Northeastern University School of Law

Legal Skills in Social Context Program
Summer/Week 1 Assignments

Welcome to the Legal Skills in Social Context (LSSC) program! It is important that you read this packet carefully as it contains all your assignments that are due in Week 1 for LSSC. Please note that you have assignments both for the Legal Research and Writing component and the Social Justice component of the program. We're looking forward to meeting you in the fall!

Sincerely,
Professors Susan Maze-Rothstein and Susan Sloane

Packet Contents

I. Summer Assignment Checklist

Here is an assignment checklist to simplify what you are expected to complete prior to your first LSSC classes. All of the required readings are included in this packet, though you are required to seek out the Legal Research and Writing component readings on TeachingLaw.com. Where a written response is required, it will be noted in **bold font**. Please complete all written assignments using the following format: 12 point font, Times New Roman, double spacing, one inch margins on each side. Also, please be sure to include both your name and the date on any written assignments that you submit. The assignments have been broken down by components, with the Legal Research and Writing component assignments listed first, then the Social Justice component assignments. It is important that you complete these assignments **in order**, as they build on one another and the readings are provided in consecutive order. Therefore, complete this assignment checklist sequentially, checking-off each task as you complete it.

A. Legal Research and Writing Component Assignments

☐ Log on to TeachingLaw.com and take the Student Tour. Note: this will require a credit card so that you may purchase a subscription (remember, we will be using TeachingLaw.com in lieu of a textbook). You will also need your TeachingLaw.com Class ID which will be available on the Orientation page.

☐ Find the syllabus on TeachingLaw.com and read the Habitability Assignment. Note: Although the TeachingLaw.com materials are included below, you must purchase a subscription, log-in, and take the Student Tour BEFORE your first day of class. More information about TeachingLaw.com is included below in the Legal Research and Writing Component section of this packet.

☐ Complete the assigned readings on TeachingLaw.com for the first week (also included below): Legal Analysis Introduction section and Legal Analysis- Statutory Language section.

Hint: open links in the syllabus by right-clicking and choosing "Open in new tab" or "Open in new window." You can then easily return to the syllabus by simply closing the new tab or window.

☐ Read the New York statute governing the warranty of habitability (included below). This is the statute that you will need to answer your client's question in the Habitability Assignment. Then, on a separate piece of paper, "parse" the statute by indicating the important "rule(s)" that the statute states. (Hint: read about how to parse statutes in the section labeled Legal Analysis- Statutory Language on TeachingLaw.com). Is there more than one part of the rule? If so, number the parts. Are there any words that need further definition? If so, underline them. **Note: This is a writing assignment. These questions require a written answer, to be submitted to your Adjunct at the beginning of your first research and writing class.**

☐ Read the Park West case.

☐ On a separate piece of paper, write a paragraph or two describing what additional information you need in order to answer you client's problem and how you think you would find that information. We understand that you are new to this; just use your common sense and see what you can think of. **Note: This is a writing assignment. This requires a written response to be submitted to your Adjunct at the beginning of your first research and writing class**.

☐ Complete the plagiarism tutorial located on Blackboard (http://blackboard9.neu.edu) and **print two copies of the completion certificate (one for your Adjunct and one for your Lawyering Fellow)**. Note: this is a joint assignment between the two components of the program, so it is listed here and it will also be listed in the Social Justice component assignments. You do not have to complete it twice, though you do need to print two copies of the certificate.

B. Social Justice Component Assignments

☐ Read the Simon article included below and reflect on the notes and questions provided for the article (you are not required to write your answers to these questions).

☐ Read the Mather article included below and reflect on the notes and questions provided for the article (you are not required to write your answers to these questions).

☐ Read the Lopez article included below and reflect on the notes and questions provided for the article (you are not required to write your answers to these questions).

☐ Review the Park West case you read earlier for the Legal Research and Writing component of LSSC. Next, consider the Park West case further in its social context. Your written assignment for the Social Justice component is to respond in writing with a paragraph or two to each of the following questions (and only the following questions) about the Park West case, utilizing the knowledge you gained by reading the Simon, Mather, and Lopez articles. **Note: This is a writing assignment. This requires a written response to be submitted to your Lawyering Fellow at the beginning of your first social justice class**.

1. The court in Park West went into a discussion of the lengthy history of landlord tenant law dating back to its agrarian roots, where the land itself mattered more than the structures on it, to urbanization where shelter and services are the key features of tenancy. Why?
2. Did you notice where the plaintiffs lived in Park West? They lived in a high-rise apartment complex in the Upper West Side of Manhattan, indicating, at least somewhat, affluent tenants. What impact do you think this had on the outcome of the case?

3. What other factors might have influenced the case?
4. Despite the possible affluence of the lead tenants in the case, go back to the very beginning of the case and look at the attorneys representing various organizations and interests who filed "amicus" (i.e. non party friend of court) briefs. Why would these non parties take the time to write briefs in this case that does not directly affect them? What does this have to do with the power relationships between landlords and tenants?
5. Now imagine that before the case went to trial, the landlord offered to discount the rent by 5%. You represent all 400 of the tenants. Imagine that the high-rise is mixed income housing. While many of the tenants are affluent, others are living in government subsidized units. About three-quarters of the tenants want to settle because they believe they can't win against a powerful landlord given current law and/or just want to get this over with. One-quarter of the tenants want to go to trial because they want more money and believe that it is time for the law to change. Will you settle or go to trial? How will you decide (what will you consider, what will you say and to whom)?
6. Same scenario except this time, you represent the landlord. You are a first year associate in a very prestigious law firm. A senior partner gave you the case and you really want to impress her, but think that the landlord is despicable. The landlord has told you that he is willing to settle for a 5% discount because he believes the court will award the tenants much, much, more. Before coming to law school, you worked as a housing advocate and you sincerely believe that nothing short of 10% would be fair considering the incredible mess and disruption that resulted from the strike brought on by the landlord's unfair treatment of the maintenance and janitorial staff, but the lower you settle the case for, the more impressed the senior partner will be and the happier your client will be. What should you do?

☐ Bring your laptop to the first Social Justice class. You will need to conduct some informal research during the class session and report your findings in class.

☐ Complete the plagiarism tutorial on Blackboard. As described in the Legal Research and Writing component assignments, you do not need to complete this tutorial twice, though you do need to print out two completion certificates, one copy to hand in to your Adjunct and the other copy to hand in to your Lawyering Fellow at the beginning of the first of each of the respective classes.

** IMPORTANT ACCESS NOTE: You have been referenced to your Blackboard website in order to take a plagiarism tutorial. Access to Blackboard will be provided shortly, but currently, all law office Blackboard sites are under construction. Likewise, you have been requested to access your TeachingLaw.com sites prior to orientation. Those are also currently under construction. Check back often and thanks for your patience. **

IMPORTANT SCHEDULING NOTE: The next few weeks in LSSC are critical for your success in the program and are very packed with information that is crucial to get you up to speed for the upcoming year. Thus, although Labor Day is Monday, September 6 and Rosh Hashanah is Thursday, September 9, you are expected to attend your classes on Tuesday, September 7, and Wednesday, September 8, as well as the Social Justice rescheduled session on Friday, September 10, in the afternoon.

**IMPORTANT FIRST WEEK NOTE: You will attend a lecture on the American Legal System during Orientation. In preparation for that lecture, you must do additional TeachingLaw readings noted on the Orientation website (navigate to http://www.northeastern.edu/law, then select the "Newly Admitted Students"

link at the top left corner, then select the "Orientation 2010" link in the center of the page, and you will be directed to "https://mylaw.slaw.neu.edu/node/1879).. You may also find these readings under "Orientation Readings" on your Teaching Law syllabus at www.teachinglaw.com. **

C. Assignments for When You Arrive on Campus

☐ Purchase the *LSSC Social Justice Fall 2010 Course Pack* from NU Reprographics Copy Center, located in 11 Ell Hall.
1. Note that you will need to purchase the Course Pack when you arrive on campus, but that the Week 1 readings and assignments are already included here.

☐ Purchase the *LSSC Rules, Policies, and Skills Course Pack* from NU Reprographics Copy Center, located in 11 Ell Hall.

☐ Purchase Morris L. Cohen and Kent Olson, *Legal Research in a Nutshell*, 10th edition (West 2010) from the NU Bookstore, located in the Curry Student Center, 1st floor.

☐ Purchase *The Bluebook: A Uniform System of Citation*, 19th edition (2010) from the NU Bookstore, located in the Curry Student Center, 1st floor.

II. Introduction and Course Overview

We're sure you are looking forward to learning to "think like a lawyer" and to developing the necessary skills and knowledge. But, you may be asking yourself: What skills do I need? And how am I going to learn them? Let's begin.

The American Bar Association Task Force on Law Schools and the Profession ("MacCrate Report") has identified the ten fundamental lawyering skills: problem solving; legal analysis and reasoning; legal research; factual investigation; written and oral communication; counseling; negotiation; litigation and alternative dispute resolution procedures; recognizing and resolving ethical dilemmas; and, organization and management of legal work.[1] In addition, the MacCrate Report identified four fundamental values of the profession as: the provision of competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.[2]

The Carnegie Foundation for the Advancement of Teaching also published a seminal study of legal education ("Carnegie Report"). Included among the recommendations in the Report is offering an integrated curriculum composed of legal doctrine, analysis, and practice; joining lawyering, professionalism and legal analysis from the start; supporting faculty to work across the curriculum; designing the program so that students and faculty weave disparate kinds of knowledge and skill; recognize a common purpose; and working together.[3]

Your LSSC course will focus on all of these vital lawyering skills and values. In LSSC we translate these key lawyering skills into the following goals.

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[1] "Fundamental Lawyering Skills," "Overview of the Skills and Values Analyzed in the Statement," Legal Education and Professional Development – An Educational Continuum, ed. by Robert MacCrate, Task Force on Law Schools and the Profession: Narrowing the Gap, Section of Legal Education and Admissions to the Bar, American Bar Association, 1992, 121-124. Also available at: http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html#A.%20Disseminating%20and%20Discussing%20the%20Statement%20of%20Skills%20and%20Values

[2] Fundamental Values of the Profession, Id., 124-125.

[3] Summary of the Findings and Recommendations from "*Educating Lawyers: Preparation for the Profession of Law*. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman. San Francisco: Jossey-Bass, 2007.

