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APPRECIATING COLLABORATIVE LAWYERING

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INTRODUCTION: WHAT'S A LAWYER TO DO?

In April 1988, I returned to East Palo Alto, California, to join its Community Law Project as a staff attorney. After two and a half years as a housing and employment law litigator at a legal services office in Fresno, I was glad to return to the San Francisco Bay Area. I was particularly eager to work in East Palo Alto because of its history, demographics, and a political climate that was refreshingly out of step with most of the rest of the nation in the eighth year of the Reagan Administration.

Thirty miles south of San Francisco, five miles from the Stanford University campus, East Palo Alto lies across a small creek from the suburban mansions of Palo Alto. In 1988, the five-year-old city was home to approximately twenty-three thousand predominantly working-class and lower-income residents of color.

The day after I started work in East Palo Alto, voters in the city’s

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1 The East Palo Alto Community Law Project was founded by Stanford Law School students working closely with community leaders active in the effort to incorporate East Palo Alto as a city. The independent non-profit corporation was run by a board of directors composed of students and recent alumni, community members, and law school faculty. The Project had three full-time attorneys handling housing, income maintenance, and education law matters and employed the only attorneys in East Palo Alto. By 1988, Stanford had begun funding a portion of the Project’s budget and made the Project its primary clinical out-placement. Three years earlier, in 1985, I had represented my first client as part of the first class of law students to work at the newly opened Project.

2 See infra text accompanying notes 306-20 and 333.

3 According to the census, East Palo Alto’s population in 1990 was 23,451. The census classified 43% of residents as “Black,” 36% as “Hispanic,” and 6% as “Pacific Islander.” CALIFORNIA CITIES, TOWNS, & COUNTIES: BASIC DATA PROFILES FOR ALL MUNICIPALITIES & COUNTIES 1997 at 121 (Edith Horner ed., 1997). In 1989, East Palo Alto’s per capita income of $9,968 was less than half (44%) of San Mateo County’s per capita income and one-third that of the neighboring cities of Palo Alto and Menlo Park. Id. at 121, 252, 300, 517.
third general election decisively shifted the composition of the City Council. Reacting to a municipal fiscal crisis, the electorate ousted two of three incumbents running for re-election. The defeated incumbents were original proponents of East Palo Alto's incorporation as a city and longtime supporters of rent control. The election created, for the first time in the city's brief history, a city council without a solid majority in favor of rent control.

Two months later, on a Friday afternoon in June, my phone rang repeatedly. The staff director of the city's Rent Stabilization Program and several tenant activists with whom our office had previously worked called to report that the new Council had vacated all but one of the seven seats on the Rent Board and selected five new Board members. My callers were angry. One was incensed that the Council had removed Board members before the expiration of their two-year terms. Another was enraged that no one had heard of the two tenants appointed to the Board, that the new homeowner appointee had been a leading opponent of incorporation as a city, and that four of the five new appointees were white — in a city where 85 percent of residents were people of color.

Everyone with whom I spoke was livid that the Council had appointed the two most visible and vehement opponents of rent control to the two landlord seats on the Rent Board. One appointed landlord, Tony Horwath, had more than $10,000 of penalties outstanding for what the Rent Program had deemed his and his brother's failure to comply with the rent control law at their three apartment complexes. Rent Program staff were investigating him for allegedly fraudulent misreporting of previous rent levels. And he was the lead plaintiff in a lawsuit seeking to invalidate East Palo Alto's rent ordinance. The other landlord appointee, Robert Saunders, was also a party to this lawsuit. He claimed to have moved from his Palo Alto mansion to an apartment in one of the complexes he and his wife owned in East Palo Alto. (Residence in East Palo Alto was a prerequisite to Board membership.) He also headed the Palo Alto Park Association ("PAPA"), an association of 100 landlords who owned some 3,000 rental units in East Palo Alto. Some tenant activists suspected PAPA members of

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5 For a more detailed political history of East Palo Alto see infra text accompanying notes 306-20.
6 My recollection of these events is enhanced by 21 pages of memoranda to the file which I updated daily from June 17, 1988, through July 19, 1988. (On file with author.)
7 See infra note 315.
having funded litigation, taken all the way to the United States Supreme Court, to invalidate the results of the city’s 1983 incorporation election. Just months before Saunders' appointment to the Board, PAPA had publicly offered to pay the cash-strapped city two million dollars in return for elimination of rent controls.

We shortly would learn that the other new appointees to the Rent Board were similarly problematic guardians of rent control. The new Board tried to hit the ground running. It immediately announced plans to slash registration fees (and thus the Rent Program’s staff) in half, to replace all of the old Board’s administrative regulations, to eliminate the use of professional hearing examiners and instead to sit in original jurisdiction to hear all petitions filed under the ordinance.

My callers were convinced the new City Council’s actions were illegal. Several of them stated it was obvious we had to sue to invalidate the Council’s illegal appointments. They wanted the Community Law Project to do something about it. I was not too shell-shocked to realize that they meant I should do something.

* * *

"What do I do now?" is a question we ask ourselves dozens, if not hundreds, of times a day. Sometimes, as it did for me on that Friday in June 1988, the question reflects our bewilderment or uncertainty. Other times, it merely entails a search for a sequence in which to undertake easily identifiable tasks. And perhaps most often, the question is a barely perceptible murmur in our heads that precedes our formulation or pursuit of a course of action.

Regardless of how difficult or easy we find the question of what

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9 See infra notes 316 and 332.
11 See Janet Wells, East Palo Alto Rent Control Deal Offered, San Jose Mercury News [Peninsula Edition], Sept. 23, 1987, at B1. This offer was 40% lower than PAPA had offered in 1986. See Wykes, supra note 8.
13 The frequency with which we ask this question, and are able to answer it for ourselves, is one indicator of the degree of autonomy we have in our work and social lives.
to do, we answer it by consulting some standard of conduct — be it a previously defined pattern or a freshly created or refined one.\textsuperscript{14} Whether we call the yardstick a role conception,\textsuperscript{15} metaphor,\textsuperscript{16} mental model, schema, script,\textsuperscript{17} or, as I prefer, a theory of practice,\textsuperscript{18} we act, or at least try to, in accord with some standard or process.

As lawyers, every day that we practice, we consult — sometimes consciously, often unconsciously — our own answers to certain foun-


\textsuperscript{15} The notion of role conception is the central focus of Gary Bellon & Bea Moulton,\textit{ The Lawyering Process: Materials for Clinical Instruction in Advocacy} (1978).\textit{ See infra} note 40.


\textsuperscript{17} For an introduction to these terms from the field of cognitive science, see Blasi, supra note 14; Albert Moore,\textit{ Trial By Schema: Cognitive Filters in the Courtroom}, 37 UCLA L. REV. 273 (1989).

\textsuperscript{18} Perhaps the most widely quoted definition of theory in the clinical legal context is Professor Mark Spiegel's: "By 'theory' we commonly mean a set of general propositions used as an explanation. Theory has to be sufficiently abstract to be relevant to more than just particularized situations." Mark Spiegel,\textit{ Theory and Practice in Legal Education: An Essay on Clinical Education}, 34 UCLA L. REV. 577, 580 (1987). Requiring theory to be explanatory is too limited for my purposes. As Spiegel acknowledges, the focus on explanation is tied to classical Greek philosophy's valuing contemplation more highly than action.\textit{ Id.} at 596. For my purposes, Spiegel's definition is only helpful if "explanation" is construed broadly to include explanations of what to do, in addition to explanations that instruct us why things are as we observe them.

Professor Stanley Fish has defined theory as:

an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice. A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term correctly understood as meaning independently of his preconceptions, biases, or personal preferences.

Stanley Fish,\textit{ Dennis Martinez and the Use of Theory}, 96 YALE L.J. 1773, 1779 (1987). Fish was, of course, attempting to minimize the importance of theory, indeed to argue that theory has no consequences, that it does not guide or shape practice. Nonetheless, this conception of theory as an abstract mental formulation that one consults in order to perform correctly (or to assess whether one is performing correctly) is precisely what I mean by a theory of practice. Unlike Fish, I do not qualify "correctly" as independent of one's "preconceptions, biases, or personal preferences," for I believe our preconceptions are in fact theories to which we ascribe. Nor do I believe theory needs to be "outside of any particular conception of practice." As I use the term, a theory of practice is an abstract formulation of our particular conception of practice.
dational questions in order to decide how to act in specific situations. Our standard or theory of good lawyering — by which I mean both effective and responsible lawyering — requires a vision\textsuperscript{19} of our ultimate goals and central activities. That vision tells us what we are trying to accomplish and how we are most likely to do so. It guides us in determining with whom we should work, in what settings we should act, and how we should decide these issues.\textsuperscript{20}

In the U.S. legal academy, the faculty engaged in the study of lawyering generally are clinicians.\textsuperscript{21} Focused on what lawyers do and how we do it, our aim is not simply to describe practice but to improve it.\textsuperscript{22} We seek to transform an inchoate sense of what constitutes good lawyering into a more coherent vision and to refine and share that vision with students, practitioners, and clients. Because lawyers' goals and understanding of our roles determine what we do, how we do it, and what we decline to do, our theories of lawyering directly shape our lawyering practice.

In the past decade, lawyering theorists in the U.S. have grappled with these issues of the range of activities and characteristics of good lawyering in creating and critiquing a vision of how lawyers can best

\textsuperscript{19} Consistent with the etymology of the word “theory,” I will use “vision,” “conception,” and “theory” interchangeably. For an analysis of the cultural significance of such a visual metaphor, see Bernard J. Hibbitts, \textit{Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse}, 16 Cardozo L. Rev. 229 (1994).

\textsuperscript{20} Some might label the answers to these foundational questions as “values” or a “value system” rather than a theory of lawyering. \textit{See, e.g.}, Roy Stuckey, \textit{Understanding Casablanca: A Values-Based Approach to Legal Negotiations}, 5 Clin. L. Rev. 211, 216-22 (1998) (defining values as “the bases from which preferences arise and on which all decisions are made”).

\textsuperscript{21} The dominant understanding of clinical legal education in the United States focuses on teaching students the methodology of reflection upon practice. For two classic expositions of this view, see Gary Bellow, \textit{On Teaching the Teachers: Some Preliminary Reflections on Clinical Education As Methodology, in Clinical Education for the Law Student: Legal Education in a Service Setting} 374 (Council on Legal Education for Professional Responsibility, Working Papers prepared for CLEPR National Conference, 1973) (core of clinical education is focused interrogation of students' performance of lawyering roles, which fosters introspection and facilitates understanding of lawyering and the legal order); Anthony G. Amsterdam, \textit{Clinical Legal Education — A 21st-Century Perspective}, 34 J. Legal Educ. 612, 616 (1984) (essence of clinical education is “to teach students how to learn systematically from experience”). As major theorists of professional development have stressed, the most effective professionals distinguish themselves from their peers through an ability to reflect on one's own actions and to transform raw conduct into meaningful experience. \textit{See, e.g.}, Donald A. Schon, \textit{The Reflective Practitioner: How Professionals Think in Action} 21-69, 128-67, 287-354 (1983). At least as I understand and practice it, a central purpose of this reflection is to help develop, refine, and articulate the contours of each of our personal theories of lawyering.

\textsuperscript{22} The legal clinician's role is similar to the mission for artists commonly attributed to Bertoldt Brecht: “Art is not a mirror to reflect the world, but a hammer with which to shape it.” Apparently the actual source of this quote was Soviet poet and painter Vladimir Mayakovsky. \textit{The MacMillan Dictionary of Quotations} 32 (1989).
represent lower-income\textsuperscript{23} clients. The late 1980's and early 1990's saw the emergence of an extensive literature stressing the importance of a more egalitarian collaboration between attorneys and lower-income clients.\textsuperscript{24} The three leading contributors to this literature were Professors Gerald López,\textsuperscript{25} Lucie White,\textsuperscript{26} and Anthony Alfieri.\textsuperscript{27} In the

\textsuperscript{23} I use the term “lower-income” rather than “poor” because I prefer to avoid the latter term’s connotations of pitifulness and because some of the authors of this new scholarship do not limit their focus to representing those with the very lowest incomes. Although “subordinated” is perhaps the most accurate, all-encompassing adjective to describe the clients about whom the new literature is concerned, I will not use the term because it strikes me as only having attained currency in the academic discourse — and thus likely would distract and possibly alienate non-academic readers. By “lower-income,” I mean not only those we in the United States label “the welfare poor,” but also “the working poor” and blue- and pink-collar workers.

\textsuperscript{24} See works cited in notes 25-27 and 55 infra.


mid-1990's, several critics challenged this new literature and its emphasis on active client participation in advocacy efforts.\textsuperscript{28} Unfortunately, rather than deepening the discussion, the critiques have been largely unexamined and unchallenged.\textsuperscript{29}

This article synthesizes and analyzes the debate over collaborative lawyering, which, I will argue, has been prematurely truncated. The article urges and engages in a closer reading of the works of proponents and opponents alike. Such a reading reveals significant differences in the ideas of leading theorists of collaboration. The article recounts and analyzes a successful implementation of collaborative approaches, using the scenario described above to examine the critiques and to highlight dynamics overlooked by both critics and proponents.

Part I(A) briefly sketches some of the theoretical antecedents and fundamental principles of the extensive literature on collaborative lawyering that emerged in the U.S. in the late 1980's to urge a radical reorientation of the work of lawyers and their lower-income clients. It discusses how collaborative lawyering is informed by, but goes beyond, the client-centered\textsuperscript{30} model of representation. Growing out of their critique of their own work with lower-income clients, their understanding of the dynamics of power and persuasion, and their political orientations, contributors to this collaborative literature exhort lawyers to involve clients directly in individual and collective efforts to speak out and act against their own oppression.

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\textsuperscript{28} See works cited in notes 32-34 infra.


\textsuperscript{30} See text accompanying notes 42-44 infra.
As Part I(B) elaborates, fellow progressives in the U.S. have criticized this literature on collaborative lawyering as too narrowly focused and thus unhelpful to efforts at collective social change. Professors Joel Handler, William Simon, and Gary Blasi have questioned the fundamental concerns, directions, and significance of the new scholarship. In essence, these critics pose a legitimate challenge to the new scholarship: to show that its visions are helpful to addressing real, pressing issues. The critics demand that the collaborative literature establish that its proposals to change lawyer-client interactions will have an impact on the material circumstances in which clients live, not just on clients' (and their lawyers') psyches.

Less fairly, the emerging criticism of collaborative lawyering has treated the new scholarship as monolithic, rarely making distinctions between the ideas of independent thinkers. The importance and diversity of the literature warrants individualized scrutiny. Part II, therefore, discusses the work of each of the three major theorists of collaborative lawyering and assesses the applicability of the criticisms.

31 I use the term "progressive" expansively to include those who view themselves as liberal or left of liberal on the U.S. political spectrum.


35 Others have criticized particular collaborative theorists. See, e.g., Cathy Lesser Mansfield, Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement, 61 Brook. L. Rev. 889 (1995) (criticizing Alfieri's assumption that clients are more interested in telling their stories than in obtaining desired legal outcomes and arguing that decision-makers will not provide desired outcomes unless lawyers alter clients' stories); Peter H. Schuck, Public Law Litigation and Social Reform, 102 Yale L.J. 1763 (1993) (criticizing López's failure to explicate a positive vision of the social change rebellious lawyers seek to effect); Ann Southworth, Taking the Lawyer Out of Progressive Lawyering, 46 Stan. L. Rev. 213 (1994) (arguing that López undervalues pro bono lawyers' provision of technical legal expertise to community organizations). For works that voice support for the goals of collaborative lawyering theorists but express concerns about the difficulty of implementing these ideas, see Marasco, supra note 29, and Paul N. Tremblay, Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 Hastings L.J. 947 (1992).

36 This formulation of a binary opposition between tangible, material rewards and intangible, emotional ones not only privileges (i.e., more highly values) the first type over the second, but largely dismisses the significance of the latter sorts of effects. Taken to extremes, privileging "real, material outcomes" over "fuzzy, intangible process" replicates exactly the sort of lawyer-centered lawyering that the client-centered approach, described infra notes 42-44, seeks to eradicate.

37 Thus, for example, after their initial citations defining the body of literature they seek to critique, neither Simon nor Blasi ever directly refers critically to any of López's work. Implicitly, they appear to believe that by criticizing his "fellow travelers" they have discredited López's work too.
to each scholar. It concludes that the most significant criticisms of the literature are far more applicable to the work of Professor Alfieri than to the work of Professors White and López. Treating the ideas of collaborative theorists as fungible obscures the critiques' inapplicability to the bulk of White's and López's work.

To the extent that practitioners, students, and legal academics rely on the critiques' characterization of the literature, there is a real danger that its most vital insights and practical applications will be ignored, misunderstood, or dismissed. One of my purposes is therefore to re-examine the literature and re-assess the validity of some readers' rather hasty characterization of it as obsessive and ineffectual. Having witnessed the effectiveness of the implementation of these ideas, I view their premature dismissal as more than just an isolated error of academic theory, but rather as an error whose practical effect will weaken efforts by lawyers and other activists.

The critiques do, however, highlight the need to make more explicit two previously unelaborated points about collaborative lawyering: how contextualized problem-solving, properly understood, and attention to managing the transformation of disputes can enhance the effectiveness of collaborative approaches to institutional and systemic issues. My goal is, therefore, to address the challenge posed by the critics and to focus attention on additional aspects of collaborative lawyering. I do so through an examination of the lawyering problem sketched in this introduction. As Parts III(A) and III(B) elaborate, the problem provides a vivid example of an issue the current literature has not fully addressed: the ways in which the law and lawyers can dramatically transform the nature of disputes, narrowing their scope and substituting very different norms by which to resolve them. Awareness of this process reminds us to monitor, indeed actively to manage, the transformations different strategies effect in clients' disputes, if we are to avoid depoliticizing them. To manage these transformations effectively, we must thoroughly investigate the contexts, including the web of institutional and structural networks of power relations, in which disputes are situated.

Part III(C) describes how my attention to potential transformations I sought to prevent, to the local context of power relations, and to a vision of good lawyering, led me to suggest an approach in which my clients and I actively collaborated, one in which we all played sig-

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38 See supra text accompanying notes 1-12. Because the literature's analysis of lawyering strikes some readers as excessively harsh — even self-flagellatory — deconstruction, I have deliberately selected an example I view as relatively successful and consistent with my vision of collaborative lawyering. My aim is to persuade, or at least invite further inquiry, by presenting a positive example of actual implementation of collaborative ideas.
significant roles in implementing remedial strategies. Part III(D) explores how this theory of lawyering paid attention to important issues of institutional and structural power and how it made a difference not only in how my clients “felt” about their representation but in their material position vis-à-vis their adversaries. In so doing, this article seeks to demonstrate that the critics have failed to appreciate perhaps the most essential aspect of collaborative lawyering. Rather than narrowly focusing an exclusively inward-looking gaze on the interpersonal and symbolic relations between attorneys and clients, collaborative lawyering theory urges attorneys (and clients) to look outward too, to understand fully the larger social and political world and to engage effectively with it.

I. THE CHALLENGES OF AND TO COLLABORATIVE LAWYERING

A. Foundations of the Literature on Collaborative Lawyering

Theoretical Antecedents. The first wave of clinical scholarship on lawyering, which emerged in the 1970's, mainly focused on delimiting attorneys’ and clients’ roles and responsibilities. In their pioneering textbook, Professors Gary Bellow and Bea Moulton encouraged students to reflect on their lawyering activities to develop a conception of the appropriate role of a lawyer. The other leading textbook authors of the era, Professors David Binder and Susan Price, more directly modeled a “client-centered” vision of lawyering, which they interwove throughout their detailed guidance on techniques for accomplishing lawyering tasks.

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40 Bellow and Moulton explained the importance of role as follows:

In simple terms, a fully-socialized individual is one who is, does, and believes pretty much what society asks him or her to be, do, and believe. The explanations focus on three key concepts: role — a socially generated set of expectations about one’s behavior in specific situations; reference group — the audience (or audiences) to whom one looks for approval, support, acceptance, reward and sanction; and ideology — the constellation of beliefs, knowledge, and ideas which, in a given situation, serve to justify, legitimate, and explain both role definitions and the allocation of reward and sanction power among reference groups. In the legal system (or any system of social relationships) role definitions, reference groups, and ideology combine to produce a distinct legal subculture which powerfully influences the “professionalization” of young lawyers. Over time, professional roles become part (and sometimes a very large part) of one’s identity.

Bellow & Moulton, supra note 15, at 11-12.

This client-centered model challenged the dominant vision of the lawyer as expert decision-maker.\textsuperscript{42} The new model’s primary concern was to ensure that clients play the central role not only in setting ultimate objectives but also in making important decisions. It urged lawyers to hone their interpersonal skills, recognize the nonlegal (especially emotional) dimensions of legal problems, and give clients the necessary information and power to make informed choices on significant decisions. This recognition of the interpersonal and emotional dimensions of lawyering required lawyers to have some grounding in psychology.\textsuperscript{43} The model viewed lawyering primarily as problem-solving and viewed counseling as the central process by which problems are solved. The lawyer’s fundamental role was to assist clients to make informed decisions by clarifying goals, facilitating the consideration of alternatives, and helping to weigh the likely consequences of various courses of action. In this model, lawyer-decision-making was a violation of the central obligation to enable clients to decide.\textsuperscript{44}

Both texts sought to guide students practicing in live-client or simulated clinical settings to handle their first cases.\textsuperscript{45} Although these authors were aware that most clinical placements involved representation of lower-income clients,\textsuperscript{46} the texts did not explicitly focus on lawyering with particular client populations. They were generic guides to what all lawyers need to do well.\textsuperscript{47}

\textsuperscript{42} Giving clients a more participatory role in formulating their problem and settling upon solutions was actually first proposed in Douglas E. Rosenthal, Lawyer and Client: Who’s In Charge? (1974). For a brief summary of the genesis of client-centered lawyering, see Linda F. Smith, Interviewing Clients: A Linguistic Comparison of the “Traditional” Interview and the “Client-Centered” Interview, 1 CLIN. L. REV. 541, 542-43 (1995).

\textsuperscript{43} An early critic of this development was William Simon, who argued that client-centered lawyering converted the attorney-client relationship into a therapeutic “community of two,” which improperly absolved attorneys of responsibility for the consequences of their clients’ choices. See William H. Simon, Homo Psychologicus: Notes on a New Legal Formalism, 32 STAN. L. REV. 487 (1980).

\textsuperscript{44} Client-centered lawyering has become the dominant model taught in clinical legal education. For interesting refinements of the model, see Robert D. Dinerstein, Clinical Texts and Contexts, 39 UCLA L. REV. 697 (1992). For criticisms of the model’s failure to address issues of power, race, class, gender, and other differences, see Ann Shalleck, Constructions of the Client Within Legal Education, 45 STAN. L. REV. 1731, 1743-49 (1993); Michelle S. Jacobs, People from the Footnotes: The Missing Element in Client Centered Counseling, 27 GOLDEN GATE U. L. REV. 345 (1997).

\textsuperscript{45} Bellow & Moulton, supra note 15, at xx; Binder & Price, supra note 41, at v.

\textsuperscript{46} See, e.g., Bellow & Moulton, supra note 15, at xxv.

\textsuperscript{47} Binder and Price focused on two primary lawyering activities: interviewing and counseling. Consistent with the UCLA model of dividing lawyering into component activities and thoroughly analyzing each step, Binder and Bergman collaborated on a separate treatise on factual investigation. David A. Binder & Paul Bergman, Fact Investigation (1984). Bellow and Moulton covered those topics as well as case planning, developing a theory of the case, factual and legal investigation, negotiation, witness examination, and
Both texts largely assumed that lawyering entails three main activities: (1) litigating claims before adjudicatory bodies, (2) negotiating claims or agreements, usually with or against other attorneys, and (3) counseling clients with respect to decisions that arise in the course of litigation, negotiation, or transactional planning. Despite their characterization of lawyering as fundamentally a process of helping clients solve problems, Binder, Bergman, and Price consistently assumed that lawyers only work on “cases.” Neither their work nor the other lawyering literature has fully addressed the significance of the difference between formulating the lawyer’s concern narrowly as a “case” or more broadly as a “problem.”

The Emergence of New Visions of Practice. In the late 1980’s and early 1990’s, a new stream of scholarship, specifically focused on the representation of lower-income clients, gained prominence in the literature on lawyering. This literature has been produced primarily by clinical law teachers, reflecting on lawyering experiences. Most of these reflections focus on the authors’ own lawyering before joining clinical academia, rather than their clinics’ representation of clients. Three of the most prolific of these scholars have been Professors Gerald López, Lucie White, and Anthony Alfieri. Methodologically, they have illustrated their new visions primarily by recounting stories of the representation of particular clients in advocacy contexts.

These scholars share a sense that prevailing lawyering practices disserve lower-income clients. Their individual visions arise largely from a critique of the power attorneys exercise, often unthinkingly, over their lower-income clients. They note that lawyers’ practices are

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argument. Bellow & Moulton, supra note 15.

48 As discussed in Part III(B), viewing a problem or situation as a legal “case” can dramatically circumscribe the range of possible solutions to a problem, sometimes radically transforming the nature of the dispute. See infra text following note 304.

49 The 1970’s and early 1980’s certainly produced a significant body of literature on lawyering with lower-income clients. See, e.g., Gary Bellow, Turning Problems Into Solutions: Legal Aid Experience, 34 NLADA BRIEFCASE 106 (1977) (to combat routinized delivery of narrowly conceived and minimally effective assistance to lower-income clients, legal services offices should adopt a “focused case” strategy targeting key institutions by consciously selecting cases and allocating resources to aggressively litigate multiple individual claims and to coordinate work with grassroots coalitions against those targets); Stephen Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049 (1971) (rather than solving individual legal problems, the only acceptable role for lawyers is to encourage poor people to organize themselves and to work to strengthen their organizations). The new literature of the late 1980’s and the 1990’s differed, however, in its efforts to draw larger lessons about lawyering generally.

