⁴³

Endangerment flows from power. To Foucault, the power of a dominant class is exercised as a perpetual strategy manifested in a network of relations constantly in tension, in activity, in battle with the powerless.⁴⁴ This network of relations descends into the "depths" of society in localized episodes of class confrontation, instability, conflict, and struggle.⁴⁵ Power thus invests and exerts pressure on subordinate classes, and simultaneously is transmitted and resisted by them.⁴⁶ In this manner, the arrangements and internal mechanisms of power "produce the relation in which individuals are caught up."⁴⁷

The attorney/client and welfare system-recipient relations are arrangements established by a knowledge and technology of power. These mechanisms of power frame the everyday lives of clients and recipients, molding their behavior, identity, and activity.⁴⁸ The control and transformation of behavior stems not only from the development of a knowledge of the client-recipient, but also from policies of coercion and discipline.⁴⁹ Foucault claims knowledge, particularly detailed knowledge, brings forth a "political awareness" of techniques and methods of control.⁵⁰ Knowledge, for example, of the

Clouded Prism, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQUALITY 103 (1987); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423-41 (1984).

42. J. HABERMAS, *supra* note 37, at 291.

43. *Id.*

44. M. FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 26 (1979).

45. *Id.* at 27.

46. *Id.*

47. *Id.* at 202.

48. *Id.* at 77.

49. *Id.* at 125, 138-69. Welfare system policies of coercion and discipline are exhibited in the political procedures of recipient registration, administrative documentation, and eligibility assessment and punishment. See, e.g., *Legality, Bureaucracy, and Class*, *supra* note 12, at 1204-13 (on quality control documentation requirements); 20 C.F.R. § 246.7 (1988) (on WIC participant eligibility, certification, and processing criteria). These procedures objectify the recipient exposing her to ongoing inspection. Thus, Foucault's phrase the "'anatomy' of power." M. FOUCAULT, *supra* note 44, at 215-30.

50. *Id.* at 141. See also Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337, 341 (1978). Bellow and Kettleson assert that public interest lawyers possess "the capacity (and sometimes the motivation) to exercise considerable influence over their client's choices and objectives." *Id.* at 341 (footnote omitted). Indeed, they suggest public interest lawyers sometimes make conscious choices to exercise such influence, and in many instances "virtually control a client's choices and are quite unaware that they are doing so." *Id.* at 341 n.22. No explanation accompanies their observation of the frequent gap between "what lawyers (not just public interest lawyers) believe they do and what they actually do [.]" *Id.*

urgent economic circumstances befalling an individual client-recipient, including detailed information regarding her family and household responsibilities, is a powerful form of political awareness subject to manipulation directed at controlling client-recipient choice.

Exercising control over client-recipient choice need not be conscious or direct. In the attorney/client relation, control is a function of hierarchy and hence is exercised as a kind of disciplinary power.⁵¹ Disciplinary coercion is effected by the normalizing judgment of the attorney.⁵²

Normalizing judgment constrains the ambit of client choice by marking the boundaries of permitted and forbidden action.⁵³ It is a "value giving" judgment establishing both the power and penalty of the norm.⁵⁴ When the client expresses a preference for "non-conforming" action in deviation from the traditional norm of resolution (e.g., where the client favors trial to settlement, or community-oriented litigation tactics to conventional litigation tactics), she may be punished by lawyer coercion, override, or withdrawal.⁵⁵ The power of normalizing judgment lies in its ability to compose a false reality and ritual of client choice and decisionmaking.⁵⁶

Seeing the poor as a class, perceiving class as an active human relationship involving everyday experience in society, and understanding class consciousness in cultural terms of domination and liberation are together the essence of critical consciousness. Applying these insights to an analysis of the

51. M. FOUCAULT, *supra* note 44, at 176. See also Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 116-17 (arguing that professional ideology, representing the lawyer as the embodiment of a neutral specialized discipline, gives rise to power over the relatively powerless and unsophisticated client).

52. *Id.* at 177. Cf. J. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 263-92 (1986) (on the capacity for individual autonomy and self-determination in the modern social welfare state).

53. M. FOUCAULT, *supra* note 44, at 183.

54. *Id.* at 183-84. By norm, I mean a standard measure or method of resolving a legal dispute. Although objective and neutral in appearance, the applied norm may tend to legitimize the client's victimization experienced in the forms of class, race, or gender subordination. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 716 (1982).

55. M. FOUCAULT, *supra* note 44, at 179. Relying on poverty population studies, Abel claims poor clients "quickly fall prey to professional dominance." Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 521 (1987). The studies show "less than half the clients served knew what they wanted from the lawyer[.]" *Id.* at 521. Additionally, "many clients wanted the lawyer to take charge and make decisions for them." *Id.* (footnotes omitted).

56. M. FOUCAULT, *supra* note 44, at 194. Normalizing judgment acts to silence the poor. On gender silencing, see Jones, *On Authority: Or, Why Women Are Not Entitled to Speak*, in FEMINISM & FOUCAULT 119-33 (I. Diamond & L. Quinby eds. 1988); C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Ritualistic decisionmaking enlists the client in a mechanism of oppressive power, in a *practice of subordination*, thus limiting the client in who she can be. See Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 845 (1989); MacKinnon, *supra* note 54, at 714. Rather than resisting and releasing the limits of clients' lives, normalizing judgment works to fortify those limits. *Id.* at 736. See Scheingold, *The Dilemma of Legal Services*, 36 STAN. L. REV. 879, 888-89 (1984) ("[W]hile Legal Services has succeeded in ameliorating the conditions of poverty, it has at the same time helped to legitimate the poor's second-class status.").

social role of the individual poor (e.g., as transcendent and transformative historical actor or as isolate and passive client-recipient) and the social organization of poor communities (e.g., as active and unified or reactive and fragmented) is critical consciousness at work.⁵⁷

Guided by critical consciousness, the poor may embrace what the historians Frances Fox Piven and Richard Cloward term the "solidarities of everyday life."⁵⁸ In so doing, the poor may "live their own history"⁵⁹ and make class happen. To that end, poverty lawyers must construct a new paradigm and vision of practice.⁶⁰

The initial step in the transformation of the poverty lawyer's imagination towards critical consciousness is the shattering of tradition-bound myths.⁶¹ A cluster of two myths comprise the poverty lawyer's core constellation of beliefs. Most basic is the deeply embedded belief that the law — in its constitutional, statutory, and decisional forms — and legal institutions — courts, governmental agencies, and advocacy organizations — can be marshaled into an effective instrument to alleviate poverty.

This bedrock premise, what I shall call legal efficacy, animates and informs the work of poverty lawyers. History teaches that this premise is overbroad. The work of Roberto Unger⁶² and Morton Horwitz⁶³ reveals a pronounced indeterminacy⁶⁴ in the interplay of formalism⁶⁵ and instrumental-

57. E.P. THOMPSON, *supra* note 23, at 11. To be accurate, that analysis must draw upon observations of the poor in the daily patterns marking their relationships, ideas, and institutions. *Id.*

58. F. PIVEN & R. CLOWARD, *THE NEW CLASS WAR: REAGAN'S ATTACK ON THE WELFARE STATE AND ITS CONSEQUENCES* 51 (1982).

59. E.P. THOMPSON, *supra* note 23, at 11.

60. On the reconstruction of practice paradigms in science and law, compare T. KUHN, *supra* note 21, at 111-35 and G. HOLTON, *THEMATIC ORIGINS OF SCIENTIFIC THOUGHT: KEPLER TO EINSTEIN* 219-59 (1973) and J. BRONOWSKI, *SCIENCE AND HUMAN VALUES* 3-20 (1965) with Bachmann, *Lawyers, Law, And Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 47-50 (1984-85) (advocating demystification of the legal process and organization of groups through community social struggle) and Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (setting forth a critical vision of nonhierarchical law practice) and Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83) (putting forward principles of counter hegemonic law practice).

61. I. ILLICH, *TOOLS FOR CONVIVIALITY* 110-11 (1973) (discussing interpretive frameworks). Leslie Bender describes this necessary step as "frame-bursting" in the similar context of feminist methodology and consciousness raising. See Bender, *supra* note 15, at 9.

62. See R. UNGER, *supra* note 7, at 193-216; R. UNGER, *supra* note 22, at 88-100.

63. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) (on formalism and instrumentalism in private law development).

64. On doctrinal indeterminacy, see M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15-63, 186-268 (1987); Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986). Compare Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 302-37 (1989) (rejecting critical legal scholars' arguments for radical indeterminacy and counterposing claim for moderate indeterminacy); Matsuda, *supra* note 41, at 341 ("The minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy.").

65. Formalism describes a particular style of legal reasoning operating "when the mere

ism⁶⁶ in legal doctrine. Even apart from class relations of domination and subordination, doctrinal indeterminacy warrants skepticism concerning the efficacy of law-induced programmatic change.⁶⁷

The prevalence of a justifiable skepticism concerning the efficacy of law as an instrument of altruistic social change does not warrant a turn towards nihilism.⁶⁸ Skepticism notwithstanding, there exists in the law a transcendent spirit,⁶⁹ internal logic,⁷⁰ and autonomy⁷¹ which may spark and effect altruistic

invocation of rules and the deduction of conclusions from them is believed sufficient for every authoritative legal choice." R. UNGER, *supra* note 7, at 194. For an elucidation and defense of formalism as an approach to legal understanding and as a concept of decisionmaking, see Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

66. Instrumentalism is a purposive or policy-oriented style of legal reasoning functioning "when the decision about how to apply a rule depends on a judgment of how most effectively to achieve the purposes ascribed to the rule." *Id.* at 194. On the general theory and history of pragmatic instrumentalism, see R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); Summers, *Pragmatic Instrumentalism In Twentieth Century American Legal Thought — A Synthesis And Critique Of Our Dominant General Theory About Law And Its Use*, 66 CORNELL L. REV. 861 (1981).

67. While critical, many scholars remain steadfast in their defense of law-erected protections and in their encouragement of law-induced programmatic change. See S. Ellmann, *From Nkwentsha to United Democratic Front: The State of Emergency and the Practice of Law in South Africa Today* 158-90 (1989) (unpublished manuscript); Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1054-67 (1989); White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 745-69; Crenshaw, *supra* note 41, at 1369-87; Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1725-35 (1986); Bell, *Law, Litigation, and the Search for the Promised Land* (Book Review), 76 GEO. L.J. 229, 233-36 (1987); Bell, *The Supreme Court 1984 Term Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 235-44 (1982).

68. For an exposition and critique of legal nihilism, compare Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) with Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

69. On the symbolic value of rights, see Schall, *Human Rights As An Ideological Project*, 1987 AM. J. JURIS. 47; Gorecki, *Human Rights: Explaining the Power of A Moral and Legal Idea*, 1987 AM. J. JURIS. 153; S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

70. On the internal logic and progress of normative values embedded in civil rights law, see E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258-69 (1975); M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50* (1987); R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975); C.V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

71. On the relative autonomy of law from class-state power structures, see E.P. THOMPSON, *supra* note 70, at 258-69; M. HORWITZ, *supra* note 63, at xiii; Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 RES. L. & SOC. 4 (1980); Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977).

See also M. FOUCAULT, *supra* note 44, at 82 (on the "space of tolerance" afforded by law and custom); R. UNGER, *supra* note 7, at 52-56 (on the interdependent autonomy of legal order). Compare Abel, *supra* note 55, at 593 ("[W]e must not assume that because some can invoke law as a shield against state power others can wield it as a sword to alter fundamental class relations. The assumption is false not only because of the essential difference between

change. Yet, even where altruism prevails and the legal rights of the poor expand, their growth is halting and slow.⁷²

The second myth⁷³ pervading the work of poverty lawyers is the belief in the inherent isolation and passivity of the poor—the inability of the poor to interconnect and exercise shared control over their own lives and communities.⁷⁴ Freire attributes partial transmission of this myth to the prejudices and deformations of those who “move to the side of the exploited,”⁷⁵ in this context poverty lawyers. These prejudices and deformations are expressed in a “lack of confidence in the people’s ability to think, to want, and to know.”⁷⁶

Like the mythology of social Darwinism infecting late nineteenth and early twentieth century American thought,⁷⁷ the myth of ingrained indigent isolation and passivity is grounded in a woeful mix of cultural and scientific theory — the culture of poverty.⁷⁸ Founded on the work of the anthropologist

resisting state power and seeking to mobilize it . . . but also because the form of bourgeois law is not equally appropriate to protect all interests.”).

72. On remedial implementation, see P. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* (1988); Bensinger, *From Public Charity to Social Justice: The Role of the Court in California’s General Relief Program*, 21 *LOY. L.A.L. REV.* 497 (1988); McKittrick, *The Homeless: Judicial Intervention On Behalf Of A Politically Powerless Group*, 16 *FORDHAM URB. L.J.* 389 (1988); Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 *WASH. U.J. URB. & CONTEMP. L.* 155 (1987); J. PELTASON, 58 *LOVELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1971); Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 *CALIF. L. REV.* 555 (1970).

Some commentators argue legal institutions are structurally ill-suited to adjudicate and implement the legal rights of the poor. See Hanson, *Contending Perspectives on Federal Court Efforts to Reform State Institutions*, 59 *U. COLO. L. REV.* 289 (1988); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1292-1316 (1976).

73. P. FREIRE, *supra* note 19, at 40. Describing the two stages of critical pedagogy, Freire asserts the need for confrontation with the “culture of domination” in order to “unveil the world of oppression.” *Id.* In the first stage of pedagogy, confrontation occurs through a change in perception. *Id.* In the second stage, confrontation occurs through the “expulsion” of dominating myths. *Id.*

74. *Id.* at 46-54. See also J. KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* 40 (1982) (tracing the historical antecedents of the poverty law conception of the “pathological poor”). For a discussion of voluntary and nonvoluntary communities, see Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 *ETHICS* 275, 277-90 (1989).

75. P. FREIRE, *supra* note 19, at 46.

76. *Id.* Freire declares:

Our converts, on the other hand, truly desire to transform the unjust order; but because of their background, they believe that they must be the executors of the transformation. They talk about the people, but they do not trust them; and trusting the people is the indispensable precondition for revolutionary change.

Id.

77. On the historical evolution of social Darwinism in American business, culture, and society, see C. RUSSETT, *DARWIN IN AMERICA: THE INTELLECTUAL RESPONSE 1865-1912* 83-123 (1976); R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 6, 13-122, 143-204 (1944).

78. Lewis, *The Culture of Poverty*, in *ON UNDERSTANDING POVERTY* 187 (D. Moynihan ed. 1968). For a forceful rebuttal assailing cultural theories of isolation and marginality, see Karst, *Citizenship, Race, And Marginality*, 30 *WM. & MARY L. REV.* 1, 8-24 (1988); W. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POL-*

Oscar Lewis, the culture of poverty thesis claims the "major characteristics" of the individual poor to be "strong feelings of marginality, of helplessness, of dependence, and of inferiority."⁷⁹

Although poverty lawyers may not endorse the culture of poverty thesis, they are enmeshed in a social system — the attorney/client relation — consigning the poor to the status of dependent other.⁸⁰ Consignment subordinates the poor through a process of eliciting and verifying client dependence.⁸¹ Objectively manifested as docility, passivity, and malleability, client dependence nevertheless is a social construct reified by attorney/client hierarchy.

Reification — the process of transforming subjective form into "phantom objectivity"⁸² — of the myth of inherent indigent isolation and passivity stems from decontextualization of the poor from domination-based social arrangements and relations. Decontextualization follows from the negation of the poor as a social class engaged in historical struggle. Poverty lawyers do not confess to this historical negation, though it directs their engineering of law and legal institutions on behalf of the poor. In this way, negation reproduces isolation and passivity in the attorney/client relationship. The reproduction of isolation and passivity marginalizes the poor.