A. Goals and structure of the LSSC Program

LSSC Program		
	Research and Writing	**Social Justice Project**
Class is led by:	Adjunct professor	Lawyering Fellow
Class consists of:	Small group Law Office	Small group Law Office
Goals:	This component focuses on developing the critical lawyering skills of legal research, analysis and writing. By the end of the course, you will be able to competently:	This component focuses on applying your research, writing and lawyering skills to the legal needs of organizational clients that serve under-represented populations in a diverse society. By the end of the course, you will be able to competently:
	1. Analyze facts and existing law applicable to a specific legal problem	1. Design a legal strategy for a specific organizational client's problem
	2. Use legal analysis to predict a legal outcome or to argue persuasively for a particular outcome	2. Complete a project for an actual organizational client that requires legal research, legal writing and legal analysis
	3. Design and execute an effective and efficient research plan	3. Work effectively and collaboratively as a member of a team to solve complex legal problems
	4. Communicate the results of research and analysis clearly, concisely and accurately in a variety of formats geared to different audiences	4. Demonstrate in written and oral work an awareness of the impacts of law embedded in its social context.
		5. Demonstrate in written and oral work that law can be used as a tool for social change

LSSC is an eight (8) credit course that spans your first year of law school. It is an exciting opportunity to learn and apply these fundamental skills individually and as part of a team working on a real life social justice project.

How is the Course Structured?

The entire incoming class has been divided into sixteen "law office" teams of approximately twelve to fifteen (12-15) students. Each law office will be assigned to both an Adjunct Professor for the Legal Research and Writing component and a second or third year Lawyering Fellow supervised by one of three faculty members for the Social Justice component. Adjunct professors, assisted by teaching assistants, will teach some of the legal research and all of the writing aspects of the course. Our Research and Instruction Librarians and our Lexis/Westlaw Representatives will provide additional research training. The Lawyering Fellows, assisted by faculty supervisors, will teach the social justice aspect where you will

immediately put your research and writing fundamentals to advanced use in representing your real organizational client.

The Legal Research and Writing component will teach you fundamental lawyering skills necessary for all practicing lawyers. Basic research skills include the ability to identify sources of legal authority, to devise and execute an efficient research plan, to organize research around the relevant legal issues, to locate and use finding aids as well as primary and secondary legal sources, to formulate and focus research questions and select search terms to find the most relevant information, to use citators to update your research and find additional authority. You will also learn basic writing skills including how to analyze a legal issue accurately, precisely and succinctly, how to organize your analysis around the relevant legal issues, how to cull and synthesize the relevant material from the authorities, and how to apply the underlying legal principles to the facts at hand in a clear, organized, concise writing style.

The Social Justice component will take your newly minted research and writing skills and put them to work situating the law and lawyering in their surrounding social contexts and on developing client representation and complex legal problem solving skills within those contexts. It will enable you to analyze legal issues in light of underlying societal differences and to reflect on professional values that support the structure and practice of law as applied to your social justice project.

B. First Year Timeline

Fall Semester

Strong legal research and writing skills are fundamental lawyering tools and they go hand in hand. The research portion of the Legal Research and Writing component will introduce you to the sources and uses of legal authority and teach you how to develop effective research strategies. Your research study will include instruction on the proper uses of secondary authority, such as legal encyclopedias and treatises, to gain an overview of any area of law and as a tool for locating related primary authorities, such as cases and statutes. You will also learn how to find primary authority both in paper and electronically. Throughout the entire first semester, you will engage in research practice designed to introduce you to effective research strategies using both secondary and primary authorities. The writing portion of the Legal Research and Writing component will focus on objective writing in the context of two office memoranda. The course will emphasize large and small scale organization, case synthesis, and effective and appropriate use of authorities. It will also emphasize effective paragraph and sentence structure, word choice and proper citation format.

The Social Justice component will focus on two themes: the complex interconnections between the law and the societal context in which it is embedded, and the challenges of lawyers' representational roles within that complex societal/legal structure. The first semester social justice work will challenge you through critical study of both primary and secondary authority (e.g., cases and law review articles), in the context of advocacy exercises and actual work products for your client. Both individually and in small groups, you will prepare written assignments and oral presentations. And, from day one, you will be introduced to your law office's social justice project. Throughout the semester, you will have to apply the lessons learned in both of your LSSC components as you work with you Lawyering Fellow and Faculty Supervisor to define, scope, and commence research planning for your social justice project.

Spring Semester

In the second semester the course will reinforce the research, writing, and analytical skills taught in the fall. In the Research and Writing component, you will be asked to individually research and write two trial briefs based on a complex simulation involving federal administrative law. Your work for the semester will culminate in an oral argument in support of or in opposition to a motion for summary judgment.

In addition, in the Social Justice component, your law office, working as a team, will apply your research, writing, and analytical skills to intensive experiential implementation and completion of your project addressing a real-life societal legal problem for a selected organizational client. The social justice project uses "team lawyering" to enhance cooperative efforts among groups of students to problem solve on behalf of clients. The team-lawyering model has consistently enabled the LSSC program both to provide a rich opportunity for students to develop further their legal research and writing skills and to produce work for our client organizations of a quality that far exceeds the ordinary expectations of first-year law students.

This short description of the program is probably just enough to whet your appetite and hopefully has inspired you as you begin your summer assignments for the course found in the following pages. As noted above, you have assignments due in Week 1 for both components of the program.

Welcome and we look forward to seeing you on campus in Week 1!!

III. Readings for Summer Assignments

Remember to complete your summer assignments in both components in the order presented in the summer assignment checklist. All readings on the assignment checklist above can be found here, organized by the component in which it is assigned.

A. Legal Research and Writing Component Readings

During the class, we will be using TeachingLaw.com ("TL") in lieu of a textbook. Having readings available online will ease the physical load on your back, allow you access to the readings from nearly anywhere with an internet connection, and quickly and easily let you navigate to the exact material that you need. In addition, you will receive a paper Companion copy of the basic information on the website and the appropriate pages in the Companion copy are noted on the syllabus. You will have access to all the TL information for three years and three months so you can use the tutorials and other information even while you are on co-op. You will find that upper level classes at NUSL also utilize TL, so it is best to get familiar with the program as quickly as possible. Although we have provided you will all of the TL readings that you will need to complete this assignment, you are required to sign on to TL and ensure that you know how to navigate the site sufficiently to review the syllabus and gather your future assignments. Additionally, you are required to take the student tour prior to the first class, therefore you will need to register for TL soon! Also note that many of the words that are foreign to you now (i.e.; stare decisis, inductive and deductive reasoning, etc.) are defined further on TL websites via hyperlinks, so if you are having a hard time understanding these readings, be sure to log on to TL to read more about them.

For your first assignment, we will take you through the analysis of your clients' legal problem concerning noxious odors in their apartment and how to use legal authority to predict a legal outcome for them. We will review in detail in class how to analyze existing law and write an objective legal memo on this topic. You will then write the legal memo and it will be due in Week 5.

Below is the fact pattern for this warranty of habitability assignment. Please read the fact pattern in order to familiarize yourself with your clients' situation, understand the assignment, and give context to your habitability readings enclosed in this packet. Importantly, read ONLY the materials included below. This assignment is what we call a "closed memo" and the materials have been especially created to help you learn legal analysis. You do not need to do any legal research or read any additional materials in order to complete this memo assignment. Additional materials will be provided by your Adjuncts in the first class.

This first TL reading will introduce you to some of the most basic legal analysis skills that you will develop. You will put these skills to use during the course, not to mention this summer assignment!

Habitability Assignment

On March 1, 2009, Chris and Leigh O'Neil-Cook, recently married, moved into a one-bedroom second-floor apartment in a brownstone building located at 316 West 14th Street in New York City. The apartment was a bit pricey compared to other similar apartments, but the O'Neil-Cooks fell in love with it. The building has commercial space on the ground floor, which had previously been used as a coffee shop but which was vacant at the time the couple moved

into the apartment directly above on the second floor. Shortly after the O'Neil-Cooks moved into their apartment, Nourish, an organic, locavore-focused restaurant, signed a lease for the commercial space on the ground floor. The restaurant opened on April 30, 2009.

At first, the O'Neil-Cooks were thrilled to have a restaurant so close to their home. However, their pleasure turned to dismay as the odors from the restaurant began wafting into their apartment. The owners of Nourish believe in the restorative and rejuvenating powers of garlic and onions, as well as other cruciferous vegetables, which, while they may be nourishing, are quite odiferous. The restaurant also serves breakfast, and the odors from the pounds of coffee beans that are ground and brewed every morning also made their way into the apartment above.

The O'Neil-Cooks notified their landlord, who told them that Nourish was within its rights according to its lease, and advised them to shut their windows and to get an air cleaner if the odors bothered them. The O'Neil-Cooks have done so, but they maintain that the smells persist and have permeated their clothes and furniture. They contend that the odors cause them headaches, are making them feel "queasy" and that they are embarrassed to have company over. They would like to know what recourse they may have, either against the restaurant or the landlord.

I have taken a look at the lease that Nourish signed with the landlord, and it does not appear that the O'Neil-Cooks have any recourse against the restaurant. However, it is still possible that the O'Neil-Cooks may have a claim against the landlord for breach of the implied warranty of habitability for failing to do anything to contain the odors; I'd like your opinion on that issue. I have done some initial research and have found a New York statute and several cases on point. Please review the materials provided and draft a memo addressing whether the O'Neil-Cooks' situation is:

1) dangerous, hazardous, or detrimental to their life, health, or safety; and

2) in accord with the uses reasonably intended by the parties.

Please only focus on the issue of landlord liability, and not on whether the O'Neil-Cooks, could break their lease, or the amount of damages they could recover; the mere existence of a valid claim could be sufficient to encourage the landlord to take some measures. Please also do not consider what steps the landlord could take to ameliorate the situation; that would better be left to negotiations, if it gets to that point. Thanks so much for your help.

TeachingLaw Reading: Legal Analysis- Introduction

Legal analysis is the art of creating reasoned, logical, legal arguments and applying those arguments to a particular set of facts. To create sound legal analysis, you must find and analyze the **facts** as well as the **law**.