50 See works cited supra at note 25.

51 See works cited supra at note 26.

52 See works cited supra at note 27.

53 López primarily presents fictionalized composites, while Alfieri and White present recollections of actual clients they or others represented.
unwittingly grounded in, and perpetuate, pejorative conceptions of lower-income people as subordinate, dependent, and helpless. They focus on how lawyers often see these clients as victims in need of rescue, rather than potential partners in solving their own problems. These scholars often depict attorneys’ failures to appreciate clients’ goals of preserving dignity and maintaining some control over the manner in which they are depicted in the course of advocacy. The authors value and extol clients’ active participation in individual and collective efforts to make themselves heard and to act against their own oppression.

At the theoretical level, these new visions share, to differing degrees and levels of sophistication, an understanding of the predominant lawyering activity. Where proponents of client-centeredness focus on counseling as the core lawyering activity, these new scholars focus on persuasion. They view lawyering as fundamentally a process of persuasive storytelling, in which the depiction or “re-presentation” of clients is central to obtaining desired responses from others.

Framing who clients and other actors are, and what happened or is happening is to them, is central to persuasion, and thus lawyering. For reasons of politics, ethics, and efficacy, these scholars believe that lawyers should encourage clients and their lay (i.e., non-lawyer) allies to participate actively in this framing.

These scholars also share certain conceptions of the nature of power. Influenced by Michel Foucault, they do not view power as a

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54 Clark Cunningham has written perhaps the most detailed account of a lawyer’s failure to appreciate a client’s concern for maintaining dignity and control over how he was presented. See Cunningham, supra note 16 (recounting his representation of an African American man in contesting charges arising from a late-night traffic stop in an affluent, white neighborhood).


56 The most sophisticated exploration is by López in Lay Lawyering, supra note 25, which he also synthesizes in REBELLIOUS LAWYERING, supra note 25, at 39-41, 43-45. Collaborative theorists are not unique in appreciating the centrality of narrative to persuasion and lawyering. See, e.g., Anthony G. Amsterdam, Telling Stories and Stories About Them, 1 CLIN. L. REV. 9 (1994); Moore, supra note 17; John B. Mitchell, Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide, 6 CLIN. L. REV. 85 (1999).
static resource that some have and others completely lack. Rather, they conceive of power as a shifting dynamic acted out in relationships. Because relationships, by definition, entail some degree of interdependence, "subordinates" always have some ability at least tacitly to negotiate or modify the directives of their "superiors." Thus power is not simply the imposition of one party's will over another; it is not simply domination. Instead, these scholars see power relations as constituted simultaneously by both domination and resistance, with power frequently shifting as parties contest the terms of the relationship. Thus these theorists assume that lower-income and subordinated people are not completely powerless, vanquished, or helpless. Instead, they view their clients as possessing skills and knowledge that enable them to resist the directives and initiatives of their "superiors" (often more effectively than those "superiors" recognize). These scholars urge lawyers to appreciate, encourage, and ally themselves with the individual and collective acts of resistance of lower-income people.

At the level of practice, the most significant common theme of this literature is its commitment to more active client participation in the framing and resolution of disputes. These scholars call for active *collaboration* between attorneys and clients. The interest in enhancing clients' involvement in the framing of their disputes and their participation in decision-making to *select* remedial strategies is not novel; it is an application of the almost universally taught model of client-centered lawyering. What is different about the new scholarship is its call to involve clients in the actual *implementation* of remedial strategies. Clients not only get to decide what their lawyer will do, but they participate in carrying out those decisions, often by speaking out on their own behalf and/or working with community groups. These theorists urge attorneys not simply to work *for* clients, but with *clients* and with their lay allies.

Perhaps the most concise capsulization is López's:

In this idea — what I call the rebellious idea of lawyering against subordination — lawyers must know how to work with (not just on

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57 The term "superior," deliberately in quotations, is mine. It seems the appropriate dyadic partner to the noun "subordinate," as it highlights the hierarchical relations of subordination.

58 See Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972-1977 (1980); White, Seeking the Faces of Otherness, supra note 26, at 1501-06 (briefly summarizing Foucault's theory of power, indicating its usefulness for lawyering theorists, yet also highlighting what this theory fails to capture); Steven L. Winter, The "Power" Thing, 82 Va. L. Rev. 721 (1996). Alferi attributes his analysis of power to Foucault in Reconstructive Poverty Law Practice, supra note 27, at 2120 n.43. López describes such an understanding of power in Rebellious Lawyering, supra note 25, at 41-42.
behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly. They must know how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation. They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come into contact, particularly about the traditions and experiences of life on the bottom and at the margins.59

Because of their emphasis on a joint problem-solving partnership with clients, I refer to these scholars as advocates of collaborative lawyering.60 As with any naming decision, this choice of term both illuminates and obscures. Others have used quite different labels, characterizing some or all of this body of work as critical lawyering theory,61 the new poverty law scholarship,62 representational narrative scholarship,63 reconstructive poverty law,64 the theoretics of practice movement,65 political lawyering,66 and community lawyering.67

59 López, Rebelious Lawyering, supra note 25, at 37.
60 Susan Bryant has described collaboration as a process that “involves shared decision making by fellow collaborators . . . [and] makes maximum use of the experiences and knowledge that each collaborator brings to the joint work.” Susan Bryant, Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession, 17 VT. L. REV. 459, 460 (1993).
61 See Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. 485, 486 (1986). Although this label helpfully draws connections with strains of critical legal studies and critical race theory, the term is insufficiently descriptive of the content of the new literature's program and critique. The harsh connotation of excessive emphasis, even carping, on the faults of other lawyers that some might draw from the word “critical” can also be counter-productive to persuading practitioners and students to consider these ideas. See infra text at note 263.
62 See Simon, supra note 33. This label too fails to describe the central concerns of the new school. Moreover, by focusing on poverty law, it is under-inclusive. Collaborative lawyering theorists, particularly López, do not necessarily limit their methods to clients who fall within prevailing characterizations of “poverty,” nor to the substantive areas of law typically considered to constitute poverty law. López, for example, elaborates his theories in the context of the representation of labor unions and a restaurant owner challenging civil rights violations. See López, Rebelious Lawyering, supra note 25, at 17-20, 167-273.
63 See Mansfield, supra note 35. This label seems likely to strike some readers as needlessly complex jargon. Moreover, it primarily focuses attention on the role of narrative, ignoring the more distinguishing concept of collaboration.
64 The label is from Alfieri, Reconstructive Poverty Law Practice, supra note 27. Again, the focus on poverty law practice is narrower than necessary and the label fails to give a sense of the principles to guide reconstruction.
65 See, e.g., Symposium on Theoretics of Practice: The Integration of Progressive Thought and Action, 43 Hastings L.J. 717 (1992). I prefer to avoid terms like “theoretics” which seem likely to strike some readers (particularly practicing attorneys) as needlessly esoteric, academic jargon. Moreover, this label too fails to describe the theory.
66 The label comes from the tribute to Gary Bellow in the Symposium on Political Law-
Authors vary dramatically in what they mean by collaboration. Indeed, to a degree not widely appreciated, these collaborative lawyering scholars differ significantly. They vary, for example, in whether and to what extent they explicitly embrace the mantle, language, and attendant concerns of postmodernism. The extent of their commit-

"erying, 31 HARV. C. R. - C. L. L. REV. 285 (1996). This label too is insufficiently descriptive of the literature's content. Moreover, it encompasses a far broader range of theorists than just those who advocate close collaboration between attorneys, clients, and lay allies. This term includes proponents of high-profile litigation in which attorneys take center stage to reveal the "political hypocrisy" of the judicial system. See, e.g., Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983). It also includes those who believe lawyers should only use their technical knowledge and skills in narrowly defined legal realms to support the efforts of organized masses to appreciate and act on their common class interests. See, e.g., Steve Bachmann, Lawyers, Law, and Social Change, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-85). Indeed, the term even encompasses the progressive critics of collaborative lawyering cited at notes 32-34.


68 Defining "postmodernism" is a daunting task. One commentator has likened it to "trying to nail gelatin to a wall." Willajeean, All's Not Fair in Art and War: A Look at the Fair Use Defense after Rogers v. Koons, 59 BROOK. L. REV. 373, 384 n.62 (1993). Part of the difficulty is postmodernism's heterogeneity. As Angela Harris has noted, "There are as many different definitions of postmodernism as there are postmodernists." Angela P. Harris, The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 748 (1994). Amy Adler points out that "postmodernism represents not a single clear movement, but a pluralist and multifaceted rebellion" against modernism. Amy Adler, What's Left? Hate Speech, Pornography, and the Problem for Artistic Expression, 84 CAL. L. REV. 1499, 1518 (1996).

The difficulty of definition is not, however, primarily a product of the diversity of its individual adherents. A meaningful definition of postmodernism is something of an oxymoron because a core goal of postmodernism is "to deconstruct misleading categories, definitions, and dichotomies." Cathy A. Harris, Outing Privacy Litigation, Towards a Contextual Strategy for Lesbian and Gay Rights, 65 GEO. WASH. L. REV. 248, 255 n.42 (1997). As Stephen Feldman has explained:

to define postmodernism at the outset, one must disavow postmodernism: a definition would reduce postmodernism to some fundamental core or essence, which would be too foundationalist, too essentialist — too modernist. Postmodernism rejects the very possibility of essences, cores, or foundations that undergird modernist definitions. Thus, to understand postmodernism one must do postmodernism. And then one must do it some more, and some more still — one must think, see, and even live postmodern.


Nonetheless, Peter Schanck has suggested that four interrelated concepts, "each of which in a sense undergirds the others," are central to postmodernism:

(1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can only apply to the context within which it is asserted. (4) Because language is
ment to postmodernism affects, inversely, the degree to which they are confident that properly trained lawyers can become "part of the solution" — that is, whether the problem involves particular models of lawyering or whether the problem is lawyering itself. Most fundamentally, these scholars differ in the degree to which they believe that: (1) identifying the appropriate remedial fora in which to seek relief is a key aspect of lawyering (i.e., that not all lawyering entails litigation before adjudicatory bodies or direct negotiation with adversaries); (2) lawyers' detachment and specialized knowledge can constructively enhance clients' self-understanding, decision-making, and problem-solving; and (3) lawyers must carefully analyze the full context of historical, institutional, and societal power dynamics at play in any situation.

B. The Critiques of Collaborative Lawyering

Lamenting a Postmodern Abandonment of Collective Action and Analysis. In an address to the Law and Society Association in 1992, the Association's then-President, Professor Joel F. Handler, questioned the value of postmodernism for progressive (his term was "transformative") politics. 69 His subject was far broader than collaborative lawyering or even postmodern legal scholarship. His target was almost all postmodern legal, literary, and political theory. 71 Indeed, while he used Lucie White's Mrs. G article 72 as an example of

socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.

Peter C. Schanck, Understanding Postmodern Thought and Its Implications for Statutory Analysis, 65 S. CAL. L. Rev. 2505, 2508-09 (1992). Although a solid beginning, this definition does not capture the mood, "stance," and style of postmodernism. It misses, for example, the valuing of irony and paradox and the stance of detached pessimism of many postmodernists.

69 Handler, supra note 32.

70 I will use "postmodern" and "postmodernist" interchangeably, even though some postmodernists use the former term solely to describe our current era or condition and the latter term to describe those who share their views or approaches.

71 Handler explicitly exempts from his critique the work of most critical race theorists, specifically citing Derrick Bell, Patricia Williams, and Regina Austin. Id. at 716-18. Although these theorists share many of the forms of postmodernism (narrative exposition; use of allegory, fantasy, metaphor, and irony; the presentation of multiple paths towards truth), Handler believes their work is saved by their attention to commonality, the struggle to resist as a people, the bonds of solidarity. While the stories themselves are often about individuals suffering from specific acts of discrimination, their most significant point is to deny individualism. Acts of racism are not individual aberrations; rather they are manifestations of our society's major structural characteristics. The victims of racism are more than individuals. . . . [T]hey are inextricably rooted in their communities . . .

Id. at 718 (emphasis added).

72 White, Notes on the Hearing of Mrs. G., supra note 26.
the limitations he perceived in postmodern legal scholarship, he did not address collaborative lawyering theory directly. Nonetheless, his perspective influenced the critique of collaborative lawyering.

Before launching his critique, Handler provided a detailed summary of postmodernist principles and their influence across various disciplines. Handler’s critique was that postmodern methods, theories, and concerns preclude any effective challenge to institutionalized power and the status quo. In Handler’s view, this ineffectiveness flows directly from postmodernists’ rejection of overarching themes (“meta-narratives”) and refusal to appeal to unifying commonalities that forge collective identities and solidarity.

Handler characterized deconstruction as the heart of postmodern thought and practice. He defined deconstruction as the denial of universal or objective truth or understanding, the emphasis on revealing internal contradictions, and the refusal to accept “privileged” or accepted interpretations as anything more than their adherents’ points of view. This process of deconstruction, he said, was the means by which postmodern political theorists sought to overturn the status quo — by destabilizing the “hegemonic structures” that those in authority use to maintain the status quo. As a form of politics, Handler found deconstruction “ultimately disabling.”

Handler illustrated his point by contrasting stories of “protest from below” written in the 1970’s with postmodern stories of the early 1990’s. He compared books by historian Eugene Genovese, anthropologist Carol Stack, and sociologists Frances Piven and Richard Cloward with law review articles by Lucie White, Patricia Ewick and Susan Silbey, and Austin Sarat. Although all of the authors

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73 Id. at 698-710. Unlike some of his fellow critics, Handler provides extensive, detailed citations to specific authors, without sarcasm, and without lamenting the complexity of the ideas he summarizes. Cf. Simon, supra note 33, at 1100 n.3 (eschewing need to differentiate between authors); Blasi, supra note 34, at 1074 n.29 (assailing unintelligibility of postmodern theory).
74 Handler defines a meta-narrative as “a construction of human nature that transcends context.” Handler, supra note 32, at 727.
75 He calls deconstruction, “the parent of postmodernism.” Id. at 698.
76 Id. at 698-99.
77 Id. at 701. The concept of hegemony to which they refer is that of Italian political theorist Antonio Gramsci. See Antonio Gramsci, Selections from the Prison Notebooks (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1st ed. 1971).
78 Handler, supra note 32, at 698.
81 Frances Fox Piven & Richard A. Cloward, Poor People’s Movements: Why They Succeed, How They Fail (1977).
82 White, Notes on the Hearing of Mrs. G., supra note 26.
83 Patricia Ewick & Susan Silbey, Conformity, Contestation, and Resistance: An Ac-
“celebrate the acts of resistance by the most marginalized people in society,” Handler was struck by the differences in tone and focus:

The stories that Genovese, Stack, and Piven and Cloward tell are about groups, communities, and movements. While considerable attention is paid to context and individual self-identity, the stories are about collective identity and collective strength.

In contrast, the heroes of the contemporary authors are isolated. Interactions are hierarchical rather than lateral . . .

The contemporary stories are about individuals, in the most marginalized spaces, engaging in very small acts of defiance, and, for the most part, very little if anything happens.

A limitation of Handler’s critique is that the two sets of works he compared are from entirely different academic venues. We should expect that law professors and law journals would focus on the conduct of lawyers and the relationships between lawyers and clients. Moreover, given that most progressive lawyers’ practices primarily involve one-on-one relationships with individual clients, it seems only appropriate that scholars begin by addressing such relationships.

For Handler, the focus on atomized individuals was one of two fatal flaws of postmodern politics. In addition, he found postmodernists’ refusal to subscribe to a global vision debilitating to any possibility of effectiveness in the real world:

The postmodernists defend their position with the claim, “But there are no Grand Narratives.” However, the opposition is not playing that game. It has belief systems, meta-narratives that allow theories of power, of action.

When we look around, everyone else is operating as if there were Grand Narratives . . . The enemies of the poor and those who suffer discrimination do not rely on localized knowledge in mini-rationalities.

Handler expressed the view that postmodernism would never challenge the ideological hegemony of liberal capitalism and the status quo unless its adherents developed a larger, alternative vision of the economy and the polity.


85 Handler, supra note 32, at 715.
86 Id. at 715, 724 (emphasis in original).
87 Indeed, opponents of legal services for lower-income persons have gone to great pains in the past two decades to attempt to ensure that federally funded legal services lawyers are limited to representing individual clients in individual disputes. For a thorough analysis of those efforts, see Paula Galowitz, Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations, 4 B.U. PUB. INT. L.J. 39 (1994).
88 Handler, supra note 32, at 726, 728.
89 Id. at 727.
As elaborated in Part II, Handler’s general critique of postmodernism overlooks two of collaborative lawyering scholarship’s central tenets: (1) that relationships between attorneys and clients must be radically reshaped to make them more lateral rather than hierarchical, and (2) that attorneys and clients should join in larger, collective efforts to challenge the status quo.

Assailing a Proscription Against Influencing Clients. Echoing Handler’s themes, poverty law scholar Professor William H. Simon criticizes the new theorists of lawyering with lower-income clients in *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era.* As Handler concludes with regard to postmodernism generally, Simon finds the new lawyering theories unhelpful in tackling larger collective efforts at institutional and systemic change. For Simon, a major source of this ineffectiveness is an excessive concern with lawyer oppression of clients.

He writes that the new poverty law scholars do not view lawyer domination of clients as a “remediable failing,” but rather as an overwhelming menace stalking the most sophisticated and well-meaning efforts to respect autonomy. In this literature, client empowerment means liberation from lawyers as much as obtaining leverage on the outside world. The scale of practice portrayed is typically small — often one on one — and the benefits are often as much psychological as they are material.

Simon paints his critique with a broad brush. He aggregates the work of López, White, and Alfieri with that of Barbara Bezdek, Clark Cunningham, Peter Gabel, Paul Harris, Robert Dinerstein, and Bill Hing. He admits that he makes “no effort to do justice to the many differences among these writers.” With one exception, Simon never specifies which scholars make the points he ascribes to the body of literature as a whole.

Simon’s “dark secret” is that “effective lawyers cannot avoid

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90 Simon, supra note 33.
91 Id. at 1099-1101.
92 Id. at 1099-1100 (footnote omitted).
93 The additional works Simon includes within the rubric of the new poverty law scholarship are Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants; Voices in Legal Process,* 20 HOPSTRA L. REV. 533 (1992); Cunningham, supra note 16; Robert D. Dinerstein, *A Meditation on the Theoretics of Practice,* 43 HASTINGS L.J. 971 (1992); Gabel & Harris, supra note 66; and Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Sexual Orientation, Physical Disability, and Age in Lawyering Courses,* 45 STAN. L. REV. 1807 (1993).
94 Simon, supra note 33, at 1100 n.3.
95 Simon’s failure to differentiate between diverse authors and to substantiate assertions with particularized citations drew a sharp response from one collaborative lawyering theorist. See López, *An Aversion to Clients,* supra note 25.
making judgments in terms of their own values and influencing their clients to adopt those judgments." Simon's articulation of this "secret" is consistent with his prior work in which he has expressed skepticism about both the feasibility and appropriateness of client-centered counseling. Perhaps because much of his focus has been on attorneys representing more powerful clients, Simon has long urged attorneys to exercise more control over, and take moral responsibility for the acts of, their clients.

Simon believes this "dark secret" runs afoul of what he considers a fundamental tenet of the new scholarship: that any attorney influence over, or change in, a client constitutes illegitimate and oppressive domination. Without citing specific sources in the lawyering literature, Simon posits its "tendency to see all constraint as power and all power as oppressive." Simon assigns the intellectual parentage of this tendency to Michel Foucault. He writes: "Since Foucault portrays all power as control, he leaves no room for the idea of 'empowerment' — power that enables rather than disciplines."

Regardless of what Foucault had to say about power, Simon fundamentally misreads the collaborative lawyering theorists when he interprets all of them as proscripting lawyers from having any influence

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96 Simon, supra note 33, at 1102.
99 Simon, supra note 33, at 1111.
100 Id. at 1112. Simon states that "this notion of power-as-oppression is implicit" in Foucault's historical examinations of disciplinary institutions. Id at 1112 n.19. Simon downplays Steven Winter's recitation of various passages in which Foucault explicitly discusses power that is productive or enabling. Steven L. Winter, Cursing the Darkness, 48 U. Miami L. Rev. 1115, 1127 (1994). Like Professor Winter, I believe Simon is wrong about Foucault's ultimate vision of power: it is not always oppressive or oppression. This positive vision of power is directly stated in the following passage from Foucault:

... [T]he notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, ... power is taken above all as carrying the force of a prohibition. Now I believe that this is a wholly negative, narrow, skeletal conception of power. ... If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.

FOUCAULT, supra note 58, at 119. See also id. at 120-21 ("I believe it is precisely these positive mechanisms that need to be investigated, and here one must free oneself of the juridical schematism of all previous characterizations of the nature of power. ... [T]he West ... [errs in] seeing the power it exercises as juridical and negative rather than as technical and positive.")
over clients or causing any change in clients. As I elaborate in Parts II and III below, at the heart of collaboration is the notion that lawyers and clients will learn from each other and teach each other,\(^\text{101}\) and that they will work together to develop and carry out persuasive strategies. Collaboration entails a level of engagement that cannot help but change the participants. Working together causes each participant to see and appreciate how others approach a problem and envision resolving it. Once we stop viewing lower-income clients as frail, downtrodden victims, and instead genuinely treat them as partners possessing problem-solving skills, knowledge, and ideas worth considering and harnessing, we can replace the paralyzing fear of changing clients with an openness to being changed by them. To use Handler’s terminology, interactions can become more lateral than hierarchical.

Because Simon believes the new poverty law scholars proscribe any attorney influence of clients, he dismisses the lawyering championed as too limited an intervention, too little a contribution to the client.\(^\text{102}\) He deems the resulting role for lawyers fundamentally unfulfilling, because he believes that in all of the inevitable situations in which lawyers’ and clients’ values clash, lawyers will always have to defer to clients’ values.\(^\text{103}\)

Simon also criticizes the new scholarship’s “naively” positive view of lower-income people.\(^\text{104}\) He believes that an unwillingness to resort to any sort of coercion, selective incentives, or group discipline of individual interests dooms any prospects for successful collective action.\(^\text{105}\) He finds the new literature’s view of clients valuable or at least harmless as long as it is treated as a presumption designed to inhibit the lawyer’s instinct toward arrogance or paternalism, but it is untenable as a categorical dogma. Poor people are capable of the same kinds of selfishness, false consciousness, and incompetence as non-poor people. Such qualities are destructive of efforts at collective action, and a lawyer who blinds herself to them is incompetent to assist collective action. Moreover, even smart, virtuous, capable people are prone to have different views of what

\(^{101}\) Hence the title of Lucie White’s article: To Learn and Teach: Lessons from Driefontein on Lawyering and Power, supra note 26. López too makes the point explicitly in the final sentence of the passage quoted supra at note 59.

\(^{102}\) Simon, supra note 33, at 1104.

\(^{103}\) Id. at 1105-06. Simon argues that insistence on “lawyer self-effacement... condemn[s] the radical lawyer to an experience that, in almost any other context she would call alienation.” Id. Of course, this critique applies to client-centered lawyering as well.

\(^{104}\) Simon characterizes a central premise of the new literature as “insist[ence] on the dignity, insight, and abilities of poor people,” essentially the “belief in the ingrained virtue and insight of poor people.” Id. at 1101, 1104.

\(^{105}\) Id. at 1106-08.
their own and their groups' interests are.\textsuperscript{106}

To organize successfully for collective action, and to maintain an existing group, Simon believes, lawyers must rely on coercion ("for example, binding a minority to majority rule"), selective incentives ("rewarding members on an individual basis for contributions to the group"), or judgments about the comparative legitimacy of different client goals that are formulated without the benefit of guidance from the clients themselves.\textsuperscript{107} Yet each of these mechanisms for encouraging collective action is, as Simon interprets the new literature, an unacceptable imposition of power over clients.

Simon sees nothing wrong in lower-income people's lawyers relying on their own personal values to influence their clients, give advice, and make decisions. So long as attorneys do not attempt to exert control over their clients, "not all lawyer power and influence should be seen as illegitimate domination."\textsuperscript{108} For Simon, "what potentially redeems this situation from constituting oppression is that the lawyers' values may include notions such as democracy, autonomy, and equality that mandate respect and empowerment for the client."\textsuperscript{109}

Decrying an Exclusive Focus on Individualized Local Narratives and a Rejection of Empiricism and Structuralism. The most detailed criticism of the literature on collaborative lawyering is Professor Gary Blasi's \textit{What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship,}\textsuperscript{110} in which he urges lawyering scholars to produce scholarship that is useful to practice.\textsuperscript{111} Besides defining the proper role,

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\textsuperscript{106} Id. at 1107.
\textsuperscript{107} Id. at 1108.
\textsuperscript{108} Id. at 1106.
\textsuperscript{109} Id. at 1103. Simon concedes that in any given context people often differ over the meaning of those values. As Steven Winter sees it: "The crux of the postmodern critique of the lawyer-client relationship... is that quite a lot of oppression happens in the name of abstract humanist values such as democracy, autonomy, and equality." Winter, supra note 100, at 112. Provided that this respect for clients is genuine and that it is perceived in this manner, I agree with Simon that lawyers should be able to influence their clients and may properly discuss their own values in counseling clients. Simon's stated position on this issue is not, however, as far removed from most collaborative lawyering theorists as he perceives.
\textsuperscript{110} Blasi, supra note 34.
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aspirations, and evaluative criteria for scholarship, he also comments on recent efforts by lawyering theorists. He labels the primary body of work he criticizes as “postmodern critical scholarship that uses and emphasizes client narratives.”

