

1990

Speaking Out of Turn: The Story of Josephine V.

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, *Speaking Out of Turn: The Story of Josephine V.*, 4 *Geo. J. Legal Ethics* 619 (1990).

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.

Speaking Out of Turn: The Story of Josephine V.

ANTHONY V. ALFIERI*

When there is no history there is no metaphor¹

INTRODUCTION

American lawyer traditions present rich opportunities for ethical inquiry. Because of the breadth and diversity of those traditions, inquiry must be tailored to specific lawyer contexts and practices. This article will address the context of poverty law and the ethical dimensions of practice in impoverished communities. My purpose is to augment the expanding body of literature rededicated to the study of poverty law by exploring the tension internal to its distinctive practice.²

From the outset, it is important to acknowledge that a number of notable

* Assistant Professor of Law and Director of Clinical Studies, Marquette University Law School; A.B., Brown University, 1981; J.D., Columbia University School of Law, 1984. I am grateful to Marie Ashe, Robert Burdick, Naomi Cahn, Clark Cunningham, Phyllis Goldfarb, Peter Margulies, Michael Perlin, Deborah Rhode, Paul Tremblay, Louise Trubek, and Ellen Barker Grant for their commentary and support. I also wish to thank Anthony Dinota, Beverly Franklin, Jennifer Woods, and the Marquette University Law School library staff for their research assistance.

This article is dedicated to the 96 students of my Professional Responsibility class for their spirited participation in role-playing, facilitation groups, and shared learning.

1. M. HARPER, *Debridement*, in *IMAGES OF KIN: NEW AND SELECTED POEMS* 69 (1977). The full text of the poem is set forth below:

When there is no history
there is no metaphor;
a blind nation in storm
mauls its own harbors
spermwhale, Indian, Black,
belted in these ruins.

Id.

2. For examples of the resurgent literature, see Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2105 (1991); Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88); Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-85); Failing & May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1 (1984); 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); Luban, *The Quality of Justice*, 66 DENVER L. REV. 381 (1989); Sarat, "The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J. L. AND HUMANITIES 343 (1990); Scheingold, *The Dilemma of Legal Services*, 36 STAN. L. REV. 469 (1984); Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984); White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990) [hereinafter *Notes on the Hearing of Mrs. G.*]; White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88) [hereinafter *Making Space for Clients to*

efforts presage this investigation.³ As a result of these efforts, we have acquired a greater understanding of the poverty lawyer's habits of thinking, seeing, and speaking. What we have not learned, however, is the extent to which the impoverished client perceives, and the manner in which she responds to, such ingrained habits. Does the client accept or contest lawyer ways of thinking? Moreover, does the client embrace or diverge from lawyer ways of speaking? In short, what is the form and substance of client interpretation?

Even the most discerning studies of the lawyer-client relation in the context of poverty law are perplexed by the nature of the interpretive process. Due to the complexity of that process, I will put forward a framework of analysis tentative in both its premise and conclusions. The analysis is divided into four parts. Part I introduces the notion of ethical lawyering. Part II considers the rationality and discourse of lawyer storytelling, especially the themes of resistance and suppression. Part III recounts the story of Josephine V., an impoverished Hispanic woman, and her act of speaking out of turn.⁴ Part IV advances an ethic of resistance.

I. ETHICAL LAWYERING

The notion of ethical lawyering is culled from longstanding practices of the poverty lawyer.⁵ Historically fashioned by direct service and law reform advocacy, the practices are unified by the concept of lawyer paternalism.⁶ By

Speak]; White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

David Luban identifies human autonomy, self-reliance, and active political participation with a poverty law practice based vision of client empowerment. Luban, *The Quality of Justice*, 66 DEN. L. REV. 381, 413 (1989).

3. For literature addressing both theoretical and practical aspects of poverty law practice, see, e.g., BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONAL IDENTITY 188-197 (E. Dvorkin, J. Himmelstein & H. Cesnick eds. 1980); G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY 90-122 (1981); G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 415-439 (2d ed. 1988); P. HEYMANN & L. LEIBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 2-48 (1988); Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978); Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

4. Josephine V.'s full name, her daughter's name, associated institutional and witness references, and certain historical facts will be withheld to protect matters of confidence and privacy. All other matters pertaining to Mrs. V's story are discussed with her permission based on case notes, file documents, and a state administrative hearing transcript.

5. See Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, *supra* note 2.

6. For a discussion of lawyer paternalism, see Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Lehman, *The Pursuit of A Client's Interest*, 77 MICH. L. REV. 1078 (1979); Luban, *Paternalism and the Legal Professional*, 1981 WIS. L. REV. 454; Margulies, "Who Are You

lawyer paternalism, I mean the lawyer's willingness and ability to dominate the rationality and discourse of the lawyer-client relation.⁷ Rationality is defined by structures of thinking and seeing which shape the content of the lawyer's vision of the client and the form of legal advocacy. Discourse is denoted by structures of speech and non-speech which invite or silence client participation in legal advocacy.⁸

to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interest of Non-clients, 68 N.C.L. REV. 213 (1990); Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003; Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 UTAH L. REV. 515 (1987).

7. Recent theoretical study and empirical research suggest significant distinctions in the degree of dominance exhibited in various practice settings. Noteworthy findings report a greater degree of dominance, for example, in poverty practice than in corporate or general practice, though perhaps not in matrimonial practice. See, e.g., J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 336, 361-73 (1982) ("[L]awyers doing high prestige work are less likely to define their clients' problems than are lawyers doing lower status work."); D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (contrasting traditional and participatory models of lawyering in terms of client dependence and collaboration); Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988) (examining conditions of lawyer professional independence from client interests); Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 899 (1983) ("[I]n the personal client sector the lawyers will be in a much stronger position to define the clients' needs and to determine the manner in which those needs are met . . ."); Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979) (describing power relationships between legal services attorneys and their clients); Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 AM. B. FOUND. RES. J. 409, 412 (documenting a broad measure of professional autonomy encompassing the multifaceted ability to control lawyer-client interaction, define the nature of legal problems, identify tasks, and dictate the means of accomplishing such tasks); Menkel-Meadow & Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL'Y Q. 237 (1983) (finding professional, rather than client, dominance of attorney resource allocation among legal services attorneys); Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985) (analyzing the ideology of large-firm lawyers and their behavior toward their clients); Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) (discussing the relationship between the role lawyers play in legitimating legal institutions and the maintenance of professional authority); Simon, *Ethical Discretion in Lawyering*, *supra* note 6 (proposing discretionary approach to reconciling client rights and the promotion of justice). But see Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. L. 331 (1979) (challenging the sociological characterization of lawyers as agents of social control).

8. In tracing the contours of lawyer rationality, I have relied on the archeological method of Michel Foucault. Foucault employs the term archeology to designate a descriptive form of analysis focusing on an archive. An archive is a set of discourses pronounced and transformed under specific historical circumstances.

To Foucault, the institutionalizations and transformations of discourse manifest practices obeying certain rules of formation and systems of functioning. By describing the consistent material forms of these practices, he seeks to define the relations apparent on the surface of discourse. He explains: "I attempt to make visible what is invisible only because it's too much on the surface of

The rationality and discourse prevailing in the practice of poverty law constitute a system of power⁹ and exclusion.¹⁰ I shall call that system ethical lawyering. The system is marked by an internal tension between privileged and subordinated structures of rationality and discourse. The poverty lawyer privileges specific structures by elevating particular ways of thinking and speaking about the client to the level of a dominant practice. This elevation subordinates alternative ways of thinking and speaking.

The privileging of certain forms of rationality and discourse under ethical lawyering is expressed in the ethic of suppression. The ethic rests on a vision of the client as dependent and isolated. Guided by this ethic, the poverty lawyer designs a plan of advocacy frequently devoid of meaningful client or community participation. This lack of participation is attributable to the lawyer's overlapping normative and empirical judgment of the client and juridical worlds. On empirical grounds, the lawyer may be convinced that client or community participation in advocacy is inefficient. On a normative basis, he may believe that client participation is properly limited to narrow spheres of decisionmaking. Accordingly, the lawyer may reason that the suppression of the client or community participation is both prudent and ethically imperative.

That logic is in tension with an alternative rationality and discourse of ethical lawyer is manifested in the ethic of resistance. This ethic relies on a countervailing vision of the client as autonomous and connected to a community. The concept of autonomy is a first principle of legal ethics.¹¹ The

things." M. Foucault, *The Archeology of Knowledge*, in FOUCAULT LIVE (Interviews, 1966-84) 45, 45-46 (S. Lotringer ed. & J. Johnston trans. 1989).

Legal scholars have applied Foucault's methodology to study gender, sexuality, and doctrine. See C. SMART, FEMINISM AND THE POWER OF LAW 4-25 (1989) (reformulating Foucault's concepts of truth, power, and knowledge to capture feminist reality); Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1157-62 (1987) (articulating the relationship of truth to power in studying gender); Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719, 1736-38 (1989) (extending Foucault's analysis of discourse to doctrinal developments under Section 1983); Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989) (redefining the framework of antitrust doctrinal history to reflect the tension between competition and property logics); Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511 (1989) (studying the tension between the paradigms of competition policy and common-law property rights in vertical restraints doctrine); Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (dissecting the connection between sexuality and identity in apprehending personhood); West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. L. F. 59 (cautioning against overbroad adoption of epistemology).

9. On the operation of power infecting legal discourse, see Ashe, *supra* note 8, at 1133, 1170. See also P. GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 186-87 (1987) (isolating the domains of local/historical power and the resistance engendered).

10. On forms of exclusion, see Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (revealing gendered nature of legal language and reasoning).

11. Autonomy intimates an anti-utilitarian Kantian ethos. For an introduction to Kant's ethical

counter-ethic of resistance enlarges the meaning of autonomy to include the concept of connected community. Governed by this ethic, the poverty lawyer seeks to increase the scope of client and community participation in advocacy. For empirical support, he may speculate that such increased participation will improve the outcome and efficiency of advocacy. For a normative foundation, he may assert a revised concept of client autonomy realized in connected community.

The contradictions generated by the tension between the ethics of suppression and resistance are often overlooked by accounts of lawyer advocacy,¹²

premises, see I. KANT, *GROUNDING THE METAPHYSICS OF MORALS* 19-62 (J. Ellington trans. 1981); Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580 (1987) ("Autonomy in Kant's sense is moral self-government, freedom from enslavement by inclination and desire."); Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457, 461 (1987) ("The Kantian conception of autonomy is an original contribution to moral and political philosophy in that it gives fundamental ethical weight to the moral powers of persons to originate and raise normative claims of rationality and reasonableness.").

Monroe Freedman champions the rhetoric of client autonomy. See, e.g., Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191, 204 (1978) ("[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them. . . ."); Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331, 333 (1987) ("[T]he lawyer's principal function is to serve the client's autonomy—to allow the client maximum freedom to exercise or to forgo rights to which the client is legally entitled."). See also Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616-17 (arguing that increasing individual autonomy is morally good); Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 663 ("[A]utonomy is of singular significance in both personal and political terms.").

Thomas Shaffer, by contrast, spurns client autonomy as the highest good of professionalism. Equating autonomy and abandonment, Shaffer argues that respect for client freedom artificially limits community by returning the client to the world of strangers. Shaffer, *The Ethics of Dissent and Friendship in the American Professions*, 88 W. VA. L. REV. 623, 662 (1986). Compare D'Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 761 (1983) (presenting a deontological model of professional responsibility elevating moral obligation above client autonomy and social need) and Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639 (objecting to preferencing of individual autonomy over right or good conduct).

I will not here take up the question whether the enhancement of client autonomy improves the character of the lawyer. For reflection on the preservation of the lawyer's moral character, see Eshete, *Does a Lawyer's Character Matter?*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* at 270 (D. Luban ed. 1983).

12. For divergent accounts of advocacy, see M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9-24 (contending zealous advocacy to be consonant with the safeguarding of the public interest); Lohn & Ball, *Legal Advocacy, Performance, and Affection*, 16 GA. L. REV. 853, 856, 860 (1982) (advancing a theory of advocacy "understood as the performance of affection[]" in an environment of cooperation and professional mutuality); Nelson, *Moral Ethics, Adversary Justice, and Political Theory: Three Foundations for the Law of Professional Responsibility*, 64 NOTRE DAME L. REV. 911 (1989) (claiming a three-pronged approach to professional responsibility combining moral ethics, adversarial commitment, and pluralistic political values); Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C.L. REV. 519 (1979) (extolling lawyer implementation of client rights and duties); Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986); Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER*, *supra* note 11,

competence,¹³ discipline,¹⁴ and morality.¹⁵ The story of Josephine V. illus-

at 150 (asserting the moral accountability of the zealous lawyer); Shaffer, *Advocacy as Moral Discourse*, 57 N.C.L. REV. 647 (1979) (distinguishing adversary and moral discourse).