Collecting the Facts

As a law student, you will probably be given a set of hypothetical facts to begin your analysis. However, as a lawyer, you will never receive such a "fact pattern." Instead, you will work for a client, and the facts will unfold in anything but a timely or thorough manner. Typical sources for collecting facts will be the client, other witnesses, documentation and tangible evidence, experts, and often a site visit (such as a crime scene). Be sure to prepare questions before you investigate, interview, or depose. The questions you ask should not only center around understanding the background, history, or client's story, but they also should help you to find relevant law. Questions organized by editor's categories are often helpful:

West Categories	Lawyers Cooperative Categories
Parties	Persons
Places, Objects, Things	Places
Basis or Issue	Acts
Defense	Things
Relief Sought	

Keep in mind that facts will often change as you collect more information. In addition, you will need to retrace many of your steps in the fact-finding process, so do not assume that you will need to visit a crime scene or interview a client only once.

Analyzing the Law

Once you have a general sense of the facts of the case, you will need to begin to apply the law to those facts. Remember to be flexible; as the facts change, your analysis of the law might change as well. Applying the law to the facts requires a number of steps. You need to identify legal issues, find controlling law, understand the relationship among the various legal branches, and then apply a variety of legal reasoning techniques to create sound, logical, legal arguments.

Identifying Legal Issues: As a law student, you will often be told the exact legal issue for the hypothetical. However, as a lawyer, you will need to identify the legal issues by analyzing the client's facts. Keep in mind that there are usually many issues in every case. The plaintiff's lawyer or prosecutor often defines the issues. The defense lawyer can also help define issues by providing counterclaims and defenses.

Finding Controlling Law: Once you have identified the issues, you need to find the law that controls on each issue. This section does not discuss research strategies; instead, it discusses whether a particular provision you found actually controls. Basically, you will be looking for a "rule of law," either from statutes, cases, or regulations. You will need to determine whether this particular law controls the issue. For example, if you find a statute that applies to "only property owned" and your client leases the property, then that particular statute does not control. Often, the terms are ambiguous, and part of your legal argument will focus on what law controls. For example, if a statute applies to "all employees," you might need to argue that your client, who contracts with this employer, is actually an employee.

Understanding the Relationship Among the Legal Branches: Statutes are usually the starting point in the law. A statute binds the courts of that jurisdiction (a Maryland statute binds Maryland courts), but courts have two roles in interpreting a statute. First, a court may find a statute to be unconstitutional; such a finding makes the statute invalid unless the legislature amends the statute to cure the problem. Second, assuming the statute is constitutional, a court interprets the meaning of a statute. Once a court has written a decision interpreting the statute, other courts in that jurisdiction are bound by that interpretation under the doctrine of stare decisis. However, if the legislature disagrees with the courts' interpretation, the legislature can amend the statute to clarify its intent.

In addition, sometimes the law starts as common law. A legislature might codify the common law. Thus, when finding law in the jurisdiction, you might find common law that predates the statute; these cases can still be applicable and binding as long as they are consistent with the way the law was codified.

Therefore, when finding controlling law, it is important to pay attention to any history of the law and look for dates of enforcement and amendments.

Applying a Variety of Techniques to Create Logical Legal Arguments: Lawyers use a variety of techniques to produce sound legal arguments. The most pervasive techniques are reasoning based on (1) rules, (2) analogies, and (3) policies.

1. **Rule-Based Reasoning:** The starting point for most legal analysis is rule-based reasoning. Here, a statute or case law dictates the rule to be applied. A lawyer's job is to break down the rule into its component elements. Oftentimes, a rule will clearly enumerate these elements; other times, a rule can be structured in many different ways. Once the elements of a rule are enumerated, the lawyer analyzes each element separately, applying the general rule to the particular client's facts to come to a conclusion. This type of analysis is similar to deductive reasoning in that the lawyer starts with a premise and then applies his client's facts to that premise. Rule-based reasoning is addressed in statutory interpretation and case synthesis.
2. **Analogies:** To analyze the elements of the law, lawyers use analogies. Here, the lawyer compares his client's case to cases that have already been decided. A lawyer will argue that his client's facts are similar to the facts of a prior case to show that the outcome should be the same. This technique is called an analogy. When a lawyer argues that his client's facts are different from the prior case, he is distinguishing that case. A good lawyer will use the facts and the reasoning of the prior case to show why the client's case should have a similar or different holding. Analogies use inductive reasoning and are addressed in case analysis.
3. **Policies:** Lawyers make policy arguments when there is no applicable rule on the subject (this is called a case of first impression), when existing rules are ambiguous, and to bolster other legal arguments. A policy argument will show why an interpretation of the law is consistent or inconsistent with the goals of the rule (if there is one) or of society in general. Policy arguments use both deductive and inductive reasoning and are addressed in policy arguments.

TeachingLaw Reading: Legal Analysis- Statutory Language

Statutory interpretation is rule-based reasoning. The lawyer starts with a rule, the statute, and then uses deductive reasoning to apply the general rule to the particular facts of her case to come to a conclusion. However, because legislative bodies rarely write a statute to apply to one particular case, the language and purpose become ambiguous when the client's facts are applied. A lawyer's job, therefore, is to analyze the language of the statute to determine the intent of the legislature that wrote the particular statute – what did the lawmakers mean for the law to do when they wrote it? A good lawyer applies a number of steps in statutory interpretation.

1. Finding an applicable statute: The first step in statutory interpretation is finding a statute that applies to your client. At times, there may be more than one statute that applies. Other times, there may be only common law available. Also, there may be a dispute as to whether a statute even applies. (For example, does an employment statute apply to independent contractors?)

2. Reading the whole statute: Many law students who find a relevant statutory section online never realize there are a number of related statutory provisions that exist on the screen prior to and immediately after their particular provision. Therefore, many good lawyers prefer to read a statute in its printed format so they can look at a statute in the context of the entire act. Whether you read a statutory provision online or in the books, be aware that most statutes have many

provisions or fall within a specific act. You should at least skim the whole act and look for some of the most important provisions for your particular statute, such as the following:

- The title of the act and the title of specific provisions
- The date of enactment (of the act or specific provisions)
- The date of any amendments
- A preamble or purpose section
- A definition section
- The language of the specific provisions that apply to your issue
- The language of provisions that appear in close proximity to your issue
- The remedy or relief provision of the act
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3. Breaking down your specific provision into its elements: Once you begin to focus on the particular statutory provision you will apply, you need to break it down into its component parts. At times, the language will clearly lay out the structure for you (e.g., the plaintiff must prove a, b, and c). However, often you will need to analyze and break down the structure yourself. One trick to do this is to draw brackets around different language so that each bracketed section becomes one element that needs to be proven. Opposing lawyers will often break down the elements differently. Judges, in their case decisions, often will try to clarify the structure of a statute.

4. Reading signaling words carefully: Particular words and punctuation can change the meaning of a statute. Therefore, you need to dissect specific statutory provisions very carefully. Here are some key words and their meanings:

- *And* = must prove all items in the list to meet statutory provision
- *Or* = must prove only one in the list to meet statutory provision
- *Including* = implies an exclusive list
- *Including but not limited to* = implies list is not exclusive
- *And any other factors* = states that previous list is not exclusive
- *Must* = required
- *Shall* = required
- *May* = not required

What follows is the key statute that you will analyze in your warranty of habitability assignment (NOTE: After reading it, refer to the assignment list pages 1-3 above). It appears here in the same format style as it would if you looked up the statute in Mckinney's Consolidated Laws of New York.

§ 235-b **REAL PROPERTY LAW**
LANDLORD AND TENANT
Art. 7

§ 235-b. Warranty of Habitability [Statute]

1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition

has been caused by the misconduct of the tenant or lessee of persons under his direction of control, it shall not constitute a breach of such covenants and warranties.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

(Added L. 1975, c. 597, § 1; amended L. 1976, c. 837, § 1; L. 1983, c. 403, § 38; L. 1997, c. 116, § 39, eff. June 19, 1997.)

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Below is the Park West case that you will utilize in your warranty of habitability assignment. As you will read, this case redefined the landlord tenant relationship, in part by analyzing the warranty of habitability statute. The case appears below in the same format style as it would if you looked it up in the actual reporter. Although we have edited the lengthy case to contain only the pertinent parts, since it is the paper version of the case taken from the reporter, it starts on the next page (NOTE: After reading it, refer to the assignment list pages 1-3 above).

47 N.Y.2D 316

PARK WEST MANAGEMENT CORP., Appellant,

v.

Arthur MITCHELL et al., Respondents.

Court of Appeals of New York.

June 7, 1979

In a nonpayment summary proceeding, landlord appealed from an order of the Appellate Term of the Supreme Court, First Judicial Department, which affirmed a judgment of the Civil Court, New York County, granting tenants a ten percent rent abatement on a counterclaim for breach of warranty of habitability. The Supreme Court, Appellate Division, 62 A.D.2d 291, 404 N.Y.S.2d 115, affirmed, and landlord appealed. The Court of Appeals, Cooke, C. J., held that: (1) where as result of strike by building maintenance and janitorial employees, essential service bearing directly on health and safety of tenants were curtailed, if not eliminated, for 17-day period, and not only were there numerous violations of housing and sanitation codes, but conditions of premises were serious enough to necessitate declaration of health emergency, tenants proved that landlord breached his implied warranty of habitability; (2) failure of landlord to provide adequate sanitation removal, janitorial and maintenance services materially impacted upon health and safety of tenants and permitted them an abatement in their contracted for rent due to landlord's breach of implied warranty of habitability; and (3) evidence supported ten percent reduction in rent of ten-

ants for months during which landlord breached implied warranty of habitability.

Affirmed.

1. Landlord and Tenant ⇦ 125(1)

A residential lease is effectively deemed a sale of shelter and services by landlord who impliedly warrants first, that premises are fit for human habitation, second, that condition of premises is in accord with uses reasonably intended by parties, and third, that tenants are not subjected to any conditions endangering or detrimental to their life, health or safety. Real Property Law § 235-b.

2. Landlord and Tenant ⇦ 125(1)

Landlord is not a guarantor of every amenity customarily rendered in the landlord-tenant relationship; warranty of habitability was not legislatively engrafted into residential lease for purpose of rendering landlords absolute insurers of services which do not affect habitability; rather, statute governing warranty of habitability was designed to give rise to an implied promise on part of landlord that both demised premises and areas within landlord's control are fit for human occupation at inception of tenancy and that they will remains so throughout lease term. Real Property Law § 235-b.

3. Landlord and Tenant ⇦ 125(1)

Scope of landlord's warranty of habitability includes conditions caused by both latent and patent defects existing at inception of and throughout tenancy; however, as statute providing for warranty of habitability places an unqualified obligation on landlord to keep premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within scope of warranty as well. Real Property Law § 235-b.

