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Cursing the Darkness

STEVEN L. WINTER*

I. IN THEORY

The contributions to this symposium represent two problems that, at first blush, may seem only tenuously related to one another. The first problem is the "crisis" in academic poverty law identified by Louise Trubek. How can clinicians with progressive commitments undertake transformative legal action in a hostile socio-legal environment? The second problem concerns the controversy over the newer, vaguely "postmodern" trends in contemporary poverty law scholarship. Here, the difficulty lies in the lack of any apparent connection between that scholarship and progressive efforts at social change. Critics of this newer scholarship question how one can engage in effective transformative action without a comprehensive normative theory that guides and underwrites those efforts.

Although these two problems may seem independent of one another, Ruth Buchanan correctly suggests that we can discern their relationship by situating these phenomena in their larger social context. Over the past twenty-five years, the political and legal climate has become increasingly hostile toward the use of law as an instrument of social change. The same conditions that have produced the crisis in poverty law have also fostered frustration over the dearth of realistic opportunities for effectuating social change through legal practice. Some younger scholars have turned to postmodern theory for an alterna-

* Professor, University of Miami School of Law. Copyright 1994; all rights reserved. I am grateful to Louise Trubek and Ruth Buchanan for inviting me to participate in the Law & Society panel for which these remarks were first prepared and to Tony Alfieri for helping me to collect my thoughts by making the right suggestion at the right time.

For Dick, and the wonder of friendship freely given.


4. See Buchanan, supra note 2, at 1019-20 (noting the decline, by the early 1970s, of any popular movement to support the legal efforts of poverty law practitioners); id. at 1028-31 (discussing the political and social climate during the Reagan and Bush presidencies).
tive conception of both practice and political action. To the extent that they focus on the micro-structural dimensions of oppression—particularly as manifested in the lawyer-client relationship itself—these efforts are viewed by traditional poverty law scholars as ephemerally small, destructively self-critical, potentially alienating, and, thus, unduly quiescent. From this more traditional perspective, the appeal of postmodernist theory has less to do with its potential as a transformative tool than with its allure as an intellectualist retreat from conservative social trends.

Whether the postmodern turn is in fact a retreat is a question that I take up below. But even if it were, it would nevertheless be a mistake to dismiss it as the peculiar lapse or self-deception of the intellectual avant-garde. Something functionally quite similar has happened to the liberal mainstream. The social context of the production of mainstream constitutional theory has changed so radically that even its conventional products appear increasingly surreal. Liberal legal scholars, seemingly oblivious to the widening gap between the judiciary and the academy, continue to spin ever more elegant prescriptive theories for a Court that long ago stopped listening.

So, too, on the academic left. More than a decade of sophisticated critical legal studies critique has failed to undermine, let alone supplant, the dominant "verities" of law and legal method. To the contrary, the courts' general shift to the right has gone hand-in-hand with a reversion to legal formalism, proving the painful truth of Stanley Fish's admonition that the law "will not fade away because a few guys in Cambridge"

5. The relevance of social context may be important in another way. The inward-drawing movement of esoteric theory in the legal academy mirrors the zeitgeist of privatism that prevails in the larger culture.

6. For a more complete discussion of this perception and some of the misunderstandings that fuel it, see Steven L. Winter, For What It's Worth, 26 LAW & SOC'Y REV. 789 (1992).


8. See, e.g., Sanford Levinson, The Audience for Constitutional Meta-Theory (or, Why, and to Whom, Do I Write the Things I Do?), 63 U. COLO. L. REV. 389, 406 (1992) ("Ito write an article with the expectation that it would be read by this particular Justice, at least, would be little more sensible than dropping a message into the ocean."). For stinging indictments of the empty normative conceit of mainstream legal scholarship, see Pierre Schlag, Normative and Nowhere to Go, 43 STAN. L. REV. 167 (1990), and Paul F. Campos, Advocacy and Scholarship, 81 CAL. L. REV. 817 (1993). For an earlier exploration of these developments, see Ronald K.L. Collins & David M. Skover, The Future of Liberal Legal Scholarship, 87 MICH. L. REV. 189 (1988).

9. This, however, was entirely foreseeable, once one accepted any version of the relativist claim with respect to knowledge. See Winter, supra note 7, at 1467-68 (explaining that this consequence follows from the Kuhnian insight that knowledge is paradigm-dependent).
and Palo Alto are now able to deconstruct it.  

Little wonder, then, that the doyens of critical legal studies seem to have abandoned internal critique for an intellectual defense of identity politics.  

