

MORE THAN ONE LANE WIDE: AGAINST HIERARCHIES OF HELPING IN PROGRESSIVE LEGAL ADVOCACY

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Progressive legal scholars and practitioners have created a hierarchy within social justice lawyering. Direct service attorneys—non-profit attorneys who focus on helping individuals in civil cases—sit at the bottom. In the 1960s, progressive theorists advanced a negative portrayal of direct service attorneys as a class. This discourse has continued through different phases in the development of progressive legal theory. Direct service work is done primarily by women in the service of women, has the aesthetic of traditional women’s work, and can be understood as embodying the thesis that women have a greater existential and psychological connection to others than men. Like other forms of women’s work, direct service work often goes unrecognized even though more visible progressive work depends on it. Negative portrayals of direct service attorneys employ a strategy of oppositional definition that is representative of binary male thinking and deny a positive view of direct service work as life-sustaining service to others. This article discusses the harms perpetuated by hierarchies of helping and sketches a more inclusive vision of progressive lawyering.

INTRODUCTION

Influential visions of progressive lawyering rely upon and perpetuate a hierarchy of helping. In these visions, direct service attorneys—those who engage in the representation of low-income individuals—serve as a foil for better social justice lawyers.¹ This article traces, critiques, and urges us to move beyond the devaluation of direct service lawyers who are as a class underpaid, underappreciated,

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¹ I will refer to direct service lawyers as lawyers whose primary focus is on advocating on behalf of individuals. I will also refer to these lawyers as “legal aid lawyers” and “legal services lawyers.”

and often working in difficult situations with people in crisis. The hierarchy of helping harms not only the lawyers who are the subjects of denigration but low-income individuals and communities, nonprofit legal organizations, and the progressive movement as a whole. The hierarchy undermines the very social justice goals to which the progressive movement aspires.

Direct service lawyering is performed primarily by women, has the aesthetic of traditional women's work, and can be understood as embodying the thesis that women have a greater existential and psychological connection to others than men. We can understand direct service work as women's work and the denigration of it as an instance of the more general phenomenon of the devaluation of women's work. Progressive practice visions that rely upon a contrast with stereotyped and inferior direct service attorneys deny a more favorable description of such lawyering as it is practiced largely by women working in the service of others. The rhetoric of stark contrast employs a strategy of oppositional definition that is representative of binary male thinking.

Visions of how lawyers can best bring about social justice are, like most theories, often presented as totalizing theories that occupy the terrain to the exclusion of all others. This article sketches a more pluralist path forward, toward a view of social justice lawyering that includes and values the great number of direct service lawyers in our progressive legal community. My affirmative vision of social justice lawyering is inspired by Martin Luther King's pragmatic and pluralist insight that "anyone who starts out with the conviction that the road to racial justice is only one lane wide will inevitably create a traffic jam and make the journey infinitely longer."² I seek not to reverse the traditional hierarchy and to privilege direct service work but to call into question the idea that there is a correct way of being a social justice lawyer.³

Part I of this article describes the magnitude of poverty in the United States, the chronic problem of unmet legal needs among people of low income, the nature of direct service work, and the idea that direct service work can be understood as devalued women's work. Part II traces the devaluation of direct service lawyers throughout progressive legal theory and practice, starting in the 1960s. I trace

² MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 49 (Clayborne Carson ed., 2001).

³ See Antonio Gramsci, 2 *LETTERS FROM PRISON* 299 (Frank Rosengarten ed., Raymond Rosenthal trans. 1994) quoted in Angela P. Harris, *Teaching the Tensions*, 54 ST. LOUIS U. L.J. 739, 750 (2009-2010) [hereinafter Harris, *Teaching the Tensions*] (we must "problematize the very idea of opposition and the notion of identity upon which it depends").

threads in the accounts of social justice lawyering using a feminist lens and focusing on influential progressive critiques of public interest lawyers. Part III discusses the harms of the hierarchical discourse and how progressive legal theorists and practitioners might move beyond it toward a more pragmatic, inclusive, and effective vision.

I. POVERTY AND PROGRESSIVE LAWYERING

There is no settled meaning to the notion of social justice or progressive lawyering. Gary Bellow used the term “political lawyering” to “describ[e] a medium through which some of us with law training chose to respond to the need for change in an unjust world.”⁴ Others have portrayed social justice lawyering as dedicated to eliminating “institutionalized discrimination” and “promoting individual and collective well-being, enhancing human dignity, and correcting imbalances of power and wealth.”⁵ I use the phrase to refer to lawyering as a means of trying to eliminate subordination and inequality and to advance human dignity.

People who think and write about social justice lawyering typically share similar political views. Explanations for the disparagement of direct service lawyering in progressive theory must take account of this common commitment. One powerful force that drives the search for an ultimate theory of progressive lawyering is the dire situation of poor and subordinated people in the United States and the overwhelming demand for legal assistance. A central—if not *the* central—challenge for social justice lawyers is how, in a world of scarce resources, they should prioritize their goals and methods to maximize positive social change.⁶ We are constantly looking for practice visions to guide our allocation of scarce human capital.

A. Dire Need

Modern-day poverty in the United States is increasing and is concentrated geographically, making it increasingly difficult for people to

⁴ Gary Bellow, *Steady Work: A Practitioner's Reflections On Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 309 (1996) [hereinafter Bellow, *Steady Work*].

⁵ MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW: CASES AND MATERIALS 1 (2003). For a discussion of the evolution of progressive lawyering ideology, see Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

⁶ See Paul R. Tremblay, *The Crisis of Poverty and the Demands of Benevolence*, Symposium: “Crisis in the Legal Profession: Rationing Legal Services for the Poor” Panel One: Tied Hands—Confronting Challenges in Civil Legal Services, 1997 ANNUAL SURVEY OF AMERICAN LAW 767, 767-68 (1997) (noting that the “shortage of available legal services . . . is endemic” and the question of how to “ration[]” legal services for the poor” is “not new”).

escape it.⁷ Although strides were made in the 1960s and 1990s, poverty is now at an all-time high.⁸ In 2011, the overall poverty rate was 15 percent.⁹ Children are twice as likely to be poor than any other group, with about one in five children living in poverty.¹⁰ Almost half of this number lives in homes with annual incomes of less than half of the official poverty level.¹¹ In 2011, the poverty rate for our nation's "youngest families with children . . . jumped by close to 12 percentage points to 37.3 percent, the highest poverty rate ever recorded for this age group dating back to 1967 when it stood at only 14 percent."¹² Children of color are three times as likely to be poor as white children.¹³

Two-thirds of poor children live in working families, but income levels keep these families trapped in poverty.¹⁴ The income gap between the richest and the poorest in our country has been trending upward since the late 1970s.¹⁵ Highly paid workers are earning more

⁷ Elizabeth Kneebone, Carey Nadeau, and Alan Berube, *The Re-Emergence of Concentrated Poverty: Metropolitan Trends in the 2000s*, *Metropolitan Poverty Program at Brookings* (Nov. 2011), available at www.brookings.edu/papers/2011/1103_poverty_kneebone_nadeau_berube.aspx (reporting that "[c]oncentrated poverty nearly doubled in Midwestern metro areas from 2000 to 2005-09, and rose by one-third in Southern metro areas").

⁸ Children's Defense Fund, *State of America's Children* B-2 (2011) ("The number of children in poverty increased 28 percent between 2000 and 2009 after dropping 27 percent between 1992 and 2000."), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-2011.pdf>.

⁹ Carmen DeNavas-Walt, Bernadette D. Proctor, Jessica C. Smith, U.S. Census Bureau, *Current Population Reports, P60-243, Income, Poverty, and Health Insurance Coverage in the United States: 2011* 13 (Sept. 2012) ("[i]n 2011, the official poverty rate was 15.0 percent" and "[t]here were 46.2 million people in poverty"). See also *The Impact of Rising Poverty on the Nation's Young Families and Their Children*, *Children's Defense Fund Policy Brief #1, 2000-2010* 1 (Sept. 2011) (in 2010, poverty rose for "the third straight year in a row" to 15.1 percent), available at <http://www.childrensdefense.org/child-research-data-publications/the-impact-of-rising-poverty.pdf>; Austin Nichols, Urban Institute, *Poverty in the United States* 1 (Sept. 2011) (poverty is trending upwards at 15.1 percent in 2010 compared to 14.3 percent in 2009 and 13.2 percent in 2008), available at <http://www.urban.org/UploadedPDF/412399-Poverty-in-the-United-States.pdf>.

¹⁰ Clifford M. Johnson, Leticia Miranda, Arloc Sherman, and James D. Well, *Child Poverty In America*, *Children's Defense Fund* (1991), available at www.childrensdefense.org/child-research-data-publications/archives/child-poverty-in-America.html.

¹¹ Children's Defense Fund, *State of America's Children*, *supra* note 8, at B-2.

¹² *The Impact of Rising Poverty on the Nation's Young Families and Their Children*, *Children's Defense Fund Policy Brief #1*, *supra* note 9, at 3.

¹³ Children's Defense Fund, *State of America's Children*, *supra* note 8, at B-2 ("In 2009, more than one in three black children and one in three Hispanic children lived in poverty."); Nichols, *supra* note 9, at 1 (in 2010, poverty rose from 35.7 percent to 39.1 percent among African-American children).

¹⁴ Children's Defense Fund, *State of America's Children*, *supra* note 8, at B-2.

¹⁵ United States Census Bureau, U.S. Department of Commerce, *Narrative (Middle Class)* (the "long-term trend has been toward increasing income inequality"), available at <http://www.census.gov/hhes/www/income/data/inequality/middleclass.html>; David Cay

while workers at the bottom of the income scale are earning less.¹⁶ At the same time, unemployment rates have risen. Since 2009, the long-term unemployment rate has increased and the general unemployment rate is at its highest since 1983.¹⁷

B. Scarcity of Legal Assistance

In the face of persistent poverty as well as other intractable problems, it is easy to see why theorists have framed the essential choice as between system-changing solutions and individual access to justice. Since the earliest days of the first legal aid societies, progressive lawyers have been frustrated by their lack of resources.

The provision of direct services is the oldest and most established form of nonprofit lawyering. Traditional direct service work involves representing individual low-income clients for free, or a very reduced fee, in accordance with their express wishes. Services vary by office, reflecting different missions and priorities. In many federally funded legal services offices, qualifying clients receive help with income maintenance, family law problems, foreclosures, landlord-tenant disputes, bankruptcy, and consumer issues.¹⁸

The first legal aid office was founded in 1876 by The German Society to help protect newly arrived German immigrants from “unscrupulous employers, landlords, and shopkeepers” who viewed them as “easy prey.”¹⁹ Ten years later, the Chicago Women’s Club created an agency to protect young women and children who were targeted

Johnston, *Income Gap Is Widening, Data Shows*, The New York Times (Mar. 29, 2007) (tax data shows that the top 1 and top 10 percentages of earners in 2005 received the biggest percentage of all income earned since the Great Depression), available at <http://www.nytimes.com/2007/03/29/business/29tax.html>. See generally JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012) (the United States has the most unequal distribution of wealth of any advanced industrial country with one percent of the population controlling 40 percent of our country’s wealth).

¹⁶ United States Census Bureau, U.S. Department of Commerce, *Narrative (Middle Class)*, available at <http://www.census.gov/hhes/www/income/data/inequality/middleclass.html>.

¹⁷ Nichols, *supra* note 9, at 2.

¹⁸ For a discussion of the restrictions on legal services offices receiving federal funding through the Legal Services Corporation (LSC), see *infra* n. 146-48 and accompanying text. Non-LSC offices provide direct services to clients who are precluded from being served by LSC offices, such as most immigrants who are not lawful permanent residents.

¹⁹ KRIS SHEPARD, *RATIONING JUSTICE: POVERTY LAWYERS AND POOR PEOPLE IN THE DEEP SOUTH 2* (2007) (citing REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 135 (3d ed., 1924)). In 1890, the organization began serving people of all nationalities and, in 1896, it adopted its current name, The Legal Aid Society of New York.

for recruitment into prostitution.²⁰ By 1965, most major cities had legal aid offices and more than 400 lawyers worked in 157 offices.²¹ Today, a total of approximately 800 civil nonprofit legal organizations and law clinics exist, funded by a variety of revenue streams.²² The single largest funder is the federal government's Legal Services Corporation, which distributed approximately 400 million dollars to 136 nonprofit civil legal aid programs in 2010.²³

Nonprofit legal services offices have never been able to meet the demand for help. Early chronicles of legal aid offices document that demand for services has always outpaced the supply.²⁴ In 2009, the Legal Services Corporation reported the national average is one legal aid attorney for every 6,451 people who qualify for assistance. Low-income people are able to obtain a lawyer's help for less than one fifth of the legal problems that they experience.²⁵ A study from Washing-

²⁰ *Id.* at 3.

²¹ ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 4 (2003) [hereinafter HOUSEMAN & PERLE, SECURING EQUAL JUSTICE] (describing the early legal aid attorneys).

²² Alan W. Houseman, *Civil Legal Aid in the United States: An Update for 2007*, Center for Law and Social Policy 1 n. 1 (Aug. 22, 2007), available at <http://www.clasp.org/admin/site/publications/files/0373.pdf> (noting that "[w]e do not know the exact number of civil legal aid programs" but estimating the number at 867, including federally funded offices, non-federally funded offices, and law clinics). Sources of funding include "state and local governments, [non-Legal Service Corporation] federal government sources, private bar, United Way, private foundations, and Interest on Lawyer Trust Accounts (IOLTA) programs." *Id.* at 2.

²³ Legal Services Corporation, 2010 Annual Report, available at <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC-2010-Annual-Report-2010-Activities.PDF>. In 2010, civil legal aid received a total \$1.5 billion in funding. About a third of this was from the Legal Services Corporation and other federal entities and another third was from the states, including Interest on Lawyers Trust Account programs. Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, Center for American Progress 7 (June 2011), available at <http://www.americanprogress.org/issues/2011/06/pdf/justice.pdf>. About \$100 million was from local government sources and the remainder was from "private foundations, corporations, bar associations, individual and law firm contributions, and other private sources." *Id.* For an analysis of the devastating effect of the recent financial crisis on the budgets of nonprofit legal service providers, see Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* RAND Institute for Civil Justice 39-44 (2012), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP353.pdf.

²⁴ See *infra* text accompanying note 64.

²⁵ Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans, An Updated Report of the Legal Services Corporation* 1 (2009). See also Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* RAND Institute for Civil Justice 39-44 (2012) (discussing how the justice gap is likely wider than reported by LSC due to the 2009 financial crisis), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP353.pdf; Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, Center

ton D.C. showed that 77 percent of family court plaintiffs, 97 percent of tenants in housing court, and 98 percent of both petitioners and respondents in civil domestic violence cases appeared without representation.²⁶

Direct service attorneys experience crushing demand for their services and observe patterns in the desperate economic and legal needs of their clients. While every person seeking help is unique, direct service work requires lawyers to perform critical but repetitive tasks. A direct service attorney who deals with a government agency might help clients fill out the same form on a daily basis. That same attorney might repeatedly contact a government office with the same type of request or complaint. Direct service work often involves crisis intervention in the lives of others. As with other professionals who help people in times of stress, direct service workers are at risk of suffering from secondary trauma and compassion fatigue.²⁷ The great need for direct service lawyers and the lack of funding, however, poses challenges for managers seeking to improve working conditions for staff.²⁸

As Katherine Kruse has observed, some lawyers gravitate to “cause” lawyering to avoid the “endless grind of remedying injustice one client at a time.”²⁹ Cause lawyering, another form of progressive lawyering, takes as a central aim the advancement of group interests or a cause.³⁰ It may involve advocacy inside, or outside of, the legal regime. Multiple forms of this type of advocacy exist, including test case and impact litigation, policy advocacy, organizing, and human

for American Progress (June 2011), available at <http://www.americanprogress.org/issues/2011/06/pdf/justice.pdf> (discussing the huge unmet need for legal assistance among low-income people).

²⁶ District of Columbia Access to Justice Commission, *Justice For All? An Examination of the Civil Needs of the District of Columbia's Low-Income Community* 7-8 (Oct. 2008), available at <http://www.dccaccesstojustice.org/files/CivilLegalNeedsReport.pdf>.

²⁷ See Nehami Baum, *Trap of Conflicting Needs: Helping Professionals in the Wake of a Shared Traumatic Reality*, 40 CLINICAL SOC. WORK J. 37 (2012); Brian E. Bride & Charles R. Figley, *The Fatigue of Compassionate Social Workers: An Introduction to the Special Issue on Compassion Fatigue*, 35:3 CLINICAL SOC. WORK J. 151 (2007).

²⁸ See Carol Ruth Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217 (1968-1969).

²⁹ Katherine Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 152 (2010).

³⁰ Cause lawyering may provide a high level of psychological satisfaction because, as explained by Stuart Scheingold, “[c]ases have significance to cause lawyers not as ends in themselves but as means to advance causes to which the lawyers are committed.” Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 118 (Austin Sarat & Stuart Scheingold eds., 1998). For a discussion of the psychology behind human motivation and the appeal of cause lawyering, see *infra* note 85.

rights advocacy. As discussed in Part II, theorists have debated for decades the relative merits of these different forms of progressive work.