* * * * * * *

8. Landlord and Tenant ⇦ 125(1)

A residential lease is essentially a sale of shelter and necessarily encompasses those services which render premises suit- able for purpose for which they are leased;

absent an express agreement to contrary, landlord is not required to ensure that premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants. Real Property Law § 235-b.

9. Landlord and Tenant ⇦ 125(1)

If, in eyes of reasonable person, defects in dwelling deprive tenant of those essential functions which a residence is expected to provide, a breach of landlord's implied warrant of habitability has occurred. Real Property Law § 235-b.

* * * * * * *

Eugene J. Morris and Michael J. De Zo-Rett, New York City, for appellant.

Kent Karlsson, Brooklyn, for respondents.

Robert Abrams, Atty. Gen. (Samuel A. Hirshowitz, First Asst. Atty Gen., and Shirley Adelson Siegel, Asst. Atty. Gen., of counsel), in his statutory capacity under section 71 of the Executive Law.

Robert Sugarman, New York City, for Ad Hoc Committee to Defend the Warranty of Habitability Law, amicus curiae.

Abraham M. Lindenbaum, Brooklyn, for Rent Stabilization Ass'n of New York City, Inc., amicus curiae.

Louis B. York and Peter M. Wendt, New York City, for Manhattan Legal Services Corporation and another, amici curiae.

Howard Lichtenstein, Marvin Dicker and Abraham Borenstein, New York City, for Realty Advisory Bd. on Labor Relations, Inc., amicus curiae.

Kalman Finkel, John R. Kirklin, New York City, Susan S. Seel,Brooklyn, Morton B. Dicker and Gary R. Connor, New York City, for the Legal Aid Society of New York City, amicus curiae.

OPINION OF THE COURT

COOKE, Chief Judge.

Under the traditional common-law principles governing the landlord-tenant relationship, a lease was regarded as a conveyance of an estate for a specified term and thus as a transfer of real property. Consequently, the duty the law imposed upon the lessor was satisfied when the legal right of possession was delivered to the leasee. The lessor impliedly warranted only the continued quiet enjoyment of the premises by the lessee. This covenant of quiet enjoyment was the only obligation imposed upon the landlord which was interdependent with the lessee's covenant to pay rent. As long as the undisturbed right to possession of the premises remained in the tenant, regardless of the condition of the premises, the duty to pay rent remain unaffected.

Because the common law of leasehold interests developed in rural, agrarian England, the right to possession of the land itself was considered the essential part of the bargain; structures upon the land were deemed incidental. Thus, notwithstanding that the building may have constituted the substantial part of the tenant's consideration for entering into the lease, its destructtion did not suspend his duty to pay the entire rent or afford him the right to rescind the lease (see 2 Powell, Real Property, par. 233 *et. seq.*). Indeed, even if the landlord had expressly covenanted to repair structures on the demised premises, that promise was considered ancillary to the tenant's obligation to pay rent. Hence, the failure of the lessor to perform the obliga tions imposed by his promise to repair gave the lessee only the right to maintain an action for damages; it did not vest in him a defense to an action grounded upon nonperformance of his covenant to pay rent (1 American Law of Property [Casner ed] § 3.79).

As society slowly moved away from an agrarian economy, the needs and expectations of tenants underwent a marked change. No longer was the right of bare possession the vital part of the parties' bargain. The urban tenant seeks shelter and the services necessarily appurtenant thereto --heat, light, water, sanitation and maintenance. Unfortunately, the early attempts of the common law to adapt to the changes encompassed by this societal transition and to mitigate the severity of the rule holding that the tenant's covenant to pay rent was independent of all but the most basic of the landlord's obligations proved less than satisfactory.

The harshness of the common-law rule was mitigated to a degree by decisions holding that performance of a tenant's covenant to pay rent was excused when the premises were destroyed through no fault of his own (e.g., *Graves v. Berdan*, 26 N.Y. 498, 501). Subsequent judicial holdings' expanded the scope of the landlord's covenant of quiet enjoyment to include a duty to refrain from any act or omission which would render the premises unusable by the tenant (e.g., *Tallman v. Murphy*, 120 N.Y. 345, 351-352, 24 N.E. 716, 720, 721). Again, however, development of this theory of constructive eviction did not meet the needs of tenants in a society rapidly undergoing urbanization and, as a practical matter, was of no aid in helping them obtain essential services. It simply afforded the tenant the option to abandon the premises and cease paying rent if the failure of services was sufficiently severe. While the constructive eviction principle mollified the rigors of the common law to some extent, it was fraught with uncertainty, for the reasonableness of the tenant's action was subject to the vicissitudes of judicial review in an action by the landlord. If the condition of the dwelling was later determined not to have justified vacation of the premises, the tenant remained liable for unpaid rent. Further, rescission of the lease and abandonment of the premises did not spur landlords into making necessary repairs in locales in which the demand for housing greatly exceeded its supply and compelled tenants living in uninhabitable premises to undergo the expense of locating new premises and moving their belongings. Thus, since the common law imposed no implied service obligations on the landlord, maintenance and other essential services often were never performed, especially in low-income neighborhoods.

These early attempts presaged a distinct trend among courts and legislatures toward characterizing a lease of residential property as a contract containing an implied warranty of habitability interdependent with the covenant to pay rent (*e.g., Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409; *Brown v. Southhall Realty Co.*,237 A.2d 834 [DC]). A number of factors mandated departure from the antiquated common-law rules governing the modern landlord-tenant relationship. The modern-day tenant, unlike his medieval counterpart, is primarily interested in shelter and shelter-related sevices. He is usually not competent to perform maintenance chores, even assuming ability to gain access to the necessary equipment and to areas within the exclusive control of the landlord (see *Javins v. First Nat. Realty. Corp.*, 138 U.S.App.D.C. 369, 375-376, 428 F.2d 1071, 1077-1078, cert. Den. 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185). Since a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales, with its implied warranty of fitness (Uniform Commercial Code, § 2-314) provides a ready analogy that is better suited than the outdated law of property to determine the respective obligations of landlord and tenant (*Green v. Superior Ct.,* 10 Cal.3d 616, 626-627, 111 Cal.Rptr. 704, 517 P.2d 1168).

The transformation of the nature of the housing market occasioned by rapid urbanization and population growth was further impetus for the change. Well-documented shortages of low- and middle-income housing in many of our urban centers has placed landlords in a vastly superior bargaining position, leaving tenants virtually powerless to compel the performance of essential services. Because there is but a minimal threat of vacancies, the landlord has little incentive to voluntarily make repairs or ensure the performance of essential services (see *Boston Housing Auth . v. Hemingway*, 363 Mass. 184, 197-198, 293 N.E.2d 831; *Javins v. First Nat. Realty Corp.*, 138 U.S.App.D.C. 369, 377-379, 428 F.2d 1071, 1079-1081, *supra*). While it is true that many municipalities have enacted housing codes setting minimum safety and sanitation standards, historically those codes could be enforced only by municipal authorities (*Davar Holdings v. Cohen*, 280 N.Y. 828, 21 N.E.2d 882; but see L.1977, ch. 849, § 13).

[1] In short, until development of the warranty of habitability in residential leases, the contemporary tenant possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential services. Initially by judicial decision (*e.g., Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y. S.2d 804; *Jackson v. Rivera*, 65 Misc.2d 468, 318 N.Y.S.2d 7; *Morbeth Realty Corp. v. Velez*, 73 Misc.2d 996, 343 N.Y.S.2d 406; *Steinberg v. Carreras*, 74 Misc.2d 32, 344 N.Y.S.2d 136) and ultimately by legislative enactment in August, 1975, the obsolete doctrine of the lease as a conveyance of land was discarded. Codifying existing case law, the enactment of section 235-b of the Real Property Law (L.1975, ch.597, as amd), placed "the tenant in parity legally with the landlord" (1975 Sen.J. 7766-7776 [remarks of Senator Barclay]). A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parites; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.[1]

1. The statute provides:

"1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

"2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

"3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony."

Petitioner is the owner of Park West Village, an apartment complex comprised of seven highrise buildings on the Upper West Side of Manhattan. For a 17-day period in May, 1976, petitioner's entire maintenance and janitorial staff did not report to work due to a strike by members of Employees' Union Local 32-B. As a result of the strike, the tenants of Park West Village suffered extensive service interruptions which prompted some of them to withhold rent for the period encompassed by the strike.

Petitioner commenced this summary nonpayment proceeding in the Civil Court of the City of New York. Respondent raised the affirmative defense that, as a result of the strike, petitioner had not provided essential services and had allowed conditions dangerous to the health of tenants to exist on the premises, constituting a breach of its implied warranty of habitability. By stipulation, the parties agreed that the decision rendered in the instant proceeding would bind some 400 tenants of Park West Village similarly situated. The parties further stipulated that in lieu of calling witnesses, they would submit written statements describing the extent and effect of the service interruptions caused by the strike. Hence, there is presented only the legal question of whether the conditions existing at Park West Village throughout the duration of the strike constituted a breach of the implied warranty of habitability.

During the strike, the entire complement of porters and handymen at the complex--some two thirds of the entire work force--did not report to work. All of the incinerators were wired shut, compelling tenants to dispose of refuse at the curbs in paper bags supplied by the landlord. Because employees of the New York Sanitation Department refused to cross the striking employees' picket lines, uncollected trash piled up to the height of the first floor windows. Exposure of the accumulated garbage to the elements caused it to fester and exude noxious odors, eventually necessitating the declaration of health emergency at the complex by the New York City Department of Health. Regular exterminating service was not performed which, together with the accumulated garbage, created conditions in which rats, roaches, and vermin flourished. Routine maintenance service was not performed, common areas remained uncleaned and sporadic interruptions of other services plagued the development. Civil Court determined that the conditions at the complex constituted a breach of the implied warranty of habitability and found that the loss in rental value of the apartments sustained by the tenants justified a reduction of 10% in their June rent bill. Both the Appellate Term and the Appellate Division affirmed, the latter court granting petitioner leave to appeal to this court.

[2] Petitioner maintains, and rightfully so, that a landlord is not a guarantor of every amenity customarily rendered in the landlord-tenant relationship. The warranty of habitability was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability. Rather section 235-b of the Real Property Law was designed to give rise to an implied promise on the part of the landlord that both the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term.