Marginalization is part of the demeaning process of domination. Freire

ICY (1987); Wacquant & Wilson, *The Cost of Racial and Class Exclusion in the Inner City* and Wilson, *The Underclass: Issues, Perspectives, and Public Policy*, in *The Ghetto Underclass: Social Science Perspectives*, ANNALS 8-25, 182-92 (R. Lambert, A. Heston, & W. Wilson eds.) (Jan. 1989); Glasgow, *The Black Underclass in Perspective*, in NATIONAL URBAN LEAGUE, INC., *THE STATE OF BLACK AMERICA 1987* 129-44 (1987).

79. Lewis, *supra* note 78, at 191-92. Lewis adds:

Other traits include high incidence of maternal deprivation, of orality, and of weak ego structure; confusion of sexual identification; lack of impulse control; strong present-time orientation, with relatively little ability to defer gratification and to plan for the future; sense of resignation and fatalism; widespread belief in male superiority; and high tolerance for psychological pathology of all sorts.

People with a culture of poverty are provincial and locally oriented and have very little sense of history. They know only their own troubles, their own local conditions, their own neighborhoods, their own way of life. Usually they do not have the knowledge, the vision, or the ideology to see the similarities between their problems and those of their counterparts elsewhere in the world. They are not class conscious although they are very sensitive indeed to status distinctions.

Id.

For an augmentation of Lewis's cultural thesis, see C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984); J. WILSON, *THINKING ABOUT CRIME* (1975); D. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1970); E. BANFIELD, *THE UNHEAVENLY CITY REVISITED* (1968). Compare Mattison, *Stop Making Sense: Charles Murray and the Reagan Perspective on Social Welfare Policy and the Poor*, 4 YALE L. & POL'Y REV. 90, 91 (1985) (accusing Murray of employing "biased and faulty perceptions about social welfare programs and the poor in order to reach a result predetermined by his ideological perspective.").

80. The demeaning characterization of the poor as deviant other is observed by Kenneth Karst, see Karst, *supra* note 78, at 3-4; J. HABERMAS, *supra* note 6, at 36-37, 43, 93.

81. On this process engendered, see Scales, *supra* note 16, at 1378.

82. For an exploration of reification, see G. LUKACS, *supra* note 28, at 83, 84-222. See also Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1157-58, 1274-90 (1985).

advances two concepts unraveling this process. First, he ventures the concept of self-depreciation:

Self-depreciation is another characteristic of the oppressed, which derives from their internalization of the opinion the oppressors hold of them. So often do they hear that they are good for nothing, know nothing and are incapable of learning anything — that they are sick, lazy, and unproductive — that in the end they become convinced of their own unfitness.⁸³

The concept of self-depreciation also emerges in the historian Harry Boyte's analysis of American grass roots citizen advocacy and organizing movements.⁸⁴ These movements are enlightening because they show that while the signs of self-depreciation may vary depending upon the organizing project constituency and terrain (e.g., age, ethnicity, gender, race, religion, geography, and class), the experience of domination is at once common. To Boyte, self-depreciation is the shared experience of "ordinary people, steeped in lifelong experiences of humiliation and self-doubt, barred from acquisition of basic public skills," an experience demeaning to "people's self-conceptions and sense of possibility."⁸⁵

In addition, Freire offers the concept of adaptation, suggesting that "the more the oppressed can be led to adapt to a situation, the more easily they can be dominated."⁸⁶ Freire argues adaptation is encouraged by the paternalistic operation of the welfare state in objectifying the poor as dependent recipients.⁸⁷

Marginalization of the poor wrought by domination and evinced by self-depreciating passivity is frequently visible albeit misinterpreted by poverty lawyers. More oblique is the marginalization of domination experienced by the poor as a function of their adaptation, integration, and incorporation into welfare programs and relationships.⁸⁸ The WIC program offers an instructive

83. P. FREIRE, *supra* note 19, at 49. Self-depreciation implicates Unger's sentiment of resignation expressed as the "despairing submission to a social order whose claims are inwardly despised." R. UNGER, *supra* note 22, at 26.

84. H. BOYTE, *THE BACKYARD REVOLUTION: UNDERSTANDING THE NEW CITIZEN MOVEMENT* 192-94 (1980).

85. *Id.* at 179, 15.

86. P. FREIRE, *supra* note 19, at 60.

87. *Id.* Freire also complains of the contributing degeneration of knowledge, resisting its conceptualization as "a gift bestowed by those who consider themselves knowledgeable upon those whom they consider to know nothing." *Id.* at 58. Deriding this concept for "[p]rojecting an absolute ignorance onto others," Freire contends that "[k]nowledge emerges only through invention and re-invention, through the restless, impatient, continuing, hopeful inquiry men pursue in the world, with the world, and with each other." *Id.* Knowledge, in short, emerges through the process of dialogue.

88. Foucault notes that the goal of integrating and incorporating marginals, particularly the "wilfully idle" — the "bad poor" — through methods of domination has "replace[d] the somewhat global charitable sacralization of 'the poor.'" M. FOUCAULT, *supra* note 29, at 169. See also *IN THE SHADOW OF THE POORHOUSE*, *supra* note 1, at ix-35.

example.⁸⁹

Federal enactment of the WIC program in 1972, as an amendment to the Child Nutrition Act of 1966,⁹⁰ and subsequent amendments,⁹¹ rest on congressional findings "that substantial numbers of pregnant, postpartum, and breastfeeding women, infants, and young children from families with inadequate income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both."⁹² Yet, Congress' declared purpose — to provide "supplemental foods and nutrition education" — is expressly limited by the "authorization levels" set forth in section 1786(g) of the statute, and by the voluntary "participation" proviso governing the eligibility of local agencies.⁹³ Moreover, federal implementing regulations promulgated by the United States Department of Agriculture enumerate seven categories of participant nutritional risk priority to be applied systematically in order to "fill vacancies which occur after a local agency has reached its maximum participation level."⁹⁴

Together, WIC statutory and regulatory authorization, participation, and priority limits hinder the distribution of program benefits to the nutritionally-at-risk poor.⁹⁵ This hindrance, borne out by the increasing feminization and

89. See *supra* note 12.

90. Child Nutrition Act Amendments of 1972, Pub. L. No. 92-433, § 9, 86 Stat. 729-31 (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS (86 Stat.) 3380.

91. Child Nutrition Act Amendments of 1978, Pub. L. No. 95-627, § 3, 92 Stat. 3611 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 9227.

92. 42 U.S.C. § 1786(a) (1982).

93. *Id.* In the fiscal year ending September 30, 1986, Congress appropriated \$1,570,000,000 to carry out the declared purpose of the statute. 42 U.S.C.A. § 1786(g) (West Supp. 1988).

94. 7 C.F.R. § 246.7(d)(4)(i)-(vii) (1988). See *Alexander v. Polk*, 459 F. Supp. 883, 886-88 (E.D. Pa. 1978), *aff'd in part, rev'd in part & remanded with directions*, 750 F.2d 250 (3d Cir. 1984) (enforcing regulatory fair hearing right of WIC recipients terminated under the City of Philadelphia's priority system).

95. The Center on Budget and Policy Priorities reports WIC "federal funding levels are insufficient for many of the eligible women and children to participate." CENTER ON BUDGET AND POLICY PRIORITIES, HOLES IN THE SAFETY NETS: POVERTY PROGRAMS AND POLICIES IN THE STATES — NATIONAL OVERVIEW 33 (1988). Indeed, "[n]ationwide, fewer than half (about 45 percent) of WIC eligibles are served under the program." *Id.* at 34 (citation and footnote omitted). By early 1988, only eleven states were providing funds to supplement federal WIC monies in order to widen service to the eligible. *Id.*

Habermas suggests a "withdrawal of legitimation" may follow from this type of governmental lag behind "programmatically demands that it has placed on itself." J. HABERMAS, *supra* note 6, at 69 (emphasis in original). A recent Ford Foundation study buttresses this point, evidencing the deterioration of program legitimacy. See FORD FOUNDATION PROJECT ON SOCIAL WELFARE AND THE AMERICAN FUTURE, THE COMMON GOOD: SOCIAL WELFARE AND THE AMERICAN FUTURE 10-29, 85-88 (1989). The study confirms that

states can and often do choose to serve only a limited number of those who are [WIC] eligible and some states are reluctant to search vigorously for needy children who qualify for the program. Only about half of the eligible women and children are reached by the WIC program as it is currently constituted.

Id. at 15. See also FOOD RESEARCH AND ACTION CENTER, FEEDING THE OTHER HALF vi (1989).

Findings indicate states may increase WIC participation and decrease related program,

infantilization of poverty⁹⁶ and the stabilizing of infant mortality rates at unacceptably high levels,⁹⁷ marginalizes the poor even as they are integrated and incorporated in remedial welfare programs. Domination is expressed then not merely in unabated hunger and infant mortality, but in adaptation to these conditions. When adaptation inhibits the imagining of alternative conditions, domination reigns.

To subvert domination in this instance, poverty lawyers must unmask the identity of the WIC program. For Habermas, unmasking can be accomplished

hospital, and Medicaid costs, *see, e.g.*, UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON NUTRITION AND INVESTIGATIONS, COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, U.S. SENATE, SUPPLEMENTAL FOOD PROGRAM: SAVINGS FROM FOOD PURCHASES COULD INCREASE WIC PARTICIPATION (July 1988) (reporting that state cost savings may increase the number of WIC eligible participants served); Edelman & Weill, *Investing in Our Children*, 4 YALE L. & POL'Y REV. 331, 361 (1986) ("Every dollar we invest in the WIC program saves as much as \$3 in short-term hospital costs, and more over the long term.") (footnote omitted); Schramm, *WIC Prenatal Participation and Its Relationship to Newborn Medicaid Costs in Missouri: A Cost/Benefit Analysis*, 75 AM. J. PUBLIC HEALTH 851 (1985) (WIC expenditures associated with reduced Medicaid costs and possible birthweight improvements).

For an evaluation of the impact of the WIC program on the nutritional status and health of participant women and children, *see generally* Participants in the National WIC Evaluation, *The National WIC Evaluation: Evaluation of the Special Supplemental Food Program for Women, and Children*, 48 AM. J. CLINICAL NUTRITION 389-519 (1988).

96. *See supra* note 2. *See also* Rexroat, *Economic Transformation, Family Structure, and Poverty Rates of Black Children in Metropolitan Areas*, 79 AM. ECON. REV. 67, 69 (1989) (reporting a sizeable increase in child poverty rates for northern metropolitan areas); FOOD RESEARCH AND ACTION CENTER, *THE NUTRITIONAL STATUS OF LOW-INCOME PRESCHOOL CHILDREN IN THE UNITED STATES: A REVIEW OF THE LITERATURE* 17-41 (1989) (surveying adverse nutritional consequences of low-income status of preschool children, especially obesity and socio-behavioral problems); Edelman & Weill, *supra* note 95, at 335-43 (documenting increased child poverty marked by widespread hunger and malnutrition).

97. Edelman and Weill report:

Our nation's progress in reducing infant mortality has slowed down, dropping from a 5 percent average annual rate of improvement in the 1970s to a 3 percent average annual rate between 1981 and 1983. As the death rates among infants are highest for the poor, this reflects, in particular, a slowdown in improvement for black infants, who are disproportionately poor.

Edelman & Weill, *supra* note 95, at 338 (footnotes omitted). *See also* U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1989 76 (109th ed. 1989) (documenting two percent average annual rate of infant mortality improvement between 1984 and 1986).

For more recent documentation, *see* Stevens, *Infant Diarrhea Kills Hundreds Yearly in U.S.*, N.Y. Times, Dec. 9, 1988, at A1, A33, col. 1 (report of new study indicating "that deaths from diarrhea 'constitute an important and preventable fraction' of infant mortality in America"); *Infants More at Risk in Poor Rural Areas, New Study Indicates*, N.Y. Times, Dec. 8, 1988, at B25, col. 4 (report of study finding levels of infant mortality, low birth weight, and maternal care "deteriorated from 1980 to 1982 nationwide and remained stable from 1982 to 1985"); *U.S. Falling Short on Its Infant Health Goals*, N.Y. Times, July 10, 1988, at A17, col. 1 (reporting "some significant problems relating to maternal and infant health," and that "[t]he decline in the infant mortality rate has slowed"); Leary, *U.S. Urged to Fight Infant Mortality*, N.Y. Times, Aug. 5, 1988, at D17, col. 1 (reporting on congressional panel's call for a "comprehensive policy to combat infant mortality," and findings "that, each year, 40,000 infants in the United States die before their first birthday and that 18 other industrialized nations have lower rates of infant mortality").

by confronting the contradiction and incompatibility between program "idea and reality."⁹⁸ Without recognition of the asymmetry between WIC program "claims and intentions," domination may remain latent.⁹⁹ When programmatic incompatibility is recognized, Habermas argues, conflict may become manifest, and irreconcilable interests may be reconceived as antagonistic interests.¹⁰⁰

II.

HEGEMONY AND TRADITION

The dominant traditions of poverty law transmit cultural mythologies through the attorney/client relation, obfuscating perception and interpretation of the common struggle of the poor to survive and overcome the conditions of poverty.¹⁰¹ The obscurantist influence of myth is best expressed in the notion of hegemony.¹⁰²

The Italian social theorist Antonio Gramsci advances the idea of hegemony to signal dominant group continuity and tradition in active development.¹⁰³ To Gramsci, hegemony is a process of assimilation, education, and adaptation consistent with the achievement of dominant group goals.¹⁰⁴ In practice, hegemony ensures a "correspondence" between individual acts and admissions, and between individual conduct and necessary group ends.¹⁰⁵

Gramsci concedes hegemonic correspondence may appear at times in the coercive guise of force. He stresses, however, its noncoercive nature.¹⁰⁶ This emphasis both highlights the repressive aspect of hegemony and underscores its potential for liberation.¹⁰⁷

Hegemonic liberation inheres in Gramsci's general conception of law and extends to the specific field of poverty law. Gramsci conceives of law as an instrument to "create and maintain a certain type of civilisation and of citizen (and hence of collective life and of individual relations), and to eliminate certain customs and attitudes and to disseminate others"¹⁰⁸ On this view,

98. J. HABERMAS, *supra* note 6, at 23, 26-27.

99. *Id.* at 27.

100. *Id.*

101. Reductionism of the term individual from a broad "indivisible" concept implicating the social group to a narrow separate notion implying an opposing disconnected sphere similarly distorts interpretation of the historical struggle of the poor. See C. MACPHERSON, *supra* note 16, at 3, 263-77.

102. E. GENOVESE, ROLL, JORDON, ROLL: *THE WORLD THE SLAVES MADE* 25 (1972).

103. A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 195-96, 246-47 (Q. Hoare & G. Smith eds. 1971).

104. *Id.* For amplification of Gramsci's idea of hegemony, see Brosnan, *Serious But Not Critical*, 60 S. CALIF. L. REV. 259, 305-08, 312-17 (1987).

105. A. GRAMSCI, *supra* note 103, at 195-96.

106. *Id.* at 196 (establishing a correspondence between hegemony, public opinion, and moral climate).

107. *Id.* at 247, 246.

108. *Id.* at 246. Enriching this conception, Tove Stang Dahl adds:

Law is an important part of the cultural hegemony that men have in our type of

the law is a kind of educator tending to foster a "new type or level of civilisation."¹⁰⁹

Conversely, the law may function as an instrument of rationalization legitimating conditions of oppression.¹¹⁰ The key for Gramsci, and for poverty lawyers, is to uncloak the contradictions suppressed by rationalization and to cultivate an alternative or counter hegemony. The turmoil of hegemonic conflict creates the conditions in which an alternative way of life — differentiated by liberation — is imagined possible.