C. Dichotomy and Denigration

How we value different types of work in our society is dictated in part by patriarchy, the power differential between men and women that has resulted in the subordination of women. Given the enduring influence of patriarchy, it comes as no surprise that male/female hierarchical associations correlate with different practice visions of social justice lawyering.³¹ Human existence has been built on the premise that there are separate and natural spheres of life activity for women and men since “the first day that mattered.”³² The U.S. legal doctrine embodying this idea is epitomized by such cases as *Bradwell v. Illinois* and *Muller v. Oregon*, which rest on the assumption that women by their nature occupy the sphere of home and family while men occupy the public sphere.³³

Although the rhetoric in the *Bradwell* and *Muller* decisions may strike us today as quaint, the public/private distinction is very much alive. Women continue to be primarily responsible for raising children and for performing or overseeing work in the home.³⁴ In the

³¹ Influenced by Jacques Derrida’s insights regarding how definitional opposites can be social constructs of meaning that serve the interests of those who are dominant, feminists have argued that the dualisms of public/private and reason/emotion in classic liberal theory have a hierarchical “male” and “female” side. See, e.g., TORIL MOI, *SEXUAL/TEXTUAL POLITICS* 104-105 (1985) (referencing the work of Hélène Cixous to argue that all binary oppositions encompass a “hidden male/female opposition with its inevitable positive/negative evaluation”); Anna Grear, *Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights*, 7 Hum. Rts. L. Rev. 511, 522 (2007) (discussing “ancient dualistic divisions drawn in Western philosophy . . . between male/female, mind/body, reason/emotion, nature/culture . . .”). Feminist theorists have argued against the efficacy of hierarchy and in favor of problem-solving involving nonhierarchical discourse and consensus decision-making. See, e.g., KATHLEEN P. IANNELLO, *DECISIONS WITHOUT HIERARCHY* (1992).

³² CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 40 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]. For a discussion of the historical evolution of the public/private distinction as it correlates with patriarchy and relates to the liberal state, see Janet Halley and Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism* 58 A. J. COMP. L. 753, 756-59 (2010).

³³ *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (stating that there is a “wide difference in the respective spheres and destinies of man and woman” and that the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life”); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (justifying restrictions on women’s work in the public sphere because “history discloses the fact that woman has always been dependent upon man” and women, like “minors,” have “been looked upon in the courts as needing special care that her rights may be preserved”).

³⁴ See generally MARIA CHARLES AND DAVID GRUSKY, *OCCUPATIONAL GHETTOS*:

public work world, women frequently occupy jobs that are perceived as most closely resembling work in the private sphere.³⁵ Salaries are lower in professions dominated by women and, when women work in professions historically dominated by men, they are paid less as a class for the same job.³⁶

Women have always been disproportionately represented as frontline workers in legal service offices and now predominate at all but the highest levels of those offices.³⁷ About 70 percent of Legal

THE WORLDWIDE SEGREGATION OF WOMEN AND MEN (2004).

³⁵ See BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES*, 3-20 (1990) [hereinafter RESKIN & ROOS, *QUEUES*]. See also Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOCIOLOGICAL REV. No. 4, 702-28 (2005) (study finding that gender stereotyping and in-group favoritism intensify gender inequality in hiring practices at law firms); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1296 (1991) [hereinafter MacKinnon, *Sex Equality*] (in the work world, “most women do jobs that mostly women do”) (internal citations omitted); Nadine Taub and Elizabeth M. Schneider, *Women’s Subordination and the Role of Law* in David Kairys, *PERSPECTIVES ON WOMEN’S SUBORDINATION AND THE ROLE OF LAW* 340 (1982) (women’s work outside the home traditionally has involved jobs “considered an extension of their work within the home”).

³⁶ See Jacqueline A. Berrien, Chair, *Statement to Commemorate Equal Pay Day*, U.S. Equal Employment Opportunity Commission (April 2010) (“[w]omen earn, on average, 77 cents for every dollar that men earn”), available at <http://www.eeoc.gov/eeoc/newsroom/equalpayday2010.cfm>. See also IRENE PADAVIC & BARBARA RESKIN, *WOMEN AND MEN AT WORK* 123 (2d ed. 2002) (reporting that, in 2000, women working full-time and year-round earned 72.2 cents for every dollar earned by men); Anthony T. Lo Sasso, Michael R. Richards, Chiu-Fang Chou & Susan E. Gerber, *The \$16.819 Pay Gap For Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30:2 HEALTH AFFAIRS, 193, 193-201 (2011); Barbara F. Reskin & Denise D. Bieby, *A Sociological Perspective on Gender and Career Outcomes*, 19 J. ECON. PERSP. 71, 71 (2005); Elizabeth H. Gorman & Julie A. Kmec, *We (Have To) Try Harder: Gender & Required Work Effort in Britain & the United States*, 21:6 GENDER & SOC’Y 828 (2007) (empirical study showing that women are required to work harder than men holding the same jobs). The causal mechanism for this phenomenon is not clear. Women could be performing this work because it is devalued or it could be devalued because women perform it.

³⁷ Female law graduates are twice as likely as men to take public interest jobs. See Katie Dilks, *Why Is Nobody Talking about Gender Diversity in Public Interest Law?* NALP Bulletin (June 2010), available at http://www.nalp.org/uploads/0610_Gender_Diversity_in_Public_Interest_Law.pdf; NALP: The Association for Legal Career Professionals, *Employment Patterns 1982-2006*, available at <http://www.nalp.org/2007augemploymentpatterns>. This has been the historical trend. See NALP: The Association for Legal Career Professionals, *Employment Patterns 1982-2004*, available at <http://www.nalp.org/2006junemploymentpatterns>. See also Lewis A. Kornhauser and Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 850 (1995) (reporting that, in 1981, 3.2 percent of men and 9.2 of women took public interest lawyering jobs and that, in 1991, these percentages were 2.4 (men) and 4.9 (women)); Linda Liefeland, *Career Patterns of Male and Female Lawyers*, 35 BUFF. L. REV. 601 (1986) (reporting that women were more than three times as likely to enter public interest law); CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 120 (Basic Books, Inc. 1981) (“Representing the poor and disadvantaged is one of the major areas of ‘women’s work’ in the law”).

Service Corporation clients are women.³⁸ Direct service work is, in large part, work done by women in the service of women. Men, particularly white men, have traditionally occupied positions of authority as managers and executive directors and are also well-represented in the nonprofit world as impact litigators.³⁹

The hierarchy of helping reflects a male/female division of labor. Like other women's work, direct service work is devalued. Within the universe of progressive lawyers, direct service lawyers are usually paid the least.⁴⁰ Moreover, the aesthetic of direct service work resembles traditional women's work. Direct service lawyering involves extensive contact with and service to others, and it involves repetitive tasks and patience for the mundane.⁴¹ It entails being responsive to concrete instances of people's pain and suffering. It involves helping to sustain life. Like raising children, caring for others, and running a household, direct service work is invisible and devalued even though more public and highly valued work depends upon it.⁴²

The characterization of direct service work as women's work can be further understood as an illustration of Robin West's "connection thesis."⁴³ West argues that both cultural and radical feminisms rely on the idea that women as a group have a greater existential and psychological connection with others than men because they, as a group,

³⁸ In 2010, LSC-funded programs closed 932,406 cases and 661,434 of clients (71 percent) were women. Legal Services Corporation, *2010 Annual Report* ii (2010). See also DOUGLAS J. BESHAROV, *LEGAL SERVICES FOR THE POOR: TIME FOR REFORM* 17 (The AEI Press 1990) (approximately two thirds of legal services clients are women).

³⁹ See generally RESKIN & ROOS, *QUEUES*, *supra* note 35.

⁴⁰ See Katie Dilks, *Why Is Nobody Talking about Gender Diversity in Public Interest Law?* NALP Bulletin (June 2010), available at http://www.nalp.org/uploads/0610_Gender_Diversity_in_Public_Interest_Law.pdf (citing Catherine Carr, *Fairness and Justice in Setting Legal Services Attorney Salaries: Finding the Will to Get There*, Management Information Exchange Journal (Summer 2007)).

⁴¹ Writing about "bread-and-butter" legal services, social work scholar Corey S. Shdaimah observed that direct service lawyers "provide direct representation to clients for mundane and arguably classical services that are of vital importance." COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE* 11 (2009).

⁴² For a discussion of the inter-dependency of direct service work and other types of progressive lawyering, see *infra* text accompanying notes 212-15. Ruth Margaret Buchanan has remarked that "[t]he privileging of abstract, timeless, and disembodied mental work over the embodied, temporal, and ever changing requirements of everyday practices, like cooking, is deeply implicated in the patriarchal and discriminatory order that has relegated women and other marginalized groups to the performance of such practical tasks." Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI. L. REV. 999, 1052 (1993-1994) [hereinafter Buchanan, *Context, Continuity, and Difference*].

⁴³ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988) (defining the "connection thesis": "[w]omen are actually or potentially materially connected to other human life," while "[m]en aren't").

have traditionally existed in a “natural web of hierarchy” as mothers and care givers.⁴⁴ In contrast, men as a group tend to act in accordance with what West calls the “separation thesis,” viewing themselves and others as separate individuals and theorizing about justice and morality in terms of how to establish abstract rules of fair play in a world dominated by others who might do them harm.⁴⁵ West describes the jurisprudential insights of both critical theory and liberalism as both resting on the same underlying “separation thesis” about human beings.⁴⁶ Liberal theorists assume that individuals are atomized and devise rules of fair play to govern behavior. Critical theorists, in her view, also assume atomization but desire solidarity. Both cultural and radical feminisms contrast with liberalism and critical theories because they take as their premise the female experience and understanding of the world as fundamentally involving connection with others.⁴⁷

West’s approach is not without its critics.⁴⁸ But the stereotype of

⁴⁴ *Id.* at 63.

⁴⁵ *Id.* at 1 (describing the “separation thesis,” whereby the “distinction between you and me is central to the meaning of the phrase ‘human being’”).

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3. For a discussion of knowledge as a based on one’s experience, known as positionality, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990).

⁴⁸ Some argue that the connection thesis is an essential narrative about women that overgeneralizes women’s experiences, abstracts gender from its historical and cultural context, deemphasizes the importance of other intersecting axes of subordination experienced by women, underestimates women’s capacity for agency and self-direction, and assumes that gender categories are binary rather than multiple. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). See also JUDITH BUTLER, *GENDER TROUBLE* 3 (1990) (arguing that “women” is not a “stable signifier” because “gender is not always constituted coherently or consistently in different historical contexts, and because gender intersects with racial, class, ethnic, sexual, and regional modalities of discursively constituted identities”); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (critiquing West for underestimating women’s capacity for agency); Devon W. Carbado and Mitu Gulati, *The Fifth Black Woman*, 11 J. OF CONTEMP. LEGAL ISSUES 701 (2001) (discussing intersectionality and the performance of race and gender). Moreover, even if the “connection thesis” is true, it is the product of women’s subordination and therefore suspect as a normative guide. See Tracy E. Higgins, “By Reason of Their Sex”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1565-1568 (1994-1995) (summarizing criticisms of West). See also BUTLER, at 5 (discussing how the “category of ‘women,’ . . . is produced and restrained by the very structures of power through which emancipation is sought”); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 32, at 39 n.6 (arguing that “women value care because men have valued us according to the care we give them”). There is no unified feminist theory and feminist methods typically resist broad categorizations. See BUTLER, at 13 (urging feminists to “remain self-critical with respect to the totalizing gestures of feminism”); JUDITH GRANT, *FUNDAMENTAL FEMINISM: CONTESTING THE CORE CONCEPTS OF FEMINIST THEORY* 1 (1993) (describing feminist “or-

direct service lawyers as dominating and disconnected from their clients, discussed below, can be understood as a set of male assumptions about direct service lawyers that feminism calls into question.⁴⁹ An equally plausible description of direct service work as women's work embodying the connection thesis decenters the pejorative account. A recent sociological study of legal services lawyers and their clients, for example, found that "caring" and "compassion" are central, although often unarticulated, values that guide the actions of direct service lawyers.⁵⁰

We can understand the devaluation of the private sphere and women's work as a collective defense to the threat that women would otherwise pose to male supremacy. Because women make up more than half of the world's population and because traditional women's work is vital to society and involves connection to children and others, women as a class have the potential to destabilize patriarchy. A way of neutralizing this threat is to devalue women's work such that societal norms of secondary status become both institutionalized and internalized by women themselves.⁵¹

A similar observation could be made regarding the devaluation of direct service work. Direct service lawyers, like women as a group, have numerous and close connections with others. In the same way that women as a group pose a potential threat to male power, direct service attorneys potentially pose a threat to advocacy and organizing work aimed at bringing about systematic change. Impact litigators, for example, typically depend on direct service attorneys to find clients willing to bring a test case or to become a class action plaintiff. Unless the client stands in absolute and perpetual ideological alliance with the litigator, however, there is the potential for conflict between

thodoxy" as the idea that "[t]here is no one feminist theory . . . [it] is multicentered and undefinable."); SANDRA HARDING, *FEMINISM AND METHODOLOGY* 1 (1987) (stating that her "point" is "to argue against the idea of a distinctive method of feminist method"); Clare Dalton, *Where We Stand*, 3 *BERKELEY WOMEN'S L.J.* 1, 7 (1987-1988) (characterizing feminism as a "post-modern project" in which "no single feminist narrative or theory should imagine that it can speak univocally for *all* women").

⁴⁹ For a discussion of this stereotype, see *infra* text accompanying notes 157-61, 181-82, 187, 250-52. This stereotype can be described as an instance of male naming, the patriarchal act of defining something as universal when it is actually partial and male. Because men as a class have more power than women, they have the privilege of defining the categories by which we understand the world. This claim is not meant to deny the existence of many other intersecting axes of subordination as well as the reality that women can and do subordinate other women.

⁵⁰ SHDAIMAH, *supra* note 41, at 80, 160, 170.

⁵¹ See MacKinnon, *Sex Equality*, *supra* note 35, at 1298 ("Like other inequalities, but in its own way, the subordination of women is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power.").

the lawyer and client's goals. Organizers may also experience conflict between the goals of the organizing effort and those of individuals. Moreover, the allocation of resources for helping individuals can be viewed as diminishing the resources available to system-changing work. As lawyers accustomed to carrying out their clients' express wishes, direct service attorneys, together with their clients, are sometimes viewed as standing in the way of broader social justice goals.

The threat posed by direct service work—just like the threat posed by traditional women's work—is neutralized by a strategy of devaluation. Placing direct service work on the bottom helps to ensure that other forms of social justice lawyering may continue unfettered by the constraints imposed by the expression of specific—and sometimes complicated—client goals.⁵²

II. HIERARCHY IN DISCOURSE AND PRACTICE

A hierarchy of helping that puts individual service at the bottom has existed in progressive lawyering theory and practice for the last half-century. Starting in the 1960s, academics portrayed legal aid attorneys as narrowly-focused and ineffective, in contrast to lawyering aimed at reforming the law. This view persisted in the years of the first federal funding of legal services through the Office of Economic Opportunity (OEO), when progressive critics argued that OEO neighborhood attorneys attended to the demands of their caseloads while neglecting strategies that would result in community-wide change. In an influential 1970 article published in the *Yale Law Journal*, Stephen Wexler argued that direct service lawyering is not only ineffective but damaging to poor people.⁵³

In the 1970's, conservatives began to attack legal services for the poor. This period was marked by a scaling-back of ambitions for legal services. Starting in the late 1980s, legal scholars on the left developed critical theories of poverty law practice. Gerald López propounded typecasts of social justice lawyers in 1992 that have since been widely interpreted as valuing “rebellious” lawyers (lawyers who

⁵² For a discussion of the tensions between the goals of the lawyers and clients in the test case litigation relating to school desegregation, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests In School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

⁵³ A great number of scholarly articles cite to Wexler's article with approval, prompting the characterization of Wexler's article an “autocite” in progressive scholarship about social justice lawyering. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 *OHIO NORTHERN UNIVERSITY LAW REVIEW* 455, 455 n.2 (1994) [hereinafter Quigley, *Reflections of Community Organizers*] (noting that Anthony Alfieri has characterized Wexler's quote about poor people stopping poverty is an “autocite” for writers about advocacy with poor and powerless people.).

work with grassroots organizations) over “regnant” ones (direct service attorneys, impact litigators, and union lawyers). In the same time period, Anthony Alfieri, regarded as a founder of the “theoretics of practice” movement, began a sustained internal critique of lawyering practices for poor and other subordinated people.⁵⁴ Writing from the position of a former legal aid attorney, Alfieri made both theoretical and factual criticisms of civil direct service lawyers, describing them as “myopi[c]” and dominating in their relationships with clients.⁵⁵

A. *Portrayals of the Early Years*

[W]e believe that the laws mean something and our work is to see that they mean the same for the poor that they do for the rich.

–Unnamed Lawyer, Legal Aid Society of New York, Early 1900s⁵⁶

With few exceptions, young, activist, social-minded lawyers would not join legal aid or defender programs.

–Joel F. Handler, Ellen Jane Hollingsworth & Howard S. Erlanger, 1978⁵⁷

In the 1960s, some progressive scholars and lawyers negatively portrayed 19th century and early 20th century legal aid lawyers. The standard narrative was that these lawyers had a limited and conventional view of lawyering that focused on helping individuals in isolated

⁵⁴ See Scott L. Cummings and Ingrid V. Eagly, *A Critical Reflection on Law and Organizing* 48 U.C.L.A. L. R. 443, 457 n.50 (2001) [hereinafter Cummings & Eagly, *Law and Organizing*] (citing to Alfieri as representative postmodern scholar of anti-poverty lawyering); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STANFORD L. REV. 1731, 1748 n.49 (1993) [hereinafter Shalleck, *Constructions of the Client*] (citing to Alfieri as key figure in the theoretics of practice movement). For a discussion of the theoretics of practice, see Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992). Alfieri’s influential work appears in leading law journals and books. See, e.g., Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2008-2009) [hereinafter Alfieri, *Against Practice*]; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 [hereinafter Alfieri, *Reconstructive Poverty Law Practice*] (1990-1991); Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2007-2008). Alfieri’s work is included in critical theory essay collections. See, e.g., *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* (Susan D. Carle & Robert W. Gordon eds., 2005).

⁵⁵ Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 691 (1987-1988) [hereinafter Alfieri, *Antinomies*].

⁵⁶ REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 152 (1919) [hereinafter SMITH, *JUSTICE AND THE POOR*] (internal citation omitted).