Blasi grounds his analysis of lawyering theory in a context to which he devoted a substantial portion of his attention as a poverty lawyer: efforts to combat homelessness. Specifically, he poses the question of why urban encampments came to American cities in the 1980’s. After a seemingly tongue-in-cheek “constructed interview” with a homeless man, Blasi discusses three theories that might shed light on the phenomenon of homelessness: what he labels a Marxist analysis of the mobility of capital, Professor Michael Lipsky’s social scientific theory of bureaucratic disentitlement, and Blasi’s version of a postmodernist analysis of “silenced narrative.”

dialogue on the direction of scholarship on lawyering with lower-income clients has not to date been engaged extensively in print. But see Trubek, Revisionist Scholarship and Practice, supra note 35, at 993-97.

Blasi, supra note 34, at 1064. He refers to White, Notes on the Hearing of Mrs. G., supra note 26, López, Reconcepting Civil Rights Practice, supra note 25, Alfieri, Reconstructive Poverty Law Practice, supra note 27, and Cunningham, supra note 16, as representative exemplars of the body of scholarship he critiques. Blasi, supra note 34, at 1074 n.27.


Blasi, supra note 34, at 1065.

Id. at 1068-69.

Id. at 1069-71. So that readers can draw their own assessments of Blasi’s representations of “postmodern” lawyering theory, here is his capsuleization in its entirety:

There are many possible readings of this narrative, one of which is that this person is homeless partly because Legal Aid lawyers did not help him, empower him or even hear him. The global economic forces and social processes previously described increase the stress on the local legal services office, making it even harder to deal with existing problems. The voices of clients disappear or are distorted in the chaos that separate professional from “client” and that separate different classes, races, genders, sexual orientations, and life experiences. No one listens to or hears the stories of desperately poor people. As a result, already powerless people become further disempowered. Moreover, the insights and understandings poor people have of their own situations are ignored. Possibilities for individual and collective action rooted in those understandings are effectively suppressed. This homeless person is trapped by both circumstance and the real violence of the streets. The possibility of his resistance is impaired by the metaphoric violence done to his narrative by lawyers.

Id. at 1071. As elaborated in Part II(B) below (see infra text at notes 238-39), Blasi’s creation of this “postmodern explanation” of the causes of homelessness ignores Professor White’s extended analysis of precisely this question. See White, The “Real Deal,” supra
ing whether these theories are true, Blasi instead explores their consequences, that is, what use one can make of them. He argues that theories must have real, concrete consequences to be of use and thus of value.\footnote{26}{279-91.}

Blasi finds the capital mobility theory useful to inform internal and public debates, to fuel concerted action at local, national, and international levels, and to enhance long-term planning (by predicting the likely temporal trajectory of the phenomenon).\footnote{117}{In an earlier work, Blasi made explicit his standard for assessing theories, strategies, and tactics: They must translate into “concrete results on the streets.” Blasi, Systematic Litigation Approaches, supra note 113, at 142. A similar standard is implicit in What’s a Theory For?, supra note 34.} He deems the bureaucratic disentitlement theory particularly useful, citing its role in providing the theoretical underpinning for seven years of concerted litigation in Los Angeles.\footnote{118}{Id. at 1072-73, 1075.} He finds the “critical, postmodern” theory close to useless.\footnote{119}{Blasi summarizes Lipsky’s theory of bureaucratic disentitlement as the understanding that social welfare institutions, especially when faced with excess demand or inadequate resources, resort to “relatively obscure and often informal changes in procedural rules and processing systems” that exclude many people from economic assistance. Id. at 1071 (citing Michael Lipsky, Bureaucratic Disentitlement in Social Welfare Programs, 58 SOC. SERV. REV. 3 (1984)). Blasi says that this theory “helped guide” concerted class-action litigation in Los Angeles seeking to remove particular disentitlement devices and to enjoin the practice of bureaucratic disentitlement. Blasi, supra note 34, at 1073. Among its virtues, according to Blasi, were its successful prediction of likely reactions by the bureaucracy and political structure, its integration into “systems-theoretic approaches that enabled advocates to construct computer models that predicted with high accuracy the consequences of procedural changes,” and its usefulness in explaining to the press, public, judges, and participants what was “really going on.” Id.} Blasi interprets this last theory as largely telling lawyers what not to do, focusing too much on who lawyers are, and, in extreme form, leading to practical paralysis. He suggests this theory might lead to efforts to join with people in camps to figure out what to do, an undertaking he views as a “worthy aspiration, but much easier said than done.”\footnote{120}{Id. at 1077-78.}

In discussing the consequences of theory and the directions in which scholarship should go, Blasi outlines four main critiques of “critical postmodern scholarship.” First, he finds it often unintelligible to the uninitiated.\footnote{121}{In Blasi’s words:
The import of this discourse is often buried in a prose that seems to value most highly subtlety, nuance, suggestion, gesture, and indirect references to other, even more obscure works. Like much of legal scholarship, it seems mainly designed to impress other scholars . . . . That tendency is amplified in this particular genre by the inaccessibility of the work of those masters of postmodern thought upon which it draws. To all but the truly initiated (a status to which I do not pretend), some of
of other (i.e., legal services) practitioners. Third, it focuses too narrowly on "the individual lawyer/client microworld." Fourth, it fails to look for structure or explanation above the level of local narrative.

With regard to his third critique, Blasi finds in the new scholarship's focus on the details of the relationship between lawyers and lower-income clients

[t]he implicit suggestion ... that the main problem faced by poor and subordinated people is not unemployment, illness, hunger, homelessness, degradation, or racist oppression, but rather the "interpretive violence" done to their narratives by poverty lawyers. Even if we completely transformed, in the postmodern vision, every interpersonal relationship between lawyer and client, it is difficult to see how institutional racism, real (as opposed to metaphoric) violence, hunger, homelessness, and the other incidents of subordination would thereby somehow quietly disappear.

This rhetorically skillful formulation raises the bar that collaborative lawyering scholarship must clear higher than Blasi had initially set it. Rather than simply asking that scholarship be useful to practice, now Blasi apparently demands that it solve the problems of racism, violence, hunger, homelessness, and other forms of subordination. Blasi assumes that a literature produced by clinicians seeking to influence how lawyers work with lower income clients is about "the main problem faced by poor and subordinated people," rather than about the main problems in how lawyers represent such clients.

The heart of Blasi's related fourth critique is that an avoidance of structuralist explanations dooms effective progress on systemic issues. Although Handler, Simon, and Blasi make this point in different ways, their critiques of the new scholarship overlap with respect to this perceived ineffectiveness in contesting collective issues.

In detailing this critique, and throughout his article, Blasi evi-

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Id. at n.29.

123 Id. at 1088-89. As Blasi states: "Postmodern scholars often adopt an imperious, monologic stance toward practicing lawyers that mirrors the stance they accuse those lawyers of adopting toward subordinated people." Id. at 1089. As elaborated in Part II, his statement that "[t]he critical gaze rarely falls on the mirror: it is about the practice of others," id. at 1088, is not true of the majority of the scholars he critiques. See infra text at notes 191-92, 227-33, and 261-65.

124 Id. at 1087.

125 Id.

126 Id. at 1089-90.

127 Blasi writes: "Structuralist theories may not capture all that exists, but ignoring structure risks missing nearly everything. Furthermore, the exclusive focus on microworlds may suppress information at the only levels at which any meaningful progress or change can be made or sustained." Id. at 1091.
dences a strong preference for arguments and theories that are explicitly stated in propositional form and are scientifically or empirically derived (ideally from extensive objective data). In short, he most values "hard" evidence or theory.\textsuperscript{128} Blasi has problems with what collaborative lawyering theorists propose and with the \textit{basis} upon which they derive their ideas.

Blasi makes plain his dissatisfaction with the prescriptions of collaborative lawyering theory by using a scenario in which the leaders of a coalition of homeless people's advocates analyze a political situation in a way that leads them to advocate against policies the majority of homeless people support.\textsuperscript{129} Blasi objects to a model of lawyering that would bar a subset of leaders or experts from acting on the basis of a "better-informed" assessment of the problem and its likely solutions.\textsuperscript{130} Blasi wishes to avoid having to defer to, or persuade, the larger client population that does not share the tactical or strategic vision of coalition leaders.\textsuperscript{131}

Besides objecting to the content of collaborative lawyering theory, Blasi also expresses antipathy for the reasoning processes that have produced the theory. For example, he writes:

> Never has so much theory rested on so little practice. The total factual content of all this scholarship consists of perhaps a dozen remembered episodes about individual clients in the former practices of the respective authors. . . . [A] search of this scholarship for the evidence supporting its arguments reveals only a few stories about individuals. This is one of the few discourses in which so small a sample (N=1) is accepted as more than illustrative.\textsuperscript{132}

\textsuperscript{128} Thus, Blasi expresses profound admiration for "cognitive science." \textit{Id.} at 1080-85. \textit{See also} Blasi, \textit{supra} note 14. He views the revolution in cognitive science as an important emancipation. Thanks to it, we need not rely entirely on the speculations of philosophers and projections from our own limited experience. Instead, we can read and interpret the accumulated results of hundreds of empirical experiments that suggest how cognitive structures, including theory, are acquired and how they affect understanding and ability to act in context.

Blasi, \textit{supra} note 34, at 1080. Blasi does not address how many of these empirical studies are based on the sorts of "ill-structured" problems that confront lawyers in the real world. \textit{See} Weinstein, \textit{supra} note 14, at 13-15 (discussing James Voss & Timothy Post, \textit{On the Solving of Ill-Structured Problems, in The Nature of Expertise} 261 (Michelene T.H. Chi et al. eds., 1988)). Nor does Blasi acknowledge that, ten years before him, it was Professor López, who, in the course of explaining how we understand the social world largely through stock stories and narratives, introduced the legal academy to the insights of many of the cognitive scientists Blasi admires. \textit{See López, Lay Lawyering, supra} note 25. Blasi's characterization of this model as an "intuition" of advocates of collaborative lawyering ignores this important work by López. Blasi, \textit{supra} note 34, at 1090.

\textsuperscript{129} \textit{Id.} at 1078-79.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} at 1087, 1090. Only in a footnote does he acknowledge that "[o]f course, the
Indeed, it seems that Blasi prefers the capital mobility and bureaucratic disentitlement theories to the postmodern one largely because the former two are "scientific" or "hard-nosed."

Closer scrutiny, however, reveals other dynamics at play. Blasi's first two theories are explanatory theories; they help us understand why things are as we observe them and they predict what we will observe. They fit precisely within Mark Spiegel's definition of theory as a set of general propositions used as an explanation. Collaborative lawyering theory is a theory of practice or action — it suggests what we should do, how we should act. This vision of practice is based on an underlying explanatory theory — an analysis of society and social change that explains why lawyers should collaborate with clients and allies. It is a vision of society and social change that values participatory democracy and broadly-based popular political mobilization over professional-driven efforts to craft and implement wise and attainable reform. Perhaps because Blasi does not share collaborative theorists' vision of social change, his theory of "silenced narrative" misses the thrust of the explanatory theory underlying collaborative lawyering.

No doubt part of Blasi's point is that there should be a close link between theories of why things are and theories of what to do. Indeed, Blasi initially presents the capital mobility and bureaucratic disentitlement theories as if they were guides both to understanding and action. But looking closely at the bureaucratic disentitlement litigation strategy he describes, one sees that the theory of bureaucratic disentitlement only informs the formulation of the problem, while a very different theory informs the solution (or "remedial strategy") selected.

Although bureaucratic disentitlement theory may have guided the litigation in Los Angeles, it did not, as Blasi acknowledges, mandate litigation — or any other remedial approach. An understanding of the theory of bureaucratic disentitlement might have informed a variety of alternative actions or strategies. For example, adherents of this theory could have politicized the issue by organizing demonstrations or civil disobedience at welfare offices or the social services department headquarters. They could have targeted specific

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133 See supra note 18.
134 Blasi, supra note 34, at 1069-75. Only in his final paragraph on the consequences of the bureaucratic disentitlement theory does he acknowledge: "it only helps explain what the government is doing. It provides no clear guide for action." Id. at 1076.
135 The primary advocates of such strategies of direct action are Piven and Cloward. See PIVEN & CLOWARD, supra note 81; FRANCES FOX PIVEN & RICHARD A. CLOWARD, REG-
bureaucrats or field offices, perhaps trying to aggregate claims or swamp offices with similar demands. They could have initiated a media campaign to expose disentitlement devices to public scrutiny. They could have tried to identify or develop additional resources for the social services programs, perhaps conditioning such assistance on particular bureaucratic changes. They could have mobilized coalitions of clergy, unions, and other organizations to support any of the foregoing efforts. Any of these remedial approaches would be consistent with, and informed by, bureaucratic disentitlement theory.

One can even argue that these approaches, individually or in combination, are more consistent with bureaucratic disentitlement theory than the litigation approach, because they entail wider public scrutiny, dialogue, and popular pressure. One of Lipsky’s central insights was that disentitlement is effected outside of public scrutiny, in the devilish details left to expert administrators and street-level bureaucrats. A litigation strategy, which also occurs largely outside of the public/political dialogue, and in which a single expert (the judge) imposes a solution on faceless bureaucrats at the urging of other experts (the lawyers), seems to share many of the anti-democratic traits of the disentitlement practices being challenged.

The choice of litigation as a remedial strategy seems instead the embodiment of a very different theory of action. That theory holds that strategic litigation, coordinated and conducted by expert, seasoned attorneys, is the most effective response and antidote to governmental oppression of the relatively powerless. I would label this the “traditional, public interest impact litigation” theory. Since the early 1970’s, this theory has shaped the structure and activities of most legal services offices, and many consumer, environmental, and civil rights organizations.

Whether such an impact litigation strategy is, in fact, the sober, tough-minded, non-utopian, and effective approach to making institu-

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136 Both Gary Bellow and Marc Feldman have advocated the strategic aggregation and litigation of multiple claims against targeted institutions, offices, or individual bureaucrats. See Bellow, supra note 49; Marc Feldman, Political Lessons: Legal Services for the Poor, 83 GEO. L.J. 1529 (1995). See also Mark H. Lazerson, In the Halls of Justice, the Only Justice is in the Halls, in 1 The Politics of Informal Justice 119 (Richard L. Abel ed., 1982) (arguing that high volumes of individual cases create opportunities for favorable informal resolutions).

137 The U.S. media’s typically short attention span and reluctance to report in depth on lengthy, complex, less photogenic, and less sensational trials renders any expectations of a meaningfully public airing of issues and evidence unrealistic.

tional change that Blasi implicitly portrays it to be is a central issue that collaborative lawyering theorists explore. These theorists, like many progressive theorists before and after them, believe it is naively sanguine to expect litigation, unaccompanied by political mobilization, to effect significant social change or to preserve gains previously won. Much of the difference between Blasi and collaborative theorists can be traced to their differences over the choice of remedial strategy.

C. Preliminary Synthesis of the Critiques

Collectively, Professors Handler, Simon, and Blasi articulate four central critiques of collaborative lawyering scholarship. These critics cast the literature as: (1) unintelligible to the uninitiated, importing unfamiliar terms and referring to inaccessible, European postmodern theorists; (2) excessively hostile to practitioners and thus unlikely to persuade lawyers to adopt new models of practice; (3) too narrowly focused on small-scale, one-on-one interactions between individual lawyers and individual clients and on the power lawyers exert over clients in the “lawyer-client microworld”; and (4) inattentive to structural and institutional explanations of clients’ oppression, other than lawyer-domination, and thus ill-equipped to effect social change. The first two critiques, primarily stylistic, are Blasi’s alone; the third and


140 See, e.g., Arthur Kinoy, Rights On Trial: Odyssey of a People’s Lawyer (1983); Bachmann, supra note 66; Bellow, supra note 49; Wexler, supra note 49; Winter, supra note 100, at 1118-24.

141 To be sure, Blasi is not unmindful of the criticisms and limitations of impact litigation. Indeed, in his earliest writing, he conceded that “the courtroom is the worst possible place to make public policy with regard to these kinds of problems,” that litigation is “very ineffective and very inefficient,” and that “courtrooms are the places of last resort.” Blasi, Litigation Concerning Homeless People, supra note 113. However, his later works on homelessness, after acknowledging the existence of doubters, are essentially optimistic guides as to how to litigate most effectively and these works devote scant, if any, attention to non-litigation alternatives. See Blasi, Systematic Litigation Approaches, supra note 113; Blasi, Litigation Addressing Bureaucratic Disenfranchisement, supra note 113, at 597-603.

142 Blasi is not alone in characterizing the collaborative literature as excessively hostile to practitioners. See, e.g., Dinerstein, supra note 93, at 983-84; Tremblay, supra note 35, at 949-50.
fourth, primarily substantive critiques are shared by all three critics.

Handler directs his critique at postmodernism as a whole and what he perceives as its abandonment of collective action and analysis. Simon and Blasi also label and discuss collaborative lawyering as a postmodern phenomenon. Simon focuses on what he sees as a proscriptive against lawyers exerting any influence on their clients. Blasi organizes his critique around what he views as an exclusive focus on individualized local narratives and a misguided rejection of empiricism and structuralist explanations and solutions.

The critics appropriately focus on a vital concern: the effectiveness of our theories of practice. For those who aspire to effect social change, the critics hone in on the most important test: whether our theories of lawyering, when put into practice, will effectively challenge institutional or structural power. This challenge to demonstrate utility in addressing significant issues is a fair one. For a literature designed to guide the activist wing of an instrumental profession, it is the right question to pose.

Before we can measure ideas against such a standard, however, we need to make sure we grasp those ideas fully and accurately.

II. Assessing the Applicability of the Critiques

A. Anthony Alfieri's Postmodern Critique of the Interpretive Violence of the Traditional Poverty Lawyer - Client Relationship

By far the most challenging to read of the collaborative lawyering theorists is Professor Anthony Alfieri. In a series of articles in the late 1980's and early 1990's, he sought to use the insights of "critical theory" to uncover the ideological underpinnings of poverty law practice and to build a theoretical foundation upon which to "reconstruct" practice. He labels his work, along with that of Lucie White, Gerald López, and others, a project to develop a "theoretics of practice."

Alfieri's initial work in the field is The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, in which he argues that poverty lawyers must completely "rethink" their efforts if they are to achieve the goal of poverty law, which "should, indeed, must be the abolition of poverty." To this end, he urges lawyers to "em-

143 After summarizing his central works, I will refer to Alfieri's entire body of lawyering scholarship (cited in note 27 supra) to assess the applicability of the critiques by Handler, Simon, and Blasi. See infra note 170.

144 Alfieri, Antinomies of Poverty Law, supra note 27. An antinomy is an opposition or contradiction between one law, principle, or rule and another. In philosophy, it is a contradiction between two statements, each apparently obtained by correct reasoning. Webster's Encyclopedic Unabridged Dictionary of the English Language 66 (1989).

145 Alfieri, Antinomies of Poverty Law, supra note 27, at 661, 711. With this formulation, Alfieri accepts the "raised bar" that Blasi sets for collaborative lawyering. See supra text
power" lower-income clients by "activizing" their class consciousness and encouraging their political organization and mobilization.\textsuperscript{146}

Alfieri views the prevailing practice of poverty law — and its two central endeavors of direct service representation and law reform litigation — as incapable of success. While echoing Gary Bellow's earlier critique of poverty law offices' delivery of routinized, minimal services to large numbers of individual clients,\textsuperscript{147} Alfieri does not limit his critique to the level of implementation. Instead he blames two erroneous "myths," which, in his view, form a partially unspoken ideology of poverty law practice.\textsuperscript{148} The first is the "myth of legal efficacy," the notion that the law and legal institutions "can be marshaled into an effective instrument to alleviate poverty."\textsuperscript{149} The second he labels "the myth of inherent indigent isolation and passivity," by which he means the pervasive belief in "the inability of the poor to interconnect and exercise shared control over their own lives and communities."\textsuperscript{150} This latter myth is rooted in the "culture of poverty" notions of Oscar Lewis and Daniel Patrick Moynihan.\textsuperscript{151} Although presumably all poverty lawyers would repudiate such a portrayal of lower-income people, Alfieri argues that these lawyers' conduct with their clients suggests that implicitly, if unconsciously, they actually do believe the portrayal.

Alfieri views both myths as erroneous because they are culturally and historically incorrect. Legal efficacy is a myth because meaningful change is only effected and preserved by organized masses.\textsuperscript{152} Indi-
gent isolation and passivity is a myth because the poor are in fact "historical actors waging a day-to-day class struggle to assert control over their lives and communities." The central contradiction (or "antinomy") of poverty law practice consequently is that

by relying on direct service and law reform litigation, poverty lawyers negate the poor as an historical class engaged in political struggle, thereby decontextualizing, atomizing, and depoliticizing that struggle. Moreover, . . . poverty lawyers reproduce isolation and passivity in the attorney/client relationship, thus inhibiting the potential for political struggle. 

Ironically, Alfieri's critique of poverty law practice in *The Antinomies* is quite similar to Handler's critique of postmodern theory: Both assail what Alfieri labels "dependent-individualization" and both urge greater emphasis on collective identity and struggle.

Alfieri implores poverty lawyers to apply "critical consciousness," engage in dialogue with clients and client communities, strive to activate class consciousness, and facilitate "the organization and mobilization of grass roots client alliances in local, state, and national communities."

Alfieri's major work on this subject is *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative,* in which he amplifies his original analysis of poverty lawyers' "discourse, knowledge, and method" in *The Antinomies* and elaborates upon his "reconstructive paradigm." Importing the language and concerns of literary criticism, he focuses on "interpretive practices" in the attorney-client relation. He characterizes the central object of his and others' work as

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*The New Public Interest Lawyers,* 79 YALE L.J. 1069, 1077 (1970) (quoting Bellow)).


154 Id. at 665.

155 Id. at 684.

156 Alfieri defines critical consciousness as "seeing the poor as a class, perceiving class as an active human relationship involving everyday experience in society, and understanding class consciousness in cultural terms of domination and liberation." Id at 670.

157 Id. at 665. At this juncture, Alfieri is not as hostile to law reform litigation as one might expect. He writes that the "insufficiency of the law reform tradition as a method of empowerment does not require its outright rejection." Id. at 689. He acknowledges that law reform may fail to raise client and community consciousness, may vest decision-making power in lawyers, stifle the development of client or community leaders, and shift disputes to judicial rather than executive or legislative branches. Id. Nonetheless, he concludes: "law reform should not be viewed as antithetical to empowerment. Carefully tailored, law reform may activate political consciousness and precipitate the growth of both client and community advocacy organizations." Id. It is not clear whether Alfieri has subsequently abandoned this position. In his 1994 review of López's book, he wrote that he is "no longer confident" of the "strong belief in rights-based empowerment" he expressed in *The Antinomies.* See Alfieri, *Practicing Community,* supra note 27, at 1751 n.10.


159 Id. at 2119.
“constructing an alternative vision of the client as a self-empowering subject” rather than a dependent object who is “acted upon but incapable of acting.”

At the core of his analysis is the notion that

[w]ithin . . . [the context of the lawyer-client relation in an impoverished urban community], lawyer and client wage an interpretive struggle. The struggle is violent. Voices are silenced and stories are forgotten. The voices silenced are the voices of clients. The stories forgotten are the stories of client self-empowerment.

In place of the “self-empowering” stories that Alfieri believes clients always tell, poverty lawyers tell stories that describe clients “in the language of dependency and powerlessness” and present them as “dependent and inferior object[s].” Poverty lawyers do so not out of conscious malevolence, but out of a tradition that orders, and makes manageable, the extraordinarily high caseload of clients served. Central to this tradition is a “pre-understanding,” a predisposition to pigeonhole or interpret clients’ stories in a stock way that frames clients in the dependent role of downtrodden victim in need of rescue by poverty lawyers (and ultimately by judicial or administrative decision-makers).

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160 Id. at 2120, 2128.
161 Id. at 2118 (footnote omitted).
162 Alfieri illustrates his points by referring to the case of “Mrs. Celeste,” a client whom he represented, again as part of a litigation team, in a class action lawsuit challenging food stamp regulations. He contrasts the primary story he and the litigation team told with Mrs. Celeste’s testimony at an administrative hearing and a deposition. His subsequent review of her transcribed testimony led him to recognize four “different interlocking narrative strands” which he characterizes as “self-empowering narratives” of dignity, caring, community, and rights — none of which were incorporated into the litigation. Id. at 2114-18, 2142-45. Alfieri writes that the “lessons of this text are singular to Mrs. Celeste and should not be extrapolated to construct an essentialist vision of the voices and narratives of impoverished clients.” Id. at 2122 (footnote omitted). Yet Alfieri does precisely what he instructs readers not to do: He posits that clients always tell these self-empowering narratives, if only poverty lawyers could hear them. Id. at 2119 (“My thesis is that situated outside lawyer-told client story is an alternative client story composed of multiple narratives, each speaking in a different voice of the client. [These] . . . narratives imbue client story with normative meanings associated with values such as self-hood, family, community, love, and work.”).
163 Id. at 2118, 2121.
164 Id. at 2118.
165 Id. at 2123-25.
166 Alfieri, Reconstructive Poverty Law Practice, supra note 27, at 2123-25. Alfieri outlines the steps of this process as follows:

The poverty lawyer’s act of naming, of portraying the client as dependent, commences at triage. Naming protects the lawyer’s interpretive authority to arrogate the client’s inherent power to define and speak for herself. In the first movement of triage, the lawyer translates the client’s oblique narratives into the lawyer’s own narrative. This translation is not an act of incorporation, but an act of silencing. In the second movement of triage, the lawyer assigns categories of value to the translated
In Alfieri’s view, this pre-understanding constitutes “interpretive violence.” Three lawyer practices drive it, he says. These are: marginalization, which deduces client inferiority from pre-understood dependency; subordination, which “entrenches inferiority in a lawyer-client hierarchy of subject-object relations;” and discipline, which enforces hierarchy and silences the expression of client narratives. Alfieri argues:

Interpretive violence is essential to the dominant-dependent order of the lawyer-client relation. Without violence, the order of discourse — who speaks and when — and the order of relations — who stands above and below in decisionmaking — fall subject to client contest and reorganization. Violence safeguards the prevailing order by endowing lawyer narrative with authoritative force.