But see Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, in THE GOOD LAWYER, *supra* note 11, at 214 (limiting the lawyer's duty of representation).

13. For overviews of lawyer competence, see Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639; Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257 (1976) (mapping a research agenda for the formulation of standards to measure lawyer competence); Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987) (skeptical overview of reported decline in professionalism); Trakman, *Competence in Law: An Unending Search*, 11 CAP. U.L. REV. 401 (1982) (examining the meaning and parameters of professional competence in light of community standards, societal expectations, and legal training); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267 (1970) (applauding Code enforcement of professional competence and conduct).

14. On lawyer discipline and sanctions, see Gray & Harrison, *Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems*, 11 CAP. U.L. REV. 529 (1982) (considering the structure, sanctions, and implementation of selected formal standards regulating lawyer discipline and disability proceedings); Hazard & Beard, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 YALE L.J. 1060 (1987) (discussing the evolution of lawyer disciplinary proceedings, particularly the availability of the privilege against self-incrimination); Kelly, *Lawyer Sanctions: Looking Through the Looking Glass*, 1 GEO. J. LEGAL ETHICS 469 (1988) (reviewing empirical evidence of inconsistency in application of lawyer sanctions); Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEX. L. REV. 367 (1970) (quarreling with Code standards of competence and discipline).

15. On lawyer morality, see D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); Elkins, *A Conversation Called Ethics*, 10 LEGAL STUD. F. 265 (1986) (advocating the teaching of professional responsibility as moral discourse); Gewirth, *Professional Ethics: The Separatist Thesis*, 96 ETHICS 282 (1986) (condemning the separatist thesis of specific professional-role morality as mistaken insofar as it infringes on the equal rights of all persons required by a general principle of morality); Held, *The Division of Moral Labor and the Role of the Lawyer*, Luban, *The Adversary System Excuse*, Wasserstrom, *Roles and Morality*, Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, and Williams, *Professional Morality and Its Dispositions*, all in THE GOOD LAWYER *supra* note 11 at 25, 38, 60, 83, 100-04, 259 (debating justifications for a separatist role-defined moral reasoning); Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451 (1981) (investigating moral philosophy to clarify and resolve nettlesome issues in legal ethics, particularly moral dilemmas spawned by conflicts between the ordinary morality and role morality of lawyers); Pepper, *supra* note 11 (furnishing a moral justification for the lawyer's amoral professional role); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (arguing that professional responsibility requires the experience and judgment of a moral personality); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) (advocating heightened lawyer sensitivity to moral consequences of conduct through ideological, structural, and institutional reform of the profession); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 19 (1975) (considering the extent to which moral criticisms of the lawyer's societal outlook and of the lawyer-client relationship derive from the fact that lawyers are professionals); Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155 (1984) (celebrating the virtues of benevolence and compassion); Ellmann, *Lawyering for Justice in a Flawed Democracy* (Book Review), 90 COLUM. L. REV. 116 (1990) (reviewing D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988)) (exploring the moral role of lawyers who advocate for the underrepresented); Gillers, *Can A Good Lawyer Be A Bad Person?* (Book Review), 84 MICH. L. REV. 1011 (1986) (reviewing THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (D. Luban ed. 1983) & S. LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE

trates three such contradictions. The first stems from the denigration of Mrs. V.'s assertions of autonomy, challenging the practices of a local welfare bureaucracy. The second emerges from the treatment of Mrs. V. in isolation from the network of communities connected by class, gender, ethnicity, race, and sexuality which suffer under common conditions of impoverishment. The third arises out of advocacy practices which silence Mrs. V.'s telling of her story of self-asserted autonomy and community aid. This is the contradiction visible in Mrs. V.'s moment of lawyer defiance, the moment of speaking out of turn.

The poverty lawyer experiences each of these contradictions when he espouses an ethic of rationality and discourse that restricts, rather than opens, access to the world of the impoverished client. The story of Josephine V. illustrates the consequences of this restriction. Access to the client world is restricted in two ways. To begin, the poverty lawyer denies the client full subjective status. This denial is effectuated by constituting the client as a dependent object.¹⁶ Situating the client as an object is not a tactic of advocacy to liberate her. If that instrumental purpose held sway, the client would be otherwise recognized as a self-determining subject. Thus recognized, advocacy would seek to discover and promote expression of the multiple features of client autonomy and community.

Situated as a dependent object, the client is invisible. Deprived of the attributes of autonomy, she is consigned to the role of the "other without reciprocity."¹⁷ Genuine reciprocity enables the client to participate¹⁸ in the

(1984)) (welcoming moral philosophers to the arena of legal ethics); Tomain, *The Legal Hierarchy: Luban's The Good Lawyer* (Book Review), 1985 AM. B. FOUND. RES. J. 693 (reviewing THE GOOD LAWYER) (defining professional ethics and lawyering skills in terms of moral reasoning and values).

16. See Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, *supra* note 2 (describing the construction of client dependency as a form of interpretive violence).

17. GENDER AND READING: ESSAYS ON READERS, TEXTS, AND CONTEXTS xviii-xix (E. Flynn & P. Schweickart eds. 1986) [hereinafter GENDER AND READING].

18. Here, I grant preference to the term "participation" over the more conventional term "decisionmaking." See Shaffer, *The Ethics of Dissent and Friendship in the American Professions*, 88 W. VA. L. REV. 623, 663 (1986) ("The moral ideal in the professional relationship of lawyer and client is the participatory ideal: The client is a partner and might become a friend."). Cf. Wadlington, *Breaking the Silence of Doctor and Patient* (Book Review), 93 YALE L.J. 1640, 1642 (1984) (reviewing J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984)) (considering greater patient participation in the medical decisionmaking process); Mariner, *Informed Consent in the Post-Modern Era* (Book Review), 13 LAW & SOC. INQUIRY 385, 403 (1988) (reviewing R. FADEN & T. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* (1986) & J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984)) (delineating the elements of autonomous decisionmaking). See also Meisel & Roth, *Toward an Informed Discussion of Informed Consent: A Review and Critique of the Empirical Studies*, 25 ARIZ. L. REV. 265 (1983) (scrutinizing clinical studies and components of informed consent).

Preference for this usage stems from the tendency in ethical lawyering to limit the opportunity for and to distort the content of client decisionmaking. By partitioning the lawyer-client relation into open and closed regions of decisionmaking, ethical rationality deprives the client of a meaningful

public process of advocacy. Without such reciprocity, the client is a phantom invoked at different stages for reasons of instrumental legitimacy.¹⁹

The poverty lawyer's denial of the client's public subjective status is sustained by the knowledge structures of class,²⁰ ethnicity, gender,²¹ race,²² and sexuality.²³ These structures fit²⁴ lawyer-imposed configurations of client dependence and isolation. Privileged forms of rationality shield this demeaning configuration, rendering alternative stories of client autonomy and community unthinkable.²⁵

The forms of rationality are lawyer created.²⁶ They secure the imprimatur

access to participation in the lawyering process. On the process of lawyer decisionmaking, see Nagel, *Lawyer Decisionmaking and Threshold Analysis*, 36 U. MIAMI L. REV. 615 (1982) (assigning threshold values to components of lawyer decisionmaking in the absence of accurate cost-benefit information).

19. On legitimation, see Abel, *Why Does the ABA Promulgate Ethical Rules*, 59 TEX. L. REV. 639, 668 (1981).

Legitimation is the attempt by those engaged in some realm of social activity to offer a normative justification for their actions. The attempt may be addressed to an external audience, as in public relations, but it may also be a dialogue among the participants themselves. Participants need not speak with a unified voice; segments can offer different, even inconsistent accounts (in which case legitimation can also be a form of symbolic politics, a competition for status through the declaration of moral superiority).

Id. (footnote omitted).

20. See, e.g., McCloud, *Feminism's Idealist Error*, 14 N.Y.U. REV. L. & SOC. CHANGE 277 (1986) (examining class-differentiated impact of sexual equality jurisprudence upon women's formal and substantive employment rights).

21. Christine Littleton notes the "identification of women with anything that is devalued, disaffirmed or disempowering." Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1046 (1987) (footnote omitted). See also GENDER AND READING, *supra* note 17, at xiii-xiv (discerning false and repressive universals in the generalizations of theoretical constructs heedless of the female perspective); Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 6-10 (1990) (enumerating categories of sexist speech).

22. See, e.g., Grider, *Hair Salons and Racial Stereotypes: The Impermissible Use of Racially Discriminatory Pricing Schemes*, 12 HARV. WOMEN'S L.J. 75 (1989) (classifying race as a social construction); Omolade, *Black Women, Black Men, and Tawana Brawley—The Shared Condition*, 12 HARV. WOMEN'S L.J. 11, 16 (1989) (documenting the historical muting of Black women's voices and experiences); Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M.L. REV. 1 (1990) (criticizing the treatment of the language rights of non-English-speaking people of color).

23. See, e.g., R. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 23-45 (1988) (elucidating the perception and status of gay men); Gomez, *Repeat After Me: We Are Different. We Are the Same*, 14 N.Y.U. REV. L. & SOC. CHANGE 935 (1986) (illuminating the multiple perspectives of Black/gay people); Kennard, *Ourselves Behind Ourselves: A Theory for Lesbian Readers*, in GENDER AND READING, *supra* note 17, at 63, 65 (cautioning against subsuming lesbian difference under the rubric of a universal female concept of identity); Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986) (considering the repression of lesbian norms in custody disputes).

24. See Finley, *supra* note 10, at 904-05 (showing how legal language and reasoning fit women's experiences into male categories of thought).

25. On the unthinkable quality of women's experience, see C. HEILBRUN, *WRITING A WOMAN'S LIFE* 44 (1988) ("[M]ale power has made certain stories unthinkable.").

26. Compare M. FOUCAULT, *How Much Does It Cost For Reason To Tell the Truth*, in FOU-

of ethics by limiting the advocacy process to a bounded set of discursive practices. Delimited in advance, those practices omit reference to vital experiences of autonomy and community which compose the client's world. The omission of these animating experiences is linked to the instrumentalist logic of poverty law advocacy.

That logic conflates reason and necessity: What once appeared instrumentally necessary to prevail in advocacy is transformed into a transcendent principle of rationality.²⁷ In this fusion, reason loses its contextual footing.²⁸ Client dependence and isolation are consequently entrenched and viewed as elements of a benign natural state. Extrapolating from this essentialist premise, the poverty lawyer deems client dependence and isolation to be necessary conditions of lawyering. These spurious universal traits conceal the suppressive power of ethical lawyering, and the client's struggle to resist pernicious lawyer identity-making practices. The poverty lawyer's blithe acceptance of subordinated²⁹ client identity distorts the lawyer-client relation by assuming the rationality of lawyer dominance.³⁰

The distortion is tolerated, and indeed encouraged, by conventional ethical systems.³¹ Under these systems, client dependence and isolation are con-

CAULT LIVE, *supra* note 8, at 243-44 (describing the self-creation of reason). Analyzing developments in the forms of rationality, Foucault seeks to isolate "various proofs, various formulations, various modifications by which rationalities educe each other, contradict one another, [and] chase each other away[.]" *Id* at 244.

27. On the distinction between ideology and necessity in the historical subjection of women, see Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 424-26 (1981).

28. Compare Goldfarb, *The Theory-Practice Spiral: Insights from Feminism and Clinical Education*, 75 MINN. L. REV. (forthcoming) and Yngvesson, *Disputing Alternatives: Settlements as Science and as Politics* (Book Review), 13 LAW & SOC. INQUIRY 113, 130-31 (1988) (reviewing S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985)) (pointing to the requisite use of contextual knowledge in skilled mediation).

29. On the overt and covert rhetoric of subordination, see Shevelov, *Fathers and Daughters: Women as Readers of the Tailor*, in GENDER AND READING, *supra* note 20, at 107, 108-09, 121.

The rhetoric of subordination implies client incapacity to comprehend and reason. Cf. Wadlington, *supra* note 18, at 1651 (assailing doctors' failure to recognize patients' individual capabilities to comprehend and reason).

30. See West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203, 237 (1987) ("When we accept a state of the world that derives from an act of power as a part of the natural world, we lose sense of how to evaluate that state of the world[.]") (emphasis in original).

31. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter MODEL CODE]; CANONS OF PROFESSIONAL ETHICS (1908) [hereinafter CANONS].