⁵⁷ JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 21 (1978) [hereinafter HANDLER ET AL., *PURSUIT OF LEGAL RIGHTS*] (describing the early legal aid attorneys).

and routine cases and failed to address systematic problems. This passage from a report for the Center for Law and Social Policy represents what Jack Katz has called the non-empirical “folk sociology” regarding the early legal aid offices:⁵⁸

In part, because of inadequate resources and the impossibly large number of eligible clients, legal aid programs generally gave perfunctory service to a high volume of clients. . . . lawyers . . . rarely went to court for their clients. Appeals . . . were virtually nonexistent. No one . . . contemplated . . . administrative representation, lobbying, or community legal education . . . the legal aid program provided little real benefit to most of the individual clients it served and had no lasting effect.⁵⁹

A 1978 policy analysis characterized the early legal aid offices as “in the backwaters of the profession” with practices that were “paternalistic, moralistic, and limited in the services they delivered.”⁶⁰ Katz describes Chicago’s legal aid lawyers as having been regarded as “lower status” lawyers doing the bar’s “dirty work.”⁶¹

This dominant narrative stands in tension with early 20th century accounts of the legal aid experience. Few published first-hand accounts of legal aid attorneys from the 19th and early 20th centuries exist. Leaders in the legal aid movement have provided the main documentation of the early legal aid experience. Harrison Tweed, former President of the Legal Aid Society of New York, wrote a history of his organization from 1876-1951.⁶² In 1919, Reginald Heber Smith, a Harvard Law graduate and director of the Boston Legal Aid Society, authored *Justice and the Poor*, a study that spurred the American Bar Association to take an interest in access to justice for the poor and launched the movement for government funded legal assistance.⁶³

Smith, who visited offices across the country for *Justice and the Poor*, expressed a high opinion of legal aid lawyers, whom he described as having “courage, zeal, and devotion” while being “overworked [and] generally underpaid.”⁶⁴ Legal aid lawyers engaged in litigation and took cases on appeal, although appellate work was limited because of the prohibitive cost.⁶⁵ In addition to providing indi-

⁵⁸ JACK KATZ, POOR PEOPLE’S LAWYERS IN TRANSITION 67 (1982).

⁵⁹ HOUSEMAN & PERLE, SECURING EQUAL JUSTICE, *supra* note 21, at 4.

⁶⁰ HANDLER ET AL., PURSUIT OF LEGAL RIGHTS, *supra* note 57, at 21.

⁶¹ KATZ, *supra* note 58, at 143. Other accounts have adopted similar portrayals. See, e.g., Martha F. Davis, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 10 (1993) (stating that “[u]ntil the 1960s practicing poverty law meant little more than giving routine legal advice to poor people”).

⁶² HARRISON TWEED, THE LEGAL AID SOCIETY: NEW YORK CITY 1876-1951 (1954).

⁶³ SMITH, JUSTICE AND THE POOR, *supra* note 56.

⁶⁴ *Id.* at 193.

⁶⁵ *Id.* at 206; TWEED, *supra* note 62, at 67.

vidual legal services, the New York Legal Aid Society's work included education and outreach to client groups such as seamen and domestic workers as well as legislative campaigns.⁶⁶ In 1903, that office added law reform to its mission statement.⁶⁷ The "essence" of legal aid's work, however, was "the individual in the individual case."⁶⁸ Legal aid attorneys sometimes conflicted with social workers at welfare organizations, who were more inclined to judge a person's moral worth before providing help.⁶⁹

Early legal aid societies faced many obstacles, including funding challenges and rocky relations with local bar associations, which resisted the creation of legal aid offices and failed to give adequate support even after the resistance was overcome.⁷⁰ To survive financially, the legal aid societies cultivated powerful elite sponsors.⁷¹ Some early legal aid leaders were skeptical of government funding, believing that it would lead to cooption.⁷²

There is little disagreement between old and newer accounts regarding the demographics of legal aid workers. The leaders and private sponsors of legal aid were typically white, upper class Protestant men, whereas the frontline attorneys were not. Most lawyers were graduates from local, non-elite law schools. Female, minority, and non-Protestant lawyers were well represented in legal aid offices because they faced discrimination in the private job market.⁷³ Katz re-

⁶⁶ TWEED, *supra* note 62, at 11, 48.

⁶⁷ SMITH, *JUSTICE AND THE POOR*, *supra* note 56, at 200. Smith described the legal aid movement as part of a "greater movement" to rebuild the justice system "to the end that denial of justice . . . may cease." *Id.* at 149.

⁶⁸ *Id.* at 150.

⁶⁹ TWEED, *supra* note 62, at 19. *But see* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 271 (1976) (stating that lawyers in the 1960s "repudiated the bureaucratic paternalism of legal aid, which dispensed charity to clients and displayed deference to the bar"); DAVIS, *supra* note 61, at 13 (characterizing the Legal Aid Society as "devoted to reforming the poor by exposing them to middle-class values—a sort of American chivalry for recent immigrants.").

⁷⁰ TWEED, *supra* note 62, at 47-48. Smith was also critical of the bar's relationship with the legal aid offices. *See* SMITH, *JUSTICE AND THE POOR*, *supra* note 56, at 226. The ABA started a Standing Committee on Legal Aid and Indigent Defendants in 1920, but opposed federal funding for legal services until the 1960s. MARK KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS* 5 (1987).

⁷¹ Despite these ties, Tweed characterized his organization as remaining true to its principles, as exemplified by the office taking on the case of a domestic worker who had been fired by the spouse of a wealthy patron despite the financial ramifications. TWEED, *supra* note 62, at 12.

⁷² *Id.* at 98-99.

⁷³ AUERBACH, *supra* note 69, at 40 (commenting that starting in the twentieth century, there was "antagonism toward lawyers from ethnic minority groups," who were viewed as "the profession's new and growing underclass"); JOEL F. HANDLER, ELLEN JANE HOLINGSWORTH & BETSEY GINSBERG, *ORGANIZATIONS AND LEGAL RIGHTS ACTIVITIES* 5

ports that, in 1950, demographics in Chicago Legal Aid were about 50 percent female (white and African-American), and 14 percent female African-American.⁷⁴ In contrast, the general Chicago bar was only three percent female (white and African-American) and 0.1 percent female African-American.⁷⁵ Legal Aid employed 33 percent of all female African-American lawyers.⁷⁶ Legal aid attorneys earned low salaries, often leaving once higher-paying jobs became available.⁷⁷

B. War on Poverty

The standard historical account of progressive lawyering portrays the 1960s as a time when a “new breed” of lawyers emerged.⁷⁸ Jerold Auerbach describes “a new generation” of lawyers that was “ripped away from the conventions of its predecessors by its encounter with racism, poverty, and the Vietnam war.”⁷⁹ This time was marked by visions of legal assistance for the poor influenced by the high profile litigation strategies of organizations like the NAACP and the ACLU, as well as the activist and community organizing strategies employed in the broad-based social and political movements of the time.⁸⁰ In 1963, President Johnson declared a War on Poverty and the next year Congress passed the antipoverty legislation creating the Office of Eco-

(1974) [hereinafter HANDLER ET AL., ORGANIZATIONS] (discussing the prevalence of female lawyers in legal aid offices); KATZ, *supra* note 58, at 46-48 (noting that legal aid offices started hiring women and people from minority groups during World War I). A 1967 study found that one percent of legal aid lawyers were African-American women and 12 percent were white women while women composed only three percent of all lawyers. CYNTHIS FUCHS EPSTEIN, *WOMEN IN LAW* 121 (Basic Books, Inc. 1981). *See also id.* at 122 (noting that “providing free legal services for indigent clients traditionally was viewed as a feminine concern”).

⁷⁴ KATZ, *supra* note 58, at 48.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ HANDLER ET AL., ORGANIZATIONS, *supra* note 73, at 5.

⁷⁸ Leonore F. Carpenter, “*We’re Not Running A Charity Here*”: *Rethinking Public Interest Lawyers’ Relationships With Bottom-Line-Driven Pro Bono Programs*, 29 BUFF. PUB. INT. L.J. 37, 48 (2010-2011) (characterizing the 1960s anti-poverty lawyers as a “new breed of poverty lawyer”); Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1239 (2004-2005) (describing public interest lawyers in the 1960s as a “new breed”). *See also* DAVIS, *supra* note 61, at 10 (stating that “[p]overty law changed dramatically in the 1960s”); Buchanan, *Context, Continuity, and Difference*, *supra* note 42, at 1000 (describing the “War on Poverty” as having “ushered in a wave of thinking and activity about the problem of poverty in America” involving “new institutions and practices”); Joan Mahoney, *Green Forms and Legal Aid Officers: A History of Publicly Funded Legal Services in Great Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223, 235 (1998) (the OEO programs “represented a sharp break from the Legal Aid precedent”).

⁷⁹ AUERBACH, *supra* note 69, at 275.

⁸⁰ *See* KATZ, *supra* note 58, at 88 (describing legal assistance lawyers in the 1960s as having a “perceived affinity to war resistance [and] the civil rights movement”).

conomic Opportunity, which would provide the first federal funding for legal services.⁸¹

The received understanding of the OEO years is that it represented a fundamental break from the earlier legal aid approach.⁸² According to the prevailing view in academic scholarship, “the poverty lawyers of the 1960s were far more talented than their legal aid predecessors.”⁸³ These accounts define the 1960s lawyers *against* the prior legal aid lawyers, who were generally regarded as “too cautious, too service-oriented, and too supportive of the establishment and the status quo.”⁸⁴ This contrast represents an early construction of a hierarchy of helping in progressive theory in which legal aid attorneys—described as narrowly focused on helping individuals without challenging the system—served as a foil for better ways of social justice lawyering. The 1960s were a time when the urge to pursue racial and gender justice and the elimination of poverty pervaded our culture, especially the culture of students pursuing higher education. We can understand how the progressive lawyers who came of age in this period of time sought to distinguish themselves from those who preceded them, according greater significance to their own endeavors in the pursuit of justice.⁸⁵

The narrative regarding 1960s lawyers as categorically distinct from, and better than, the prior legal aid lawyers is exaggerated. As discussed above, pre-1960’s accounts described the early legal aid lawyers as zealous but devalued advocates who worked in difficult conditions for very little compensation. The legal aid lawyers struggled for

⁸¹ Act of 1964, tit. 2, 78 Stat. 516 (current version at 42 U.S.C.A. § 2996 (West 2012)).

⁸² See KATZ, *supra* note 58, at 88.

⁸³ SHEPARD, *supra* note 19, at 17.

⁸⁴ HANDLER ET AL., ORGANIZATIONS, *supra* note 73, at 23.

⁸⁵ The psychology of human motivation might also help us understand the phenomenon of the hierarchy of helping. The vision of an activist political lawyer concerned with systematic change has an undeniable psychological hold on the collective imaginations of lawyers concerned with social justice. Because people are motivated to act in accordance with their fundamental values, it stands to reason that social justice lawyers feel more fulfilled if they believe their work is bringing about systematic change for great numbers of people rather than only limited remedies for a few individuals. See Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLIN. L. REV. 425, 427-28 (2004-2005) (citing to Abraham H. Maslow, MOTIVATION AND PERSONALITY 57 (2d ed. 1970))(demonstrating the link between intrinsic motivation in accordance with one’s value scheme and the maintenance of psychological wellbeing among lawyers). In his sociological study of Chicago legal aid offices, for example, Jack Katz concluded that lawyers in the 1960s were driven to imbue their work with significance beyond just helping individuals. KATZ, *supra* note 58, at 104-22. In a more uncomfortable commentary, Derrick Bell has discussed the “narcissistic gratification” of class action litigation. Bell, Jr., *supra* note 52, at 493 (1976) (citing Dr. Andrew Watson in Council on Legal Education for Professional Responsibility, Inc., LAWYERS, CLIENTS & ETHICS 101 (M. Bloom ed. 1974)).

justice for their clients without the benefit of a supporting culture of political activism and without the respect of their peers. Although law reform was not the dominant focus of legal aid offices, it did constitute part of their work.⁸⁶ Moreover, neither the early legal aid lawyers nor the poverty lawyers of the 1960s were, as a general matter, revolutionaries.⁸⁷ Rather than revolution, the contrast between old and new practice visions revolved around the fluid and nebulous concept of the status quo.⁸⁸ Legal aid attorneys were viewed as accepting the status quo, believing the current legal system capable of delivering justice.

The discursive approach of defining the 1960s attorneys in contrast to the prior legal aid attorneys relies on opposition rather than connection for definition and identity. This description of a stark difference arrived simultaneously with the increased popularity of poverty lawyering and an infusion of elite, white men into the profession. The percentage of female legal aid attorneys decreased in this period of time.⁸⁹ In Chicago in the 1960s, the percentage of legal aid lawyers who had been members of their law school's law review or who had graduated with honors increased from zero to 33 percent.⁹⁰ The percentage of lawyers who had graduated from major national law schools increased from 11 percent to 25 percent and the percentage from elite schools went from zero to 18 percent.⁹¹ Where previously legal aid lawyers "were mostly young and almost all from minority groups," they increasingly came from a broader cross-section of the law school population.⁹² As part of its project to attract the best and the brightest to legal services, the OEO directed fellowship funding towards recruiting promising attorneys from top law schools.⁹³ Jobs in

⁸⁶ See *supra* text accompanying notes 66-67.

⁸⁷ Nonetheless, the anti-revolutionary label has been pejoratively attached to legal aid lawyers, usually by reference to statements of elite political stakeholders who justified the existence of legal aid as a means of correcting societal ills without resort to revolution. See TWEED, *supra* note 62, at 10. See also Reginald Heber Smith, *Introduction* to EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* xiii-xiv (1951) (expressing concern that failing to provide equal access to justice would spark a Marxist revolution).

⁸⁸ The concept of challenging the status quo as a defining feature of progressive lawyering is present in later practice visions as well. See, e.g., Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 415 n.2 (1996) [hereinafter Trubek, *Embedded Practices*] (defining "social change lawyering" as "directed at altering some aspect of the social, economic, and/or political *status quo*") (emphasis added).

⁸⁹ KATZ, *supra* note 58, at 71 (the percentage of female legal aid lawyers in Chicago dropped to 12 percent between 1965 and 1973).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 47. In Chicago in 1955, all 14 lawyers on staff "each fit one or more of the following categories: female, black, Jewish, Catholic." *Id.* at 47-48.

⁹³ The OEO funded the Reginald Heber Smith Fellowship program to recruit and train "the best and the brightest" to a career in legal services. HOUSEMAN & PERLE, *SECURING*

the OEO programs were considered prestigious and appealed to new lawyers interested in political activism.⁹⁴

Within some OEO funded offices, there was a division of labor between impact and direct service attorneys and only the former were considered different from prior legal aid attorneys. The OEO set up a funding scheme that privileged law reform over service work and created hierarchies among attorneys along the law reform/service divide. The prospect of doing law reform work—viewed as more “glamo[r]ous” than direct service work—was used to draw in elite law students.⁹⁵ Direct service work was “drudge work” whereas law reform was “sexier,” “better,” “more interesting.”⁹⁶ Law reform attorneys often did not stay for long periods of time, and attorneys viewed as committed to a lifetime of legal aid work were considered “mediocre.”⁹⁷ Some OEO programs were therefore marked by tensions between attorneys engaged in different kinds of work and perceived as holding different status.

The tensions between law reform and direct service attorneys were in full view at the Harvard Conference on Law and Poverty in 1967. The written introduction to the proceedings employed the popular rhetorical strategy of drawing a line between those for and those against the status quo, describing the purpose of the conference as “providing a forum in which advocates of institutional change and advocates of the *status quo* can exchange views and work toward constructive solutions.”⁹⁸ It was not clear, however, that anyone at the conference either self-identified as in favor of the status quo or actually favored it.⁹⁹

Present at the conference were two young Yale Law School graduates, Jean and Edgar Cahn, whose article *The War on Poverty* is

EQUAL JUSTICE, *supra* note 21, at 11 (internal quotations omitted). These “Reggie” fellowships were “prestigious and paid a salary higher than most regular Legal Services jobs.” *Id.* at 28.

⁹⁴ KATZ, *supra* note 58, at 71.

⁹⁵ HANDLER ET AL., ORGANIZATIONS, *supra* note 73, at 32. See also Burt Griffin, Dir., Legal Aid Soc’y of Cleveland, Address at the Harvard Conference on Law and Poverty (March 18, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 32 (Daniel H. Lowenstein ed., 1967) (“[F]ew graduates of Ivy League law schools are motivated to enter legal services work at the neighborhood level.”).

⁹⁶ SHEPARD, *supra* note 19, at 84 (internal quotations omitted).

⁹⁷ KATZ, *supra* note 58, at 128.

⁹⁸ Daniel H. Lowenstein et al., Introduction to PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at iii (Daniel H. Lowenstein ed., 1967) (emphasis added).

⁹⁹ The label appears to have been intended for the OEO and ABA representatives and for some of the direct service lawyers who practiced in OEO funded offices.

credited with providing the vision for the OEO program.¹⁰⁰ The Cahns' central concept was of decentralized neighborhood legal offices.¹⁰¹ The vision was motivated by concerns that the existing legal aid offices were often located outside poor people's communities and that the War on Poverty had created bureaucratic and political Community Action Agencies that demeaned and alienated those who sought assistance.¹⁰² The goal of neighborhood offices was to put high quality lawyers "at the disposal" of the community, working on whatever the community decided was best.¹⁰³ The Cahns distinguished between "service" and "representative" cases, the latter characterized as having "institutional implications and widespread ramifications."¹⁰⁴ Addressing the critical issue of determining who speaks for the community, the Cahns' idea was to "create . . . a supply of persons (often referred to as 'indigenous leaders') who are capable of articulating the demands and concerns of their 'constituency.'"¹⁰⁵

Although the original OEO vision gave local communities the power to set the priorities of the neighborhood offices, the discussions at the conference revealed that the Cahns and others expected communities to choose a focus on law reform. Attorneys in the OEO-funded neighborhood offices were viewed by critics, including the Cahns, as concentrating too much on individual casework and failing to cultivate and work with community leaders so that the neighborhood offices would meet what was presumed to be the priority for those communities—namely, law reform or systematic change.¹⁰⁶

The transcript of the three-day proceeding reveals a palpable frustration with the enormity of the task of achieving social justice for the poor. Earl Johnson, Jr., Director, Legal Services Program, Office of Economic Opportunity, began the conference with the following remark: "Now eighteen months after our program began we find ourselves swamped by a horde of astonishing problems the existence of

¹⁰⁰ Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) [hereinafter Cahn & Cahn, *The War on Poverty*].