The historian Eugene Genovese interprets Gramsci's idea of hegemony to imply not only class antagonism, but also class legitimacy.¹¹¹ Like Gramsci, Genovese proclaims the hegemonic function of law as disguising class antagonisms in a cloak of juridical legitimacy, thus minimizing the necessity for the use of coercion.¹¹²

Although Genovese considers law to be a principal vehicle of dominant class hegemony, he properly rejects simple-minded reduction of the law to a reflexive superstructural phenomenon,¹¹³ contrary to the declarations of more orthodox Marxists.¹¹⁴ By rejecting a crudely deterministic conception, Genovese grants the law a degree of autonomy in shaping class relations, albeit as an instrument of domination.¹¹⁵ In his view, the law is not "something passive and reflective," but "an active, partially autonomous force" mediating among competing socio-economic classes.¹¹⁶

For Genovese, the legal system molds and is molded by the interrelation

society, and a cultural hegemony means that a ruling group's special way of viewing social reality is accepted as normal and as a part of the natural order of things, even by those who are in fact subordinated by it. In this way law contributes to maintaining the ruling group's position.

T. DAHL, *WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE* 13 (1987).

109. A. GRAMSCI, *supra* note 103, at 247. It is important to note Gramsci's recognition of the law as an autonomous force capable of spontaneous development and "haphazard and sporadic germination." *Id.*

110. *Id.* For an exploration of hegemony as "a way of interpreting reality" established and perpetuated by the federal judiciary, see Walsh, "The People Who Own the Country Ought to Govern It:" *The Supreme Court, Hegemony, and Its Consequences*, 5 *LAW & INEQUALITY* 431, 434 (1988).

111. E. GENOVESE, *supra* note 102, at 26.

112. *Id.*

113. *Id.* at 25.

114. For feminist and humanistic approaches to the Marxian analysis of the relation between class, law, and the state, see D. COOLE, *WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM* 251-54 (1988); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS: J. WOMEN CULTURE & SOC'Y* 635 (1983); E.P. THOMPSON, *supra* note 70, at 258-69.

For a survey of recent Neo-Marxian scholarship, see Tay & Kamenka, *New Marxisms for Old: Contemporary Radicalism and Legal Theory*, 21 *U.C. DAVIS L. REV.* 605 (1988).

For more rigidly instrumentalist and structuralist formulations, see E. WRIGHT, *CLASS, CRISIS, AND THE STATE* (1978); N. POULANTZAS, *STATE, POWER, SOCIALISM* (1978); R. MILIBAND, *THE STATE IN CAPITALIST SOCIETY* (1969).

115. E. GENOVESE, *supra* note 102, at 25.

116. *Id.* at 26.

of socio-economic classes evolving in society. This molding becomes more pronounced when a political center emerges within a class clearly perceiving the "interests and needs of the class as a whole."¹¹⁷ As a class becomes "more conscious of its nature, spirit, and destiny" and reaches a "higher understanding of itself" manifested in a particular world view, Genovese contends the class is "transformed from a class-in-itself, reacting to pressures on its objective position, into a class-for-itself, consciously striving to shape the world in its own image."¹¹⁸ Once a class acting-for-itself acquires possession of public power, Genovese suggests the juridical system may become both an expression of class interest and a theater of class mediation.¹¹⁹

Dominant legal traditions mediate class antagonisms between the poor and competing socio-economic classes.¹²⁰ Mediation is effectuated by the mystifying process of legalization whereby class antagonisms are decontextualized and individualized, then channeled into formal, purportedly neutral categories of sanctioned conduct, such as rights and duties. By compelling and validating conduct in terms of apolitical norms and standards, poverty law inhibits consciousness of class and class conflict.¹²¹

To inculcate consciousness of class among the poor, poverty lawyers must reshape and thereby subvert dominant hegemony. The British cultural theorist Raymond Williams embellishes the idea of dominant hegemony, recasting it to capture the "wholeness" of the "lived social process" experienced by subordinate classes.¹²² He construes dominant hegemony as the practical organization of this process around specific dominant meanings and values. Mapping the patterns of the "whole social process" in accordance with specific distributions of power and influence, Williams explains class relations of domination and subordination translate into forms of "practical conscious-

117. *Id.* at 27.

118. *Id.*

119. *Id.* Moreover, Genovese argues the legal system may become an "instrument by which the advanced section of the ruling class imposes its viewpoint upon the class as a whole and the wider society." *Id.* The imposition of hegemony through law serves to "discipline the ruling class and to guide and educate the masses." *Id.* Discipline, guidance, and education are accomplished by establishing criminal and civil standards of behavior which compel social conformity, sanction norms, and validate ethical conduct. *Id.* These standards hold hegemonic sway and mediate class antagonisms until contradictions appear exposing the deceptions undergirding law and society. *Id.* at 30. When an awareness of rights withheld springs from the exposure of legal and societal deceptions, hegemony may be subverted and world view remodeled. *Id.* at 31-49.

120. For a close analysis of class mediation within the forum of the modern welfare state, see I. GOUGH, *THE POLITICAL ECONOMY OF THE WELFARE STATE* (1979); J. O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973).

121. On the relation between class mediation and legal formalism, see Gabel, *Reification in Legal Reasoning*, in MARXISM AND LAW 262-78 (P. Beirne & R. Quinney eds. 1982). See also M. Horwitz, *supra* note 63, at 253-66.

122. Williams defines dominant hegemony alternatively as the "complex interlocking of political, social, and cultural forces," and as "the active social and cultural forces which are its necessary elements." R. WILLIAMS, *MARXISM AND LITERATURE* 108-09 (1977) (emphasis in original).

ness," producing "a saturation of the whole process of living."¹²³

Williams sees that process encompassing economic, political, and social activity together with the "whole substance of lived identities and relationships."¹²⁴ The depth of saturation is such that the "pressures and limits" generated by a specific economic, political, and cultural system appear as the "pressures and limits of simple experience."¹²⁵ In this way, objective relations of domination and subordination become a whole body of subjective practices and expectations permeating the "whole of living," suffusing individual "senses and assignments of energy," and shaping perceptions of self and the world.¹²⁶

The transmutation of domination into a lived system of subjective meanings and values — a system experienced as a set of "reciprocally confirming" natural practices — is the insidious work of hegemony.¹²⁷ Insidious because that lived system creates a sense of reality verging on the absolute in excluding and selecting out alternative versions of reality. For Williams, this confined sense of reality is a *culture* consisting of the "lived dominance and subordination of particular classes."¹²⁸

Williams rightly notes that the experience of domination is not passive and one-dimensional, but rather an active, complex process. The process is mutable and textured because it gathers from a web of "experiences, relationships, and activities, with specific and changing pressures and limits."¹²⁹ Hence, it is a process "continually . . . renewed, recreated, defended, and modified."¹³⁰ At the same time, it is a process "continually resisted, limited, altered, [and] challenged by pressures not at all its own."¹³¹ These pressures are applied by ordinary people acting singly and in relationships to decipher and remake material reality.

Deciphering and remaking reality constitutes the work of alternative or counter hegemony. Williams introduces these concepts to describe "forms of alternative or directly oppositional politics and culture."¹³² He suggests the existence of significant oppositional forces precludes the total and exclusive hold of dominant hegemony over society.¹³³

Williams's cultural analysis is instructive for poverty lawyers in disclosing the integral relation between tradition and domination. Indeed, it is the meanings and values of poverty law traditions which reciprocally confirm

123. *Id.* at 109-10. See generally R. WILLIAMS, *RESOURCES OF HOPE* (R. Gable ed. 1989); R. WILLIAMS, *CULTURE & SOCIETY: 1780-1950* (1983).

124. R. WILLIAMS, *supra* note 122, at 110.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 112.

130. *Id.*

131. *Id.*

132. *Id.* at 113.

133. *Id.*

domination of the poor. Confirmation of this bleak condition diminishes the breadth of attorney/client vision. As vision contracts, the belief in alternative constructs and practices is relegated to delusion.¹³⁴

Counter hegemony enables the poor to reclaim the belief in an alternative vision of reality. Reclamation must begin with the poor investigating hegemonic alternatives to their socially constructed and reified client-recipient identity. In accord with feminist methodology, this role investigation centers on communication in collective relational contexts by means of consciousness raising.¹³⁵

By developing hegemonic alternatives and oppositional discourses¹³⁶ in collective relational contexts, the poor enter the transformational process of breaking free from the subordinate role and identity assigned by the dominant hegemony.¹³⁷ With the splintering of dominant hegemony, the poor may converge as a class-for-itself around an alternative vision of reality.

This convergence is congruent with E.P. Thompson's notion of class as a "self-defining historical formation" constructed from the human experience of struggle.¹³⁸ Thompson's understanding of men and women as historical "makers" of social class¹³⁹ and class consciousness¹⁴⁰ reinforces the importance of grounding empowerment in the concrete historical conditions of poor communities. The object of empowerment is to raise consciousness of class among disparate individuals and groups living in those communities.

A. Dominant Traditions

To elucidate the idea of hegemony as an active process of cultural incorporation interweaving various meanings, values, and practices, Williams sets forth the concept of tradition.¹⁴¹ Departing from the strictures of antiquated Marxist cultural theory, Williams reasserts tradition as an "actively shaping force" expressing "dominant and hegemonic pressures and limits."¹⁴² As a means of incorporation, this expression is necessarily "selective," representing an intentionally discriminatory version of a "shaping past and a pre-shaped present."¹⁴³ Emerging dominant, the selective version directs the "process of

134. See J. HABERMAS, *supra* note 6, at 96 (remarking on the interconnection between an "individual's perception of his own powerlessness and the lack of alternatives open to him").

135. Scales, *supra* note 16, at 1386, 1401-02. Scales considers consciousness raising "an inherently transformative process" validating experience and expressing self-creation and responsibility. *Id.* at 1401-02.

136. This term is taken from Nancy Fraser. See Fraser, *Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies*, 99 ETHICS 291, 303 (1989).

137. R. WILLIAMS, *supra* note 122, at 115.

138. E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 46 (1978).

139. *Id.* (rejecting reduction of social class to a "static category").

140. E.P. THOMPSON, *supra* note 23, at 11 ("Class is defined by men as they live their own history, and, in the end, this is its only definition.").

141. R. WILLIAMS, *supra* note 122, at 115.

142. *Id.*

143. *Id.*

social and cultural definition and identification."¹⁴⁴

Two traditions dominate the practice of poverty law. The first tradition is denominated by direct service litigation. The second tradition is designated by law reform litigation. Both traditions deliberately select specific meanings and practices in fashioning dominant conventions, language, and institutional structures.

1. *Direct Service*

Since the late nineteenth century, the direct service tradition of providing civil legal assistance to the poor has predominated.¹⁴⁵ Initially staffed by volunteer lawyers or operated by private legal aid societies supported by charitable contributions and local governmental funding,¹⁴⁶ organizations tied to the direct service tradition prevailed for nearly five decades.¹⁴⁷

In the early 1960s, more innovative poverty law programs emerged exemplified by Mobilization for Youth (MFY) in New York City and Community Progress Incorporated in New Haven, Connecticut.¹⁴⁸ Funded by federal, state, and local monies, and supplemented by foundation grants,¹⁴⁹ these demonstration projects presaged later programs developed by the Office of Economic Opportunity¹⁵⁰ (OEO), culminating in the National Legal Services Program¹⁵¹ (NLSP) and ultimately in the National Legal Services Corporation (NLSC).¹⁵²

The direct service tradition is marred by dominant tendencies prescribing the routine treatment of poor clients as isolated and passive individuals with-

144. *Id.*

145. For historical background, see J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 53-62, 263-308 (1976); R. SMITH, *JUSTICE AND THE POOR* 133-99 (2d ed. 1919).

146. On staffing and funding patterns, see Bellow, *supra* note 11, at 337. See also E. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951); J. BRADWAY, *LEGAL AID BUREAUS* (1935).

147. See J. AUERBACH, *supra* note 145, at 269-75. See also Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 806-09 (1967).

148. See Cahn & Cahn, *The War On Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) (on the history of Community Progress Incorporated); *REGULATING THE POOR*, *supra* note 1, at 290-95 (on the history of Mobilization for Youth).

149. *REGULATING THE POOR*, *supra* note 1, at 290, 290-95; Cahn & Cahn, *supra* note 148, at 1319 n.7.

150. For OEO history, see E. JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 3-102 (1974); J. DONOVAN, *THE POLITICS OF POVERTY* (2d ed. 1973); Pious, *Policy and Public Administration: The Legal Services Program in the War on Poverty*, 1 POLITICS & SOC'Y 365 (1971); Note, *supra* note 147, at 806-22.

151. For NLSP history, see Pious, *supra* note 150, at 378-79; Note, *supra* note 147, at 806; Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

152. For NLSC history, see George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976); Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734 (1976); Falk & Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and The Future of Legal Services*, 24 HASTINGS L.J. 599 (1973); Note, *supra* note 151, at 259-86.

out common attributes or bonds.¹⁵³ Documenting this treatment — what I shall call the process of dependent-individualization — Gary Bellow observes:

The lawyers treat clients and problems individually. No efforts are made to encourage clients with related problems to meet and talk with each other, or to explore the possibilities of concerted challenges to an institution's practices.¹⁵⁴

Dependent-individualization forecloses systematic analysis of the common experiences of class domination.¹⁵⁵ The consequent narrow treatment of cases as distinct unrelated disputes, without reference to larger class continuities, sacrifices a valuable opportunity to unmask domination and promote counter hegemony by organizing around legal controversy.¹⁵⁶ The opportunity to engage in dialogue regarding the economic, political, and social forces engendering and surrounding legal conflict is similarly lost.¹⁵⁷ The failure to address legal disputes contextually as individual manifestations of class antagonisms inhibits client politicization and class consciousness, thus reinforcing dependence, isolation, passivity, and fragmentation in poor communities.

Attributable to the cultural pull of dominant hegemony, buttressed by legal education¹⁵⁸ and professional elan,¹⁵⁹ poverty lawyer allegiance to the

153. For an examination of these tendencies, see Bellow, *The Legal Aid Puzzle: Turning Solutions into Problems*, 5 WORKING PAPERS FOR A NEW SOC'Y 52, 55 (1977) [hereinafter *The Legal Aid Puzzle*]; Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977). For a "procedural justice" defense of the direct service strategy within the equal access rights model, see Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. REV. 282, 286 (1982).

154. *The Legal Aid Puzzle*, *supra* note 153, at 55. See also Failinger & May, *supra* note 10, at 6-7 (arguing that equal access and law reform models are compatible with case selection procedures and litigation strategies designed to maximize group impact).

155. Bellow comments:

Nor do the lawyers systematically review cases to identify recurring problems, to deepen their knowledge of the bureaucracies with which they deal, or to expose publicly what they have uncovered. Despite the volume of cases, there are legal services lawyers who have been handling landlord-tenant or welfare cases for several years who cannot describe the nature of the housing market in their area or the supervisory structure of the local welfare department.

The Legal Aid Puzzle, *supra* note 153, at 55.

156. On rights mobilization, see S. SCHEINGOLD, *supra* note 69, at 131-48; R. KLUGER, *supra* note 70, at 450-79, 748-78; C.V. WOODWARD, *supra* note 70, at 149-220.