[3,4] The scope of the warranty includes, of course, conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy. However, as the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well (cf. Uniform Residential Landlord and Tenant Act, § 2.104). Inasmuch as the landlord is vested with the ultimate control and responsibility for the building, it is he who has a corresponding nondelegable and nonwaivable duty to maintain it. The obligation of the tenant to pay rent it dependent upon the landlord's satisfactory maintenance of the premises in habitable condition.

[5,6] Naturally, it is a patent impossibility to attempt to document every instance in which the warranty of habitability could be breached. Each case must, of course turn on its own peculiar facts.

* * * * * * *

[8,9] A residential lease is essentially a sale of shelter and necessarily encompasses those services which render the premises suitable for the purpose for which they are leased. To be sure, absent an express agreement to the contrary, a landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants. For example, no one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit. If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warrant of habitability had occurred.

[10,11] Under the facts presented here, respondents have proven that petitioner breached its implied warranty of habitability. As a result of the strike, essential services bearing directly on the health and safety of the tenants were curtailed, if not eliminated. Not only were there numerous violations of housing and sanitation codes (e.g., Administrative Code of City of New York, §§ D26-11.01, D26-11.03, D26-11.05, D26-13.03, D26-14.03, D26-22.03), but conditions of the premises were serious enough to necessitate the declaration of a health emergency. In light of these factors, it ill behooves petitioner to maintain that the tenants suffered only a trifling inconvenience. Rather, the failure of petitioner to provide adequate sanitation removal, janitorial and maintenance services materially impacted upon the health and safety of the tenants and permitted them an abatement in their contracted-for rent. [2]

2. It is noted that the statute we construe today speaks only of residential property used for such a purpose.

* * * * * * *

[16] The record here amply supports the 10% reduction in rent ordered by Civil Court. Given the severity of the conditions existing on the premises during the strike and the feeble attempts by petitioner to alleviate the dangers to the health and safety of the tenants, there is no basis for disturbing the award.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG, JJ., concur with COOKE, C.J.

Order affirmed.

Finally, below you will find a reading from TeachingLaw.com explaining the difference between binding law and persuasive law. This distinction is important to learn early as you will encounter it throughout the semester.

Strategies –
Quick Reference - Binding vs. Persuasive Law

Binding law is law that must be followed in that jurisdiction.

Persuasive law is law that a jurisdiction may look to for guidance but is not obligated to follow. Ordinarily, if there is sufficient binding law to support your position, persuasive authority is not necessary. However, if you are attempting to convince a court to adopt a new approach that is supported in persuasive authority from other jurisdictions, using that authority may be helpful.

State Courts
On matters of state law in state trial court, precedents from higher state courts are binding. For example, a California trial court must follow precedent from the California Supreme Court. Precedent from other courts at the same level (e.g., another trial court) is usually only persuasive, not binding.

Federal Courts
Federal district courts must follow the precedents from that particular circuit's court of appeals. For example, a federal district court in North Carolina must follow precedent from the Fourth Circuit Court of Appeals and the U.S. Supreme Court. However, a federal district court is bound only by the court of appeals for the circuit in which it is located. For example, precedent from the D.C. Circuit is only persuasive in a federal district court in Wyoming. Precedent from the U.S. Supreme Court is binding in all courts. As in the state courts, precedent from other courts at the same level (e.g., another circuit court) is usually only persuasive, not binding.

Secondary Sources
Secondary sources, such as law review articles, are only persuasive authority.

Statutes
A statute is considered to be binding law within the jurisdiction in which it was enacted. For example, a state statute in California is binding in California, but only persuasive in other states.

B. Social Justice Component Assignments

Having just finished reading your first case and statute, you are probably thinking that there is a lot to this thing called "lawyering." Even reading one statute required a substantial explanation. Though you may find it hard to imagine at present, in a few short months all this will seem second nature to you. Yet to truly think like a lawyer includes much more than being able to read, understand and properly apply cases and statutes. Doing that and doing it well, is a competent lawyer's daily fare. To apply law creatively or to use law as a tool for social change requires more of lawyerly thinking. It requires a social, historical, political and cultural awareness. Law must be seen and practiced in its societal context.

Our first week of class will begin to explore your lawyering role and provide an introduction to your social justice project. The overarching theme this first week will be exploring the craft of lawyering, the struggles lawyers encounter, and what your clients will expect of you.

The first reading is we have asked you to complete in the summer and week one reading packet is an excerpt from an article entitled, Lawyer Advice and Client Autonomy: Mrs. Jones' Case by William Simon. Simon, now a professor of law at Stanford Law School, writes about one of his first lawyering experiences while working for a law firm. A house keeper of a partner in his firm was charged with leaving the scene of a minor motor vehicle accident. In attempting to represent Mrs. Jones in what at first blush seemed like a simple legal matter, Simon found himself embroiled in difficult questions of about lawyering and the decisions lawyers make about client interaction and autonomy. Simon found all of these considerations were complicated by social and cultural difference that manifest as "social distance" between lawyer and client. Simon also observed how complex notions of client choice and autonomy are, when attempting to clarify client options and goals in the representation. This article invites you to contemplate what it means to clarify client goals and to present them with choices on their legal options. We also ask you to consider your own ideas about client representation and responsibility. (NOTE: After reading the three excerpted articles and contemplating the related notes and questions after each, refer to the assignment list pages 1-3 above).

William H. Simon

LAWYER ADVICE AND CLIENT AUTONOMY: MRS. JONES'S CASE

50 Maryland Law Review 213

1991

INTRODUCTION

In one influential view, the lawyer's most basic function is to enhance the autonomy of the client. The lawyer does this by providing the information that maximizes the client's understanding of his situation and minimizes the influence of the lawyer's personal views. This autonomy or "informed consent" view is often contrasted with a paternalist or "best interest" view most strongly associated with official decisions about children and the mentally disabled. Here the professional's role is to make decisions for the client based on the professional's view of the client's interests.

I am going to argue against the autonomy view that any plausible conception of good practice will often require lawyers to make judgments about clients' best interests and to influence clients to adopt those judgments. The argument, however, does not amount to an

embrace of paternalism…. My argument is that in practice we often cannot make such distinctions.* * *

I.

The client, Mrs. Jones, was charged with leaving the scene of a minor traffic accident without stopping to identify herself.

According to her, she had stopped to identify herself; it was the other driver-the complainant-who had both caused the accident by hitting her car in the rear and who had left the scene without stopping. The other driver then called the police and reported Mrs. Jones as leaving the scene.

Mrs. Jones was black; the other driver was white. The police, without investigation, had taken the other driver's word for what had happened, and when Mrs. Jones came down to the station at their insistence, they reprimanded her like a child, addressing her-a sixty-five-year old woman-by her first name while referring to the much-younger complainant as "Mrs. Strelski." Mrs. Jones lived near Boston in a lower middle class black neighborhood with a history going back to the Civil War. She was a homeowner, a church-goer, and a well known and respected member of the community. This was her first brush with the police in her sixty-five years. Nervous and upset as her experience had made her, she was obviously a charming person. As far as I was concerned, her credibility was off the charts. * * *

Thus, things looked fairly good. Mrs. Jones's main problem was that her lawyer-me-was incompetent. I had never tried a case and had never done any criminal work. But I tried to remedy that by getting a friend with a lot of experience in traffic cases to co-counsel with me. The first thing my friend did was to dismiss, with a roll of his eyes, my plan to expose the police's racism through devastating cross-examination. The judge and the police were repeat players in this process who shared many common interests, he told me. We could never get a dismissal on a challenge to prosecutorial discretion, and if an acquittal would imply a finding of racism against the police, it would be all the harder for the judge to give one. The second thing my friend did was to start negotiation with the prosecutor, which he told me was the way nearly all such cases were resolved. He told the prosecutor some of the strengths of our case and showed him my photographs, but he didn't say a word about racism.

The prosecutor made the following offer. We would enter a plea of, in effect, nolo contendere. Under the applicable procedure, this, if accepted by the judge, would guarantee a disposition of, in effect, six months probation. Mrs. Jones would have a criminal record, but because it would be a first offense, she could apply to have it sealed after a year. [This means it could not be disclosed in the future.]

We considered the advantages: It would spare her the anxiety of a trial and of having to testify. In the unlikely but possible event that we lost this trial, the plea bargain would have spared her six further months of anxious waiting, and the anxiety of a second trial. [Under Massachusetts procedure as it existed at that time, a criminal defendant could agree to a trial without a jury. If she was acquitted the case was over. But, if she were convicted, she could demand a second trial, this time with a jury.] In the even more unlikely but still possible event that we lost both trials, it would have spared her certain loss of her driver's license, a probably modest fine, and a highly unlikely but theoretically possible jail term of up to six months.

What was the downside? I couldn't say for sure that the criminal record Mrs. Jones would have for at least a year wouldn't adversely affect her in some concrete way, but I doubted it. (She was living primarily on Social Security and worked only part-time as a housekeeper.)

What bothered me was that the plea bargain would deprive her of any sense of vindication. Mrs. Jones struck me as a person who prized her dignity, deeply resented her recent abuse, and would attach importance to vindication.

Mrs. Jones had brought her minister to the courthouse to support her and serve as a character witness. Leaving my friend with the prosecutor, I went over to her and the minister to discuss the plea bargain. I spoke to them for about ten minutes. For about half this time, we argued about whether I would tell her what I thought she should do. She and her minister wanted me to. "You're the expert. That's what we come to lawyers for," they said. I insisted that, because the decision was hers, I couldn't tell her what to do. I then spelled out the pros and cons, much as I've mentioned them here. However, I mentioned the cons last, and the last thing I said was, "If you took their offer, there probably wouldn't be any bad practical consequences, but it wouldn't be total justice." Up to that point, Mrs. Jones and her minister seemed anxiously ambivalent, but that last phrase seemed to have a dramatic effect on them. In unison, they said, "We want justice."

I went back to my friend and said, "No deal. She wants justice." My friend stared in disbelief and then said, "What? Let me talk to her." He then proceeded to give her his advice. He didn't tell her what he thought she should do, and he went over the same considerations I did. The main differences in his presentation were that he discussed the disadvantages of trial last, while I had gone over them first; he described the remote possibility of jail in slightly more detail than I had, and he didn't conclude by saying, "It wouldn't be total justice." At the end of his presentation, Mrs. Jones and her minister decided to accept the plea bargain, and as I said nothing further, that's what they did.

II.