¹⁰¹ *Id.* at 1334.

¹⁰² EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 20, 33 (1974).

¹⁰³ Cahn & Cahn, *The War on Poverty*, *supra* note 100, at 1334.

¹⁰⁴ *Id.* at 1346.

¹⁰⁵ *Id.* at 1332. The Cahns recognized the dangers in deciding whether a leader speaks for the community. *Id.* at 1348.

¹⁰⁶ For example, James D. Lorenz, Jr., Director of California Rural Legal Assistance, believed that many neighborhood lawyers were not "standing" in "meaningful relation . . . with poor people, in groups as well as individuals." James D. Lorenz, Jr., Dir., Cal. Rural Legal Assistance, Address at the Harvard Conference on Law and Poverty (March 18, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 39 (Daniel H. Lowenstein ed., 1967).

which we never before imagined.”¹⁰⁷ The overarching tone of the conference was one of shared commitment to social justice but fierce and fundamental disagreement about how to achieve that ultimate goal. Participants described the primary problem as the overwhelming caseload and debated how the OEO funded attorneys should be balancing system changing and service work.¹⁰⁸ Johnson framed the debate in the classic law reform versus services dichotomy, concluding “the primary goal of the Legal Services Program should be law reform” because “law reform can provide the most bang for the buck.”¹⁰⁹ This mathematical formulation of the problem evoked an image of an amorphous “caseload” diverting resources and standing in the way of systematic change. The solution that flowed from this formulation was simple—spend less time helping some individuals so that many individuals could be helped.

The emphasis on law reform work had a gendered coding: the female value of connection with specific individuals had to be contained to prevent it from consuming scarce resources and threatening more reasoned, efficient, and strategic methods of bringing about systematic change. The image evoked was of an all-heart direct service staff acting without reason and restraint to help those in their midst and posing a threat to the rational plan of the office to allocate time for law reform aimed at helping large groups of people.¹¹⁰ A gender subtext was also present in the discussion of whether legal services offices should limit the number of “domestic” or family law cases—cases that disproportionately benefitted women. These cases were viewed as consuming large amounts of resources and providing no systematic-change payoff.¹¹¹

¹⁰⁷ Earl Johnson, Jr., Dir., Legal Services Program, Office of Economic Opportunity, Introductory Address at the Harvard Conference on Law and Poverty (March 17, 1967) in *PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967*, at 1 (Daniel H. Lowenstein ed., 1967) [hereinafter Johnson, Address, in HARVARD CONFERENCE].

¹⁰⁸ Explaining why the program could not meet its original goals, Earl Johnson, Jr., Director, Legal Services Program, Office of Economic Opportunity, said the following: “The problem, as all of you know, is caseload.” *Id.* at 2.

¹⁰⁹ *Id.* at 4.

¹¹⁰ This image is present in more contemporary writing. See Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2514-19 (1998-1999) (discussing the danger that the “rescue mission” of direct services will overwhelm impact work).

¹¹¹ See, e.g., Johnson, Address, in HARVARD CONFERENCE, *supra* note 107, at 5. See also Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 50-51 (1994-1995) (internal citations omitted) (discussing refusal of legal services attorneys to take divorce cases on the grounds that they did not involve law reform despite clients regarding these cases as a high priority). Douglas Besharov has commented on how domestic cases have been viewed as “less interesting,” “frustrating,” and “intense,” and as presenting “less opportunity for law reform.” BESHAROV, *supra* note 38, at 14. He re-

Highly abstract reasoning permeated the conference, which was dominated by men.¹¹² Speaking to the service/reform issue, for example, Edgar Cahn was confident that the poor would choose reform as a priority. He said: “the poor crave attention to their personal needs” but they are “willing to sacrifice part of the service function for the social change function.”¹¹³ He argued that otherwise we would “reduce[]” poor people to “selfish needy human being[s].”¹¹⁴ This view of how poor people would choose reform over service invoked a type of Rawlsian abstract and ahistorical “original position” in which people would choose the rules to govern themselves behind a “veil of ignorance” that prevents them from knowing what personal attributes they have.¹¹⁵

This reasoning contrasted with that employed by direct service attorneys, many of whom questioned the conclusion that the poor would choose law reform strategies.¹¹⁶ These speakers tended to resist the service/reform dichotomy, to graphically explain the nature of the need, and to use specific examples to illustrate their points.¹¹⁷

marks that there was a “degree of male chauvinism in the failure to handle more family matters. *Id.* at 15. For an argument that direct service work in domestic violence cases transcends the direct/impact distinction, see Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493 (1995-1996).

¹¹² Jean Cahn appears to have been the only female panelist at the conference. See PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967 (Daniel H. Lowenstein ed., 1967).

¹¹³ Edgar S. Cahn, Address at the Harvard Conference on Law and Poverty (March 18, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 60 (Daniel H. Lowenstein ed., 1967).

¹¹⁴ *Id.* at 60.

¹¹⁵ JOHN RAWLS, A THEORY OF JUSTICE 118-194 (1971). As others have noted, the original position represents classic expression of ahistorical and abstract rights-based legal reasoning associated with male jurisprudential thinking. For a summary of the literature in this area, see Marion Smiley, *Democratic Citizenship v. Patriarchy: A Feminist Perspective on Rawls*, 72 FORDHAM L. REV. 1599, 1601-13 (2003-2004). For feminist critiques of contract theory, see CAROLE PATEMAN, THE SEXUAL CONTRACT 41-43 (1988); Virginia Held, *Mothering versus Contract*, in BEYOND SELF-INTEREST 287-304 (Jane J. Mansbridge ed., 1990). For a feminist defense of Rawls’ liberalism, see Linda McClain, “Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1206 (1991-1992).

¹¹⁶ See, e.g., Herbert Semmel, University of Illinois, Remarks at the Harvard Conference on Law and Poverty (March 17, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 25 (Daniel H. Lowenstein ed., 1967).

¹¹⁷ See, e.g., William Stringfellow, Address at the Harvard Conference on Law and Poverty (March 17, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 8 & 10 (Daniel H. Lowenstein ed., 1967) [hereinafter Stringfellow, Address, in HARVARD CONFERENCE] (speaking of the “great multitudes of causes and complaints and rights of those who are poor and black have gone unrepresented in spite of all that has happened, of all that has been volunteered, of all the good intention . . . we are on the verge of insurrection”).

Brian Olmstead, a neighborhood attorney in a small office in Washington DC, rejected the heavily theoretical focus of other speakers. In his experience, the courts and agencies were not even honoring clearly established rules and rights and he believed the goal of the neighborhood attorney was to “attempt[] to get the most minimal concept of law to have some relation to reality.”¹¹⁸

Other neighborhood attorneys also rejected the law reform/direct service dichotomy. Harold Rothwax challenged the way that the policy makers and academics were framing the “caseload” as the problem. He stated: “In my view the only way you can get law reform and social change is through the caseload.”¹¹⁹ Drawing on his experiences representing juveniles in New York, he remarked that “the caseload . . . provides you with power, and without that caseload you do not have any capacity for achieving law reform.”¹²⁰ Another attorney pointed out that the only way of learning about what the systematic problems are is by having a caseload big enough to “give you a reservoir of concrete knowledge of what is going on.”¹²¹ A rejection of the law reform/service dichotomy was also present whenever someone gave a concrete example of a problem. William Stringfellow, said “there is hardly a bank in the United States that extends credit, conventional credit, on equitable terms to Negro applicants.”¹²² It did not matter what side of the “systematic” or “service” line this problem fell. It was enough that it was a problem needing a solution.

C. Wexler's *Indictment of Poverty Lawyering*

While progressive theorists and lawyers were debating the relative merits of law reform and direct service work, the seeds were being sown for a new approach to poverty lawyering—one that rejected both law reform and direct services. The approach is what some now call “law and organizing.” Unlike the OEO funded programs, which

¹¹⁸ Brian Olmstead, Attorney, Neighborhood Legal Servs. Project, D.C., Address at the Harvard Conference on Law and Poverty (March 18, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 40 (Daniel H. Lowenstein ed., 1967) [hereinafter Olmstead, Address, in HARVARD CONFERENCE]. He characterized as “revolutionary” the act of getting “a hearing at which the court will simply listen to you.” *Id.* at 41. Olmstead gave multiple examples of egregious conduct, including an example of going into small claims court and arguing a new legal theory and having the judge say: “Don’t give me that liberal garbage.” *Id.* at 40.

¹¹⁹ *Id.* at 63.

¹²⁰ Harold Rothwax, Dir., Legal Servs. Unit, Mobilization for Youth, N.Y.C., Address at the Harvard Conference on Law and Poverty (March 18, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 63 (Daniel H. Lowenstein ed., 1967).

¹²¹ Olmstead, Address, in HARVARD CONFERENCE, *supra* note 118, at 43.

¹²² Stringfellow, Address, in HARVARD CONFERENCE, *supra* note 117, at 7.

were firmly committed to lawyers acting in their professional capacity as lawyers, the law and organizing approach views the mission of progressive lawyers as helping poor people organize. The commitment to social change through mobilization was based in skepticism about whether social justice can be achieved through an individual rights framework.¹²³

A highly influential article that continues to be cited today in progressive scholarship on lawyering is the 1970 Yale Law Journal article “Practicing Law for Poor People” by Stephen Wexler, then a staff attorney at the National Welfare Rights Organization.¹²⁴ In one of the most often-cited quotes about social justice lawyering, Wexler indicted the traditional role of lawyers in the war against poverty: “Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people.”¹²⁵ In a strongly worded description of well-intentioned but ineffectual direct service attorneys, Wexler wrote:

Two major touchstones of traditional legal practice—the solving of legal problems and the one-to-one relationship between attorney and client—are either not relevant to poor people or harmful to them . . . The lawyer for poor individuals is likely, whether he wins cases or not, to leave his clients precisely where he found them, except that they will have developed a dependency on his skills to smooth out the roughest spots in their lives.¹²⁶

Direct service attorneys, in other words, are not simply less effective than organizer-attorneys. They work against the movement. By cultivating “dependency” of poor people on lawyers, they are part of the problem, not part of the solution.

Wexler uses an anecdote to convey his vision of the “proper mentality” of a lawyer towards organizing.¹²⁷ In the story, the organizer, a man, visits a female welfare recipient who displays skills helpful to the organizing project. The story told in the first person by an organizer described by Wexler as “effective” is as follows:

I once found a [welfare] recipient who worked hard at organizing, and was particularly good in the initial stages of getting to talk to new people. I picked her up at her apartment one morning to go

¹²³ See *infra* note 151 and accompanying text.

¹²⁴ Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

¹²⁵ *Id.* at 1053.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1054 (internal quotations omitted). Despite the popularity of Wexler as a source of authority in progressive scholarship, this story appears not to be discussed. The only apparent reference to this story appears to misunderstand Wexler as being critical of the organizer (whom the author mischaracterizes as a poverty lawyer). See Jayanth K. Krishnan, *Lawyering for a Cause and Experiences Abroad*, 94 CAL. L. REV. 575, 576 n.6 (2006).

out knocking on doors. While I was there, I saw her child, and I noticed that he seemed to be retarded. Because the boy was too young for school and the family never saw a doctor, the mother had never found out that something was seriously wrong with her son. I didn't tell her. If I had, she would have stopped working at welfare organizing to rush around looking for help for her son. I had some personal problems about doing that, but I'm an organizer, not a social worker.¹²⁸

The anecdote suggests that effective lawyer-organizers should ignore concern for poor people as individuals and instead view them in terms of what they can contribute to the movement.¹²⁹ The woman's presumed nurturing and emotional connection to her son stands as a threat to the larger organizing project. The organizer displays the "proper" dispassion, using a utilitarian justification that the needs of the movement outweigh those of the woman's son. The cost-benefit analysis abstracts the woman and her son from their lived reality and relies on the questionable assumption that the woman was not aware of the developmental and medical issues affecting her son. Wexler's illustration of how organizers should use poor people instrumentally stands in contradiction to his central claim that only poor people themselves can eliminate poverty.

Wexler's negative portrayal of individual service is a direct product of his view about how social change occurs and must be understood in these theoretical terms. At the same time, Wexler's theoretical points must be understood in juxtaposition to not only his understanding of organizing but also his descriptive comments about direct service lawyering. Wexler believed that poverty law practice was frustrating, "not intellectually stimulating," and that no one would do it for very long.¹³⁰

D. Retrenchment

The 1970s saw the beginning of a push to blunt the effectiveness of federally funded legal services. The period included an economic depression from 1973-1975, the institutionalization of a welfare system for dealing with the poor, and a general decline in political activism. OEO litigation successes spawned a conservative effort to seek reversal of federally funded legal assistance. In 1970, Ronald Reagan, as governor of California, threatened to veto the federal grant to Califor-

¹²⁸ Wexler, *supra* note 124, at 1054.

¹²⁹ For an extended discussion of how individual legal services may thwart collective action, see Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 438 (1995).

¹³⁰ Wexler, *supra* note 124, at 1051-52.

nia Rural Legal Assistance because of its aggressive advocacy on behalf of community groups, advocacy that included lawsuits against state and local agencies.¹³¹ In 1973, President Nixon tried to appoint a director to the OEO in order to undermine the program. Phyllis Schlafly later accused federally funded legal services offices of “creating clients, initiating class-action suits, litigating and lobbying, to restructure society according to their own radical notions.”¹³²

To insulate legal assistance groups from political opposition, a movement began to create a private nonprofit corporation. Although President Nixon initially opposed the idea, he reversed his position after the Watergate scandal and the Legal Services Corporation (LSC) was created in 1974.¹³³ It still exists today.

The 1970s also saw the end of the Vietnam War and the decline of widespread activism for civil and welfare rights. The NWRO, which had allied with OEO-funded lawyers, ceased to be active after 1975. Those who had represented politicized individuals and groups lamented the end of an era. Courtroom victories on welfare rights, however, continued. Law reform attorneys secured major victories in courts at all levels, including *Goldberg v. Kelley*, and in legislative campaigns.¹³⁴ Lawyers themselves continued the fights started in alliance with politicized groups of poor people.¹³⁵

1. *Nostalgia for the More Political*

After the heyday of favorable court decisions and broad-based social movements, some began to criticize what was viewed as the waning political orientation of social justice lawyers. Some pointed to how nonprofit lawyering became institutionalized after the creation of the Legal Services Corporation, locking lawyers into typecast roles and hampering them from thinking outside of the usual categories. For example, Gary Bellow, a giant in the world of progressive law-

¹³¹ See Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 6, 23 (1972).

¹³² Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 484 (1985) (“Legal aid lawyers handle their cases in a routine fashion, with the least possible expenditure of effort.”).

¹³³ See HOUSEMAN & PERLE, SECURING EQUAL JUSTICE, *supra* note 21, at 17, 20.

¹³⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (establishing due process right to hearing before denial of welfare benefits).

¹³⁵ Jack Katz argues that this continuation was possible because lawyers came to view local control by community groups as standing in the way of law reform, which had become the priority in the OEO years. In his study of Chicago legal aid offices, Katz reports that, contrary to expectations, community groups represented on the boards governing OEO funded groups wanted resources directed at individual services. See KATZ, *supra* note 58, at 95. Katz further argues that legal services groups confronted a host of difficulties working with community groups, which led to a focus on impact litigation and an abandonment of community action policy. *Id.* at 102-103, 179.

ying, expressed a low opinion of the work of LSC attorneys who worked on individual cases, having conducted an empirical study in 1977 that found “routine processing of cases,” “low client autonomy,” “narrow definitions of client concerns,” and “inadequate outcomes.”¹³⁶ Bellow found that legal services offices were institutionalized and increasingly focused on a “national delivery system” rather than the political goals related to fundamental change, even alleging that “[i]t appears that the legal aid system . . . may be supporting the very inequalities that brought a federally financed legal aid program into being.”¹³⁷

Marc Feldman, a law professor and former project director in a legal services office, echoed Bellow’s criticism of LSC offices and his nostalgia for past forms of advocacy aimed at changing the system, authoring a strongly worded “constructive polemic” in the Georgetown Law Journal against traditional legal services offices.¹³⁸ Bellow and Feldman’s criticisms of LSC lawyers, while limited to a discrete time and place, contributed to an enduring negative image of direct services lawyers.

Even as Bellow criticized LSC lawyers, he had begun to propound a theory of social justice lawyering that supported a positive image of direct service lawyering. Perhaps reflecting a diminished view of what was possible to achieve in the increasingly hostile litigation and funding environments, Bellow viewed individual cases as a locus of systematic change. He criticized the service/law reform dichotomy and instead viewed social justice lawyering as a political and “self-conscious[]” stance towards lawyering rather than any particular methodology.¹³⁹ He called upon all legal service attorneys to self-identify and act as agents of political change, criticizing lawyers who failed to view “day-to-day” cases as “fuel for political action or reform.”¹⁴⁰ Bellow urged more experienced attorneys to take on more of these cases and propounded a theory of case aggregation whereby individual cases could have an impact beyond the sum of their parts.¹⁴¹

¹³⁶ Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, (Aug. 1977), available at <http://www.garybellow.org/garywords/solutions.html> [hereinafter Bellow, *Turning Solutions Into Problems*].