157. Simon maintains that "the political realities which create the need for collective action are obscured in the ideal of lawyer-and-client as a self-contained relation between individuals." Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 504-05 (1980). On rights organizing tactics, see Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

158. On the ideological tilt in legal education and the marginalization of the politically and socially subordinated, see Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989); Weiss & Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U.L. REV. 1141 (1985); Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40-61 (D. Kairys ed. 1982).

perceived historical logic¹⁶⁰ of the practice of dependent-individualization redounds to the detriment of the poor. Individualization blankets class antagonisms and shrouds community in Darwinist-tainted liberal theory,¹⁶¹ a theory inimical to the evolution of class consciousness and too often impoverishing of community.

To heal the conceptual schism between the individual-as-self and community-as-other undermining liberal theory, Drucilla Cornell urges "the role of reason as the enhancement of innovative capability," thus reconciling the distinction between the autonomous subject and the shared community.¹⁶² Cornell argues reason permits criticism of self and community in light of the potential for mutual transformation. The potential embedded in self and in community is actualized "through the critique of what is and through the appeal to the *might have been* and the *should be*."¹⁶³ Cornell's vision of the self in terms of "innovative capability" enables poverty lawyers to reconcile the "sovereign" client with the "otherness" of community through the reasoned discourse of transformational dialogue.¹⁶⁴

Poverty lawyers deny the reconciliation of client and community by pressing ahead with individualization until it brings forth routinization. Routinization is a formulaic and mechanical convention devised to process individual cases on a mass scale.¹⁶⁵ The by-product of marginalizing traditions, burgeoning case loads, and meager institutional resources,¹⁶⁶ routinization

159. On the constraints of professional culture, see B. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM* 98-99 (1976); E.P. THOMPSON, *supra* note 70, at 258-69; Cahn & Cahn, *Power to the People or the Profession? — The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

160. For a discussion of historical necessity, see E.P. THOMPSON, *supra* note 138, at 37-50.

161. Individualization may not only obscure a collective experience of injury, but also redefine the experience in private terms. Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631, 631-32 (1980-81). To reverse this process, poverty lawyers must transform individual legal disputes into collective political struggles. This inversion may be spurred by expanding the "scope of disputing" into political dimensions. *Id.* at 644. For a dissection of the individualistic core of classical liberal theory, see C. MACPHERSON, *supra* note 16, at 3-4, 263-77.

162. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1226 (1988).

163. *Id.* (emphasis in original).

164. *Id.* Cornell echoes Habermas's notions of communicative ethics and rational consensus. See J. HABERMAS, *supra* note 6, at 92, 111, 142; J. HABERMAS, *supra* note 37, at 321-26, 335-67.

As Friedman points out, actualization of these notions may be undermined when the norms and practices of original nonvoluntary communities (e.g., family and neighborhood) or chosen voluntary communities (e.g., friendships and political action groups) are exploitive and oppressive. See Friedman, *supra* note 27, at 277-90.

165. Abel, *supra* note 55, at 570. On routinization, see J. CARLIN, J. HOWARD & S. MESSINGER, *CIVIL JUSTICE AND THE POOR* 22-23 (1966); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 119-22, 139-41 (1974). Cf. I. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION* 1-45 (1973); J. EISENSTEIN & H. JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 3-64, 190-311 (1977) (analyzing criminal court process of routinization).

166. See Bellow, *supra* note 11, at 341-43; J. CARLIN, J. HOWARD & S. MESSINGER, *supra*

paradoxically undercuts the logic of individualization. Liberal theory accords no logic to the routine and standard treatment of the individual poor.¹⁶⁷

The genesis of routinization as a convention can be traced to the dominant traditions and institutional economics of poverty law. As Bellow points out, the "demand for legal services increases with supply."¹⁶⁸ Thus, while poverty lawyers may "regularly handle 150 to 200 ongoing cases" each year, nevertheless "in most communities 80 to 90 percent of the need is not being met."¹⁶⁹ The gravity of this need generates institutional pressure to decrease the level of "care and energy" devoted to individual cases in order to increase the aggregate number of cases processed.¹⁷⁰

As a result, individual cases are *slotted*¹⁷¹ into standard patterns of advocacy and resolution — notably settlement¹⁷² — which fail to encourage client empowerment and collective opposition. The centrifugal forces of routiniza-

note 165, at 49-50; George, *supra* note 152, at 709-11. See also Silver, *Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217 (1969).

167. For a powerful restatement of liberal theory, see J. RAWLS, *A THEORY OF JUSTICE* (1971). But see Miller, *Rawls and Marxism*, and Daniels, *Equal Liberty and Unequal Worth of Liberty*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE* 206-30, 253-81 (N. Daniels ed. 1975) (condemning Rawls's structural premises and logic).

168. Bellow, *supra* note 11, at 342; Failinger & May, *supra* note 10, at 13 ("[T]he demand for legal services, like that for health services, increases with increases in the supply.") (footnote omitted).

169. *The Legal Aid Puzzle*, *supra* note 153, at 56. Bellow dolefully remarks that the Sisyphean task confronting poverty lawyers poses "the uncomfortable choice of either being inundated with cases or dealing with the accompanying strain — not easily understood until one has done it — of regularly turning needy people away." Bellow, *supra* note 11, at 342.

170. Bellow, *supra* note 11, at 342. Bellow's assessment of these institutional pressures and their ill-effects is sobering. He states:

The pressures on these attorneys, who make up the bulk of the program's staff, to take the path of least resistance — to convince clients and themselves that nothing much can be done for them, that additional research or investigation on the case is unnecessary, that the result they obtained was all that was possible — is very great indeed. The net result of these pressures is to induce patterns of practice throughout the legal aid system which depart substantially from norms of care and competence which I believe most program people would agree are reasonable to expect in legal services work.

Id. (footnote omitted). See also Bellow & Kettleson, *supra* note 50, at 354-55 (describing the pressures producing the "high volume, minimal service mode of practice" in which "full" representation in particular cases is subordinated in order to "help more people").

171. *The Legal Aid Puzzle*, *supra* note 153, at 55. In assessing the impact of routinization and standardization on the disposition of cases, Bellow observes:

Cases not referred to other agencies are typically "slotted" into predictable patterns — getting the client time to move out in an eviction case, working out a payment schedule in a debt case, applying to the appropriate agency in a benefit case. Only rarely do the lawyers get involved in any research, investigation, or courtroom work. Indeed, many of the lawyers never leave the office, resolving their cases over the phone. Only if an "interesting" issue is raised, or if the client is especially attractive or demanding, will the attorney spend an unusual amount of time, effort, or planning on a particular case.

Id.

172. Abel, Bellow, Carlin, and Galanter identify the incessant pressures and demands of settlement as an essential part of the tendency towards routinization and standardization. J. CARLIN, J. HOWARD & S. MESSINGER, *supra* note 165, at 21-59; Abel, *supra* note 55, at 572;

tion and standardization constrain poverty lawyers to distinguish between client interest in empowerment and institutional interest in mass processing. This separation creates a false dichotomy of conflicting attorney/client interest.¹⁷³

Poverty lawyers confronted by this dilemma ineluctably yield to institutional persuasion thereby betraying their commitment to individualized service. Comforted by the maxim of "doing less for more," they adopt the methods of routinization and standardization without divulging the elevation of institutional interest over client interest. Overlooked in this rationalization is the denigration of the client not only as individual, but also as class agent and community member.

The rupture between attorney and client interests is endemic, and perhaps irreparable, given the goals and structure of poverty law programs. The overriding objective of "minimum access" commands local programs to design and implement a direct service structure relying heavily on the methods of routinization and standardization. Implementation shunts aside the alternative tradition of client and community empowerment. This ideological shunting causes poverty lawyers to miss crucial opportunities to weave individual cases together in an oppositional strategy of building community organization and mobilization.

Galanter, *supra* note 165, at 120-22; *The Legal Aid Puzzle*, *supra* note 153, at 56-57. Bellow asserts:

The Legal Aid lawyer practices in courts where there are persistent demands to settle every case. Opposing lawyers and agency officials, who are pressed by high caseloads, want quick, certain resolution, of disputes. For a legal aid lawyer willing to go along with prevailing settlement patterns, there are many potential benefits: a break now and then for a client with a weak claim, consideration for the lawyer's busy schedule, or help in looking good when public performance slips a little. On the other hand, there can be severe sanctions against the client of the legal services lawyer who won't cooperate. Most poor clients are vulnerable to harassment by a hostile social worker, or by the attorney for an angry landlord who can almost always serve the client with a late-rent eviction notice.

* * *

Judges often use similar pressures. The courts want the crowded calendar to move, whatever the circumstances of particular cases. A surprising number of judges in the last ten years have punished legal aid clients because their lawyers took too much of the court's time on "frivolous" matters. Some even initiated actions against particular legal aid programs when they thought the staff departed too dramatically from regular ways of doing things in the local system.

* * *

The potential impact of these sanctions on clients creates considerable pressure to go along with the bureaucratic rules of the game.

The Legal Aid Puzzle, *supra* note 153, at 56-57.

173. The implicit assumption in this formulation is that the mass processing of cases is inconsistent with empowerment both theoretically, because empowerment dialogue is silenced by the monologue and technical dialogue of the mass processing relation, and practically, because empowerment dialogue is temporally demanding and thus precluded by the mass processing relation.

2. Law Reform

The law reform tradition, conceived broadly to encompass test case litigation and legislative advocacy,¹⁷⁴ stems from the effort to ameliorate the laws and institutional policies and practices composing the socio-economic structure of poverty.¹⁷⁵ This effort materialized in 1963 during the incipient development of the MFY program in New York, though its early strains may be uncovered in the late nineteenth century.¹⁷⁶ Engrafted as the welfare progeny of earlier civil rights desegregation litigation,¹⁷⁷ the tradition grew from an enlarged interpretation of the myth of legal efficacy.¹⁷⁸

While correctly positing the poor's group interest in challenging certain institutional policies and practices,¹⁷⁹ the law reform tradition cannot independently achieve the goal of empowerment. Framing an attack on a particular wrong¹⁸⁰ cannot *ipsi dixit* unmask domination and liberate consciousness.¹⁸¹ In the same way, pressing for judicial creation or enforcement of a particular rule or doctrine¹⁸² cannot redistribute class power. Bellow argues

174. E. JOHNSON, *supra* note 150, at 130. In a roughly analogous treatment, Lucie White compares the law reform tradition to the "litigation-centered approach" characteristic of public interest lawyers. White, *supra* note 67, at 757. White classifies this style of lawyering as "first-dimensional," due to its reliance on the courts "as a direct mechanism for redressing the injuries of class, race, and gender, and for redistributing power to subordinated groups." *Id.* at 755-58.

175. E. JOHNSON, *supra* note 150, at 128. See also Failinger & May, *supra* note 10, at 14-18.

176. *Id.* at 23-24, 131. See also R. SMITH, *supra* note 145, at 200-18.

177. E. JOHNSON, *supra* note 150, at 24.

178. Note, *supra* note 147, at 813-16. A contributing factor, according to Abel, is that law reform "activity expresses a dynamic of professionalism — the valuation of skilled work for its own sake, an elevation of technique over extrinsic goals." Abel, *supra* note 55, at 518 (footnote omitted).

179. Silver, *supra* note 166, at 218.

180. Comment, *supra* note 159, at 1077. Even when framed broadly on behalf of a class of similarly situated individuals, particularized attacks "tend[] to substitute for, rather than foster, organization . . ." Abel, *supra* note 55, at 496. Devoid of empowerment, this tendency may be ineradicable. By comparison, in circumstances antagonistic to political organization, the tendency may be exploited by initiating a series of class actions on behalf of discrete groups of individuals attacking a range of particularized wrongs thereby exposing the structures and relationships of poverty and arousing insurgent resistance.

181. White appears more sanguine on this point asserting specifically fashioned litigation as a form of "public action with political significance." White, *supra* note 67, at 758. Classified as "second-dimensional" lawyering, White claims such litigation possesses "cultural meaning" representing a "discourse about social justice." *Id.* (footnote omitted). For White, success in this approach is measured by a different set of factors, such as public rights education and political mobilization. *Id.* at 758-59.

182. Comment, *supra* note 159, at 1077. Abel adds that law reform litigation may actually undermine organization by substituting an individual to represent the group interest, or by bringing a class action because no organized group exists. Abel, *supra* note 55, at 578-79 (footnotes omitted). The critical point overlooked by Abel is the contingent logic of litigation tactics. See Kennedy, *supra* note 67, at 1064 ("Litigation served as the Negro's most successful and aggressive form of political activity throughout the first half of this century.") Circumstances of group conflict and disarray or political harassment and surveillance may dictate different forms of litigation appropriate to historical time and place. See Scheingold, *supra* note 56, at 890 ("In more open political settings, grass-roots political organizing by lawyers working together with community activists has proved feasible.").

that the law reform tradition in fact misconstrues the nexus connecting law and class power.¹⁸³ He states:

The problem of unjust laws is almost invariably a problem of distribution of political and economic power; the rules merely reflect a series of choices made in response to these distributions. If a major goal of the unorganized poor is to redistribute power, it is debatable whether judicial process is a very effective means toward that end. . . . "rule" change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.¹⁸⁴

The insufficiency of the law reform tradition as a method of empowerment does not require its outright rejection. To be sure, law reform may blunt empowerment by failing to raise client and community consciousness. That failure, coupled with the concentration of decisionmaking authority among poverty lawyers, also stifles the natural development of client and community leadership. Likewise, law reform may undermine organizing initiatives by focusing disputes on the judicial branch, rather than on the politically more susceptible executive and legislative branches of government, where conflict is transfigured by formalistic rhetoric.¹⁸⁵

Nonetheless, law reform should not be viewed as antithetical to empowerment.¹⁸⁶ Carefully tailored, law reform may activate political consciousness and precipitate the growth of both client and community advocacy organizations.¹⁸⁷ Law reform may even establish an interrelationship with client political action at once fomenting and defending progressive change.¹⁸⁸ Creation

183. Comment, *supra* note 159, at 1077.

184. *Id.* (quoting Bellow). See also Noble, *Farm Workers Fault Lack of Enforcement of Sanitation Rules*, N.Y. Times, Oct. 4, 1988, at A1, col. 1 ("Just getting regulations on the book is not enough. The other half is enforcement.") (quoting Valerie Wilk, a health specialist with the Farmworker Justice Fund).

185. Wexler, *supra* note 157, at 1062-67; Comment, *supra* note 159, at 1077-91.

186. Comment, *supra* note 159, at 1079 (footnote omitted). Failinger and May supply an inchoate example of an integrated law reform empowerment strategy. They suggest:

A law reform orientation might lead a lawyer to assist a client wanting changes in nursing home conditions, by helping the client organize a group of similarly minded nursing home residents, by obtaining media coverage for them to air their grievances and demands, by aiding the group in drafting petitions and testimony before legislative committees, and most importantly . . . by initiating a class action law suit against the owners of the nursing home. In this way, the initial unequal power relationship that existed between the poor person and the nursing home owners might be overcome with the additional possibility of far-reaching changes for nursing home residents other than the individual who came to the Legal Services office.

Failinger & May, *supra* note 10, at 15.

187. Comment, *supra* note 159, at 1091. Here, White's "second-dimensional" litigation claim to the contingent expansion of "public consciousness about justice" and mobilization of "direct action for change" seems more appropriately modest. White, *supra* note 67, at 760.

188. Comment, *supra* note 159, at 1083-89. Abel maintains that "structural reform" of this kind "thrives only when lawyers are subordinated to other political activists." Abel, *supra* note 55, at 518 (footnotes omitted).

of this dynamic requires a providently designed and executed law reform strategy centered on political action, a strategy driven by the engine of politics.

B. *Alternative Traditions and Oppositional Continuities*

Instead of approaching dominant poverty law traditions in strategic candor, lawyers veil these traditions in mystification. Resting on the logic of *predisposed continuity*, they offer the two traditions as natural and even necessary extensions of past values and practices of celebrated legitimacy.¹⁸⁹ No mention is made of the specific political and socio-historical character or ideological content of the traditions.

