

CIVIL PROCEDURE ASSIGNMENTS
PLEASE READ FOR THE FIRST DAY OF CLASS – THURSDAY, SEPTEMBER 2rd

- 1) The Buffalo Creek Disaster, Gerald M. Stern: pp. 1 – 137 (A paperback book found in bookstores everywhere)
- 2) Civil Procedure (Seventh Edition), Stephen Yeazell, pp. 1 – 12, 257 – 259, 13 – 25 (Casebook available at the Northeastern University Bookstore)
- 3) *The Dark Secret of Progressive Lawyering*, William H. Simon (below)

THE DARK SECRET OF PROGRESSIVE LAWYERING: A COMMENT ON
POVERTY LAW SCHOLARSHIP IN THE POST-MODERN, POST-REAGAN ERA

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I. Introduction

In 1971, Stephen Wexler argued in “Practicing Law for Poor People” that what poverty lawyers should be doing was, in a word, organizing. [FN1] Wexler flaunted a tough-minded disdain, not only for individual claim assertion, but also for the purely individual concerns of particular clients. Instead, he advocated efforts to assist the poor to collective power.

In his 1977 diagnosis of the state of poverty practice, Gary Bellow argued that what legal services lawyers should be doing was “focused case pressure.” [FN2] He proposed aggregating small housing or welfare claims in order to generate pressure on institutions engaged in systemic misconduct and to encourage collaborative action among clients. Like Wexler, Bellow advocated collective empowerment, but the process he envisioned was smaller in scale and more informal. Bellow expressed concern about lawyers dominating clients with their own agendas and argued that heightened lawyer accountability was an important virtue of small-scale client collaboration.

In the late 1980s and early 1990s, a large body of literature on poverty practice emerged. This literature focused intensely on the problem of lawyer domination, which it portrayed not – as Wexler had – as a necessary evil, nor – as Bellow had – as a remediable failing, but 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. [FN3]

At each stage in this remarkable evolution, the concern with lawyer oppression of clients has increased, while the scale of material and organizational ambitions has declined. Of course, it is easy enough to correlate this intellectual development with the course of practice. Wexler wrote as counsel to the national organization coordinating the welfare

rights movement of the late 1960s and early 1970s -- the last time lawyers participated in anything resembling large-scale collective action by poor people. Bellow wrote at a time when a significant legal services movement had gained institutional security, but the energy and inspiration for collective practice seemed to be draining rapidly. The new poverty lawyers write at a time when practitioners feel besieged by hostile politicians and rebuffed by the judiciary, and the idea that lawyering might serve ambitious collective goals seems less plausible than ever.

Thus, we find ourselves in the peculiar situation of having for the first time an extensive and rich literature on poverty law -- a literature that makes substantial progress toward the goal of bringing theory to bear on practice -- at a time when the general state of poverty law practice is so depressing. This work draws in a sophisticated way on a breath-taking array of ambitious social theories, and it is informed by concrete knowledge of the texture of practice.

I admire this literature and am pleased to have had my own work associated with it. However, I have reservations about it that I want to explore here: I think that it does not adequately treat several lawyering issues, especially those concerning collective practice. In pursuing this point, I do not mean to minimize the great contribution this work makes to understanding the lawyer-client relation and the effect of legal institutions on poor people's sense of themselves. On the other hand, I mean to say more than that there are important topics that these authors don't deal with extensively. I think that the preoccupation of the new poverty law scholars with professional domination and their premises about the nature of domination perpetuate some mistaken conservative views about law practice.

II. Self-Assertion for the Client; Self-Effacement for the Lawyer

The new poverty law scholarship proceeds from two central premises, one about clients and one about representation. The client premise insists on the dignity, insight, and abilities of poor people. The scholars make this claim in the face of a largely implicit conventional view that treats poor clients as if they had nothing to teach their lawyers and nothing to contribute to advocacy efforts on their behalf. The new scholarship insists that overcoming the cultural distance that obscures the political sophistication and coping skills of poor clients is the first duty of the poverty lawyer.