¹³⁷ *Id.*

¹³⁸ Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1994-1995).

¹³⁹ Bellow, *Steady Work*, *supra* note 4, at 300.

¹⁴⁰ Bellow, *Turning Solutions Into Problems*, *supra* note 136.

¹⁴¹ *Id.* Others have endorsed the Bellow’s case aggregation theory. See, e.g., Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLIN. L. REV. 333, 377-79 (2008-2009).

2. LSC Restrictions, 1980 to the Present

Conservative hostility towards publically funded legal services for the poor reached a high with the election of Ronald Reagan as President in 1980. President Reagan sought to eliminate the LSC altogether. Although he failed in this endeavor, LSC funding was reduced by 25 percent, resulting in massive office closures and staff reductions.¹⁴² 1982 brought additional restrictions on lobbying, rulemaking, and representation of noncitizens.¹⁴³ The LSC board was stocked with members who were antagonistic to the LSC's mission.¹⁴⁴ Legal services staff were subject to "adversarial" and lengthy monitoring visits during which monitors "often demanded access to client files and other confidential information."¹⁴⁵

Under the Bush and Clinton administrations in the early 1990s, LSC received more support than in the Reagan years. The Congressional leaders who emerged from the 1994 elections, however, were committed to eliminating LSC and, in 1996, Congress enacted sweeping restrictions on LSC money—restrictions that, in large part, exist to the present day.¹⁴⁶ These limitations prevent LSC-funded entities from engaging in law reform activities—such as class action litigation and policy work—and broadened the existing restrictions on representation of noncitizens. Critically, the restrictions applied regardless of whether the LSC-funded group had independent funding for those activities.¹⁴⁷

The 1996 restrictions sent a shock-wave through the nonprofit advocacy community.¹⁴⁸ Offices experienced a 30 percent reduction in

¹⁴² HOUSEMAN & PERLE, SECURING EQUAL JUSTICE, *supra* note 21, at 27-28.

¹⁴³ *Id.* at 28.

¹⁴⁴ *Id.* at 28-29.

¹⁴⁵ *Id.* at 29.

¹⁴⁶ These legislative restrictions were implemented by regulations. See 45 C.F.R. §§ 1612, 1617 (1996). For a discussion of these restrictions, see Liza Q. Wirtz, *The Ethical Bar and the LSC: Wrestling With Restrictions* 59 VANDERBILT L. REV. 971, 992-998 (2006).

¹⁴⁷ Some of the provisions were invalidated by court or Congressional action. In 2001, the U.S. Supreme Court struck down the legality of the prohibition against challenges to welfare law. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). In 2010, the Consolidated Appropriations Act of 2010 eliminated the restriction on collection of statutory attorneys' fees. Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 533, 123 Stat. 2034 (amending Section 504(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, in Public Law 104-134, by striking attorney fee restriction in paragraph (13)). See also 75 Fed. Reg. 6816-01 (2010) (interim final rule on lifting attorney fee restriction). For an analysis of whether the restrictions are lawful, see Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107 (1998).

¹⁴⁸ For a discussion of this time period, see Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213 (2001-2002); William P. Quigley, *The Demise of Law Reform and the Triumph of*

funding, forcing the advocacy community to scramble and adjust. The result was a radical transformation of the legal assistance landscape. Many staff members lost their jobs. When non-LSC funding was available for certain restricted work, entirely new organizations were formed, employing a disproportionate number of the senior attorneys (many of whom were doing law reform work). In essence, the funding restrictions split the legal services baby, ensuring that the focus of LSC funded groups was exclusively on individual casework.

E. Critical Theory to Law and Organizing

In the late 1980s, progressives inspired by the critical theory movement began a new phase of critique of nonprofit lawyering practices. Many varied strands of progressive visions of lawyering self-identify as critical.¹⁴⁹ One commonality is a Foucauldian understanding of the nature of power as pervasive yet permitting of opportunities for resistance.¹⁵⁰ Skeptical of normative and formalistic claims, critical theorists typically understand the world as indeterminate, noncategorical, and constructed. Like critiques prevalent in the 1960s and 1970s, critical views clash with classic liberal theory and regard rights and procedural justice as masking and perpetuating pervasive substantive inequality and subordination.¹⁵¹

Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's, 17 ST. LOUIS U. PUB. L. REV. 241, 260-61 (1997-1998).

¹⁴⁹ Ruth Buchanan and Louise G. Trubek have described "critical lawyering" as having the central tenets of humanizing clients by resisting their reduction to "legal categories," resisting the "marginalization of clients' voices," collaborating with clients and client groups to "dismantle the lawyer/client hierarchy," and to strategize about nontraditional legal solutions based in client experiences, and encourage organization of collectives of clients. Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 691 (1991-1992).

¹⁵⁰ For a discussion of the relationship between Foucault's notion of power and progressive lawyering, see Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395 (2004). Rather than view the world as one in which we are inevitably trapped in patterns of domination and subordination, Foucault recognized the potential for exercising power (resistance) by even those most subordinated in our society. Describing the relationship between knowledge and power, Foucault argued that "[d]iscourses are not once and for all subservient to power or raised up against it." MICHEL FOUCAULT, *THE WILL TO KNOWLEDGE, THE HISTORY OF SEXUALITY: VOLUME ONE* 100-101 (1976). The relationship is more complex. "[D]iscourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy." *Id.* at 101.

¹⁵¹ See Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Abel, *Speaking Law to Power*, in CAUSE LAWYERING] ("Most of the time law reflects, reproduces, reinforces existing power inequalities."); Alfieri, *Antinomies*, *supra* note 61 at 680 (explaining that the law "decontextualize[s] and individualize[s]" "class antagonisms" and "channel[s]" them "into

Multiple visions of progressive lawyering have emerged in the wake of critical theory.¹⁵² Some approaches take aim at what is often called the liberal-legalist framework of advocacy through law reform and policy work and instead promote extralegal methodologies for shifting institutional power.¹⁵³ Theorists in this tradition restate, and build on, the 1960s critique of legal aid lawyers as insufficiently engaged with community groups and the project of mobilizing poor people.¹⁵⁴ In these models, lawyers are resources for, and in alliance with, politicized groups of subordinated people seeking to shift power through a panoply of methodologies, including extra-legal ones.¹⁵⁵

formal, purportedly neutral categories of sanctioned conduct, such as rights and duties”); Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 594-95 (2010) (arguing that the “‘individual rights’ model . . . legitimize[s] power over ongoing relationships of exploitation” and that lawyering within the current system has a tendency to “exacerbate those power differences, reifying elite professionals as leaders”); Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 721 (1991-1992) (arguing that “legal culture induces acquiescence to institutional structures that are built on the values of liberal capitalism while obscuring recognition that these values are preordained choices derived from a particular set of power relations”); Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1000 (1987-1988) [hereinafter Handler, *Dialogic Community*] (discussing “the realization of the limits of the legal rights revolution in protecting dependent people, consumers, and the victims of discrimination, occupational hazards, and environmental harm”); Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1705 (1994-1995) [hereinafter Houseman, *Political Lessons*] (arguing that “[l]egal services cannot end poverty; nor are the courts going to redistribute wealth”); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as “Foreigners,” and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 362-67 (1997) (challenging utility of law as means of achieving racial justice); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 210-11 (1979) (arguing that Blackstone represents the “liberal mode of American legal thought” whose work “set out . . . all the themes that right to the present day characterize attempts to legitimate the status quo through doctrinal exegesis.”); Edwin L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 18-19 (2001-2002) (describing law as “a crucial element in the ideology of liberal democracy”). See generally Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1983-1984). For more recent essays on progressive critiques of rights, see LEFT LEGALISM/LEFT CRITIQUE, Wendy Brown and Janet Halley, eds. (2002).

¹⁵² See, e.g., Kevin R. Johnson, *Lawyering for Social Change: What’s a Lawyer to Do?*, 5 MICH. J. RACE & L. 201 (1999-2000); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990-1991) [hereinafter White, *Goldberg*]; Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1996-1997).

¹⁵³ For an analysis of these theories, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2006-2007).

¹⁵⁴ For example, Lucie White argues that “[l]egal remedies that are designed by lawyers to impose improved conditions upon the poor aren’t likely to do much to challenge subordination in the long run.” White, *Goldberg*, *supra* note 152, at 872.

¹⁵⁵ See, e.g., Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L.

Gerald López, in 1992, put forth what may be the single most influential vision of progressive lawyering.

1. *Rebellious Lawyering*

In *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, López propounds a vision of lawyers as collaborators with nonlawyers in grassroots organizations to bring about social change. He does so through a typology of social justice attorneys, counterposing “regnant” lawyers against “rebellious” ones. López relates the journey of a fictional young, recent graduate from law school, Catharine, who is searching for role models amongst progressive lawyers. We learn about Catharine’s impressions of Teresa, Abe, and Jonathan (the “regnant” lawyers), as well as Sophie and Amos (the “rebellious” lawyers).

Teresa is a brilliant and hard working impact litigator and media strategist at a nonprofit law office who is relatively unconnected to her clients, whom she handpicks for her legal cases, and to the community.¹⁵⁶ Abe is a private attorney who represents unions in a traditional fashion because he believes in the labor movement even though he is critical of some of the ways in which union leaders sometimes treat their members. Jonathan is a committed housing attorney who helps low-income people at a legal services office, but feels “overwhelmed” by how many people have housing problems.¹⁵⁷ He tries to help as many people as he can, declining help to those without a legal defense and spending only as much time needed with the client in

REV. 355 (2007-2008) (describing a law clinic model focusing on mobilization); Jennifer Gordon, *The Lawyer is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007) (describing role of lawyers in worker rights campaigns); E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 214 (2009-2010) (presenting examples of how community lawyering can follow a “resource-ally” model). Today’s lawyer-community collaborations typically involve smaller-scale grassroots organizations or fledgling groups of clients in the process of becoming politicized. See, e.g., BUTLER, *supra* note 48, at 147 (arguing that progressive politics should take place through small, local interventions); Alizabeth Newman, *Bridging the Justice Gap: Building Community By Responding to Individual Need*, 17 CLIN. L. REV. 615 (2010-2011) (describing model of providing individual services to women who are committed to building a collective). But see Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC’Y REV. 697, 719–28 (1992) (criticizing the focus of activism at the local level that fails to produce sustained, grand-scale political change); William H. Simon, *Symposium: Race, Economic Justice, and Community Lawyering in the New Century* 95 CAL. L. REV. 1821, 1823 (2007) (arguing that “one can strengthen strong local ties and forge links to broader-based institutions at the same time” when pursuing community economic development).

¹⁵⁶ GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 13-21 (1992).

¹⁵⁷ *Id.* at 20.

order to prepare the case.¹⁵⁸ Jonathan seems to have a “low opinion about the good sense or intelligence of some of his clients” and typically does not find it efficient to involve them in the preparation of their cases.¹⁵⁹ Regarding links with the community, Jonathan is only minimally aware of “social service groups in the community or with other people in the community who are interested in housing issues.”¹⁶⁰ He prefers to “solv[e] poor peoples’ problems” through the legal system.¹⁶¹

Teresa, Abe, and Jonathan collectively represent the “regnant” mode of lawyering.¹⁶² Regnant lawyers have faith in the legal system as a means of fighting subordination and engage in “formal representation” defined as service or impact work, viewing themselves as the primary “problem-solvers” and as “aesthetic if not political heroes.”¹⁶³ Although regnant lawyers may engage in community education, they have only loose connections with community groups and understand poor people as facing numerous and intractable barriers to helping themselves.¹⁶⁴

The regnant attorneys stand in contrast to “rebellious” lawyers, as epitomized by Sophie and Amos. Their practice vision shares features with the older tradition of law and organizing, discussed above, in which legal solutions are understood as limited and lawyering must be linked with broader movements for social change composed mainly of non-lawyers. Both Sophie and Amos spend a considerable amount of time using nontraditional lawyer skills in their collaborations with community groups. Sophie lives in the neighborhood where she works, which Catharine believes “appears to make all the difference in the world.”¹⁶⁵ Sophie’s projects include developing a lay lawyering model to help people apply for lawful immigration status. Although she sometimes uses litigation strategies, she “systematically tries to encourage local people to share experiences and to develop know-how that will enable them to better anticipate and address their needs over time.”¹⁶⁶ Sophie is always on the lookout for established or emerging community groups with which she can work.

Amos takes a similar approach to lawyering as Sophie. Amos, an “old home boy,” grew up in the community where he is now the coor-

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 21.

¹⁶⁰ *Id.* at 21.

¹⁶¹ *Id.* at 22 (internal quotations omitted).

¹⁶² *Id.* at 23-24.

¹⁶³ *Id.* at 24.

¹⁶⁴ *Id.* at 24.

¹⁶⁵ *Id.* at 31.

¹⁶⁶ *Id.* at 32.

dinator of a nonprofit organization (not a legal service offices) dedicated to “respond” to the community’s “frustrations over the (dis)array of resources and assistance available for children and families.”¹⁶⁷ In learning about how to intervene best to bring about the coordination of services, Amos seeks to learn from those “at the ground level.”¹⁶⁸ Like Sophie, he views problems faced in the community as not necessarily legal problems amenable to a legal solution and seeks to understand problems from the perspective of those affected by them.

López’s powerful vision of small scale, grassroots movements for change in which lawyers work in egalitarian collaboration with community groups has resonated with many progressive scholars and lawyers over the last two decades. Although some scholars have been critical of rebellious lawyering, many others have sought to identify their visions of progressive lawyering with the “rebellious” label (or as not “regnant”).¹⁶⁹ Gary Bellow, for example, expressly identified his concept of political lawyering with López’s “rebellious” archetype.¹⁷⁰ Echoing Stephen Wexler’s analysis from 1970, Bill Ong Hing has endorsed the “rebellious” concept while arguing that “prevailing lawyering practices disserve lower-income clients” by subordinating them and making them unable “to act against their own oppression.”¹⁷¹

López’s analysis is rooted in his experience with legal services lawyering in East Los Angeles, where he grew up. It is tied to a particular time and place and must be understood in these terms. His

¹⁶⁷ *Id.* at 34.

¹⁶⁸ *Id.* at 36.

¹⁶⁹ More than 500 law review articles reference Gerald López’s concept of rebellious lawyering. Recent examples include Arkles et al., *Trans Liberation*, *supra* note 151, at 595, 614 (discussing “rebellious lawyering” as a way that lawyers can avoid “replicat[ing] oppression”); Robin S. Golden, *Collaborative As Client: Lawyering For Effective Change*, 56 N.Y.L. SCH. L. REV. 393, 406 (2011/2012) (invoking “rebellious lawyering” as model vision of collaborative lawyering); Kevin R. Johnson, *How Racial Profiling In America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1008 (2009-2010) (using the framework of “rebellious lawyering” to argue for litigation to be combined with “political strategies to bring about social change”); Kelly McAnnay & Aditi Kothekar Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 VAL. U. L. REV. 875, 896 (2010-2011) (characterizing Gerald López as “a renowned pioneer of the community lawyering model”); Newman, *supra* note 155, at 615 (contrasting a “regnant” attorney who “act[s] on behalf of the poor” to a “rebellious” “community lawyer”). For discussions of the limitations of rebellious lawyering, see generally Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993-1994); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1991-1992).

¹⁷⁰ Bellow, *Steady Work*, *supra* note 4, at 303 n.11.

¹⁷¹ Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1, 25 (2007).

typecasts are meant to serve as suggested points of departure for self-reflection on the part of progressive practitioners and thoughtful students entering practice. The rebellious/regnant distinction, however, has taken on a life of its own, entrenching itself in scholarship about progressive lawyering over the last twenty years. This phenomenon is a testament to the provocative and inspirational nature of López's rebellious practice vision. The journey of young lawyer Catharine appeals to progressive lawyers because it promises to fulfill our collective desire to be catalysts for social justice.¹⁷²

López's larger project is to propose a theory of how social change occurs. His rebellious practice vision reflects his view that working at the grassroots level with non-lawyers is more effective than advocating within the legal system. Yet there are limits to how well stereotyped characters can persuade us of any theory of social change. Like most stereotypes, the characters of Teresa, Abe, and Jonathan both reflect and distort reality.¹⁷³ It might be more accurate to say that every practicing progressive lawyer is simultaneously the regnant Jonathan and the rebellious Sophie/Amos.

López uses Jonathan, a man, to represent direct service lawyers, even though women perform the lion's share of direct service lawyering. López's portrayal of Jonathan as disconnected from, and superior to, his clients may offer only partial truth about direct service lawyering. As discussed in Part I.C., this description may not fully capture direct service lawyering as it is experienced and practiced, largely by women. López's rebellious/regnant distinction works against constructive dialogue and towards reification of differences among people engaged in a common project.¹⁷⁴ The labels prompt social justice lawyers to either deny that the label applies to them or to identify with the label and feel either inferior or hostile. Labeling may distract progressive lawyers from the task at hand—working towards a more just society.

2. *The Turn Inward*

A distinct contribution of critical theorists lies in the analysis of

¹⁷² For a discussion of the psychological appeal of activist lawyering, see *supra* note 85.

¹⁷³ Psychology tells us that stereotypes are always at work in how we perceive reality. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1254, 1256 (2001-2002) ("What we sometimes refer to as 'essentialism' may be less the result of flawed thinking than a byproduct of quite ordinary thinking about human categories."). Martha Minow has observed that "we are attracted to simplifying categories . . . [and we] have an unconscious attachment to stereotypes." Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 64 (1987-1988).