For an historical overview, see Abel, *supra* note 19; Frankel, *Review*, 43 U. CHI. L. REV. 874 (1976) (reviewing the *Model Code* and comparing standards of conduct commanded by the *Canons* and the *Model Code*); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (criticism of *Model Code* represents pressure to reform the requirements of professional responsibility); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939 (comparing interpretive and enforcement

strued simply as descriptive statements of a material reality.³² That approved construction sanctions hierarchical practices of discourse,³³ presenting a coherence and uniformity of client identity contradicted by the discontinuities of class, ethnicity, gender, race, and sexuality. Generated by alternative structures of rationality, those discontinuities exemplify autonomous constructions of identity in connected communities.³⁴

weaknesses of the *Model Code* and *Model Rules*); Sutton, *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C.L. REV. 497 (1979) (urging revision of *Model Code* standards); Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970) (enumerating deficiencies of the *Canons* and remedial measures of the *Model Code*).

For a defense of the *Model Rules*, see Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 TEX. L. REV. 723 (1981) (offering modest support for the *Model Rules*); Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981) (praising increased candor brought to client-public understanding of law and lawyering); Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016 (justifying intermediate level of generality of *Model Rules*); Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. U.L. REV. 1 (1980) (applauding the *Model Rules* and noting controversial areas); Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 (advocating reallocation of lawyer-client decisionmaking authority favored by the *Model Rules*); Stark, *Review Essay, The Model Rules of Professional Conduct*, 12 CONN. L. REV. 948 (1980) (discussing principal differences between the *Model Code* and the *Model Rules*).

Scholars have assailed the *Model Rules* on an assortment of grounds. Stephen Gillers denounces the *Model Rules* as "an astonishingly parochial, self-aggrandizing document" acclaiming and protecting lawyer-centered prerogatives over competing client, third-party interests, and juridical interests. Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 245 (1985) (analyzing the interests of lawyers, clients, third party others, and the profession in dyad relations). Gillers also derides the *Model Rules* for internal inconsistency and for masking inflationary controls on the availability of legal services. *Id.*

In contrast, Monroe Freedman views the *Model Rules* as an assault on confidentiality and an attack on the adversary system, thus imperiling the Constitution. Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685, 690 (1981). *Cf.* Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695 (1981) (reproaching the *Model Rules* for failing to integrate derivative lawyer rights and duties with client positive law rights and duties in measuring the allocation of lawyer discretionary decisionmaking authority).

Other scholars have upended the *Model Rules* by distinguishing between code and character. Thomas Shaffer advances two propositions in this regard. First, he contends that "[s]ound ethical codes in the professions are those which depend on character[.]" Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 249 (1986). Second, he claims that "[e]thical codes in which that dependence is not understood are corrupt and corrupting." Using stories for illustration, Shaffer argues that "character helps us survive the corruption of our codes." *Id.* at 249.

32. *Cf.* Bobbitt, *Is Law Politics?* (Book Review), 41 STAN. L. REV. 1233, 1310 (1989) (reviewing M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)) (attacking the belief in the necessary congruence between legal statements and fact).

33. On legal and political discourses of power and the reproduction of social hierarchy, see Rosenberg, *Another History of Free Speech: The 1920s and the 1940s*, 7 LAW & INEQUALITY 333 (1989).

34. Discontinuities are manifested in alternative storytellings of social life. See Minda, *Phenomenology, Tina Turner and the Law*, 16 N.M.L. REV. 479, 487 (1986) (advancing a consciousness-

II. SUBORDINATED STORIES

The construction of client identity embodied in the ethics of suppression and resistance are communicated in story form. Both the rationality and discourse of these competing ethics is displayed in stock stories.³⁵ Thomas Shaffer argues that the study of legal ethics is illuminated by the reading of stories. Shaffer contends that the truth of individual, family, and community morality is "more a matter of character, of life as we live it, of story, than it is of principles."³⁶ To Shaffer, stories elucidate moral principles.

Listening to and giving voice to client stories provides a contextual method of exploring and recasting the ethics of advocacy. Without recasting, the ethic of suppression privileges the voice and story of the lawyer, and subordinates the competing voice and story of the client.³⁷ Read together, lawyer-chronicled stories are strikingly similar in their characterization of the client. Whether the narrative portrays the client as impoverished, female, or of color, the description invariably constructs an image of the client as dependent and isolated. This image is conveyed in mundane lawyer acts, and circulated in routine lawyer pronouncements. Through these acts and pronouncements, the lawyer becomes inured to the role and expectation of client silence.³⁸

The ethic of suppression disguises the poverty lawyer's normative assessment of the client's world. Belittling normative evaluation in the guise of factual description erodes the client's public autonomy.³⁹ This erosion reinforces the lawyer's public narrative of suppression.

Because the ethical poverty lawyer judges the predominance of his own

based critique of legal analysis employed "to reveal the artificial and contingent nature of legal interpretations of reality.") (footnote omitted).

35. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984). See also C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 54 (1987) ("Social situation is expressed through the concepts people construct to make sense of their situation."); Cunningham, *A New Way of Practicing Law: The Lawyer as Translator* (1990) (unpublished manuscript); Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) (lawyering as a form of translation); Dahl, *Taking Women as a Starting Point: Building Women's Law*, 14 INT'L J. SOC. L. 239, 240-41 (1986) (noting that stock stories of women's dependence may infect private and public spheres of experience).

36. See Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 MERCER L. REV. 877, 882, 884-88 (1982) (viewing legal ethics as an ethical subject rather than a legal one).

37. For a discussion of client subordination, see Alfieri, *Reconstructive Poverty Law: Learning Lessons of Client Narrative*, *supra* note 2; White, *Notes on the Hearing of Mrs. G.*, *supra* note 2.

38. For a discussion of roles and expectations, see Hazard, *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721, 735 (1988) ("[T]he question remains as to which role, and which set of corresponding expectations, ought to determine the question of what is right to do.").

39. Normative evaluation may attach privileged meaning to class, gender, and race. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 35, at 54 ("[T]heories constructed by those with the social experience of men, most particularly by those who are not conscious that gender is a specific social circumstance, will be, at the least, open to being male theories.").

narrative as legitimate, he expects the client to adhere without resistance. This misunderstanding of social life is explained by the illusory logic of subordination.

Like other forms of rationality, subordination is a stock story. The meaning of the story is found in a condoned hierarchical social arrangement.⁴⁰ The poverty lawyer perceives this arrangement as the natural and necessary order of the lawyer-client relation.

The positing of hierarchy as an inherent property of poverty law practice is a product of lawyer self-reference.⁴¹ In the self-referencing system of suppression, the observed world of the client is mediated and thereby distorted by the expectation of dependence and isolation. The end result is a world contrived by the lawyer's imagination. The crux of ethical lawyering expressed in storytelling lies in this distortion.⁴²

Notwithstanding his distorting ethic, the poverty lawyer adopts the posture of a neutral technician, of a craftsman at work.⁴³ Denouncing this stance of objective neutrality, Catharine MacKinnon contends that "[i]t is

40. On Cartesian dualism and the permanent *a priori* structures of meaning in the social world, see R. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* 107-14, 138, 159 (1976). For a helpful introduction to Cartesian rhetoric, see T. CARR, *DESCARTES AND THE RESILIENCE OF RHETORIC: VARIETIES OF CARTESIAN RHETORICAL THEORY* (1990).

Deceived by his own structure of dualistic thinking, the lawyer mistakes his narrative for neutral, objective description. See Minda, *supra* note 34, at 482 (attributing the dualistic perception of social life to the structure of legal consciousness).

Bernstein maintains that "*what we judge to be an adequate interpretation of social action is itself dependent on our understanding of the causal determinants of social action.*" R. BERNSTEIN, *supra*, at 167 (emphasis in original).

41. Bernstein comments: "Individuals in their social and political lives are self interpreting beings. The ways in which they interpret their own actions and those of others are not externally related to, but constitutive of, those actions." R. BERNSTEIN, *supra* note 40, at 156.

42. See D. COOLE, *WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM* 268 (1988) (disclosing the structuralist and post-structuralist feminist insight that "it is the male who constructs a mirror of himself which he mistakes for knowledge"); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1280-81 (1987) (describing the process of representing the male experience as truth); Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 43 ("[W]hat we know has largely been imposed on us as 'truth' by a particular class of truth creators and interpreters.").

43. See, e.g., Eisele, *The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities*, 54 TENN. L. REV. 345, 388 (1987) (promoting an aesthetic approach to law dedicated to craft, craftsmanship, and professional technique).

Compare J. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) (defending account of the law as a rhetorical and literary activity) and CH. PERELMAN & L. OLBRECHTSTYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (J. Wilkenson & P. Weaver trans. 1969) (laying the groundwork for the study of discursive techniques of argumentation) with B. JACKSON, *LAW, FACT AND NARRATIVE COHERENCE* 161 (1988) (challenging White's appreciation of advocacy and truth) and R. BARTHES, *WRITING DEGREE ZERO* 62-73 (1953) (tracing the "bourgeois heritage" of style as craftsmanship).

only a subject who gets to take the objective standpoint."⁴⁴ The stance of the poverty lawyer is the feigned objectivity of the male subject. By exerting power, he gains "social access to being that self which takes the stance that is allowed to be objective[.]"⁴⁵ As MacKinnon points out, "that objective person who is a subject, is socially male."⁴⁶

Christine Littleton conceives of the male power to define and construct reality as the power to speak the world. She argues that male power—phallocentrism—"defines the boundaries of acceptable discourse—not only of what can be heard and responded to, but also to some extent of what can be thought."⁴⁷

A. SUPPRESSION

To the extent that ethical lawyering is formulated by stories of dependence and isolation, client autonomy and community connection are suppressed. Suppression is embedded in the poverty lawyer's basic narratives, stifling discourse capable of reconstituting the lawyer-client relation.⁴⁸ Absent reconstitution, client autonomy is circumscribed by lawyer tolerance.

The boundaries of poverty lawyer tolerance coincide with the limits of suppressive rationality and discourse. These limits preclude the lawyer from imagining the client as a self-determining subject. When ways of speaking prohibit the client from enjoying the status of an independent creator of meaning in the public world, the client's public capacity to act autonomously is weakened.⁴⁹

The ethic of suppression⁵⁰ is deceiving because it simultaneously excludes

44. C. MACKINNON, *supra* note 35, at 55. The male subject interprets the world from a masculine perspective. From this point of view, the experience of dominance is central. *See id.* ("A subject is a self. An object is other to that self . . . it is men socially who are subjects, women socially who are other, objects."). *See also* D. COOLE, *supra* note 42, at 267 (describing theorizing "as a form of domination, whereby the theorist conceptually appropriates the objects of knowledge at the same time imposing his own laws upon them"); Irigaray, *This Sex Which is Not One*, in *NEW FRENCH FEMINISMS* 99 (E. Marks & I. de Courtivron eds. 1980) (remarking that "female sexuality has always been theorized within masculine parameters.").

45. C. MACKINNON, *supra* note 35, at 55.

46. *Id.*

47. Littleton, *supra* note 42, at 1318 (footnote omitted). *See also* H-G. GADAMER, *PHILOSOPHICAL APPRENTICESHIPS* 179 (1985) (on the non-linguistic understanding circumscribing the space within which speaking-with-each-other and listening-to-each-other take place).

48. Compare M. FOUCAULT, *Sexual Choice, Sexual Act*, in *FOUCAULT LIVE*, *supra* note 8, at 211-31 (pursuing a similar analysis of sexuality); M. FOUCAULT, *THE HISTORY OF SEXUALITY—VOLUME 1: AN INTRODUCTION* (R. Hurley trans. 1978).

49. C. MACKINNON, *supra* note 35, at 49. MacKinnon's implicit sense of autonomy evokes Lawrence Haworth's notion of procedural independence. *See* Haworth, *Autonomy and Utility*, 95 *ETHICS* 5, 8-9 (1984) (characterizing autonomy in part as procedural independence realized in the individual's relationship with others).

50. For an explication of Foucault's theory of societal repression-suppression systems, *see* M. FOUCAULT, *Rituals of Exclusion*, in *FOUCAULT LIVE*, *supra* note 8, at 63, 65.

and absorbs the client in the advocacy process. In this beguiling ritual, the client obtains aid, but surrenders her voice and story. Legal assistance is conditional on the waiver of autonomous participation.