I suggest, therefore, that the “crisis” in poverty law scholarship—like the condition of legal scholarship generally—is a function of changes in social context rather than a product of radical innovations in social theory. The social and political developments of the past twenty-five years—more than any revolution in theory—have changed our sense of what it is to “do” legal scholarship. If we find ourselves in crisis, it is a result of social circumstances rather than intellectual choices. The upshot is that liberal-to-left legal academics live in an age that confronts them with the unpalatable options of continuing in a state of denial or searching anxiously for a new and different sense of self, place, and mission.

II. IN PRACTICE

Some of us learned these lessons the old-fashioned way: first hand, through hard-won experience. Although perhaps the best-kept secret in the academy, I was once one of those compromised “liberal legalist” reformers identified by Buchanan. In eight exciting and exceptionally rewarding years at the NAACP Legal Defense & Educational Fund—LDF, as we called ourselves—I engaged in (largely successful) structural reform litigation concerning prison conditions, police practices, and a variety of other civil rights matters. These experiences taught me several lessons that, in one way or another, have shaped all of my subsequent scholarship.

The first lesson was a certain anti-idealism. I use this abstract, negative formulation because it best captures the default position that characterizes both critical left and liberal mainstream alike. Both presume, though perhaps unwittingly, that social action is driven or guided by the force of ideas. In this unreflective view, the key to effective social transformation lies in developing just the right idea that, followed through to its logical conclusion, will lead to the desired social change. This manner of idealism does not require any particular level of abstraction and, as a consequence, can take a variety of intellectual forms. Thus, the operative idea can be a critical theory, a moral principle, a particular constitutional interpretation, or a conventional doctrinal standard. Similarly, this form of idealism has no inherent political valence. The same

assumption is in play whether constitutional argument is invoked by the right in an attempt to roll back the welfare state or by the left in order to establish basic welfare rights.13

Perhaps it was just the historical contingency of working on prison reform in the late 1970s, as I did. But it seemed clear to me from the start that a theory-driven agenda was destined to disappoint. In particular, I remember a meeting very early in my tenure at LDF. A colleague and I donned our suits and ties and flew to Washington to meet with our counterparts at the ACLU Prison Project. (Hence, the first rule of public interest practice: Notwithstanding the prevalence of jeans in the office, dress up when you go to meetings with other public interest lawyers.) I listened attentively as they explained their carefully reasoned, two-part strategy to reverse the overincarceration trend already well underway in 1978.

The principal element of this strategy was to keep the pressure on through litigation challenging the overcrowding, endemic violence, and other abhorrent conditions typical of contemporary prisons. The idea was that judicial decrees requiring improved conditions would so raise the price of incarceration that the states would be forced to turn to less costly alternatives.

The second part of this strategy involved the use of prison classification systems. In the famed Alabama prison case,14 the Prison Project persuaded Judge Johnson that the lack of an effective classification system contributed to other problems that plagued the prison system.15 It exacerbated the widespread violence because vulnerable prisoners were not separated from those more violent inmates who preyed on them.16 Relatedly, it aggravated the problems of overcrowding and underfunding because, without a method to classify prisoners, many of them were unnecessarily assigned to maximum security.17 The Prison Project lawyers concluded that the pressure of litigation could be used to spur implementation of professionally-designed classification systems that would create a “downward spiral,” funneling prisoners to less restrictive, less expensive minimum-security facilities and, ultimately, to community based alternatives to incarceration.

15. Id. at 324.
16. Id. at 325.
17. Id. at 324.
I was impressed. The strategy was astute and sophisticated. Still, it struck me—fledgling reformer though I was—as hopelessly naïve. Then, as now, "law and order" rhetoric firmly held center stage on the national scene. (The mid-1970s, after all, was a time when the states and the Court were rushing to reinaugurate the death penalty. In 1978, the leading sponsor of a new federal criminal code known for its draconian innovations was none other than that avatar of liberalism, Ted Kennedy, who was positioning himself to run for the Presidency in 1980.) Therefore, it seemed clear to me that only one conclusion could follow: If the logic of prison litigation did, in fact, lead in the direction mapped by this strategy, the only plausible result would be a retrenchment of the governing legal standards. It was a sure bet, in short, that the Court would read the handwriting on the wall and act accordingly.

It did not take long. Also on our agenda for that meeting was a discussion of the Court's grant of certiorari in Bell v. Wolfish. It was agreed that my colleague and I would write an amicus brief. My part was to construct the classic argument for judicial restraint showing that the judgment below could be sustained on statutory grounds, thus avoiding the constitutional question. The Court gave it short shrift. Notwithstanding the fact that we devoted three pages of our brief to demonstrate just how the statutory issue had been handled by the lower courts, the Court dismissed our argument on the ground that it had not been "presented to or passed on" by the courts below. The Court went straight for the heart of the constitutional issue and approved double-celling. Worse yet, the Court made it painfully clear that the high-water mark for prison reform litigation had passed. The Court upheld the other challenged practices on the basis of an approach that suggested an alarming recrudescence of the "hands-off" doctrine of the 1960s.