¹⁷⁴ Anthony V. Alfieri has called labeling "an act of demeaning subordination." Alfieri, *Antinomies*, *supra* note 55, at 691.

the details of the lawyering practice itself—in how specific lawyering actions either enhance or detract from poor people’s individual and collective empowerment or critical consciousness. These scholars are concerned about what happens in individual cases and train their attention on the core activities of direct service attorneys, like courtroom situations and lawyer-client conversations. As Louise G. Trubek explains, critical lawyering theory “views client work as transformative in and of itself, lessening the tension between advocating on behalf of individual clients and pursuing transformative goals.”¹⁷⁵ Lucie White has described this focus as analyzing the “situated microdescriptions of lawyering practice.”¹⁷⁶

Critical thinkers explore how the lawyer-client relationship is not immune from the power analysis and deconstruct the ways in which conventional, lawyer-dominated advocacy has disempowered clients individually and collectively. The Foucauldian understanding of power makes re-imagination of roles possible and, through self-reflection, lawyers can work towards true collaboration with their clients. A central focus is the damaging effects of disempowering narratives, which might portray clients as dependent victims or rely on stereotypes related to such characteristics as race, class, gender, national origin, sexual orientation, and/or religious affiliation.¹⁷⁷

Some critical theorists reject the reform/service and organizing/service dichotomies and see value in lawyering to help individuals. These theorists seek to reform how direct service lawyers do their job. The operative contrast for these theorists has become one between critical lawyers and so-called conventional ones.¹⁷⁸ With the lines redrawn, traditional or regnant direct service lawyering remains at the bottom of the hierarchy of helping, joined by other forms of conventional nonprofit law practice like impact litigation.

¹⁷⁵ Trubek, *Embedded Practices*, *supra* note 88, at 416.

¹⁷⁶ Lucie E. White, *Seeking “. . . The Faces of Otherness . . .”: A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1502 (1991-1992). Another strand of scholarship that focuses on the lawyer-client relationship is the “client-centered” approach commonly used in law school clinics. For an explanation of the “client-centered” approach, see generally David Binder, Paul Bergman, Susan C. Price & Paul R. Tremblay, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2004). See also Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993-1995); Shalleck, *Constructions of the Client*, *supra* note 54.

¹⁷⁷ Muneer I. Ahmad, for example, discusses a tension “between the progressive lawyer’s political commitment to anti-subordination . . . and the particular demands of an individual client’s case.” Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U.J. GENDER SOC. POL’Y & L. 117, 117 (2002-2003).

¹⁷⁸ See Scott L. Cummings and Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. R. 443, 456-67 (2001) (noting that “[i]n the late 1980s and early 1990s,” scholars influenced by “postmodern social theory” “began to detail the deficiencies of conventional poverty law practice”).

Anthony Alfieri is a key thinker in the “theoretics of practice” movement.¹⁷⁹ His articles have been published in influential journals and he is cited often as representing the critical lawyering school of thought.¹⁸⁰ Drawing on his experience as a legal aid attorney, Alfieri argues that lawyers who help poor people perpetuate “caste status, class subordination, and the stigmas of race, gender, and sexuality.”¹⁸¹ While progressive lawyers should not give up helping individuals, they should seek to minimize this “interpretive violence” by engaging in self-reflective “cross-cultural and difference-based identity analysis.”¹⁸²

In Alfieri’s view, the traditional outcome of client representation, winning or losing, becomes less important because it is only a “short-term interest.”¹⁸³ The long-term goal (articulated variously as political consciousness, empowerment, self-actualization, activism, or agency) can be met even if the case is lost. When attorneys tell narratives that perpetuate negative racial stereotypes, for example, Alfieri argues that the “legacy of winning” a case is “client powerlessness.”¹⁸⁴

¹⁷⁹ See *supra* note 54 and accompanying text.

¹⁸⁰ See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427, 457 (1999-2000) (describing Alfieri as a “challenging” collaborative lawyering theorist who wrote a series of articles in the 1980’s and 90’s on the “theoretics of practice,” a subject also explored by other well-known theorists, such as Lucie White and Gerald López); Shalleck, *Constructions of the Client*, *supra* note 54, at 1750 (recognizing Alfieri for having “critically examined power within the lawyer-client relationship in the context of poverty law practice”); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853, 853 (1991-1992) [hereinafter White, *Paradox, Piece-Work, and Patience*] (acknowledging Alfieri’s work on poverty advocacy as being widely read by both law students and their professors).

¹⁸¹ Alfieri, *Against Practice*, *supra* note 54, at 1085.

¹⁸² Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 54, at 2125; Alfieri, *Against Practice*, *supra* note 54, at 1084.

¹⁸³ Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800, 802 (1996) [hereinafter Alfieri, *Race-ing Legal Ethics*].

¹⁸⁴ Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 54, at 2147. Others have characterized narratives as causing harm. See, e.g., Kruse, *supra* note 29, at 151-52 (discussing how winning a case may require that lawyers “force their clients’ stories into narratives that may be disconnected from the perspectives and circumstances of their clients’ lives”). Similar arguments have been made in the context of human rights advocacy. See Dina Haynes, *Client-Centered Human Rights Advocacy*, 13 CLIN. L. REV. 379 (2006-2007) (arguing that human rights advocates often tell damaging and essentializing narratives about people as victims); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Postcolonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002) (arguing that the “international women’s rights movement has reinforced the image of the woman as a victim subject” and has “not produce[d] an emancipatory politics for women” in India); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L. J. 201 (2001) (arguing that the “grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other”). For an analysis of whether narrative harms outweigh other harms like loss of liberty in the criminal context, see Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1998-1999) [hereinafter Smith, “Race-Conscious” Ethics].

Attorneys should question the “logic of elevating a client’s liberty and survival interests over the competing values of dignity and community.”¹⁸⁵ Progressive lawyering, in the strongest version of Alfieri’s view, involves lawyers laying aside “subordinating” tactics and placing limits on their zealous representation of clients.¹⁸⁶

Alfieri’s practice ideology is a product of his belief in the limits of western liberalism and the adversarial system and his desire for community over individual justice. At the same time, his vision, like López’s, relies upon a discourse of opposition and denigration for definition. Critical lawyers contrast with direct service lawyers who are “myopi[c]” and “subordinati[ng]” as a class.¹⁸⁷ Alfieri’s hope that “poverty lawyers and the poor [can] experience the union of connection and the unity of community” illustrates that male jurisprudential critical theory rests on an assumption that people are separated from one another and long for solidarity.¹⁸⁸ Direct service lawyers may be more connected to their clients than Alfieri would have us believe. Their commitment to their clients’ express wishes may indeed pose a threat to the community justice that he hopes to achieve.

III. BEYOND HIERARCHIES OF HELPING

Hierarchies of helping in progressive theory and practice are harmful and work against the project of internal critique. Like all hierarchies, they exaggerate differences, closing down the conversation between theorists and practicing lawyers and between different kinds of progressive lawyers. Fostering collaboration between progressive theorists and nonprofit lawyers of all types is critical because the Legal Service Corporation restrictions on legal service offices channel

¹⁸⁵ Alfieri, *Race-ing Legal Ethics*, *supra* note 183, at 801 (referencing his earlier work).

¹⁸⁶ Alfieri can be understood as arguing that a defense attorney is justified in sacrificing a client’s subjectively expressed goal to, for example, avoid the death penalty or to stay at liberty if it would contribute to subordination. See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1306 (1995) (challenging “criminal defense lawyers’ freedom in storytelling”). See also Alfieri, *Race-ing Legal Ethics*, *supra* note 183, at 801 (noting his “assail[ing]” of the presumption that “a client might freely adopt a self-subordinating narrative of racial deviance”). For a defense of representing clients without constraints imposed by lawyer or community interests, see Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996); Christopher Slobogin, *Race-Based Defenses: The Insights of Traditional Analysis*, 54 ARK. L. REV. 739 (2001-2002); Smith, “Race-Conscious” Ethics, *supra* note 184. For an articulation of a middle position in which progressive lawyers do not unilaterally put their individual clients’ cases at risk but instead discuss with clients about whether to tell an effective but subordinating narrative in the course of their cases, see Ahmad, *supra* note 177.

¹⁸⁷ Alfieri, *Antinomies*, *supra* note 55, at 691.

¹⁸⁸ *Id.* at 696. See *supra* text accompanying notes 46-47.

the majority of funding to direct service lawyers.¹⁸⁹ While traditional direct service attorneys as a class occupy the lower tier in progressive theory, they dominate the universe of practicing nonprofit lawyers.¹⁹⁰ It is thus imperative that theorists of social change constructively engage with the largest group of people fighting for social justice every day. To do otherwise not only misses an opportunity but plays into the hands of conservative political forces that are hostile to progressive lawyering and seek to capitalize on a divided progressive community.

A view of social justice lawyering that rejects hierarchies of helping might take lessons from what Mari J. Matsuda called “looking to the bottom.”¹⁹¹ Writing in 1987, Matsuda was concerned with what she described as “the failure” of people of color and critical legal scholars “to develop an alliance.”¹⁹² She sought to intervene in the seeming deadlock between critical theory’s rejection of an “external, universally accepted normative source [] to resolve conflicts of value” and people of color’s “experience of oppression” that compels embracing “identifiable normative priorities.”¹⁹³ Her highly influential work helped open the minds of progressive theorists to linking experience with knowledge, specifically the experience of oppression.¹⁹⁴

My point is not to analogize the experiences of frontline social justice attorneys as a class with those of people of color as a class.¹⁹⁵ Rather, I suggest that we can borrow Matsuda’s insights grounded in “the bottom” as a starting place for suggesting how progressive theorists can move toward a more constructive understanding of the place of direct service lawyers in movements for justice. Progressive theorists, whom Matsuda analogizes to a pack of termites, have turned to “sawdust” both the methodology and practice of direct service lawyers as a class since at least the 1960s.¹⁹⁶ Yet these practicing attorneys persevere, “informed by a dual commitment to social justice and the necessity of getting one’s hands dirty.”¹⁹⁷ They enter the “fray” where

¹⁸⁹ For a discussion of these restrictions, see *supra* notes 146-48 and accompanying text.

¹⁹⁰ The largest portion of funding is provided by the Legal Service Corporation for individual casework. See *supra* note 23 and accompanying text.

¹⁹¹ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

¹⁹² *Id.* at 323.

¹⁹³ *Id.* at 324-25.

¹⁹⁴ Fred R. Shapiro and Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 100 MICH. L. REV. 1483 (2012). Her article has been cited 655 times. *Id.* at 1491.

¹⁹⁵ These are, of course, overlapping groups. See *supra* text accompanying notes 73-76.

¹⁹⁶ Matsuda, *supra* note 191, at 330.

¹⁹⁷ SHDAIMAH, *supra* note 41, at 16. Corey S. Shdaimah calls this “situated practice.” *Id.* at 18. “A situated perspective . . . avoids neat categorization” and “highlights the tensions that can be obscured by overly theoretical debates that may unnecessarily polarize or, alternatively, mediate contradictions by skirting true dilemmas.” *Id.* at 19.

there is a “balancing” of sometimes conflicting ideals and the border between strategy and cooptation or capitulation” is “constant[ly] test[ed].”¹⁹⁸

Theoreticians might benefit from “looking to the bottom” of the hierarchy of helping to appreciate how the theoretical literature on social justice lawyering, taken in the aggregate, can create paralyzing Catch-22 scenarios for direct service attorneys. For example, these attorneys are expected to be client-centered and zealous but also to ignore clients’ express goals in the interest of community justice. They are expected to be responsive to requests for professional advice but also to refrain from it because it could be considered dominating or disempowering. They are criticized for not responding to community needs when they limit intake of new cases, but they also draw criticism when they let individual cases divert them from work considered more strategic.

It is undeniably correct that direct service attorneys, like all professionals, find themselves reproducing society’s patterns of subordination in their relationships and professional practices.¹⁹⁹ The fact that direct service attorneys typically labor for little pay in underfunded and overtaxed offices leads to working conditions not conducive to healthy and self-reflective interactions with others.²⁰⁰ Without a doubt, the insights of theorists must give all practicing lawyers pause for serious reflection and an impetus for re-imagination of their professional lives and the offices in which they work. While some academic writing in this area rings true, it fails to capture the moments in which direct service lawyers and their clients connect across what separates them to relate to one another as human beings.²⁰¹ These moments might be found when initial rapport between a lawyer and her client is established or when a hearing or trial is lost or won. Whether these moments are isolated or pervasive is up for

¹⁹⁸ *Id.*

¹⁹⁹ The sociological theory of complex organizations helps us understand how legal advocacy organizations, like all organizations, are “self-referential” “subsystems” that “pre-suppose and reproduce themselves.” Handler, *Dialogic Community*, *supra* note 151, at 1046.

²⁰⁰ For a discussion of the perils of high caseloads, see Silver, *supra* note 28.

²⁰¹ See Stephen Ellmann, Isabelle Gunning, Ann Shalleck, and Robert Dinerstein, *Connection, Capacity & Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 *Clinical L. Rev.* 755 (2004) (discussing how lawyers can learn to bridge differences and connect with their clients). See also Peter Margulies, *Re-Framing Empathy in Clinical Legal Education* 5 *CLIN. L. REV.* 605, 606 (1999) (recognizing the value of even “partial” law student understanding of clients’ lives and arguing that the “personal” can become the “political” when law clinics “merg[e] the micro-version of empathy (which focuses on interpersonal relationships) with the macro form of empathy (which focuses on distributive issues in society)”).

debate, but they most certainly exist.²⁰² Moreover, many direct service attorneys, like many criminal defense attorneys, see value in representing people in need regardless of whether they share a strong human connection with them.

Matsuda offers insights based in the “double consciousness” experience of people of color in which “deep criticism” is combined with “an aspirational vision of law.”²⁰³ From this point of view, we can believe in both the necessity and the inadequacy of rights.²⁰⁴ We can believe in both the necessity and the inadequacy of direct service lawyering. Theoretical critiques of liberalism may require the critique of individual client services as, at best, a panacea and, at worst, a practice that perpetuates client domination and the status quo. Yet social reality requires that progressive lawyers work with individual people and within the current legal system. Social justice lawyers can believe in the inadequacy of the liberal rights framework and the adversarial system but still make rights claims in court; reject formalism but still engage in rule-bound lawyering; believe that helping individuals alone will never bring about social justice, but keep helping individuals; understand the indeterminacy of any road towards social justice but still meaningfully debate the best goals and methods; and believe that there is inherent domination whenever lawyers engage with their clients but still offer their professional skills in the service of others and the movement. Progressive legal advocates—attorneys and academics alike—should value the work of those who have the patience and commitment to offer life-sustaining help day in and day out.

A. Seeing Connections

Monolithic and pejorative portrayals of direct service attorneys are incomplete, essentializing narratives that deny the similarities between types of progressive lawyers. The reliance on stark contrasts

²⁰² Corey S. Shdaimah observes that “[i]t is disturbing that professionals purportedly working toward social justice may be implicated in oppressive relations of power,” but notes that “the flip side of this is that these same relationships also hold potential for resistance, change, and social justice—particularly if power is dynamic and potentially malleable.” SHDAIMAH, *supra* note 41, at 28.

²⁰³ Matsuda, *supra* note 191, at 333. Angela Harris, making a similar point, quotes Derrick Bell’s insight that “racial justice is impossible, yet we all have a moral obligation to struggle for it every day.” Angela P. Harris, *supra* note 3, at 750.

²⁰⁴ Matsuda, *supra* note 191, at 338. For other analyses of how a rights framework is critical to working towards racial justice, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1365 (1987-1988) (arguing that “Blacks’ assertion of their ‘rights’” brought them into “the American political imagination”); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987) (arguing that “the so-called ‘governing narrative,’ or metalanguage, about the significance of rights is quite different for whites and blacks”).

for explanatory power, such as the contrast with a stereotyped direct service attorney, is not unique to legal theory.²⁰⁵ The classic contrast of good versus bad possesses great narrative force.²⁰⁶ Yet there is irony in the fact that the direct service lawyer stereotype exists in some progressive theory despite the critical theory lesson that we should be skeptical of generalizations, essential narratives, and of painting groups of people with a broad brush.²⁰⁷ In the collective struggle to re-imagine and improve social justice lawyering, we must resist the temptation to construct archetypes and exaggerate differences. We must be suspicious of claims like the description of “a new breed” of legal services lawyers in the 1960s.²⁰⁸

Specific examples of lawyering touted as progressive are sometimes not so very different from examples of so-called traditional lawyering. For example, William Quigley—who has called into question the efficacy of lawyering within the existing system—has argued that the effective representation of collectives of organized poor people using the organizing model of lawyering may look a lot like traditional representation of a private corporation.²⁰⁹ Bill Ong Hing has called

²⁰⁵ For a discussion of the feminist critique of oppositional discourse, see *supra* Part I.C.

²⁰⁶ See, e.g., BEOWULF: A NEW VERSE TRANSLATION 632-638 (Seamus Heaney trans., 2000) (chronicling the hero warrior Beowulf's fight of the evil demon Grendel).

²⁰⁷ I am not the first to point out the irony when scholars writing in the critical theory tradition resort to generalizations or claim truths. See, e.g., Buchanan, *Context, Continuity, and Difference*, *supra* note 42, at 1010 (noting the drive of theorists to posit “broad-ranging narratives of social power and transformation”); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 984 (1991-1992) (urging “[t]heoretics writers [to] be careful not to substitute one set of problematic or incomplete concepts for another” and noting the tendency of critical thinkers to “suggest[] that client stories represent either objective truth or . . . some kind of pristine Rousseauian purity”); White, *Paradox, Piece-Work, and Patience*, *supra* note 180, at 855 (criticizing Anthony Alfieri for claiming that he is engaging in “a dialogic, situated, open-ended exploration of his own practice” when he actually “leaps toward certainty, closure-Narrative Authority”). See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 811 (1990-1991) (stating that “serious intellectual problems” stem from “the routine objectivist habit of legal thinkers to ‘apply’ or ‘posit’ ‘models,’ or ‘ideal types,’ or ‘definitions’”).