Public acts of suppression pervade the lawyer-client relation, inhibiting client resistance, and rationalizing dependence. The rationalization of dependence hinges on the pretense of client silence. That pretense is overthrown when client speech is understood to consist of "intensities, rumblings, muffled things, thicknesses, repetitions, things hardly spoken . . ."⁵¹

Even when the pretense of silence is overcome, the muffled voice of the client is often not fully heard. Suppression blocks the translation of things hardly spoken into autonomous speech. Despite this impediment, speech can emerge revealing the voices and stories of the autonomous client. The poverty lawyer's retelling of suppressed stories supplies the opening for client resistance.⁵²

B. RESISTANCE

Obtaining space sufficient to overturn lawyer narrative and install a self-proclaimed client narrative rests on opposing strategies of rationality and discourse. These strategies affirm a client world infused with the values of autonomy, community, and participation. Such values are always immanent. Removing the constraints suppressing their declaration requires finding and inciting the elementary power of resistance.⁵³ The power of resistance is not anterior to the power of suppression. The two powers are in fact coextensive.⁵⁴

Indeed, client resistance is a concurrent form of social power. Inventive and mobile, it works "to organize, coagulate, and solidify itself."⁵⁵ Withheld underneath false layers of imposed identity, it distributes itself strategically

51. M. Foucault, *I, Pierre Riviere*, in FOUCAULT LIVE, *supra* note 8, at 131, 136 (describing nineteenth and twentieth century peasant culture).

52. For Foucault, the task is to formulate description "in a kind of virtual break, which opens room, understood as a room of concrete freedom, that is possible transformation." M. Foucault, *Reason to Tell the Truth*, in FOUCAULT LIVE, *supra* note 8, at 252.

53. Foucault stresses the importance of studying "the manner in which power gives itself over to representation." M. Foucault, *Monarchy of Sex*, in FOUCAULT LIVE, *supra* note 8, at 148. Relocating power from the narrow purview of political life, he comments that "[t]he relations of power are perhaps the most hidden things in the social body." *Id.* By unlocking power from forms appended to the state apparatus, economic relations, and individual interiorization, Foucault proposes to "investigate what might be most hidden in power relations; anchor them in their economic infrastructures; trace them not only in their governmental forms but also in their infra-governmental or para-governmental ones; and recuperate them in their material play." *Id.*

54. Foucault argues that resistance "is not anterior to the power which it opposes. It is coextensive with it and absolutely its contemporary." *Id.* at 153.

55. Foucault maintains: "As soon as there is a power relation, there is the possibility of resistance. We are never trapped by power; we can always modify its grip in determinate conditions and according to a precise strategy." *Id.*

against suppression. Viewed as a strategy of opposition, client resistance is always materializing, propelled by the discontinuities of class, ethnicity, gender, race, and sexuality.⁵⁶ Hence, the lawyer-client relation is always strained, pulled in the opposite directions of suppression and resistance.

The pulling of ethical lawyering against itself ceaselessly transforms the lawyer-client relation. The relation shifts even when rationality and discourse make claims of constancy. Depending on the degree of dissonance between suppression and resistance, the space available for autonomy and community may contract or expand.⁵⁷

The enlargement and contraction may not be immediately obvious in discourse. At points, the lawyer-client relation may accommodate a mixed discourse, entangling strands of suppression and resistance. Martha Minow's investigation of social roles exposes life patterns containing this mixed discourse. These patterns interweave strands of autonomy and dependence, self-reliance and helplessness. The complexity of these patterns reveal the vigor of narrative contests over the meaning of the client's world, and reaffirms the importance of resistance expressed in the telling of personal stories.⁵⁸

III. THE STORY OF JOSEPHINE V.

The story of Josephine V. highlights the tension between the ethics of sup-

56. In this way, client resistance does not operate merely as a negation based on opposition, but as an affirmative strategy of survival. See GENDER AND READING, *supra* note 17, at xxx.

57. Both Lucie White and Foucault esteem drama as a forum for open discourse. White contends such discourse "enable[s] speakers to fashion new forms of collective speech, new patterns of culture from their diverse, fragmented histories." White, *Making Space for Clients to Speak*, *supra* note 2, at 557. Citing the "Los Angeles Poverty Department," an improvisational revolutionary theater group composed of a loose confederation of the sometimes-homeless, she argues that theater induces changes in the self-understanding of the participants and in the other-understanding of the audience by suspending and restructuring social patterns of the everyday world.

Like Foucault, White admires drama as a *space* in which subordinated people "assume the power to define social reality" in accordance with their own self-proclaimed narrative. *Id.* at 562. The terms of this narrative invert discursive practices and social relations of dependency prevalent in daily life. This inversion acquires political significance when the practices and relation of dominance are permanently toppled.

Foucault attaches political importance to creating the possibilities for peasants to "play themselves, with their own means, in a drama which is of their generation[.]" For Foucault, the acting out of such human texts creates a space where the poor can meet and talk about the common themes of their daily lives. M. FOUCAULT, *I, Pierre Riviere*, in FOUCAULT LIVE, *supra* note 8, at 134-35.

58. See Minow, "Forming Underneath Everything that Grows:" Toward a History of Family Law, 1985 WIS. L. REV. 819, 882, 824-39 (noting the often obscured abilities of individuals to combine dependency and independence in defining their social roles); Paul, *Private/Property: A Discourse on Gender Inequality in American Law*, 7 LAW & INEQUALITY 399, 433 (1989) (disclosing the shuttered reality of women's bifurcated legal existence in a male world of discursive domination).

pression and resistance operating in daily poverty law practice.⁵⁹ In retelling the events of Mrs. V.'s story, I have concentrated on the contextual exposition⁶⁰ of suppression and resistance in the public sphere of an administrative hearing.⁶¹ The study of resistance in this forum demonstrates how the voice and story of an impoverished Hispanic woman may construct a reality⁶² where daily acts of autonomy and community are honored rather than covertly or overtly suppressed.⁶³ Mrs. V.'s struggle to resist lawyer suppressive discourse is indicative of the struggle internal to ethical lawyering.⁶⁴

Her act of speaking out reveals the upheaval produced by the ethic of resistance. In this upheaval, traditional lawyer and client roles are displaced

59. The story flows unsolicited. For a searching analysis of solicitation in a broader context, see Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 325 (1986) (inferring that solicitation serves interests undervalued by ethical canons). Cf. Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. REV. 559 (1979) (inspecting the economics of solicitation in the purchase and delivery of legal services).

60. Contextual ethical critique focuses on the lawyer-client situation. Geoffrey Hazard points out that "[e]thical deliberation and ethical conduct are unintelligible if considered only in terms of rules or principles or precepts, apart from situation." Hazard, Book Review, 63 NOTRE DAME L. REV. 393, 397 (1988) (reviewing T. SHAFFER, *FAITH AND THE PROFESSIONS* (1987)).

61. For an empirical evaluation and survey of informal adjudication procedures applied by federal and state administrative agencies, see Verkuil, *A Study of Informal Adjudication Procedures*, 43 CHI. L. REV. 739 (1976). See also Norton, *Public Assistance, Post-New Deal Bureaucracy, and the Law: Learning from Negative Models*, 92 YALE L.J. 1287 (1983) (encouraging decentralized administrative reform).

62. On the centrality of discourse, see P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1145 (1988) (asserting that "individual reality is socially constructed in and through dialogue with others."); Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217, 248 (1988) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987) (discussing experiential discourse in feminist methodology)).

On the denigration of everyday existence in the construction of social problems, see Edelman, *The Construction of Social Problems as Buttresses of Inequalities*, 42 U. MIAMI L. REV. 7, 28 (1987).

63. On the covert refusal to allow women to speak, see Suleiman, *Malraux's Women: A Re-vision* in GENDER AND READING, *supra* note 17, at 124, 130.

64. A second locus of study is the dual advocacy strategy evinced in Mrs. V.'s case. The strategy combined the tactics of lawyer and group lay advocacy. Because lay advocacy was abandoned at an incipient stage in favor of lawyer intervention, it is impossible to fairly compare the utility of the two tactics in this instance. Cf. Greenebaum, *Law Firms and Clients as Groups: Loyalty, Rationality, and Representation*, 13 J. LEGAL PROF. 205 (1988) (evaluating role behavior and group dynamics in the process of representation).

The difficulty in securing an accurate comparison of advocacy tactics presents a propitious opportunity to critique ethical lawyering from the stance of discursive practice rather than solely in terms of material outcome. From this vantage point, the telling of client story is probed as a discrete but intricately linked component of material outcome.

By establishing an alternative bench mark to gauge the aftermath of ethical lawyering, I do not suppose any superiority of method. The advantage of a discursive measurement is the wider range of understanding garnered. For this reason, I do not recommend the analytic severing of discourse and outcome. I merely endorse exploiting the instant ambiguity of advocacy strategy to make headway in obtaining a fuller appreciation of the detrimental effects of dominant discursive practices.

by new formations free of preordained notions of ethical rationality and discourse. Role modification unfetters the limits of poverty law practice creating an opportunity for the client to assert autonomous identity—to speak out of turn.⁶⁵

Client resistance is fostered by putting forth an alternative system of rationality and discourse rooted in an autonomous vision of client identity and rights.⁶⁶ Even when rights are defined formalistically, as in Mrs. V.'s case, their embrace may enable the client to assert her own narrative, to tell her individual story in her own voice.

The key to rights discourse is struggle. Rights are signs of individual and collective struggle. They demand the consummation of the promise held out by the dominant normative order. In a rudimentary sense, rights are alarms of protest transcending the divisions of class, ethnicity, gender, race, and sexuality.⁶⁷

Rights are not an ethereal stratum of discourse separated from the base line of social relations. Nor are they lockstep mechanisms obeying the precise design of dominant juridical structures.⁶⁸ Instead, rights are thick, supple implements of political struggle.⁶⁹ Like political struggle itself, the

65. Foucault traces a similar movement in philosophy where "one detaches oneself from what are the received truths and seeks other rules of the game." M. FOUCAULT, *The Masked Philosopher*, in FOUCAULT LIVE, *supra* note 8, at 193, 200-01. He opines: "From philosophy comes the displacement and transformation of the limits of thought, the modification of received values and all the work done to think otherwise, to do something else, to become other than what one is." *Id.* at 201.

66. The proliferation of resistance as an alternative meaning may well constitute an inherent aspect of interpretive divergence in all communities. See Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 33-40 (1983) (comparing Garrisonian and radical models of antislavery constitutionalism). That larger inquiry, however, is beyond the scope of this limited project. In this instance, I commit to a more modest undertaking. Drawing upon a single client history for illumination, I venture to discover the meaning of voice and story overlooked in the dominant narrative of ethical lawyering.

67. Debate over rights discourse continues to embroil the theoretical movements within the legal academy. See, e.g., Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (Critical Race Theory); Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 385 (1988) (Critical Legal Studies); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (feminist theory).

But cf. Hardwig, *Should Women Think in Terms of Rights?*, 94 ETHICS 441 (1984) (arguing that rights categories are inappropriate in the context of close personal relationships characterized by intimacy, genuine care, love, and emotional involvement); C. SMART, *supra* note 7, at 138-59 (exploring the detrimental rhetoric and strategies of women's rights).

68. See Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INT'L J. SOC. L. 109, 111 (1986) ("[L]aw itself is not a unified entity, indivisible in terms of structure and effects.").

69. On the interconnection of legal rights and political struggle, see Law, *Equality: The Power and Limits of the Law* (Book Review), 95 YALE L.J. 1769, 1783 (1986) (reviewing Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY* (1984)) (asserting that rights "acquire concrete meaning only as people act collectively to claim them.") (footnote omitted).

meaning of even well-settled rights is always open to the interpretive future.⁷⁰

In the public process of representing Mrs. V., rights were exhibited in discourse, in rights talk. Although the talk—my lawyer talk—was primarily one-sided and unilateral, it did not prevent Mrs. V. drawing on her experiences as an impoverished Hispanic woman and mother living in a community actively engaged in practices of self-help and mutual aid.

The inclusion of these experiences in ethical lawyering runs counter to the rationality and discourse of suppression. Such rationality yields only partial knowledge, informed and disseminated by self-referential lawyer narrative.⁷¹ Omitted from this narrative are the competing voices and stories of client

70. Serving as the backdrop of legal disputes, rights create opportunities for resistance in the minds of the disputants. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 631-33 15 LAW AND SOC'Y REV. 631, (1980-81). The transformative process of creating opportunities for resistance in the form of rights talk spans the interrelated stages of naming (perceiving injury), blaming (fixing responsibility), and claiming (seeking redress). This process is reactive undergoing definition and redefinition in response to the alterations of discourse. *Id.* at 636-45. See also Breger, *Pursuing Justice: Pitfalls and Prospects*, 34 STAN. L. REV. 685, 692 (1982) (reviewing M. FRANKEL, *PARTISAN JUSTICE* (1980)) ("Legal needs depend in part on client perception, in part on attorney manipulation, and in part on cultural conceptions of legality.").