The presentation of direct service and law reform litigation as self-ratifying traditions signals a failure by poverty lawyers to grasp the acontextual and ahistorical nature of their world view. To be authentic, ratification must come from without, from contextual practice and historical experience, not from self-serving affirmations. It is these affirmations that have salvaged the traditions of direct service and law reform when historical experience demanded their reformation. Their rescue marks not a ratification of absolute value, but a ratification of dominant hegemony.

Williams argues the clinging embrace of tradition is a powerful process fastened to places, institutions, and language, and hence directly experienced.¹⁹⁰ Because that process is turbulent — battered by the reinterpretation, dilution, and conversion of cultural conventions and forms — it is also vulnerable.¹⁹¹ This vulnerability is displayed at “vital points of *connection*, where a version of the past is used to ratify the present and to indicate directions for the future”¹⁹²

Each day in the conventions of practice — interviewing, counseling, negotiation, investigation, drafting — poverty lawyers experience vital points of cultural connection between the poor, the state, and society. These connections reinforce a deformed version of the poor derived from a mystified past and apply it to ratify and project a present as well as a future version of the poor. None of these versions, however, renders an accurate portrait.

To obtain a fuller version of the poor and to exploit the vulnerability of dominant traditions at points of cultural connection, Williams adjures the recovery of “discarded” traditions and the redress of “selective and reductive interpretations.”¹⁹³ Recovery and redress are possible, according to Williams,

189. R. WILLIAMS, *supra* note 122, at 116.

190. *Id.*

191. *Id.* The vulnerability of tradition to appropriation and reconstitution recalls Jacques Derrida's concept of the “free ‘play’ of text.” Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743, 777 (1987) (quoting J. DERRIDA, *WRITING AND DIFFERENCE* 292 (1978)). For probing introductions to deconstruction, structuralism, and poststructuralism, see J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984). For a critical summary of Derrida's methods of analysis, see Brosnan, *supra* note 104, at 360-76.

192. R. WILLIAMS, *supra* note 122, at 116 (emphasis in original).

193. *Id.*

because the "real record" as well as many "alternative or opposing practical continuities" are still available waiting to be unearthed.¹⁹⁴

For Williams, the selective version of dominant traditions is always moored to "contemporary pressures and limits."¹⁹⁵ When these moorings snap, dominant traditions may be deprived of contextual verification. Unobserved by rationalization, the contradictions and deceptions of dominant traditions then may be recognized and subverted.¹⁹⁶ In the light of contradiction, Williams tells us dominant hegemony can be broken.

The lesson in Williams's analysis lies in the importance he attaches to the recovery of the discarded traditions of the dissident poor, and to the redress of selective and reductive interpretations of their human nature and history. In crucial respects, these traditions are bound up in notions of community and solidarity.¹⁹⁷ The traditions are part of the real record of the poor and can be traced as historical continuities of thought and action.¹⁹⁸ Together, they comprise a counter hegemony.

Poverty lawyers overlook the alternative traditions and blur the oppositional continuities of the poor. This myopia is the fruit of selective and reductive interpretation of human nature and history. Poverty lawyers daily employ selective and reductionist methods of interpretation in their relations with poor clients, effectively labeling¹⁹⁹ them a fractured, unrelated mass of dependent "dissociated individuals."²⁰⁰ Labeling is itself an act of demeaning subordination.

C. Language

The language²⁰¹ of dominant poverty law traditions privileges the norms

194. *Id.*

195. *Id.* at 117.

196. *Id.* Subversion comports with the deconstructive premise that hidden ideological hierarchies underlying language and thought can be identified, inverted, and liberated. Balkin, *supra* note 191, 744-46. For a cogent illustration, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007-09 (1985). Compare Brosnan, *supra* note 104, at 376-88 (appraising Dalton's derivative deconstructive method).

197. Unger describes solidarity in terms of concern and responsibility shared with another person. He states: "Solidarity is the social face of love." R. UNGER, *supra* note 7, at 206.

198. For a canvass of this history, see POOR PEOPLE'S MOVEMENTS, *supra* note 1, at 1-40, 264-361; IN THE SHADOW OF THE POORHOUSE, *supra* note 1, at 206-73.

199. On labeling theory and its insidious application by public interest lawyers, see Minnow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987).

200. C. MACPHERSON, *supra* note 16, at 1.

201. On the constitutive power of language to shape values, norms, and assumptions regarding human possibilities for transcendence and solidarity, see M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 190 (1964); C. MUELLER, *THE POLITICS OF COMMUNICATION: A STUDY IN THE POLITICAL SOCIOLOGY OF LANGUAGE, SOCIALIZATION, AND LEGITIMATION* (1973).

The language of the direct service and law reform traditions shapes the values, norms, and assumptions held by the poor concerning the human possibilities of empowerment in their own lives and communities. No doubt this process operates on both conscious and unconscious levels. In either event, the process is pernicious in its subtle demarcation of the realm of the possible. As the literature of a society both mirrors and distorts the reflection of social reality,

of lawyer domination and control.²⁰² These norms are closed rather than open to possibility, repressive rather than liberating in vision. Bellow aptly describes the forms and terms of the normative language pervading the attorney/client relationship when he states:

The lawyers dominate interaction with clients. In most discussions with clients, the lawyer does almost all of the talking, gives little opportunity for the client to express his or her feelings or concerns, and consistently controls the length, topic, and character of the conversation. Facts are obtained by a series of pointed, standard questions rather than by any process that resembles a dialogue. The lawyer then restates the client's problems in legal terms and suggests the best available solutions based on his or her view of the situation and its possibilities.²⁰³

Within the attorney/client relation, therefore, the "production of discourse" is controlled, selected, and organized by norms which exclude the client voice.²⁰⁴ This system of exclusion or silencing is maintained by status and power hierarchies.²⁰⁵ These hierarchies rest on the authoritative roles and identities reified by the attorney/client relationship.

In deconstructive practice, linguistic signs and metaphors represent "privileged conceptions of social reality."²⁰⁶ As such, they are neither self-sufficient nor value-neutral structures. Instead, they are ideologies of a hierarchical social life. Because ideologies obtain legitimacy from the denial or exclusion of alternative possibilities of social life, real or potential, they are subject to contest.²⁰⁷ The crux of deconstructive practice is to seize, affirm, and emancipate those human possibilities denied or excluded by dominant modes of discourse.²⁰⁸

D. *Williams v. Axelrod*

The infirmities passed on by dominant poverty law traditions often conspire to marginalize the poor under the rubric of aid. Marginalization may be sustained even where the poor are in fact aided. This process is illustrated by

so too does its language. See R. WILLIAMS, *supra* note 122, at 21-54; T. EAGLETON, *supra* note 6, at 194-217.

202. *The Legal Aid Puzzle*, *supra* note 153, at 55.

203. *Id.*

204. Foucault, *The Order of Discourse*, in LANGUAGE AND POLITICS 108, 109 (M. Shapiro ed. 1984).

205. Edelman, *The Political Language of the Helping Professions*, in LANGUAGE AND POLITICS, *supra* note 204, at 44, 45-60.

206. Balkin, *supra* note 191, at 764.

207. Relying on Derrida, Dalton notes the disfavored conception — here, the client voice denied, excluded, and silenced — harbors the "dangerous" potential of revelation, of disclosing that "things are not, after all, what they seem." Dalton, *supra* note 196, at 1007 (footnote omitted).

208. Balkin, *supra* note 191, at 763-65.

a mixed direct service/law reform case, *Williams v. Axelrod*,²⁰⁹ recently litigated in New York State Supreme Court. In *Williams*, poverty lawyers commenced an Article 78²¹⁰ proceeding on behalf of Deon Williams, a two-year-old child suffering from sickle-cell anemia and related nutritional impairments, against David Axelrod, Commissioner of the New York State Department of Health, and Dosoon G. Min, Director of the Bronx-Lebanon Hospital Center Women, Infants, and Children Program.²¹¹ The *Williams* lawyers complained these officials had acted arbitrarily, capriciously, and erroneously in disqualifying the child from participation in the state-wide WIC program and in depriving him of recertification.²¹²

Alleging that deprivation of WIC benefits had caused the child physical hardship, including weight loss and deteriorating health,²¹³ the *Williams* lawyers petitioned the court for relief annulling the challenged decisions.²¹⁴ Additionally, they sought a declaration that the disqualification and denial of recertification violated the Child Nutrition Act and its federal implementing regulations, as well as the New York State and United States Constitutions.²¹⁵ Moreover, they sought to reinstate the child in the WIC program and restore all benefits unlawfully withheld.²¹⁶

Finding that the child fulfilled all WIC program requirements and reasoning therefore that his parent's actions as a non-participant could not affect his eligibility, the supreme court concluded the child had been unlawfully dis-

209. See *Williams v. Axelrod*, 133 Misc. 2d 817, 508 N.Y.S.2d 371 (Sup. Ct. 1986). The author served as a member of the litigation team representing the Williams family.

210. N.Y. CIV. PRAC. L. & R. §§ 7801-7806 (McKinney 1988).

211. 133 Misc. 2d at 818-19. The court found the child's impairments to include "impeded" physical development evidenced by "inadequate bone formation, slowly developed speech abilities, and general sluggishness." *Id.*

212. *Id.* See also Petitioner's Verified Petition at §§ 13-26, *Williams* (Dec. 23, 1985); Petitioner's First Amended Verified Petition at §§ 13-26, *Williams* (Feb. 5, 1986). The child Deon Williams, appearing by his parent and guardian Doris Williams, was accepted as a WIC program participant at birth in August, 1983. Affidavit of Doris Williams at ¶ 5, *Williams* (Dec. 23, 1985).

In August, 1985, Min disqualified the child from WIC program participation because his parent Doris Williams, a non-participant, assaulted a member of the Bronx-Lebanon Hospital Center WIC program staff. 133 Misc. 2d at 818. After review at an administrative law judge hearing, Axelrod upheld the disqualification and denial of recertification. *Id.* at 819.

213. Petitioner's First Amended Verified Petition, *supra* note 212, at ¶ 10.

214. *Id.* at §§ (a)-(b).

215. *Id.* at §§ (c), (f), (g)-(h).

216. *Id.* at §§ (j)-(k). Furthermore, the lawyers requested an award of compensatory damages, including out-of-pocket food expenses, and reasonable attorneys' fees and costs. *Id.* at §§ (a)-(m), (o)-(p).

Having alleged the state's failure to promulgate rules and regulations governing WIC program participant sanctions, in claimed violation of federal regulation and the New York State Administrative Procedure Act, the lawyers also sought relief declaring and enjoining immediate regulatory promulgation. *Id.* at §§ 15-16, (d), (n).

In settlement, Min awarded the child \$1000 in damages, and the lawyers' legal aid program \$6100 for attorneys' fees and costs. Petitioner's General Release, *Williams* (June 13, 1986).

qualified as punishment for parental misconduct.²¹⁷ With this conclusion, the court held the challenged decisions were thus arbitrary, capricious, and contrary to law.²¹⁸ Consequently, the court ordered reinstatement of the child's certification at the Bronx-Lebanon Hospital Center WIC program and restoration of all WIC benefits withheld during his period of disqualification.²¹⁹

Pressed by the exigencies of circumstance²²⁰ and the potential import of altruistic rule expansion, the *Williams* lawyers departed from the tradition of direct service routinization. Nonetheless, they failed to withstand the tendency of decontextualization and atomization manifested in the continued isolation and disconnection of the Williams family from other WIC clients and the larger welfare community. That tendency, part of the process of dependent-individualization, went unnoticed and unbridled.

The garnering of a settlement award of damages for the Williams family did not reverse this process and the accompanying reproduction of dependence, isolation, and passivity. These reified myths of helplessness were as real at the outset of the *Williams* litigation as they were at the close. The negation of class and class consciousness was similarly constant throughout the litigation.

Framed in terms of empowerment theory, *Williams* required poverty lawyers to synchronize²²¹ the vindication of the child's individual interest in regaining WIC benefits with the activation of community interest in improving the WIC program as well as similar welfare programs. Harmonization of these mutual interests necessitated attorney/client engagement in dialogue, specifically in socio-economic and political discourse relevant to enhancing community health and nutrition.²²² Amplification of that discourse warranted meetings between the Williams family and other WIC client families to create a client/client study group. Further expansion of discourse entailed the participation of the surrounding community, especially neighborhood churches, clinics, day care centers, schools, and self-help associations, in organizing community consciousness raising and action groups.

Client/client and client/community discourse might have commenced with a series of small informational meetings regarding the nature of the WIC

217. *Williams v. Axelrod*, 133 Misc. 2d 817, 821-22 (Sup. Ct. 1986). Although acknowledging the state's interest in protecting WIC agency staff from harm, the court stressed the importance of alternative means to achieve this legitimate goal short of terminating the benefits of an eligible and needy WIC program child participant. *Id.* at 822.

218. *Id.*

219. *Id.* at 823.

220. The *Williams* lawyers secured a temporary restraining order on December 24, 1985, from the New York State Supreme Court enjoining Axelrod from continuing to deny the child current WIC benefits, pending a full hearing on a motion for a preliminary injunction. See Petitioner's Order to Show Cause, *Williams* (Dec. 24, 1985).

221. Cornell, *supra* note 162, at 1226.

222. The historian J.G.A. Pocock deems "verbalization itself as a political act." Pocock, *Verbalizing a Political Act: Towards a Politics of Speech*, in *LANGUAGE AND POLITICS*, *supra* note 204, at 25 (emphasis in original).

program, particularly its controlling rules and regulations on matters of eligibility and participation. Out of these meetings an organizing committee might have formed to call forth a plenary community meeting specifically to address the WIC program and related health and welfare issues. From this meeting, clients and community members might have planned numerous actions, from study groups to demonstrations, including establishing a physical presence (e.g., an advocacy table) at or outside local WIC programs to distribute information and aid independent client action.

Bounded by tradition, these opportunities for empowerment were left unexploited in *Williams*. Deprived of discourse, neither the Williams family nor their lawyers were able to engage in a joint effort to educate, organize, and mobilize similarly aggrieved individuals, groups, and communities. Even the basic groundwork of attorney/client and client/client dialogue — discourse on socio-economic history and political strategy, consciousness raising meetings, and study groups — was neglected.

With the exception of standard attorney/client interviews, no meaningful dialogue was established between poverty lawyers and the Williams family. Accordingly, the monologue and technical dialogue of the traditional attorney/client relation prevailed. Nor were rights deconstructed and synthesized to expose their contextual and transcendent nature. Thus, the transformational potential of dialogue, client organization, and community mobilization was dismissed. In sum, the preconditions — critical consciousness and dialogue — for empowerment were discarded, and with them the alternative traditions and oppositional continuities of the poor accumulated in their long struggle against state sanctioned poverty.

III. DIALOGIC EMPOWERMENT

The salutary results procured in *Williams* and like cases ratify the relative value of dominant poverty law traditions, but leave a tragic legacy for the poor.²²³ Tragic because those traditions are mired in an orthodoxy that ultimately marginalizes the poor. The attorney/client relation stands at the epicenter of this marginalization.

By seizing upon a critical theory of class and class consciousness,²²⁴ poverty lawyers can unfetter that relation. Although this seizure may occur abstractly, its application must be grounded concretely in the daily cultural experiences of the poor. To connect with and share in these experiences, and thereby facilitate a transformation in the social role of the individual poor and

223. Cf. C.V. WOODWARD, TOM WATSON: AGRARIAN REBEL iv (1938) (describing agrarian Populist battles as "the tragedy of a class, and more especially the tragedy of a section").