With the ambiguity and pessimism that characterize most of his work after The Antinomies, Alfieri enumerates four interrelated “reconstructive” practices that can “counter,” but not “overturn,” the interpretively violent traditions of poverty law practice, which “are too settled to be completely dislodged.” The first is “suspicion,”

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client story. These categories objectify the client in a dependent role. In the third movement of triage, the lawyer calculates what client performance (for example, “victim,” “incompetent,” or “enfeebled”) will be most efficacious for his telling of the client’s story.

*Id.* at 2124 (footnotes omitted).

167 Alfieri explains that marginalization “is discernible in legal aid offices when client speech is restricted to a sequence of short answers, in administrative hearings when client testimony is narrowly prescribed, and in courthouses where the client is excluded from conferences, arguments, and negotiations.” *Id.* at 2127.

168 *Id.* at 2125.

169 *Id.* at 2126. In response to the interpretively violent manifestations of pre-understanding, clients “manufacture[] dependence as a mask to secure legal services,” but poverty lawyers, because of their power in the attorney-client relationship, fail to recognize that the passivity and dependence they detect is “the illusion of dependence projected by” their pre-understanding and “reflected back by the client.” *Id.* at 2125.


171 Alfieri, The Antinomies of Poverty Law, supra note 27, at 2131. He explains his limited aspirations are a function of his presuppositions that lawyers are only able “to seize a limited autonomy from the pre-understanding and violence of interpretive practices” and “to extract partial understanding of the client’s world from the voices of client narratives.” *Id.* (footnotes omitted). After suggesting the impossibility of overturning the traditional practice he so pejoratively describes, he shifts to argue that doing so is unnecessary and undesirable: “The ongoing project to expose the ideological underpinnings of poverty law practice does not require absolute renunciation of its traditions; reconstruction rather than
which invites lawyers to skeptically investigate the presumptive dependency of their clients.\textsuperscript{172} The second is “metaphor,” which pushes lawyers to “decipher the ‘doubleness’” of clients’ stories, to “search for a deeper, normative meaning” that reveals clients to be self-empowering subjects.\textsuperscript{173} The third is “collaboration,” which “commands lawyer-client co-equal participation in the telling of client story” and requires lawyers to “[m]ake[ ] room for client voice in the public telling” of client stories.\textsuperscript{174} His final suggested reconstructive practice is “redescription,” in which lawyers “retell[ ] client story” by “discredit[ing] traditional images of client dependency [and] by crediting client narratives of daily struggle.”\textsuperscript{175}

The foregoing should suffice for these purposes as a general summary of Alfieri’s theses. Let us now turn to assessing the applicability of Handler, Simon, and Blasi’s critiques to Alfieri’s work.

\textit{Intelligibility}. Blasi’s first critique, that collaborative lawyering theorists are unintelligible to all but the truly “initiated,” is precisely on target with regard to Alfieri. Blasi says that part of the challenge to understanding stems from “the inaccessibility of the work of those masters of postmodern thought” from whom collaborative theorists draw.\textsuperscript{176} Alfieri is certainly unmatched in his enthusiasm for citing those he considers “critical theorists”\textsuperscript{177} and those citations (and theorists) frequently mystify even highly educated, well-read legal academics — let alone practitioners and law students.\textsuperscript{178} Yet the problem is

\begin{itemize}
\item \textsuperscript{172} \textit{Id.} at 2134-37.
\item \textsuperscript{173} \textit{Id.} at 2138-39.
\item \textsuperscript{174} \textit{Id.} at 2140-41.
\item \textsuperscript{175} \textit{Id.} at 2141-42.
\item \textsuperscript{176} Blasi, \textit{supra} note 34, at 1074 n.29.
\item \textsuperscript{177} In \textit{The Antinomies of Poverty Law}, \textit{supra} note 27, Alfieri extensively cites Brazilian educator Paolo Freire, social theorists Michel Foucault and Roberto Unger, German sociologist Jürgen Habermas, British cultural theorist Raymond Williams, and theologian Martin Buber. In \textit{Reconstructive Poverty Law Practice}, \textit{supra} note 27, he dramatically decreases his outside citations, primarily citing to hermeneuticians (\textit{i.e.}, scholars of interpretation) Paul Ricouer and Hans-Georg Gadamer. Alfieri uses \textit{Disabled Clients, Disabling Lawyers}, \textit{supra} note 27, as a vehicle to “deploy a theoretical structure extracted from” Roberto Unger’s three-volume treatise \textit{Politics: A Work in Constructive Social Theory} (1987) (including \textit{Social Theory: Its Situation and Its Task} (1987), \textit{False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy} (1987), and \textit{Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success} (1987)).
\item \textsuperscript{178} Two examples demonstrate the point. Alfieri uses Habermas’ term “dialogic moments” and then quotes Habermas’ definition of “these moments as points of ‘self-supporting higher-level intersubjectivities.’” Alfieri, \textit{Antinomies of Poverty Law Practice}, \textit{supra} note 27, at 698 n.245, quoting Jürgen Habermas, \textit{The Philosophical Discourse of Modernity} 364 (1987). After using “pre-understanding,” he refers to Paul Ricoeur’s definition of “an ontological structure mediating interpretive knowledge and method.” Alfieri, \textit{Reconstructive Poverty Law Practice}, \textit{supra} note 27, at 2123 n.57 (citing Paul Ricoeur,
not limited to his sources. It is unfortunately endemic to his prose style.

Alfieri’s prose is ponderous and often impenetrable, in large part because he insists on extensively using arcane jargon from other branches of the academic profession. Vast passages of his work are inaccessible to all but the tiniest circle of social science academics. Rather than integrating insights from other disciplines to clarify his points, Alfieri’s jargon tends to obfuscate and mystify. It leads many readers to view his references as merely testimonials to the breadth of the author’s reading. His use of awkward nouns (e.g., “emplacement,” “thematic,” and “intersubjectivity”) and verbs (e.g., “problematicize”), his use of common words in bizarre ways (e.g., “play”), his short-hand references, efforts to classify “modernist” and “postmodernist” thoughts and thinkers, treatment of “critical” or postmodern ideas as self-evidently irrefutable certainties, and his hyperbole are formidable hurdles for all but the most patient of

Hermeneutics and the Human Sciences 81, 89-90, 110, 178, 243 (1981)).

179 Alfieri, Reconstructive Poverty Law Practice, supra note 27, at 2145.
180 Alfieri, Stances, supra note 27, at 1234.
181 Id.
182 Alfieri, Impoverished Practices, supra note 27, at 2570.
183 In Reconstructive Poverty Law Practice, supra note 27, Alfieri discusses “play” as a technique to facilitate the reconstructive practice of “suspicion.” Influenced by anthropologist Clifford Geertz’s use of the term, Alfieri defines play as “the deliberate act of shifting the dominant-dependent hierarchy of the lawyer-client relation” and urges lawyers to “playfully” shift hierarchy and “playfully ascribe” to the client the properties of power such as independence, competence, and self-determination.” Alfieri, Reconstructive Poverty Law Practice, supra note 27, at 2136-37 (citing Clifford Geertz, Deep Play: Notes on the Balinese Cockfight, in The Interpretation of Cultures 412 (1973)). Calling this practice “play” is bizarre and off-putting. The term’s connotation as something temporary and make-believe — a pretended inversion of authority in which the actors know that the truly dominant party can reclaim the dominant role whenever she or he wants — seems to undercut the genuineness of the belief that lower-income people have valuable knowledge and skills. If one must pretend, or “playfully” act as if, clients are independent, competent, self-determining individuals, it seems that one does not really believe they are.

184 For example: “Theory may commit materialist errors by blundering into structuralist hypotheses about discourse and history. Conversely, theory may inflict idealist errors by mistaking material constraint or necessity for individual choice and group consensus.” Alfieri, Impoverished Practices, supra note 27, at 2570.
185 See Alfieri, Stances, supra note 27 (classifying Clark Cunningham, James Boyd White, and Naomi Cahn as modernist and Lucie White, William Felstiner, Austin Sarat, Richard Delgado, and Jean Stefancic as postmodernist); Alfieri, Impoverished Practices, supra note 27.
186 For example: “It is folly, however, for the poverty lawyer to mount claims of neutral practice in the midst of postmodern criticism.” Alfieri, Reconstructive Poverty Law Practice, supra note 27, at 2121.
187 In addition to characterizing poverty lawyers' treatment of their clients as “violent,” Alfieri writes, for example, that the cost of vigorous and well-intentioned advocacy “is paid for by the lawyer’s purchase of the client's story, and with it, her voice and narrative. This is the historical price of poverty law, the image of the unspeaking client. The legacy of
readers.

There is, of course, a glaring irony in the radical discontinuity between Alfieri’s content and his style. He criticizes professional domination of clients, yet his critique is itself mired in aloof, inaccessible, professional language. By writing as he does, he effectively excludes clients, practitioners, and students from his audience. He gives the few of these who attempt to read his work little choice but to scratch our heads and to retreat in perplexed silence or in irritation.

**Stance Toward Practitioners.** Blasi’s second criticism, that collaborative lawyering theory is too harshly critical of legal services practitioners and adopts precisely the stance toward other practitioners that it accuses those practitioners of taking toward their clients, is also true of Alfieri’s published work. Alfieri writes about poverty lawyers as a monolith: All of them act the same way, uniformly excluding their clients and invariably depicting them as dependent; and all of them are equally guilty of the charges he levels against “traditional practice.” If “reification” — a charge he routinely levels at poverty lawyers — is taking a complex and variable phenomenon and treating it like an immutable thing, Alfieri seems to do precisely that when he discusses “traditional poverty law practice.” By mischaracterizing a common or even pervasive tendency as a universal practice, Alfieri diminishes the credibility of his critique. He needlessly puts readers who are practitioners, or who empathize with practitioners, on the defensive. In so doing, he adopts a “monologic” rather than “dialogic” stance: His writing talks at or about poverty lawyers, but it comes across as uninterested in initiating an exchange of equals with them.

The only aspect of Blasi’s second critique that fails to apply to Alfieri’s work is Blasi’s claim that the criticism “rarely falls on the mirror: it is about the practice of others.” Alfieri usually illustrates his points by analyzing what he perceives as failings in his own representation of particular clients. The problem is his predilection for pro-

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188 Blasi, *supra* note 34, at 1088-89.

189 For example, Alfieri writes: “Read together, lawyer-chronicled stories are strikingly similar in their characterization of the client. Whether the narrative portrays the client as impoverished, female, or of color, the description invariably constructs an image of the client as dependent and isolated.” Alfieri, *Speaking Out of Turn*, *supra* note 27, at 629 (emphasis added).

190 If instead Alfieri took the stance that many — but not necessarily all — lawyer-told stories characterize clients as dependent and isolated, he would give practitioners reading his work a less charged, potentially face-saving opportunity to consider what kinds of stories they tell. When not all are accused of misconduct, each reader has the opportunity to silently reflect on which group she or he falls into. When all are accused, readers know — rather than ponder whether — they are deemed guilty; and thus the most common response is denial, rather than introspective questioning.

191 See Blasi, *supra* note 34, at 1088.
jecting his former practice onto the entire universe of poverty lawyers. When he looks at them, all he can see is himself (or perhaps what he now views as an unenlightened, former self). 192

Locus of Attention. The third critique (a synthesis of points made by Handler, Simon, and Blasi) is that collaborative theorists devote excessive attention to stories of one-on-one relationships between a single client and a single attorney (what Blasi calls "the individual attorney-client microworld") and place excessive emphasis on "interpretive violence" and "lawyer domination." This criticism has substantial merit regarding Alfieri’s work. He certainly is the primary decler of "interpretive violence" and his turn in later articles to detailed analysis of this violence leads him to lose the forest for the trees. Nevertheless, the critique does not have quite as much merit as might first appear.

Alfieri illustrates many of his articles with accounts of his representation of individuals. Although the clients described are individuals or families, all but one of their legal cases were either class actions or law reform test cases intended to change institutional practices. 193

192 This projection of his practice, tactics, techniques, and skills onto all poverty law practitioners is somewhat frightening, given the one extended glimpse he provides into his interactions with his clients. In Reconstructive Poverty Law Practice, Alfieri recreates his initial interview with "Mrs. Celeste." Alfieri, Reconstructive Poverty Law Practice, supra note 27, at 2111-13. The interview he depicts is an extreme example of what most clinicians would characterize unfavorably as lawyer-centered (rather than client-centered) interviewing.

Alfieri appropriately opens the interview with two paragraphs of preparatory explanation of the intake procedures of the office. Less auspiciously, however, he concludes each paragraph with the question, "Do you understand?" Depending on how this question is delivered, it can come across as condescending, if the client feels the lawyer is doubting her intelligence or attentiveness. Throughout the rest of the interview, Alfieri asks this question three more times. He follows his preparatory explanation with: "The first thing I'd like to do is check the information on your case card to make sure it is accurate. That will save us time later." Id. at 2113. Alfieri then proceeds to ask more than forty narrow, closed questions in a row. These questions limit Mrs. Celeste to giving very brief answers on topics established by her lawyer; nowhere does he ask the sorts of open-ended questions that would allow his client to tell her story in a fashion that makes sense to her. Never does he inquire into her goals or objectives. Nor does he give her an opportunity to give a chronological account of what has happened. In all of these regards, the interview violates many of the principles that clinicians teach students about client-centered interviewing. See generally Binder, Bergman, & Price, supra note 41, at 2-256.

To his credit, Alfieri recognizes that his questioning prevented Mrs. Celeste from effectively conveying her story and marginalized her role. The problem, however, is his assumption that all lawyers interact with lower-income clients in this fashion.

193 The Williams case sought a court order requiring the promulgation of written rules and regulations to formalize the discretionary practices of certification of eligibility for the WIC program. Alfieri, Antinomies of Poverty Law, supra note 27. Mrs. Celeste was a class representative in a class action challenging food stamp regulations and their treatment of foster families. Alfieri, Reconstructive Poverty Law Practice, supra note 27. Mrs. Hill was a class representative in a class action challenging the federal Old-Age, Survivors, and Disa-
Thus Simon is inaccurate when he calls the "scale" of practice described by Alfieri "small." And the litigation strategies Alfieri recounts are the exact types of lawyering Blasi implicitly endorses as best calculated to alter institutional and structural arrangements.

Alfieri does focus much of his attention on "interpretive violence." This label rings as hyperbolic excess to many readers. It also invites the kind of dismissive spoofing that Blasi accords it. Most significantly, it obscures two of Alfieri's most significant points, for the label draws attention to itself rather than to the impact of the practices it criticizes.

Although he obviously means to, Alfieri never clearly makes the point that how others depict us is central to who we are (i.e., to our personhood), our well-being, and our interactions and level of engagement with others. The significance of depiction is not limited to lawyer-client interactions. Consider, for example, a closely contested faculty vote on tenure, in which the tenure candidate's chief advocates decide they can win the support of key undecided voters by depicting the candidate as "genial, well-meaning, and likely to have a lot of difficulty finding another job if denied tenure here" or "not clearly the worst candidate we have ever awarded tenure" or "not much of a scholar or teacher, but he may have some connections to potential donors" or "obviously not up to our level, but we probably could not withstand a court challenge that we failed to give him sufficient notice of the pedestrian quality of his scholarship." Even if these arguments were successful in garnering the necessary votes to receive tenure, most of us would probably agree that these depictions would produce harms other than just the blows to the tenure candidate's self-esteem. They impinge upon his reputation and affect the way his colleagues relate to him. Even if we would not treat the statements as defamatory (they are just opinions), nor make them otherwise actionable in a court of law, nor characterize them as "violent," we would not be surprised if these statements led the candidate to resent both the faculty who opposed him and the "supporters" who resorted to such depictions. We likely would not be surprised if the candidate withdrew from both adversaries and supporters alike. He might well begin to doubt his own talents and ability to assess those talents, and, as a result, withdraw from other pursuits as well.

bility Insurance Program's treatment of widows. Alfieri, Disabled Clients, Disabling Lawyers, supra note 27. Only Josephine V. was an individual client seeking relief exclusively for herself and her family. Alfieri, Speaking Out of Turn, supra note 27.

194 See supra note 92 and accompanying text.

195 See supra notes 113, 141 and accompanying text.

196 Blasi's "postmodern theory of silenced narrative," quoted supra at note 116, strikes me as fundamentally a parody of Alfieri.
Alfieri is making an analogous argument about lower-income people and the impact of unflattering depictions on their sense of self and level of engagement. Unfortunately, he does not make these points clearly. His focus on "interpretive violence" obscures his point that attorneys' depictions of clients and attorney-client interactions not only fail to foster, but actually impair, clients' "willingness and ability to organize and mobilize politically." Lawyers do not merely hurt clients' feelings; they deter clients' conduct on behalf of themselves and other lower-income people. Treated and depicted as dependent, isolated, and unable to help themselves or others, many lower-income clients fulfill the prophecy, adopting, and even internalizing, their assigned role. Alfieri makes this point, but submerges it in pages of difficult prose. The point is crucial, however, for it connects his analysis with real, concrete consequences. It suggests that despite the intellectual journey through the academic realms of narrative, hermeneutics, "interpretive violence," and the modern/postmodern split, Alfieri has not abandoned the core political truth he expressed in The Antinomies: that "the best hope for combating poverty" lies with grassroots organization and mobilization in local, state, and national political alliances.

Utility in Challenging Institutional and Structural Power. The final criticism (again shared by Handler, Simon, and Blasi) is that collaborative lawyering theory is unhelpful to efforts to change the larger institutional and structural relations in which clients live. Again, this charge is largely true of Alfieri's written work, although for several additional reasons besides those identified by Handler, Simon, and Blasi.

The critics' allegations of ineffectiveness flow from what they view as the failure to consider structural and institutional issues, explanations, and solutions. The critics are largely correct that Alfieri generally fails to address these issues. After The Antinomies, Alfieri rarely focuses attention on larger social, economic, or political forces outside of the lawyer-client relationship.

At least as fundamentally, however, Alfieri's scholarship lacks in-depth appreciation of how we persuade others. He routinely characterizes persuasion as a process of storytelling, but he does not focus on how to tell persuasive stories. Instead, he has a simplistic and inaccurate view that there are invariably two — and only two — independent and immutable stories that can be told in any situation: the client's story and the lawyer's. He believes that lawyers' stories of dependent

197 Alfieri, Disabled Clients, Disabling Lawyers, supra note 27, at 834.
198 This is Blasi's standard of measurement. See supra note 117 and accompanying text.
199 Alfieri, Antinomies of Poverty Law Practice, supra note 27, at 665.
and isolated client-victims inevitably "displace" clients' stories of independent, self-activating, community-minded actors. And he believes that clients' stories should always prevail — *i.e.*, they should always be told. He is so focused on depiction — and what it says about the depicted and the depictors — that he devotes scant attention to the audiences at whom we aim these depictions. Thus, he notes but does not effectively address the likelihood that decision-makers will be unmoved by clients' self-empowering stories.200

These views are inaccurate and unhelpful for a variety of reasons. As Binny Miller has observed, Alfieri's metaphor of "narrative contest" — his vision of lawyer and client stories as always diametrically opposed and at war — "misses the mark in several important respects."201 First, lawyers do not *always* tell stories that characterize their clients as helpless, dependent victims. Although *far too often* lawyers characterize their clients as passive victims and although this tendency is a significant problem that needs to be confronted and eliminated, characterizing this practice as universal is an unhelpful overstatement.202 Often, lawyers tell stories that depict their clients as active, responsible, and respectable actors and contrast their clients' conduct with that of their adversaries.203

Second, not all clients tell empowering stories that favorably de-

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200 *See, e.g.*, id. at 833-34. Alfieri perceives a dividing line between modernists and postmodernists: Modernists naively focus instrumentally on how to improve their craft and thus focus on "pragmatic" efficacy, whereas postmodernists truly appreciate "the negation of meaning." He writes:

The good modernist lawyer employs skilled craftsmanship, pragmatic reasoning, and empathetic understanding to engage the multiple texts — client, doctrinal, and institutional — of the sociolegal world. The activity of engaging those texts in advocacy involves a process of translation. Because that process is distorting, certain textual meanings will be lost. This loss is the tragedy of modernist lawyering. It is a tragedy, however, experienced as imperfection, rather than as the negation of meaning. Alfieri, *Stances, supra* at note 27, at 1234. Postmodernists, apparently by contrast, "recognize this difficulty as a given, yet strive to find room to liberate the client-subject and to permit lawyer/client intersubjectivity in order to reconstruct dominant legal discourses." *Id.* The difference between these two approaches eludes me.

201 Miller, *supra* note 61, at 525.

202 In addition to lawyers' "pre-understanding" of lower-income people, law school education itself seems to play a role in fostering this tendency. Patricia Williams, for example, has noted how law school teaches students "to clothe the victims of excessive power in utter, bereft, naïve; to cast them as defenseless supplicants raising — pleading — defenses of duress, undue influence and fraud." *See* Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 419-20 (1987).

203 To cite just a single example from a prominent law review article, the "estoppel story" in Mrs. G's case portrayed her as responsible and respectable (proactively reporting and inquiring into the consequences of receiving a compensation check from an insurance company) and contrasted her conduct with the sloppily and misleading conduct of her caseworker at the department of social services. *See* White, *Notes on the Hearing of Mrs. G.*, *supra* note 26, at 27-28.
pict themselves as independent and community-minded. Like almost everyone, lower-income people sometimes see themselves (and thus tell stories that portray themselves) in ways that comport with pejorative stereotypes about them, their actions, or their failures to act.\textsuperscript{204} Many others tell stories in which they accept and repeat such stereotypes, but seek to differentiate themselves as aberrational exceptions — different from other members of the group.\textsuperscript{205}

Third, it fundamentally distorts the world to assume a person has only one story to tell about a situation. Reality is far richer. We often have many ways of characterizing an experience and our role in it. Depending on our audience, purpose, frame of mind, and other factors, we may highlight or add certain elements, downplay or eliminate others, and often suggest dramatically different interpretations of characters and events.

Fourth, the world of narrative is not, as Alfieri implicitly asserts, Archimedian; stories do not completely “displace” each other, the way an object displaces water in a tub. Rather, a narrative changes incrementally as we tell it to various audiences; we process audience reactions and change our story as we encounter and react to competing accounts of the same events. We incorporate some elements of those alternative stories, alter other elements of the original version of our story, and reject some competing elements. Once we abandon the simplistic notion that clients’ stories are all good and lawyers’ all bad, we can recognize that, rather than necessarily displacing or obliterating clients’ stories, sensitive lawyers can help to refine and improve those stories.

Such refinement and enhancement of stories by lawyers and clients who truly respect each others’ abilities and who work together to

\textsuperscript{204} Alfieri even recognizes this point in \textit{The Antinomies}, when he refers to Paolo Freire’s concept of “self-deprecation.” He quotes Freire at length on this point:

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

Alfieri, \textit{The Antinomies of Poverty Law}, supra note 27, at 675 (quoting \textsc{Paolo Freire}, \textit{Pedagogy of the Oppressed} 49 (1968)).

\textsuperscript{205} Austin Sarat, for example, has written about “the respectable poor,” who define themselves through their stark contrast from those they consider “the welfare crowd.” Sarat, supra note 84, at 348-49. \textit{See also} Sylvia A. Law, \textit{Ending Welfare As We Know It}, 49 \textsc{Stan. L. Rev.} 417, 493 (1997) (“most welfare recipients themselves subscribe to common stereotypes of welfare recipients . . . . Thus reporters can easily find welfare participants who will stigmatize others and often themselves, fueling stereotypes further . . . .”) (citing Ted George Goertz & John Hart, \textit{New Jersey’s $64 Question: Legislative Entrepreneurship and the Family Cap}, in \textit{The Politics of Welfare Reform} (Donald F. Norris & Lyke Thompson eds., 1995)).
frame stories is perhaps the very core activity of collaborative lawyering, as I understand the concept. Alfieri, however, is fundamentally skeptical about the possibility of such positive interactions between poverty lawyers and lower-income clients.206

Indeed, Alfieri’s skepticism is so great that he may not truly belong in the same category as scholars who are more optimistic about the possibility of meaningful collaboration between lawyers and lower-income clients. For although Alfieri urges “collaboration,” he uses the term in a limited sense.207 For him, a lawyer collaborates with a client when she or he simply repeats the client’s story or makes it possible for the client to tell that story directly.

I view this mimetic representation — this automatic parroting of clients’ initial versions of their stories — as an abdication of responsibility by the lawyer.208 We owe clients the benefits not only of our empathy but also our detachment and specialized knowledge of persuasion, the law, and legal and other institutions. We owe it to clients to engage with them and to interact authentically with them, not simply to defer silently to them.

In addition to these fundamental limitations in Alfieri’s understanding of how to persuade, he is silent on the issue of whom to persuade. Despite his expressed interest in political mobilization, he routinely assumes that whichever story emerges victorious from the attorney-client struggle will be told in either a judicial or an administrative forum. Each of his four “reconstructive practices” centers on what stories get told and whether lawyers or clients tell them.209 He says little or nothing about where those stories should be told. Nor does he pay attention after his initial work to how individual clients and their stories might be connected to other efforts to change the status quo.

B. Lucie White’s Search for Settings in Which Clients Can Speak and Act Collaboratively Against Their Own Oppression

Intelligibility. In contrast with Alfieri’s work, Professor Lucie White’s scholarship is as readable as most contemporary legal academic writing.210 In a series of works from the late 1980’s through the

206 Alfieri deems such interactions “aspirational” and distinguishes his views, writing: “I have little faith in the ability of progressive lawyers to redeem community in their individual and collective meetings with subordinated clients.” Alfieri, Practicing Community, supra note 27, at 1750.