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21. Id. at 541 (referred to as "double-bunking" by the Court); see also Rhodes v. Chapman, 452 U.S. 337 (1981).
22. Id. at 546-48. The "hands-off" doctrine of this period openly justified judicial abstention in the name of deference to prison officials. See, e.g., Tilden v. Pate, 390 F.2d 614, 615-16 (7th Cir. 1968); Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965); Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963). To be sure, the Wolfish Court was not so candid. Rather, the Court's more circuitous rationale started from the premise that the Due Process Clause prohibits only such deprivations that "amount to punishment." Wolfish, 441 U.S. at 535. Whether a practice constituted punishment turned on whether the deprivation was excessive in light of an alternative, nonpunitive purpose. Id. at 538-39. By definition, any practice that was justified for security
But anti-idealism need not mean defeatism. I soon learned a second lesson: the social contingency of legal reform. In one sense, this lesson is just the obverse of the first. If effective social change is not driven by the force of ideas, then it must be contingent upon some other, contextual factors. This insight counsels awareness of the ways in which the cultural, the social, and the political operate as constraints on good legal strategies. But the insight that meaningful reform is socially contingent is double-edged. As any fancy postmodernist worth his or her salt will tell you, every constraint is also an enablement. The social and political context can also create possibilities for reform through litigation quite beyond those sanctioned or even hinted at by the governing legal standards.

My first assignment when I arrived at LDF was to join the ongoing settlement negotiations in the Georgia State Prison case, Guthrie v. Evans. The case was infamous in the public interest world, where it was popularly known as “the Legal Defense Fund’s Vietnam.”

At that time, the prison was the state’s principal maximum security facility and the last stop for the system’s incorrigibles. The prison stands about five miles west of the town of Reidsville—one of those rural, impoverished south Georgia towns that barely extend two blocks beyond the Dairy Queen and county courthouse. Insular and provincial do not begin to describe the place. The prison was the local industry. Prior to my arrival, one of my LDF colleagues had deposed the then newly appointed warden. “Warden Balkcom, when did you first come to the Georgia State Prison?” he asked. “First come?” the Warden responded, “I grew up here. My Daddy was warden.”

The prison facility had been built as a Works Progress Administration project and was transferred to the State for nominal consideration. Its portal was graced with the obligatory Depression-era frieze of noble workers and artisans. Every time I entered the building, I found myself instinctively intoning “Arbeit macht frei.” Some of the prisoners needs qualified as nonpunitive, but the necessity of any particular practice was a matter to be determined according to the expert judgment of jail administrators. Id. at 546-48. At the same time, the Court conceded that, “on occasion, prison administrators may be ‘experts’ only by Act of Congress or of a state legislature.” Id. at 548. In short, the Court answered the question “Are these conditions inhumane?” by deferring to the admittedly nonexpert judgment of the very people who had imposed the challenged practices in the first place. This sleight-of-hand was not lost on the lower courts. As one federal judge said to us in an off-the-record, in-chambers conference: “I’ve read the Court’s opinion in Wolfish, and I can read between the lines. I understand what they’re telling us.”

23. 93 F.R.D. 390 (S.D. Ga. 1981). This is the only reported decision in a case that spanned over a decade.

24. Readers who would like a glimpse of the original prison can rent Burt Reynolds’s movie The Longest Yard, which was filmed at the Georgia State Prison in the early 1970s. The scene of his character’s arrival at the prison is entirely authentic, down to the woman with the beehive
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worked in the fields and the tag shop, but most sat idly in the housing units all day. Notwithstanding the nature of the clientele, most of the housing units were unsupervised open dormitories. Staff was scarce, underpaid, and undertrained. Theft, assault, and rape were commonplace. That, however, was not the worst of it. The prison was wracked by racial violence and, as a consequence, went through spasms of court-ordered integration and subsequent resegregation. The staff was all white and widely suspected of fomenting racial violence. (In the mid-1970s, the only black officer was burned to death in his living quarters on the prison reservation. Once, when I was doing research in the case files, I came across a copy of the frantic telegram to the FBI that my LDF predecessors had sent from Reidsville the morning after the death.) In 1980, Newsweek magazine referred to Reidsville as “perhaps the South’s most violent prison.”

