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# The Puzzle of Social Movements in American Legal Theory

Scott L. Cummings


## ABSTRACT

In one of the most striking developments in American legal scholarship over the past quarter century, social movements have become central to the study of law. In constitutional theory, movements have emerged as key drivers of legal reform, creating new constitutional ideals and minimizing concerns of activist courts overriding the majority will. In lawyering theory, movements have appeared as mobilized clients in the pursuit of social change, leading political struggle and shifting attention away from concerns about activist lawyers dominating marginalized groups. In a surprising turnabout, social movements—long ignored by legal academics—have now achieved a privileged position in legal scholarship as engines of progressive transformation. Why social movements have come to play this dramatic new role is the central inquiry of this Article. To answer it, the Article provides an original account of progressive legal theory that reveals how the rise of social movements is a current response to an age-old problem: harnessing law as a force for social change within American democracy while still maintaining a distinction between law and politics.



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## INTRODUCTION

This Article is about a central puzzle of contemporary American legal scholarship: the dramatic rise of social movements as key actors in legal theory.[1] In the past fifteen years, references to social movements in U.S. legal periodicals have more than quadrupled in absolute terms and doubled in percentage terms over the preceding fifteen-year period.[2] Perhaps even more significantly, social movements have become critical to the work of prominent scholars in fields at the heart of American legal theory, where they have emerged as key drivers of legal change.[3] This is a surprising turnabout for social movements, which as empirical phenomena were more prominent in the 1960s and, as objects of scholarly study, have long occupied a marginal position in social science and have been largely ignored by legal academics. Yet, a half century after the zenith of social movements in American politics,[4] they have now achieved a privileged position in legal scholarship as engines of progressive transformation. Why social movements have come to play this impressive new role—and what it means for legal theory and practice—is the central inquiry of this Article.

1. *See, e.g.*, Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 1–2 (2001).
2. Based on a search in Westlaw Classic, from 2000 to 2015, there were 7850 articles in Westlaw's Law Reviews & Journals database containing the search term "social/2 movement," up from 1893 articles from 1985 to 2000; during the same periods, the number of total articles in the database grew from 205,401 to 402,421. There has been a similar increase of interest in social movements in sociology. *See* David A. Snow, Sarah A. Soule & Hanspeter Kriesi, *Mapping the Terrain*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 3, 5 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004) (noting the increase of social movement articles in the top four sociology journals between the 1950s and 1990s).
3. *See, e.g.*, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Jack M. Balkin, Brown, *Social Movements, and Social Change*, *in* CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 246 (Robert L. Hayman Jr. & Leland Ware eds., 2009); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).
4. It was just over fifty years ago that Martin Luther King, Jr. led civil rights protestors across the Pettus Bridge in Selma, *see* TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–65 (1998), one of the symbolic highpoints of the civil rights movement captured in the recent movie SELMA (Paramount Pictures 2014).

To answer it, the Article claims that the social movement turn in legal scholarship can only be understood as the current version of an intense and long-standing historical debate over the appropriate role of law and lawyers in democratic social change. Although this debate crosses ideological lines, it has been most pronounced and controversial within progressive legal scholarship,[5] which has divided over the relation between law and transformative politics since the civil rights period.[6] The key contribution of this Article is to recover this critical intellectual history in order to explain how the emergence of social movements in contemporary legal scholarship addresses foundational critiques of court and lawyer cooptation of social change.

The Article proceeds as follows. Part I frames what is at stake in the scholarly debate over the role of law and lawyers in social movements. To set the stage for the historical overview that follows, it briefly outlines the fundamental *law-politics problem* that has bedeviled progressive legal theory: how to mobilize law for social change while protecting the boundary between law (as neutral and procedural) and politics (as partisan and substantive).

At the Article's heart, Part II offers a historical account that explains how the law-politics problem has structured progressive legal debate for more than a century. Its central thesis is that the story of how and why social movements have come to matter within contemporary legal scholarship can only be understood in connection with the broader progressive debate over the law-politics line. This debate emerged during the Progressive Era and erupted as an intellectual crisis after *Brown v. Board of Education*,[7] when it became linked to the controversial ideology of legal liberalism.[8] A deeply disputed concept, legal

5. The term "progressive" is used here to correspond to the range of views generally associated with the political left in the United States (beginning in the Progressive Era), which are directed at shifting power and resources to those at the bottom of social hierarchies, including the poor, racial and ethnic minorities, women, LGBT people, and political dissidents. Its basic tilt is toward the achievement of greater equality as opposed to individual liberty (although it is often linked with civil libertarianism). *See generally* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (Beard Books 2006) (1975); Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149 (1995).

6. For the seminal contribution on this point, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciounsness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

7. 347 U.S. 483 (1954).

8. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996). An early use of the term legal liberalism was by Fred Rodell, who described the Justices Black, Douglas, Murphy, and Rutledge bloc on the Court as "a solid four-man core of living legal liberalism." FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 283 (1955). It was not until the 1980s, with the advent of Critical Legal Studies (CLS), that the idea of legal liberalism took hold as a critique of reform through law. *See generally* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Neil K. Komesar, *Lawyering Versus Continuing Relations in the Administrative Setting*, 1985 WIS. L. REV.

liberalism came to be associated with a cluster of ideas: confidence that courts could effectively respond to the problems of democratic pluralism;[9] faith in the leadership of lawyers pursuing policy reform through impact litigation;[10] and commitment to the protection of individual civil and political rights. Legal liberalism was thereby defined as an an *alliance of activist courts and activist lawyers* working in concert to advance progressive political change.

Part II shows how legal liberalism disrupted the law-politics compromise of the earlier era and caused deep rifts among progressive scholars that led to intellectual impasse by century's close. It does so by way of a historical analysis of progressive legal theory through four critical periods of scholarly development: (1) *legal realism*, from the beginning of the twentieth century through the New Deal; (2) *legal liberalism*, from *Brown* through the end of the Warren Court; (3) *critical legalism*, during the era of conservative political ascendance; and (4) *pragmatic liberalism*, associated with the liberal-centrism of the 1990s. As this Part argues, the law-politics problem organized progressive scholarly debate at each stage in relation to underlying political conflict, producing a series of unstable theoretical resolutions that ultimately fractured progressive scholars around the question of law's appropriate role in social change. A key contribution of this account is to demonstrate how legal liberalism became identified with foundational critiques of courts and lawyers—that they were ineffective in producing social change and unaccountable to the very constituencies they purported to serve. It also shows how these critiques came to frame debate in the two fields most closely linked to the legal liberal model (and invested in the law-politics boundary): *constitutional law*, concerned with the legitimacy of activist courts, and the *legal profession*, concerned with the legitimacy of activist lawyers. Debate in these two fields operated along parallel—and strikingly similar—lines even though the fields themselves were divided by academic status and did not interact. Within this debate, social movements played no affirmative analytical role—rather, they operated as an implicit ideal against which legal liberalism was critiqued.

The goal of Part II's intellectual history is to set the frame for the current social movement turn in legal theory—helping to explain how and why social movements have ascended within progressive legal thought as a way of

751. Early critics of social reform through law coined the term liberal legalism to distinguish it from political liberalism. *See, e.g.*, David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

9. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 258 (2005).

10. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 142–45 (2004).

reasserting a politically productive relationship between courts, lawyers, and social change. Specifically, it suggests how the promise of legal liberalism became recast as a failure of liberal lawyers, whose efforts to use law as politics undercut the very ideals that those lawyers advanced. As legal liberalism was thus blamed for the decline of political liberalism, the question became: How could law advance progressive politics without simply becoming politics? As I show in a companion article, scholars within progressive legal thought over the past decade have turned to social movements to help answer that question.[11] In both constitutional law and legal profession scholarship, scholars have incorporated social movements as independent actors that mobilize dissent in order to shift politics and culture, thereby producing changes in law that reflect and codify social movement goals. In this model, which I call *movement liberalism*, social movements are positioned as leaders of progressive legal reform in ways that promise to reclaim the transformative potential of law while preserving traditional roles for courts and lawyers.[12] The central goal of this Article is to set the stage for the emergence of movement liberalism by recovering the progressive debates in which it intervenes. Part II's intellectual history therefore leaves off at the pivotal social movement turn in American legal theory—suggesting how the rise of social movements as critical legal actors in the current scholarly moment constitutes the newest progressive response to the age-old law-politics problem.

Part III concludes by reflecting on the enduring legacy of legal liberalism, which is fundamentally a story about the decline of an ideal: that lawyers should play a leadership role in advancing a transformative and inclusive vision of law, and that law could be used instrumentally to change society in progressive directions. Part III articulates this decline in terms of the persistence of foundational critiques of lawyers and law emerging from the legal liberal period. It discusses the implications of these critiques for the development of constitutional law and legal profession scholarship (and their relation to empirical social science through the end of the millennium). Part III ends by suggesting how the fault lines within progressive legal thought emerging from legal liberalism precisely shape the intellectual terrain within which social

11. *See* Scott L. Cummings, *The Social Movement Turn in Law*, 42 LAW & SOC. INQUIRY (forthcoming 2018).

12. *See id.* In this companion piece, I delineate and analyze the features of movement liberalism, which are framed around two essential concepts, majoritarian courts and movement lawyering, responding to the critiques of legal liberalism. I conclude that, contrary to its ambitious effort to bridge divisions in progressive legal theory, the new social movement literature ultimately carries forward the very critiques of courts and lawyers it seeks to surmount, while reproducing the precise debate about the role of law and politics in progressive social change that it seeks to bridge.

movements are now being deployed in the current era of empirical legal studies as a response to the fundamental law-politics problem.

## I. FRAMING THE LAW-POLITICS PROBLEM IN LEGAL THEORY

The central thesis of this Article is that social movements are a new answer to an age-old problem within progressive legal theory. This Part presents the essential outlines of this problem to frame the history of scholarly debate that follows. The law-politics problem in legal theory centers on the appropriate role of law in a democratic society. Theorists have long divided democracy into two spheres: one of politics, where norms are debated by interest groups and enacted into law in ways that reflect interest group power, and the other of law, where disputes are settled based on the application of rules to all individuals equally and neutrally irrespective of social position.[13] Theorists acknowledge that law is ultimately derived from norms generated through political conflict, but the idea of the rule of law is that, once these norms are codified in constitutions and statutes, legal rules should operate irrespective of the power of parties bound by them or the ideology of judges entrusted to apply them.[14] This is the foundation of a system of constitutional rights and judicial review, in which law operates to check the passion of the majority and the will of the powerful in favor of essential democratic values: equality and liberty.[15]

The core problem of progressive legal theory arises precisely because the values that progressives seek to advance—greater regulation of the private market, redistribution of resources, and protection of political dissidence and minority rights—pit them against interests that typically

13. *See generally* BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 11–50 (2001) (canvassing conceptions of law in Western legal thought).

14. Here, a controversial question is whether judges ever simply apply law or whether the idea of law is too indeterminate, thus requiring judges to exercise political discretion. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); H.L.A. HART, THE CONCEPT OF LAW (1961); *see also* Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN: CONTEMPORARY PHILOSOPHY IN FOCUS 22 (Arthur Ripstein ed., 2007) (describing the central problem in philosophy of law as whether legality depends on judicial interpretations of morality). Bradley Wendel, focusing on lawyering and legal ethics, argues that lawyers faced with ethical discretion should exercise it in favor of upholding the political legitimacy of law. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 4 (2010).

15. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 289 (Phillips Bradley ed., Henry Reeve trans., 1945) (1835) ("When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counsels.").

have greater power to influence politics.[16] Such interests could use their power to resist law, so it is critical for the proper functioning of democracy that they do not. To ensure that the powerful follow the rule of law, they must perceive either a sanction for noncompliance or a benefit for compliance. Precisely because the powerful can influence when and how government decides to impose sanctions, proponents of the rule of law cannot simply rely on government coercion to deter or punish noncompliance. Rather, powerful social interests must be held in check by law because they perceive systemic benefits in doing so—even if in the short-term complying with law may not be in their self-interest.[17] It is in this sense that theorists assert that, for democracy to work, the powerful must agree to follow law, at least sometimes, because they perceive it to be *legitimate*.[18]

The central importance of law's legitimacy in democracy gives rise to the key challenge for progressives seeking to mobilize law to advance their substantive values.[19] When these values are in conflict with the interests of power holders, legal mobilization often requires countermajoritarian action by courts and lawyers to advance minority interests against the "tyranny of the majority."[20] Progressive reformers frequently find themselves in the position of at once criticizing law as an instrument of power, but also relying upon the rule of law to check power and promote greater equality. This puts them in a bind: If progressive reformers do not push hard enough for legal change, they may be acquiescing to the perpetuation of injustice. If they push too hard—if

16. It is important to note that this is predominately a progressive, not conservative, problem because conservativism tends toward maintaining the legal status quo while progressivism, as its name implies, is oriented toward change. Although this is generally true, the degree to which conservatives have adopted a change-oriented legal approach in reaction to the civil rights movement would argue in favor of understanding the law-politics dilemma in nonideological terms—though it is also important to note that within legal theory, the problem has been debated almost entirely within progressive thought.

17. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., Macmillan Press 1984) (1893); MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954); Talcott Parsons, *The Law and Social Control*, *in* LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56 (William M. Evan ed., 1962); *see also* William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 573 (1985) (stating the Progressive-Functionalist view of "normative integration, the notion that individuals and the various specialized roles in the society are held together by a general moral culture"). For analysis of law as a tool of social integration and control, see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

18. *See* Trubek, *supra* note 17, at 736; *see also* Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT'L L. 517, 517 (2001); Christopher Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. SOC. SCI. 45, 49 (2007).

19. *See*, *e.g.*, Trubek, *supra* note 17, at 732–33 (discussing the role of law's legitimacy in the exercise of political domination).

20. DE TOCQUEVILLE, *supra* note 15, at 281, 288–89.

they too explicitly link legal reform to their substantive values—they risk politicizing law and thereby undermining the very legitimacy they need to check the power of opponents and advance their goals. And even if they find a way to advance reform through law without destabilizing it, progressives may succeed only in tinkering at the margins and giving legitimacy to a legal order that remains structurally unfair.[21] From this standpoint, the law-politics problem within progressive legal theory presents a fundamental challenge: *How to justify a legitimate role for courts and lawyers in shaping law to promote progressive ends, while preserving the democratic line between law as neutral and procedural, on the one hand, and politics as partisan and substantive, on the other*.

## II. THE RISE AND FALL OF LEGAL LIBERALISM

This Part provides a historical overview of progressive legal theory to show how the law-politics problem has animated scholarly development during four key periods: (1) *legal realism*, from the turn of the century through the New Deal; (2) *legal liberalism*, associated with the era of the Warren Court; (3) *critical legalism*, through the Reagan years; and (4) *pragmatic liberalism*, through the Clinton presidency. As this Part argues, the law-politics problem framed progressive scholarly debate at each stage in relation to underlying political conflict, producing a series of unstable theoretical resolutions that ultimately fractured progressive scholars around the question of law's appropriate role in social change. A key insight of this account is to show how the law-politics problem organized debate in the two scholarly fields most concerned with policing the law-politics boundary: *constitutional law*, focused on the appropriate role of courts, and the *legal profession*, attuned to the appropriate role of lawyers. Debate in these two fields operated along parallel—and strikingly similar—lines even though the fields themselves were divided by academic status and did not interact.

To summarize the argument: Prior to the New Deal, legal realism *avoided* the law-politics problem by promoting a notion of legal independence that rested on judicial deference to class-based majoritarian political reforms and lawyer resistance to corporate client power, while advancing a theory of institutional specialization that separated law from policy making. Following

21. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 242–43 (1987) (discussing critical views of the role of law, which include the notion of law as "convincing the 'masses' that the existing distribution of perquisites and power is reasonably just"); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 36 (1982) (discussing the hegemonic function of the legal system in maintaining the capitalist state).

*Brown v. Board of Education*,[22] legal liberalism *defined* the law-politics problem in terms of the democratic legitimacy of courts and lawyers advancing rights for underrepresented interests, framed around countermajoritarianism in constitutional law and professionalism in legal profession scholarship. As the claims of underrepresented interests expanded against the backdrop of conservative political ascendance in the 1980s, critical legalism *contested* the possibility of a principled law-politics division and questioned its political value. This pitted radical critics who pushed away from legalism as a political strategy against mainstream and outsider scholars who continued to defend the law, albeit on different grounds. In the aftermath of this debate, as progressives gave up on the hope of grand theory and sought instead to leverage smaller scale opportunities for political change in inhospitable conditions, pragmatic legalism aimed to *rebuild* a vision of law from the bottom up that looked for new legal norms in community-based struggle while relying on the indirect effects of law to reshape politics.

### A. Legal Realism: Avoiding the Tension

Legal realism in the 1920s and 1930s was generally associated with a critique of adjudication, attacking the idea that judges could decide cases by reasoning deductively from formal legal rules, coupled with a call to study those rules empirically in order to test whether they actually produced their intended results.[23] Yet realist scholars also posited an affirmative

22. 347 U.S. 483 (1954).

23. *See* Brian Leiter, *American Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 249 (Dennis Patterson ed., 2d ed. 2010). Realism—as it emerged in tentative form in the early twentieth century writings of Oliver Wendell Holmes, Roscoe Pound, and Felix Frankfurter, and then grew in the 1930s with the leadership of Karl Llewellyn, Robert Hale, Morris Cohen, and Lon Fuller—was framed by its proponents as a counter to legal formalism. Scholars use a variety of terms and definitions for formalism. *See, e.g.*, ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1 (1986); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 111 (2010). As a historical matter, formalism was associated with three notions: First, the common law existed as a closed system separate from politics within which legal disputes could be decisively resolved; second, this law could be scientifically organized under coherent legal categories with determinate, *a priori* rules derived from authoritative legal materials; and third, by reasoning deductively and analogically, judges could rely solely on such rules to reach a definitive legal outcome in a particular case. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 16 (1992); AMERICAN LEGAL REALISM, at xii (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993). *But see* DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013) (challenging the description of nineteenth century jurisprudence as formalistic and conservative); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010) (arguing there was not a clear formalism prior to the

jurisprudential theory that marked the first effort within progressive legal thought to articulate a democratic role for courts and lawyers that addressed the law-politics problem. This section makes two claims about the legal realist period. First, it argues that the realist position ultimately *avoided* the law-politics problem by bracketing race—and thus evading the countermajoritarian difficulty—while arguing for judicial and professional roles that expressed law's *independence* from corporate influence in politics.[24] This view of independence allowed realists to present a tentative process oriented resolution of the law-politics problem that rested on institutional specialization. Second, by juxtaposing the conventional story of realism with historical accounts of black legal progressivism during this same period, this section argues that the realist law-politics resolution was both artificial and under pressure by the time of the New Deal. This comparison highlights that there were already competing strains of progressive thought well before the legal assault by the National Association for the Advancement of Colored People (NAACP) on *Plessy v. Ferguson*[25] began: While white realists advanced the dominant concept of independence, black progressives asserted the ideal of *representation*—of subordinated minority groups by courts and lawyers acting to advance countermajoritarian rights.

1890s and that realists' view of judging, skeptical that judging could be non-normative but also recognizing its rule-bound nature, mirrored what historical jurists wrote in the 1880s and 1890s). The idea of law constraining judicial decision making through deductive reasoning was championed by Blackstone and Hale. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *69; MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (1713); *see also* CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii (2d ed. 1879) ("Law [is] considered as a science . . . ."). A key concept within formalism was the public-private distinction, which carved out space within society for legal noninterference. Formalists, as classical liberals, tended to draw the public-private line in a way that located a broad range of market activity within the private sphere where it was protected against state regulation; as racial conservatives, they understood local rules addressing social interaction (*i.e.*, racial segregation) as an expression of private preferences and therefore protected from higher-order (constitutional) interference. *See* HORWITZ, *supra*; *see also* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860–1915 (1944); HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970 (2015); KENNEDY, *supra* note 5.

24. For background on realism, see BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007); WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009). Also see Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1216 (1981), which states: "Concern over Realism's legacy seems to recur at generational intervals."

25. 163 U.S. 537 (1896).

### 1. Dominant Strain: Class and Independence

Politically, realism intervened at a moment of national transformation shaped by struggles over race and class. The end of the Civil War and passage of the Thirteenth Amendment formally eliminated the legalized race-based slavery that had ravaged the Union.[26] This ushered in a period of rebuilding that unleashed pent-up forces of industrialization,[27] which swept through a nation recovering from catastrophic upheaval—while still grappling with the unsettled legacy of its primary cause. Although the struggle for racial justice was a seminal problem of the Progressive Era, it played a minor role in national level progressive political discourse,[28] because African Americans were—despite the Fifteenth Amendment—effectively prohibited from voting by Jim Crow. Even as W.E.B. Du Bois proclaimed in 1903 that "the problem of the Twentieth Century is the problem of the color-line,"[29] it was class inequality to which legal realism responded—with race relegated to a footnote in the debate.[30]

From the perspective of scholars loosely allied under the realist banner—white, male academic elites at Ivy League schools—there were two central challenges to law posed by industrial capitalism in the Gilded Age[31]: first, keeping courts from interfering with the growing political success of class-based

26. *See* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981); *see also* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 11 (2000).

27. STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 15–29 (1998); *see also* H.W. BRANDS, AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM, 1865–1900, at 5–7 (2010); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 256 (3d ed. 2005); PURCELL, *supra* note 26, at 11; ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877–1920, at vii (1967).

28. PURCELL, *supra* note 26, at 11.

29. W.E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES, at vii (3d ed. 1903).

30. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

31. *See generally* SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT (3d ed. 1993). For treatments of the role of law in American society that laid the foundations upon which the Gilded Age was built, see FRIEDMAN, *supra* note 27, at 253–54, 390–91, which shows how, at the federal level, the government offered financing and land grants to railroad companies, and combined strict tariffs and loose money to fuel industrial growth, while states made it easier for corporations to form and combine. Also see JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865 (2010); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993); and ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE (anniversary ed. 2007).

progressive social movements,[32] and second, preventing powerful corporations from exploiting loopholes to undermine public regulation in their business dealings. Legal realism responded to these challenges by asserting new roles for courts and lawyers that sought to protect law's independence from corporate power. For courts, independence meant deferring to labor-backed political reform, while for lawyers, it meant *not* deferring to corporate client self-interest.

The realist position on courts reflected what scholars perceived to be the central political dilemma of the time: how to unleash the power of class-based policy reform from the punitive gaze of judicial review,[33] exercised by a Supreme Court solicitous of corporate power.[34] As the labor movement built strength at the turn of the century,[35] its legislative successes were repeatedly thwarted in court,[36] while union organizing was undercut by lower courts' issuance of antilabor injunctions.[37] Particularly after *Lochner v. New York*[38] invalidated New York's maximum hour law for bakers on substantive due process grounds,[39] realists made it their project to reveal how formalist legal reasoning, which purported to be apolitical,[40] provided cover for a substantive political agenda[41]: advancing laissez faire capitalism.[42]

32. *See* FRIEDMAN, *supra* note 27, at 254; *see also* JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1900–1917 (1980); LEWIS L. GOULD, AMERICA IN THE PROGRESSIVE ERA, 1890–1914 (2001); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920 (2003).

33. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

34. PURCELL, *supra* note 26, at 15.

35. *See* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 11 (2002).

36. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37–58 (1991); *see also* FRIEDMAN, *supra* note 27; BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942); GEORGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934–1940 (1962).

37. CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 48 (1985); *see also* FORBATH, *supra* note 36, at 147 (describing federal legislation banning the antilabor injunction). Despite judicial hostility, the spread of industrialism produced a surge in union membership, which grew to 5 million by World War I. DINER, *supra* note 27, at 239. This gave it increasing political power, which it was able to assert as the country was plunged into the Depression and President Roosevelt was elected with a mandate for economic reform.

38. 198 U.S. 45 (1905).

39. *Id.* at 53. The *Lochner* freedom of contract reading of the Fourteenth Amendment built on a series of pro-business state cases during this time. *See* Ritchie v. People, 40 N.E. 454 (Ill. 1895); Godcharles v. Wigeman, 6 A. 354 (Pa. 1886); *see also* HORWITZ, *supra* note 23, at 33.

40. *See* Joseph William Singer, Review Essay, *Legal Realism Now*, 76 CALIF. L. REV. 465, 499 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986)).

Although explicitly concerned with exposing the political character of judicial decision making,[43] legal realism linked its critique of judicial review to an implicit theory of institutional specialization.[44] The reformist goal of realist scholarship—to reconnect "legal justice" and "social justice"[45]—was to be achieved not though judicial activism, but rather by rejecting the centrality of common law adjudication in favor of "new principles, introduced by legislation, which express the spirit of the time."[46] Yale law professor Roscoe

41. In this sense, realism was associated with a deconstructionist method that revealed how judicial decision making, particularly in commercial law, applied norms derived from existing economic practice (like "liberty of contract") to determine socially regressive legal outcomes. *See* HORWITZ, *supra* note 23, at 200; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909). For important examples of the realist school, see Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1063 (1934); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV 457 (1897); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); and Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925). For realist works showing how indeterminacy of precedent permitted the exercise of policy choice, see JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963) (1930); Cohen, *supra*; Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); and Wesley A. Sturges & Samuel O. Clark, *Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691 (1928).

42. AMERICAN LEGAL REALISM, *supra* note 23, at 99; HORWITZ, *supra* note 23, at 16; *see also* EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY (1934) (criticizing the conservative U.S. Supreme Court's exercise of judicial review to dominate national policy making); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) (tracing realist critique of early twentieth century economic libertarianism).

43. For work exploring this theme in legal realism, see generally Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 749 n.2 (2013). Also see LEITER, *supra* note 24, at 21–23; EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS IN THE LAW 537–56 (1953); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 120 (2003); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208–09 (1986); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 607–10 (2007); Duncan Kennedy, *Freedom and Constraint in Adjuidcation: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518 (1986); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822 (1983); and G. Edward White, *The Inevitablity of Critical Legal Studies*, 36 STAN. L. REV. 649, 651 (1984).

44. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 40 (David M. Trubek & Alvaro Santos eds., 2006).

45. *See* Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 196 (1914); *see also* Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

46. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35 (1910). Although it was Pound who first called for greater attention to "law in action," *see id.* at 34, Llewellyn connected realism to progressive politics by advocating sociological study to promote legal reform, *see, e.g.*,

Pound's call for a "sociological jurisprudence" was therefore meant to replace one set of social facts[47]—the existing regime of market transactions that courts were using to justify decisions like *Lochner*[48]—with another derived from deeper analysis of the underlying political conditions and power differences that enabled industrial inequality and exploitation.[49] Analyzed with the new tools of empirical social science, legal rules could thereby be brought into line with social reality through ameliorative legislation and—as the New Deal approached—expert problem solving in the administrative state.[50] Courts, in this framework, would remain independent of the corrupting influence of corporate capital by deferring to the majority's legislative will. For the time being at least, progressives could fuse positive social science with normative jurisprudence: By grounding law in the "Is" of economic inequality, they could still promote the "Ought" of progressive reform.[51]

The realist position on lawyering reflected a similar concern with corporate power. For realists looking at the legal profession in the early twentieth century, the central threat was the perceived commercialization of law practice and the decline of professional independence among newly minted corporate lawyers.[52] In language that echoed critiques of courts' capitulation to

Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

47. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912). The arrival of empirical social science, building from the influence of Darwinism and the reaction against Euclidean mathematics, undercut the idea that law could operate according to a closed system of formal rules that had determinate normative content and thus opened the door to realism's attack on judicial review. EDWARD PURCELL, THE CRISIS OF DEMOCRATIC THEORY 8 (1973); *see also* MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949).

48. Pound, *supra* note 41, at 454 ("Why do so many [courts] force upon legislation an academic theory of equality in the face of practical conditions of inequality?").

49. Pound, *supra* note 46, at 35–36 ("Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient.").

50. *See* HORWITZ, *supra* note 23, at 200.

51. For skepticism about whether the realist commitment to understanding the law in action could translate into progressive reform, see *id.* at 210, which states: "[T]he question remains whether the turn to positivist social science was not also a political and moral failure because it not only suppressed the critical stand of Realism but also encouraged Realists to rely on a methodology that strongly tended to confer a privileged position on the status quo." Also see Fuller, *supra* note 41, at 461, which asks: "Why should realism, which starts out as a reform movement, carry in its loins [an] essentially reactionary principle?"

52. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 2–3 (1988); *see also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 866–67 (1992) (noting that corporate clients are in a "good position" to exert pressure on lawyer independence). The transformation of the legal profession at the turn of the twentieth century gave impetus to the first effort in ethical codification. This effort drew on antebellum legal treatises that incorporated values

big business, giants of the Progressive Era voiced concern over the declining ethics of the corporate bar,[53] contrasting what they did—devising "bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws"[54]—with what they ought to do—serving as an independent check on the power of those very same clients.[55] This position, captured by Louis Brandeis's "lawyer for the situation," expressed a view of lawyers as guardians of a public profession.[56] What this meant in the realist context was an updated version of Tocqueville's "balance wheel" concept: Instead of tilting law in favor of corporate clients through litigation, corporate lawyers were to mediate between corporate power and the public good to foster democratic stability.[57]

Echoing their approach to adjudication, realists articulated a vision of professionalism that welded lawyer independence to a theory of institutional specialization.[58] The professionalism advanced by realists was one in which the corporate lawyer would exercise independent judgment in order to push back

of ethical independence from clients that would form part of the foundation for the 1908 Canons of Professional Ethics. *See, e.g.*, DAVID HOFFMAN, A COURSE OF LEGAL STUDY: RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES (1817); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (2d ed. 1860). *But see* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999) (noting that the Canons departed from Hoffman and Sharswood in important ways that promoted client-centered advocacy).

53. A.A. Berle, Jr., *Modern Legal Profession*, *in* 9 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 340, 344 (Edwin R.A. Seligman & Alvin Johnson eds., 1933).

54. THEODORE ROOSEVELT, *At Harvard University, June 28, 1905: The Harvard Spirit*, *in* IV PRESIDENTIAL ADDRESSES AND STATE PAPERS OF THEODORE ROOSEVELT 407, 420 (1905), *quoted in* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA 33 (1976).

55. *See* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996) (offering a critical evaluation of this posture).

56. *Id.* at 1503 n.199; *see* AUERBACH, *supra* note 54, at 85. The idea was that lawyers would show corporate clients that "conflict was a result of short-sightedness and confusion rather than of divergent norms, and to recommend that it be resolved simply by showing individuals that their true interests converged with the public interest." William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 68; *see also* Saul Touster, 76 HARV. L. REV. 430 (1962) (reviewing BERYL HAROLD LEVY, CORPORATION LAWYER . . . SAINT OR SINNER? THE NEW ROLE OF THE LAWYER IN MODERN SOCIETY (1961)). This view of independence also resonated with an elitist strain in progressivism, which often "viewed reform by experts as a vehicle for the reestablishment of elite ascendancy in public life." AUERBACH, *supra* note 54, at 85.

57. Gordon, *supra* note 52, at 14 ("Lawyers were to be the guardians, in the face of threats posed by transitory political and economic powers, of the long-term values of legalism."); *see also* Alfred L. Brophy, *Foreword: Lawyers and Social Change in American Legal History*, 54 ALA. L. REV. 771, 774 (2003) (noting that the nineteenth century lawyer was celebrated for "stopping radical reform" and helping to "maintain order").

58. *See* Simon, *supra* note 56, at 68–73.

against corporate client interests in the nonlitigation realm of client counseling.[59] There, outside of the domain of adversarial legalism, lawyer autonomy from client influence was necessary to ensure that corporate client plans fit within the broader public purposes that Progressive Era regulation demanded.[60] In contrast, within the adversary system, realists supported more conventional professional notions of neutral client advocacy in ways that linked back to their vision of courts. In private disputes over corporate conduct, courts would act as impartial umpires resolving arguments involving the application of law to fact. In that context, it was deemed appropriate for lawyers to zealously advocate their clients' best interests in a truth-seeking forum where legal claims were checked by opposing counsel and vetted by judges.[61] Realists also suggested that the professional duty of elite lawyers required that they deploy their prodigious advocacy skills in favor of public regulation when it came under attack. Brandeis's famous brief in support of Oregon's maximum hour law for female laundry workers in *Muller v. Oregon*[62] symbolized this brand of realist

59. The view of professionalism as independence was pronounced from on high by lawyers in the pantheon of progressive legal elites. *See* LOUIS BRANDEIS, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION 329, 337 (Hale, Cushman & Flint 1933) (1914); HARLAN F. STONE, LAW AND ITS ADMINISTRATION 165–66 (1915); Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

60. As Spillenger recounts, some of Justice Brandeis's most famous and controversial representations—such as his decision to effectively place himself in the role of trustee for client James Lennox's nearly bankrupt tannery business in order to devise a plan to repay creditors that would be "fair to all"—fit within this model. Spillenger, *supra* note 55, at 1508–09 (noting also that such "counsel for the situation" was premised on Brandeis's relentless political nonaffiliation that cut against his claim to serve the public); *see also* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

61. Lon L. Fuller & John D. Randall, *Professional Resposibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958). Canon 15 of the Canons of Professonal Ethics states:

> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty.

CANONS OF PROFESSIONAL ETHICS Canon 15 (AM. BAR ASS'N 1908). The problem of unequal access to law, and the impact that had on the perceived legitimacy of the legal system (especially among the new immigrant urban poor), was resolved by calling for increased charitable investment in legal aid as a mechanism of procedural fairness, not substantive justice. REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES (1919).

62. 208 U.S. 412 (1908).

professionalism: a prestigious corporate pro bono lawyer bucking his client constituency to argue for judicial deference to state employment regulation.[63]

Legal realism advanced a resolution to the law-politics problem that supported a unified theory of courts and lawyers in response to the challenge posed by industrial capitalism. In this scheme, courts would apply law according to strict standards limiting the scope of judicial review and legislatures would make policy to be refined by legal experts in the administrative state.[64] While lawyers could freely engage in policy development in their role as New Deal technocrats,[65] as client representatives they would promote legal compliance in the public interest.[66] As this underscored, the realists, though progressive in their commitment to a broad role for the state in the economy, were not populists, but rather sought to use law to "redeem the profession and reform the nation."[67] Connecting their theory of adjudication and lawyering with support for legislative reform, realists could simultaneously be against court-centered legal activism and in favor of progressive political change. Yet this resolution depended on assiduously avoiding the race question and thus failing to confront the deep tension in realist jurisprudence.[68] In the end, although realism persuasively

63. *See* NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS (1996) (including the Brandeis brief). In supporting the Oregon law, Brandeis embraced a controversial concept of difference feminism, though his primary motivation seemed to be advancing labor rights. David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2037 (2014) ("Brandeis was much more interested in protective labor legislation for women as a precedent for general economic reform than with the question of whether it advanced or harmed the cause of women's rights.").

64. *See* PURCELL, *supra* note 26, at 13–16; *see also* Kennedy, *supra* note 44, at 43 ("[A]gencies were supposed to bring 'expertise' to bear, meaning both social science and concrete pragmatic knowledge. . . . They were law reformers, writing theory, doing studies, drafting legislation . . . ."); *see also* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 310 (1978).