207 See supra note 174 and accompanying text.

208 López agrees. See López, REBELLIOUS LAWYERING, supra note 25, at 173; López, Lay Lawyer, supra note 25, at 12.

209 See supra notes 172-75 and accompanying text.

210 Consequently, I will not summarize White’s work at length before turning to the
early 1990's, White reflects on collaborations she describes between lawyers, community organizers, and lower-income clients. She also comments generally on legal advocacy, scholarship, theories of power, and the consequences of advocates' depictions of lower-income people.

While she refers to many of the same postmodern theorists as Alfieri, White does a far better job of explicating their ideas and using them to illuminate, rather than simply to adorn or lend outside academic authority to, her ideas. Although Blasi quotes a highly abstract and lyrically metaphoric passage from White's work that he implies is unintelligible to the "uninitiated," the passage is not typical of her prose as a whole. White generally makes her points straightforwardly applicable to it.

211 In To Learn and Teach, supra note 26, White recounts collaborations between an attorney, a community organizer, and the Black residents of a South African village who were facing forced removal under apartheid. In Mobilization on the Margins of the Lawsuit, supra note 26, she describes collaborations between an attorney and a community organizer to facilitate "speakouts" against Social Security disability cutoffs, as well as between a theater artist and a group of homeless people. In Notes on the Hearing of Mrs. G., supra note 26, she recollects her attempted collaboration, as a legal services attorney, with an individual client to contest a reduction in income maintenance payments.

212 In Paradox of Lawyering for the Poor, supra note 26, White posits a fundamental inconsistency at the heart of advocacy by lawyers seeking justice for "the socially and politically disempowered." Id. at 861. By definition, advocacy entails an advocate speaking for a client; but speaking for oneself, "naming the world," is fundamental to personhood. Consequently, an advocate necessarily replays the drama of subordination by speaking for her client or constituency. Id.

213 In Paradox, Piece-Work, and Patience, supra note 26, White warns against "imperial," prescriptive scholarship. In Collaborative Lawyering in the Field?, supra note 26, she calls for careful study of grassroots organizations in local communities and of the ways lawyers can productively interact with them.

214 In Faces of Otherness, supra note 26, White discusses the strengths and weakness of Foucault's understanding of power. In To Learn and Teach, supra note 26, at 745-68, she describes and applies English philosopher Steven Lukes' three-dimensional model of power.

215 In Representing the "Real Deal," supra note 26, White examines the development of advocacy around "homelessness" in the 1980's, its policy impact, and the interplay of images used in that advocacy with cultural stereotypes of passive victims and the worthy and unworthy poor.

216 For example, when White uses the term "metatheory," she immediately defines it as "more simply, the images we use to frame our thinking about the social world." White, Faces of Otherness, supra note 26, at 1499.

217 Blasi actually quotes two different passages from The Faces of Otherness, in which White recollects her college education and contrasts the structuralist approaches of Noam Chomsky and Claude Levi-Strauss which were then in vogue with the post-structuralist ideas of Michel Foucault. Of Chomsky and Levi-Strauss, White writes: "Their intellectual maps were geometric and symmetrical, and covered the entire social world, as we then imagined it. Although there was a lot of movement within their paradigms, that movement resembled a military drill more than a dance." Id. at 1499-1500. After discussing the conventional view of power as "a thing that people have and wield over others, usually on the basis of their roles in stable institutions," White describes Foucault's theory of power:
forwardly, frequently returning to two central themes.

First, as an advocate of "empowerment," White urges lawyers for lower-income people to focus on creating, nurturing, and protecting settings in which clients can safely and comfortably speak their minds. Among the settings or "spaces" she describes are communal legal clinics in which participants can publicly discuss problems and potential solutions, public speakouts or demonstrations, Head Start programs, and public theater works. She implores advocates to listen to and engage with what lower-income people say and do in such "spaces." Extending her spatial metaphor, one could say that lawyers play such diverse roles as location scout or real estate agent (finding the space), remodeling contractor (improving or altering the space), security guard (protecting the space), or unobtrusive but helpful guest or neighbor (i.e., they are invited into the space or observe it from a slight distance).

Unlike Alfieri, White does not posit that all lower-income people are persuasive advocates on their own behalf. Indeed, she observes that social subordination may inculcate a lack of self-confidence like an evanescent fluid, it takes unpredictable shapes as it flows into the most subtle spaces in our interpersonal world. In this picture, we no longer see distinct "persons" controlling power's flow. Indeed, we cannot really separate the agents of the movement from the movement itself. Sometimes we may think we see more or less familiar human actors, who seem to guide the fluid, like children might make giant soap bubbles in a park. Yet at other moments, these familiar "persons" disappear, and we see only the patterns that linger as the bubbles dance.

Id. at 1501. Blasi asserts that these "poetic exemplars" are typical of postmodern theory's affinity for image and metaphor. Blasi, supra note 34, at 1083.

White states that empowerment is the goal of her lawyering. White, Paradox of Lawyering for the Poor, supra note 26, at 873. I prefer to avoid this term because of its ambiguity and its recent co-optation in the U.S. by right-leaning politicians. Embedded in its passive construction, there is a fundamental ambiguity in the term: Who is the subject? In one sense, it can mean people collectively empowering themselves; but it also can encompass a radically different notion of outsiders — perhaps well-meaning, perhaps condescendingly patronizing — empowering "the less fortunate." Often implicit in the latter formulation are notions of inferiority and deficiency on the part of those who need empowerment. For some, "disempowerment" is treated as an individual character flaw susceptible to something akin to a twelve-step, self-help program. In the 1980's and 1990's, at least in the U.S., those intending this second meaning have used the term so frequently as to have largely appropriated it. See Shah, supra note 29, at 233 (discussing Jack Kemp's use of "rhetoric of empowerment to advance his libertarian ideology of self-improvement in the guise of social change").

See White, To Learn and Teach, supra note 26, at 730-32, 745.

See White, Mobilization on the Margins of the Lawsuit, supra note 26, at 547-57.

See White, Faces of Otherness, supra note 26, at 1509-11; White, Collaborative Lawyering in the Field, supra note 26, at 164.

See White, Mobilization on the Margins of the Lawsuit, supra note 26, at 557-63.

Indeed, in her application of Lukes' conception of power, the self-image of the subordinated is the key, third "dimension" in which power operates. See White, To Learn and Teach, supra note 26, at 747-54, 760-66.
and engender communication patterns that lower-income people’s “superiors” often see as ineffective. Consequently, judicial and administrative settings are often inhospitable to lower-income people’s self-confident self-expression. White therefore urges lawyers to seek safe, “parallel” arenas in which lower-income people, both individually and especially collectively, can speak and act against their oppression. It is in such settings, where advocates and allies value and respect lower-income people, that real collaboration can occur.

In her later works, White sounds a second, recurring theme. Applying a central tenet of postmodernism, she urges advocates to remember that general concepts, even those we hold most dear, never completely capture a situation. Consequently, we should apply our theories tentatively and humbly, avoiding the strident creation of new dogmas and the labeling of new heretics. Unlike Alfieri, she deploys her postmodern insight not as a deconstructive weapon against the ideas or practices of others, but as a cautionary check against complacently becoming too enamored with her own ideas and those of her fellow collaborative theorists. She invites, and sometimes forces, readers to draw their own conclusions and to test those conclusions or hypotheses actively in new contexts.

Stance Toward Practitioners. Blasi’s second critique, that collaborative lawyering theorists are too harshly critical of legal services attorneys and adopt the same domineering stance toward these practitioners that they accuse these lawyers of taking toward clients, is not true of White’s work as a whole. Indeed, as Blasi acknowledges, it is White who initially criticized Alfieri on these very grounds.

Unlike Alfieri, White does not exclusively portray forms or instances of lawyering that she views negatively. Two of her major works, To Learn and Teach: Lessons from Driefontein on Lawyering and Power and Mobilization on the Margins of the Lawsuit discuss positive examples of lawyers collaborating with clients and with

\[224\] White, Notes on the Hearing of Mrs. G., supra note 26, at 14-19. The term “superior” is mine, not White’s. See supra note 57.

\[225\] This search for extra-judicial arenas does not cause White to dismiss litigation strategies completely. She indicates that litigation can create remedies and entitlements that lower-income people use tactically. “[W]hen legal remedies respond to strategic needs that emerge as poor people mobilize themselves, those remedies can, indeed, make a difference.” White, Paradox, Piece-Work, and Patience, supra note 26, at 872.

\[226\] See White, The Faces of Otherness, supra note 26, at 1504-06.

\[227\] White warned Alfieri that his “imperial, imperative style of doing theory” risks “repeating within our own theories the very ‘interpretive violence’ that our theories seek to move us beyond.” White, Paradox, Piece-Work, and Patience, supra note 26, at 856 (emphasis in original) (quoted in Blasi, supra note 34, at 1089).

\[228\] White, To Learn and Teach, supra note 26.

\[229\] White, Mobilization on the Margins of the Lawsuit, supra note 26.
community organizers. When she does portray lawyering in a critical manner, as in perhaps her best known work, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, the lawyering she criticizes is most frequently her own. Blasi’s assertion that “the critical eye rarely falls on the mirror: it is about the practice of others” misses the mark when it comes to White. Even in *Representing the “Real Deal,”* in which she critically examines the consequences of advocates’ depictions of “the homeless,” White takes care to use the first person plural in referring to “poor people’s advocates” and she repeatedly notes the constraints under which advocates operate, their good intentions, and the reasonableness of the paths taken. In so doing, she steadfastly places herself on the same plane as the advocates she questions, presenting herself as susceptible to the very shortfalls she urges other advocates to avoid. Rather than castigating “them” from on high, White urges “us” to do our best to follow a path from which she and we will often stumble.

*Locus of Attention.* The third critique of exclusive attention to individualized stories of one-on-one attorney-client relationships and of excessive emphasis on “interpretive violence” and “lawyer domination” is inapposite to White’s work when read as a whole.

In contrast to the *Mrs. G.* article’s focus on White’s one-on-one relationship with her former client, *To Learn and Teach* is about the interactions of a lawyer and an organizer with a village of 20,000 people fighting forcible relocation. *Mobilization on the Margins of the Lawsuit* recounts client activities on the margins of two large class action litigation efforts, one challenging the Reagan Administration’s early attempts to reduce the Social Security disability rolls and the other the Los Angeles litigation on behalf of the homeless that Blasi describes in his work. In each of these settings, the relationships are between advocates and large numbers of similarly situated lower-income people, usually working collectively to name and alter their situations. Even in *Goldberg v. Kelly on the Paradox of Lawyering for the Poor,* where she sounds most like Alfieri in noting that advocates necessarily “replay[] the drama of subordination” by speaking for clients, White does not confine her attention to individual relationships between lawyers and clients. Instead she focuses on the role of the National Welfare Rights Organization in creating the polit-

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231 Blasi, *supra* note 34, at 1088.
233 *Id.* at 271-74, 291-92.
234 White, *Paradox of Lawyering for the Poor,* supra note 26, at 861.
...ual context in which the Goldberg v. Kelly litigation could succeed and should be interpreted.

Given their targets — apartheid, the Reagan administration’s national attack on Social Security disability rolls, homelessness, and the welfare bureaucracy’s power over “recipients” — these efforts cannot be accurately characterized as “small scale” practice. Indeed, these are precisely the sorts of collective efforts that Handler urges scholars and activists to pursue.

Nor is lawyer domination of clients the exclusive or central evil in any of these tales. White certainly discusses lawyer domination and advocates against it. Unlike Alfieri, however, she also directs our attention to the actions and interests of lower-income people’s adversaries and to the receptivity, indifference, and hostility of judicial and administrative decision-makers.

Most problematic for the critique is White’s Representing “The Real Deal,” which is a lengthy exploration of the structural explanations for homelessness, as well as an overview of the costs and benefits of the rhetoric employed by poor people’s advocates on behalf of the homeless. Among the structural explanations White details for the crisis in housing affordability are changes in construction methods that inflated newer housing prices and the value of older housing stock, decreasing real wages, destruction of low-rent housing stock, and dramatic cutbacks in income maintenance payments and housing subsidies for lower-income people.

But even when structural explanations are not the primary subject, White makes plain that good lawyering requires attention to structural and institutional dynamics. In To Learn and Teach, the organizer, lawyer, and villagers are always attending to — and shaping — opportunities created by media portrayals, domestic and international public opinion, the government’s rhetoric, and the competing interests of businesses with international ties. In Notes on the Hearing of Mrs. G., White, as lawyer and academic, focuses on the general U.S. cultural and political climate of assailing welfare fraud and stigmatizing recipients, the structure of the welfare bureaucracy, the pressures on various levels of that bureaucracy, the dynamics of race and class, and differences in national, state, and county governmental...


236 See Simon’s criticism, discussed supra note 92 and accompanying text.

237 See Handler’s criticism, discussed supra notes 85-89 and accompanying text.

238 White, Representing the “Real Deal,” supra note 26.

239 Id. at 279-91.

240 See White, To Learn and Teach, supra note 26, at 723-38.
interests.\textsuperscript{241}

To characterize White’s vision of lawyering as inattentive to issues outside the lawyer-client relationship and uninterested in structural explanations of clients’ predicaments is fundamentally to misread her work.

\textit{Utility in Challenging Institutional and Structural Power}. Handler, Simon, and Blasi’s final criticism is that collaborative lawyering theory is unhelpful to efforts to change the larger institutional and structural relations in which clients live. A corollary of the third criticism, the charge is that collaborative theorists devote insufficient attention to matters outside the attorney-client relationship and consequently fail to explore the only meaningful explanations and solutions for their clients’ predicaments: structural ones.

In applying this charge to White, the critics misinterpret her refusal to generalize explicitly and prescriptively \textit{from} the specific settings she discusses. They assume this reticence means she similarly refuses to bring generalizations \textit{to} those settings. As just discussed, however, White does bring generalized theories and structural analyses to settings, but she does so \textit{tentatively}, as hypotheses to test. I read this stance not as a complete repudiation of general theories, but rather as a view that general theories are not accurate in every situation, and that we must therefore test theories in each particular setting rather than assuming they will prove true in all contexts.

There is a symmetry between White’s vision of scholarship and her vision of lawyering. Both are collaborations between parties to draw meaning and fuel action. In these collaborations, there is no dominant teacher instructing pupils what to learn or do. All parties — clients and readers, as well as advocates and scholars — are assigned active, not passive, roles. All have work to do. Rather than attempting to tell readers how they should interpret a situation or what they will find, White invites and expects readers to engage actively in their own thoughts and reflections and to reach their own conclusions — with regard to the stories she tells as well as the applicability of general principles to specific contexts. Her refusal to generalize explicitly and prescriptively \textit{from} the examples she describes is not so much a rejection of broader, structural explanations for phenomena as it is an invitation and exhortation to readers to engage in their own thought and action.

Stripped of the assumption that White ignores structural explanations, the fourth criticism boils down to the argument that lower-income clients acting collaboratively will fail to alter the larger

\textsuperscript{241} See White, \textit{Notes on the Hearing of Mrs. G}, supra note 26, at 32-52.
structural and institutional arrangements in which they live. The argument consequently implicates larger visions of social change: what sparks such change and what thwarts it. Some have inferred from this criticism the charge that collaborative theorists lack an underlying theory of social change.242

Although White may not have distilled her vision of social change into an axiomatic formulation, one need not make great inferential leaps to surmise the broad contours. Essentially, the vision is that the most effective agents of positive social change are the subordinated themselves, when they are engaged to come together to analyze their situation, educate themselves, and act collectively and self-confidently to contest their subordination. In this vision, active engagement in self-help and collective action engenders the self-confidence and political power that fuels further collective activity.

One can, of course, disagree with this conception or elements of it. But to label White’s (and other collaborative theorists’) vision of lawyering as ungrounded in theory or historical experience is inaccurate.243 How one responds to the vision — whether one is energized, persuaded, intrigued, spurred to empirically test it, threatened, angered, or bored by it — will vary dramatically.

Because I equate collaborative efforts by lower-income people with their political engagement and mobilization and I view the lack of such mobilization as a significant factor in the current correlation of forces that maintains the status quo, I do believe that collaborative lawyering can alter the structural and institutional relations in which lower-income people live. After the next section addresses the applicability of the critique to the preeminent244 advocate of collaborative lawyering, Part III will discuss a specific instance of lawyering to illustrate how a collaborative approach can effect change of this sort.

C. Gerald López’s Call to Recognize and Tap the Problem-Solving Talents of Lower-Income People and Their Lay Allies

Intelligibility. Gerald López’s work is consistently readable and accessible. In Lay Lawyering,245 he explicates cognitive theories of


243 Id.

244 Both White and Alfieri discuss López as the leading exponent of collaborative lawyering. See, e.g., White, Collaborative Lawyering the Field?, supra note 26, at 158 n.4; Alfieri, Practicing Community, supra note 27, at 1750.

245 López, Lay Lawyering, supra note 25.
how we understand and navigate the world by means of stories and he applies these theories to a seemingly mundane situation of talking someone into ceding a taxicab ride. In *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice*,246 he reveals his vision of lawyering by providing extended descriptions and commentary on fictionalized247 lawyering examples. Throughout his work, López demonstrates a remarkable facility for conveying complex ideas in almost conversational prose — a skill that leads some readers to miss the sophistication of his insights. With the exception of less than a handful of word choices,248 López’s writing is immediately accessible to an immensely wide audience. The contrast with Alfieri’s prose could not be starker; nor is it accidental.249

At the core of López’s vision is the notion that lawyering fundamentally entails persuading others and that persuasion is a central aspect of everyday life. As we interact with others and seek their assistance in matters small and large, we all develop persuasive — *i.e.*, lawyering — skills. Defining lawyering as the practice of telling stories designed to persuade others to act in a desired fashion,250 López emphasizes the continuities between what professional lawyers do and what lay people do on a daily basis.251 Storytelling is not merely an expert tactic of a professional lawyer or the prized tool of outsiders,252 but the central means by which all of us persuade others and make

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247 *Id.* at 8.

248 The three words he uses regularly that would not be immediately intelligible to all readers are: “regnant” (the present participle of the French verb “to rule”), which he uses to describe the prevailing vision of lawyering he seeks to supplant; “subordinated,” his term for the people with whom progressive activists work; and “anti-generic,” the type of legal education he proposes. He uses the first two terms throughout his work; the latter term is from *Anti-Generic Legal Education*, supra note 25. He does define each of these words clearly in his work, so that readers can follow him.

249 López writes:

... I believe we can and should have books about law practice suitable for and accessible to all the different sorts who constitute a “general audience.” ... After all, whatever there is in the way of richness and challenge to law practice more reflects life’s complexities than technical legal difficulties. And, in our own ways, we are all experts about those complexities, capable of mulling over written descriptions, critiques, and alternatives.

... Any vision of activist lawyering worth pursuing reflects the participation of a diverse group of people. ... [L]awyers and law practice are too important to activist work to leave to the influence of lawyers alone.

250 *Id.* at 39.


sense of our lives.

López’s attention to how we persuade uncovers the significance of understanding the audience(s) to whom we tell, pitch, sell, or spin stories. What we find persuasive is far less helpful instrumentally than what our audiences find compelling. Detailed knowledge of and insight into the actors and audiences we seek to persuade is therefore critical to success. A second key element of his vision is that the “subordinated” usually have expert knowledge of their “superiors” and have developed skills for “handling” them. Survival requires that lower-income people develop such understanding and the ability to anticipate the wishes and reactions of those “superiors.” López urges lawyers to respect and tap such knowledge and skills and to endeavor to develop their own analogous “feel” for how things work in communities and institutions. Rebellious lawyers can do so primarily by honing their listening skills and powers of observation.

López is not saying, of course, that lay people are immediately ready to handle court hearings or negotiation sessions or to draft contracts. He acknowledges that lawyers have specialized knowledge and highly refined skills. Those skills can and do help clients; lawyers are not predestined to wreak interpretive violence on client-victims.

Unlike Alfieri, López does not argue that lower-income people’s knowledge and stories are better than those of lawyers. In López’s vision, both groups are essential to the struggle “to fundamentally transform the world.” To make such change, López explains, lower-income people and their attorneys “do not want simply to add to each other’s knowledge, a bit of this and a bit of that coexisting easily. Instead, they desire to challenge what each knows — how each gained it, what each believes about it, how each shares and uses it.” Rather than emphasizing their fragility (as White sometimes does) or placing lower-income people on a pedestal (as Alfieri does and Simon accuses all collaborative lawyering theorists of doing), López urges lawyers to engage their clients as true equals, worthy of respect but also of caring confrontation.

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253 Again, the term “superior” is mine, not López’s. See supra note 57.
254 Others have characterized this familiarity with one’s own world and the world of one’s oppressors as a dual consciousness. See, e.g., W.E.B. DuBois, The Souls of Black Folks (1903); This Bridge Called My Back: Writings by Radical Women of Color (Cherrie Moraga & Gloria Anzaldua eds., 1981).
255 López, REBELLIOUS LAWYERING, supra note 25, at 57-62.
256 Id. at 53. This passage also refutes Simon’s assumption that a central tenet of collaborative lawyering theory is that lawyers should not influence or change clients in any way. See supra text following note 98.
257 See supra notes 223-25 and accompanying text.
258 See supra note 162 and accompanying text.
259 See supra note 104 and accompanying text.
He calls for a collaboration of "co- eminent" practitioners, by whom he means lawyers, clients, and other potential problem-solvers, such as community activists, organizers, media, administrators, policy makers, researchers, and funders.\(^{260}\) The existence and relevance of these other lay problem-solvers is a third core element of López's vision. In his view, careful investigation of lower-income and subordinated communities reveals many individuals, groups, and organizations working to challenge subordination.

**Stance Toward Practitioners.** In elaborating his vision of "rebellious" lawyering, López contrasts his ideas with what he labels the "regnant" vision of practice that holds sway over the vast majority of lawyers.\(^{261}\) In so doing, he opens himself to Blasi's second critique:\(^{262}\) He talks about practicing lawyers but his writing does not evince strong interest in a dialogue of equals with practitioners, at least not those he labels regnant.

I agree with Blasi, White, and others, that attacking professional identities with critical messages of incompetence or insensitivity is un-

\(^{260}\) López, Rebellious Lawyering, supra note 25, at 55.

\(^{261}\) In addition to presenting and dissecting many extended fictionalized examples of "regnant" practice, López summarizes this ruling conception as one in which:

- Lawyers "formally represent" others.
- Lawyers choose between "service" work (resolving individual problems) and "impact" work (advancing systemic reforms), largely dichotomous categories.
  - Lawyers litigate more than they do anything else.
  - Lawyers understand "community education" as a label for diffuse, marginal, and uncritical work . . . and "organizing" as a catchword for sporadic, supplemental mobilization (variations on sit-ins, sit-downs, and protests).
  - Lawyers consider themselves the preeminent problem-solvers in most situations they find themselves trying to alter.
  - Lawyers connect only loosely to other institutions or groups in their communities, and almost always these connections focus on lawyers' use of institutions or groups for some aspect of a case in which they serve as formal representatives.
  - Lawyers have only a modest grasp on how large structures — regional, national, and international, political, economic, and cultural — shape and respond to challenges to the status quo.
  - Lawyers suspect that subordination . . . cyclically recreates itself in certain subcultures, thereby preventing people from helping themselves and taking advantage of many social services and educational opportunities.
  - Lawyers believe that subordination can be successfully fought if professionals, particularly lawyers, assume leadership in pro-active campaigns that sometimes "involve" the subordinated.
  - Lawyers do not know and try little to learn whether and how formal changes in law penetrate the lives of subordinated people.
  - Lawyers . . . see themselves as aesthetic if not political heroes, working largely alone to make statements through their (more than their clients') cases about society's injustices.

\(^{262}\) See supra note 123 and accompanying text.
likely to persuade many practitioners to adopt new models and methods.\textsuperscript{263} Although López states at several junctures that rebellious practice is often more an aspiration than a consistent reality for even its most committed adherents,\textsuperscript{264} his overall message rings in many readers’ ears as a blanket indictment of an almost monolithic Regnant Practice. Like Alfieri, López puts most practitioners and their sympathizers on the defensive, scurrying to dodge criticisms which, even if born from street-level experience, are lobbed from what some may dismiss as a lofty and comfortable academic perch.\textsuperscript{265}

There is merit in this critique. Nonetheless, the critique may be seen to impose a norm of gentility and modulated persuasion that may stifle ground-breaking efforts to challenge prevailing paradigms. Effecting change often requires boldly stated views in order to command attention — statements that may sometimes (or to some people) appear strident or overstated.\textsuperscript{266} Such a forceful approach often creates

\textsuperscript{263} As Howard Lesnick eloquently notes:

The hazard of theoretically oriented presentations, inherent in their very power, is that they have a tendency to be experienced by their addressees — especially by practitioners — as critical of who they are, rather than of what at times they do or the ways in which they are accustomed to think. Like most legal writing, such presentations tend to be prescriptive in their tone — what James Boyd White has felicitously termed, “structurally coercive” — rather than sharing or disclosing the person of the speaker, and inviting one’s hearers to “try on” a somewhat different understanding of their work.

If we are to “invite” rather than “prescribe,” it is necessary not only to present ourselves authentically, but also to meet others on their own terrain. To do this requires that we be willing to engage with rather than judge or dismiss the existential realities of practice.


\textsuperscript{264} López notes that the regnant idea of practice surrounds us and probably dwells within all of us. López, \textit{Rebellious Lawyering}, supra note 25, at 23. He writes: “No matter how committed we may be to the idea of involving clients and client communities in progressive work, it is almost always hard and sometimes downright scary to do it.” López, \textit{An Aversion to Clients}, supra note 25, at 321. He adds: “we shouldn’t kid ourselves. We’re all vulnerable to the allure of seeking to avoid the hard work and messiness of involving clients and communities in our work.” \textit{Id}.