Notwithstanding this state of affairs, the State fought the suit tooth and nail. It was an inauspicious case with which to start one’s career. Still, it was not long before I knew we would win. Oddly enough, it was outside Rome in 1980 that I became convinced that we would prevail. I had just completed a tour of the catacombs and was standing outside drinking a soda and waiting for the bus back to the city. I heard several Americans speaking and joined them in conversation. There were three couples, as I remember it, middle-class, middle-aged (I was twenty-seven at the time), suburban Republicans. One couple was from Georgia. I let it drop that I was one of the lawyers in the Reidsville case. At first, I got the standard line about coddling criminals: free education, color TV, veritable country clubs; we all know the routine. I looked up and asked incredulously, “Have you ever been to a prison?” There was a painful silence, some shuffling of feet, and then: “I hear Reidsville is pretty bad.” Once home, it became a kind of sport. I would get into a taxi at the Atlanta airport, give the driver my destination, and engage in

_hairdo—an actual state employee, not an actor—who presided over the sign-in sheet. So, too, the scenes shot in the warden’s office are reasonably authentic—Eddie Albert and the other actors, notwithstanding._

As for the film’s depiction of the despotism, murder, and corruption in the administration of the prison, one can only marvel at the candor and perspicacity of what is, after all, a mainstream Hollywood product. One anecdote is suggestive. After completing the film, Burt Reynolds wanted to thank the men in the cellblocks whose daily routine (such as it was) had been disrupted during the filming. He donated several color television sets, one for each of the housing units. Not one television ever made it to the prisoners’ living quarters. When the first of the brand-new, 80 square foot, single-celled units opened in the early eighties, the warden found an older prisoner standing mesmerized, staring at the television that was blaring away in the day-room. “What’s the matter, Pops?” the warden asked. “I’ve never seen TV in color,” was the startled reply. “When did they start to make them?”

26. It came up; it was an election year.
the usual pleasantries. The subject usually came up about the time we hit Interstate 75. The driver would ask why I had come to Atlanta, and I would mention the case. From the response, I knew all I ever needed to know about the progress of the lawsuit.

Before we were done, we had a completely new facility with single-occupancy cells, sufficient staff (both trained and integrated), vastly improved medical care, and a modicum of programs for the prisoners. Indeed, even as the Court steadily curtailed prisoners’ rights, we negotiated everything down to the number of bytes in the memory typewriters for the prison legal services office. This was no accident, but neither was it a simple matter of winning the hearts and minds of a few cabdrivers. Though the early 1980s was hardly a time of rampant progressivism, it was a time when the “New South” was anxious to shed its image as an undeveloped backwater. The Carter presidency, for all its shortcomings, was a source of local pride and a symbol of the state’s arrival on the national scene. We had the editorial support of the state’s leading paper, a sympathetic reporter covering the story, and an electorate that, while deeply conservative, was quite defensive about the lingering after-image of its former governor, Lestor Maddox, brandishing an axe handle defending his right to discriminate and of B-movies with inspirational titles such as “I Was a Fugitive from a Georgia Chain Gang.” The times were ripe for change; it was just a matter of figuring out the stops and pedals.

That was the third lesson: how to operate effectively in a polycentric world. The term “polycentric” comes from Michael Polanyi’s The Logic of Liberty, although most people in law will recognize it from Lon Fuller’s article, The Forms and Limits of Adjudication. A polycentric matter is characterized by many interacting points of influence and, as a consequence, is not susceptible to the rigors of reason. Structural reform cases—which involve large, multi-systemic social

27. The official Department of Corrections designation for the rebuilding project was “Project 360” because they were going to “turn the place around.” From time to time, we would point out that to turn around one makes a 180 degree turn; a full 360 degrees puts one right back where one started. We never did get through to them. Notwithstanding the ill-chosen name, the reforms and improvements we helped achieve have apparently endured. See Sturm, supra note 18, at 676 n.160.

28. There was some irony in this, since it was under Governor Jimmy Carter that the State decided to resist the Guthrie suit at all costs. At that time, the State decided to bypass the Attorney General’s office and engaged Judge Bell’s son, Griffin Bell, III, to represent the Department of Corrections in federal court.


issues such as school segregation or institutional reform—are prototypical examples of polycentric problems.

Although we were no longer so naïve as to think that we could win the case through the force of legal logic, my co-counsel and I still thought in largely subjectivist terms. We assumed that winning the case was simply a matter of persuading the judge, convincing him to hold the State’s feet to the fire, and, if necessary, protecting him on appeal. This, of course, was just another corollary of the idealist fallacy. The judge, who had taken a relatively activist stance in a number of more traditional civil rights cases, was more sensitive about local perceptions of the case than he was astute about the cultural undercurrents that made change possible. At the same time, like us, he thought that the right amount of saber-rattling would be enough to get the State to comply with the various consent decrees that we had negotiated in our efforts to resolve the case.

In The Forms and Limits of Adjudication, Fuller defined adjudication as a mode of social ordering on the basis of reason and principle. Accordingly, he maintained that adjudication is not a suitable mechanism for resolving polycentric problems. This rules out prison suits by definition. Not everyone, however, agrees with Fuller. Some people understand such cases and know how to make them work. Fortunately, we found one such person to serve as a special master to oversee compliance with the consent decrees.