Compare Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1666 (1989) (citing AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (G. Teubner ed. 1988) (describing the creation of an autopoietic system through a "network of operations constituting further legal statements") and Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 736 (1989) (contending that autopoietic systems "recursively produce their own elements from the network of their elements").

For expansion of Luhmann's sociological theory of law, see Rottluehner, *A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System*, 23 LAW & SOC'Y REV. 779, 779 (1989) (defining autopoiesis as the "internal operations of self-production").

71. Stanley Fish's theory of contextual interpretation explicates the power of lawyer narrative. See Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 563-64 (1982) [hereinafter *Working on the Chain Gang*]. Probing the interior of professional narrative, Fish discerns implicit meanings preselected by education and training. These meanings become available to the lawyer through the adoption of "the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise[.]" Because dominant narrative is engraved by privileged meanings, lawyers are unable to confront client narrative untainted by their own *interested* perceptions. Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1339 (1984) (emphasis in original). Cf. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (claiming interpretive narrative constrained by disciplining rules and authoritative standards of community); Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982) (questioning composition and normative insulation of the dominant interpretive community).

In this sense, prevailing lawyer narrative acts as an interpretive constraint to gaining access to the client world. Like interpreters, lawyers "are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise[.]" Operating within these constraints, lawyers "see and bring others to see" the contorted shape of the client world. Fish, *Working on the Chain Gang*, *supra*, at 562.

Patrocinio Schweickart notes that Fish's ruling interpretive communities are androcentric in their choice of strategies and modes of thought. Schweickart, *Reading Ourselves Toward a Feminist Theory of Reading*, in GENDER AND READING, *supra* note 17, at 31, 50.

resistance traced to class, gender, and race. This omission accounts for the silence of the subordinated client. Properly understood, silence is an emblem of exclusion.⁷²

The story of Josephine V. shows that the poverty lawyer's ethic of suppression may be challenged by the client's ethic of resistance. As the story demonstrates, the public encounter and tension between suppression and resistance may occur suddenly, albeit briefly. When the rationality of resistance joins with the discourse of rights, the client may find the interval of space to muster the strength to speak out of turn.

A. JOSEPHINE V.

Josephine V. was twenty-seven years old, impoverished,⁷³ and living in the South Bronx, when I interviewed her in the neighborhood legal aid office. During the first week of June, 1986, in her seventh month of pregnancy, Mrs. V. visited the local Income Maintenance (IM) Center⁷⁴ to apply for public assistance, food stamps, and Medicaid.⁷⁵ Income Maintenance workers⁷⁶ provided her with an application, and scheduled an interview to be held the following week.⁷⁷

72. On the roots and experience of women's silence, see M. BELENKY, B. CLINCHY, N. GOLDBERGER, & J. TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* 17-34, 146-48 (1986); Finley, *supra* note 10.

Additional explanation of exclusion-associated silence may be found in muted group theory. This theory postulates women as a group muted by the dominant—male—idiom, especially in the realm of formal, public discourse. See GENDER AND READING, *supra* note 17, at xvi.

73. The terms "impoverished" and "impoverishment" (of women) are employed throughout the text to ensure a more accurate account of women's experience under conditions of poverty. These terms replace the well-accepted but misleading concept of the "feminization of poverty." See Littleton, *supra* note 21, at 1043. See also T. BARRETT-LENNARD, *THE POSITION IN LAW OF WOMEN* 21-24 (1983) (reviewing women's rights and duties under English Poor Laws); A. DAVIS, *WOMEN, CULTURE, & POLITICS* 23-33 (1989) (remarking on the obscurantist impact of the concept of the "feminization of poverty" in cloaking economic setbacks of the Black community).

74. An Income Maintenance Center (IMC) is the modern equivalent of the public welfare bureaus of the New Deal era. In general, an IMC serves the entitlement needs of a specific geographic area. For an analysis of the formalized and bureaucratized administration of public benefits, see Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

75. For recent studies of public welfare programs, see Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987-88); Quadagno, *Race, Class, and Gender in the U.S. Welfare State: Nixon's Failed Family Assistance Plan*, 55 AM. SOC. REV. 11 (1990); Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986).

Compare Maranville, *Welfare and Federalism*, 36 LOY. L. REV. 1 (1990) (summarizing historical and philosophical foundations of the AFDC program) with Barry, *The Welfare State versus the Relief of Poverty*, 100 ETHICS 503 (1990) (contemplating alternate philosophical justifications for income maintenance programs).

76. Unlike social workers, Income Maintenance workers (IM workers) are exclusively public entitlement eligibility specialists. For an historical comparison of the two roles, see Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

77. Hearing Record at 6, 17-18 [Hereinafter Record].

On June 17, 1986, Mrs. V. returned to the Center for an eligibility interview. At the interview, the IM worker informed her that an appropriate public benefits case would be opened and instructed her to submit a letter showing proof of pregnancy. A document supplied by the worker advised her "when to go back and bring in the proof,"⁷⁸ setting a deadline of June 26, 1986.⁷⁹

Hurrying to furnish proof before the June 26th deadline, Mrs. V. traveled to the hospital to procure a doctor's letter confirming her pregnancy. Once she obtained the needed letter, she called the Center and requested permission to submit proof of pregnancy. When the IM worker granted permission, she delivered the letter to the Center.⁸⁰

At the Center Mrs. V. asked the IM worker: "When would they be able to put the baby on the budget[?]"⁸¹ The worker responded that the child would be added to the budget immediately, without a birth certificate, provided Mrs. V. presented a hospital letter verifying the birth of the child. Complaining that her public assistance grant was insufficient to pay the rent in the interim, Mrs. V. was advised to borrow to meet the July rent. Fearing eviction, she borrowed \$63.68 from a friend.⁸²

On August 7, 1986, Mrs. V. returned to the Center for a recertification interview. After notifying the IM worker of her arrival, she began to experience labor pain. Hearing of the onset of labor, the worker's supervisor excused her from attending the recertification interview. Mrs. V. quickly departed the Center and entered the hospital where she remained until her pain subsided.⁸³

On August 12, 1986, Mrs. V. gave birth to a daughter. Upon her discharge from the hospital on August 18, 1986, Mrs. V. called the IM worker to announce the birth of the child and to apprise her of the contents of a hospital letter verifying the date of the birth. The worker replied that the Center did not accept that type of letter. Mrs. V. countered that a prior worker had assured her that submission of the letter "would put the baby on the budget."⁸⁴ Confessing regret, the worker insisted that Mrs. V. must wait until the receipt of the birth certificate.⁸⁵

In the first week of September, 1986, Mrs. V. called the IM worker asking "again" about her daughter, emphasizing that she had no clothing, Pampers

78. *Id.* at 18.

79. *Id.*

80. *Id.* at 18-19.

81. *Id.* at 19.

82. *Id.* 19, 21.

83. Mrs. V. described her experience as "false labor." *Id.* at 22-23.

84. *Id.* at 6, 21, 23.

85. *Id.* at 23, 26-27.

or milk.⁸⁶ The worker answered that the Center “couldn’t do anything for [her].”⁸⁷ When pressed, the worker disclosed that because Mrs. V. “didn’t] have the Birth Certificate,” the Center had “no kind of proof.”⁸⁸ Consequently, she argued, Mrs. V. had to wait.⁸⁹

During the second or third week of September, 1986, Mrs. V. called the IM worker to mention that she had received the birth certificate at home and “wanted to take it in, let them apply the baby to the budget.”⁹⁰ The worker directed her to the fifth floor receptionist area window. Accordingly, Mrs. V. returned to the Center and “went to the window to leave the Birth Certificate [.]”⁹¹ But, the IM workers rebuked her, claiming “they couldn’t accept it, ‘cause [she] didn’t have the [hospital] clinic card for the baby.”⁹² Instead, they admonished her to call her worker.⁹³

On October 10, 1986, Mrs. V. revisited the Center receptionist area to deliver a copy of her daughter’s clinic card and birth certificate. IM workers instructed her to call the assigned worker to report conveyance of the documents. Refusing, she opted to journey upstairs to the sixth floor “face-to-face”⁹⁴ area in an effort to communicate with the worker directly. Locating the worker, Mrs. V. introduced herself and “let her know” that the child’s birth certificate and clinic card were downstairs.⁹⁵ She also inquired: “When would the baby be added[?]”⁹⁶

On or about October 27, 1986, Mrs. V. received a letter from the IM worker commanding her attendance at the Center on October 31, 1986. The letter explained attendance was required to complete papers concerning the child’s father, an allegedly “absent parent.”⁹⁷ At the appointment, Mrs. V. remonstrated about “hard times” and pleaded to know “when is the baby going to be added to the budget[?]”⁹⁸ The worker retorted that “the baby is

86. *Id.* at 24, 26.

87. Mrs. V. testified “So, she just told me I have to wait as she hanged up, so I hanged up.” *Id.* at 24.

88. *Id.*

89. *Id.* at 24. Mrs. V. ordered her daughter’s birth certificate when she “checked out” of the hospital on August 18, 1986. She testified: “I told them to give me the letter stating that the baby was born and then I told them how long the Birth Certificate was gonna take. . . . that it was gonna take three weeks to a month.” *Id.* at 24-25.

90. *Id.* at 27-28.

91. *Id.* at 28.

92. *Id.* at 29.

93. *Id.* 27-29. Mrs. V. stated: “They didn’t accept it. They told me they weren’t going to take it, to call my worker.” *Id.* at 30.

94. *Id.* Recertification interviews required by federal and state public welfare statutes are commonly referred to as “face-to face” interviews.

95. *Id.* at 30-31.

96. *Id.* at 31.

97. *Id.* On welfare families and child support, see Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619 (1987-88).

98. Record at 31.

already added to the budget[,]" noting that by Mrs. V.'s "November check, the baby should be already added."⁹⁹

B. MILK, PAMPERS, AND COMMUNITY

To survive during these months of deprivation, Mrs. V. relied on a monthly public assistance grant of \$374.40 and a monthly food stamp allotment of \$122. Because those meager sums were inadequate to support herself and her daughter,¹⁰⁰ especially given a monthly rent of \$256.68,¹⁰¹ she turned to a community of family and friends for aid.¹⁰² The aid came in the form of loans.¹⁰³

The lending began in July, 1986 when Mrs. V. solicited \$63.68 from a friend to meet a rent shortfall. It continued in September and October, 1986 when she borrowed \$250 from another friend to satisfy two months of outstanding rent and to finance the purchase of "a small crib and some clothing."¹⁰⁴ This and other purchases associated with the care and feeding of her daughter consumed the great bulk of the lending.¹⁰⁵

These regular purchases, outlays for milk and Pampers, compelled Mrs. V. to seek out loans from six different friends or family members. The loan amounts ranged from \$20 to \$100 and reached a total of \$280. Even the proprietor from the corner grocery store extended credit, in the amount of \$73, to pay for food stuffs.¹⁰⁶

The generosity of friends and family soon proved insufficient. Alarmed by the ongoing need for "milk and Pampers and food," Mrs. V. pawned her wedding ring. Later, she sold her jewelry, a gold chain. At the end of seven months, Mrs. V.'s accrued debts, coupled with the loss of her jewelry,

99. *Id.*

100. For a discussion of the inadequacy of public welfare budgets and the socio-economics of homelessness, see Dehavenon, *Administrative Closings of Public Assistance Cases: The Rise of Hunger and Homelessness in New York City*, 16 N.Y.U. REV. L. & SOC. CHANGE 741 (1987-88); Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. L. & SOC. CHANGE 565 (1987-88); Recent Developments, *Between Helping the Child and Punishing the Mother: Homelessness Among AFDC Families*, 12 HARV. WOMEN'S L.J. 237 (1989); Rossi, *The Family, Welfare and Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1989); Sullivan & Damrosch, *Homeless Women and Children*, in *THE HOMELESS IN CONTEMPORARY SOCIETY* 82-98 (R. Bingham, R. Green, & S. White eds. 1987).

101. This rent amount did not include gas and electricity. Record at 3.

102. *Id.* at 34-40.

103. *Id.* The agency made no determination whether Mrs. V. incurred overpayments due to the receipt of loan monies. For a discussion of public welfare overpayment recoupment provisions, see Failingler, *Contract, Gift, or Covenant? A Review of the Law of Overpayments*, 36 LOY. L. REV. 89 (1990).

104. Record at 35-37.

105. *Id.* at 36-40.