\textsuperscript{265} Of the collaborative theorists discussed here, López is the only one who fits Blasi’s characterization that “[t]he critical gaze rarely falls on the mirror: it is about the practice of others.” Blasi, supra note 34, at 1088.

\textsuperscript{266} In the elegant words of Frederick Douglass:

Let me give you a word of the philosophy of reform. The whole history of the progress of human liberty shows that all concessions yet made to her August claims have been born of earnest struggle. The conflict has been exciting, agitating, all absorbing . . . . If there is no struggle there is no progress. Those who profess to favor freedom, and yet deprecate agitation, are men who want crops without plowing up the ground, they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters.

Frederick Douglass, \textit{West India Emancipation}, in \textit{2 The Life and Writings of Frederick Douglass: Pre-Civil War Decade 1850-1860} at 426, 437 (Philip S. Foner ed.,
room for more temperate and moderated presentations of a new paradigm. Those who are perceived as extremists are often indispensable in producing the eventual reforms commonly attributed to more "palatable" reformers.\textsuperscript{267}

We need to tread cautiously, lest our search for constructive, respectful dialogue eliminate all space for passionate, emotional debate. A core bond we share is a commitment to challenging injustices we perceive. We should not lose sight of a central injustice that advocates of collaborative lawyering seek to eliminate: the tendency of predominantly white, middle- and upper-middle-class lawyers to act as if their disproportionately of-color and female lower-income clients are largely incapable of and irrelevant to efforts to change the conditions of their lives and the larger structure of our society.\textsuperscript{268} If we are to do justice to our values and our clients, we need to be willing to examine

\textsuperscript{267} My sense of history is replete with examples of radicals, deemed beyond the pale, making significant contributions to the success of those seen as more reasonable or palatable. Malcolm X played such a role for Martin Luther King, as did many radical feminists in the 1970's for their more liberal or mainstream sisters.

\textsuperscript{268} Statistics of clients served in 1997 by Legal Services Corporation-funded agencies confirm that clients are disproportionately female (68.1\%) and of-color (50.8\%). Legal Services Corporation, 1998 Fact Book & Program Information 16 (1998).

Looking at the entire lawyering profession in the U.S., it is evident that white men continue disproportionately to comprise the vast majority of lawyers. In 1997, of the 885,000 lawyers nationally in the U.S., not including judges, only 2.7\% were African American (despite African Americans' comprising 10.8\% of the civilian, noninstitutional population 16 years old and over in the U.S.), 3.8\% were "Hispanic" (who comprised 10.8\% of the population), and 26.6\% were women (who comprised 46.2\% of the relevant national population). Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States: 1998, at 417 tbl. 672 (1998). (In 1983, 2.6\% were African American, 0.9\% were Hispanic, and 15.3\% were women. Id.) In 1990, approximately 1.4\% of U.S. lawyers were Asian Americans (who comprised 2.9\% of the U.S. population). See Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 WM. & Mary L. Rev. 1, 48 (1994).

One might expect or hope that lawyers representing lower-income clients are more racially diverse and more female than the U.S. bar as a whole. The scant demographic information published on lawyers representing lower-income clients does establish that, at least among legal services attorneys and public defenders, women are better represented among these attorneys (38\% in 1991) than they are in the bar as a whole (20\% in 1991), but not as well represented as in the U.S. population as a whole. See Barbara A. Curran & Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in the 1990's at 10 (American Bar Foundation, 1994).

No similar data has been published on the racial demographics of any subset of lawyers who primarily represent lower-income clients. The closest approximation is information on the racial demographics of clinical legal academics. Data from a 1993-94 survey indicates that 9.6\% of self-identified legal clinicians were people of color. See Robert F. Seibel, Do Deans Discriminate?: An Examination of Lower Salaries Paid to Women Clinical Teachers, 6 UCLA Women's L.J. 541, 553 (1996). Again, these figures are better than the U.S. bar as a whole, but worse than the general U.S. population, and far different from the demographics of clients served.
our practices honestly, whether the prodding to do so is gentle or accusatory.

*Locus of Attention.* The third critique — that the scholarship narrowly focuses on small-scale, one-on-one interactions between individual lawyers and individual clients and on the power lawyers exert over clients in the "lawyer-client microworld" — is not true of López’s work. The critics fail to appreciate a central element of López’s vision: that the relationship between a lawyer and an individual client should not be an exclusively inward-focused "community of two."269 The critics ignore his insistence that lawyers strive to connect themselves and their clients with outward-oriented activities and activists. Rather than advocating a retreat into an isolated, private "microworld," López calls for extensive connection with the larger world and with social and political efforts to change it. Unlike Alfieri, López does not simply focus on the violence or oppression that occurs within what he considers regnant lawyer-client relationships; López regularly directs our attention to collective efforts to challenge subordination. Thus, he writes:

For all the importance of their immediate relationship, clients and lawyers work inescapably within a network of problem-solving practitioners. Every situation laces their collaboration into the efforts of other problem-solvers — the client himself, his family, friends, neighbors, community activists, organizers, public employees, administrators, policy makers, researchers, funders. Moving the world in the desired direction often depends on the identification and effective coordination of these practitioners.270

A central element of rebellious practice is a commitment to engage in *group* problem-solving efforts and collective attempts to challenge elements of the status quo. Rather than "wait[ing] around for ‘big’ chances to change things in a ‘big’ way all at once — the kinds of chances and changes that tend to attract much attention, and about which our culture teaches us to dream," lawyers should "regard every form of group work as important to mobilization" and should "consider educational aims as central to every form of mobilization."271

When he looks at subordinated communities, López sees many

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269 The term is Simon’s from his 1980 critique of Carl Rogers’ psychology and its application by client-centered advocates to the attorney-client relationship. See Simon, *supra* note 43, at 496-525. The core of Simon’s disdain for what he calls the "Psychological Vision" is its "reduction of the social to the personal," its treatment of "social norms, rules, and values as obstacles to personal fulfillment," and its failure to understand power "as a product of class, property, or institutions." *Id.* at 495. In essence, the critique is of an inward-looking, individual-centered, intensely private focus that leads lawyer-therapists to affirm and validate clients’ every wish and action, regardless of social consequences.


271 *Id.* at 73, 77 (emphasis in original).
individuals and groups actively struggling to challenge their social, economic, and political subordination. Wherever groups of lower-income people meet or can be brought together, he sees opportunities for rebellious advocates to nurture and further this resistance by "train[ing] groups of subordinated people to represent themselves and others," an activity he calls "teaching self-help and lay lawyering."272 Rather than assuming that lawyers are always best suited to "represent" clients and that legal arenas are always the most appropriate forums for solving problems, López urges rebellious lawyers to remain open to collaborating with lower-income individuals, groups, and institutions and to exploring social and political problem-solving approaches.

In this regard, López's vision transcends any individual attorney-client relationship. Indeed, if any vision is self-contained enough to be labeled a "microworld," it may be the traditional, non-collaborative one in which lawyers' expertise and orientation are almost exclusively confined to the "attorney-legal system microworld." In López's vision, lawyers must be skilled legal technicians and engaged public citizens and activists. They must expertly navigate and integrate many worlds: the legal, interpersonal, social, and political.

Utility in Challenging Institutional and Structural Power. The final critique — that the scholarship fails to attend to structural and institutional explanations of clients' oppression (other than lawyer-domination) — also is inapplicable to López's work. Indeed, López urges progressive lawyers and law schools training them to study this very issue systematically and to immerse themselves in their own and other disciplines' analyses of the topic.273

He explicitly states that it is a "regnant" failure for lawyers to "have only a modest grasp on how large structures — regional, national, and international, political, economic, and cultural — shape and respond to challenges to the status quo." Similarly, he chides the failure to investigate "how formal changes in the law penetrate the lives of subordinated people."274 He prods progressive lawyers and law schools to value and intimately familiarize themselves with the study of people "in all their heterogeneous complexity," the study of people of color, gays and lesbians, and more generally, the study of

272 Id. at 24.
273 In order to properly train students to work with lower-income and subordinated clients, López urges law schools to create a separate curriculum, a core course of which would rigorously study theoretical analyses, ethnographic accounts, and professional and lay literary explorations of the experiences of social activists, organizers, social workers, and lower-income people themselves. López, Anti-Generic Legal Education, supra note 25, at 373-74.
274 López, Rebellious Lawyering, supra note 25, at 24.
power, "quiescence and rebellion," economic democracy and development, the secondary labor market, and cultural production and identity.\(^{275}\)

López urges rebellious lawyers to attend to "international, national, and regional matters" in their own right and to understand "their interplay with seemingly mundane local affairs."\(^{276}\) He calls for lawyers to develop detailed information on both the trees and the forest, stressing "the importance of understanding the political nature of neighborhoods as well as the politics of multinational decision-making."\(^{277}\)

Whether we deem the path he identifies for challenging institutional and structural power as likely to be effective or not turns on our understanding of what facilitates and frustrates social change. To suggest that López is inattentive to these issues again fundamentally mischaracterizes his work.

D. Overall Assessment of the Critiques: Misreading the Literature and Dangerously Separating Outcome and Process

Despite the importance of their challenge to collaborative lawyering theory to demonstrate utility in effecting social change, the critiques of Handler, Simon, and Blasi miss the mark by failing to appreciate the significant differences between Alfieri, White, and López. While largely — but not entirely — accurate with respect to Alfieri’s work, the critiques seriously misread White’s and López’s work. Lumping together all three as exponents of postmodernism, the critics fail to appreciate the extent to which White and López temper postmodern insights with an explicit commitment to collective social and political activism and action.

The critiques also fall prey to a problematic distinction between outcome and process, between ends and means. In essence, the critics argue that collaborative lawyering theorists spend too much time worrying about how they treat their clients, and, as a result, fail to spend enough time worrying about what their adversaries are doing to their clients and what they as lawyers can do to stop it. The critics implicitly assert that there is no significant connection between involving clients and successfully altering the material conditions in which clients live. "Stop obsessing about how you may be excluding or silencing your clients," the critics essentially urge; "clients are better served if you focus on defeating their adversaries, rather than beating yourself up for not paying enough attention to how you and your clients can work

\(^{275}\) López, The Work We Know So Little About, supra note 25, at 11.

\(^{276}\) Id. at 38.

\(^{277}\) Id. at 30.
together.” According to the critics, effectiveness in delivering results is far more important than effectiveness in delivering a participatory process for pursuing those results. At times, it seems some of the critics may even be going further, implicitly arguing that a participatory process will impede the delivery of results.\footnote{Such an argument is deeply troubling. If the critics of collaborative lawyering truly mean that lawyers only need to deliver “results” \textit{e.g.}, changes in adversaries’ policies or practices} to lower-income clients and communities, and need not involve clients and community allies in any meaningful participation in securing those results, then the critics risk turning poverty lawyers into a disconnected vanguard of technocratic experts who shape policy on behalf of passive constituents. In such a system, lower-income clients are largely limited to answering their lawyers’ questions, furnishing documents, signing declarations, and occasionally testifying; otherwise the clients wait on the sidelines to hear reports of glorious victories from the expert attorneys who toil on their behalf.

Most issues that involve challenges to institutional or structural power are fundamentally political.\footnote{Most issues that involve challenges to institutional or structural power are fundamentally political.} Consequently, the level of participation we as lawyers allow our clients should reflect our political visions, particularly our visions of democracy and the sort of society we seek to create. A significant advantage of collaborative lawyering is its integration of problem-solving approach and progressive politics. Collaborative lawyers’ means and ends are consistent: The path into the promised land of an egalitarian, participatory democracy is pursued by means of egalitarian, participatory democracy.\footnote{As López suggests in the penultimate paragraph of the epilogue to \textit{Rebellious Lawyering}, the objective of collaborative lawyering must be to “itself reflect and occasionally even in usher in the world we hope to create.” López, \textit{Rebellious Lawyering}, supra note 25, at 382.}

A return to the scenario described in the introduction, to the packing of the East Palo Alto Rent Board, may provide a fuller appreciation of the nature of collaborative lawyering.

III. Appreciating a Collaborative Approach

A. \textit{Understanding Problem-Solving, Re-Imagining Context, and Recognizing the Transformation of Disputes}

As described in the introduction, shortly after the East Palo Alto City Council packed the local Rent Board with vehement opponents
of rent control in June of 1988, I received several requests from local residents urging me to help them challenge and overturn the controversial appointments and to prevent the dismantling of rent control.

As I assessed how to respond to the City Council's actions, I drew on certain core theories about lawyering. I understood responsible lawyering to be (1) a type of problem-solving (2) that rigorously explores context and (3) attends to the ways in which disputes can be transformed — and de-politicized, if we are not careful. I viewed all three of these theories as consistent with, even integral to, my understanding of collaborative lawyering.

The criticisms made by Handler, Simon, and Blasi demonstrate, however, that not everyone reads the second and third theories into the notion of collaborative lawyering and appreciates their helpfulness for collective work. Consequently, I will make more explicit and elaborate upon the meaning of contextualized problem-solving and the significance of attending to and managing the transformation of disputes. The considerations and activities that flow from attention to context, properly understood, and to dispute-transformation focus progressive attorneys on structural dimensions of problems and encourage approaches that maximize the likelihood of successfully challenging institutionalized power. These two considerations help to avoid the ineffectiveness against which critics of collaborative lawyering warn.

**Understanding Problem-Solving.** First, like Binder, Bergman and Price, López, and many others, I saw and continue to see lawyering as fundamentally concerned with problem-solving. Most of the problem-solving in which lawyers (and activists) engage entails persuasion. As concisely summarized by López, this problem-solving process requires (1) identifying the results one seeks, (2) identifying the actors or institutions that can provide or compel those results, and (3) convincing those actors (or "audiences") to provide or compel those results. This process of persuasion occurs most frequently by

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282 Two key areas that do not involve persuasion, at least when conducted in client-centered fashion, are counseling and planning. Yet even in counseling and planning, lawyers and clients need to consider what others will find persuasive.

283 See López, Rebellious Lawyering, supra note 25, at 39. López actually posits an additional step between the second and third, which he calls identifying the "remedial ceremonies" that are available or might be created. Id. By this term, he means procedural mechanisms, such as a school board meeting, a hearing on renewal of a business license, a
means of telling stories or making arguments, and occasionally by taking actions, which the targeted actors or institutions find compelling.284

Framed this way, legal stories, arguments, and institutions are merely some of the many possible choices for lawyers and clients to consider. We must decide: (1) what results to seek; (2) which potential actors (either individuals or institutions) to seek to persuade; (3) what stories, arguments, or actions are best calculated to persuade them; and (4) who is best situated to tell those stories, make those arguments, or take those actions. In this model a lawyer is but one of many possible storytellers, argument-makers, and action-takers. For the attorney interested in challenging institutionalized power, two choices are often critical: whom to persuade and who might most effectively persuade the relevant individual or group. The answers to these questions are often plural, with the most effective strategies involving multiple targets and multiple advocates telling multiple stories.285

Re-Imagining Context. To answer these problem-solving questions, I applied a second theoretical commitment: that a lawyer needs to situate a problem in context. Although easily stated, this commitment to contextualize is easily misunderstood — or at least understood quite differently than I do. To me, the call to context is not, as the critics of collaborative lawyering assume, a call to abandon the general or universal and to focus only on the particular. It is not simply a catalogue of what makes a situation idiosyncratic or different. It is not, in the parlance of the critique of collaborative lawyering, an abandonment of general theory for a focus on microstructures and microstories.

Putting a problem in its full context is, in my view, a call to investigate that problem rigorously. This investigation is more than an exploration of the ways in which the problem is unique; it is also an examination of what the problem has in common with other contexts, problems, and potential solutions.286 Fundamentally, the call to context is a call to draw connections to other bodies of knowledge, other ways of interpreting a situation.287 It is most often a reminder to bring

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284 My model is essentially the same as López’s, with the addition that sometimes we persuade by taking actions, rather than telling stories or making arguments.

285 As indicated in Part II(A), Alferi often seems to assume there will only be a single story and a single storyteller. See supra text following notes 205 and 209.

286 As Martha Minow has insightfully detailed, any examination of difference always entails a comparison, usually to a norm (which is often unstated). See Martha Minow, Supreme Court 1986 Term — Forward: Justice Engendered, 101 Harv. L. Rev. 10 (1987).

287 The etymology of the word is illuminating. It derives from the past participle of the Latin contextere, which meant to interweave or plait together. Webster’s Encyclopedic
other theories to bear, to explore additional dimensions of a problem, to make other aspects of a situation relevant.\textsuperscript{288} It is a call to view and interpret a situation by considering it along with other information. For those comfortable with literary metaphors, it is a call to read two texts together to create meaning or, more simply, a call to read one text in light of another. Most significantly for the response to the critics of collaborative lawyering, putting a problem in context is also a call to explore its \textit{structural} and \textit{institutional} dimensions.\textsuperscript{289}

In the arena of problem-solving, the call to contextualize entails at least three distinct sets of explorations.\textsuperscript{290} First, it presupposes an effort to understand a situation in its \textit{historical} context, to view it in longitudinal perspective. Such an approach focuses on what led up to the problem and considers how the problem and various potential remedial strategies are likely to unfold in the future.\textsuperscript{291} Looking backwards to understand why and how a problem has arisen encourages the consideration of connections between events. This search for historic connection often invites attention to larger forces or struggles. This focus on the bigger picture is encouraged by the attempt to project how various alternative solutions are likely to unfold in the future.

Second, putting a problem in context usually necessitates mapping the \textit{web of relationships} in which the problem arises.\textsuperscript{292} This

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\textsuperscript{288} As Martha Minow and Elizabeth Spelman observe: "Typically, . . . when people advocate looking or deciding 'in context,' they advocate a switch from one context to another — from one level of analysis to another, or from a focus on one set of traits or concerns to another set." Martha Minow & Elizabeth Spelman, \textit{In Context}, 63 S. CAL. L. REV. 1597, 1605 (1990). In the parlance of Clifford Geertz, the call to context is a call to view a situation through another "screen" — another matrix of terms or concepts through which we filter our perceptions and thoughts. See White, \textit{The Faces of Otherness}, \textit{supra} note 26, at 1500 (summarizing Clifford Geertz, \textit{Person, Time and Conduct in Bali, in The Interpretation of Cultures} 360 (1973)).

\textsuperscript{289} As Minow and Spelman continue: "In many contemporary arguments for context, what people in fact urge is greater attention to factors of race, gender, or class. Perhaps paradoxically, then, the call for context represents a call to consider societal structures of power that extend far beyond the particularities of a given situation." Minow & Spelman, \textit{supra} note 288, at 1605 (emphasis added).

\textsuperscript{290} In reviewing contemporary theoretical debates, Minow and Spelman identify a different set of three meanings of context. The first meaning they identify refers to a focus on the historical and social situation of writers and thinkers. Their second possible meaning focuses on the reader or audience for texts. The third meaning they identify highlights the importance of previously ignored specific details of a problem. \textit{Id.} at 1602-03.

\textsuperscript{291} This focus on what comes before and after is the primary dictionary definition of context: "the parts of a written or spoken statement that precede or follow a specific word or passage, usually influencing its meaning or effect: [e.g.] You have misinterpreted my sentence because you took it out of context." \textit{Webster's Encyclopedic Unabridged Dictionary of the English Language} 316 (1989).

\textsuperscript{292} This image of a web of relationships is influenced by both Michel Foucault and Carol Gilligan. \textit{See} Foucault, \textit{Power/Knowledge, supra} note 58; Carol Gilligan, \textit{In a Different Voice: Psychological Theory and Women’s Development} (1982) (discuss-
probably requires, at the least, an investigation of the interpersonal relationships between the parties. Such a focus on relationships encourages consideration of potential actors or institutions with influence or leverage over the parties, which often helps to identify "nonlegal" alternative avenues to provide the desired results. Understood expansively, the web of relationships encompasses far more than the individual actors. It also focuses on the larger networks of power relationships in the broader setting inhabited by the individual and institutional actors. Mapping these webs of relationships involves both particularizing and generalizing, a focus on both trees and forest. Thus, for example, after investigating who might potentially have leverage over a particular landlord, a focus on context also invites consideration of what institutions might have leverage over landlords in general.

Third, the attention to context is a reminder to examine the role and effects of larger societal structures of power. These structures — such as race, gender, and economic power — extend beyond the confines of a given situation. Although most would acknowledge that race, gender, and class make a difference in our society, garnering agreement that these dynamics are operating in a particular situation is often difficult. The call to place a problem in context is a call to investigate the possible effects of societally prevalent patterns or forces. Because most of U.S. society's leaders and opinion-shapers routinely ignore the role of race, gender, and class (as well as sexual orientation and physical ability) and typically cast actions and institutions as unaffected by such factors, the drive to contextualize is often a drive to look beneath the culture's implicit claim that decisions and outcomes have nothing to do with such structural factors.

Recognizing the Transformation of Disputes. Before grounding this examination of the nature of context in the East Palo Alto Rent Board-packing example, I need to outline a final, related, theoretical concern: that lawyers must be alert to the formation and transformation of disputes.

In the early 1980's, sociologists William Felstiner, Richard Abel,
and Austin Sarat articulated a three-stage process through which disputes are formed. In their formulation, the first step is a characterization of an occurrence as harmful, a phenomenon they call "naming." When the harmed party attributes the injury to the fault or responsibility of another individual or social entity, Felstiner, Abel, and Sarat call this second stage "blaming." Finally, in what they call "claiming," the injured party voices the grievance to the individuals or entities deemed responsible and asks them to provide some remedy. If the other individual or entity ignores or rejects the claim, in whole or in part, a dispute ensues.

According to Felstiner, Abel, and Sarat, disputes exist mainly "in the minds" of disputants; they are subjective feelings about an experience and set of actors. As feelings, disputes are highly unstable and reactive; that is, they easily transform. Felstiner, Abel, and Sarat elaborate that "individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behavior, and expectations of a range of people, including opponents, agents, authority figures, and intimates." Of all the possible agents of transformation, lawyers and legal institutions exert perhaps the most significant influence in narrowing and potentially de-politicizing disputes. We do so by determining, among other things, a dispute's scope, substantive and procedural norms, rules of relevance, cast of characters, and available remedies.

Quite commonly, legal frameworks individualize problems and narrow disputes. They do so, in the words of Felstiner, Abel, and Sarat, by "using a limited number of norms to evaluate an even more circumscribed universe of relevant facts." The legal system expects parties to fit their conception and presentation of their dispute into the categories and procedures the system provides. The system values logic and reason; it discourages displays of emotion. Decisions are purportedly made objectively, without reference to the social position (especially the race, gender, class, or sexual orientation) of parties or other actors; attempts to refer to or question such factors are gener-

296 Id. at 633.
297 Id. at 635.
298 Id. at 635-36.
299 Id. at 636.
300 Id. at 637-39.
301 Id. at 638.
302 Id. at 643.
303 For a thoughtful rejection of the dichotomy between reason and emotion, see Angela P. Harris & Marjorie M. Schultz, "A(No)ther Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 Stan. L. Rev. 1773 (1993).
ally deemed to be off limits. Remedies are most commonly limited to the specific individual directly harmed (even if she sees the dispute as a collective issue) and most frequently compensatory and monetary (even if the aggrieved party views the dispute as a matter of principle and is most interested in the establishment of mechanisms to prevent similar conduct in the future).

Each of these common aspects of a legal framework can de-politicize disputes. I agree with Handler that atomizing a dispute — treating it as a discrete incident suffered by an unconnected individual without regard to the context of socioeconomic relations in which it occurs — is the enemy of politicization. Where we may disagree\textsuperscript{304} is that I view non-collaborative lawyering as more likely to fall prey to such a formulation than collaborative lawyering.

When solutions are implemented without the involvement of clients and lay organizations, attorneys assume center stage as the primary problem-solvers. Even if, as client-centered lawyers, we enable our clients to be the primary decision-makers, we commonly limit our clients’ choices to what we should do for them. As the primary implementers of the decisions we help our clients make, we most commonly follow two approaches: we litigate and/or we enter into negotiations (or some more formal type of alternative dispute resolution), often with other attorneys. Our training and role conceptions seem to predispose us that a “case” that cannot be resolved with advice and counseling necessarily requires us to litigate or settle it. With the adjudicatory forum and our legal training casting their “legalizing” influence, the range of issues, tactics, and solutions often narrows dramatically.

Of course, not all these typical characteristics of “legalizing” a dispute are inevitable. Devices certainly exist to keep disputes collective, to include multiple parties, and to secure changes in conduct (rather than, or in addition to, monetary compensation). Yet because such formulations and devices run against the grain, they will go unutilized unless a lawyer makes a conscious decision to invoke them. If we wish to avoid inadvertently de-politicizing our clients’ disputes, we need to be alert to the ways that we and the legal system can transform disputes.

B. Application to the Packing of the East Palo Alto Rent Board

As the foregoing discussion\textsuperscript{305} has suggested, I approached the

\textsuperscript{304} Handler’s critique was of postmodernism generally. See supra notes 69-72 and accompanying text. Although he cited White’s Mrs. G. article, supra note 26, he did not explicitly address the rest of her work, nor any of Alfieri’s or López’s work.

\textsuperscript{305} See supra text accompanying notes 286-94.
subject of how to aid my clients in the rent control controversy by trying to situate the new developments in their broader historical, relational, and institutional context. As I understood East Palo Alto’s pre-cityhood history during its decades as an unincorporated part of San Mateo County, neighboring cities had brazenly expropriated its most valuable land and resources. State transportation planners then literally bisected the community and decimated its central business district by routing a major freeway right through it. Most of these incursions occurred after the community had become home in the 1940’s to African Americans who worked in wartime industrial jobs and faced fierce housing discrimination in the Bay Area. By the 1980’s, more than 85% of residents were people of color. While African Americans continued to be the largest ethnic group, the 1980’s also saw the rapid growth of a large Latino population and the development of a significant Pacific Islander community. Unlike lower-income neighborhoods in many U.S. metropolitan areas, more

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306 Annexations by neighboring cities severed 80% of East Palo Alto’s land, reducing it from 12.3 square miles to 2.5 square miles. Among the resources taken were an airport, helicopter factory, and business park. See Mark A. Stein, *East Palo Alto Minority Cityhood: A Casebook*, L.A. TIMES, Jan. 21, 1987, at 1.