65. *Cf.* Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292, 292 (1954) (arguing in favor of a "ministry of justice" in which lawyers would draw upon social science to be "problem-solvers in the real world"). For a portrait of the politics of the New Deal, see HOFSTADTER, *supra* note 32, and BRANDS, *supra* note 27. As Ronen Shamir argues, corporate lawyers were also involved in carrying out "their own crusade against the New Deal" in order to preserve control over "law" and maintain prestige. RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 169–71 (1995).

66. *See* David Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 729 (1988); *see also* Ben Glassman, *Representing Law, Representing Truth: Legal Realism and Issues in the Ethics of Representation*, 44 HOW. L.J. 1 (2000).

67. AUERBACH, *supra* note 54, at 81.

68. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 639 (2009); Axel R. Schäfer, *W.E.B. Du Bois, German Social Thought, and the Racial Divide in American Progressivism, 1892–1909*, 88 J. AM. HIST. 925, 927 (2001); Christopher Bracey, Note, *Legal Realism and the Race Question: Some*

theorized the role of law in relation to economic populism, it did not resolve the looming question of what affirmative role courts and lawyers should play in the countermajoritarian struggle for racial justice.[69]

### 2. Recessive Strain: Race and Representation

Although race was absent from the realist conversation, it was the focal point of parallel discussions by black progressives struggling to devise a response to the violence of Jim Crow.[70] While they had no faith in law's independence from politics, black progressives had ample reason to want to build it—yet on quite different terms than their white realist counterparts. Whereas realists could connect a critique of judicial activism with support for social movement-led policy reform, black progressives did not have that luxury. As Jim Crow crushed the viability of racial justice movements and the possibility of legislative reform in the "nadir period" of the post-Reconstruction South,[71] black progressives sought to define a pragmatic political program in which lawyers worked to enlist courts to protect African Americans from

*Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1619 (1995) [hereinafter Bracey, *Some Realism*]; *see also* Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 861 (2001) (reviewing Brandeis's "conspicuous evasion of public issues that dealt with inter-ethnic relations between African-Americans and Euro-Americans and his complicity in rendering judicial decisions that reinforced the core principles of the segregation regime"). Hale proposed to solve the race problem through passage of federal antilynching law. Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 639 (1946). Llewellyn, although promoting law's ability to "set up ideals," expressed skepticism about the ability of law to change racial attitudes, and worried about racial backlash. Karl N. Llewellyn, *What Law Cannot Do for Inter-Racial Peace*, 3 VILL. L. REV. 30, 31 (1957). Cohen also argued that the appropriate venue for racial remediation was the executive branch, not the courts. Felix S. Cohen, *Reviews*, 57 YALE L.J. 1141 (1948) (reviewing PRESIDENT'S COMM'N ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947)).

69. Realism did not fully confront what law should do when majoritarianism itself was the problem—as the growth of totalitarianism abroad and the rise of Jim Crow at home spotlighted. This issue was spotlighted by political scientists investigating the danger to democracy posed by majority opinion. *See* WALTER LIPPMANN, THE PHANTOM PUBLIC 60–61 (1925) ("When public opinion attempts to govern directly, it is either a failure or a tyranny."); *see also* HAROLD D. LASWELL, DEMOCRACY THROUGH PUBLIC OPINION (1941); WALTER LIPPMANN, PUBLIC OPINION (1922); CHARLES EDWARD MERRIAM, POLITICAL POWER: ITS COMPOSITION AND INCIDENCE (1934).

70. *See generally* SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915 (2013); Mack, *supra* note 9. Black progressives were located at the nexus of progressive political-legal organizations (before and after the formation of the National Association for the Advancement of Colored People (NAACP) in 1908) and black academic institutions (notably Howard Law School after Charles Hamilton Houston's arrival).

71. *See* RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877–1901 (1954).

repressive local politics. This approach was reinforced by the fact that blacks were also largely shut out of the benefits of the New Deal and thus could not view the federal administrative state as a source of hope. In this context, black progressives understood the challenge to law, and the solution to the law-politics problem, in terms contrary to those of white realists: Rather than deferring to majoritarianism, law had to operate as a check on its excesses, and rather than confining policy reform to specific institutional spheres, such reform had to develop through dynamic engagement among the branches. Resolving the law-politics problem thus hinged on a justification for the very judicial activism from which realists recoiled, now framed by black progressives around the concept of *representation*: by courts and lawyers of the interests of African Americans as a politically disenfranchised minority group.

For black progressives at the turn of the century, the politics of race argued in favor of a pragmatic position on the countermajoritarian role of courts. After the Civil War's brief experiment with black political representation,[72] racial subordination quickly reasserted itself as a pervasive system. Southern legislatures codified a post-Reconstruction system of total segregation, to which the federal government and the U.S. Supreme Court acquiesced. It was, in the Court's words, time for blacks to cease "to be the special favorite of the laws,"[73] a point it made with brutal clarity in *Plessy v. Ferguson*'s sweeping endorsement of the "separate but equal" doctrine.[74] In this bleak environment, black progressives—"forerunners" of the civil rights movement to come[75]—developed a political strategy that rejected the institutional specialization of realists. Instead they embraced a broad conception of law reform that was understood to encompass a dynamic combination of law-making strategies, including "race uplift" initiatives,[76] legislative advocacy, and court-centered change. Although deep fractures developed among advocates of competing models,[77] black leaders—even as they aligned

72. *See* ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 355 (1988).
73. The Civil Rights Cases, 109 U.S. 3, 25 (1883).
74. Plessy v. Ferguson, 163 U.S. 537 (1896).
75. *See* CARLE, *supra* note 70, at 13; *see also* SHAWN LEIGH ALEXANDER, AN ARMY OF LIONS: THE CIVIL RIGHTS STRUGGLE BEFORE THE NAACP (2012).
76. Mack, *supra* note 9, at 280.
77. Three basic schools of thought emerged—none of which were mutually exclusive. Conservatives, whose views were associated with Booker T. Washington, argued for a retreat from the state and the pursuit of race uplift through intraracial community building. *See* CARLE, *supra* note 70, at 75–81. Radicals, seeing opportunity in the rising power of the labor movement, argued in favor of cross-racial alliance with the white working class in order to advance national reform that would simultaneously address the interlocking problems of racial subordination and poverty. *Id.* at 9

themselves with different organizations[78]—promoted movement along all tracks simultaneously in the hope that smaller victories would accumulate into larger transformation.[79]

The black progressive position recognized no clear boundary between law and politics. But rather than undermining the value of law, this ambiguity only served to increase the importance of building law's legitimacy to advance the cause of racial justice. Early on, African American organizations advanced a broad conception of legal mobilization that was understood to encompass both legislative and court-centered reform, the latter of which was valued not just for its concrete legal outcomes but for producing symbolic victories.[80] Toward that end, mainstream leaders called for a gradual strategy of leveraging judicial review—in carefully selected circumstances—to challenge state-based segregation and thus counteract black disenfranchisement in the realm of representative politics. After its founding, leaders of the NAACP were clear-eyed about both the limits of court victories and their potential to spark political mobilization.[81] In proposing to "boldly challenge the constitutional validity of segregation,"[82] NAACP leaders were cognizant of the "danger . . . entailed by any sort of effective action which we can hope to take in our campaign."[83] Yet, given the alternatives, risking those dangers was necessary to build the doctrinal and political momentum to dismantle Jim Crow.

Although black progressives could plainly see the conservative ideological tilt of courts, they sought to fashion a pragmatic theory of judicial review in

(noting split between Reverdy Ransom (and later Dubois), who focused on a "democratic, labor-based, coalition-organizing approach," and Washington, who adopted a "conservative, racial interest group or power-brokering model of racial progress"). Pragmatists, while not rejecting the importance of intraracial or cross-racial work, also embraced legal reform strategies to redress the deprivation of civil and political rights in the areas of most grievous concern. *Id.* at 55.

78. The NAACP's formation also marked the rise of organizational specialization. *Id.* at 289. The NAACP, coming out of the Niagara Movement, was oriented toward legal reform, with an explicit focus on litigation expressed in the creation of its National Legal Committee. The Urban League took over the economic development mantle of the Washington wing of the Afro-American Council, the National Negro Congress focused on political action, and the International Labor Defense was created to advance a more radical cross-racial and labor movement-oriented agenda. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 146–47 (2004) (stating that black progressive organizations held "comparative advantages in different spheres").

79. CARLE, *supra* note 70, at 289 (stating that the Niagara Movement founders promoted a "robust mix of litigation, legislation, and social welfare objectives").

80. *Id.*

81. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 132 (1975).

82. *Id.* at 134.

83. TUSHNET, *supra* note 78, at 28.

which planned litigation and strategic judicial intervention could expose cracks in the foundation of Jim Crow that could be exploited through further organizing and political work. In this sense, the Court's "switch in time" and rapprochement with the New Deal pointed toward new legal opportunity. Chief Justice Harlan Stone's famous footnote four named the issue that had long lurked beneath realist jurisprudence[84]: What should the Court do when majoritarian legislation was in fact antidemocratic? While this issue would splinter progressive legal thought after *Brown*, the Court's recognition of its importance signaled receptivity to the NAACP's frontal equal protection assault on segregation and channeled resources by civil rights organizations into litigation.

Yet even as the NAACP geared up to attack *Plessy* in the Supreme Court, its lawyers were cautious of what law could achieve on its own.[85] As Charles Hamilton Houston described the NAACP's litigation work in the late 1930s:

84. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (positing strict judicial review of legislation that restricted the political process or reflected "prejudice against discrete and insular minorities").

85. As Michael Klarman recounts:

> [Houston] recognized that law "has certain definite limitations when it comes to changing the mores of a community." He conceded, "It is too much to expect the court to go against the established and crystallized social customs." Houston warned that "we cannot depend on judges to fight . . . our battles" and urged that "the social and public factors must be developed at least along with and if possible before the actual litigation commences."

MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 164 (2004) (quoting GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 135 (1983)); *see also id.* at 165 (quoting Houston stating that litigation should be "to arouse and strengthen the will of local communities to demand and fight for their rights" (quoting Memorandum from Charles H. Houston for the Joint Committee of the NAACP and the American Fund for Public Service, Inc. 1–2 (Oct. 26, 1934) (NAACP Records, Collections of the Manuscript Division, Library of Congress, Group I, Series C, Box 196, Subject File: American Fund for Public Service))). Thurgood Marshall inherited this pragmatic view. *See Discussion of Papers—Third Session*, 21 J. NEGRO EDUC. 327, 335 (1952) (quoting Thurgood Marshall in 1952: "I believe quite firmly that we will have to go from county to county and from state to state even after we get it, whichever kind of decision we get. Bear in mind in Georgia you have two hundred and some counties. So I still say there is no short-cut to it."), *quoted in* JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 114 (1994). The approach of NAACP lawyers reflected the insights gained from their own lived experience, as well as their connection to legal realism. The NAACP's early approach aligned with the basic principles of realism's emphasis on the law in action, while accepting realist appraisals of law's limits. *See* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 97 (2002). In this regard, Mack notes that the views of African American civil rights lawyers about the relation of law and courts to the broader racial justice movement were influenced by Marxist ideas of worker consciousness and economic struggle, as well as progressive-realist notions about the role of law in social engineering. Mack, *supra* note 9, at 302–18.