106. *Id.* A seventh friend lent Mrs. V. \$55.00 to supply her with "money to travel[]" to the hospital when her daughter contracted meningitis. *Id.* at 38-39.

amounted to \$851.68.¹⁰⁷

C. SPEAKING OUT

When no remedial action had occurred by the middle of November, 1986, Mrs. V. called the IM worker to dispute the claims, repeated "over and over again," that her daughter was to be added to the household public benefits budget.¹⁰⁸ The worker rejoined that "whenever the computer picks her up, that's when she'll be added."¹⁰⁹ Dissatisfied, Mrs. V. asked the worker to "give [her] the number for a fair hearing."¹¹⁰ The worker replied "you want it, you get it yourself[.]" and hung up.¹¹¹

In December, 1986, on the advice of her sister-in-law, Mrs. V. visited the local welfare client advocacy organization.¹¹² Consulting with the director, she described "what had happened."¹¹³ The director resolved to conduct an immediate investigation by contacting Center officials. Acting as Mrs. V.'s lay advocate, the director called the IM worker, the IM supervisor, and the Center director.¹¹⁴

Initially, the calls proved fruitless.¹¹⁵ But with persistence, the director shortly reached Mrs. V.'s IM worker and asked "why the baby still wasn't added [.]"¹¹⁶ The IM worker answered: "'cause of the computer error," contending that "when the computer . . . picks up the baby, then the baby will be added."¹¹⁷ Addressing Mrs. V. harshly, the worker adamantly repeated: "when the computer picks it up, the baby will be added."¹¹⁸

On or about January 13, 1987, the Center redefined Mrs. V.'s public assistance and food stamp household to include her daughter, recomputed her monthly grant and allotment, and issued full benefits. Having suffered a three month delay in the issuance of public benefits and accumulated a substantial debt, Mrs. V. requested an administrative law judge (ALJ) hearing

107. *Id.* at 8, 40-41.

108. *Id.* at 32.

109. *Id.*

110. *Id.*

111. *Id.*

112. For an analysis of client community-based advocacy organizations, see Rosenblum, *Controlling the Bureaucracy of the AntiPoverty Programs*, 31 LAW & CONTEMP. PROBS. 187, 190-91 (1986) (describing the British Citizens' Advice Bureau as a means of ensuring bureaucratic accountability). Cf. D. LEWIS, J. GRANT, & D. ROSENBLUM, *THE SOCIAL CONSTRUCTION OF REFORM: CRIME PREVENTION AND COMMUNITY ORGANIZATIONS* (1988) (analyzing community and cultural context of collective action).

113. Record at 32-33.

114. *Id.* at 33.

115. In a frustrating series of phone calls, the director learned that the IM worker "wasn't in," the IM supervisor "wasn't in yet," and the Center director was "at a conference." *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

from the New York State Department of Social Services seeking the full restoration of benefits retroactive to August, 1986 and the reimbursement of all out-of-pocket expenses.¹¹⁹

D. SPEAKING OUT OF TURN

In January, 1987, Mrs. V. retained the neighborhood legal aid office as counsel. Assigned to the case for the purpose of hearing representation, I visited the Center to review Mrs. V.'s case file.¹²⁰ Reading the file, I learned that on or about October 23, 1986, the IM worker directed the reclassification of Mrs. V.'s public assistance household to compensate for the birth of her daughter. Additionally I found that when the directive was not implemented in the ensuing two months, the IM worker issued a second reclassification directive on December 19, 1986. This directive was processed on December 30, 1986.¹²¹

At the hearing, Mrs. V. and a representative from the New York City Human Resources Administration appeared and testified.¹²² Mrs. V. opened her testimony by reciting the composition and financial circumstances of her household. Thereafter, she carefully recounted the events leading up to and following her application for public welfare benefits.¹²³

Recalling these events, Mrs. V. asserted that IM workers never offered to issue her emergency public assistance or food stamps.¹²⁴ Furthermore, she noted that they never proffered help in verifying her daughter's birth. She pointed out, for example, that the workers never called, contacted, or investigated her doctor, clinic, or hospital. Beyond vague mention of a computer error by a worker on one occasion, Mrs. V. stated she received no explana-

119. *Id.* at 11-12.

120. On-site physical inspection and review is appropriate not only for the purpose of investigation, but also to uncover client fraud and present client perjury. For a restatement of the problem of client fraud, see Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984). Hazard poses the problem in this way: "What should a lawyer be permitted or required to do when he learns that the client's project is fraudulent at a point when it is simply too late for innocuous withdrawal?" *Id.* at 291. By way of resolution, he recommends a formula consolidating prevention and rectification, but requiring warning where practicable. *Id.* at 308-09.

For a review of disclosure requirements, see Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 981 (commending disclosure provisions of the *Model Rules*); Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 AM. B. FOUND. RES. J. 964 (juxtaposing proposals requiring disclosure of client perjury).

121. Record at 10-11, 14.

122. *Id.* at 1. The New York City Human Resources Administration (HRA or the agency) is a local arm of the New York State Department of Social Services (NYSDDS or the State).

123. *Id.* 2-4, 17-44.

124. See Note, *Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children*, 60 CORNELL L. REV. 879 (1975) (reviewing administration and procedures governing availability of emergency assistance relief).

tion for the Center's failure to add her child to the household budget.¹²⁵

Mrs. V. next testified regarding the protracted struggle to add her infant daughter to the household budget. The testimony included a detailed description of the numerous bureaucratic obstacles impeding that addition. At the close of this testimony, Mrs. V. summarized the nature of her petition for reimbursement of out-of-pocket expenses. Interrupted by skeptical ALJ questioning discounting her right to such a reimbursement, Mrs. V. became indignant.¹²⁶ Confronting the ALJ, she demanded: "Can I speak?"¹²⁷

Apparently surprised by her outburst, the ALJ withheld his questioning, permitting Mrs. V. to speak without intrusion. The complete text of her statement is set down below.

To tell you the truth, first of all, . . . my worker, I can't speak with the lady, because every time I try to talk to her, she's a very rude and nasty person. So, how can I—if I can't—if she can't add my baby to the budget, how can I go and explain to her, which they should know by themselves, that I need food and Pampers for my daughter. And, after they have—I let her know when I called up that I didn't have anything at all for my baby. That day—and I find out that they're supposed to give me clothes—at least, money to buy the baby clothes. So, how can I go to my worker when she always hanging up on me or don't want to talk to me and tell her that I had to go out of my way to borrow money from people or pawn or sell my—my jewelry which . . .

. . . I didn't have to.

. . .

I think we have [suffered hardship]. 'Cause just what—what [my worker] has put me through and the time my daughter was in the hospital and I was broke and I—and I had to go back and forth walking and the day I took her into the emergency that I was walking to the hospital. . .

. . .

'Cause I didn't have no money. And, the time—it says it even on the papers the time that I had sold my jewelry that I had to go out of my way I think that nobody has to go through that or sell jewelry or sell my personal belongings when the welfare is supposed to add the baby to the budget.¹²⁸

125. Record at 32-33.

126. *Id.* at 17-44. On the importance of indignation in the progress of the woman's suffrage movement of the nineteenth century, see Edwards, *Women and the Law: From Abigail to Sandra*, 52 U. CIN. L. REV. 967, 972 (1983). See also S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 375-404 (1975) (describing feminist strategies opposing sexual assault and rape); S. NICHOLAS, A. PRICE, & R. RUBIN, *RIGHTS AND WRONGS: WOMEN'S STRUGGLE FOR LEGAL EQUALITY* 3-22 (1986) (tracing women's suffrage movement); West, *Love, Rage and Legal Theory*, 1 YALE J.L. AND FEMINISM 101 (1989).

127. Record at 42. In confronting the ALJ, Mrs. V. seems to challenge his implicit claim to authoritative interpretation of her asserted right to reimbursement. See Cover, *supra* note 66, at 53.

128. Record at 42-44. On June 3, 1987, the ALJ rendered a decision directing the agency to issue Mrs. V. public assistance and Medicaid retroactive to August 12, 1986, and food stamps retro-

IV. THE ETHIC OF RESISTANCE

The indignant declaration which concludes Mrs. V.'s hearing signifies more than a denunciation of callous bureaucratic treatment. Viewed broadly, it suggests a powerful, albeit inchoate, stance of public resistance to both judicial and lawyer authority. Concededly, the umbrage Mrs. V. directs at the ALJ appears to be a plainer statement of resistance. Yet, the statement "Can I speak?" carries sufficient ambiguity to warrant the suspicion that Mrs. V. may have aimed her remark at lawyer authority as well. Extending this analysis is perhaps appropriate to interpreting her remark as something larger, a kind of public uprising against the form and substance of lawyer storytelling. Even on this interpretation, Mrs. V.'s declaration is a starker and more boldly asserted example of resistance than generally might be found in the poverty law context. In the suppressive confines of the poverty lawyer's practice, client resistance is likely to be marshalled narrowly and obliquely. Even when resistance is shown, however, it is slighted by the poverty lawyer as insignificant. This evasion is attributable to the ethic of suppression.¹²⁹

Diagnosing the fallacies in this lawyer ethic demands alternative structures of rationality. Here I propose two such structures: detachment and connection.¹³⁰ Both detachment and connection are singular "moments-of-knowing."¹³¹ Coupled together, they enable the poverty lawyer to discover the falsity of client dependence and isolation, and the existence of autonomy and community.

Detachment furnishes the poverty lawyer a means of separating from practices which privilege a subordinated vision of the client.¹³² Discarding privileged recordings of the history of client advocacy is essential to safeguarding

active to September 11, 1986. The period of restoration extended to December, 1986 with benefits computed to offset prior grants and allotments. The ALJ declined to order agency reimbursement of out-of-pocket expenses citing insufficient statutory authority. In re Josephine V., Decision After Fair Hearing (State of N.Y. Dept. of Soc. Serv. June 3, 1987), slip op. at 4.

129. On claims of necessity broached by various forms of rationality, see M. FOUCAULT, *Reason to Tell the Truth*, in FOUCAULT LIVE, *supra* note 8, at 252.

130. For a discussion of detachment under historical frameworks of knowledge, see M. FOUCAULT, *Historian of Culture*, in FOUCAULT LIVE, *supra* note 8, at 79. Cf. Postema, *Self-Image, Integrity, and Professional Responsibility*, in THE GOOD LAWYER, *supra* note 11, at 286, 293 (noting that detachment offers an excuse but not a justification for professional irresponsibility).

Elizabeth Flynn supplements this discussion by seeking to integrate detachment and involvement in order to reach a comprehensive viewpoint. Flynn, *Gender and Reading*, in GENDER AND READING, *supra* note 17, at 267, 268-70 (defining detachment as "observation from a distance").

131. Lahey, ". . . Until Women Themselves Have Told All That They Have to Tell . . .", 23 OSGOOD HALL L.J. 519, 535 (1985).

132. The step outside of prevailing logic may be likened to an act of self-refutation. See Miller, *The Glittering Eye of Law*, 84 MICH. L. REV. 880, 896-98 (1986) (reviewing J. VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986)).

the potential for client autonomy.¹³³ Without such revision, the self-evidence of client dependency remains a compelling memory.¹³⁴

Of course, detachment can never be complete. There is no transcendent state guaranteeing critical detachment. Similarly, there is no perfect insight into structures of rationality or discourse. But, detachment may allow for the emergence of shared meanings institutionalized in alternative roles and practices.¹³⁵ That transfiguration yields a counter-ethic of resistance.

The ethic of resistance challenges the rationality of lawyer suppression.¹³⁶ The ethic is not reducible to a legalistic rule,¹³⁷ but is instead demonstrated through the practices of voice and story.¹³⁸ These alternative practices are exhibited in Mrs. V.'s struggle to maintain autonomy and community connection. The practices speak in opposition not only to judicial and bureaucratic authority, but also to the authority of the poverty lawyer.

The voice of resistance tells the story of individual clients connected by interdependent narratives of class, ethnicity, gender, race, and sexuality. The conception of the connected self locates each client within social networks.

133. Cognitive research shows memory and comprehension to be based on the same generalized knowledge structures. Crawford & Chaffin, *The Reader's Construction of Meaning: Cognitive Research on Gender and Comprehension*, in GENDER AND READING, *supra* note 17, at 3, 5.

134. On popular memory, see M. FOUCAULT, *Film and Popular Memory*, in FOUCAULT LIVE, *supra* note 8, at 89-106. Cf. Cornell, *Post-Structuralism, the Ethical Relation, and the Law*, 9 CARDOZO L. REV. 1587, 1623 (1988) ("When we recall the past, we inevitably remember the future.").

135. See Cornell, *Two Lectures on the Normative Dimensions of Community in the Law: The Problem of Normative Authority in Legal Interpretation*, 54 TENN. L. REV. 327, 328 (1987) ("It is precisely because we are in a shared world of institutionalized meaning that critique as well as agreement is possible.").