The representation premise portrays power and oppression as pervasive and diffuse in the professional interaction. This point involves a revision of older, more conventional leftist views that see power in terms of the larger structures of political economy. In the new scholarship, power does its work through the micro-structures of everyday life: the physical layouts of courtrooms and workplaces, the rituals of interaction in courts and other public places, and the conventional modes of communication in public life. In particular, language and speech constitute arenas of power. For example, rhetorical styles empirically associated with white upper-class males are given implicit normative primacy in the credibility judgments of official actors. Specialized jargon serves to disable people from participating in conversations about matters that affect them.

Helping professionals who purport to speak for poor people are incapable of empathic understanding and systematically reprocess what their clients say in ways that subvert their intentions. Such practices conspire to "silence" the poor client.

One disheartening implication of this view of power is that the lawyer is constantly at risk of implication in the structures she needs to challenge to benefit the client. Her own role is defined in terms of a range of social practices that are themselves micro-structures of power that contribute to the larger patterns of subordination. But there is also a heartening implication: if oppressive power is more omni present than the old left view suggests, it is also less omni potent. The battle can be fought on millions of fronts and, on many of them, victories are possible. For example, the way the lawyer arranges her office, where she has the client stand in court, or how she interviews and examines the client can all yield micro-victories over oppression.

The prescribed goal of the new scholarship is "empowerment" or enhancing the autonomy of the client. This means, first, minimizing the lawyer's own power or the social power the lawyer would otherwise tend to implement. Second, it means enlarging the client's capacities for self-assertion. The idea is to enable, or at least not disable, clients to assert their own goals, to draw on the insight they already have, and to act on their own behalf.

III. The Dark Secret

The Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments. This is so for the following reasons:

First, lawyers choose their clients. Even if they delegate the choice to other people, organizations, or the market, the decisions to delegate involve choices that influence the outcomes.

Second, the advice lawyers give clients and the representational tactics they choose on behalf of clients are inevitably influenced by the lawyers' own values. This advice and these tactics in turn influence clients' perceptions of their interests. There is no value-free mode of communication in which clients could be presented with unfiltered information needed for decision. Advice has to be limited and structured in ways that will reflect the advisor's values. Similarly, tactical choices that the lawyer makes may affect not only opposing parties but also the client's sense of his own interests. [FN4]

Third, collective practice involves commitments to multiple clients with potentially differing interests. To engage in this kind of practice, lawyers have to make choices that influence the balance of power among these interests. If conflicts materialize, lawyers will have to take sides. (Even if they react by withdrawing or deferring to the instructions of someone else, those decisions will affect the balance of power.) If conflicts do not materialize, lawyers will make decisions (or will choose others to make decisions) that affect the contours of organizational power. [FN5]

Lawyers have to make all these choices and decisions in terms of their own values. Even a decision to defer to someone else is a decision that, if not arbitrary, must be based on some judgment about why the other is entitled to deference in this matter. 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. People, however, tend to differ over what such values mean in any given context. Except in the highly unlikely circumstances in which all clients fully understand and share the lawyer's values at the outset of the relationship, the lawyer's efforts to respect and empower the clients are likely to involve power over the clients, that is, the imposition of lawyer values.

I call this situation a "Dark Secret" because the established bar has been at pains to deny it for the past hundred years. [FN6] Mainstream lawyers have long aspired to see their work as apolitical -- as not involving choices for which they have substantive responsibility or which might legitimate public concern or regulation. Thus, the bar has insisted that effective lawyers merely carry out the will of their clients. They have tended to ignore the fact that lawyers choose their clients (aside from ineffectual laments that the resulting distribution of legal services is so skewed). They have mistakenly portrayed the practice of counseling as the neutral presentation of information for autonomous client decision.

In the case of collective practice, the bar has been alternately obsessed with and blind to the problems of conflicts of interests. In its moments of obsession, the bar tends to find conflicting interests everywhere and discourages lawyers from multiple representation. In its moments of blindness, the bar ignores conflicting interests and treats multiple representation as tantamount to individual representation.