Mrs. Jones did not want to be autonomous in the way that the autonomy view contemplates. She asked me to make the decision for her. She would have been immensely relieved if I had told her without explanation what she should have done, and she would have done it. * * * However, I don't think Mrs. Jones's desire for an "escape from freedom" was crazy or highly unusual. Decision making of this kind involves anxiety. Moreover, some people may reasonably believe that they are not very good at it. In such circumstances, the opportunity to put your fate in the hands of an apparently benevolent expert may seem attractive.

I've had experiences of this kind. For example, I recall our pediatrician advising my wife and me as to whether we should have our then two-month-old son vaccinated against whooping cough, several cases of which had occurred in our area. There was a specified small probability of an adverse reaction to the vaccine, and given an adverse reaction, a specified small probability of death, and specified small probabilities of less extreme bad outcomes. Without the shot, there was a specified small probability of contracting the disease, a specified small probability given contraction of death, and specified small probabilities of various bad results short of death. I found this explanation, which went on for several minutes, overwhelmingly oppressive, and I felt a sense of deliverance when she concluded by saying, "In the case of my own child, I decided to give him the shot." I felt, and still do, that that sentence was all that I needed or wanted to know.

Such attitudes pose a dilemma for the autonomy view. In the legal context, the lawyer must either acquiesce in the client's choice to put her fate in the lawyer's hands or "force her to be free" by denying her the advice that she considers most valuable. Neither seems consistent with the mainstream idea of autonomy. * * *

III.

Even where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt. As you probably surmised from the way I told the story, I think Mrs. Jones's initial decision not to accept the plea bargain was influenced by the facts that I went over the disadvantages of the plea bargain last, that I concluded by saying, "It wouldn't be total justice," and that my tone and facial expressions implied that justice should have been a decisive consideration for her. I think her ultimate decision was influenced by the facts that my friend discussed the advantages of the plea bargain last, went over the jail possibility at more length, omitted any reference to justice, and implied by his manner that he thought she should accept the bargain.* * *

My friend and I made clear to her that there was a theoretical possibility of a jail term if she were convicted, even though we both thought this probability tiny, and this knowledge visibly evoked anxiety and fear in Mrs. Jones. At the same time, we never discussed with her the possibility that we might defend on the ground that the prosecution was racially discriminatory.* * *

Most lawyers would assume that even a small probability of jail would be important to most clients, and that in a case with strong conventional defenses, a defense with little probability of success and a strong potential for alienating the judge would be of little importance to most clients. The compatibility of such assumptions with the autonomy view depends on the extent to which the assumptions accurately reflect client ends.* * *

I once met a client who had received a notice from the welfare department accusing her-more or less accurately-of some small-time fraud. She sobbed and fidgeted uncontrollably and couldn't focus on my questions or tell a coherent story. After a few minutes she said, "Please tell me there's no chance I could go to jail." I replied, "There is no chance you could go to jail," and she relaxed and achieved some composure. My statement was inaccurate in two respects: first, it implied that I had a professionally adequate basis for such an opinion, when in fact I did not know either what the law said or what the relevant official practices were; and second, there was in fact a chance, albeit a small one, that she could have gone to jail. I did not qualify or correct the statement when I learned more. Had I done so, I don't think she would have been able to focus on anything else or to achieve enough composure or confidence to engage in anything that could plausibly be called decision making.

In Mrs. Jones's case, I think my friend and I should have either omitted mention of jail entirely or characterized it in the way I did to the welfare client. Mrs. Jones was a considerably more self-possessed woman; she was intelligent, and her anxiety was no greater than I'd guess the median person's would be in her situation. Still, I think she was bound to be disabled by any description of jail as a real, even if small, possibility.

What about the option of the race discrimination defense? This defense is almost impossible to establish, and we had no evidence for it other than Mrs. Jones's testimony of some vaguely racist police statements and the fact that the police had insisted on prosecution after the other driver had withdrawn her complaint…[But] Mrs. Jones's chances of success on the discrimination claim were no less than her chances of going to jail. She clearly thought she was the victim of official racism. An acquittal would not have specifically vindicated this dimension of her grievance. The opportunity to bear witness in public to the grievance, even if it were not

officially vindicated, might have been of some value to her.

In any event, the reasons that lawyers seem to find adequate for not mentioning the racism defense are hard to distinguish from the reasons they seem to find inadequate for not mentioning the jail penalty. * * *

IV.

I should now acknowledge a point that often concerns people about Mrs. Jones's case. Mrs. Jones was elderly, female, black, and of modest means; my friend and I were none of these. She probably had a vast lifelong experience of subordination and marginalization of kinds that we knew only through imagination. In these circumstances, the dangers were great that we would fail accurately to understand her, that we would compound her oppression by interpreting her in terms of inappropriate assumptions conditioned by the dominant culture.

Indeed, ever since I entered Mrs. Jones's plea, I have believed that my friend succumbed to just such dangers: class and race prejudice inclined him to see avoiding sanctions as the only thing Mrs. Jones really cared about. * * *

However, several friends who read earlier drafts of this Essay have persuaded me that I failed to consider adequately the possibility that my own views were conditioned by prejudice. Perhaps I was just smugly attributing my own liberal upper-class moralism to her. I never considered how the fact that I had no reason at all to fear the kind of risks facing Mrs. Jones, might lead me to overly discount them and how my generally more satisfying experience with official institutions might lead me to overvalue official vindication.* * *

Such observations might lead some to conclude that lawyers like me are so ill-equipped to understand clients as socially distant as Mrs. Jones that it would be better if we didn't try. Or that we are likely to do more harm than good if we challenge the client's initially articulated choice or if we tell the client what we think the better choice would be. * * *

I don't agree with these views, at least when put categorically. I think they underestimate the capacity of people to empathize across social distance (though I agree this requires training and effort). Moreover, social distance from the client is not entirely a disadvantage; we associate distance with detachment as well as alienation. A lawyer socially closer to Mrs. Jones might have been less conscious of the distance that remained and more ready to attribute his own values to her than I was.* * *

V.

Let's consider some descriptions of the contrasting approaches to counseling in the autonomy and paternalist views. Begin with a crude but nevertheless influential version of the autonomy view: the lawyer's job is to present to the client, within time and resource constraints, the information relevant to the decision at hand.* * *

Now consider the paternalist view-first in a crude version. In this view, the lawyer simply consults her own values; she asks what she would do in the client's circumstances or what she thinks a person with some general characteristic of the client should do and tries to influence the client to adopt that course.

My claim is that, once we get beyond the crude versions, it is hard to distinguish the autonomy and paternalist views. Each refined view contemplates a dialogue with the client that it recognizes is both essential to understanding the client and fraught with dangers of oppressing or misunderstanding him . . . .The paternalist view is intensely individualistic to the extent that it aspires to deep knowledge of the client as a concrete individual and grounds the lawyer's

decision in the client's self-realization. Even where it disregards client choices because they fail the minimum reasonableness test, it is not denying the value of autonomy, just that the particular client has the capacity for autonomous choice. Conversely, the refined autonomy view is quite collectivist to the extent that it licenses the application of objective "typical" client presumptions to the particular client. And to the extent that it differs from the paternalist view in failing to apply a minimum reasonableness test, that difference, though perhaps defensible on other grounds, is not plausibly grounded in the value of autonomy, since that value presupposes a capacity for rational choice.* * *

If the debate between the autonomy and paternalist views is so often moot, why does it inspire so much energy and emotion? My guess is that the debate expresses the anxiety that lawyers, especially those who represent clients socially distant from themselves, feel about getting to know their clients and about assuming responsibility for them. The process of learning to understand and communicate with a stranger is usually difficult and often scary. * * *

VI. CONCLUSION

I don't claim that we can never plausibly conceive of a meaningfully autonomous choice that is not in the chooser's best interests. But I would argue, at least, that there is a large category of cases involving legal decisions, where, given the circumstances in which the decisions must be made, we have no criteria of autonomy entirely independent of our criteria of best interests. Many of the best reasons we have for thinking that Mrs. Jones's choice was not autonomous are the reasons we have for thinking that it was not in her best interests.

Notes and Questions:

1. What is your initial reaction to this article? Do you agree/disagree with Simon's approach to representing Mrs. Jones? What might have you done differently? Why?

2. Did this article challenge any of your conceptions about how lawyers should advise their clients? Why?

3. How did Simon's personal values affect his advocacy for Mrs. Jones? Why did Mrs. Jones bring her minister to the courthouse for support? What does that indicate about social distance between Mrs. Jones and her attorney, Simon?

4. What role do differences of race, class, age, and gender play in Simon's representation of Mrs. Jones? Are there ways in which he could or should have modified his representation or interaction with her in order to address these differences?

5. Why did the more experienced practitioner take the time to discuss the remote possibility of jail time but not the equally remote possibility of the discrimination claim with Mrs. Jones? And how does that reflect on lawyering and on client autonomy as discussed by Simon?

6. What is your interpretation/understanding of Simon's argument that the "refined autonomy" approach and the "refined paternalist" approach are similar guides for an attorney working with a client? Are there other alternatives open to an attorney?

The second reading in this section is intended to provide you with some tools to use in reflecting on the choices that lawyers must make in selecting among the range of approaches that are available. In this article, Lynn Mather, a professor of law and political science at the University of Buffalo, draws on an extensive sociological study of lawyers in a wide range of practice fields. Her article raises questions about the factors that may influence lawyers' choices of approaches, and about the appropriateness and the larger dominant and legal culture implications of the choices they/we/you make.

Lynn Mather

WHAT DO CLIENTS WANT? WHAT DO LAWYERS DO?

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Introduction

A serious discussion of "what do clients want?" requires an understanding of the particular situation clients find themselves in when meeting with their attorneys. Consideration of emotional and financial stress, the stakes and complexity of the conflict, relations between opposing parties, a client's view of law and her lawyer, and differences between ordinary language and the language of the law are among the many factors that shape the ability of clients to articulate exactly what they want from their lawyers. Indeed, some clients do not know what they want and rely instead on their lawyers to tell them what they should do. Clients may also change their goals during the course of legal representation. Constructing client goals is a social process throughout which lawyers influence the defining of issues, the framing of the case, the formulating of alternatives, as well as many other decisions potentially affecting the outcome.

To what extent should the lawyer control the client? Should she exercise independent, objective judgment about the case and attempt to persuade the client of her view, or should she simply seek to implement the client's expressed position, so long as it is within the bounds of the law? The question, more or less, is which role appropriately defines "professional" conduct for lawyers? Many scholars advocate an independent role, as evidenced by the use of terms such as "professional" instead of "agent" when referring to the role of the lawyer. Yet others see lawyer independence not as professional conduct but as authoritarian manipulation and domineering paternalism, and argue that professionalism should be defined by a more client-centered approach.