308 After inter-racial civil rights organizations initially facilitated African Americans’ entry into the community by encouraging liberal whites to “front” for African Americans in the purchase of homes, white real estate agents used red-lining and block-busting to encourage white families to sell their houses cheaply to these agents, often writing “Blacks just bought the house next door” on their business cards to get listings. These agents then quickly resold the homes to Black families at considerably higher prices. See Lowe, *Blacks Vie For Bayside Homes: A History of East Palo Alto (Part 3)*, supra note 306, at 4; Steven Robitaille, “Unrestricted Area” Meant East Palo Alto, SAN JOSE MERCURY NEWS, Feb. 12, 1989, at A21.

than 40% of East Palo Altans were homeowners.\textsuperscript{310}

In 1983, local residents voted to incorporate as a city, by a margin of only 15 votes.\textsuperscript{311} Incorporation advocates stressed self-determination, autonomous self-rule, community and racial pride, local accountability, and freedom from abuse by County sheriff’s deputies. Opponents argued that the local tax base was insufficient to fund adequate services and, implicitly, that they were unwilling to pay higher taxes to do so.\textsuperscript{312}

From the outset of the campaigns in the late 1970’s and early 1980’s that ultimately led to East Palo Alto’s incorporation as a city in 1983, it was clear that one of the first legislative acts of self-rule would be the enactment of a rent control law. Thus, support for, and opposition to, incorporation and rent control often went hand in hand in East Palo Alto.

To no one’s surprise, the enactment of residential rent control was one of the first acts of the initial city government.\textsuperscript{313} Almost continuously thereafter, anti-rent control advocates sought to undo the law. By 1988, there had been three elections in which East Palo Alto voters reaffirmed their support for rent control\textsuperscript{314} and three lawsuits.

\textsuperscript{310} California Cities, Towns, & Counties, supra note 3, at 121.

\textsuperscript{311} San Mateo County certified 1,782 votes for incorporation and 1,767 opposed. See Incorporation of Coast Town Divides Community, N.Y. Times, Aug. 17, 1983, at A18.

\textsuperscript{312} An economic study by the County’s Local Agency Formation Commission concluded that the community could survive as a city. The study predicted that the city would have a $2.5 million surplus after five years. See Jennifer Cannon, Struggling to Survive Cityhood, Peninsula Times Trib., Feb. 18, 1990, at A1. Years later, however, Arlen Gregorio, a County Supervisor at the time of incorporation admitted, “We knew they would have some funding problems,” but self-determination “is a much more affirmative way to help people solve their own problems.” Id at A8.

\textsuperscript{313} Within three weeks of incorporation as a city, the City Council established a ninety-day moratorium on rent increases for residential units in the city. The Council extended this moratorium twice while a task force of residents drafted a rent control law. In November 1983, the Council adopted a comprehensive, strict rent control ordinance on apartments but not on most single-family homes. Ordinance 17-83, The Rent Stabilization and Eviction for Good Cause Ordinance. This legislation created a politically appointed Rent Board, paid for the staff to administer it by levying registration fees on each rental unit, required the certification of rent levels as of April 1983, limited rent increases over those base levels (even upon vacancy of the unit) to a percentage of the rate of inflation, and prevented evictions other than for good cause. It only applied to rental units owned by landlords who owned 5 or more rental units. Its provision for controlling rents even after vacancies (rather than allowing unlimited rent increases before new tenants move in) and its tight limits on allowable annual adjustments characterize it as a “strict” rent control law. See John I. Gilderbloom & Richard P. Applebaum, Rethinking Rental Housing (1988).

\textsuperscript{314} The California Constitution confers upon state and local voters the power to approve or reject statutes, ordinances, or other legislation adopted by a legislative body, upon the gathering of a sufficient number of signatures asking that the legislation be submitted to the electorate. Calif. Const. Art. 2, §§ 9, 11. After opponents of rent control gathered sufficient signatures, a referendum election was held in April 1984, in which voters sup-
filed to challenge or overturn the ordinance. Anti-incorporation advocates litigated all the way to the U.S. Supreme Court in an attempt to invalidate the City’s 1983 incorporation election.

By 1987, the new municipal government faced a serious fiscal crisis. A regional recession hit lower-income communities particularly hard. By late 1987, the City’s annual budget of five million dollars

ported rent control by a vote of 58%. The rent law was supported by 1349 voters and opposed by 989. Records of Registration-Election Department of San Mateo County Clerk (on file with author).

The California Constitution also confers upon state and local voters the power to propose statutes, ordinances, and constitutional amendments upon the gathering of a sufficient number of signatures asking that the initiative be submitted to the voters. CALIF. CONST. Art. 2, §§ 8, 11. In a special election in January 1985, a “Property Owners’ Civil Rights Initiative,” which would have outlawed rent control, lost by an even larger margin, with 66% opposed. The vote was 1,478 against the initiative, 757 in favor. Records of Registration-Election Department of San Mateo County Clerk (on file with author).

In April 1986, rent control was again on the ballot, this time as an amended ordinance to last indefinitely, unlike its predecessor which had only been scheduled to last two years. Again, the voters supported rent control, this time by a vote of 59%. The ordinance making rent control permanent — Measure A on the ballot — won by 1,550 votes to 1093. Election Results, SAN JOSE MERCURY NEWS [PENINSULA EDITION], Apr. 9, 1986, at B5.


Given the 15-vote margin of victory, the 272 absentee ballots — which favored incorporation by a ratio of almost two to one — determined the outcome. Opponents alleged numerous irregularities by pro-incorporation forces in procuring and handling absentee ballots. To challenge the results in court, they retained a large Bay Area law firm, Brobeck, Phleger & Harrison, and its high-profile partner, “Pete” McCloskey, Jr., a former U.S. Representative who had challenged Richard Nixon in the 1972 Republican presidential primaries. The case, Wilks et al. vs. Mouton et al., San Mateo Superior Court, No. C-275654 (filed June 14, 1983), entailed a bitterly contested three-week trial. After hearing from more than a hundred witnesses, a visiting judge from San Joaquin County validated almost all of the contested ballots and certified a 13-vote margin of victory for incorporation. See California City Upheld on Vote to Incorporate, N.Y. TIMES, Sept. 18, 1983, at Sec. 1, p. 35. In August 1984, the California Court of Appeal reversed the trial court, instructing the Superior Court to invalidate a large number of the ballots and re-calculate the outcome. Wilks v. Mouton, 159 Cal. App. 3d 792, 205 Cal. Rptr 735 (1984). Two years later, the California Supreme Court upheld the trial court’s rulings and validated the election results and the U.S. Supreme Court refused to review the decision. Wilks v. Mouton, 42 Cal.3d 400, 722 P. 2d 187, 227 Cal. Rptr. 1 (1986), cert. denied, 479 U.S. 1066 (1987).

The Silicon Valley’s economy suffered a severe recession in the mid- to late-1980’s, even while the national and state economy grew after the national recession in 1982.
was a million dollars in the red and the City faced the prospect of laying off a quarter of its municipal employees. This fiscal crisis led to the voters' decisive ouster of two of the three incumbents running for re-election in the April 1988 municipal election.

Also on that municipal election ballot was Measure C, which proposed that any ordinance adopted directly by the voters — as the rent control ordinance had been in 1986 — could only be amended or repealed by the voters. It was clear to informed voters that the primary law affected (and protected) by this ballot measure would be the perennially challenged rent ordinance. At the same time that the electorate ousted pro-rent control incumbents, 79 percent of voters overwhelmingly approved this ballot measure.

Placed in this larger historical and institutional context, the immediate goal my clients sought was to remove the two landlords, who had long spearheaded efforts to destroy rent control, from their new positions on the Rent Board. But my clients' larger concern was to prevent the Rent Ordinance from being dismantled from within. As we considered possible paths to effect those results, we identified three: we could pressure the landlords to resign and to relent from their efforts to eliminate rent control; we could persuade the City Council to remove the landlords and to appoint less hostile replace-

e.g., John Eckhouse, Silicon Valley on Edge: Electronics Industry Jolted by Unprecedented Recession in High Tech, S.F. CHRON., June 24, 1985, at 23; Michael W. Miller, Vale of Tears: Slump in High Tech Casts a Long Shadow in the Silicon Valley, WALL STREET J., July 24, 1985; Dan Walters, A New Chance for a Change, SACRAMENTO BEE, Nov. 28, 1988, at A3 (discussing inner-city barrios and ghettos as significant pockets of California economy bypassed by subsequent upturn in economy); Ramon G. McLeod, Good Jobs Keep Receding Beyond Black Workers' Grasp, S.F. CHRON., Mar. 29, 1988, at A1 (reporting that unemployment rate for African Americans in San Francisco Bay Area was two and a half times higher than that of Whites).


See Two Incumbents Ousted from E. Palo Alto Council, SAN JOSE MERCURY NEWS [PENINSULA EDITION], Apr. 13, 1988, at B1. With three seats up for election, the two incumbents, James Blakey and Ruben Africa, finished fifth and sixth, with 678 and 660 votes respectively, compared to the 1,033 to 1,136 garnered by the three winning candidates. Election Results, SAN JOSE MERCURY NEWS [Peninsula Edition], Apr. 13, 1988, at B1.

Measure C won by 1,683 votes to 459. Id.

My clients comprised an informal, ad hoc group of tenant activists, a few of whom were homeowners. Because the events I discuss occurred twelve years ago, I have not been able to contact each of them for authorization to reveal their names — nor, even more importantly, to solicit their comments on the events and my recounting of them.

For a few of my clients, the ultimate goal was broader: the establishment of a large, pro-active tenants organization. Although an ad hoc tenants group had successfully mobilized many times to pass and support rent control at each election, it all but disappeared in non-crisis periods. A few activists hoped to use the packing of the Rent Board to renew momentum and to create a more permanent, institutionalized tenants organization. Memorandum to File, supra note 6.
ments; or we could convince the San Mateo Superior Court to invalidate the appointments (and perhaps to void particular acts undermining the Ordinance).

As part of my exploration of the stories we might tell and the arguments we might make to persuade the pertinent decision-makers, I researched the relevant law. In so doing, I came to recognize a significant transformation in the dispute when framed legally. This transformation became apparent when I contrasted this legal framing with a contextualized understanding of East Palo Alto’s history, the network of relationships between the relevant actors, and the role of race and economic power. A legal framing not only narrowed the dispute, it fundamentally transformed it.

The legal characterization was dramatically different from my clients’ view of the situation. The law was not nearly as helpful as most tenant activists and their allies presumed it should and would be. They incorrectly (although not surprisingly) assumed that what violated their norms of legitimate conduct also violated the law.323

For example, the City Council’s holding a secret vote on the appointments violated state requirements for open public meetings, but the law permitted the Council to subsequently ratify the action in public and thereby to avoid any sanction.324 Nor was the Council’s removal of the former Rent Board members prior to the expiration of their terms necessarily illegal. Although common law and some statutory provisions implied that the Council could not vacate the offices, a specific statute provided that appointive officers hold office at the pleasure of the City Council.325 Nor was it legally helpful that one of the landlord appointees claimed to have moved to East Palo Alto on June 3rd but had voted in Palo Alto on June 7th, for California law provides that people who move have twenty-eight days during which they may still vote at their previous residence.326

Not only was the law of little assistance on many of these points, the law’s concerns were of little import to my clients. Most of what tenant activists found repugnant about the City Council’s actions would be legally irrelevant in a lawsuit. The major legal issue was

323 I have found that the majority of lay people I have encountered in the U.S. generally assume that conduct they view as immoral or unfair “must be illegal.” This tendency may be a product of U.S. society’s self-depiction of our laws and institutions as exceptionally just.
324 Although the Ralph M. Brown Act, CALIF. GOV’T CODE §§ 54950 et seq., mandates open public meetings and formally proscribes secret deliberation and decision-making, it effectively allows a public body to subsequently ratify an improper action in the proper, public forum and thereby to avoid sanctions. CALIF. GOV’T CODE § 54960.1(e).
325 Section 36506 of the Government Code regarding general law cities (i.e., cities that have not drafted their own city charters) provides that appointive officers and employees hold office at the pleasure of the City Council. CALIF. GOV’T CODE § 36506.
326 CALIF. ELEC. CODE § 2035 (formerly § 217).
whether it was a conflict of interest for the two landlord appointees to sit on the Rent Board. The strongest legal grounds for alleging an illegal conflict of interest seemed to be that both appointees were parties to a lawsuit seeking to invalidate East Palo Alto's rent stabilization ordinance. Under California law, the existence of a legal conflict turned on the interpretation of the following statutory language:

a local agency officer . . . shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer.\footnote{Calif. Gov't Code § 1126(a).}

As I studied this sentence, and particularly as I read it to other attorneys, the question seemed to turn on whether one construed the landlords' lawsuit as "an activity . . . for compensation."\footnote{Of course, this reading assumes that the prepositional phrase "for compensation" modifies each of the three nouns in the preceding series (i.e., employment, activity, and enterprise) rather than just the last in the series (i.e., enterprise).} For many attorneys with whom I discussed this statute, the nature of relief sought in the lawsuit seemed dispositive: If the suit sought damages, it would probably be an activity for compensation; if it merely sought injunctive relief, the suit would not be an activity for compensation and thus would not constitute a conflict of interest.\footnote{I noticed that the lawyers whom I consulted for an interpretation of the statute tended to conflate compensation and monetary remuneration, deeming injunctions non-remunerative (and thus non-compensatory). This formulation assumed an injunction was somehow "non-monetary," which is not always accurate. One need not subscribe to all the tenets of the law and economics movement to recognize that injunctions, particularly in lawsuits between private parties, are often starting points in a negotiation in which legal rights are bought and sold. See, e.g., Richard Posner, Economic Analysis of the Law (3d ed. 1986); Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972); Ronald Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960); Robert Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681 (1973); Barton H. Thompson, Jr., Note, Injunction Negotiations: An Economic, Moral, and Legal Analysis, 27 Stan. L. Rev. 1563 (1975). Indeed, landlord opponents of rent control were actively trying to buy out East Palo Alto's right to impose such controls. See supra note 10. Nonetheless, I recognized that if the landlords' lawsuit "only" sought injunctive relief, I might well have a hard time convincing a judge that their engagement in this litigation was "an activity for compensation."}

As I read this sentence, I was not able to come up with a reading that satisfied both those of my colleagues who believed that one could construe the suit as an activity for compensation and those who thought it did not. I then thought of the two members of the Rent Board who were parties to the lawsuit. Indeed, the two parties were themselves local agency officers. If the suit was brought by or against a local agency officer, the local agency officer was no longer a "party to the suit." Thus, the suit was not an activity for compensation. In light of this interpretation, I was able to resolve the conflict of interest.

Paul Brest has been perhaps the strongest advocate of broader participation in constitutional discourse and interpretation. See, e.g., Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585 (1975) (arguing that legislators have a duty to determine the constitutionality of proposed legislation); Paul
When I juxtaposed the legal framing of the issue with the way tenant activists conceived their dispute, the magnitude of the transformation was arresting:

*Scope and Parties.* In a lawsuit, the question presented would be whether it was a conflict of interest for the landlord appointees to sit on the Rent Board. The City Council would not be a central focus. The litigation would pay no attention to who appointed these landlords, or why they did. The courts would focus exclusively on whether these landlords could legally hold office. Such a focus would largely let the City Council off the hook. Much of what tenants viewed as “harmful” was the Council’s conduct. Tenants viewed these appointments as overreaching, anti-democratic, corrupt, and almost akin to a treasonous conspiracy with enemies of the City. Tenants blamed both the landlords and the new Council majority; but a lawsuit would only pay attention to the landlords. Moreover, the scope of attention on the landlords would not extend to how they secured the appointments. Nor would the courts pay attention to the new appointees’ agenda of administratively dismantling rent control. These issues were central to my clients’ understanding of their dispute but they were beyond the scope of a legal challenge to the appointments.

*Substantive Norms and Rules of Relevance.* Particularly striking to me was the gulf between the question on which a lawsuit would focus and what tenant activists and their allies found repugnant and assumed should be illegal. The lawsuit might well turn on whether the landlord appointees’ lawsuit sought “only” to invalidate the law they had been appointed to enforce or whether the suit also sought monetary damages. Such a distinction was irrelevant to East Palo Alto tenants. The key issue for tenant activists was that vehement opponents of rent control should not be placed in charge of rent control policy. In a lawsuit, this issue would only be addressed obliquely.

Placed in their full local context, the appointments outraged tenants and their allies for many reasons: (1) The winning City Council slate had not raised the rent control issue in the recent election, so it had no popular mandate to abandon rent control; (2) 79 percent of the voters had said that only the voters could amend or repeal rent control, thus the appointments were a circumvention of the voters’ will; (3) the landlord lobby was rumored to have been major financial con-

tributors to the winning slate of Council candidates, so these appointments appeared to be a blatant political pay-back for their money; many viewed these landlords as not merely opponents of rent control, but of the existence and survival of the city itself, so these residents viewed the appointments as a retreat from self-rule; (5) the landlords personified the predominantly white, wealthy neighbors who had for decades taken advantage of East Palo Alto's weakness, so the landlords' acquisition of the power to alter policies set by the local electorate seemed like a return to the domination by wealthy, white outsiders that incorporation was supposed to have ended; (6) the new appointments created a Rent Board in which four of six members were white, in a city overwhelmingly comprised of people of color; and (7) while Ronald Reagan might get away with appointing opponents of government regulations to dismantle regulatory agencies, East Palo Alto was not supposed to be anything like Reagan's Washington, D.C.

Each of these stories and arguments had persuasive appeal to lay people in East Palo Alto. These stories and arguments resonated deeply with those who believed in self-rule, local democracy, and resistance to domination by wealthy, white outsiders. A significant, perhaps even defining, element of the local context of East Palo Alto was the receptiveness of many residents to stories and arguments that focused attention on issues of race and class.

But in a lawsuit, a court was not likely to deem any of these aspects of the situation legally relevant. Certainly a skilled litigator

331 California law requires disclosure of identifying information on all campaign donors who contribute $100.00 or more. CALIF. GOV'T CODE § 84211(f). Tenants believed that the winning slate had received a large number of anonymous $99.00 contributions. East Palo Alto city staff have been unable to find the campaign finance disclosure reports for this election. Conversation with City Clerk Russell Averhart (Feb. 26, 1998).

332 See supra note 316. Thomas Adams, who represented the city in the challenge to the validity of the incorporation election, recalls that landlords regularly attended the trial and that throughout the litigation the question of who was funding the legal challenge was repeatedly asked but never answered. Conversation with Thomas Adams (Feb. 21, 1998).

333 President Reagan's appointment of Clarence Thomas to head the Equal Employment Opportunities Commission was likely the most widely known example, and the one which most irked East Palo Alto residents. The appointments of James Watt to direct the Environmental Protection Agency and William Baxter to the helm of the Antitrust Division of the Justice Department were other prominent examples of this phenomenon. All three of these figures were seen by many as not so much heading their respective agencies as dismantling them — or at least their traditional enforcement functions.

East Palo Alto voters were not charmed by President Reagan or Vice-President Bush. In 1984, when Reagan overwhelmed Walter Mondale, and won 53% of San Mateo County's vote, East Palo Alto voted almost seven-to-one against Reagan (4,954 votes for Mondale/Ferraro to 770 for Reagan/Bush). In 1988, East Palo Alto voted nine-to-one against Bush (4,502 votes for Dukakis/Bentsen to 501 for Bush/Quayle). Data from San Mateo County Clerk, Registration-Election Bureau (on file with author).
would try to weave as many of these potentially persuasive “nonlegal” facts into her or his theory of the case. But in this setting it would have proved difficult to infuse many of these contextual considerations into the lawsuit effectively; indeed, they might prove counterproductive.

_Cast of Characters and Procedural Norms._ Posing the challenge in a legal forum also meant making the ultimate decision-maker a Superior Court judge in Redwood City. In East Palo Alto’s historical context, this was significant for several reasons. For tactical considerations, it was highly likely that the judge assigned to the case would be white, politically conservative, opposed to rent control, and, because of longstanding media portrayals, would probably view East Palo Alto as a quagmire of incessant political bickering. Of the eighteen judges on the Superior Court in April 1988, seventeen were white (the eighteenth was an African American man), fifteen were male, and eleven were appointed to the bench by conservative Governors Ronald Reagan or George Deukmejian.

As I understood East Palo Alto’s history, its drive for incorporation was largely about home-rule and self-determination, born in part out of a perception that San Mateo County had malignly neglected East Palo Alto. On this symbolic level, a lawsuit would entail going

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334 For a concise description of what goes into a theory of the case, see the excerpts from GEORGE VETTER, SUCCESSFUL CIVIL LITIGATION — HOW TO WIN YOUR CASE BEFORE YOU ENTER THE COURTROOM (1977), in BELLOW & MOULTON, _supra_ note 15, at 305-07. For a thoughtful, in-depth discussion of the concept of case theory, see Miller, _supra_ note 61 (discussing a theory of the case as the basic underlying story — interweaving facts, law, and our experiences and assertions of how things work — around which the presentation of the case revolves).

335 As discussed immediately below, the judges who would make the decision were unlikely to be receptive to many of these stories. Because effective advocates frame their theories of the case based on what will persuade the fact-finder, not based on what the advocate finds most persuasive, it would likely have been counter-productive to weave many of these stories into a legal theory of the case.

336 This image of a city incapable of “getting its act together” pervaded the outside media’s and area politicians’ depictions of East Palo Alto. Even the County’s most progressive member of the Board of Supervisors expressed such views: “People in East Palo Alto need to learn to transcend their differences,” offers County Supervisor Tom Nolan, who has worked closely with city officials on various problems. “People,” he said, “have to give up something for the common good.” Don Kazak, _A City At War, PALO ALTO WEEKLY_, July 31, 1991, at 20. The reporter who wrote this article for a liberal weekly newspaper genuinely asked in an accompanying editorial, “Do you think people in East Palo Alto are so accustomed to failure that success is no longer possible?” Don Kazak, _Across the Freeway, PALO ALTO WEEKLY_, July 31, 1991.


338 In addition to dozens of conversations I had with local community members, my understanding of East Palo Alto history and the impetus for incorporation was shaped by
outside the community to seek the intervention of a distant, powerful authority figure — likely to be an older, white male with political connections to other County elites.

Beyond the symbolic level, such ties and similarities to County elites might well affect the substantive outcome in the case. There was significant pressure to gentrify East Palo Alto, which was almost the only source of cheap land for expansion by Silicon Valley corporations. County economic planners were keenly aware of the overall real estate market and recognized that a “favorable investment climate” in East Palo Alto would be key to encouraging the sort of development they valued. (Indeed, County economic planners were pursuing the notion of building a baseball stadium for the San Francisco Giants on a site in East Palo Alto.) For those sharing this mind set, any weakening of rent control would help foster a more favorable investment environment. To the extent Superior Court judges worked with, socialized with, raised campaign funds from, or shared the views of these economic planners and Silicon Valley executives, the judges might be likely to subscribe to such policy preferences for “improving” the investment climate in East Palo Alto.

Litigation, therefore, created an opportunity for County elites to exert their influence to encourage gentrification. Avoiding litigation denied those elites at least one mechanism by which they might impose their vision of a “better” East Palo Alto. Because we sensed that vision was of a differently populated, far whiter and wealthier, East Palo Alto, several of my clients and I were leery of providing any opening for outside elites to promote such a gentrification agenda.

A lawsuit would also make me — a white, male, nonresident — and the City Attorney the primary framers of the dispute, certainly the primary articulators of the case. I had difficulty imagining how my clients could play a significant role in or even at the margins of such litigation, given the composition of the San Mateo Superior Court bench and the narrow legal issue on which it would probably

the articles cited supra note 306.

339 See Bill Workman, Another Sign the Giants Are Peninsula-Bound, S.F. CHRON., Apr. 9, 1988, at A2 (San Mateo Economic Development Association pushing site in East Palo Alto).

340 While race was quite an important factor in East Palo Alto, so too was residence. During my four years there, initially as a staff attorney and later as executive director of the Community Law Project, I often heard residents pejoratively characterize people of color who did not live in East Palo Alto as “outsiders” — and I heard especially strong resentment expressed toward those who had lived in the city but had subsequently “abandoned” the community.

341 East Palo Alto contracted out its City Attorney position. The City Attorney at that time, was an African American man who did not work or reside in East Palo Alto.

342 See White, Mobilization on the Margins of the Lawsuit, supra note 26.
turn — the contents of the prayer for relief of a complaint in another lawsuit. Because mobilization seemed unlikely to sway judges who were likely to be hostile and uninterested in what East Palo Altans did, the litigation option seemed likely to replay East Palo Alto’s historically unsatisfying relationship with county officials. A decision would be made in the county seat regardless of what East Palo Alto’s residents thought or did.

Remedy. Beyond my doubts about the strength of the tenants’ legal case and the likelihood of obtaining judicial relief from the San Mateo County bench, I also felt that the available remedy might not mean much, when placed in its full context. For one thing, the landlords might circumvent it easily; they could either drop their claim for monetary damages or just drop out of the lawsuit, which had sixteen other plaintiffs. Another consideration was that a litigative victory would also entail the imposition of significant attorneys’ fees, likely to be borne by the already fiscally-strapped City, not the landlords. With the City teetering on the edge of insolvency, tenants did not want to contribute to its financial woes: without a city there would be no rent control.