For many decades the bar's pattern of oscillation between these two perspectives on collective practice could be very simply summarized. When individuals were formally organized as a business corporation, the bar treated them as a unit and approved the lawyer's representation of the "corporation" as if it were an individual with unitary interests. In nearly all other situations, the bar expressed hostility toward, or at least suspicion of, collective practice on the ground that it would involve the lawyer in potential conflicts, and it often persecuted lawyers affiliated with consumer, labor, and civil rights groups who were attempting to coordinate claims in order to achieve the benefits of collective action routinely available to corporations. Although the bar's current positions are more complex, the tendency toward blindness to internal conflicts of formally organized clients and oversensitivity to conflicts among noncorporate clients persists.

One would expect that the new poverty law scholarship would be well positioned to reject this perspective. The new scholars have absorbed modernist and post-modernist critiques of the idea of neutral communication and autonomous decision. They profess support for collective practice. And they are leftists who are aware of the conservative purposes to which the older doctrines have been put.

Yet, to a surprising extent the new scholarship continues to implicitly deny or at least ignore the Dark Secret. It tends to ignore the way lawyers choose clients. Most of its narratives start out with a lawyer who already has a client. And to the extent collective issues are addressed, they usually take the form of an effort to "find allies" who already share the goals of the given client. Although the ways in which lawyers influence clients are acknowledged, they are treated as thoroughly pathological. When lawyers are portrayed as having responsibilities to collectivities or "communities," the communities are described as if they were fully constituted with homogeneous interests.

Because it does not adequately acknowledge the Dark Secret, the new scholarship suffers from at least three major problems:

First, the client "empowerment" recommended by the new scholarship seems quite similar to the client autonomy exalted in the traditional doctrine. In this respect, the new scholarship seems much less radical in principle than in rhetoric. If "empowerment" means simply respecting the client's own sense of her goals, then this is exactly what mainstream doctrines prescribe. If it means enhancing the client's potential for self-help, it is, if not required by mainstream doctrine, certainly not discouraged by it.

Where the new poverty law scholarship differs from mainstream doctrine is in its appreciation of the difficulty of respecting the client's autonomy. Mainstream doctrine treats the process of learning and respecting client goals as straightforward. On the other hand, the new poverty law scholars recognize myriad ways in which well-intentioned lawyers can misunderstand and dominate their clients. This recognition, however, involves them in a difficulty. The scholars are committed both to a post-modernist belief that identities and relations are constantly constructed in the process of interaction (the representation premise) and a pre-modernist belief in the ingrained virtue and insight of poor people (the client premise). These conflicting commitments make it difficult to explain the lawyer's intervention.

The pre-modernist commitment leads to the prescription that the lawyer leave the client alone (not dominate her). But this raises the question of what the lawyer can usefully contribute. The post-modernist premise suggests that only a fairly minor intervention could avoid changing the client. Indeed, one tendency of the scholars is to describe lawyering in terms that connote a fairly minor intervention -- for example, as a form of "translation" of obscurantist professional rhetoric into lay terms that enables clients to act on the basis of their pre-existing insight. But this approach seems to trivialize poverty and subordination. One would almost think that good dictionary would be enough to overcome them. [FN7]

Lawyers and professional advisors for the dominant social groups seem to do considerably more than translation for these groups. For example, they assist them in reflecting on their goals by offering a detached perspective, they give strategic advice, and they try to persuade third parties to support the client. Note that when lawyers get in

trouble, they rarely represent themselves, even though they are presumably fluent in the law and require no translation.

Another tendency of this literature is to describe lawyering in ways that suggest a considerably more ambitious intervention -- say, as a form of "consciousness raising" that creates confidence, solidarity, and clarity out of insecurity, alienation, and confusion. But this approach makes it impossible to see how the lawyer could ever avoid imposing her own view on the client. Having absorbed the lessons of post-modernism, the scholars can't believe that there is any neutral process of consciousness-raising that merely facilitates the emergence of some immanent client character. The structure of the consciousness-raising process is necessarily a structure of power, and the ways the lawyer influences that structure will necessarily influence the outcomes.