224. On the foundations of critical theory, see M. JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH* 1923-50, at 41-85 (1973).

the social organization of poor communities, poverty lawyers must enter into a transformational dialogue with the poor.

A. Dialogue

The notion of dialogue has been most profoundly explored by the theologian Martin Buber.²²⁵ Buber establishes a relational theory of dialogue heralding the sanctity of the "primary word I-Thou" as an open mutual world of relation.²²⁶ To Buber, this "primary word can only be spoken with the whole being. He who gives himself to it may withhold nothing of himself."²²⁷

Buber's notion of dialogue as a direct meeting involving affirmation of the other in a lived relation explains the division and separation between poverty lawyers and the poor.²²⁸ Poverty lawyers withhold relation. They hesitate to "step into direct relation" with the poor.²²⁹ Without this step into the "solidarity" of dialogic relation, there can be no connection or community, no union or unity between attorney and client.²³⁰

Buber exhorts poverty lawyers to destroy the "barrier of separation" and embrace "real relation in the world" of the poor.²³¹ Real relation is marked by "individuation" and the "interchange of actual and potential being."²³² The "world of relation" consists of many "moments of relation" encompassing different spheres, each part of a "process of becoming."²³³ This process emerges from the act of relation, from the "wholeness of real mutual action."²³⁴

Buber's teachings plant the foundation for a theory of transformational dialogue. From his relational premise, a theory of dialogue can be constructed intertwining the values of directness, mutuality, and openness into an other-affirming whole. Within that world of relation, poverty lawyers and the poor can experience the union of connection and the unity of community.

Riven by marginalizing tendencies, the attorney/client relation has shattered into a cracked monologue or at best a technical dialogue of lawyer domi-

225. M. BUBER, *I AND THOU* (1937) [hereinafter *I AND THOU*]; M. BUBER, *BETWEEN MAN AND MAN* 1-39 (1947) [hereinafter *BETWEEN MAN AND MAN*]. For lucid commentary, see R. ARNETT, *COMMUNICATION AND COMMUNITY: IMPLICATIONS OF MARTIN BUBER'S DIALOGUE* (1986); M. FRIEDMAN, *TO DENY OUR NOTHINGNESS: CONTEMPORARY IMAGES OF MAN* 17-27, 281-306, 357-73 (1967).

226. *I AND THOU*, *supra* note 225, at 4, 6, 8-9, 15.

227. *Id.* at 10-11.

228. *Id.* at 11-12, 16, 18, 27, 43.

229. *Id.* at 76. Direct relation here implies seeing the social world from the standpoint of the subordinated client. See C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 43 (1987). This approach to interpersonal relations of dominance is avowedly feminist. *Id.*

230. *I AND THOU*, *supra* note 225, at 63, 45, 59, 86-87.

231. *Id.* at 77, 99-100.

232. *Id.* at 99, 100.

233. *Id.* at 101, 103, 101.

234. *Id.* at 109, 110.

nation.²³⁵ To repair this relation and restore dialogue, poverty lawyers must address and penetrate the marginalized social role of the poor. This role is characterized by cultural and socio-historical signs.²³⁶

The prosaic signs of the poor are easily recognized. They are expressed in variations of ethnicity, gender, race, and class, in characterizations of dependence, isolation, and passivity, and in the language of acquiescence, compliance, and deference. The liberating signs of the poor, the signs of potential being and historical becoming, are more opaque. These signs are embedded in particular social roles and forms of organization.

Gramsci and Genovese expose the roots of these roles and formations, locating them in the historical continuities and traditions of class and hegemonic conflict. Thompson and Williams, as well as Foucault and Habermas, provide insight into the manner in which those roots saturate the whole body of lived experience, thus shaping the full realm of consciousness including perception, interpretation, and vision. But it is Freire and Buber who supply a method of shedding a lived domination by reaching out²³⁷ and embracing the potential of the individual poor, cooperatively decoding²³⁸ signs of domination, culling alternative and oppositional thematics,²³⁹ and reconstructing those thematics in collective transformational dialogue.

Transformational dialogue cannot spring serendipitously from the attorney/client relation. Nor can it be boiled down to a formula conjured or incanted. Transformational dialogue is instead a relational process of mutual unfolding between the attorney and client in direct and open meeting.²⁴⁰

Relational unfolding is a process of communication comprised of speech and gesture as well as silence.²⁴¹ It is a discourse between the attorney and the client-as-other in which the attorney does not merely observe and look upon

235. BETWEEN MAN AND MAN, *supra* note 225, at 19-21.

236. *Id.* at 10-13.

237. *Id.* at 21.

238. P. FREIRE, *supra* note 19, at 96-118. Freire employs decoding as a deconstructive method of critical analysis applied concretely to penetrate socially constructed situations and reveal objective meaning. *Id.* at 96.

239. *Id.* at 86-95. Freire utilizes thematics to capture the limiting (i.e., dominated) and liberating (i.e., generative) elements, folkways, and traditions pervading specific historical contexts. *Id.* at 86-95. The dialogic process of decoding takes place in "thematic investigation circles." *Id.* at 110 (footnote omitted). The investigation proceeds from Freire's central premise of "educational action as liberating cultural action." *Id.* at 110 n.32.

The form and method of Freire's investigation are analogous to the feminist consciousness raising group. As Carrie Menkel-Meadow explains:

this particular form of organization is more than a form; it is a methodology that creates knowledge from shared, collective experience. Communication occurs in a leaderless circle, and in some groups attention is paid to equality of presentation time and rotation of instrumental and affective tasks. There is a devaluation of expertise; everyone has life experiences from which something might be worth learning.

Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 55 (1985).

240. White merges Freire's pedagogy and the feminist method of consciousness raising in classifying the work of "third dimensional" lawyers. White, *supra* note 67, at 760-66.

241. BETWEEN MAN AND MAN, *supra* note 225, at 3-6.

the client-as-symbol, but becomes aware of the client-as-historical-actor apart from her marginalized social role as client-recipient.²⁴² This coming of awareness requires poverty lawyers to renounce prevailing mythologies and genuinely respond to the client-as-other, as an historical actor.²⁴³

Renunciation of debasing mythology alone is insufficient to meet the poor in transformational dialogue. Real relation requires the further repudiation of those habits tending to negate class and class consciousness, and decontextualize and atomize common struggle. Unless these habits of mind are rejected, the process of dependent-individualization will continue undeterred.

Transformational dialogue reverses that process. In its place, it substitutes the process of dialogic-individuation within a growing community of others.²⁴⁴ This alternative process encompasses three dialogic moments in corresponding relational spheres. These moments constitute interdependent points of empowerment.²⁴⁵

B. Attorney/Client Dialogue

The first moment of dialogue occurs in the sphere of the attorney/client relation. Here dialogue arises from faith, practical wisdom, respect, and sympathy. Each of these elements implies mutuality, a shared sense of direct and open engagement by the poverty lawyer and individual client.

Faith²⁴⁶ denotes fidelity and trust.²⁴⁷ It also connotes genuine and sincere belief, a kind of authenticity of motive. Practical wisdom describes reasoning that is principled and rooted in everyday experience.²⁴⁸ It suggests considered judgment informed by the ordinary lessons of everyday life.²⁴⁹

242. *Id.* at 8-10.

243. *Id.* at 16-17. On human responsiveness, see G. MORGAN, *THE HUMAN PREDICAMENT: DISSOLUTION AND WHOLENESS* 306-12 (1968).

244. *BETWEEN MAN AND MAN*, *supra* note 225, at 30-32.

245. Habermas defines these moments as points of "self-supporting higher-level intersubjectivities." J. HABERMAS, *supra* note 37, at 364.

246. Freire claims dialogue "requires an intense faith in man, faith in his power to make and remake, to create and re-create, faith in his vocation to be more fully human . . ." P. FREIRE, *supra* note 19, at 79. He proclaims: "Faith in man is an *a priori* requirement for dialogue; the 'dialogical man' believes in other men even before he meets them face to face." *Id.* See also P. TILICH, *PERSPECTIVES ON 19TH & 20TH CENTURY PROTESTANT THEOLOGY* 168-76 (C. Braaten ed. 1967) (critique of Kierkegaardian faith); M. HEIDEGGER, *BEING AND TIME* 322 (1962) (describing the "call of care" as discourse).

247. The interconnection between trust and "good will" is affirmed by Joel Handler in extending the work of Annette Baier, see Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 *UCLA L. REV.* 999, 1077-79 (1988); Baier, *Trust and Antitrust*, 96 *ETHICS* 231, 234-35 (1986). See also Simon, *supra* note 51, at 133 (defining trust as "a quality which the parties must create or fail to create in each instance.").

248. In Freire's lexicon, practical wisdom flows from "praxis: the action and reflection of men upon their world in order to transform it." P. FREIRE, *supra* note 19, at 66.

249. Freire recognizes that "the present, existential, concrete situation" of everyday life furnishes the "starting point for organizing the program content of education or political action." *Id.* at 85. From daily life, Freire suggests, "certain basic contradictions" can be discovered and posed to the poor "as a problem which challenges them and requires a response — not

Respect²⁵⁰ defines an imparted deference to independent decisionmaking and an honoring of individual client choice and preference.²⁵¹ In this way, respect follows from the cultivation of faith and practical wisdom.²⁵² Sympathy is an ethic and ideal of shared ends experienced in the relation between self and others.²⁵³ For Unger, "[c]ommunity begins with sympathy."²⁵⁴

The reaching out of empowerment begins in the first moment of dialogue within the attorney/client relation. At this meeting, the poverty lawyer must engage the individual client in a direct and open discourse concerning the myths of legal efficacy and ingrained indigent isolation and passivity.²⁵⁵ This discourse inaugurates the task of redressing and rebuilding reductive interpretations of the poor.

Where domination is interpreted and interiorized as dependence and self-depreciation, discourse may fall short. In this circumstance, the client must be encouraged to reassess her expectations of lawyer-engineered legal efficacy and to consider alternative insurgent traditions discarded by dominant poverty law traditions. Client reassessment of the myth of legal efficacy is guided by the concept of legal superstructure analysis.²⁵⁶ This analysis examines the nature

just at the intellectual level, but at the level of action." *Id.* (footnote omitted). This process of discovery and response instructs from the ordinary lessons of domination.

250. Unger denotes respect as a common duty founded on equal dignity and individual distinctiveness. R. UNGER, *supra* note 7, at 207.

251. Stephen Ellmann recommends a course of practice "in support of clients' autonomy" marked by "the client's enjoyment of the opportunity to choose, his attainment of the capacity to choose, and his full exercise of that capacity." Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 776-77 (1987). Ellmann asserts:

The guiding goal of such a practice is that a lawyer should strive to enable her client not only to know what choices await him, but also to reach full decisionmaking capacity, and then she should participate in her client's exercise of that capacity by offering information, legal advice, and those other perspectives, be they moral or political, that constitute the "fullness of [her] experience."

Id. at 777. See also Ellmann, *Reply — Manipulation by Client and Context: A Response to Professor Morris*, 34 UCLA L. REV. 1003-22 (1987). See generally D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147-55 (1977).

252. Respect can be exhibited in both large and small gestures. In neighborhood offices, for example, the poverty lawyer should seek to greet, accompany, and dispatch her individual clients. This and other small gestures, such as the flexible scheduling of evening, weekend or on-site appointments and interviews, as well as qualified involvement in family support (e.g., referrals for counseling and sheltering of battered children and women) and community outreach (e.g., attendance at community meetings), help build rapport and trust.

253. See R. UNGER, *supra* note 22, at 22, 141-42, 217, 220.

254. *Id.* at 262.

255. At the initial client interview, the poverty lawyer should carefully explain office case selection and retainer procedures, and the limited resources of the office relative to the magnitude of client and community grievances. This preparatory explanation is only the first step towards demystifying the advocacy process and involving the client/community as an active participant in that process. Cf. D. BINDER & S. PRICE, *supra* note 251, at 64-72 (proffering a more narrow construction of preparatory explanation). The subject of office case selection and resources, particularly their definitive limits, affords the client a first opportunity to grasp the importance of client/community advocacy organizations.

256. The premise of legal superstructure analysis is client knowledge and decisionmaking. To that end, the attorney/client dialogue should include a basic explanation of the judicial

of both legal institutions — courts, governmental agencies, and advocacy organizations — and legal ideology — constitutionalism, and statutory and common law jurisprudence. The purpose of the analysis is to enable clients to gather a rough understanding of the potential and limits of social change accrued through direct service and law reform litigation. The goal in enlarging the breadth of discourse is to move the client beyond a subordinate posture of passive lawyer reliance towards an active, participatory recovery of insurgent community traditions.²⁵⁷

Boyte recounts that people engaged in the process of recovering an oppositional history of insurgency “draw upon rich cultural resources and traditions from the past, unearthing subversive themes of protest, dignity, dissent, and self-assertion, and fashioning them into foundations for a new culture.”²⁵⁸ By drawing from indigenous sources of cultural dissent, insurgent movements ensure a continuity and vitality of opposition.²⁵⁹

Demythologizing dominant poverty law traditions in order to recover alternative traditions and oppositional continuities does not — and should not — preclude the employment of the methods of direct service and law reform litigation²⁶⁰ as instruments of counter hegemonic education,²⁶¹ protection,²⁶²

system, its courts, judges, personnel, rules, and folkways. The explanation should note the attendant limits of the judicial process as an instrument of affirmative social change and the radiating force of class, gender, and racial prejudice throughout that process.

Similar analysis should be applied to governmental agencies and their private affiliates responsible for promulgating and implementing welfare policies and practices. As seen in *Williams*, these agencies and their personnel exercise decisive power over the lives of client-recipients. *Williams v. Axelrod*, 133 Misc. 2d 817, 508 N.Y.S.2d 371 (Sup. Ct. 1986). It is essential, therefore, that poverty lawyers discuss with clients agency structure, operation, and susceptibility to legal and political attack.

Likewise, legal superstructure analysis should review and summarize, in a simplified form, the substance of the constitutional, statutory, and decisional law impinging upon client grievances. This is not to suggest that clients should be entangled in the complexity of federal or state law, but instead to emphasize that clients should be supplied the opportunity to learn the substantive foundations of specific litigation. Without this background, clients will be unable to participate meaningfully in the planning of litigation tactics and strategy. This learning opportunity should be supplemented by self-help handbooks and manuals.

257. On American insurgent traditions, see T. BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988); D. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 431-624 (1988); H. ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 247-397, 435-569 (1980); L. GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 97-124 (1978).

258. H. BOYTE, *supra* note 84, at 179.

259. *Id.* at xii. As Taylor Branch points out in his incisive history of the civil rights movement, the vitality of dissent may continue across the dividing lines of class and race. See T. BRANCH, *supra* note 257, at 143-205, 451-91 (1988) (contrasting the Montgomery bus boycott and the Freedom Rides).

260. Habermas approves this conversion of method as the “critical appropriation of tradition.” J. HABERMAS, *supra* note 6, at 70-71.

261. William Simon puts forth a critical vision of practice “as a process of constituting or reconstituting nonhierarchical communities of interest.” Simon, *supra* note 60, at 485. He envisions situations “in which the client is encouraged to enter into nonhierarchical relationships by the experience of solidarity and another in which she is empowered to withdraw from or

and positive insurgent growth. Mounting the instruments and institutions of the law either to safeguard or strengthen the rights of the poor, however, requires a prior deconstruction and synthesis of rights theory. This synthesis combines the concepts of individual and class rights in a unified, multi-dimensional theory of contextual and transcendent rights.