²⁰⁸ See *supra* note 78 and accompanying text. As noted by Eduardo Capulong, differences of lawyering models may be more of “nuance” than of kind. Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLIN. L. REV. 109, 123 (2009). Ruth Margaret Buchanan, has likewise observed: “The limitations and discontinuities between the new and old [lawyering] approaches have been overemphasized, while many significant matters of congruence and continuity have been obscured.” Buchanan, *Context, Continuity, and Difference*, *supra* note 42, at 1006.

²⁰⁹ Quigley, *Reflections of Community Organizers*, *supra* note 53, at 473. See also Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment* 95 CAL. L. REV. 1999, 2056 (2007) (discussing how “the work of in-house counsel for labor unions” can provide a useful model for lawyers working with organizations working for community economic development). Addressing lawyering for individuals, Martha Minow similarly has observed that “[s]ometimes the best way” progressive lawyers can “honor the dignity of disempowered persons” is by “ensur[ing] their represen-

for progressive lawyers to educate people about resistance strategies, to be open to learning from clients and communities, to not “romanticize” clients, to act collaboratively, to respect clients, and to take on challenging battles.²¹⁰ These qualities describe a great many “reg-nant” direct service attorneys. Even Wexler, who made one of the brashest indictments of traditional attorneys, gives examples of effective lawyering that are not so very unconventional, at least today. He lists the following as ways in which lawyers can help the organizing movement: “informing individuals and groups of their rights”, “writing manuals and other materials”, “training lay advocates”, and “educating groups for confrontation.”²¹¹ Many direct service attorneys today routinely engage in these activities.

The hierarchy of helping obscures the fact that all types of social justice advocacy—from impact litigation to organizing—rely on direct service representation. One need only imagine the sorry state of progressive advocacy if direct service lawyers were to close up shop. In courtrooms and other advocacy situations, the corrective force of lawyers who represent the interests of poor people would be absent. Even cause lawyering would suffer, as the classic test case model of cause lawyering was, by definition, an individual case strategy. Cause lawyers offered representation to a particular individual precisely because that individual’s case presented an issue of broad concern to many and became the vehicle of achieving the end of justice for all similarly situated. Test cases, of course, do not magically appear. More often than not, plaintiffs are offered representation out of a large group of individual clients being represented by direct service attorneys. Whatever the validity of critiques of the test case approach, the methodology relies on a wellspring of individuals and their direct service lawyers.²¹²

tation by the toughest, most high-powered lawyer available—just as a wealthy corporate client can expect.” Martha Minnow, *Lawyering for Human Dignity, Third Annual Peter M. Cicchino Awards Program: Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL’Y & L. 143, 155 (2002).

²¹⁰ Hing, *supra* note 171, at 19.

²¹¹ Wexler, *supra* note 124, at 1056.

²¹² The Cahns’ initial vision of neighborhood offices was premised on an individual case model. The Cahns believed that helping individuals within the system is how we learn about what needs fixing. Cahn & Cahn, *The War on Poverty*, *supra* note 100, at 1346. While being embedded in a community-based organization or holding meetings in the community are effective means of identifying some problems, others only surface while actually representing individuals in their cases. Although López may have disagreed with a legal services approach to social change, his focus on smaller collaborations with grassroots organizations was in part a reaction to how “[c]onventional accounts of fights against subordination typically glom on to high-visibility actors and strategies.” LÓPEZ, *supra* note 156, at 67. López observed that “for every Martin Luther King, Jr., there must be constellations of [other people] collectively responsible not ‘just’ for grunt work but also for the

Policy advocacy also relies on the helping of individuals because this advocacy depends on telling specific narratives about individuals embroiled in the legal system. The explosion of writing about the power and pervasiveness of narratives and their relationship to advocacy and the law demonstrates that individual stories are a driving force behind how we understand each other and how we seek to shape and reshape our world.²¹³ Gerald López characterized advocacy as lawyers and nonlawyers working together to figure out the right audience for hearing “understandable and compelling” stories, regardless of whether the audience is a “landlord, the school board, or the Supreme Court.”²¹⁴

Like policy advocates, proponents of the organizing model of social change rely upon the stories of individuals to facilitate understanding of the connections between people’s struggles and the need for collective action. Moreover, some see a benefit in offering direct services as a draw for people to become members of a collective.²¹⁵

B. Pragmatic Pluralism

Despite decades of thought and scholarship, we still cannot agree on what exactly it means to be an authentic and effective progressive lawyer. Perhaps there is no single answer to this question. There is real danger in propounding visions of the ideal lawyer and demanding pure motives and textbook attorney-client interactions. These are luxuries that those who need the free help of lawyers or who care about global social justice cannot afford. While every office has employees that fall on a spectrum of commitment and competency, many direct service attorneys are simultaneously pragmatic and creative in the ways that they solve problems. These lawyers are painfully aware of the limits of legal solutions. Far from being closed to new ideas, many direct service attorneys seek out and are invigorated by alternative visions of how they might move forward the goal of social change more effectively and authentically. As Sameer Ashar has noted, “most public interest lawyers no longer operate in a single forum or use a single mode of advocacy. These lawyers develop campaigns on parallel tracks, including litigation, policy and legislative advocacy, community and public education, media advocacy, and international

ideas and passion that animated the modern civil rights movement.” *Id.*

²¹³ See, e.g., Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 Legal Comm. & Rhetoric: JALWD 37 (2010), available at www.alwd.org/LC&R/CurrentIssues/2010/Grose_1.html. Robert D. Dinerstein has commented on the “necessity” or “instrumental” use of client narratives. Dinerstein, *supra* note 207, at 985.

²¹⁴ LÓPEZ, *supra* note 156, at 39.

²¹⁵ See, e.g., Newman, *supra* note 155, at 636.

or transnational advocacy.”²¹⁶

Because institutionalization can breed rigidity and routinization, we should focus on creating the conditions under which direct service lawyers can follow institutional norms when they are effective and seek to reform them when they are not.²¹⁷ There are no easy answers to how this can be accomplished on a grand scale. One way that progressive lawyers can gain fresh perspectives about their own organizational norms and methodologies is to work on a case or advocacy project with people from other types of organizations. Participation in a variety of experiences is key to expanding our understanding what tools are in our toolbox and when they should be deployed.²¹⁸

A recent collaboration between two clinics at the University of Miami School of Law and a variety of nonprofit groups, including both legal and non-legal organizations, illustrates how a common advocacy project can spark learning between different types of advocates.²¹⁹ After the January 2010 earthquake that devastated Haiti,

²¹⁶ Ashar, *supra* note 155, at 399. See also Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, Symposium: *Race, Economic Justice, and Community Lawyering in the New Century* 95 CAL. L. REV. 1927, 1932 (2007) (describing “tactical pluralism, in which lawyers helped to advance a coordinated labor campaign using traditional litigation alongside nontraditional skills such as drafting legislation and conducting public relations”); Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 509 (1998-1999) (analyzing empirical research of conventional social justice lawyers, concluding that they are not “myopic litigators”).

²¹⁷ Max Weber warned of the “iron cage” of modern life under capitalism in which bureaucratic, goal-driven organizations define people’s values and control their actions. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 96 (1905) (Richard Swedberg ed. 2009). For a history of the institutionalization of legal services, see Stuart A. Scheingold and Austin Sarat, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 23-50 (Stan. U. Press 2004). See also, *supra* notes 136-38 and accompanying text for a discussion of Gary Bellow and Marc Feldman’s critiques of the institutionalization of legal service offices.

²¹⁸ Of course, collaborations can be time-consuming and can involve a lot of talk without yielding any action or results. Moreover, the purpose of collaborations is not to teach advocates skills but to help individuals and their communities. Short of actual collaborations, we can expand our sense of what is possible and effective by attending conferences, sharing experiences, and reading the rich and growing body of writing by clinical teachers about advocacy strategies that worked well. At the same time, it bears remembering that many organizations cannot afford to send their staff to conferences or other networking events at which these types of cross-organizational working relationships get formed.

²¹⁹ This collaboration included a wide range of organizations, including organizations whose participation ebbed and flowed as needed and as time allowed. The partners in the advocacy before the Inter-American Commission for Human Rights included the two University of Miami Law Clinics, the Center for Constitutional Rights, Alternative Chance, FANM Haitian Women of Miami, Americans for Immigrant Justice, and Loyola University New Orleans College of Law Clinic and Center for Social Justice. Many other groups were involved in the advocacy at various points, including Jacksonville Area Legal Aid, Florida Coastal School of Law’s Immigration Clinic, Catholic Charities Legal Services in Miami, Catholic Charities of the Diocese of Baton Rouge, Immigration Clinic at the University of

immigration authorities suspended deportations for a period but then restarted them, focusing on people who had a criminal record. Immigration authorities rounded people up from their communities and deported to Haiti in the midst of cholera outbreak. Upon arrival in Haiti, Haitian authorities, following a longstanding practice, jailed the deportees in extremely cramped and bare concrete cells smeared with feces, blood, and vomit. Within one week, one man got sick and died.²²⁰

The goal of the advocacy—stopping deportations to Haiti until they were safe—called for advocacy outside the usual parameters of the direct services usually provided by the immigration clinic. The group facing deportation had already received the due process required by our immigration system and had exhausted, or waived, all rights to appeal. Moreover, the group was too large for the clinic to provide individual representation. The lack of the usual legal remedies pushed advocates of different types to join forces and pursue alternate strategies. Individual representation remained but it constituted only a part of the effort. Other strategies included human rights advocacy through the Inter-American Commission on Human Rights and United Nations, Washington DC-focused policy advocacy, fact-finding trips, community outreach and organizing, and multi-media work.

The partnering organizations coordinated via email and conference calls, each bringing to the table ideas informed by their own advocacy experiences. All of the advocates learned from the experience and from each other. Those with human rights and policy advocacy expertise taught the group how to advocate outside the limitations of domestic legal remedies, leading to concrete, positive results for people facing deportation. In turn, those whose work traditionally fo-

Pittsburgh School of Law, Immigrants' Rights Clinic at the UC Hastings College of Law, Yale Law School's Allard K. Lowenstein International Human Rights Law Clinic and Worker and Immigrant Rights Advocacy Clinic, Center for the Advancement of Human Rights at Florida State University College of Law, Asylum and Human Rights Clinic at Boston University School of Law, Massachusetts Law Reform Institute, the PAIR Project, the Immigration Clinic at Louisiana State University Law Center, ACLU (both the national office and the Florida and Pennsylvania affiliates), University of Pennsylvania School of Law's Transnational Legal Clinic, University of Virginia School of Law's International Human Rights Law Clinic, University of Houston Law Center's Immigration Clinic, Immigration Clinic of William S. Boyd School of Law at the University of Nevada, Catholic Charities Legal Services in Miami, and Immigrant Rights Project of the University of Tulsa College of Law. Michael Guare of Pine Tree Legal Assistance also provided valuable assistance.

²²⁰ Jennifer Kay, The Associated Press, *Activists Seek to Stop US from Deporting Haitians After Deportee Dies After Being Sent Back* (Feb. 2, 2011), available at <http://www.1310news.com/news/world/article/178184—activists-seek-to-stop-us-from-deporting-haitians-after-deportee-dies-after-being-sent-back?ref=topic&name=japan-earthquake&title=>.

cused on helping individuals kept the group accountable and attuned to the ways in which advocacy for the larger cause could undercut legal strategies in individual cases. Each type of advocacy informed and strengthened the other.

The Haiti deportations advocacy also demonstrates the benefits of thinking about specific advocacy goals before proceeding to a discussion of advocacy methods. Once the goal of stopping deportations was agreed upon, discussion could turn to how best to accomplish it. Theorizing in the abstract about the best ways of doing social justice lawyering may be less effective because it shifts the discussion to methodology and away from threshold goal setting. Neither the inspirational practice visions of people like Gary Bellow and Gerald López nor the cautions of critical theorists provide a well-defined roadmap for social justice lawyers. Theories about the practice of social justice lawyering, while important, will never replace a discussion of what people interested in working towards social justice are specifically meant to achieve. We must work backwards from concrete goals, choosing methodologies only after the goals are set. There can be no formula for effective social justice lawyering that transcends goals and context.

A more inclusive understanding of progressive lawyering would recognize that there are many theories of how social change occurs. We have neither definitive empirical proof nor consensus that one methodology of social lawyering is more effective than another.²²¹ We lack well-developed accounts of what conditions are necessary for broad-based social change and have even less of an idea of how lawyers can help bring these about. As Gerald López observed, “the evolution of social structures and strategies remains, to an extent, unpredictable.”²²² Progressive lawyers operate in an environment of perpetual uncertainty.

The hierarchy of helping has been built on the bedrock claim that

²²¹ There is a push to perform more empirical studies of the effect of legal assistance on outcomes. See, e.g., D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2188 (2012). For a discussion of this study and the empirical trend, see Jeffrey Selbin, Jeanne Charn, Anthony Alfieri, and Steven Wizner, *Service Delivery, Resource Allocation and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012), <http://yalelawjournal.org/2012/07/30/selbin-cha-arn-alfieri&wizner.html>. See also Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PENN. J. OF LAW & SOC. CHANGE (2009-10) (discussing lack of outcome measures in area of civil legal assistance and proposing an “outcome-based metric” to measure access to justice).

²²² LÓPEZ, *supra* note 156, at 68. See also White, Goldberg, *supra* note 152, at 865 (viewing the law as “an irregular terrain, rich with unlikely sites for poor people to act out moments of resistance”).

social justice lawyers who do *not* focus on helping individuals as individuals are more likely to bring about systematic changes that will lead to social justice. The logic is one of efficiency, namely that it is more effective to focus efforts on changing the system for everyone than it is to ameliorate harm within that system for a small number of individuals.²²³ But it may be a fallacy to attribute positive change to advocacy strategies expressly aimed at making a big impact, as opposed to less ambitious strategies or factors entirely unrelated to advocacy. Social change may be nonlinear, such that small events might give rise to large changes. There may be no such thing as a truly insular individual case, as Gary Bellow argued over fifteen years ago.²²⁴

The critical theory observation about the pervasive workings of power and subordination supports the non-exclusivity of methods. If power and subordination are like the air we breathe—occupying all interstices of public and private life, the locus for social justice must be equally all-encompassing, ranging from the traditional courtroom, to streets and sidewalks, to encounters with opposing counsel, legislators, and the front-desk clerk at an administrative agency. The corollary to the insight that large forces are in play during the smallest of interactions is that there must be correction and push-back at all levels, at all times. For example, a study found that welfare recipients in Appalachia engaged in critical but underappreciated “everyday resistance” practices.²²⁵ If the hierarchy of helping obscures the workings of power in all aspects of life, a rejection of this hierarchy entails an appreciation for all advocacy, small, medium, and large.

C. Goal Setting and Community Accountability

One possible approach to goals is that the community, not lawyers, should set them. As William Simon and others have pointed out, this begs the critical question because progressive lawyers still choose their clients, thus endowing lawyers with the power to anoint community representatives.²²⁶ Since at least the earliest days of the Cahn’s vision of neighborhood offices, the question of community has figured

²²³ See *supra* text accompanying notes 109-11.

²²⁴ One of Bellow’s central insights was that “the practice of law always involves exercising power,” which “always involves systematic consequences, even if the systemic impact is a product of what appear to be unrelated cases pursued individually over time.” Bellow, *Steady Work*, *supra* note 4, at 301. See also *supra* notes 139-41 and accompanying text.

²²⁵ SHDAIMAH, *supra* note 41, (citing JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 109 (2001)).

²²⁶ William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1993-1994) [hereinafter Simon, *The Dark Secret*].

prominently in theories about social justice lawyering.²²⁷ Many proponents of progressive lawyering invoke some version of the community as a source of legitimacy. The hierarchy of helping therefore has correlated to a significant degree with the position that representation of collective interests is more worthy than representation of the goals of individuals. The stark community/individual distinction, however, impedes our understanding of the similarities between representing individuals and representing groups as well as the practical challenges of community or group representation.²²⁸ As evidenced by the discussions in the 1967 Harvard Poverty Law Conference, we have been struggling for a long time with how to truly put lawyers “at the disposal” of communities, as envisioned by Jean and Edgar Cahn.²²⁹

Parallel to the value of community in most higher-valued modes of progressive lawyering is the prioritization of representing politicized and/or activist clients, be they individuals or collectives. Working with clients who share the same cause as the lawyer permits lawyers to resolve the tension between client and lawyer goals. Gary Bellow, for example, characterized his relationships with his clients as one of “alliance.”²³⁰ He also acknowledged, however, that he selected his own clients, presumably because they had the same or similar social justice goals or were willing to have their cases used as vehicles for effecting their lawyers’ goals.²³¹ Law and organizing visions expressly depend on working only with people who are, or who are open to becoming, politicized and active in organizing campaigns.

At an institutional level, the social theory of organizations holds that “staff use [their] power to select and deal with clients who will serve their interests.”²³² But the observation that lawyers working for social justice choose their clients does not answer the question of whether they *should* only choose clients who are perceived as willing to become activists or agents of change. There is no doubt that all progressive lawyers would greatly enjoy standing in ideological alliance with their clients and communities. In the absence of the type of broad social movements we experienced in the 1960s, however, we

²²⁷ See *supra* text accompanying notes 100-06. See also William H. Simon, *Symposium: Race, Economic Justice, and Community Lawyering in the New Century* 95 CAL. L. REV. 1821, 1821 (2007) (observing that “[p]rogressive lawyers have long been preoccupied with accountability to their disadvantaged clients”).

²²⁸ For a discussion of the challenges of representing groups, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103 (1992); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1981-1982).

²²⁹ Cahn & Cahn, *The War on Poverty*, *supra* note 100, at 1334.

²³⁰ Bellow, *Steady Work*, *supra* note 4, at 302-03.