> [W]e used the courts as dissecting laboratories to extract from hostile officials the true machinations of their prejudices; and . . . the resulting exposures were often enough in themselves to produce reforms. Likewise we use the courts as a medium of public discussion, since it is the one place that we can force America to listen. . . . [W]e attempted to activate the public into organized forms of protest and support behind the cases, under the theory that a court demonstration unrelated to supporting popular action is usually futile and a mere show.[86]

Adopting their own version of sociological jurisprudence, black lawyers presented empirical facts of segregation and its impact directly to the courts as a basis for the affirmative articulation of legal rights. In this model of law reform, litigation was presented as a means to achieve deeper cultural change by shifting public opinion.[87]

This pragmatic approach to litigation framed a particular understanding of the professional role of lawyers in the racial justice struggle: Because lawyers occupied a new and very small professional class within black society, attention focused on how to build a cadre of activist professionals to advance the civil rights cause.[88] Particularly as control of the NAACP shifted to black lawyers in the 1930s,[89] tactical questions about how much and what type of litigation to pursue merged with questions of strengthening black leadership and promoting community accountability. Early legal success,[90] combined

86. TUSHNET, *supra* note 78, at 18.

87. Mack, *supra* note 9, at 297–98 (stating that, although Charles Chesnutt believed that "courts and Congress merely follow public opinion, seldom lead it," lawyers viewed litigation as one way to potentially shift public opinion (quoting Charles W. Chestnutt, *The Disenfranchisement of the Negro*, *in* THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE NEGROES OF TO-DAY, 77, 114 (1903)). As Mack recounted:

> Marshall, echoing Houston, argued that litigation could help "build a body of public opinion" in support of the legal changes that alone would be ineffective. As late as 1948, Loren Miller followed up the victory in *Shelley v. Kraemer* by arguing that "[t]he legal victory will prove a hollow triumph unless the battle against residential segregation is also won in the field of public opinion."

*Id.* at 349 (alteration in original) (footnote omitted) (first quoting Thurgood Marshall, *Equal Justice Under the Law*, 46 CRISIS 199, 201 (1939); then quoting Loren Miller, *A Right Secured*, 166 NATION 599, 600 (1948)).

88. In the 1920s, there were only about 1100 black lawyers in the United States, roughly 100 of whom had elite educations. KLUGER, *supra* note 81, at 125.

89. Carle, *supra* note 85, at 100–08 (noting that the first NAACP legal committee was comprised of white progressives, like Moorfield Story, who came out of the abolitionist tradition and saw their work as a product of noblesse oblige).

90. *See id.* at 117, 124–28 (describing *Guinn v. United States*, 238 U.S. 347 (1915), striking down grandfather voting clauses, and *Buchanan v. Warley*, 245 U.S. 60 (1917), invalidating a local ordinance preventing blacks from living in white neighborhoods).

with the notion of lawyering as race uplift,[91] underscored the role of black lawyers "representing the race" in litigating for greater equality.[92] Howard Law School emerged at the center of this project with Houston's ascendance as vice dean, transforming Howard from a poorly regarded trade school to a training ground for the impending legal assault on Jim Crow.[93] Houston swiftly raised standards and reoriented the school to provide deep practical experience to a new generation of black lawyers, including Thurgood Marshall, who recalled Houston's stark challenge: "[W]e had to be social engineers or else we were parasites."[94]

For these new social engineers, using law as a tool of representation involved a contested process of negotiating whose interests were served. From the beginning, this caused tensions around class difference within the black community and class solidarity across race. The interests of middle-class blacks—whose economic worlds revolved around the segregated economy—focused on the harm of unequal schools, segregated transportation, and the denial of voting rights.[95] Black exclusion from unions and the benefits of the New Deal had the effect of pushing black lawyers away from the administrative state that their white progressive counterparts had built and staffed, and toward the courts as the venue of last resort.[96] In the 1940s,

91. The 1920s black bar focused primarily on race uplift. As Mack notes, during the interwar period, leading treatments of the black bar emphasized service to intraracial institutions. Mack, *supra* note 9, at 266 (first citing Charles Houston, Tentative Findings re: Negro Lawyers (Jan. 23, 1928) (unpublished manuscript) (on file with the Laura Spellman Rockefeller Memorial Papers); then citing CARTER G. WOODSON, THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY (1934)). But that idea was merged into a legalist strand, with elite black lawyers coming to see effective lawyering in white arenas (like courts) as a way to advance the uplift idea: proving to the white world that blacks could rise by their own talents and be just as good (or even better) than their white counterparts. *See id.* at 284–85.

92. *See* KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

93. Houston graduated from Harvard Law School and took the job as vice dean of Howard in 1929. KLUGER, *supra* note 81, at 125.

94. *Id.* at 128 (quoting Marshall, who came to Howard in 1930); *see also* MCNEIL, *supra* note 85; Bracey, *Some Realism*, *supra* note 68, at 1622; David B. Wilkins, *Social Engineers or Corporate Tools?:* Brown v. Board of Education *and the Conscience of the Black Corporate Bar*, *in* RACE, LAW, AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 137, 137 (Austin Sarat ed., 1997).

95. *See* AUERBACH, *supra* note 54, at 210–17.

96. Despite the success of unions like A. Phillip Randolph's Brotherhood of Sleeping Car Porters and the efforts of the Wobblies, blacks were largely excluded from mainstream unions (those in the American Federation of Labor and later Congress of Industrial Organization) because of systematic discrimination. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 179–80 (2007). Thus, for black leaders, the culmination of labor's agenda in the New Deal was seen as a codification of its racist policies. The NAACP had lobbied to implement the Wagner Act without discrimination and to deny certification to unions that discriminated. *Id.* at 180.

growing working class membership, combined with a challenge from class-oriented groups like the International Labor Defense,[97] encouraged NAACP lawyers to focus on litigating economic rights—largely by filing suits against discriminatory unions[98]—thus attempting to leverage substantive due process claims to bring blacks within the protection of the New Deal framework.[99] However, the Cold War reconciliation between the NAACP and anticommunist unions turned the group away from suing organized labor,[100] pivoting it more singularly toward the attack on *Plessy*, and connecting civil rights litigation to an assault on state action and away from private market discrimination.[101] Although this meant valuing middle-class interests, NAACP leaders remained sensitive to how their litigation success depended upon support of local community members to build and sustain cases.[102]

Postwar progressive legal thought thus began in a place of dynamic tension: white realists seeking to maintain a separation between law and politics by confining class-oriented law reform to the legislature and administrative state, and black progressives challenging that separation by building an autonomous legal space for race in court under the Equal Protection Clause. *Brown* represented a fragile reconciliation: By striking down school segregation, the Supreme Court could be seen advancing representative politics—correcting an egregious political process flaw denying blacks the right to equal education—while otherwise maintaining its deferential posture

97. The International Labor Defense represented the defendants in the Scottsboro case. TUSHNET, *supra* note 78, at 39.

98. GOLUBOFF, *supra* note 96, at 196 (describing how the NAACP began to file discrimination suits against the boilermakers union and railroads under New York fair employment law). Antidiscrimination litigation also targeted federal government and union collusion to exclude black workers in federal projects, like the Hoover Dam. TUSHNET, *supra* note 78, at 11; Mack, *supra* note 9, at 324.

99. GOLUBOFF, *supra* note 96, at 143. In the 1940s, in addition to bringing university and salary suits, the NAACP pursued litigation on behalf of black workers under *Lochner*-like theories of substantive due process (*i.e.*, unions were depriving black workers of their property right to work). *Id.* at 206–08.

100. David Engstrom also notes that the turn away from workplace litigation was a way for mainstream groups like the NAACP to limit the power of more radical elements in the movement. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1075 (2011) (claiming that before Title VII, the NAACP and Urban League attacked job discrimination at the state level by arguing for state fair employment practices agencies with exclusive jurisdiction, rather than private rights of actions, in order to manage conflict within the movement, "denying more militant and increasingly litigious local protest networks an entrée into the courts").

101. *See* GOLUBOFF, *supra* note 96, at 218–68.

102. TUSHNET, *supra* note 78, at 148.

toward economic legislation.[103] Similarly, the NAACP lawyers who argued the case embodied both independent lawyer-expertise (mobilizing social science to craft a case that responded to an intractable social problem) and community representative (growing out of, and deeply accountable to, the interests and aspirations of African Americans in the Jim Crow South). Yet this resolution of the law-politics problem—expressed in the ideal of legal liberalism—would be severely tested as the Southern civil rights movement asserted a broader challenge to the system of legalized segregation, while other social interests began to claim new rights in court.

### B. Legal Liberalism: Defining the Problems

While legal realists avoided the law-politics problem in the pre-war era through a theory of legal independence that deferred to the power of class-based social movements, avoidance was no longer possible as *Brown* ushered in legal liberalism. The fundamental question raised by *Brown* was how progressives should respond to the countermajoritarian use of law by indentity-based social movements, which challenged ideals of judicial and professional independence with practices of judicial and professional activism.[104] Later scholars would come to define these practices in terms of legal liberalism: a "trust in . . . courts, particularly the Supreme Court . . . [to produce] those specific social reforms that affect large groups of people, such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact*."[105] Legal liberalism, thus framed, depended on an *alliance of activist lawyers and activist courts*, both of which were critical to win "specific social reforms" desired by progressives.

Legal liberalism was never a complete description of what was in fact a complex reality.[106] However, in the post-*Brown* legal academy, it became a shorthand for the purported democratic threats posed by the progressive alliance

103. Outside the South, the *Brown* opinion received overwhelmingly positive reaction, suggesting its majoritarian appeal. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 186 n.132 (2002), for citations.

104. In challenging racial segregation, *Brown*—and the rise of legal liberalism that it ushered in—framed the democratic role of courts and lawyers in precisely the opposite terms as realists had: Courts were supposed to overturn the majority legislative will insofar as it subordinated minorities, while lawyers for those minorities were supposed to zealously represent their interests in pushing the courts to articulate new rights.

105. KALMAN, *supra* note 8, at 2; *see also* Mack, *supra* note 9, at 258.

106. *See* Mack, *supra* note 9, at 258; *see also* Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297 (showing that court-based enforcement of civil liberties was controversial among progressives during the New Deal).

of courts and lawyers. During this period, scholars in the two legal academic fields most closely associated with courts and lawyers *defined* these threats as the central focus of academic debate. Within constitutional law, the threat was framed as the *countermajoritarian problem*: the risk of activist courts substituting their own vision of justice for that of democratically elected lawmaking bodies representing the majority will.[107] Within the legal profession, the threat was framed as the *professionalism problem*: the risk of activist lawyers substituting their own vision of justice for that of the clients and constituencies they claimed to represent.[108] Both problems, at bottom, were concerned with maintaining law's independence from politics against the charge that legal liberalism threatened to coopt law in the service of its own vision of the good society. In the eyes of its critics, by harnessing law for substantive over procedural reform, legal liberalism revealed activist courts and lawyers as dangers to democratic pluralism—and to the very movements they purported to help.

As this section suggests, defining the law-politics problem in relation to activist courts and lawyers shaped three important scholarly developments. First, although legal liberalism was explicitly premised on an alliance of courts and lawyers in the progressive law reform project, scholars divided study of these constituent parts into separate analytical domains separated by academic status—with constitutional law at the apex and legal profession at the base. Second, despite this bifurcation, scholars in each domain engaged in parallel debates, which coalesced around emerging "process" and "liberal" positions. Third, in these parallel debates, the scholarly methodology shifted relative to the realist period. In contrast to the commitment to empiricism that progressives espoused when they were defining realism on the periphery of the mainstream academy, now that progressives had become the mainstream, their methodological program changed—from an empirical critique of the old order to a theoretical defense of the new.

### 1. The Countermajoritarian Problem

For progressive constitutional scholars in the 1950s, *Brown* posed the fundamental challenge that realism had studiously ignored—famously articulated as the countermajoritarian difficulty.[109] The question was how the court, as an unelected body, could justify the exercise of judicial review to strike

107. *See* Friedman, *supra* note 103, at 155.
108. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 129 (1988).
109. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

down the acts of the very majorities on which democracy staked its legitimacy.[110] For progressives still haunted by the specter of *Lochner*, the answer had to be something other than simply advancing a political agenda with which they agreed.[111] What that something was quickly split progressive legal thought into two camps, both within mainstream liberalism, but with different perspectives on the nature of judicial review—and, ultimately, the relation between law and politics.