The discourse of multi-dimensional rights theory should be held even though the individual client may articulate a limited rights demand. In comparison to *Williams*, where the client's rights demand was couched narrowly in terms of regaining WIC benefits, the poverty lawyer should not readily accept such a crabbed interpretation of entitlement. Nor, by contrast, should she disrespect the client's rights demand. Rather, she should focus discourse on the historical derivation of that narrow, particularized statutory right, especially the economic, political, and social collision of interests underlying its development. At the same time, she should focus on the potential evolution of a broader, more comprehensive nutritional right, a right universal in scope.

By focusing on multi-dimensional rights theory in the "real, concrete, historical situation"²⁶³ of rights demand, the attorney/client dialogue may elevate immediate rights demand to transcendent rights aspiration. The enlargement of rights demand from a contextual to a transcendent dimension is necessary to counterbalance the regressive forces of atomization and negation. In this respect, multi-dimensional rights theory vindicates the contextual rights demand of the individual client while inculcating transcendent rights aspiration on behalf of the client historical class.²⁶⁴

C. Client/Client Dialogue

The second moment of dialogue occurs in the sphere of the client/client

challenge hierarchical ones." *Id.* (footnote omitted). These situations may be realized in client/client and client/community dialogue and collective opposition.

262. In his critique of CLS scholars, Richard Delgado points out: "Rights do, at times, give pause to those who would otherwise oppress [minorities]." Delgado, *supra* note 41, at 305. He adds, "[f]or minorities . . . that rights minimize many forms of coercion is of enormous importance." *Id.* at 306. See also Kennedy, *supra* note 67, at 1062-63 (emphasizing the value of formal rights in protecting blacks against invidious racial discrimination); Crenshaw, *supra* note 41, at 1384-85 (characterizing rights as "the means by which oppressed groups have secured both entry as formal equals into the dominant order and the survival of their movement in the face of private and state oppression."); Williams, *supra* note 41, at 413 (defending rights as measures of actual entitlement providing protection against genuine vulnerability).

This point applies with equal force to the safeguarding rights of the poor, and likewise, to women "who are not in a position to abandon hard-won rights for the ephemeral promise of direct political struggle." Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1283 n.24 (1987) (citation omitted). See also Scales-Trent, *supra* note 61, at 40-41 (claiming that the assertion of rights is the only source of protection for dispossessed black women).

263. P. FREIRE, *supra* note 19, at 185.

264. The germination of transcendent rights theory is found in Freire's analysis of cultural synthesis and the "deception of palliative solutions." *Id.* See also Matsuda, *supra* note 41, at 333 (describing an aspirational vision of law as part of the experience of people of color); Schneider, *supra* note 41, at 629 (presenting the linkage between the specific experiences of women and the universal claim of rights in women's rights discourse).

relation. As with the attorney/client relation, client/client dialogue emerges from the mutual affirmation of the client-as-other in direct and open meeting. The unfolding of dialogue from the individual interchange of client/client relation is a critical facet of empowerment. The evolution of community, class, and class consciousness is untenable without client/client dialogic relation.

The centrality of this relation is trampled by dominant poverty law traditions. William Simon observes "neither communication among clients nor direct client participation is valued" by these traditions.²⁶⁵ This devaluation contrasts against his own proffered "[c]ritical notion that a community of interest is something to be created in the course of representation."²⁶⁶ On this view, the creation of client relational community becomes linked to "communication among clients and direct participation."²⁶⁷ Consistent with empowerment, "[c]ommunication among clients and direct participation are valued for their potential to increase understanding and solidarity and to safeguard against hierarchy."²⁶⁸

Client/client relational communication and participation requires not only the proliferation of client voices, but also the extension of discourse to the subjects of socio-economic history and political strategy. Experience shows this discourse may sprout naturally between attorney and client, as well as among clients, in poverty-law offices, welfare agency waiting rooms, courtroom halls, church basements, and tenement stairwells.²⁶⁹

When words empower, they may facilitate client socio-economic identification and class affiliation first in local communities, then gradually in state and national communities. For example, a WIC recipient confronted, as in *Williams*, by benefit termination caused by hostile and uncooperative agency officials should be told of similarly situated recipients represented by the poverty lawyer's office in the local community. The client should be further advised of the shared political and socio-economic status — as unrepresented or underrepresented social class — of those recipients both in the community and in wider state and national communities. Additionally, she should be apprised of the history of these local, state, and national client communities, particularly regarding the formation of political alliances.

Once the client understands she is part of an oppressed *political* community, not simply an individual isolated and disconnected in her experience of oppression, she should be encouraged to join client study and consciousness raising groups and client/community advocacy organizations. Conceding that

265. Simon, *supra* note 60, at 487. Simon conflates the dominant direct service and law reform traditions into the inclusive concept of "established professional culture" or "professional vision." *Id.* at 469, 487.

266. *Id.* at 487.

267. *Id.*

268. *Id.* (footnote omitted).

269. Doubtless, even the most balanced and circumspect methods of discourse may quickly deteriorate into lawyer domination and manipulation. See Ellmann, *supra* note 251, at 719-33. To safeguard against this marginalizing tendency, poverty lawyers must eschew dominance and manipulation and strive to realize Buberian openness in the attorney/client relation.

the process of individual client empowerment may come slowly, and in some cases never materialize, does not warrant abnegating the undertaking.

Discourse on socio-economic history should focus on enabling clients to locate themselves on the class map of American society. Client socio-economic location entails client study and organized client/client investigation and reflection.²⁷⁰ The purpose of these joint endeavors is to broaden client awareness of self as an historical actor within a larger class and community whole.²⁷¹

Socio-economic history, even at an elementary level, is vital to the unfolding of client/client relation. Lacking an informed sense of self and place in historical context, individual clients may be unable to overcome narrow self-interest and perceive the common interests of class and shared community. Thus, they may be unwilling to participate in the united resurrection of that

270. Under Freire's pedagogy, attorney and client act as *co-investigators* of the thematics of domination. P. FREIRE, *supra* note 19, at 97, 68-74, 93-123. Within this joint investigation, Freire claims "[a]ction and reflection occur simultaneously." *Id.* at 123. Accordingly, "[c]ritical reflection is also action." *Id.*

271. Materials relevant to client socio-economic location span a vast range. In a single community, these materials should include quantitative data measuring client poverty populations in terms of age, disability, gender, household composition, income, wealth, and race. Additional data highlighting the gravity of community oppression (e.g., alcohol and drug addiction, battered women, child abuse, crime, hunger, infant mortality, juvenile delinquency, school truancy and dropout rates, and teenage pregnancy) are also pertinent. Data on federal, state, and local funding of public resources, including police, fire, sanitation, parks, hospitals, mental health and drug rehabilitation clinics, and social services are equally germane.

Community socio-economic data should be supplemented by historical materials documenting the evolution of local neighborhoods. Particularly noteworthy are patterns of economic development, employment, housing displacement and segregation, and immigration. In assembling and interpreting this data, efforts should be made to discern and chart factors influencing the growth and decline of neighborhoods. Close attention should be devoted to the role and effect of public and private initiatives in ameliorating and preserving neighborhood prosperity.

Socio-economic materials also should winnow and synthesize data from national, state, and adjacent local sources. The goal in distilling these materials is to present an in depth and detailed profile of client poverty populations. To that end, socio-economic data illuminating the plight of impoverished communities should be accumulated widely. Data then should be analyzed comparatively seeking a correlation between communities connected by factors such as gender, household composition, or race.

Likewise, national, state, and local historical sources should be consulted in tracing client poverty populations. The similar objective is to delineate the history of a client population that goes beyond anecdote and myth. See, e.g., COALITION ON HUMAN NEEDS, *HOW THE POOR WOULD REMEDY POVERTY* (1988); B. LEYSER, A. BLONG, & J. RIGGS, *BEYOND THE MYTHS: THE FAMILIES HELPED BY THE AFDC PROGRAM* (2d ed. 1985). By combining socio-economic and historical data, poverty lawyers may be able to compose an accurate account of client poverty populations specific to local communities and common to larger state and national communities.

The account should be drafted in conjunction with individual clients and client/community groups. Because client populations may vary in literacy skills, the account should be plainly written with statistical analysis limited to easily grasped illustrations. The account then should be reviewed with individual clients and organized client/community study groups for revision. After revision is complete, the account should be circulated among client/community groups for dissemination. The entire process of drafting and distribution should be client-centered and, to the extent possible, client-participatory.

community. Poverty lawyers should work to sharpen client perception of relational community, of individuals acting in mutual affirmation and solidarity of interest.

D. Client/Community Dialogue

The third moment of dialogue occurs in the sphere of client/community relation. Like the dialogic moments of attorney/client and client/client relation, this relation unfolds from mutual affirmation of the client-as-other in direct and open meeting. This meeting is pluralistic drawing from and coalescing around a community of clients. In that meeting, empowerment of class and class consciousness is enriched.

To promote client/community relation, the attorney/client dialogue must branch off into straightforward political discourse.²⁷² This turn transports the attorney/client relation outside the conventions of dominant traditions to arrive at a *political base* theory of representation.²⁷³ Invoked by Bellow and amplified by Simon, this theory proposes to bond traditional litigation tactics to political organizing, protest, and electoral politics, thereby forging an integrated political strategy.²⁷⁴

272. Bellow and Kettleson stress that "[p]olitical organization and activity by disadvantaged groups will be necessary to maintain, expand and assure full implementation of any benefits and rights that lawyers might establish." Bellow & Kettleson, *supra* note 50, at 383-84 (footnote omitted). See Condlin, "Tastes Great, Less Filling": *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 49-53 (1986) (endorsing overt political discourse in clinical setting); Simon, *supra* note 157, at 558-59 (studying the political character of lawyering and advocating a Political Vision); Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694, 702-06 (explicating the political dimensions of poverty law, particularly as a community instrument and resource).

273. Comment, *supra* note 159, at 1078 (quoting Bellow). Bellow expounds that "legislatures will make new laws, and executives will enforce new rules, where interest groups exist to exert continuing pressure." *Id.* (footnote omitted). For theoretical justification, see D. RICCI, *COMMUNITY POWER AND DEMOCRATIC THEORY: THE LOGIC OF POLITICAL ANALYSIS* (1971); R. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971); R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961). Compare S. BOWLES & H. GINTIS, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT* 91 (1986) (describing "the manner in which the power of capital undermines the liberal promise of autonomous and effective action by individuals and groups"); G. DOMHOFF, *WHO REALLY RULES? NEW HAVEN AND COMMUNITY POWER RE-EXAMINED* (1978) (challenging pluralist conceptions of local and national power structures); Abel, *supra* note 55, at 497 (assailing the "apolitical conception of legal aid as simply another means of fostering liberal pluralism").

274. See Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1499-1513 (1986). Historians contemplating the community action programs of the 1960s confirm the efficacy of the Bellow-Simon theory of "legal intervention" as a framework for reform. P. MARRIS & M. REIN, *DILEMMAS OF SOCIAL REFORM: POVERTY AND COMMUNITY ACTION IN THE UNITED STATES* 294 (2d ed. 1973). They wisely point out, however, that this strategy encountered fierce and ultimately fatal resistance, at both local and national levels, once legal activists overstepped the "limits of political tolerance." *Id.* at 293, 164-90. The inherent risk of political encroachment stands independent of equally nettlesome issues of constituency, coalition, funding, planning, and leadership development. *Id.* at 56-163. For prospective and retrospective assessments of the community action program, compare Cannon, *Enlightened Localism: A Narrative Account of Poverty and Education in the Great Society*, 4 YALE L. &

Reconstituting this theory, Habermas recommends "a new division of powers within the dimension of social integration" represented by autonomous self-organized public spheres of solidarity.²⁷⁵ He contends autonomous public spheres arise from domains of everyday practice and centers of concentrated communication.²⁷⁶ By means of communication and through forms of self-organization, Habermas claims the collective capacity for action is strengthened.²⁷⁷

The imperatives of interest group politics and class power compel poverty lawyers and clients to move towards client community. This movement requires "working with organized groups of poor people, working with organizers, and occasionally even organizing itself."²⁷⁸ The collaboration of poverty lawyers, clients, and political organizers in the formation of community empowerment groups assigns a tactical role to the traditional methods of direct service and law reform litigation. Each method "becomes simply one tactic among many available to poor people's groups."²⁷⁹

The fundamental rethinking demanded by the unfolding of client/community dialogue sparks a moment of democratic renewal for poverty lawyers. Disclaiming marginalizing traditions, they may search dialogically for multi-dimensional rights issues galvanizing client/community organization at local, state, and national levels. Collaboratively fashioned, these catalyst²⁸⁰ rights

POL'Y REV. 6 (1985) and Sloan, *The Community Action Program and the Social Responsibility of the Local Lawyer*, 51 VA. L. REV. 1545 (1965).

275. J. HABERMAS, *supra* note 37, at 364.

276. *Id.*

277. For a deepening of Habermas's understanding of critical theory and communicative action, see R. RODERICK, HABERMAS AND THE FOUNDATIONS OF CRITICAL THEORY 62-173 (1986).

278. Comment, *supra* note 159, at 1078. See also Failinger & May, *supra* note 10, at 55 ("Group-oriented approaches to legal services recognize that the poor have common interests and are subjected to class treatment, a reality that suggests the desirability of group legal responses.").

279. Comment, *supra* note 159, at 1078 (footnote omitted). The implications of this tactical organizing approach are significant. Offering an example of this approach in practice, Bachmann surmises:

[c]onsider an intersection where the lack of a stop sign is causing traffic hazards and threatening children. A lawyer would solve this problem by going to court to get the stop sign put into place. From this process people either do not know how the stop sign got there or learn that lawyers produce change. Both results aggravate people's perceptions of their powerlessness, which is disastrous from an organizer's perspective. In contrast to the lawyer, the organizer would knock on all the doors in the neighborhood, organize a meeting of interested people, and help them collectively deal with the problem. They would probably hold a mass demonstration, meet with a city official, and successfully pressure her to provide the stop sign. From this experience, people in the neighborhood would learn that they can have power if they organize, and coordinate their efforts. Because so many individuals participated in producing the sign, nearly everyone in the neighborhood would learn this lesson. Suddenly an aspect of the neighborhood is the product of the residents' personal actions.

Bachmann, *supra* note 60, at 6.

280. Comment, *supra* note 159, at 1079. Scheingold argues that concentrating litigation tactics on "building political coalitions and mobilizing resources on behalf of implementation"

issues may awaken dormant client/community consciousness and mobilize the building of independent, locally-based client/community empowerment groups.²⁸¹

This boldly political object transforms the goal of representation from the protection and expansion of individual or group entitlement claims to the establishment of client/client and client/community organization. As Bellow mentions, this methodological transformation must be accompanied by a re-orientation of poverty lawyer perspective. He remarks: "The organization's purpose is to bring about some change in the situation of its members and to establish some real modification of problems they face. That may involve changing legal rules; it may not."²⁸²

Perceiving traditional litigation methods as tactical organizing techniques²⁸³ directs poverty lawyers to adopt a role subordinate to clients in organizing client/client and client/community empowerment groups. Lawyer adoption of a subordinate role is crucial to the fecund evolution of these grass roots organizations. Without the separation of lawyers from leadership positions, client and community organizations will be fixed to a lawyer-engineered political strategy.

Commentators have denounced the tendency of poverty lawyers to arrogate leadership through domination. That tendency, charged by force of personality²⁸⁴ and professional training, is anathema to independent group formation and leadership development.²⁸⁵ Defining the poverty lawyer's role as secondary to and supportive of client/community empowerment enables

may enable the poor to acquire sufficient autonomy to generate and sustain their own entitlement claims, and hence, reduce their dependency. Scheingold, *supra* note 56, at 891.