²³¹ *Id.*

²³² Handler, *Dialogic Community*, *supra* note 151, at 1055.

may find that only the very selective hand-picking of clients will produce this result. Entire groups of clients—rightly or wrongly characterized as dependent—stand to be excluded under this approach, including children and people who are elderly, sick, or disabled. Moreover, outsiders to politically active communities, including prisoners, civil detainees, and the mentally ill, are often the most at-risk for mistreatment. The many barriers to collective mobilization, including poverty, lack of transportation, childcare responsibilities, low literacy rates, and poor education conspire to place significant limits on who might qualify for an offer to stand in “alliance” with lawyers.

The unity of client interests and larger goals social justice may be overstated. Clinical law teachers have commented on student disappointment when their “own sense of the justice at stake . . . is not matched by the client[].”²³³ We must guard against the tendency to “sentimentalize poor clients and especially poor communities.”²³⁴ Writing about the theoretics of practice tradition, for example, Robert Dinerstein has warned that the “movement must [] avoid its own form of essentialism in which poor clients are seen as all-powerful individuals awaiting only their lawyers’ assistance to unleash their potency.”²³⁵

Looking for alliance and liberation in the micro-context of lawyer-client interactions also has its limitations.²³⁶ While this view permits progressive lawyers to claim that they are working towards social justice for all by striving to engage in authentic relationships with individual clients, this characterization runs against common sense. It might be more accurate to simply acknowledge the intrinsic value of these individual helping relationships.

Alliance and accountability have become touchstones of legitimacy for progressive lawyers. Direct service lawyers, in focusing on individuals (sometimes unpopular ones) in desperate need, can fail to be accountable to the community and to build power among organized collectives of poor people. Yet there is great malleability in what counts as satisfying these ideals. As with the Haiti deportations advocacy, described above, it is often not clear what counts as community justice. Protecting members of Haitian communities in the United

²³³ Brodie, *supra* note 141, at 377.

²³⁴ Simon, *The Dark Secret*, *supra* note 226, at 1144 (internal quotations omitted).

²³⁵ Dinerstein, *supra* note 207, at 985.

²³⁶ For a critique of focusing on an analysis of the attorney-client relationship to the exclusion of bigger problems, see Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. Miami L. Rev. 1063 (1993-1994). See also William Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) (arguing against lawyering visions that focus on a sense of well-being rather than societal change).

States from the harms of deportation and family separation carries out the will of the community.²³⁷ Yet federal immigration authorities have argued that keeping individuals with criminal records within our communities disserves them because of a fear of recidivism.²³⁸

Today's advocates "recognize that they can rarely commit themselves to communities without taking sides in intra-community conflicts."²³⁹ There may be no sweeping theory of community alliance and accountability, only multiple, partial ones. As pointed out by direct service lawyers at the 1967 Harvard Conference on Poverty, we should be cautious of claims to speak for the community.²⁴⁰ Lawyers who represent individuals tend to complicate our assumptions about community justice and expand our notions of accountability.

D. Professionalism

The hierarchy of helping creates a false dichotomy between professional "access to justice" work on behalf of individuals and higher-valued political work such as cause lawyering, organizing, and representing collectives. As discussed above, helping individuals has been equated with the amorphous notion of the status quo or the Establishment—something that progressives are uniformly against.²⁴¹ But this portrayal is overly simplistic. Many, if not most, direct service attorneys view themselves as political and working towards fundamental change.²⁴² For many, the ideology of helping individuals is grounded in a political view about the worth and dignity of each individual, a

²³⁷ The coalition opposing the deportations included community-based organizations such as FAMN Haitian Women of Miami.

²³⁸ See Press Release, U.S. Immigration and Customs Enforcement, Policy for resumed removals to Haiti (April 1, 2012), <http://www.ice.gov/news/releases/1104/110401washingtondc2.htm> (stating that the presence of Haitian nationals with "significant criminal records" in "U.S. communities . . . poses a significant threat to the American public").

²³⁹ William H. Simon, *Symposium: Race, Economic Justice, and Community Lawyering in the New Century* 95 CAL. L. REV. 1821, 1821 (2007). See also *id.* at 1825 (arguing that "a distinctive feature of accountability in collective representation, especially of disadvantaged people, is that the lawyer who wants to be accountable has to create, or help create, a client capable of holding her accountable").

²⁴⁰ See, e.g., Brian Olmstead, Attorney, Neighborhood Legal Servs. Project, D.C., Address at the Harvard Conference on Law and Poverty (March 18, 1967) in PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY MARCH 17, 18, AND 19, 1967, at 43 (Daniel H. Lowenstein ed., 1967) (cautioning that there is "too much of a tendency to use this term [community] as a slogan, as though it can give us an immediate solution to the problem of poverty").

²⁴¹ See *supra* note 88 and accompanying text.

²⁴² See SHDMAIH, *supra* note 41, at 12 (noting that "[e]ven in discussing the more mundane cases, without exception clients and lawyers articulated some alternate vision of social justice and decried the workings of a system they viewed as unjust" and that "the social change work [of legal services attorneys] often falls below the 'radar' of progressive lawyering theories").

commitment to fighting the system with one foot in it, and the value of alleviating immediate suffering.²⁴³ Moreover, the view that direct service work is politically neutral also ignores the reality that organizations must adopt the rhetoric of political neutrality in order to gain legitimacy, power, and resources. Use of access to justice rhetoric may mean that these organizations are strategic, not that they are co-opted and politically neutral.²⁴⁴

The hierarchy of helping reflects the ambivalence of many progressive scholars and lawyers about the professional role of lawyers, viewed as a set of constraints. Jerold Auerbach, for example, wrote in his 1976 historical account of legal services that, in the 1960s, the “OEO could not escape the tentacles of professional constraint.”²⁴⁵ The professionalization of lawyers in the United States has been associated with a turn away from social justice and towards politically neutral “expertise and effectiveness.”²⁴⁶

The progressive attack on professionalism breaks down into at least two distinct criticisms. One is more accurately described as ambivalence about having a client to whom a duty of zealous advocacy is owed. Acting in accordance with the express goals of a client is problematic in this view because it limits lawyers from pursuing their own goals and ideals or the goals and ideals of whomever the lawyer recognizes as speaking for the community.²⁴⁷

The 1967 Harvard Conference on Poverty illustrates how quickly some progressive thinkers begin to rely on claims of false conscious-

²⁴³ See *id.* at 12 (finding that the attorneys “ma[de] strategic choices arising from their hard-won understanding of the possible, which [was] different from their own (and others’) utopian visions”).

²⁴⁴ See *id.* (for both clients and direct service lawyers, “working within the system is a necessity and should not be confused with an acceptance of the legal system and/or the government” and “lawyers and clients see themselves and their struggles as resisting and oppositional, despite the fact that they take pace in conventional legal forums using the ‘master’s tools’ (often with considerable relish!)”).

²⁴⁵ AUERBACH, *supra* note 69, at 274.

²⁴⁶ Philip Gaines, *The “True Lawyer” in America: Discursive Construction of the Legal Profession in the Nineteenth Century*, 45 AM. J. LEGAL HIST. 132, 132 (2001) (quoting KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 211-12 (1989)).

²⁴⁷ See, e.g., Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311 (1996) (arguing that clients may not know best because of false consciousness); Kevin Johnson, *Lawyering For Social Change: What’s A Lawyer To Do?*, 5 MICH. J. RACE & L. 201, 206 (1999-2000) (arguing that an “attorney’s professional responsibilities to clients, specifically to zealously represent one’s clients within the bounds of the law, limit his or her power to proceed independently on a path seeking true social transformation”). But see Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 178 (1990) (discussing how overriding express client interests will “open the door to a dreary range of client abuse”); Nancy D. Polikoff, *Am I My Client: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996) (discussing the potential for conflict between lawyering for a client and activism).

ness to justify their positions. As discussed above, Edgar Cahn assumed that the true desire of communities was for long-term law reform as opposed to short-term individual services.²⁴⁸ This thinking was carried forward in the actual practice of the OEO program, which focused on law reform even though many community groups wanted individual services. As discussed above, Anthony Alfieri and other contemporary theorists inspired by critical theory have continued the tradition of permitting lawyers to question, even ignore, their clients' express goals so that their so-called true goals (or the community's goals) can be attained. The ethical debates about express-versus-actual client goals and individual-versus-community justice are worth having.²⁴⁹ The pejorative rhetoric about lawyers who seek to represent the express goals of their clients, however, thwarts our ability to have these debates on the merits.

The second critique of professionalism is that it narrows the lawyer's field of vision and leads to lawyer domination.²⁵⁰ Problems are viewed as either inside or outside the professional's area of expertise. Clients are not viewed holistically and problems are not viewed systematically. The lens of professionalism can be used to impute goals to the client, usually self-interested ones.

These claims ignore the potential for myopia and domination whenever lawyers interact with others. Lawyer domination is not unique to those who provide direct services or engage in impact litigation.²⁵¹ It could be that direct service attorneys are the least likely to substitute their own goals for those of their clients because their representation is focused on helping individuals meet their express goals, as opposed to a community or lawyer-identified cause.²⁵²

²⁴⁸ See *supra* notes 113-15 and accompanying text.

²⁴⁹ Identification of clients' express goals is always easy or possible. See William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 470-71 (1984) (discussing the critical legal theory view that stable, express client interests are a fiction and that client interests are "indeterminate") (internal citations omitted).

²⁵⁰ For a long list of progressive scholars who have argued that direct service attorneys dominate their clients, see Cummings & Eagly, *Law and Organizing*, *supra* note 178, at 457 n.50. But see William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1451 (1991-1992) (arguing that lawyer-client relationships are more nuanced than the "predominant image of the law-client relationship [as] one of professional dominance and lay passivity"); Handler, *Dialogic Community*, *supra* note 151 (arguing that even terminally ill patients can be involved in authentic, Habermasian dialogic community with their lawyers).

²⁵¹ See generally Lobel, *supra* note 153 (arguing that "extralegal activism" has "suffered from the same drawbacks" of traditional advocacy).

²⁵² See *supra* text accompanying note 52.

E. Movement Building

The idea that there is a best way of social justice lawyering assumes that the individual lawyer is the relevant unit of analysis. This fallacy of the ideal progressive lawyer leads us to overlook the ways in which collaborative groups of people with different specialties, talents, and temperaments can and do work together to achieve shared and specific social justice goals. Social justice lawyers come in many stripes, bringing different talents and competencies to the table. Like all groups of people, they display multiple intelligences. Appellate attorneys may not be gifted organizer-lawyers and vice versa. Moreover, lawyers and their non-lawyer collaborators use many and varied tools to achieve results. These include but are not limited to: litigating in courts and other tribunals, organizing or working with organizers on a common campaign, press work, research studies, report writing, lobbying and policy work, education campaigns, protests and other direct action, pro se clinics, and messaging through social media. Given this multiplicity, it might be more effective and realistic to ensure that multiple competencies be available within each office or collection of offices, rather than within each individual attorney.

We should consider the ways in which collaborations of different groups following different advocacy models, or a mix of more than one, can effectively come together in common cause. The Haiti deportations advocacy, discussed above, provides one such example. Such meta-strategies can take advantage of the talents offered by each organization. The methodology of cross-organizational collaboration, about which some have written, may deserve more discussion.²⁵³

Shedding hierarchical discourse about modes of progressive lawyering will also help us avoid the danger of a self-fulfilling prophecy in which direct service attorneys increasingly exhibit the qualities of the negative stereotype.²⁵⁴ Negative rhetoric can lead to internalization

²⁵³ See, e.g., Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLIN. L. REV. 451, 482 (2009).

²⁵⁴ According to theories about self-fulfilling prophecies, humans act according to the expectations that others have for them. See generally Mark Snyder and Arthur A. Stukas, Jr., *Interpersonal Processes: The Interplay of Cognitive, Motivational, and Behavioral Activities in Social Interaction*, 50 ANN. REV. PSYCHOL. 273 (1999). See also KATZ, *supra* note 58, at 19 (discussing how the early legal aid lawyers “confront[ed] an everyday environment that treats their work as routine by assuming, suggesting, and at times demanding that it ought to be regarded as insignificant”); Anne M. Corbin, *Policy Report on Public Defender Reputation Among Peers and Clients*, 44:6 CRIM. LAW BULL. 913 (2008) (negative rhetoric about public defenders leads to poor performance); Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011) (discussing the internalization of low expectations among African-American youth).

of secondary status, diminished internal and external expectations, and poor performance. In his 1995 critique of legal services offices, Mark Feldman stated that “many Legal Services lawyers feel demeaned by the supposed second-class nature of their cases.”²⁵⁵

To build a movement for social justice, direct service work must not be seen as only entry-level, an early rung on the ladder to law reform work, organizing, or academia. As noted by Gary Bellow, this practice has institutional consequences because the most experienced attorneys in legal services are typically not working on individual cases.²⁵⁶ As a result, the hierarchy of helping reproduces itself by normalizing a system whereby people seek higher professional prestige in lawyering activities considered system-changing.

The hierarchical discourse also has financial implications for the movement for social justice. We are witnessing the phenomenon of packaging all kinds of advocacy using narratives of systematic change in order to meet the expectations of foundations and other funders.²⁵⁷ Organizations characterize their work to show that it involves more than just individual services. Buzz words like “transformative,”²⁵⁸ “innovative,”²⁵⁹ and “visionary”²⁶⁰ are prevalent in foundations’ descriptions of their missions and in organizations’ descriptions of themselves. Despite the criticisms of the impact/direct distinction, it is still very much alive today and creates an incentive for groups to characterize their advocacy methodologies as “impact.”²⁶¹

A related phenomenon is the tendency to value specialty projects that focus on a narrowly defined population or issue over projects that have a more general mission to help people in need. Organizations or projects with a singular focus are more likely to be viewed as innova-

²⁵⁵ Feldman, *supra* note 138, at 1594.

²⁵⁶ See *supra* text accompanying note 140-41.

²⁵⁷ See Jessica Bearman, *Project Streamline, Drowning in Paper, Distracted from Purpose: Challenges and Opportunities in Grant Application and Reporting* 16, 25 (noting that organizations must strive to meet various funders’ “detailed theories of [how to bring about] change” and finding that the “most commonly cited effect of the foundation funding system is that nonprofits continually reinvent their programs—at least on paper—in response to foundations’ preference for the ‘new and different,’ and reluctance to pay core operating support”).

²⁵⁸ Tides Foundation description of its philanthropy, available at <http://www.tides.org/impact/predictive-philanthropy/>.

²⁵⁹ Annie E. Casey Foundation description of mission, available at <http://www.aecf.org/AboutUs/GrantInformation.aspx>.

²⁶⁰ Ford Foundation statement of purpose, available at www.fordfoundation.org (“working with visionaries on the frontlines of social change worldwide”).

²⁶¹ See, e.g., Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1126 (1996) (stating that “lawyers who provide counseling and transactional services to community organizations and small businesses are performing a type of ‘impact’ work”).

tive and effective, to attract funders, and to garner public attention. The untold story, however, is that specialty projects, to stay on mission, must turn away anyone whose case does not fall within the acceptance criteria. These rejected clients often end up being served by direct service organizations that serve as offices of last resort.

To qualify for foundation money, organizations must meet top down categories from potential funders rather than respond to more local needs identified by the organization and its constituents.²⁶² Because of the scarcity of unrestricted funding, these organizations often suffer from the problem of patchwork funding from multiple funders whose expectations might conflict.²⁶³ To cover operating costs, non-profit organizations feel pressure to overcommit in their deliverables to multiple funders, which in turn creates the conditions for decreased staff performance and morale. A reduction of rigid priorities imposed by funders would increase no-strings-attached financial support, giving those closest to the problems needing solution more control over advocacy strategies and improving working conditions for nonprofit staff.

CONCLUSION

I have told a story about how, starting in the 1960s, leading theorists about progressive lawyering have negatively portrayed direct service lawyers. My analysis is meant to provoke. I point out a negative narrative about direct service lawyers and I then tell a countervailing positive one. I do not claim ultimate truth or to idealize direct service lawyering. I aim only to call into question the pejorative portrayal of direct service lawyering. This article, in short, is meant as a corrective and an invitation to build a more constructive dialogue and collaboration among progressives.

Ideologies of social justice lawyering have changed over time, often reflecting their historical times as well as the collective understanding of what was achievable given the constraints of political economy, social reality, and institutional forces. There has never been, and there probably never will be, a definitive theory of how lawyers can most effectively contribute to bringing about social justice. The idea that there is one best way to be a social justice lawyer that transcends time and circumstances stands in considerable tension with the critical theory that teaches that context matters. Arguing

²⁶² A notable exception is bar foundation funding, which is generally untethered to any particular deliverable or methodology. Few organizations, however, can rely solely on bar foundation support.

²⁶³ Bearman, *supra* note 257, at 4 (concluding that grantmakers “often fail to consider the cumulative impact that thousands of separate requirements have on grantseekers”).

about the best way of progressive lawyering sets up an us-versus-them dynamic that impedes discussion of similarity, dependency, and opportunities for collaboration. Such “right-wrong dualist thinking” is an incomplete, first level understanding of a problem.²⁶⁴

It may be true that the time of “clear and visible” “evil” that is “easy to organize around” is behind us.²⁶⁵ Members of today’s social justice movements must struggle in an environment in which no one can agree about anything except that there is no agreement. This absence of consensus has led to a focus on methodology and to an inward-looking examination of the relationship between social justice lawyers and their clients. We cannot allow ourselves to be paralyzed by the indeterminacy of answers to the question of how we should spend our time. We must continue to struggle with this ultimate question, broadening our understanding of what tools we have to induce social change and keeping our hearts and minds open to different ideas about how we might move forward together. At the same time, we must remain humble about the correctness of whichever path we have chosen for ourselves.

²⁶⁴ See Jane H. Aiken, *Provocateurs for Justice*, 7 CLIN. L. REV. 287, 290-91 (2000-2001) (discussing the levels of understanding of social justice issues in law school clinics).

²⁶⁵ Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2035 (2007-2008).