What is a good lawyer to do? * * * In short, neither the rules of the bar nor the academic literature provide a clear answer to the question of what role lawyers should play in representing their clients. Perhaps lawyers, implicitly understanding this uncertainty, decide on their own whether to be agents for clients or independent advisors-- with great individual variation in the choices made and no particular pattern as a result. But that seems not to be the case. An emerging literature focusing on lawyers' ideologies and practices suggests that they develop standards of professionalism in concert with one another. That is to say, lawyers articulate and share particular norms of professional conduct through daily interactions with their peers-- through "communities of practice," "arenas of professionalism," "local legal cultures," or through the "culture . . . of practice organizations." Instead of thinking of professionals as autonomous individuals each developing her own approach to clients, professional decision-making should be understood in its social and organizational context. Viewed in context, one can see that lawyers

create professional roles for client representation according to, for example, the nature of the client, the area of law practice, and the organizational setting of practice. Commonalities emerge, in short, from lawyers who handle similar clienteles, who do similar kinds of legal work, and/or who practice in organizations together. This explains Robert Gordon and William Simon's wry comment that, "[i]t is striking that the people who find the claims of professionalism most convincing are the professionals themselves." Lawyers believe in the claims because they have in effect constructed them out of the demands of their practice, the nature of their workplace, and the various ambiguous expectations of the bar and the legal academy.

II. Empirical Research on Lawyers and Clients

[The author considered sociological studies of lawyers, and their approaches to client interaction, in a variety of different contexts. In sections omitted here, she discussed public defenders, divorce lawyers, and plaintiff-side injury lawyers.]* * *

D. Poverty and Civil Rights Lawyers

Legal services lawyers, like those in criminal law, have a high volume practice and typically face a large social distance between themselves and their clients. Studies of lawyer-client relations in areas of poverty law (e.g., housing, welfare, consumer problems) have observed lawyers generally taking charge of clients' cases. Indeed, scholarly critics of lawyer dominance such as Gerald Lopez, Anthony Alfieri, and Lucie White draw explicitly on examples from poverty law to develop their arguments for changing the way lawyers practice. Traditional legal practice, these critics argue, simply strengthens power differentials between lawyer and client and encourages passivity and dependence in the poor. Carl Hosticka's systematic observations of lawyer-client negotiations in a legal services office certainly support this critique. Using sociolinguistic methods, he found that poverty lawyers dominated conversations with clients through control over topic and timing. By controlling the clients' problem definitions, lawyers could routinize cases into set categories for easier disposition. The cost of this approach was "to ignore differences in detail and preferences between clients" and to communicate to clients how little the system cares about them as individuals.

Ann Southworth's recent study of legal services and law school clinic lawyers similarly reported very little client participation. Lawyers she interviewed explained that their clients were "unsophisticated," "had no idea what to do," or simply expected the lawyers to take charge. Other lawyers in Southworth's research worked for advocacy organizations and they too described the substantial direction they exercised in cases, partially due to their interest in long term law development. Like their peers in legal services, lawyers for advocacy organizations have also been attacked for defining and waging, through the courts, what are essentially political agendas on behalf of disadvantaged minorities without allowing meaningful client input. Lawyers for the NAACP during the campaign for school desegregation have been used as examples of lawyers exerting control over case strategy and tactics. Since then, social reform litigation has become widespread and rights consciousness among consumers has increased. Susan Olson's 1984 research on disability rights litigation revealed a collaborative process in all five of the law reform cases she studied, with active client participation in the formulation of case strategy. Disabled clients asserted themselves in the litigation process as part of their emphasis on autonomy and self-help. The disability rights groups Olson examined were already organized at the outset of litigation, which also facilitated the group leaders' active involvement with their lawyers.

Attorneys who worked in small civil rights firms or business lawyers from large firms who represented nonprofit organizations as part of their public service expressed far more deferential views toward their clients than those in the legal service programs discussed above. For instance, the business lawyers interviewed by Southworth said that they rarely made strategy decisions without consulting with their clients (who were nonprofit organizations), and that they preferred to explain the legal options and let clients choose among them. Some attorneys qualified this view, however, by noting that their role depended in large part on "the sophistication of their clients." The contrast found between the lawyers' norms in legal service organizations and those in the private firms could be due to differences in the social distance between lawyer and client or to the legal culture of workplace itself.

E. Corporate Lawyers

Unlike most of the lawyers discussed thus far who represented individual clients, attorneys retained by large businesses or corporations occupy a quite different segment of the profession. As John Heinz and Edward Laumann have shown, lawyers working on personal plight cases or personal business issues share little in common with those working on cases for the corporate sector. The differences in background, demographics, working conditions, pay, and prestige in the two sectors extend to the relations between clients and lawyers. Lawyers representing business and organizational clients identify with them and defer to them in decision making. Paradoxically, then, as Richard Abel notes, "lawyers at the bottom of the professional hierarchy are the most autonomous." Or, to put this as Joel Handler does, "Strong, rich and confident clients direct their lawyers . . . lawyers dominate the relationship when clients are poor, deviant, or unsophisticated."

Robert Nelson's interviews with over two hundred lawyers in large Chicago law firms revealed how closely attorneys identified with their clients and how dependent upon them they were. When asked how much of their time was spent on just one client, lawyers at one firm said it was nearly fifty percent, with an average of more than one-third across the interview sample. Rarely did the lawyers see a conflict between their personal values and what they were asked to do by their clients. Additionally, the notion of professional autonomy made no sense in the course of their daily practice. Robert Kagan's and Robert Eli Rosen's study of lawyers in large firms found the same picture of lawyers as agents for their clients. One section of their article is entitled, "Why the Lawyer-As-Influential-and-Independent-Counselor Role is Likely to Be Extraordinary Rather than Ordinary." The large businesses and corporations acting in their client role simply did not want influence or direction from a lawyer; rather they sought a "conduit" or perhaps an "insurer." Thus, attorneys in large law firms reported that they rarely acted as influential and independent counselors for their clients.

If a corporation's attorney were to offer independent advice to her client and try to "lean" on the client to accept it--similar to the approach of the public defender or divorce lawyer--the result would be obvious and swift: the business would seek another attorney. Competition for corporate business thus discourages client-influencing behavior. Eve Spangler's research on large-firm lawyers in New England provides further evidence for this point. For example, she cites one corporate attorney (who had previously worked in legal services and civil liberties) about the differences between these areas of practice:

> I think Legal Services people see an issue, want to represent that issue. On the other hand, when you're involved in this type of practice, you are a tool of your

client. You're part of his team--you're there to advise the client, structure the deal, whatever, but you're still doing it within what his goals are.

One consequence of lawyer deference to business clients lies in the periodic scandals of corporate wrongdoing. Such episodes should not be surprising given the difficult situation in which business lawyers are placed. Thinking about the differences between representation of corporate and individual clients raises other issues for considering "what do clients want?" The client-sensitive or agent role in representation could become the role of the lackey in situations of unequal power between client and lawyer. As a result, the broader public interest, including the requirements of the law, may suffer.

III. Factors Explaining Lawyers' Roles

As this brief survey has shown, lawyers' approaches to client representation vary considerably by areas of practice and type of client. * * * Just like other workers, lawyers appear to respond to economic incentives in the course of their work. Thus, client resources and fee structure influence lawyers' approach to representation. A single or flat case fee encourages private criminal defense attorneys to minimize time on a case and to dominate their clients. Personal injury lawyers, who are paid on a contingency fee, also benefit from a quick turnover of cases and tend to exercise considerable client control. By contrast, business lawyers, who bill by the hour, typically allow their clients to set the agenda and pace of work. Comparison of lawyers representing poverty and civil rights claims found that, with some exception, "lawyers who were dependent upon their clients for their salaries generally expressed more deferential views than did lawyers whose payment came from other sources." Exceptions to these patterns in criminal practice or divorce work frequently came from clients with substantial resources. Clients with deep pockets could more easily resist their lawyers' control and, if they chose to, direct case strategies themselves.

The relationship between lawyer and client also explains why some lawyers exercise greater control over clients than others do. Lawyers in high volume practices, such as criminal defense or divorce work, do not depend on any particular client for a significant source of their income. This provides the lawyer with leverage to part ways with clients who resist her advice. On the other hand, corporate lawyers whose annual income depends heavily on one or two clients may have difficulty exerting substantial influence over them. As the saying goes, "you can't be a good lawyer with just one client." That is to say, professional independence and objectivity are threatened by a lawyer's economic reliance on her client. Furthermore, as Marc Galanter has shown, clients who are "repeat players," regularly using the courts, show less deference to their lawyers than "one shotters" who use the courts infrequently. But repeat player clients who regularly work with the same lawyers over time willingly cede control to them and rely on them for advice. As one senior partner in a large law firm explained, "business clients with whom I have had a relationship over a long period of time do look to me for independent business advice as well as for legal counsel." Thus, lack of a working relationship between lawyer and client, or an imbalance of power between them, affects how lawyers approach the task of client representation.

How lawyers represent their clients also depends upon the organizational context of lawyers' work. Law firms and other legal organizations develop shared cultures or house norms that profoundly affect how a lawyer practices, including her approach to clients. As discussed earlier, the office cultures of different public defender organizations varied along numerous

dimensions, including the allocation of decision-making responsibility between public defenders and their clients. Informal communities of legal practice develop around certain legal specialties (e.g., divorce, personal injury) and in small towns and cities where lawyers repeatedly work with one another. These communities provide another type of organizational context that shapes lawyers' actions. Thus, particular norms of client representation develop and influence lawyers in those communities to behave accordingly in order to maintain their reputations. For example, as discussed earlier, most divorce attorneys value reasonableness and pride themselves on educating their clients to have realistic expectations.