His name was Vince Nathan. He, too, learned his lessons the old-fashioned way. A former law professor who had specialized in Article 9 of the UCC, he served as special master in two Ohio prison cases. A consummate lawyer and a genuine workaholic, Vince was, by far, the most organized person I have ever met. The first time we visited his

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31. More precisely, Fuller maintained that “adjudication is a form of decision that defines the affected party’s participation as that of offering proofs and reasoned arguments.” Id. at 369.

32. “[T]he fundamental truth [is] that certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.” Id. at 371.

33. I introduced him once at a conference on prison litigation and reform attended by federal judges, court-appointed special masters, and correctional experts. When I was done, he cleared his throat and said: “I’ve been called many things in my life, but never ‘uniquely efficacious.’”

34. How Vince came to be appointed in Guthrie is itself a study in fortuity. Once the judge became convinced that it was necessary to appoint a special master, he directed the parties to submit a list of nominees. I consulted with colleagues in the prison reform bar and came up with a list of ten names. I ranked Vince fourth. I did so mostly because he had no correctional experience, and we were afraid that fact would make him unacceptable to the judge and to the defendants. In any event, we decided to give the judge a clear indication of our preferences and therefore submitted only our top three choices. When Vince’s name turned up on the defendant’s list, we told the judge “appoint their guy!” The judge did, and the State promptly objected.

35. Even more so than Professor Claude Sowle of the University of Miami School of Law.
office in Toledo, Vince insisted on showing off his filing system for the case. We thought the innocence of his unselfconscious pride in his files genuinely weird until we saw them. They were a true wonder, complete with a Dewey Decimal system of his own devising.36 In fact, when I was unable to find a document immediately, it was faster to call Vince’s office and have them send a copy by Federal Express than to try to locate it in my own files.

Vince had all of the organizational and political skills of a master bureaucrat. Almost from the first day, he identified and courted each of the many different players who were necessary to bring about the prison’s successful transformation. He found the key professionals in the Department of Corrections who understood the state bureaucracy and could get things done. He met with the chairs of the important legislative committees, the Governor, the Attorney General, and the press. He used his connections throughout the world of corrections to bring in both the expertise and the grant money required to bring Reidsville up to something like contemporary standards.37 At the same time, his official reports on the state of compliance—or lack thereof—proved that he knew how to build a legal case that could withstand even the most Fuller-esque insistence on reasoned arguments and proof. Above all, he understood that an institution is a complex social system. He understood, therefore, that to reconstruct an institution, it is necessary first to transform its local culture.

For me, it was a marvelous apprenticeship.38 Above all, I learned something profound that continues to sustain me: It may be better to light a candle than to curse the darkness, but it is better still to take out your sextant and learn to navigate by the lights there are.

III. IN PERSPECTIVE

These lessons of anti-idealism, social contingency, and polycentricity all have implications for the debate over the newer, “postmodern” poverty law scholarship. In developing these implications, I shall focus

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36. Other than Vince’s secretary, who later became a lawyer herself, the only other person known to have mastered Vince’s filing system was the GSP warden that the State borrowed from the federal Bureau of Prisons once the State became convinced that reform was truly necessary. Vince would receive letters from the warden with the proper file codes already on them.

37. This is how we got the warden from the Bureau of Prisons in the first place.

on William Simon’s analysis because it is a sophisticated version of the concerns this scholarship has provoked.

Simon raises four related criticisms. First, he identifies an internal contradiction in the genre’s approach to the lawyer-client relationship. On the one hand, it adopts the postmodern view in which professional relationships are understood as part of a system of power that constructs and subordinates already disadvantaged and disempowered clients. On the other hand, this genre adopts the pre-modern—though it would be more accurate to say Romantic—view of the clients whose identity and autonomy are suppressed in this way.  

Second, Simon ascribes the postmodern critique of the lawyer-client relationship to “the tendency to see all constraint as power and all power as oppressive.” He attributes this tendency to the influence of Michel Foucault, whose “general theorizing about power” Simon dismisses as “vacuous.” He points out, moreover, that constraint is necessary to achieve collective action and that collective action is a necessary element of effective political struggle.

Third, like Handler before him, Simon laments the potentially adverse effects of postmodern theory. “The dominant groups in the society still make extensive use of collective coercion and material incentives, and the assertion of encompassing ideological identities, and the efficacy of their efforts does not seem to be declining.”