136. The upshot of this challenge is likely to be suspicion. See Freedman, *Lawyer-Client Confidences and the Constitution*, (Book Review) 90 YALE L.J. 1486, 1496 (1981) (reviewing M. FRANKEL, *PARTISAN JUSTICE* (1980)) ("[O]ne of the costs of destroying confidence and trust between lawyers and clients is that lawyers would lose the opportunity to give sound legal and moral advice based on full knowledge of the matters entrusted to them.").

137. For a discussion of an alternative rhetoric of professional aspiration based on a classical form of normative instruction denoted by education through illuminating example, see Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 575-76 (1982).

Asserting that "the legal profession has come to put too much weight on codes and rules as the medium of discourse about professional ethics[.]" Hazard endorses Thomas Shaffer's use of the method of illuminating narrative. See Hazard, *Book Review*, 63 NOTRE DAME L. REV. 393, 396 (1988) (reviewing T. SHAFFER, *FAITH AND THE PROFESSIONS* (1987)). Hazard asserts "[n]arrative reveals dimensions of events that rules cannot. These dimensions at a minimum include specification of the social context in which an ethical dilemma arises and the identity and character of the participants." *Id.*

138. Hazard maintains that "[a] story can reveal to us moral aspects of life that otherwise are simply inaccessible." Hazard, *Book Review*, *supra* note 60, at 398. The ethical truth of story telling is undertaken by indirect demonstration. *Id.* at 393. Hazard explains that a story "engages the reader in the situation and, having done so, induces him into reflection to 'solve' or make sense of the events portrayed." *Id.* Learning occurs in the attempt to construct an interpretation when "no single interpretation of a situation is the only interpretation, and no single answer entirely complete." *Id.*

For Martha Minow, individual membership in connected networks helps to constitute the *I*. On this view, individual "belonging is essential to becoming."¹³⁹

Recognizing collective networks of resistance is indispensable to recapturing the omitted stories of clients.¹⁴⁰ The actualization of resistance in the daily actions of ordinary clients proves that dissenting interpretations of the world may become real.¹⁴¹ Overlooking those interpretations denies clients the opportunity to assemble a coherent narrative adequate to contest dominant lawyer narrative. It is the norm of resistance, manifested in word and deed,¹⁴² that provokes events around which alternative narrative coherence may coalesce.¹⁴³

Client narratives of resistance are disclosed in conversation with the poverty lawyer.¹⁴⁴ Hans-Georg Gadamer urges "no higher principle than holding oneself open in a conversation."¹⁴⁵ To hold himself open in conversation, the poverty lawyer must grasp the "common structure of understanding and playing."¹⁴⁶ Gadamer asserts that meaning grows in "playful fashion" from the value of words spoken in concrete situations.¹⁴⁷ The non-fixity and constant play of meaning is for Gadamer the ongoing game in which "being-with-others" occurs.¹⁴⁸

Conversation commences with the poverty lawyer's offer to play with privileged and subordinated meanings of autonomy/dependence and isolation/community.¹⁴⁹ The intent of this offer is to preempt suppression.¹⁵⁰ Pre-

139. Minow, *supra* note 58, at 894 (footnote omitted).

140. *Id.* at 821.

141. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617-29 (1986).

142. *Id.* at 1618.

143. For a discussion of narrative coherence in jurisprudential contexts, see Van Roermund, *Narrative Coherence and the Guises of Legalism*, in LAW, INTERPRETATION AND REALITY: ESSAYS IN EPISTEMOLOGY, HERMENEUTICS AND JURISPRUDENCE 310, 342 (P. Nerhot ed. 1990).

144. Jacobson expands the parameters of conversation to include non-speech acts. On his view, "[c]ommunication is textured and various. It need not even include speech, certainly not rational discourse, so long as it expresses information calculated to change the understanding (in some way) of an addressee of the communication." Jacobson, *supra* note 70, at 1664-65.

145. H.-G. GADAMER, *supra* note 47, at 189. See also D. COOLE, *supra* note 42, at 267 (commenting on the valuable "creation of a new set of meanings and referents which differ from, and circumscribe, men's knowledge").

146. H.-G. GADAMER, *PHILOSOPHICAL HERMENEUTICS* 56 (D. Linge trans. 1976).

147. *Id.*

148. *Id.*

149. Play refers to the play of perspective. Perspective "signifies the capacity for certain insights as well as the limitation of vision." GENDER AND READING, *supra* note 17, at xxi.

Introducing the element of play does not deny that the creation of the lawyer-client relationship carries significant legal consequences worthy of safeguard through legal formalities. Cf. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 326 (mentioning the symbolic legitimacy and protections acquired by attaching legal formalities to cohabitation).

150. Pre-emption assumes the open acknowledgement of lawyer-client mistrust. Play, in turn,

emption seeks to disrupt the logic of suppression in the hope of re-aligning hierarchical structures of rationality and discourse.¹⁵¹

While the offer of play may echo an offer of friendship, the two are distinct.¹⁵² Play neither invites nor requires friendship. At best, play temporarily displaces the rationality and discourse of suppression. Displacement kindles a process of reconstituting the client as subject.¹⁵³

offers an opportunity for the sustained exploration of alternative grounds for mutual trust. For a careful probing of lawyer-client mistrust, see Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981).

151. For a discussion of the realignment of patriarchal epistemology and discourse, see Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189, 194 (1990) (rejecting the practicality of using feminist litigation as a vehicle for dialogue); Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990) (proposing the incorporation of the feminist voice of dialogue in constitutional litigation); Griffith, *Sexism, Language, And The Law*, 91 W. VA. L. REV. 125, 143-46 (1988) (urging self-reflective action to transform the language of the law by changing the identity of the speakers, the content of the stories related, and the metaphors and descriptive terminology used); Menkel-Meadow, *supra* note 42, at 30 (exploring the epistemology of women's exclusion: the distinctive ways of knowing gleaned from the everyday experience of exclusion); Phinney, *Feminism, Epistemology, and the Rhetoric of Law: Reading Bowen v. Gilliard*, 12 HARV. WOMEN'S L.J. 151, 179 (1989) (approving a dialogic rhetoric of intersubjectivity that "attempts to grasp, through an act of imaginative identification, the situation of the victim.") (footnote omitted); Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV. 521, 523 (1987) (approaching gender as a category of contextual analysis); Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 68 (1985) (asserting that feminist jurisprudence must go beyond attempting to include women in patriarchal categories; it must question the "methods, and scope of inquiry, the categories which structure how questions are formed, and the rules which both legitimize sources of information and govern modes of interpretation."); Young, *Difference and Policy: Some Reflections in the Context of New Social Movements*, 56 U. CIN. L. REV. 535, 545 (1987) (espousing a politics of difference defined by "particularity, specificity, and the impossibility of reducing either social process or individual subjectivity to unity."); Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1563 (1987) (citing the existence of contradictory truths as integral to women's experience and knowledge).

152. Thomas Shaffer propounds friendship as an alternative professional ethic. Shaffer, *The Ethics of Dissent and Friendship in the American Professions*, 88 W. VA. L. REV. 623 (1986). Lawyers guided by this dissenting ethic "seek to practice the virtue of friendship with their clients." *Id.* at 638. For Shaffer, practicing the ethics of friendship raises a moral issue of preference resolved by the circumstances of community. *Id.* at 643, 662. In this sense, "the community teaches the professional how to be a friend." *Id.* at 662. See also Fried, *The Lawyer as a Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (defining friendship as the adoption of client interests).

Cf. Selinger, "The Ethics of Dissent and Friendship"—A Response to Professor Shaffer, 88 W. VA. L. REV. 666 (1986) (approving professional detachment as a reflection of diversity and independence); Friedberg, *A Comment for Tom Shaffer: The Ethics of Race, the Ethics of Corruption*, 88 W. VA. L. REV. 670 (1986) (objecting to Shaffer's ethic of friendship and community as unresponsive to racial prejudice, corruption, and favoritism); Dauer and Leff, *Correspondence*, 86 YALE L.J. 573 (1977).

153. On the discourse of truth and the constitution of the self, see M. FOUCAULT, *Reason to Tell the Truth*, in FOUCAULT LIVE, *supra* note 8, at 253-54 ("If I 'tell the truth' about myself, I constitute myself as subject by a certain number of relationships of power, which weigh upon me and

Reconstitution generates consideration of alternative possibilities of individual and collective client resistance.¹⁵⁴ Refashioning these possibilities from long-developed strategies of client resistance resembles a seizure of power over the process of poverty law advocacy. Seizure is crucial to normative reclamation.

Recognizing this importance, many feminists argue that in renouncing the patriarchal conditions of oppression which produce resistance, women at the same time must reclaim the normative underpinnings of such strategies. These feminists therefore endorse a continued devotion to caring for the needs of others and facilitating the bonds of community, in spite of the subjugating history of this ethic.¹⁵⁵ Applied here, that endorsement gives positive meaning to the subordinated social text of the client's world.

The rescuing of client resistance strategies demonstrates the potential for the normative inversion of the ethic of suppression.¹⁵⁶ This potential encom-

which I lay upon others."'). See also McGuire, *Moral Relativism and Habermas*, 6 ALSA F. 23 (1982) (charting the development of political autonomy and moral discourse).

154. Reconstitution neither ratifies nor ignores the inequalities dividing the lawyer-client relation. Eschewing both paternalism and antipaternalism, reconstitution seeks to replace the isolation of individualism with the solidarity of community. For a study of paternalism and anti-paternalism in feminist theory and practice, see Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1522 (1986).

155. See Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, (Book Review) 82 NW. U.L. REV. 352, 379 (1988) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)).

156. For an exposition of feminist legal practice as an alternative normative culture, see Littleton, *supra* note 42, at 1300 (claiming that practice empowering women or contributing to the breakdown of male domination enhances equality); Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 OSGOODE HALL L.J. 897, 914 (1986) (suggesting that application of the female form of moral reasoning to the legal process might spur different processes, such as mediation, and produce different substantive solutions); Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289, 304 (1989) (calling for a redirection of legal profession research to get inside the content, definition, and structure of work in order to find how particular conceptions of work are reinforced and encoded); Menkel-Meadow, *supra* note 42, at 39 (exploring how women's different voices may affect the lawyering process); Schultz, *Room to Maneuver (f)or a Room of One's Own? Practice Theory and Feminist Practice*, 14 LAW & SOC. INQUIRY 123, 141-42, 145 (1989) (chiding feminist practice theory for underestimating connection between gender hierarchies and women's oppression, and prodding feminists to articulate stories of oppression as well as counter-normative visions).

Compare Shaughnessy, *Gilligan's Travels*, 7 LAW & INEQUALITY 1, 23 (1988) (arguing that "women's inclinations for activities of care will necessarily be frustrated as they encounter the law's limitations") with Standford, *Lawgirls and Cowgirls*, 10 LEGAL STUD. F. 283 (1986) (contemplating women's practices of self-empowerment) and Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 LEGAL STUD. F. 287 (1986) (exploring the consequences and contributions of an ethic of care).

For criticism of feminist practice and culture on grounds of false universalism and ethnocentric sociology, see C. SMART, *supra* note 8, at 66-89 (assailing grand theorizing in feminist jurisprudence as a celebration of positivistic, scientific feminism replacing one hierarchy of truth with another); E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); R.

passes both rationality and discourse suggesting "a way of being, thinking, and speaking that allows for openness, plurality, diversity, and difference."¹⁵⁷ Fulfilling that potential demands an end to the trivialization of client stories and strategies of resistance¹⁵⁸ and the beginning of a participatory poverty law practice.¹⁵⁹ The purpose of such participatory practice is twofold: first, to improve the quality of ethical lawyering¹⁶⁰ and second, to enable clients to assert their autonomy consonant with community.

Admittedly, unrestrained autonomy threatens the dissolution of community and the accompanying isolation of the individual client.¹⁶¹ This result is in part the consequence of employing a liberal, rather than a feminist, notion of autonomy.¹⁶² Under liberal theory, autonomy is defined by the rugged independence of atomized individuals competing in society.¹⁶³ By compari-

TONG, *FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION* 217-33 (1989) (citing anti-essentialism of post-modern feminism and deconstruction); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (gender essentialism may silence the voices of Black women); Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989) (examining the diversity of women's experiences of oppression and the inadequate treatment of race as a discrete category of oppression); Ashe, *Conversation and Abortion* (Book Review), 82 NW. U.L. REV. 387 (1988) (reviewing M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987)).

157. R. TONG, *supra* note 156, at 219.

158. See Cornell, *Post-Structuralism, the Ethical Relation, and the Law*, *supra* note 134, at 1588 (defining the ethical relation of otherness as safeguarding difference and singularity).