Thus, on the premises of this literature, it is hard to imagine a role for the lawyer that would make a difference without oppressing the client.

The second major problem is that the normative premises of the new literature are not plausible. The problem is not so much with the idea of client empowerment as with the idea of lawyer self-effacement.

Mainstream doctrine portrays the lawyer as mediating between client goals and a determinate, just system that delineates the boundaries of each citizen's autonomy. Since lawyers are presumptively morally committed to the system, serving the autonomy of any client is consistent with the lawyer's own moral autonomy. But radical lawyers don't see the system as either just or determinate. They see the assertion of legal claims as part of a broad political struggle.

Radical lawyers thus cannot think that their work is valuable and fulfilling just because they help enforce their clients' legal rights. The fact that their clients are poor is critical to their sense of professional worth and satisfaction. But the new scholarship seems hostile to allowing the expression of any personal commitments of the lawyer beyond the general commitment to the poor. Once the client is identified as poor, her values are supposed to determine the relation.

Yet this position seems to condemn the radical lawyer to an experience that, in almost any other context, she would call alienation, since the values of even poor clients' will sometimes be different from those of the lawyer. The left has always considered the ability to express one's values in one's work as a defining quality of a just, humane society. Presumably this is part of what lawyers are trying to help poor clients achieve. Why should they be denied this benefit themselves?

To say that lawyers have a legitimate interest in expressing their values in their work is not to say they should be able to control their clients. It is to say that not all lawyer power and influence should be seen as illegitimate domination. I don't have any formulas about the legitimate range of lawyer influence, though I'll give some examples below. But I think consideration of this issue has been inhibited by a reluctance exemplified in

this literature to acknowledge any legitimate lawyer interest in participating in formulating the goals of the relation.

On this normative point, radical poverty law scholarship again tracks mainstream doctrine. For the established bar, the goals of the relation are to be set by the client. [FN8] But this premise, morally implausible enough for mainstream lawyers, seems doubly so for poverty lawyers. Most mainstream lawyers allocate their efforts through the market to the highest bidders, thus obviating normative judgments. But poverty lawyers typically disapprove of this practice and in any event cannot practice it themselves. They must make normative judgments about how to distribute their services, and of course, they cannot defer to clients here, because they don't know who the clients are until the judgments are made.

The third problem with the new literature is that it has difficulty squarely addressing some of the critical aspects of collective practice. The scholars express considerably more sympathy to noncorporate collective activity than mainstream doctrine, but on examination this difference is less substantial than it initially appears. The bar's anxiety about collective action stems from the beliefs that, first, multiple clients tend to have conflicting interests, and second, lawyers have difficulty functioning effectively in situations of conflicting interests.

It seems unlikely that the new poverty law scholars can deny the second point. The reason mainstream doctrine deems lawyering ill adapted to situations of conflicting interests is that such situations might require lawyers to make value judgments about the relative validity of competing client claims. Since the choice among client interests would involve resort to some value other than those asserted by clients, such a choice would require the lawyer to look to some commitment of her own or of some authoritative source other than the clients. And this would have to be seen as oppressive power.

So the reason why collective action seems less problematical to the new scholars cannot be their greater willingness for lawyers to resolve client conflicts of interest. It must be that they are less prone to see the interests of poor people as in conflict. And this, in turn, seems related to their commitment to viewing poor clients as attractive people. But this is naive. The client premise is 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 their own and their groups' interests are.

Poor people are not more likely than non-poor people to have consensus about their interests. Indeed, an interesting argument made recently by Claus Offe asserts that they are more likely to have conflicting notions of their interests than the most advantaged groups in the society, and that this greater likelihood represents a critical structural axis

of disadvantage. [FN9] Offe argues that a major reason why capitalists do better than the poor is that the capitalists are better organized. He claims that a major reason for this is that it is easier for them to organize because they have a stronger sense of common interest. Although capitalists may have diverse preferences and beliefs, they share a basic interest in profit that is both objectively formulable in terms of a unitary metric and separable from other material and nonmaterial interest. This distinctive common interest makes it relatively easy for capitalists to achieve the necessary agreement for collective action in pursuit of profit.