Finally, Simon makes the affirmative point that there is no escaping the imposition of normative values. He calls this “the Dark Secret of Progressive lawyering.” He makes this point in different ways depending on the context. In the context of lawyers’ practice, Simon argues that effective lawyering necessarily involves value imposition in making decisions about tactics and in advising clients about their interests. He points out that, because of potential conflicts of interest, this is particularly true in the case of collective action. Simon states that “lawyers have to make choices that affect the balance of power among those interests. . . . Even if they react by withdrawing or deferring to the

40. Id. at 1111.
41. Id. at 1114.
42. Id. at 1111; compare Handler, supra note 3, at 726 (“[T]he opposition is not playing that game. It has belief systems, meta-narratives that allow theories of power, of action.”).
43. “Imposition” is, perhaps, too strong a term. Simon’s point is that value choices are an inescapable part of lawyering. But “imposition” captures the negative normative charge of the postmodern critique of the lawyer-client relationship which arises from the fact that a value choice by the lawyer affects someone else’s life.
44. Simon, supra note 39, at 1102.
instructions of someone else, those decisions will affect the balance of power." 45 In the context of political practice, Simon follows Steven Lukes in maintaining that any meaningful concept of power necessarily turns on normative judgments about people's interests. 46 This is so, as Lukes explains, because every concept of power identifies a different range of behavior for analysis; every "way of conceiving power (or a way of defining the concept of power) that will be useful in the analysis of social relationships must imply an answer to the question . . . ‘what makes A’s affecting B significant?'" 47 Not surprisingly, Simon pronounces Lukes's theory of power more valuable than Foucault's.

Simon's thoughtful critique contains much that is important, but two of his criticisms stand out. First, he astutely points out that the romanticization of client identity is inconsistent with the postmodern view that emphasizes the socially constructed nature of all identity. Simon is absolutely right about this. Indeed, it is just this kind of mistake that inevitably occurs when theory is subordinated to a normative agenda. This residual humanist moment in otherwise "postmodern" scholarship can only be understood as an unconscious attempt to arrest the infinite regress in order to find a place on which to rest its critique of the lawyer-client relation. Second, Simon forthrightly acknowledges some uncomfortable truths that most normative enterprises prefer to deny or suppress: that "consent" and "consensus" operate as ideologies that rationalize, rather than justify, political action; that collective action is impossible without some form of coercion; that, in effect, "what is involved is a violent act which is validated by being performed." 48

Nevertheless, Simon's criticisms are marred by a mistake—one might even say a bias—that distorts his analysis in a fundamental man-

45. Id.
46. Id. at [14]; see Steven Lukes, Power: A RADICAL VIEW 35 (1974) ("[a]ny view of power rests on some normatively specific conception of interests.").
47. Lukes, supra note 46, at 26. Lukes explains that behind[ ] all talk of power is the notion that A in some way affects B. But, in applying that . . . notion to the analysis of social life, something further is needed—namely, the notion that A does so in a non-trivial or significant manner. Clearly, we all affect each other in countless ways all the time: the concept of power, and the related concepts of coercion, influence, authority, etc., pick out ranges of such affecting as being significant in specific ways.

Id. (reference omitted).
48. Maurice Merleau-Ponty, The PHENOMENOLOGY OF PERCEPTION 20 (Colin Smith trans. 1989) (1962); see also Steven L. Winter, Contingency and Community in Normative Practice, 139 U. PA. L. REV. 963, 970 (1991) ("Persuasive normativity cannot be understood apart from its prescriptive dimensions; in an important sense, every act of persuasion has its origin and end in prescription."); Winter, Human Values in a Postmodern World, 6 YALE J.L. & HUMAN. 233, 248 (1994) ("[T]he problem of values is one of learning to rediscover their locus in our practices and commitments. There is no other basis for our values than our own committed actions.").
ner. Simon's antipathy to the work of Michel Foucault is almost palpable, and it causes him to seriously misread Foucault. Although one might puzzle over the reason at first, it soon becomes apparent.

Simon reasons that, "[s]ince Foucault portrays all power as control, he leaves no room for the idea of 'empowerment'—power that enables rather than disciplines." But this is not Foucault; this is an inversion of Foucault. Perhaps Foucault's most important contribution was his rejection of the repressive understanding of power in favor of a productive conception of power. Thus, Foucault maintained that "this is a wholly negative, narrow, skeletal conception of power, one which has been curiously widespread. . . . [Power] needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression." Foucault conceived of power "in its material instance as a constitution of subjects." Power is never totalizing for Foucault because, in order to be "power," it must be enabling. Thus, Foucault defined power "as a way in which certain actions may structure the field of other possible action." In short, if postmodernists like Foucault teach us anything, they teach us that every constraint is an enablement and every enablement a constraint.

Oddly enough, Simon's inversion of Foucault corresponds precisely with his very apt criticism of the contradiction at the heart of the newer poverty law scholarship. Simon is exactly right in saying that this scholarship betrays its own postmodern insight when it seeks to liberate some "authentic" client voice. And he is exactly wrong in attributing this mistake to the influence of Foucault. For Foucault, these clients were already subjected when they were constituted as the subjects they

49. Simon, supra note 39, at 1112.

50. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 119 (Colin Gordon ed. & Colin Gordon et al. trans., 1980); see also id. at 92 ("this notion of repression . . . is wholly inadequate to the analysis of the mechanisms and effects of power").