Most significant, however, was the fact that the same City Council would appoint new Rent Board members if the current two landlords were disqualified. These particular appointments were just a single skirmish in an ongoing political battle over rent control. Tenants would likely have to wage this battle defensively for several years until the next elections, or until they and their allies could convince a majority of the City Council that tempering or abandoning opposition to rent control was in their political interest. In essence, the issue was one of comparative power: Tenants needed to re-exert their power, show that they could not be bullied, and demonstrate that they had the strength to harm those seeking to tamper with rent controls.

C. A Collaborative Remedial Strategy

Viewed longitudinally and situated in the context of power relations, the problem seemed better suited to a multidimensional persuasive strategy. As I counseled my clients and helped them to articulate their immediate and long-term goals, they agreed on a remedial approach in which each of us would play significant roles. We set a primary short-term goal of removing the three suspect appointees (the two landlords and the purported tenant) from the Rent Board. We

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344 Memorandum to File, supra note 6. For discussion of the purported tenant, see supra note 11.
agreed on a strategy in which we would address a broad panoply of stories and arguments — legal ones and lay ones — to a variety of audiences.

All of us would make the case. Tenants and their allies would publicize Rent Board developments throughout the community and local media, using the heavy-handedness of the appointments and of the appointees’ emerging agenda to galvanize public opinion. Our focus would be on publicly pressuring the Board members to resign and the Council to remove them, while privately contacting the City Attorney to argue that the appointments were illegal.

A key persuasive strategy would be to generate large turnouts of tenants at the meetings of the new Rent Board and the City Council. These public meetings provided important opportunities for community members to voice strong opposition to the appointments and to the agenda of the new Rent Board. For we were not simply seeking the removal of the appointees, we wanted the politicians, landlords, media, and residents to view the removal as having been compelled by tenant opposition.

Thus, the purpose of these opportunities for tenants and residents to speak out was not, as Professor Simon’s critique contends, simply cathartic; nor did the strategy flow from any naive sense that all lower-income people are highly skilled advocates on their own behalf. The chief purpose was to demonstrate that significant numbers of people cared about the issue and were willing to rally to express their concerns. It was fundamentally an attempt to show and exert political strength. Given cultural predispositions by politicians and the media to discount comments by “the usual suspects” or “professional complainers,” conveying strength often requires that new faces and new voices be seen and heard. Only by mobilizing tenants and their allies could we deliver those new faces and voices. Additionally, however, it would have been naive to overlook the degree to which a broad array of storytellers and argument-makers would enhance the persuasive power of tenants’ arguments. By discussing their lives and detailing the real, adverse human impact that radical changes in rent policies would inflict, tenants brought the issues to life and forced the Board and Council to express their views to tenants’ faces.

My tenant-activist clients played a central role in carrying out the strategies upon which we decided. By distributing flyers at various apartment complexes, staffing tables outside local stores, and canvassing residential neighborhoods, they generated large turnouts of tenants at key Rent Board and City Council meetings. The previous Rent

345 See supra text accompanying notes 92 and 104
Board’s meetings generally drew no more than a handful of observers; suddenly fifty to seventy tenants were attending the new Board’s meetings.346

At these meetings, tenants and their allies used statutorily-mandated public comment periods to state their views forcefully and to make their presence felt. Despite the new Board’s unity of purpose, its coherent and detailed agenda, and its self-confidence, tenants succeeded in putting the landlords and their allies on the defensive. In fact, tenants turned all of these traits of the new Board into liabilities. In a forum almost exclusively composed of tenants and supporters of rent control, the Board came across as usurpers seeking to destroy a key institution that contributed to the well-being of East Palo Alto’s tenants.

Tenant leaders, several of whom were recently deposed former Board members themselves, skillfully used the state’s public meeting law — the “Brown Act”347 — to thwart the new Board’s immediate implementation of its agenda. Tenants successfully forced a public discussion of that agenda. State and local laws distinguished between “action” items on which the Board could vote (after having provided sufficient public notice in advance) and “discussion” items, on which no action other than public discussion could occur. The large turnouts by tenants helped to embolden the Rent Program’s staff director — a civil servant who reported to the City Manager, not the politically appointed Board — to enforce this distinction and to relegate most of the new Board’s agenda to the realm of discussion. These turnouts also ensured that the Board acceded to the staff director’s interpretation of the Brown Act. Tenants consequently put the new Board in the difficult position of choosing whether or not to prohibit public comment on “discussion items.” Board members decided to take the public heat and to prohibit public discussion and questioning on only one topic: their qualifications to sit on the Board.348

Having forced their way into a public discussion of the Board’s agenda items, tenants held this discussion on the merits of rent control in a favorable setting in which they vastly outnumbered their adversaries. Tenants subjected each landlord initiative to a challenge to ex-

346 At its first special meeting, held at 9:00 p.m. on Monday, June 20, 1988, notice of which was posted at City Hall on Sunday, June 19, only four tenants attended. Two days later, at a regularly scheduled meeting on June 22, I estimated the turnout of tenants at sixty. See also Irene Chang, Proposal to Cut Landlord Fees Under Attack, PENINSULA TIMES TRIB., June 23, 1988, at A1, A8 (estimating turnout at 70). At the next Rent Board meeting on June 30, I estimated that up to fifty tenants turned out. Memoranda to File, supra note 6.

347 See supra note 324.

348 Memorandum to File, supra note 6.
plain what needed to be fixed, since it was clear to tenants that nothing was broken. Tenants also used their numbers to play a version of "good cop, bad cop." They sensed the impatience and frustration of some new Board members at having to justify their agenda to a hostile crowd rather than just announcing it and having it implemented. A few tenants decided to try to "push the buttons" of the landlord appointees, hoping they would reveal the intensity of their enmity not only toward rent control, but toward tenants and the entire community of East Palo Alto. The large tenant turnout allowed most speakers to make their points politely, while a few engaged in less decorous heckling. By the third meeting, the tactic led one landlord appointee to adjourn the meeting in embarrassment while the other landlord appointee vociferously challenged a tenant activist to a fist fight.349

While Rent Board meetings generated spirited discussions of the merits of rent control, my clients and their allies were also engaging in other conversations in other settings. Two of these settings I only learned about later, as I debriefed with activists and tried to evaluate what had occurred. Because of their knowledge of and integration into the web of relationships in the community, rent control supporters and activists fostered discussions in a local coffee shop patronized by some Council members and in churches attended by others. Both were private arenas in which the politicians operated, and which they used to sample public opinion. In those arenas, my clients and their allies reiterated many of the stories that resonated so well in East Palo Alto. Those stories did not focus on the merits of rent control (and certainly not on whether the landlords were seeking damages in addition to an injunction to invalidate the Ordinance). They centered on issues of fair play, local democracy, and resisting the arrogance of wealthy, white outsiders. These were fora my clients knew well, from the inside. These were what Professor White would call "safe spaces."350 In these arenas, local community members and parishioners obviously could function far more effectively than a young, white newcomer and outsider such as myself.

Although I was unaware of the conversations in the churches and coffee shop, I did participate on several fronts. I was the primary contact with the City Attorney, to whom I conveyed my legal research and arguments. My position as a fellow attorney made him more likely to attend to what I had to say than to what my clients might tell him. I also coordinated fact-gathering efforts with various tenants; I took on some while my clients took on others. I shared my legal re-

350 See supra notes 218-25 and accompanying text.
search and arguments with my clients, preparing them to use the law when necessary or appropriate. I attended all public meetings, quietly but conspicuously sitting in the front rows of the audience, where public officials could notice my presence. Before and sometimes during these public meetings, my role often involved advising tenants of procedural and parliamentary rules. In addition, and I think fundamentally, I played the role of a strategic advisor and ally. I participated not simply by raising or responding to “legal” questions. Instead, I worked as a member of a collaborative team to jointly devise, refine, and implement an overall strategy — including framing and refining the stories we would tell and the arguments we would make.

The new Board made our jobs easier at several junctures. Unfamiliar with the local terrain, they made several missteps. For example, a new tenant appointee purported to live at an apartment complex whose residents were being organized by two tenants whom I was advising in that organizing effort. Thus we were quickly able to learn that only two white tenants, neither of whom could have been the new Board member, lived at the complex, and that the particular unit that he claimed to have been occupying for two weeks was still vacant and was being used by another tenant to store her excess furniture.\textsuperscript{351} The landlord appointees also made several gaffes. One called the City Attorney, an African American man, a “busy boy.” The same appointee also once confused the single holdover Rent Board member with the staff director of the Rent Program — two individuals whose only physical similarity was that they were both African American women. At one meeting, the new Rent Board members conducted an impromptu public interview of a white man for the position of legal counsel to the Board, apparently oblivious to or uninterested in the current City Attorney’s exclusive contract to provide services and to the racial significance observers attached to this action. The Rent Program’s staff director made sure to report these gaffes to the City Attorney; my clients and our allies noted and recounted them in various circles.\textsuperscript{352}

What ultimately happened? Within three weeks, the City Council, at a meeting attended by seventy-five tenants, unanimously decided to remove the two landlords.\textsuperscript{353} At the very next meeting, the Council removed the purported tenant appointee on the ground that he lived in San Francisco.\textsuperscript{354} Ostensibly, the City Council based its

\textsuperscript{351} Memorandum to File, supra note 6.
\textsuperscript{352} Id.
\textsuperscript{353} See Michael Shapiro, Council Asks for Resignation of Two Rent Board Members, \textit{Peninsula Times Trib.}, July 6, 1988.
\textsuperscript{354} Memorandum to the File, supra note 6.
unanimous decision on a report from the City Attorney that tracked my analysis of the statute.\textsuperscript{355} Fortunately for the tenants, the landlords' lawsuit against the rent ordinance \textit{had} sought monetary damages in addition to injunctive relief.

\textbf{D. Lessons, Lingering Issues, and Aspirations}

Ultimately, luck had very little to do with our success. It was readily apparent that the City Council backed down because the new Rent Board had become a political liability. Tenants had mobilized themselves and community opinion. On this issue, we had successfully manipulated the network of power relations. As many of us recognized, however, this battle was likely to be but one in an unending series of contests over rent control. Other gains and losses loomed over the horizon.

For a brief moment, tenants could savor the satisfaction of having actively participated in the democratic process and successfully persuaded their elected officials to change course. Beyond this psychic satisfaction, however, tenants' active participation changed the political correlation of forces in the community. Had tenants and their lay community allies not been active participants in the persuasive campaign, I doubt that the weight of the available legal arguments would have carried the day in a County courthouse or that any arguments or threats I might have made to the City Council would have swayed them.

The new Council majority's base of support were homeowners, not tenants. The two defeated pro-rent-control incumbents had lost by electoral margins of almost two to one. At the time of the appointments to the Rent Board, tenants were reeling and the new Council majority was in the ascendancy. A critical accomplishment of my clients and their allies was to alter the political balance of power as quickly as they did. Within three weeks, open opposition to rent control and alliance with outside landlords had once again become a political liability in East Palo Alto. Aware of their target audience, my clients were not merely arguing that rent control was sound policy. As they recognized, persuasion of the Council majority required reaching at least part of its homeowner base of support; thus our stories and arguments focused on issues of history, class, race, and collective community identity.

The experience of this Rent Board-packing campaign brought many new tenants into the persuasive arena, several of whom became

\textsuperscript{355} Shapiro, \textit{supra} note 353 (quoting City Attorney's report to City Council that state law prohibits local officials from engaging in any activity for compensation that is inconsistent with his or her duties and that "[a] lawsuit is an activity for compensation.").
key leaders in subsequent efforts. My clients and I organized a city-wide meeting that autumn to bring new tenants into the struggle, which led to the formation of a non-profit education and outreach arm for the tenants’ organization. Several of the activists brought into the tenants’ movement to contest the new Board and its agenda subsequently participated in creating — and then sat on the board of directors of — a community development corporation, which advocated on economic development and redevelopment issues and later built new affordable housing units in the city.\textsuperscript{356}

Tenants were not the only ones who grew from this experience. I too learned several lessons, about the network of power relations in East Palo Alto, how to collaborate effectively with clients, and the value of such collaboration.

I learned about the importance of formal and informal community institutions and social networks in East Palo Alto’s political life. When it came to East Palo Alto’s many churches, I had previously thought mainly about the influence ministers might have on their congregations. My clients and their allies taught me the significance of the social interactions among members of the same church. During and after this Rent Board-packing incident, fellow congregation members spoke with one of the new Council members and plainly informed him that he had been elected to straighten out the City’s fiscal mess, not to undo rent control. Because he regarded his fellow congregation members as sharing important values with him, their entreaties had real persuasive strength. Coming from members of his community, their opinions mattered and their stories and arguments moved him. Thereafter, that Council member became a strong supporter of rent control.

After learning of this intra-Church exchange, I recognized that my clients and I would be wise to pay attention to the church affiliation of key actors and to treat congregational ties as potentially vital to successful persuasion.

This initial skirmish over the appointments to the Rent Board also refined my understanding of how to collaborate successfully with clients. It led me to abandon my initial reluctance to speak at public meetings. I soon recognized that, as long as I was careful to ensure that my clients also spoke and I did not monopolize the spotlight, my public addresses led clients to view me as more firmly on their side. Silence on my part was perceived not as respectful deference but as aloofness or indifference. I soon realized that if I wanted to be a collaborative team player, my clients expected me to carry my weight in

the public arena too.\textsuperscript{357} Moreover, our adversaries might have construed my silence as fear, incompetence, or unwillingness to confront their actions.

I emerged with questions, too, about how collaborative I had really been. For example, how freely had my clients chosen to follow the course we outlined and carried out together? I was, after all, the only free lawyer in town and I did not want to rush to litigate. Even if I had neutrally presented the likely consequences of various possible strategic alternatives, the mere identification of drawbacks to litigation inevitably shaped the “consensus” we ultimately reached. As I review my contemporaneous notes of our counseling sessions, hindsight reveals ways in which my execution of client-centered counseling techniques falls below my current standards. There certainly was a gap between what I thought I said and what at least one of my clients heard me say about the litigation option. My notes indicated that I said “it is often easier to convince the public, the press, and politicians that something is illegal than it is to convince a lawyer or a judge” and that I noted how “litigation is often counterproductive in efforts to organize and empower tenants.”\textsuperscript{358} The minutes of the meeting taken by one of my clients reported that I felt “other options should be utilized before lawsuits, due to costs, manpower and evidentiary concerns.”\textsuperscript{359}

Beyond refining my understanding of how best to collaborate, this experience taught me important lessons about the value of collaboration. Despite my extensive exposure to White’s and López’s work, I had primarily thought about collaboration as something that was good for my clients: it would actively involve them, thereby confirming and enhancing their persuasive skills, self-confidence, political engagement, and ultimately, their political power. What I had not yet experienced and fully internalized was how collaboration could be good for me as an attorney and for us as collaborative problem-solvers.\textsuperscript{360}

Although much of the analysis of the local context and many of the strategic choices we made and implemented now seem obviously correct with hindsight, I would have overlooked many of them with-

\textsuperscript{357} Although I had not read Professor Alfieri’s work at the time, my initial inclination towards silence in public settings was probably most consistent with his more circumscribed vision of collaboration. \textit{See supra} note 207 and accompanying text.

\textsuperscript{358} Memorandum to the File, \textit{supra} note 6.

\textsuperscript{359} Minutes of June 25, 1988, Steering Committee Meeting (on file with author).

\textsuperscript{360} At that early point in my career, my commitment to collaboration was based more on intellectual or political predisposition than actual experience. Until I actually engaged extensively in such work, I did not recognize the unconscious paternalism or arrogance of my initial assumption that collaboration would chiefly benefit my clients.
out my clients and their allies. Besides my obliviousness to the persuasive opportunities in churches and coffee shops, I would not have thought of the "good cop, bad cop" tactics at Board meetings, nor appreciated the value of detailed narratives of the likely consequences of rent increases, nor fully recognized the importance of reaching or at least neutralizing the City Council's homeowner base of support.

By viewing and treating my clients as partners with superior expertise in certain areas, listening carefully to them, and seeking their feedback and advice, I learned from them — not just their goals but their insights regarding the solutions to this problem and problems in general. My clients and their allies taught me much about East Palo Alto, its history, networks of institutions and relationships, and what sorts of stories, arguments, and actions could persuade local audiences. My commitment to being one of many co- eminent strategists liberated me from the need to be the single preeminent strategist. In addition to enabling my clients to play a more active role in collectively analyzing the situation, plotting a course of action, and implementing that plan, I was able to learn from them in each of these areas.

This collaboration was not only good for my clients and good for me, it was good for us. It led us to a wiser strategy and a more effective implementation of that strategy than would have occurred had we not collaborated. Ironically, Gary Blasi has written one of the better expositions of the value of collaboration for problem solving. Blasi writes about a meeting in Washington D.C. of a dozen advocates for homeless people:

By comparing experiences, drawing on both separate and common histories, and correcting for the idiosyncrasies of individual places and times, a dozen people are more astute than any one of them would be alone. Without doubt, because of who they collectively are, distortions and blind spots remain, but are fewer than in the local knowledge of any single advocate. For a time, [until the group disbands] the imperfectly combined knowledge of many people constitutes a superior, if evanescent, kind of intelligence. If it remained constituted in that form, the capacity for action, for making good decisions, and for solving problems would be quite remarkable.

361 There is an important difference between humility and self-negation. I considered and tried to present myself as knowledgeable, with skills and knowledge to offer, but eager to learn more and willing to admit fallibility. Had I presented myself as having no opinions or thoughts, always just listening and never sharing my own views, my clients would likely and rightfully have seen me as "clueless" and useless, more akin to a sponge or a voyeur than to a true collaborator. See supra note 208 and accompanying text.

362 Blasi, supra note 34, at 1095. Blasi is, of course, championing more global (i.e., regional, national, or international) gatherings of local advocates, to rectify the shortcomings of local knowledge and to create and act on global insights.
The value of group discussion and the greater insights that flow from multiple discussants and problem solvers is, I believe, true of any group in which participants respect and are willing to learn from each other. At the heart of collaborative lawyering is a commitment to seeking and creating such circles — or “spaces,” to use Lucie White’s terminology — comprised not simply of national experts but also clients and community allies.

With regard to context and the legal transformation of disputes, the main lesson I learned was not categorical, but contextual: not to avoid the law, but to put it in its place. At times, the law’s tendencies to narrow the scope of disputes, parties, and issues, to focus simply on the facts established in a record, and to allocate decisions to a more or less disinterested outsider, are quite helpful. Sometimes the law’s substantive norms are as helpful or even more helpful than lay ones.\textsuperscript{363}

What is essential, I realized, is to recognize when other stories, arguments, or actions by non-lawyers, can be equally or more effective. Occasionally, lay stories, arguments, or actions are effective in isolation. More commonly, they are particularly effective in conjunction with legal and political approaches. To recognize those opportunities, we must be alert to the phenomenon of dispute transformation and we must explore the full local context: its history, network of power relations, and the operation of structural forces such as race, class, and gender. And we must be open and eager to learning from our clients, about what strategies to adopt and how to implement them.

Returning to the two main substantive criticisms of collaborative lawyering — its purportedly narrow focus on the details of the attorney-client relationship and its alleged failure to attend to and inability to alter structural and institutional power — neither criticism seems to apply to the experience I described here.

I did not focus exclusively on the power I might exercise over my clients or on the symbolic analysis of how I might depict them. Although I did consciously seek to make the Law Project a natural, supportive place for activists to meet and strategize, and my clients and I did spend a good deal of time and energy thinking about how we would depict the situation and their adversaries, we were not motivated exclusively by an inward focus on the sort of relationship we wanted with each other. Our approach was driven as well by the world outside our relationship. It was driven by analysis of the full historical, relational, and structural context of the problem we faced.

\textsuperscript{363} Even when the legal framing of a dispute has none of these advantages, litigation may still be a helpful device to seize the initiative in the dispute, as Arthur Kinoy has ably documented. See Kinoy, \textit{supra} note 140.
We constantly attended to institutional and structural relationships of power that shaped the problem and potential solutions. As we discussed the matter, my clients and I viewed the issue as the defense of rent control and the struggle to keep East Palo Alto a community in which current residents could continue to afford to live. We perceived this struggle as one which would be perpetually contested for the foreseeable future. Consequently we sought an approach that did not simply remove the landlord appointees but that would build political power and better position tenants vis-à-vis their adversaries for the long run.

We did not eliminate poverty in East Palo Alto, of course, nor change property ownership patterns in the community. Wealthy, white outsiders continued to own almost all of East Palo Alto’s apartments and continued to seek to undermine and eliminate rent control. Gentrification pressures and efforts continued as well. But my clients and their allies did place significant limits on the power of those outsiders. Thanks to the efforts of tenant activists and their allies, the landlords and new City Council majority were unsuccessful in their efforts to dismantle rent control. Over the next two years, new appointees attempted to adopt the very same set of administrative regulations that the controversial Board distributed at its first meeting. Tenant activists and I, again working collaboratively, successfully thwarted the adoption of almost all of these proposed regulations.364

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In providing so detailed a narrative of a collaborative venture, I hope to facilitate a better understanding of the nature of collaborative lawyering. Critics and supporters alike are at the earliest stages of

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364 Although East Palo Alto tenants successfully fought off local efforts to weaken rent control, they eventually were defeated at the statewide level. In 1995, seven years after the events recounted here, the California legislature dealt a decisive blow against rent control ordinances in East Palo Alto, Santa Monica, Berkeley, and West Hollywood when it passed a statewide ban on vacancy controls and on any form of rent control for single-family homes and condominiums. See Costa-Hawkins Rental Housing Act. CALIF. CIVIL CODE §§ 1954.50 et seq.

Opponents of rent control in California had been trying for a dozen years to pass state legislation limiting or abolishing rent control. See Pamela J. Podger, Costa’s Anti-Rent Control Success Brings Cheers, Jeers, FRESNO BEE, Aug. 27, 1995, at B1. Although landlords frequently succeeded in passing anti-rent-control bills in the state assembly, tenants’ powerful ally, David Roberti, longtime President Pro Tem of the state senate, killed such bills by referring them to a liberal-dominated Judiciary Committee from which the bills never emerged for a vote by the full senate. Id. Eventually, California’s term limit ban led to Senator Roberti’s retirement; an unexpected turnabout by outgoing Senator Nicholas Petris, a Judiciary Committee member from Berkeley who had previously voted against such measures, led to the Costa-Hawkins Act’s successful passage by the state senate in 1995. Id.
identifying criteria by which to define this phenomenon and assess this type of lawyering. Yet we cannot hope to assess the efficacy of the approach without a precise understanding of the activities it entails.

Of course, some may object on principle to drawing any conclusions from a single example.\textsuperscript{365} They may be inclined to dismiss this experience and the work of other collaborative lawyering theorists as merely anecdotal. But even those who prefer empirical inquiry and rigorous scientific study can, I believe, find value in such reports on efforts to implement a collaborative approach. At the very least, these detailed descriptions and analyses provide valuable data for study.\textsuperscript{366}

Moreover, looking beyond the paradigm of scientific study, reports of experiences such as the one described in this article facilitate the application of another, more prevalent, metaphor that describes our work: the paradigm of the reflective practitioner.\textsuperscript{367} In this conception, we engage in careful introspection on our lawyering experience (and the experiences of others that we observe or learn about). Such reflection is not undertaken to develop scientifically verifiable truths, but rather to improve our craft and refine our understanding of what it means to do our jobs well. Like many professional problem-solvers, we regularly act in conditions of uncertainty. We cannot rely on scientifically verified support for most of our tactics. We think, we act, and then we try to learn from those actions. We do not demand scientific verifiability of the lessons we draw. As lawyers, we understand that we will rarely be able to avoid ambiguity. We do, however, try to think deeply about experiences, attending to as many aspects of a situation as we can and examining as many perspectives and dimensions as possible. These reflections lead us not to verities, but hypotheses — hypotheses that we test by acting and then reflecting upon the results.

\textbf{Conclusion}

The critics of collaborative lawyering theory ask precisely the right question when they focus on whether this theory is helpful to

\textsuperscript{365} Blasi, for example, has written: “There is now a substantial body of literature in experimental and cognitive psychology demonstrating the existence of pervasive biases in the processing of experiential information of all kinds. For example, we are all subject to a tendency to generalize too strongly from very striking examples.” Gary L. Blasi, \textit{The "Homeless"Seminar at UCLA}, 42 \textit{WASH. U. J. URB. & CONTEMP. L.} 85, 96 (1992) (footnotes omitted) (citing Amos Tversky & Daniel Kahneman, \textit{Availability: A Heuristic for Judging Frequency and Probability}, in \textit{JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES} (Daniel Kahneman et al. eds., 1982)).

\textsuperscript{366} See White, \textit{Collaborative Lawyering in the Field}, supra note 26 (urging clinical scholars to ground rhetorical exhortations to lawyer collaboratively by producing detailed descriptions and analyses of grassroots, community-based initiatives and the ways that lawyers productively interact with them).

\textsuperscript{367} See \textit{supra} note 21.
legal practice. By directing attention to effectiveness in addressing issues of collective import and structural or institutional power, the critics get to the core of a central, usually unexpressed, fear of most of us who view ourselves as progressive: that the way we structure our work and the issues to which we choose to devote our time and efforts may be irrelevant or even counter-productive to efforts to move the world toward positive change. If we are to be responsible to ourselves and our clients, we need to honestly examine our visions and practices against this standard.

Because the heart of the critiques is that collaborative lawyering theory and its emphasis on client involvement is unhelpful, I have shared an extended illustration of what I consider a successful (though by no means flawless) implementation of collaborative lawyering ideas. I have no illusion that this example will “prove” the critics are wrong about the ineffectivity of this approach. But I do hope that this exploration will help critics, skeptics, agnostics, and supporters gain a better appreciation of the precise nature of a collaborative approach and the benefits that such an approach may confer.