159. Foucault emphasizes that liberty is a practice. M. FOUCAULT, *An Ethics of Pleasure*, in FOUCAULT LIVE, *supra* note 8, at 264. Its effective exercise is guaranteed not by institutions or laws, but by the safeguarding projects of people participating in their own freedom. *Id.* at 257, 265-66.

160. Douglas Rosenthal's empirical study of personal injury practice showed that an active, participatory model of the lawyer-client relationship produced "significantly better" results in the settlement and trial of claims. D. ROSENTHAL, *supra* note 7, at 61.

161. Commenting on this peril, Martha Minow avers: "Freedom may mean freedom to choose isolation, but then it must also mean freedom to choose connection." Minow, *Consider the Consequences* (Book Review), 84 MICH. L. REV. 900, 916 (1986) (reviewing L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)). See also L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 374-75 (1985) (documenting the rise of individualism in the traditional concept of marriage). Cf. Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1687-90 (1986) (reconceiving modernist isolation in terms of mistrust and strife).

162. For a penetrating critique of liberal individualism, see Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

163. The liberal tradition propounds a model of insular autonomy. Cover, *supra* note 66, at 33 ("People associate not only to transform themselves, but also to change the social world in which they live."). See also H. GANS, *MIDDLE AMERICAN INDIVIDUALISM: THE FUTURE OF LIBERAL DEMOCRACY* (1988); C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

For recent communitarian accounts of the modern liberal subject, see A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Freedon, *Human Rights and Welfare: A Communitarian View*, 100 ETHICS 489 (1990); Binder, *Mastery, Slavery, and Emancipation*, 10 CARDOZO L. REV. 1435 (1989); Nino, *The Communitarian Challenge to Liberal Rights*, 8

son, under feminist theory, autonomy is tied to community and the associated values of nurturing, care, love, and empathy.¹⁶⁴

Reinvigorating the meaning of autonomy in a manner congruent with community requires the renewed contemplation of client's role and world.¹⁶⁵ When social roles are interpreted in terms of human interdependence and interaction, autonomy and community are complementary.¹⁶⁶ This integration is consistent with a feminist-defined notion of self-determination conceived in light of connection.¹⁶⁷

Using the value of connection¹⁶⁸ as a cantilever to join autonomy and community expands the content of lawyer rationality. This expansion entails the inclusion of different forms of rationality and discourse at play in the diverse communities of class, ethnicity, gender, race, and sexuality.¹⁶⁹ As Foucault notes, play between different social groups can construct, rationalize, and organize old usages and forms of behavior in new and unforeseen ways.¹⁷⁰

Client-participatory forms of rationality and discourse undermine the law-

LAW & PHIL. 37 (1989); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988); Cornell, *In Union: A Critical Review of TOWARD A PERFECTED STATE* (Book Review), 135 U. PA. L. REV. 1089, 1091-94 (1987) (reviewing P. WEISS, *TOWARD A PERFECTED STATE* (1986)).

164. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988). See also, S. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) (dismissing the false gender neutrality of contemporary liberal theory); Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (exploring ways that feminists have tried to join political agendas with methodology).

165. Deciphering gender roles in communities, Lucinda Finley asserts that "power, domination, and the consequent social construction of gender roles affect choice and the configuration of community." Finley, *Choice and Freedom: Elusive Justice in the Search for Gender Justice* (Book Review), 96 YALE L. J. 914, 923 (1987) (reviewing D. KIRP, M. YUDOF, & M. FRANKS, *GENDER JUSTICE* (1986)).

166. Finley, *supra* note 165, at 931. Compare Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, *supra* note 62, at 1143 (pronouncing the Hegelian understanding of community as the reality of internal interrelatedness); Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319, 325 (1987) ("The real challenge to autonomy as a doctrine is the ordinary fact that the person comes to be in relationships—in families, congregations, communities, friendships, and associations.") (emphasis in original).

167. Finley, *supra* note 165, at 933. Finley does not address the concept of self-respect as a condition of self-determination, though the two seem intertwined. For consideration of subjective and objective measures of self-respect, see Massey, *Is Self-Respect a Moral or Psychological Concept?*, 93 ETHICS 246 (1983).

168. Robin West asserts the central insight of recent feminist theory to be the vision of women as "essentially connected," not "essentially separate," from the rest of human life, both materially, through pregnancy, intercourse and breast-feeding, and existentially, through the moral and practical life." West, *supra* note 164, at 3.

169. On the social meanings of association, assimilation, and difference arising out of membership in empowered and disempowered groups, see Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106 (1986).

170. Foucault calls this level of analysis strategic configurations. He insists "[t]here's no person or group, no titular head of this strategy; but beginning from effects different from their initial end and from the capacity to utilize these effects, a certain number of strategies are formed." M. FOUCAULT, *What Call for Punishment?*, in FOUCAULT LIVE, *supra* note 8, at 284.

yer-client relation as a field of power. As the field collapses, individual acts of resistance furnish organizing principles for the formation of an alternative relational order. Long neglected or underestimated, those acts are symbolic of the client subject asserting a practice of resistance.¹⁷¹

Deducing techniques of lawyering from an ethic of resistance in order to enhance client autonomy without sacrificing community or reinscribing subordination promises a slow and arduous labor.¹⁷² Here, I suggest only that such labor begin with the investigation of how the client survives and overturns the ethic of lawyer suppression.¹⁷³ Learning how and why the client rallies the force to assert her autonomous status as subject, to speak out of turn, is vital to the establishment of a new ethic of resistance.¹⁷⁴ By learning this lesson well, lawyers may spur the increased participation of excluded client communities in the advocacy process.¹⁷⁵

171. Foucault's practices of the self resemble practices of resistance. He explains:

Sometimes these practices are associated with numerous, systematic, and restrictive kinds of codings. Sometimes they even lose almost all definition, to the profit of a set of rules which then appears as the essential of a morality. But it can also happen that they constitute the most important and the most active source of the morality, and that it is around them that reflection develops. The practices of the self thus take the form of an art of the self, relatively independent of any moral legislation.

M. FOUCAULT, *The Concern for Truth*, in FOUCAULT LIVE, *supra* note 8, at 293, 298-99.

172. In this labor, the reconstitution and subordination of the client subject occurs simultaneously. Cf. M. FOUCAULT, *Concern for the Truth*, in FOUCAULT LIVE, *supra* note 8, at 300 (defending the thesis of two distinctly different, albeit simultaneous as well as successive experiences of madness: internment and medical practice). See also M. FOUCAULT, *MADNESS AND CIVILIZATION* (1977).

Lawyer participation in stimulating and sustaining acts of resistance is essential to the remaking of the character, culture and language of poverty law. Cf. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 871-95 (1983) (positing the interconnection between rhetoric and character).

173. See D. GRANFIELD, *THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY* 271 (1988) (on the self-appropriation of the legal subject).

174. Foucault contends that "the subject is constituted through practices of subjection, or, in a more anonymous way, through practices of liberation, of freedom[.]" M. FOUCAULT, *An Aesthetics of Existence*, in FOUCAULT LIVE, *supra* note 8, at 309, 313. Cf. Schibanoff, *Taking the Gold out of Egypt: The Art of Reading as a Woman*, in GENDER AND READING, *supra* note 17, at 83-101 (on the transformation of the emasculated female reader).

175. The active participation of client groups or whole communities in the advocacy process may invite prohibitions for the unauthorized practice of law. For a discussion of the disparate impact of these prohibitions on those (i.e., the poor) lacking adequate self-help skills or access to legal assistance, see Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

Furthermore, participation raises the issue whether lawyer responsibility to promote the campaigns of individual clients should be codified and mandated. See, e.g., Drinan, *Untying the White Noose* (Book Review), 94 YALE L.J. 435, 443 (1984) (reviewing J. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* (1983)) ("The writings on ethical norms and standards of professional conduct for lawyers seldom, if ever, talk about the responsibility of lawyers to promote integrated housing."). Cf. Elster, *Rationality*,

CONCLUSION

The ethic of resistance celebrates the inclusion of client voice and story in the advocacy process. It rejects specious analytic dichotomies (e.g., independence/dependence, and isolation/community) in favor of the historical categories of class, ethnicity, gender, race, and sexuality. Applying these categories to the practical activities of poverty law advocacy, the ethic seeks to reconstruct the lawyer-client experience.

Even when reconstruction fails, the silence of excluded voices and stories is not an intransigent feature of ethical lawyering. Silence merely indicates the transitory dominance of a privileged rationality and discourse. Reconstituting ethical lawyering to liberate client narrative is a continuing critical enterprise.

This is not to suggest that the field of ethical lawyering has evolved without the acute proddings of criticism. To be sure, the expanding literature of ethics reveals formidable critique.¹⁷⁶ Thus far, the critique has failed to de-center the dominant ethic of suppression.

The telling and retelling of client stories frames a new stance from which to assay the ethics of poverty law practice. Because the relation between a poverty lawyer and an impoverished client is woven in story, I have begun my critique in this context.¹⁷⁷ Basic to the vitality of this critique project is

Morality, and Collective Action, 96 ETHICS 136 (1985) (considering the norms and motivations for collective action).

Whether failure to abide by that responsibility establishes grounds for discipline, and moreover, what procedures might govern such disciplinary proceedings must be left for later inquiries.

176. Critique has arisen from many stations. See, e.g., Abel, *supra* note 19, at 653-66, 667-85, 686 (1981) (describing the market and legitimation functions of the *Model Rules*, and disparaging their ethical claims as internally inconsistent, linguistically meaningless, empirically false, and prescriptively impossible); Elkins, Essay Review, *The Reconstruction of Legal Ethics as Ethics*, 35 J. LEGAL EDUC. 274, 283 (1986) ("Ethics cannot, if we are to avoid the entangling net of personal and social deception of the traditional professional ethos, exist without a critical perspective.") (footnote omitted); Rhode, *supra* note 31, (upbraiding regulatory structure of the legal profession and self-interest of ethical codes).

Practitioners have also mounted criticism. See, e.g., Kasanof, *The Hazards of Legal Ethics: Two Views* (Book Review), 89 YALE L.J. 1438, 1439 (1980) (reviewing G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978)) (assailing Hazard's advice as "utterly unhelpful to the attorney who needs guidance in his quest for ethical conduct.").

Academics located in adjacent disciplines, e.g., anthropology, have leveled a broader criticism. See, e.g., Nader, *Serving Self, Not Others* (Book Review), 89 YALE L.J. 1442, 1444 (1980) (reviewing G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978)) ("The [Hazard] book reflects the specialized practitioner's passion for technical skill—a value that seems to override what most people think the central purpose of law should be: a more just society.").

177. Doubtless there are numerous contexts which provide fertile ground for further critique. See, e.g., Brenner, *Albert H. Scharrer: An Anecdotal Exploration of the Practice of Criminal Law in Dayton, Ohio Between 1910 and 1950*, 14 U. DAYTON L. REV. 563 (1989) (examining the social and legal milieu surrounding Scharrer's career as a prosecutor and defense attorney); Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253 (exploring lawyer accountability to and control of private and public criminal

the willingness to shed the absolutist faith in the tradition of poverty law practice and the essentialist belief in a dependent and isolated client world. Neither faith nor illusion, of course, is dispassionately surrendered. What is required therefore is a normative and empirical strategy of reexamining and reconstituting the dominant system of ethical lawyering. For clients who speak out of turn, and for those who remain still silent, the lawyer's ethic of suppression is no longer satisfactory. The search for an alternative ethic, and ethic of resistance, is the ongoing collective project of poverty lawyers and impoverished clients.

clients); Hazard, *Quis custodiet ipsos custodes?* (Book Review), 95 YALE L.J. 1523, 1534-35 (1986) (reviewing K. MANN, *DEFENDING WHITE COLLAR CRIME* (1985)) ("Lawyers cannot pretend that their duty as advocates to stay 'within the bounds of the law' extends only as far as a violation of that duty can be proved in court."); Kritzer, *supra* note 7 (describing corporate lawyer-client relations as multifaceted encompassing professional, business, and social dimensions); Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989) (challenging traditional understanding of the lawyer-client relationship in the context of section 1983 litigation); Luban, *A Fierce Blindness* (Book Review), 5 CRIM. JUST. ETHICS 69 (1986) (reviewing K. MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985)) (deflating the rococo moral strategies of white-collar defense attorneys in New York City); Shaffer & Shaffer, *Character and Community: Rispetto as a Virtue in the Tradition of Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838 (1989) (considering the Italian-American virtues of dignity and self-respect displayed in lawyering); Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970) (discussing client-group conflict of interest).