51. Id. at 97 (emphasis added). As he explained:

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

Id. at 98.

52. MICHEL FOUCAULT, THE SUBJECT AND POWER, IN MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 222 (Hubert L. Dreyfus & Paul Rabinow eds., 2d ed. 1983); see also id. at 220 ("[I]t incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless always a way of acting upon an acting subject . . . . ").
are—that is, long before they arrived in the lawyer's office to tell their stories. The point of the postmodern critique of the lawyer-client relationship is only that, good intentions notwithstanding, progressive lawyers who aspire to aid these clients may be nothing more than another bureaucratic stratum in the régime du savoir.

Simon is much too sophisticated to miss this point. So what is it about Foucault that he finds so irksome? One can glimpse the answer in Simon's insistence on the unavoidably normative dimension of lawyering. What progressive lawyers like Simon find particularly nettlesome about postmodernists like Foucault is their disparagement of normative theory and grand normative pretensions. This troubles the deep commitment of progressive lawyers and legal academics—a commitment that, to paraphrase Simon, constitutes an "encompassing ideological identity."

The ideological issues seethe just beneath the surface of the argument. Like Handler, Simon presents his objections as instrumental. Both fear that postmodernists make a mistake in eschewing normative theories because that effectively concedes the field to the opposition. But what is offered as an instrumental argument is really nothing more than an ideological assertion. It simply assumes the causal efficacy of normative theory. Watch carefully. Simon says: "The dominant groups in the society still make extensive use of collective coercion, material incentives, and the assertion of encompassing ideological identities, and the efficacy of their efforts does not seem to be declining." But how does he know that "the efficacy of their efforts" is a function of this "assertion of encompassing ideological identities" and not some other socially contingent factor? Simon himself identifies two social mechanisms—"collective coercion" and "material incentives"—that might be entirely sufficient to account for the success of these dominant groups. There are yet other candidates; as we shall see in a moment, Simon endorses a view of power that hinges on just such an alternative mechanism. The point to be made here is that Simon offers neither evidence nor argument for the proposition that normative theory and its accompanying identity formations have anything like the causal power he claims.

Simply put, postmodernism is threatening because it puts in jeopardy a professional identity premised entirely upon one's self-image as a normative and political agent. If we are not about saving the world with

53. This conclusion is underscored by Simon's characterization of Foucault's studies of domination as "parasitic" on the liberal humanist values, about which Foucault had nothing to say "except to heap contempt on them." Simon, supra note 39, at 1114.
54. See id. at 1111.
55. Id.
our values and theories, then who are we and what, in Heaven’s name, are we doing? The answer suggested by the newer, postmodern poverty law scholarship is, in Simon’s words, “disheartening.” The putatively progressive lawyer “is constantly at risk of implication in the structures she needs to challenge to benefit the client.” Indeed, if Simon is correct and there is no escaping the imposition of normative values, then the lawyer is always already implicated in a power relation. Understandably, this predicament is intolerable to a committed liberal humanist; it virtually demands the “redemption” of a lofty normative value such as democracy, autonomy, or equality.

Faced with the dark secret of progressive lawyering, Simon lights a noble candle. Being a do-gooder myself, I don’t mean this to sound disparaging; there is something genuinely admirable in this. Still, it is not necessarily reassuring. For the lessons of anti-idealism and social contingency admonish that faith in the power of ideals is all too often misplaced—frequently ineffective, sometimes dangerously deceptive. Ideals may inspire, but they may also pacify; ideals can instigate change, but their hegemonic force can also strengthen and sustain the status quo. The crux of the postmodern critique of the lawyer-client relationship—like the point of much feminist and critical race theory—is that quite a lot of oppression happens in the name of abstract humanist values such as democracy, autonomy, and equality. Ironically, the danger of self-deception is especially real for the helping professions. After all, one corollary of the lessons of anti-idealism and social contingency is that what these professionals profess to help is largely beyond their control. So, perhaps, it might be better to curse. At least sometimes.