Process scholars concerned with the implications of countermajoritarianism for democratic legitimacy sought to ground legal liberalism, in Herbert Wechsler's famous phrase, on the foundation of "neutral principles"[112]—a set of positive rules that constrained judicial discretion within a broader theory of institutional competence and lawmaking.[113] Process theorists sought to claim the mantle of realism's law-politics compromise by assigning lawmaking to the legislative and administrative domains while advocating judicial restraint.[114] Within this framework, *Brown* was correct as a matter of politics, but dubious as a matter of law since it failed to rest its holding on neutral grounds, thereby posing unacceptable legitimacy risks.[115] For process scholars, the maintenance of legitimacy counseled in favor of

110. KALMAN, *supra* note 8, at 19.

111. *See id.* at 19–20 (quoting Felix Frankfurter that the court could not become a "superlegislature for our crowd" (internal quotation omitted)).

112. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").

113. For seminal works in the process school, see HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Phillip P. Frickey eds., Foundation Press 1994) (1958); Henry M. Hart, Jr. *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); and Albert Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 HARV. L. REV. 96 (1954). For excellent reflections on the creation and legacy of legal process, see William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994), and Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994).

114. Hart and Sacks's famous formulation of this approach was the notion of "institutional settlement," in which "decisions which are the duly arrived at result of duly established procedures" were entitled to strong deference. HART & SACKS, *supra* note 113, at 4 (emphasis omitted); *see also* ALPHEUS THOMAS MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 107 (1962).

115. For the controversy sparked by Wechsler, see Friedman, *supra* note 103, at 198. Also see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), and Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345 (1958). Philip Kurland argued that the Warren Court "failed abysmally to persuade the people that its judgments had been made for sound reasons." Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 45 (1969).

"attempting to separate law from politics, process from substance, fact from values,"[116] in order to promote public acceptance.[117] Toward this end, Henry Hart from Harvard Law School famously cautioned against hurried judicial resolution of difficult policy questions, calling instead for "the maturing of collective thought."[118] In 1962, Yale law professor Alexander Bickel issued the strongest statement of this position, arguing in favor of judicial review only in rare occasions when the court could "foster assent, and compliance through assent,"[119] warning that court intervention in politics would not work "if it ran counter to deeply felt popular needs or convictions, or . . . was opposed by a determined and substantial minority and received with indifference by the rest of the country."[120]

Defenders of legal liberalism interpreted realism's legacy differently,[121] emphasizing its critical role in correcting the deficiencies of democracy. For these liberal scholars, the relevant law-politics precedent was not the dominant vision of institutional specialization and independent expertise of the New Dealers, but rather the pragmatic approach to representation enacted by NAACP lawyers and espoused in *Carolene Products*' footnote four. Claiming this mantle, Judge Learned Hand made the liberal case for aggressive judicial review, stating that it was "altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers."[122] Unlike the process theorists, liberals like Hand were comfortable with the courts' ability to ascertain and respond to political process flaws and thus felt it unnecessary to impose additional legal restraints on the courts' ability to strike down legislation that interfered with minority rights.[123]

As the Warren Court moved from its early *Brown*-era jurisprudence on race and civil liberties to its second wave of decisions on school prayer,

116. KALMAN, *supra* note 8, at 36.
117. BICKEL, *supra* note 109, at 83.
118. Hart, *supra* note 113, at 100.
119. BICKEL, *supra* note 109, at 251.
120. *Id.* at 258.
121. KALMAN, *supra* note 8, at 268 n.64 (suggesting these scholars were of the next generation, shaped more by *Brown* than *Lochner*).
122. LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958, at 15 (1958); *see also* ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).
123. For other liberal perspectives on judicial review, see generally CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); and Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

reapportionment, and criminal justice, the law-politics debate crystallized around the scope of judicial review—with process scholars profoundly suspicious of countermajoritarianism and liberals eager to support judicial activism in favor of minority rights.[124] Notably, this debate played out entirely on the ground of legal theory. Turning their backs on the realist call for empirical study, progressive legal scholars agreed on the centrality of countermajoritarianism as the defining issue of constitutional theory, but divided over the normative question of how activist courts should be in their exercise of judicial review. In debating judicial legitimacy, legal scholars implicitly credited the power of courts generally and the Supreme Court in particular as policy making actors: The question was not whether courts made change but instead what were the conditions under which it was proper to do so.

### 2. The Professionalism Problem

Emerging scholarship on lawyers also wrestled with the law-politics problem in the wake of *Brown*—interpreted through the lens of legal professionalism. As the realist ideal of Brandeisian independence appeared even further on the retreat in corporate law firms,[125] the emergence of legal liberal lawyers, who self-consciously advanced law reform on behalf of marginalized groups, provoked professional anxiety. In the national reformist zeal of the War on Poverty, a new infrastructure of legal rights activity was created on the NAACP model.[126] Heeding the call for a "civilian perspective" on poverty law that emphasized the use of test cases to address systemic issues,[127] the federal government sponsored the dramatic expansion of legal

124. Some conservative scholars picked up the theme of neutral principles to mount a more wide-ranging attack on the Warren Court's jurisprudence. *See*, *e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) (defending Wechsler's concept of "neutral principles" and applying it to criticize first amendment doctrine).

125. On the rise of the corporate law firm, see generally JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1966); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950); and ERWIN O. SMIGEL, THE WALL STREET LAWYER (1964).

126. JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 24–29 (1978); Daniel H. Lowenstein & Michael J. Waggoner, Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967).

127. Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1340 (1964). Supporters of legal services urged the federal government to do more to defend local law reform efforts against state and local political interference. *See* Jerome B. Falk, Jr. & Stuart R. Pollak, *Political Interference With Publicly Funded Lawyers: The CRLA Controversy and the Future of*

services to the poor. *Gideon v. Wainwright*[128] spawned the creation of state-sponsored indigent defense premised on the model of zealous advocacy. This was followed by the endowment of progressive legal organizations and clinical legal education by the Ford Foundation in the late 1960s and early 1970s—launching the "new public interest law."[129] These developments cut in different directions. Indigent defense rested on the advocacy ideal, but the reform-oriented legal services and public interest law programs challenged the law-politics division that the realists had demarcated—with law (*i.e.*, apolitical adjudication) assigned to courts and politics (*i.e.*, policy and rule-making) assigned to legislatures and agencies. Debate quickly focused on public interest law's use of courts to solve political problems by creating new rules rather than simply applying established ones. The issue was not merely academic: As the NAACP advanced desegregation through courts, Southern states attacked its lawyers on ethics grounds, leading to a showdown that prompted the Supreme Court to affirm litigation activity as protected political speech.[130]

Within the academy, legal scholars noted the proliferation of public interest law and focused on the question of its normative legitimacy. The professionalism question turned on whether it was appropriate for lawyers to

*Legal Services*, 24 HASTINGS L.J. 599 (1973); Ted Finman, *OEO Legal Service Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1971 WIS. L. REV. 1001; Richard Pious, *Congress, the Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418; Richard M. Pious, *Policy and Public Administration: The Legal Services Program in the War on Poverty*, 1 POL. & SOC'Y 365 (1971); Note, *The Legal Services Corporation: Curtailing Outside Political Interference*, 81 YALE L.J. 231 (1971). Opponents criticized legal services lawyers for political overreach. *See*, *e.g.*, Spiro T. Agnew, *What's Wrong With the Legal Services Program*, 58 A.B.A. J. 930, 930 (1972) ("The legal services program was not created to give lawyers a chance to be social engineers on a grand scale."). Judicare was presented as an alternative model of access to justice that paid private lawyers to represent the poor and thus reduced the incentive for law reform. SAMUEL J. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE (1974). For additional perspectives on the role of lawyers in providing access to legal services for the poor, see Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 452 (1965), and Jack B. Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 453 (1972).

128. 372 U.S. 335 (1963).

129. Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3 (1970).

130. NAACP v. Button, 371 U.S. 415, 444 (1963) (overturning a Virginia law outlawing barratry, champerty, and maintenance). For a powerful historical account, see Susan D. Carle, *From* Buchanan *to* Button*: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281 (2001). For its part, whipsawed between concerns over the commercialization and politicization of law represented by the twin challenges of corporate and public interest law, the organized bar sought a compromise in its 1969 Model Code of Professional Conduct. It emphasized the ethical aspiration to ensure that "every person in our society should have ready access to . . . independent professional services," and also strongly defended the advocacy ideal: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ." MODEL CODE OF PROF'L RESPONSIBILITY, EC 1–1, 7–1 (AM. BAR ASS'N 1969).

actively pursue social change rather than neutrally representing client interests. In answering it, scholars coalesced around process and liberal positions that echoed those of their constitutional law counterparts. Process-oriented defenders of professional neutrality expressed discomfort with the growing prominence of the policy-oriented test-case litigation model. Paul Freund, following the legal process school, emphasized that "law reform in response to the felt needs of the public is a concern of the legislature, not of the judges."[131] He went on to champion professional neutrality, noting that the "distinctive role of the legal profession is to serve as the architect of structure and process," and observing that lawyers were more equipped to represent public agencies in resolving "diverse points of view."[132] In a similar vein, Geoffrey Hazard asked whether the "law-reform potential of litigation through the Legal Services Program . . . is not considerably exaggerated" and if legislation "has been given adequate attention."[133] Although acknowledging the attraction of courts to the "politically weak," Hazard cautioned against the "ephemeral legitimacy" of judicial lawmaking, stressing the courts' lack of implementation tools and power to "stimulat[e] and sustain[] political support," which was crucial to efforts to "benefit the have-nots, especially because so many of the have-nots are black."[134] He argued that test-case litigation appealed to legal services lawyers by allowing them to postpone "questions of politics and political ethics," but opined that "[i]f the interest groups that comprise the poor do not organize their own political action, law reform on their behalf is almost certainly destined to be halting and fragmentary."[135] Hazard concluded with frustration by observing that "[j]ust why" legislative reform advocacy "has not been seriously pursued through the Legal Services Program is not clear."[136]

Defenders of legal liberalism responded by attempting to position public interest law squarely within professionalism, emphasizing its procedural role

131. Paul A. Freund, *The Legal Profession*, 92 DÆDALUS 689, 690 (1963). Lon Fuller and Jon Randall, in their 1958 Report to the American Bar Association (ABA), sought to walk the line drawn by the realists, with independence stressed for the "counselor," who must be "at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do"; partisan advocacy, in contrast, was recognized as playing an "essential part" in ensuring "a fair hearing." Fuller & Randall, *supra* note 61, at 1161.

132. Freund, *supra* note 131, at 692, 693.

133. Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 244 (1970).

134. *Id.* at 243–50; *see also* Geoffrey C. Hazard, Jr., *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 699 (1969) (questioning the assumption that "litigation can significantly improve the situation of the poor").

135. Hazard, *supra* note 133, at 251, 255.

136. *Id.* at 255.

in facilitating minority group representation.[137] In this spirit, scholars emphasized public interest law's consonance with professional notions of the public good and stressed the impossibility of interest group representation in the absence of externally funded legal organizations.[138] From this perspective, legal work on behalf of the poor and other marginalized groups, rather than revealing the lawyer's political commitment, was an expression of the professional ideal of public service.[139] Following this tack, early accounts of public interest lawyering advanced a procedural definition aligned with pluralism. Public interest lawyers represented "the underrepresented groups and interests in society."[140] Yet this definition begged the key question—How representative were public interest lawyers of group claims?—immediately confronting the question of accountability that had also loomed over black progressive debate.[141]

Critics argued against law reform on client autonomy grounds: It was likely to give lawyers too much discretion to set agendas and shape litigation in ways that were unaccountable to the very people they purported to represent.[142] This criticism came from the right, but also from erstwhile allies on

137. *See* Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459 (1972).

138. Charles R. Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 118, 122–24 (1974) (noting the importance of representing citizen interests before agencies and achieving "victories out of court," including expanding consciousness within the bar and increasing receptivity to citizen issues in agencies). For scholarship in support of public interest law, see generally Edward Berlin et al., *Public Interest Law*, 38 GEO. WASH. L. REV. 674 (1970); Richard Frank, *The Public Interest Lawyer*, 7 J. INT'L L. & ECON. 180 (1972); Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); and Francis B. Stevens & John L. Maxey, II, *Representing the Unrepresented: A Decennial Report on Public-Interest Litigation in Mississippi*, 44 MISS. L.J. 333 (1973).