Poor people, on the other hand, must organize as workers, or members of a residential community, or a group defined by ethnicity, gender, or some other social category. The interests of the prospective members of such groups resist reduction to a common metric. Even the purely economic interests of workers will involve trade-offs between job security and compensation, cash and fringe benefits, current and future compensation. And even to the extent material interests can be reduced to a common metric, these interests are typically inseparable from other noneconomic interests, for example, safety or comfort or personal autonomy or dignity. Conflicting views of self and group interest will thus be more numerous and intense within groups of poor people, and achieving the agreement necessary for effective collective action will be harder.

Organization on the basis of consensus is difficult generally, and especially difficult for the poor. Thus, to maintain an existing group it may be necessary to rely either on coercion (for example, binding a minority to majority rule) or selective incentives (rewarding members on an individual basis for contributions to the group). The same principles apply to organizing unaffiliated people; only here the coercive power or selective incentives would have to come from some source outside the unorganized community, perhaps from "outside agitators" or social reformers.

Now if this argument is correct, it means real trouble for any attempt to integrate collective practice into the perspective of the new poverty law scholarship. For the application of coercion and selective incentives can only look like illegitimate power in this perspective.

Even if we reject the claim that conflicts of interest are less tractable for the poor than for capitalists, the problems remain. Any degree of conflict of interests among client constituencies will necessarily require lawyer judgments about the comparative legitimacy of different client goals that cannot be made in terms of articulated client goals. This seems unacceptable in the new poverty law scholarship framework.

VI. Conclusion

The great achievement of the new poverty law scholarship is to show how the normatively uncontroversial principle that the poor client deserves the lawyer's respect and understanding requires a vastly more complex undertaking than most lawyers have

supposed. Unfortunately, however, the scholars have given less attention to the normatively more controversial issues of ethics and political economy that reveal actual and potential conflict and division among poor people. In doing so, they have tended to sentimentalize poor clients and especially poor "communities," to ignore the legitimate ethical claims of lawyers to influence their work, and to underestimate the difficulties of collective practice.

FNa. Professor of Law, Stanford University. I am grateful for comments from Guyora Binder, Jamie Boyle, Janet Halley, Bill Hing, and Mark Kelman.

FN1. Stephen Wexler, *Practicing Law for Poor People*, 79 *Yale L.J.* 1049, 1053 (1971).

FN2. Gary Bellow, *Turning Solution Into Problems: The Legal Aid Experience*, 34 *NLADA Briefcase* 119 (1977).

FN3. Prominent examples of this large literature include Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buffalo L. Rev.*, 1 (1990); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narratives*, 100 *Yale L.J.* 2107 (1991); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 *Hofstra L. Rev.* 533 (1992); 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); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *Cornell L. Rev.* 1298 (1992); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 *Hastings L.J.* 971 (1992); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 *Stan. L. Rev.* 1807 (1993). I make no effort to do justice to the many differences among these writers, nor to take account of all of their contributions. My remarks have been influenced by the appraisals of this work in Ruth Buchanan's and Gary Blasi's contributions to this symposium, and by Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 *Law & Soc'y Rev.* 697 (1992).

FN4. This point is amply acknowledged in the new poverty law scholarship. See the works cited in note 3 and also William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 *Md. L. Rev.* 213 (1991).

FN5. See generally William H. Simon, *Visions of Practice in Legal Thought*, 36 *Stan. L. Rev.* 469 (1984).

FN6 *Id.*, at 470 - 84.

FN7. Although the new poverty law scholars acknowledge that translation can be complex and creative, see Cunningham, *supra* note 3, the purpose of the metaphor seems to be to humble the lawyer and flatter the client by suggesting that the lawyer merely removes a minor technical obstacle to an understanding that the client can otherwise achieve on her own.

FN8. Model Rules of Professional Conduct Rule 1.2(a).

FN9. Claus Offe, Two Logics of Collective Action, in *Disorganized Capitalism* 170-220 (John Keane trans. 1985).