281. Comment, *supra* note 159, at 1086. See also Abel, *supra* note 55, at 522 ("Individual apathy and feelings of impotence can be overcome through organization and collective action, but again there are obstacles.").

282. Comment, *supra* note 159, at 1087 n.28 (quoting Bellow). As Scheingold warns, without the reorientation of consciousness and commitment to the insurgent "dynamics" of social change, poverty lawyers will again "become bogged down in litigation tactics that may be personally gratifying but that are institutionally disruptive and socially inconsequential[.]" Scheingold, *supra* note 56, at 888.

283. Comment, *supra* note 159, at 1087. Bellow and Kettleson admonish:

Unless public interest lawyers find ways of pursuing shorter term legal gains without encouraging dependency and blunting both individual and organized client initiatives to deal with their own problems, they will substantially undermine the possibility of the sorts of political activity essential to any long term resolution of the inequities that burden their clients.

Bellow & Kettleson, *supra* note 50, at 384 n.182.

284. On charismatic domination and legitimation of obedience, see Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 79 (H. Gerth & C. Mills eds. 1946).

285. Commentators decry the "significant dangers" accompanying the involvement of "middle class lawyers" in organizing the poor.

More articulate, better educated, aggressive by nature and training, some lawyers tend to dominate newly formed groups, even when they try not to; such dominance, even if the middle class lawyer has been able to internalize the perspective of the poor, will generally result in the same dependence on the lawyer which a strategy of test case litigation inevitably means for the poor. The organization will not develop the aggres-

her to structure direct service and law reform litigation in accordance with the priorities set by client/community groups. The generation of litigation initiatives activating and reinforcing client/community wholeness must flow from client/community empowerment groups not poverty lawyers.²⁸⁶ The primacy of these groups assures client/community-centered decisionmaking regarding the content and direction of group policy.²⁸⁷

The emergence of client/community empowerment groups permits poverty lawyers to deconstruct more effectively the myths of legal efficacy and inherent indigent isolation and passivity in transformational client/community settings. Because counter hegemony must be constructed from these mythological ruins, poverty lawyers must simultaneously communicate multi-dimensional rights theory. Conveying this information is a cardinal element of empowerment.²⁸⁸

Multi-dimensional rights education may broaden the historical understanding of individual clients, client/client, and client/community groups. Moreover, rights education may serve to encourage clients to communicate and share their common complaints with a community of others in like situations. This dialogue is transformational in its power to invigorate political organization and mobilization around basic, generally held grievances.

sive and self-confident indigenous leadership that is probably the most effective stimulus to a vigorous membership, and the only lasting basis for the organization's power.

Comment, *supra* note 159, at 1091 (footnote omitted). See also Abel, *supra* note 55, at 578-79 (attributing poverty lawyer preference for litigation to "its higher visibility, quicker results, and greater legitimacy"); J. KATZ, *supra* note 74, at 105-22 (describing law reform litigation as a "culture of significance").

286. Comment, *supra* note 159, at 1088. This analysis follows the main outlines of Bellow's integrated model of politics. The conceptual precursor of the class advocacy model, based on "representation of the poor with respect to their common or collective interests," is sketched in the earlier work of Jerome Carlin and Jan Howard. See Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 436 (1965).

287. As Lawrence Grosberg and Deborah Rhode demonstrate, client/community decisionmaking expressed in class actions may be fractured by internal conflicts over divergent litigation interests commonly arising during "settlement or remedial deliberations." Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1188 (1982). See Grosberg, *Class Actions and Client-Centered Decisionmaking*, SYRACUSE L. REV. (1989) (forthcoming); Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). See also Meeker, Dombrink & Song, *Perceptions About the Poor, Their Legal Needs, and Legal Services*, 9 LAW & POL'Y 143 (1987) (finding little similarity between the poverty community and community organizations concerning resource allocation priorities).

Derrick Bell shows these internal conflicts also may distort the attorney/client relation. See Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

288. A.F. Ginger comments:

When a lawyer talks to people about their rights in a fundamental sense, he strengthens the individual client and the organizational client to the point where they are prepared to do things they were afraid to do before. Not that you should tell them what they should do and should not do. But certainly they should know what the law says, and something about the history of this society.

Comment, *supra* note 159, at 1086 n.25 (quoting Ginger, *The Movement and the Lawyer*, 26 GUILD PRACTITIONER 12 (1967)).

Poverty lawyers can stimulate client organization and community mobilization by drafting self-help advocacy materials, such as legal handbooks and manuals, which translate the law into a more intelligible and less intimidating medium.²⁸⁹ This translation is particularly cogent if undertaken in the context of client/community lay advocacy training. Training welfare clients, for instance, to teach others similarly situated about relevant program rules and regulations or agency procedures instills a provocative lesson in the practice of collective self-help.²⁹⁰

A more provocative lesson poverty lawyers prudently fear to broach concerns client physical confrontation with oppressive actors, as vividly portrayed in *Williams*. This fear, however, exerts an overinclusive chilling effect. Viewed as the political venting of either aspiration or dissent, individual and mass confrontation are fundamental to the "process of democratic movement-building."²⁹¹ Because these forms of confrontation are at different times unforeseeable and "overarchingly difficult"²⁹² to fashion, and at all times dangerous, it may be necessary to counsel clients regarding contemplated acts of civil disobedience or political protest.

The object of confrontation is political incitement.²⁹³ As an incendiary act of politicization, confrontation may prove essential to community activiza-

289. Wexler, *supra* note 157, at 1056-57. Expanding on this point, Wexler states: Having a summary and explanation of the laws which affect their lives means a great deal to poor people. It means that they have a weapon with which to fight back, and knowing that they have the weapon builds the security to engage in the fight. Many poor people do not even know that they have legal rights; very few know the substance of even their most fundamental rights.

Id. at 1057. For concrete examples, see THE LEGAL AID SOCIETY, HOMELESS FAMILY RIGHTS PROJECT, HOMELESS FAMILIES KNOW YOUR RIGHTS! (1987); THE LEGAL AID SOCIETY, COMMUNITY ADVOCATE PROJECT, THE PEOPLE'S GUIDE TO FAIR HEARINGS IN NEW YORK CITY (1985).

290. Wexler, *supra* note 157, at 1056-58. Wexler adds:

If properly trained, welfare recipients can help other recipients compute their own budgets, figure their own available income and resources, succeed at eligibility interviews, win fair hearings, negotiate with merchants for credit, lobby for legislative and administrative changes in welfare, appear before hospital boards, and so on. Most often poor people can help each other better than lawyers can; they have easier access to other poor people, know the problems intimately, and can act in ways which lawyers fear to act.

Id. at 1057.

291. L. GOODWYN, *supra* note 257, at XVIII (construing "democratic movement-building" as a four-stage "sequential process" of formation, recruitment, education, and institutional politicization).

292. *Id.* at XVII. Where the individual or group client purpose involves civil disobedience, confidentiality doctrines must be assessed. To accommodate the sometimes clandestine needs of political confrontation and the professional canons of compelled disclosure, the attorney must fully explain confidentiality to the client not only to avoid misleading her, but also to permit her to forego legal representation when essential to preserve the act of disobedience itself. For an elaboration of the obligation to explain confidentiality, see Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703 (1988).

293. The vagueness of individual and community thresholds of tolerance renders political

tion and mobilization.²⁹⁴ Its value, when effective, lies in its visceral quality of empowerment as a shared experience of lived political principle.²⁹⁵

The poverty lawyer's role in political confrontation is limited. Working in unison with political organizers and client/community groups, she should help provide insight into the legal ramifications of a direct action, in specific the imperiling risk of civil and criminal penalties. In no circumstance should she participate in that action. Nor should she assume the role of political counsel on matters of tactics and strategy. Rather she should cabin her activities to the ken of legal knowledge. Armed with this knowledge, client/community empowerment groups can prepare and execute confrontational political actions in light of legally appraised repercussions.

The dialogic moments of attorney/client, client/client, and client/community relation permit the mutual embrace of individual and collective values of solidarity.²⁹⁶ Solidarity creates community. The creation of democratic community hinges on "cooperative struggle,"²⁹⁷ on the meeting of the poor "in cooperation in order to transform the world."²⁹⁸ That transformation re-

incitement an inexact and explosive empowerment device. Cf. J. HABERMAS, *supra* note 6, at 63 (commenting on the uncertainty of such thresholds).

With respect to protest in an urban community, Martin Luther King, Jr., explains:

To raise protest to an appropriate level for cities, to invest it with aggressive but nonviolent qualities, it is necessary to adopt civil disobedience. To dislocate the functioning of a city, without destroying it, can be more effective than a riot because it can be longer lasting, costly to the society, but not wantonly destructive, [sic] Moreover, it is difficult for government to quell it by superior force.

D. GARROW, *supra* note 257, at 574 (quoting Martin Luther King, Jr.). See also M. KING, *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289-302 (J. Washington ed. 1986).

294. See L. GOODWYN, *supra* note 257, at XVIII-XXIV. On the transformation of black dissident consciousness generated by litigation and extra-legal protest (e.g., boycotts, sit-ins, marches, and riots), see Kennedy, *supra* note 67, at 1064-66.

295. See generally H. RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* (1977). Confrontation reflects principled political action embodying a sense of witness and opposition to injustice. See Margolis, *On the Ethical Defense of Violence and Destruction*, Held, *On Understanding Political Strikes*, Gendin, *Governmental Toleration of Civil Disobedience*, and Schochet, *The Morality of Resisting the Penalty*, in PHILOSOPHY & POLITICAL ACTION 52-71, 109-28, 160-96 (V. Held, K. Nielsen, & C. Parsons eds. 1972). Even when marred by bloodshed, it may inspire commitment to further action. As the civil rights movement demonstrated, confrontation may also stir a sympathetic reaction and support from peripheral communities. Of course, confrontation may also spiral into inane and self-destructive acts of violence. See generally K. SALE, *SDS* (1973); *WEATHERMAN* (H. Jacobs ed. 1970).

Wexler reiterates this theme of protest, maintaining:

If the people confront those who oppose them and win, they see that they can beat those whom they will inevitably oppose again. That lesson is more valuable than anything the lawyer can win, or any ease in his style of victory.

Wexler, *supra* note 157, at 1058 (footnote omitted).

296. For Unger, the values of solidarity come from the practices and institutions of group life; their worth stands independent of their use to individual will or combination of individual wills. R. UNGER, *supra* note 7, at 29. The subversion of relationships of dependency and domination, according to Unger, is the "crucial determinant of the progress of equity and solidarity in law." *Id.* at 212-13.

297. L. GOODWYN, *supra* note 257, at XXIII-XXIV.

298. P. FREIRE, *supra* note 19, at 167.

quires the unity²⁹⁹ of cultural consciousness and political organization where the poor "see themselves" as a self-liberating class.³⁰⁰ Poverty lawyers can empower liberating consciousness and organization by turning openly to the poor and jointly engaging in a dialogue about the world.³⁰¹

Poverty lawyers must be circumspect in naming that world. As Unger reminds us, "[h]e who has the power to decide what a thing will be called has the power to decide what it is."³⁰² Naming, therefore, must be guided by critical self-reflection and dialogic reciprocity³⁰³ as well as by allegiance to the open discourse of diverse community.³⁰⁴

Naturally, language, like identity and role, is slow to acquire new meanings. Here, the solution advanced by Unger and Minow is instructive: "use of old words in new ways."³⁰⁵ This solution, however, is itself vulnerable to privileging.³⁰⁶ Privileging new forms of discourse may silence different and opposing voices, thus doing violence to democratic community. Caring for

299. *Id.* at 172, 173-85.

300. L. GOODWYN, *supra* note 257, at XXV. To enter that world, the poverty lawyer must personalize and contextualize the poor client's problems. Menkel-Meadow, *supra* note 239, at 57-58.

301. P. FREIRE, *supra* note 19, at 181.

302. R. UNGER, *supra* note 22, at 80.

303. Dialogic reciprocity hinges on the poverty lawyer's ability to maintain a critical self-awareness of the "necessary situatedness" of her own standpoint. C. MACKINNON, *supra* note 229, at 59-60. *See also* Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 595-96 (1988) (discussing dialogic reciprocity). With this understanding of self, the poverty lawyer may gain "some access to the truth of the situation." C. MACKINNON, *supra* note 229, at 60.

304. On the chorus of voices and common purposes of community, see R. UNGER, *supra* note 22, at 220-25, 249-64.

305. *See id.* at 16; Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987). Naming postulates a reinterpretation and reconstruction of both word and practice. That reconfiguration is itself an act of empowerment. *See* Scales-Trent, *supra* note 41, at 43 ("Naming oneself, defining oneself and thereby taking the power to define out of the hands of those who wield that power over you, is an important act of empowerment.").

306. Privileged discourse may subordinate differences of class, culture, gender, and race. *See* Scales-Trent, *supra* note 41, at 13 (describing a system of mythology and misinterpretations degrading the status of black women); Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1458 (1989) (describing the socio-historical and legal "invisibility" of black women); Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989) (discussing discursive themes and practices of European-derived colonialism and racism); Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251 (1989) (examining process of transforming stereotypic images into vehicles for discrimination); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing the cultural meaning of racial stereotype).

Minow recognizes the "dilemma of difference" in the multiple contexts of gender, race, ethnicity, and class, as well as in the evolution of current feminist theory and practice, *see The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12 (1987); Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

difference in the context of community is the unresolved task of dialogue.³⁰⁷

CONCLUSION

The theory of counter hegemonic empowerment entrusts the poor with the responsibility for their own historical transformation. Twenty-five years of oftentimes dedicated advocacy have shown poverty lawyers cannot discharge that responsibility. At best, poverty lawyers can provide particularized aid and forge piecemeal reform.

The importance of these efforts should not be denigrated. Fending off hunger and homelessness, even barely or momentarily, is of no small comfort to those who would otherwise go hungry and homeless. Conversely, winning selected skirmishes against a looming poverty should not distract poverty lawyers from larger goals and untoward consequences.

The goal of poverty law should, indeed, *must* be the abolition of poverty. By now it seems painfully clear that the traditional methods of poverty law — direct service and law reform litigation — have fared badly in that abolitionist effort. The tragedy of this effort lies not in being bested by poverty, but in running afoul of history.

Poverty lawyers negate the insurgent history of the poor, a history of dissent and protest, a history of class and class consciousness. This history is daily rewritten by poverty lawyers bent on unmindfully reifying myths of legal efficacy and inherent indigent isolation and passivity. By decontextualizing and atomizing the common struggle of the poor, these revisionist myths deny the poor a history of individual rebellion and collective solidarity, instead reducing their experience to the demeaning label of dependent client-recipient.

Only by redressing this reductionism, restoring the fullness of historical experience, and recovering the oppositional continuities of alternative traditions, can poverty lawyers facilitate the unification of the poor into a class-for-itself consciously striving to remake the oppressive world of poverty. Remaking this world begins with the transformation of the attorney/client relation, the dialogic point of connection between poverty lawyers and the poor.

By recasting the attorney/client relation as a direct and open meeting of mutual affirmation, the historical potential of the poor may unfold. This unfolding may continue in the meetings of client and client as well as client and

307. See Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 CARDOZO L. REV. 989, 1017-22 (1987) (unpacking the ethic of caring for difference).

The process of dialogic resolution is feminist in employing a method of knowing — consciousness raising — to discern the meaning of difference and exclusion. In the “telling and sharing of experiences[,]” Menkel-Meadow finds the “potential for breakthrough, transformation, epiphanies of knowledge, and change and contribution.” Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 31-32 (1987). The fulfillment of this potential implies the possibility of coercion-free discourse. Until that possibility is demonstrated, unencumbered by ideological determinations, the task of dialogue must be left unresolved.

community. In these dialogic moments of empowerment, the poor make history happen.