139. A parallel literature began to develop on why lawyers pursued public interest careers. *See generally* RODERICK N. PETREY, CARL A. MODECKI, AND RAUL R. RODRIGUEZ, COMMITMENT TO PUBLIC INTEREST LAW (1980); Anthony Chase, *Lawyer Training in the Age of the Department Store*, 78 NW. U. L. REV. 893 (1984) (reviewing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO 1980S (1983)); Howard S. Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM. BAR FOUND. RES. J. 83 (1978).

140. *The New Public Interest Lawyers*, *supra* note 129, at 1071 n.3.

141. *See, e.g.*, Harry P. Stumpf et al., *The Legal Profession and Legal Services: Explorations in Local Bar Politics*, 6 LAW & SOC'Y REV. 47, 48–57 (1971) (detailing local bar opposition to the reform oriented posture of legal services programs on professional ground that it was outside the norm of individual case representation).

142. A number of commentators expressed concern over the disjuncture between law reform goals and the interests of local communities. *See*, *e.g.*, Harry Brill, *The Uses and Abuses of Legal Assistance*, 31 PUB. INT. 38, 40 (1973) ("[L]iberals have ignored the various direct and indirect costs to the poor that class action suits [by legal services program lawyers] have entailed."); Leroy D. Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 U. KAN. L.

the left. Edgar and Jean Cahn, who had been instrumental in shaping the legal services program, expressed "concern [about] the moral implications of a group of independent lawyers free to choose their own version of the public interest. This raises the critical question of accountability in a democratic society."[143] In addition, defenders of professionalism worried that the creation of a separate class of lawyers whose job it was to promote the "public interest" would have negative effects on civil engagement by the private bar.[144]

As Hazard's earlier criticism of public interest law suggested, there were concerns not only with lawyer accountability, but also with litigation's efficacy as a social change tool. Echoing the positions of NAACP lawyers in the pre-*Brown* era, many on the left, including some of public interest law's own practitioners, were skeptical that litigation, on its own, could produce social transformation. In his foundational 1970 *Yale Law Journal* article, Stephen Wexler roundly criticized court-centered strategies and instead urged lawyers to "strengthen existing organizations of poor people, and to help poor people start organizations where none exist."[145] Prominent public interest lawyers agreed.[146] Marian Wright Edelman, reflecting on her early career at the NAACP in Mississippi, concluded: "The thing I understood after six months there was

REV. 459, 468 (1971) (warning that civil rights lawyers "are in danger of being ineffective as they become divorced from the stronger social currents moving the client population"); Philip J. Hannon, *The Leadership Problem in the Legal Services Program*, 4 LAW & SOC'Y REV. 235, 251 (1969) (noting that the federal legal services program policy of promoting law reform was "inconsistent with the promise of local control"); Dennis G. Katz, *The Public's Interest in the Ethics of the Public Interest Lawyer*, 13 ARIZ. L. REV. 886, 905 (1971) (stating that public interest lawyers too frequently "regard their client as a technical necessity"); *see also* Carolyn F. Etheridge, *Lawyers Versus Indigents: Conflict of Interest in Professional-Client Relations in the Legal Profession*, *in* THE PROFESSIONS AND THEIR PROSPECTS 245 (Eliot Friedson ed., 1973).

143. Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008 (1970). In the Cahns' critique, special censure was reserved for poverty lawyers:

> Thus in the case of the poor, the lawyer may feel that he can, with impunity, impose his own will and his own convictions as to what is "best for his client." . . . In this respect, it must be said that private law firms tend to honor the lawyer-client relationship more scrupulously than poverty lawyers.

*Id.* at 1041.

144. *See* Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 807 (1971). For an analysis of the private bar's role in the public interest, see generally ALLAN ASHMAN, THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY'S NEIGHBORHOOD LAW OFFICE (1972); F. RAYMOND MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY (1972); and David P. Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 GEO. WASH. L. REV. 547 (1970).

145. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053–54 (1970).

146. For additional perspectives by well-known early legal services lawyers, see Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1980), and James Lorenz, *Lawyers, Law, and the Poor*, 27 GUILD PRAC. 192 (1968).

that you could file all the suits you wanted to, but unless you had a community base you weren't going to get anywhere."[147] Echoing this sentiment, Gary Bellow, former deputy director of California Rural Legal Assistance, called test-case litigation "a dead end," arguing that "'rule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism."[148] These views resonated with those of radical lawyers, who saw their work in terms of supporting organized efforts to transform society, and often saw tension between conventional legal action and transformative change.[149]

As this suggested, while critics on the right were attacking legal liberal lawyers for too forcefully crossing the law-politics line, critics on the left suggested the opposite problem: Legal liberal lawyers needed to understand law reform in more dynamic political terms. As the 1960s began to recede from view, such criticism came to penetrate the heady idealism with which the legal liberal project had begun. And, just as black progressives dissented from the dominant view of realism in the preceding era, the gathering critique of legal liberal practice—that it was unaccountable and ineffective—precisely framed the nature of progressive divisions to come.

### C. Critical Legalism: Contesting Law's Neutrality

While the Warren Court's decision in *Brown* sparked hope that legal liberalism could produce progressive change, the end of the civil rights period brought sharp critical reassessment,[150] in which courts and lawyers would be examined as a contributing cause of liberalism's decline. Two decades after *Brown*, the legal and political landscapes were transformed: "All deliberate speed" in the South and struggles over integration in the North cast a shadow over the achievements of the civil rights movement;[151] President Nixon's

147. *The New Public Interest Lawyers*, *supra* note 129, at 1081.

148. *Id.* at 1077.

149. For background on these lawyers, see generally MARLISLE JAMES, THE PEOPLE'S LAWYERS (1973); RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (Jonathan Black ed., 1971); THE RELEVANT LAWYERS: CONVERSATIONS OUT OF COURT ON THEIR CLIENTS, THEIR PRACTICE, THEIR POLITICS, THEIR LIFE STYLE (Ann Fagan Ginger ed., 1972); and Victor Rabinowitz, *The Radical Tradition in the Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 310 (David Kairys ed., 1982).

150. Tomlins, *supra* note 18, at 48 ("[I]f, in the Warren Court's United States, legalism had expressed an expansive optimism about the ease with which law might be pressed into reformist service, by the end of the 1960s law was in crisis.").

151. *See* Brown v. Board of Educ., 349 U.S. 294, 301 (1955) ("[T]he District Courts [must] enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with *all deliberate speed* the parties to these cases."

election in 1968 signaled the rise of an invigorated conservatism reacting to civil rights victories and the clash over the Vietnam War; and the Burger Court, despite rulings in *Goldberg v. Kelly*[152] and *Roe v. Wade*[153] as well as some expansion of civil liberties, pursued a doctrinal course that curtailed the signature achievements of the Warren Court in the areas of welfare rights,[154] civil rights,[155] and criminal justice.[156] In 1973, Watergate exposed the duplicity of lawyers in massive governmental corruption, provoking professional soul-searching, while the end of the Vietnam War also augured a reorientation in the progressive social movement activism that had roiled the nation.[157] As the legal liberal vision of social change appeared to reach its limit—erupting in bitter fights over abortion, busing, and affirmative action—optimism began to fade. Rather than "balancing the scales of justice,"[158] legal liberalism came to be seen as woefully inadequate to challenge deeply ingrained social inequality—too thin a concept to confront the deep conflicts convulsing American society. How could what was essentially a proceduralist framework for resolving political disputes address what critics viewed as deep structures of subordination that operated outside the state? At this moment, progressive scholars began to sour on the legal liberal project itself—producing a critical turn in analyzing the role of law in social change.

(emphasis added)). *See generally* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004) (analyzing resistance to *Brown*); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008) (detailing the fight against desegregation in the north).

152. 397 U.S. 254 (1970).

153. 410 U.S. 113 (1973).

154. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (upholding Maryland's cap on welfare benefits for large families).

155. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (upholding employment tests with disparate racial impacts in the absence of evidence demonstrating racially discriminatory intent); Milliken v. Bradley, 418 U.S. 717 (1974) (holding that school districts were not required to integrate across district lines without showing of intentional discrimination); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding system of financing public school education based on local property tax despite unequal expenditures based on wealth of districts).

156. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (upholding death penalty and ending moratorium instituted under *Furman v. Georgia*, 408 U.S. 238 (1972)); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding that state juries may convict on less than a unanimous vote).

157. The assassinations of Martin Luther King, Jr. and Robert Kennedy in 1968 signaled the rise of more militant movement activism. *See* BRYAN BURROUGH, DAYS OF RAGE: AMERICA'S RADICAL UNDERGROUND, THE FBI, AND THE FORGOTTEN AGE OF REVOLUTIONARY VIOLENCE (2015).

158. COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976).

This section explores how scholars during this period of critical legalism fundamentally *contested* the law-politics division, calling into question not just whether there could ever be a defensible line—but whether, as a political matter, progressives should even engage in the project of trying to define and defend it. In this debate, for the first time, a critical perspective emerged that challenged the basic premise of legal realism and legal liberalism—that liberal capitalist democracy, as it had evolved in the United States, was politically desirable and could be improved through incremental legal reform. This challenge reframed the law-politics problem on new grounds, organizing progressive legal debate around two foundational critiques. One centered on the political *accountability* of legal activism, with critics contending that lawyer-led, court-centered change undercut grassroots leadership and disempowered marginalized communities. The second critique centered on the political *efficacy* of legal activism, with critical scholars claiming that the project of liberal law reform disserved the very movements that it was intended to help. The debate was internecine and electric, leaving deep scars that fractured progressive legal scholars in the academy at the very moment progressivism itself was being undone in the real world of politics.

### 1. The Critique of Legal Neutrality: Constitutional Rights in Adjudication

Critical legalism, as it arrived in the 1970s academy, was framed by two fundamental challenges to law's neutrality. Within institutional politics, the realist resolution of the law-politics problem—to assign law reform to specialized agencies acting in the public interest, while limiting judicial discretion[159]—had fallen apart as all notions of "wise social policy were fundamentally contested" by conservatives in the administrative sphere,[160] while legal liberalism thrust courts into the center of controversial social policy disputes. All law "became politicised."[161] In this environment, the

159. As Mark Tushnet put it, the realist project was to "transform law into policy analysis." Mark Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TEACHERS L. 20, 22 (1980). This could be seen in Cohen's call for law reform through "rational [and] scientific" jurisprudence and in Lasswell and McDougal's effort to promote legal education in the public interest. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935); Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 203 (1943).

160. Tushnet, *supra* note 159, at 23; *see also* Tushnet, *supra* note 24, at 1207 ("Policies, like precedents, could aways be used to argue for contradictory results.").

161. Tushnet, *supra* note 159, at 23. The rights revolution and Great Society programs of the 1960s thereby put to rest the notion that progressive reforms in the public interest could flourish inside or outside of courts without political controversy. *See* Allan C. Hutchinson & Patrick J. Monahan,

administrative state came to be seen as vulnerable to regulatory capture as the very foundation of interest group pluralism was questioned.[162] Courts were asked to play long-term oversight roles that extended beyond traditional adjudicative functions, leading some to question whether the new public law litigation was compatible with judicial competence.[163] Outside of institutional politics, social movement activism posed serious challenges to law's legitimacy. Although the civil rights movement had relied heavily on law, its use of civil disobedience also asserted the right to break law viewed as illegitimate.[164]

### a. Defense

The initial strategy of mainstream progressive scholars confronting the decline of legal liberalism was to double down on a strategy of defending it. Eager to protect the Warren Court's jurisprudence in the face of escalating attacks,[165]

*Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 204–05 (1984) (discussing the breakdown of the realist ideal of institutional specialization).