Fortunately, there are alternatives. Part of the lesson of polycentricity is that, notwithstanding the dogmas of the Enlightenment tradition, meaningful action is strategic and, therefore, not dependent on the guiding light of some grand normative theory. What enables effective action is not transcendental truth, but pragmatic knowledge—that is, the smaller human truths that best explain how we think and act within the complex social webs that we inhabit (and that inhabit us). Gary Blasi is correct in suggesting that the “naturalized” theory developing in the cognitive sciences offers something that is truly useful to practicing law-

56. Id. at 1101.
57. Id.
58. See id. at 1103 (“What potentially redeems this situation from constituting oppression is that the lawyers’ values may include notions such as democracy, autonomy, and equality that mandate respect and empowerment for the client.”).
yers,\textsuperscript{59} or so I have argued for some time now.\textsuperscript{60} What we need is something like a cognitive map of the cultural models and other social constructs that animate thinking and decision making among lawyers, judges, and laypeople alike. For this, we need a set of tools quite different from those of normative theory, which is why I have devoted so much effort explaining the new conceptual development in cognitive theory.

One of the things we need is a better theory of power. Simon is mistaken in recommending Lukes over Foucault. Lukes's view was an important innovation when first introduced. But, as I explain in a forthcoming essay,\textsuperscript{61} it does not hold up well in the face of postmodern understandings. In fact, it suffers from precisely the same defect that Simon identified with respect to the "postmodern" poverty law scholarship.

Lukes's central innovation was to introduce notions of social construction into the analysis of power. Thus, his "three-dimensional" view of power looked beyond the exercise of power through overt decision-making (the first dimension) and by control over the political agenda and the structure of political institutions (the second dimension). It emphasized, instead, the largely invisible ways in which a social and political order may be systematically biased in favor of certain groups; it identified power at work in the formation of "perceptions, cognitions and preferences" such that people "accept their role in the existing order of things."\textsuperscript{62}

It is easy to understand why, with its echoes of Gramsci, Lukes's view has been widely influential on the Left. A theory of power that employs the insight about social construction successfully preserves some of the political issues elided by more traditional theories because it includes within its concept of "significant affecting"\textsuperscript{63} aspects of social relations that are generally considered apolitical or beyond the domain of conventional politics and official institutions. In this way, it has the potential to open for consideration even the most basic terms and conditions of social life.\textsuperscript{64} But this advance turns out to be equivocal because

\textsuperscript{59} Blasi, supra note 2, at 1080.

\textsuperscript{60} Oh, see almost anything I've written. Cf. Anthony G. Amsterdam, Telling Stories and Stories About Them, 1 CLINICAL L. REV. 9, 36-37 (1994).

\textsuperscript{61} See Steven L. Winter, The "Power" Thing (forthcoming) [hereinafter Winter, The "Power" Thing].

\textsuperscript{62} Lukes, supra note 46, at 24.

\textsuperscript{63} See supra note 47 and accompanying text.

\textsuperscript{64} For this reason, Lukes's three-dimensional view is particularly attractive to and useful for feminist theorists. See Winter, The "Power" Thing, supra note 61.
the reflexive application of this insight exposes a crippling inconsistency in the three-dimensional view.

Simon stresses that this theory of power is fundamentally normative. As Lukes explained, the whole point "of locating power is to fix responsibility for consequences held to flow from the action, or inaction, of certain specifiable agents." Yet, it is difficult to see how these "specifiable agents" could themselves have escaped the processes of social construction. If power constructs, then absolute power constructs absolutely. Once it is postulated that power constructs the subordinated to embrace their role in the prevailing order and to do so against their interests, then it is hard to see how those "in power" could have bypassed these same processes of social construction to act in ways inimical to their interests. And, if they could not, then it is hard to see how they can be held responsible.

Simon's appreciation for Lukes makes it difficult to see why he is so resistant to Foucault. Foucault merely takes the insight about social construction to its logical conclusion. His is not a theory that reduces us to cursing the darkness; his is a theory that lights the candle at both ends. To Foucault, socio-cultural construction is an all-pervasive process in which each of us necessarily participates. "The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation." It is this dynamic view of power that underpins Foucault's claims that power is always susceptible to disruption and that power inevitably entails resistance. Power becomes polycentric because it is articulated in each and every interaction between lawyer and client, teacher and student, senior and junior faculty. Power becomes vulnerable because its very existence is contingent on its constant reenactment. In the necessity of its continued performance lies the possibility of its disruption and potential reconstruction.

What is discouraging about this understanding is that there is no Archimedean point from which to act to transform the world. Power is everywhere and so must be confronted and reconstructed everywhere. What is hopeful about this understanding is that we have only to do

65. LUKEs, supra note 46, at 56.
66. FOuCAULT, supra note 50, at 98.
67. See id. at 142:

[T]here are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power . . . .

Id.
things differently. Not that this is easy; not that those who try won't pay the price. What is important to see, however, is that this postmodern understanding is anything but what it is made out to be. Where it was understood to be destructively self-critical and disparaging of the lawyer's role, it turns out to be merely candid and unsentimental in its self-appraisal. Where it was thought to be ephemerally small and unduly quiescent, it turns out to be overwhelmingly large and extraordinarily demanding.

As Foucault himself remarked: "My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do."68

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