Variation in the characteristics of individual clients sheds further light on why lawyers choose different professional roles. Lawyers who exercised considerable client control often referred to the characteristics of their clients to justify or explain the need for the attorney's influence. Criminal defense lawyers commented on their clients' lack of intelligence; divorce lawyers emphasized their clients' emotional instability and self-absorption; and legal services attorneys pointed to their clients' lack of sophistication. On the other hand, corporate lawyers pointed to their business clients' extensive knowledge and sophistication to justify a collaborative style or attorney deference to client. Variation in the personality or demographics of lawyers has also been suggested to explain different approaches to client representation, but little systematic evidence exists to support this point. Other factors might also explain differences in the degree of independent judgment and influence lawyers exercise over clients. These include: the nature of the problem and the available legal remedies; the type of legal work performed (e.g., litigation, transactional, organization, counseling, etc.); the degree of uncertainty and the clients' willingness to accept risk; political goals for lawyers and client; and any external controls over lawyer-client interactions (e.g., governmental regulation, ethics supervision within a law firm or company, appellate processes, or insurance systems).* * * *

Notes and Questions:

1. Can you think of some examples of real-world influences and pressures that would affect lawyers?

2. Do any of the examples you came up with create/result from/utilize the power differentials that Mather explores?

3. What are the implications for the ethical responsibilities of lawyers?

Having looked at two more centrist views of lawyering and the tough choices they involve, this third excerpt starts with the irony that even lawyers who would like to think of themselves as activists find themselves mired in the "regnant" (i.e. ruling, prevailing) standard theory and practice of law. This may explain why sometimes lawyers and organizers have tension between them which can hinder their social justice campaigns. Lopez lays bear the conventions of the regnant lawyering approach and then offers some first steps in breaking away from that approach. As this year progresses, will you be a regnant or rebellious lawyer?

Gerald P. Lopez

REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE

New Perspectives on Law, Culture, and Society, Westview Press 1992

The Rebellious Idea of Lawyering against Subordination

As a beginning practitioner, you expect your vocation to animate and fit quite neatly into your radical ambitions. Yet, in exploring options and thinking about how through your own work you can best help change the world, you run up against a deeply rooted conception of activist lawyers and activist lawyering that seems pretty fundamentally at odds with your own gut sense of what it means to live out your vocation. Even when you try to fight off this dominant conception, you most often find yourself lacking both practical opportunities and the inspiration of mentors within your field. And that can be the most discouraging feeling of all.***

The "Basic Look" of Regnant Lawyers and Their Practices

Let me try to describe the terms in which those who labor within the regnant idea of practice for the subordinated understand lawyers and their work:

- Lawyers "formally represent" others.
- Lawyers choose between "service" work (resolving individual problems) and "impact" work (advancing systemic reforms), largely dichotomous categories.
- Lawyers set up their offices to facilitate formal representation in service or impact work.
- Lawyers litigate more than they do anything else.
- Lawyers understand "community education" as a label for diffuse, marginal, and uncritical work (variations on the canned "after-dinner talk about the law"), and "organizing" as a catchword for sporadic, supplemental mobilization (variations on sit-ins, sit-downs, and protests).
- Lawyers consider themselves 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 of all sorts 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 to little to learn whether and how formal changes in law penetrate the lives of subordinated people.

- Lawyers understand their profession as an honorable calling and see themselves as aesthetic if not political heroes, working largely alone to make statement through *their* (more than their clients') cases about society's injustices. * * *

Breaking Away from the Regnant Idea

Breaking away from this idea of the lawyer for the subordinated can be daunting * * * [e]ven when you think "something's the matter," you don't quite know what to do about it. Daily activities, office habits, and the like usually make you feel either that you're picking on too many "little things" or that you're taking on way too much in the process of resisting, much less rebelling against, what "everybody" seems to be doing and thinking. That this idea of practice (like so many things "thoroughly" known) remains so taken for granted hardly helps you to know how to order your thoughts and experiences. The culture surrounding and supporting this image of the lawyer for the subordinated makes you feel that you don't have much of a chance of struggling against it. So why try?* * *

Lay and Professional Lawyering a Part of Everyday Living.

Clients invite lawyers to intervene in their lives, to work with them, and in so doing help them help themselves. Asking for and providing help are central not only to professional lawyering but to everyday living-to the practice of problem-solving that consumes so much of our lives. In this sense, when we say professional lawyering we necessarily refer to *one* dimension of getting by day to day, *one* way in which we make and change life, *one* practical knowledge among other practical knowledges, *one* form of all I mean when I say "lawyering." A professional lawyer's work * * * inevitably takes place within the larger world of problem-solving, within other peoples' lawyering, and within the client's social (not just legal) situation. To understand this link between lawyering and living the daily grind, we first must get a handle on what it is we do when we solve problems. We must take apart much of what we take for granted in our everyday lives, give names to what we find, and describe their interaction. Along the way, we will being to see how professional lawyering fits within a larger image of social life, and how lawyering in the rebellious idea takes its cues from what we all learn through our efforts to get by and make things better.

Lawyering-The Practice of Using Stories to Solve Problems.

Solving any problem requires going through the same steps: perceiving that the world we would like varies from the world we see, and trying to move the word in the desired direction. Moving the world might require altering the physical world, transforming ourselves, or trying to persuade others to act in ways that will change the world. When problem-solving requires persuading others to act in a compelling way, we can call it lawyering, whether the problem-solver is representing herself (self-help), a friend (lay lawyering), or a client (professional lawyering). Lawyering can involve trying to get your landlord to fix your roof, or going to school to talk to a teacher who you think handles your child poorly, or filing a suit against your city for nonenforcement of its housing code. *Everyone* knows how to solve some common problems that involve persuading others to do something-*everyone* owns a set of lawyering skills.

To understand lawyering, think about how we go about solving problems by persuading others to act in desired ways. Imagine some residents of the city of Oakland, for example, trying to gain evening access to an elementary school for adult education classes. The

problem-solver (the residents and their allies) initially must figure out what audiences can move the world in the desired direction (perhaps most obviously the school board) and what "remedial ceremonies" seem to be available through which to propose the change (perhaps most obviously a school board meeting). The problem-solver must then take advantage of the ceremony to tell a story that will persuade the audience to grant the remedy sought (the building isn't in use anyway, the school board should take responsibility for the failures of an education system that left these parents in need, the idea makes good fiscal sense, the classes will help motivate parents-and, in turn, kids- and make the whole school better). And, if all this doesn't work, the problem-solver must start again, trying to identify and persuade other audiences through whatever remedial ceremonies can be uncovered or, if necessary, created.

We all go through the process all the time. The principal features of a situation suggest to us a particular audience, a particular remedial ceremony, and a particular persuasive story. With the story we try to characterize the situation in a way that we hope the audience will find understandable and compelling. And then we see what comes to pass. It all happens so regularly we usually don't even mull it over much. But think about it or not, when we try to change things though persuasion we are, as I use the term, lawyering. Whether the audience is our landlord, the school board, or the Supreme Court. Whether the remedial ceremony is a telephone call, a meeting, or an oral argument. And whether the story is about out leaky roof, adult education classes, or affirmative action.

We learn to use stories-to understand the world and solve problems-by living in our cultures. It's just that straightforward. We learn stories and storytelling by hearing people around us describe what's going on, what we've always done, where we should be headed, and by trying the stories on for size in our own lives. Each person's practical, working knowledge includes a set of stock stories and storytelling techniques appropriate to her or his everyday needs. The stories and techniques in this working knowledge bring into play a whole body of wisdom, an alertness to strategic and tactical tendencies, and an appreciation for the conventional and the taboo. That's how we're able to get by day to day.

We don't often recognize ourselves as going through this storytelling process when we solve problems. It all just feels "natural" to us, part of a way of life rather than a problem-solving operation. Many of us thus come to regard our own native problem-solving skills as "no big deal, really." We often don't even recognize them as useful in meeting our needs outside the setting in which they were learned. The battered women who[ ] * * * apply for restraining orders, for example, often feel overwhelmed with having to tell their stories through the forms they need to file with the court. Yet [the rebellious lawyer] helps them understand that they squeeze their stories onto forms in other "non-legal" settings all the time-as when they enroll a child in school or apply for a driver's license. As she helps them understand that the skills they've often already developed transfer surprisingly well to what they now must do for the court.

This may well be a critical insight for these women and anyone else hoping-needing, really-to challenge the status quo. We all change our world by learning to isolate (and therefore highlight) problems, and by understanding that we can act on these problems by applying familiar techniques. Realizing that we can learn to use an "experience" as a distinct "problem" that can be acted upon- as when a battered woman learns the shared reality of other women's experiences- can often dramatically accelerate the transformation of feeling into actions. We begin more regularly to see how we can take what we have and put it to work, in terms of not just intuitively getting by but deliberately taking on what we otherwise

perceive as largely unchangeable. ***

Problem Solving Stories as Power Strategies.

If we can't easily appreciate that our storytelling is a built-in problem-solving technique, we seem to have nearly as tough a time understanding that our everyday lawyering is inescapably a part of the power we all inevitably exercise. At least that's one way of making sense of what we sometimes hear ourselves saying about the world. Throwing around labels like "thoroughly oppressed" and "totally dominant" does seem to imply, after all, that power can sometimes reside only on one side of a relationship. And stressing slogans like "speaking truth to power" and "transcending power" does seem to suggest that the exercise of power is itself regarded as something ugly or evil, perhaps necessary now to fight the subordination but ultimately something to be shunned, avoided, or outgrown in a better life.

But power-the capacity to make things the way we want them-isn't something only some people have.* * *

Power necessarily runs in all directions within relationships. No person, no group is ever *absolutely* powerless in any relationship, not battered women and not low-income people of color in the East Bay. In fact, when we call a person or a group "subordinated" or "victimized," we're always describing a state of relative powerlessness. For all that they endure, battered women and low-income people of color still retain the capacity to work rebelliously with both stock and improvised stories-the capacity to resist victimization and subordination and to reverse its tendencies.

This is not to say that * * * groups of people find themselves persistently battered or poor simply because they lack the imagination to use their power well. Granted, no one is weaponless in a power struggle. But some of us have tanks and some of us only rocks. The relatively powerless do lose more and more often (jobs, security, lives), and the forces that shape these losses are sometimes determined in arenas largely inaccessible to most of us. That's what everybody * * * finds so hard about taking on the status quo.* * * *

Notes and Questions:

1. You have now been introduced to three views (Simon, Mather and Lopez) on categorizing and conceptualizing some of the key choices that lawyers make in deciding how to relate to and how to represent their clients. Which did you find helpful?

2. Which of the approaches have the greatest appeal to you as a future lawyer?

3. What are some of the factors that would or should influence a lawyer's selection of an approach in representing a client?

4. You will make some important decisions in the Park West scenario that your Social Justice component written assignment sets up. What are some of the factors influencing how you will approach the representation of your first tenant client? Landlord client? How are you going to avoid the Mrs. Jones' problem?