162. *See generally* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969) (calling into question the viability of interest group pluralism in the face of regulatory capture); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682–83 (1975) ("To the extent that belief in an objective 'public interest' remains, the agencies are accused of subverting it in favor of the private interests of regulated and client firms.").

163. Abram Chayes famously defended "public law litigation" and the role of the judge in implementing large-scale efforts to reform bureaucracies, arguing that it was legitimate because judges were insulated from interest groups and there was public participation through amici and experts. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307–08 (1976). For the debate over this role, see Geoffrey F. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739 (1980); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); and Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Also see DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371 (1980); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); David L. Kirp & Gary Babcock, *Judge and Company: Court-Appointed Maters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); and Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980).

164. Particularly as new left movements—antiwar, feminist, black power, countercultural, and others—took center stage and adopted antiauthoritarian tactics, law's legitimacy was challenged. *See generally* BURROUGH, *supra* note 157.

165. *See*, *e.g.*, Nathan Glazer, *Towards An Imperial Judiciary?*, 41 PUB. INT. 104, 109 (1975) ("The distinctive characteristic of more recent activist courts has been to *extend* the role of what the government could do, even when the government did not want to do it.").

these scholars mounted a defense of legal liberalism that once again sought to advance a principled justification for countermajoritarian judicial review.[166] The basic project remained the same—to justify the line between legitimate judicial reasoning and political instrumentalism. In contrast to the prior period—in which the countermajoritarian debate played out in the familiar discourse of law—scholars now sought support from new intellectual quarters: political theory.[167] Duly armed, now-familiar liberal and process positions were staked out.

Liberal scholars turned to Rawlsian political philosophy, which by asserting the "priority of the right over the good" promised a framework of individual rights that could be placed beyond political dispute.[168] Ronald Dworkin linked Rawls's theory of justice to a theory of adjudication, seeking to eliminate the exercise of political discretion from even the hardest judicial case by following the principle that each citizen had "the right to equal concern and respect in the political decision about how the[] goods and opportunities [of society] are to be distributed."[169] Scholars, like Frank Michelman, used Rawls to develop "a principled account" of "specific welfare guaranties,"[170] as well as other fundamental constitutional rights.[171]

166. *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1316 (1982) (reviewing the origins and implications of Carolene Products footnote four, arguing that "whether or not the footnote is a wholly coherent theory, it captures the constitutional experience . . . . [This experience] is the validating force in law").

167. *See* John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 569–70 (1979) (arguing that as the social scientific side of realism declined, the philosophical side "flowered" as did the "political reformist side").

168. *See* JOHN RAWLS, A THEORY OF JUSTICE 31 (1971) (describing how the theory of "justice as fairness" requires that "the concept of right is prior to that of the good").

169. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977).

170. Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966 (1973).

171. For seminal works in the fundamental rights vein, see generally Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Also see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980), which argues in favor of an "Individual Rights Proposal," in which the Supreme Court is required to consider all individual rights issues because it is best situated by virtue of its political insulation to do so. For a critique of fundamental rights arguments, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1063 (1981), which argues that the debate over fundamental rights is "essentially incoherent and unresovable."

Process-minded scholars shared the goal of protecting the legacy of the Warren Court but differed with liberals over the appropriate foundation. Instead of analytically derived rights, process scholars defended legal liberalism in relation to the legitimacy of the broader political system. John Hart Ely's comprehensive defense of "representation reinforcement" as a principle for judicial review was the high-water mark of this approach, in which he argued for locating "value determinations" in the sphere of politics, but emphasized the need for countermajoritarian judicial intervention when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[172] In recognition of the risks to legal neutrality, Ely conceded that the representation reinforcement principle was not part of the U.S. Constitution itself, but argued that it was a necessary interpretative tool in light of the "impossibility" of answering hard cases from the constitutional text alone.[173] Despite Ely's efforts, it was precisely this interpretive "impossibility" that radical critics would assert to undermine legal liberalism.

**b. Critique**

As the judicial and political branches began to move away from liberal reformism in the 1970s, critics from the political left, rather than shoring up the foundations of legal liberalism, worked to hasten its demise. Their focus was on the politically pernicious effect of "legalism,"[174] which they viewed as promoting a "law-worship" that crowded out space for more transformative politics.[175] Breaking with the realist faith in law, left critics charged that legalism served the interests of socially powerful groups over the long-term.[176] From this viewpoint, law appeared as "a source of violence, as one of the institutions in decay."[177] In opposition to legal liberalism, critics argued for a new vision of law

172. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).
173. *See id.* at 11 (arguing for the "impossibility of a clause-bound interpretivism").
174. *See* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (2d ed. 1986); *see also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).
175. Lester Mazor, *The Crisis of Liberal Legalism*, 81 YALE L.J. 1032, 1034 (1972) (reviewing IS LAW DEAD? (Eugene V. Rostow ed., 1971), and THE RULE OF LAW (Robert P. Wolff ed., 1971)).
176. *See* Mark V. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law"*, 1977 WIS. L. REV. 81, 105 ("[O]ver the long term, the law taken as a whole will take its shape from the interests of socially powerful groups."); *see also* Robert W. Gordon, *The Politics of History and the Search for a Usable Past*, 4 BENCHMARK 269, 274 (1990) (stating that the "promises of the legal system" appear in radical history as "ideological window-dressing, masks for power").
177. Mazor, *supra* note 175, at 1049.

that would advance a definition of equality "which does not rest with the evenhanded administration of opportunity to unequals, but demands a distributive justice which compensates for inequalities, whatever their origin."[178] Yet even among those on the left, this was not an uncontroversial position, with some scholars calling attention to the racial privilege that permitted the critics' rejection of law. In this vein, prominent African American historian Harold Cruse recalled that "from the very outset, the law was always dead or ineffective for blacks."[179] In the decade that followed, fractures in progressive legal thought around the role of rights in relation to class versus race and other identity-based projects would widen.

For Critical Legal Studies (CLS) scholars, the crisis in law's legitimacy represented not an occasion for retrenchment, but an opening for wider transformation. In this sense, CLS sought to turn the deconstructive impulse of realism against the New Deal-Civil Rights liberalism that realism had advanced. Toward this end, CLS would fully embrace the concept of "law as politics" in order to shake the legitimacy of law and support the forces of progressive change that were already arrayed against the liberal state.[180] In so doing, CLS aspired to "the development of a social theory that need not be demobilizing in adverse political conditions."[181]

Mounting a critique required constructing a target. CLS therefore crafted a definition of legal liberalism that fused Warren Court jurisprudence with the classical liberalism anathema to the realists.[182] In Karl Klare's influential formulation:

178. *Id.* at 1052.

179. Harold Cruse, *The Historical Roots of American Social Change and Social Theory*, *in* IS LAW DEAD?, *supra* note 175, at 315, 326.

180. *See* Hutchinson & Monahan, *supra* note 161, at 216–21.

181. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1528 (1991). The CLS goal, at bottom, was to eliminate the artificial barrier liberalism erected between law and politics, and thereby unleash collective forces to produce a fundamentally different society. Although the contours of that society were never precisely defined, the CLS program was built on a critique of class inequality, coupled with New Left critiques of other social sites of domination, which pointed toward a system more firmly rooted in principles of community and equality. Direct democracy and robust bottom-up participation were touchstones of the new critical ideal. Kennedy, *supra* note 21, at 36 ("There is a vital form of interaction between legal intellectuals—that is, lawyers, judges and other kinds of legal workers—and working class people, which is simply to try to systematically demystify legal reasoning as something that somehow can be used as an argument for or against doing anything.").

182. CLS scholars also rejected a return to realism, which they argued carried forward a faith in law and an optimistic functionalism that made it inadequate as a basis for progressive politics. Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1154 (1985); *see also* Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 897 (1988) ("[Gary Peller] argued that realism perpetuated the basic flaw of formalism: its commitment to determinacy. Instead of seeing the

> The metaphysical underpinnings of legal liberalism [rest on] the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.[183]

According to CLS, the basic flaw in legal liberalism was that it reduced what were essentially social problems—discrimination, poverty, inequality—to individual problems to be resolved through the enforcement of legal rights.[184] In Duncan Kennedy's famous articulation of this position, rights operated to "legitimate" social unfairness, validating a "condition of bondage" by obscuring liberalism's "fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom."[185] Specifically, by masking the necessity of solidaristic "relations with others" to achieve freedom, legal liberalism disserved the cause of progressive justice it claimed to advance.[186] John Schlegel, reflecting on the postrealist landscape, argued that "the question of whose values legal rules serve, a question highlighted in the Realists' destruction of the formalist universe and in their attempts at legislative law-making, and believed to have been put to rest by post-Realist legal thought, has re-emerged, exactly where it was found forty years ago."[187]

A core theoretical move of CLS was to redraw the relationship between law and society, as it broke down the boundary between law and politics. Whereas earlier theoretical frameworks assumed a fundamental correspondence

social world as determined by law, realism insisted that legal decisions are and should be determined by their social context.").

183. Karl Klare, *Law-Making as Praxis*, TELOS, Summer 1979, at 123, 132 n.28.

184. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976). Kennedy launched the movement by linking Harvard's legal process school to classical liberalism—arguing that the tension inherent in liberalism could not be neatly resolved, as Hart and Sacks had argued, by assigning law to spheres of institutional competence and agreeing upon neutral principles.

185. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210, 213 (1979).

186. Kennedy argued there was an inherent tension between legal rules—aligned with formalism and individualism—and standards—associated with policy-informed balancing in favor of altruism. Because judicial legitimacy depended on rule formalism, which purported to limit judicial discretion but in reality committed it to a politics of radical "self-reliance," a key goal of CLS was to show how rule formalism denied scope for "sharing and sacrifice." *See* Kennedy, *supra* note 184, at 1713, 1717. Kennedy claimed that liberalism sought to reconcile the fundamental contradiction between individualism and communitarism by dividing the world into private and public spheres; but rather than solve the contradiction, liberalism served only as a "denial and apology" for inequality. *See* Kennedy, *supra* note 185, at 210.

187. Schlegel, *supra* note 167, at 462.

between law and social values, CLS argued that law was "relatively autonomous" from society—constrained by powerful social forces but also shaping social views.[188] Law, in this sense, was "constitutive" of social relations, rather than always reflecting class interests (in the Marxist account), flowing out of transcendent social values (in the functionalist account), or producing social change (in the instrumentalist account).[189] This insight had important political implications. It meant that although the force of law's normative power could in some cases constrain the actions of the powerful, it could also shape the attitudes of the masses, and their well-meaning progressive allies, in ways that caused them acquiesce to injustice.[190] This led to the crux of the CLS critique: Because many liberals had come to believe in the legitimacy of law as an independent force with the power to change society, they had become unable to see how individual rights strategies were now constraining collective action by lulling people into a false sense of courts' power to solve social problems. CLS thus turned the legitimacy of law on its head, viewing it as a source of "legitimation" that obscured and ultimately undermined more effective political avenues for advancing less powerful social interests. In this sense, the *Brown*-inspired rights revolution was incompatible with the CLS project, which was "nothing short of reimagining the relationship between civil society and the state."[191]

The CLS program, from this vantage point, was to critique the very theoretical and doctrinal positions that mainstream progressives had built to

188. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 72–76 (1984) (arguing that CLS rejected functionalist accounts of law in society, including those put forward by law and economics, pluralism, realism, and law and society).

189. As Mark Kelman noted:

> CLS theorists have devoted a great deal of their efforts to demostrating that law and society are inseparable or interpenetrating and arguing that traditional pictures of the relationship between law and society that ignore that point almost invariably make law seem both more important than it is (in supposing that particular structures require particular rules) and less important than it is (in ignoring its basic constitutive nature).

KELMAN, *supra* note 21, at 7.

190. *See id.* at 242. In this way, CLS built upon Gramscian notions of hegemony—the idea that people's beliefs supported the status quo as the natural order of things unsusceptible to change. *See* David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 250 n.12 (1984) (citing Carl Boggs's description of hegemony as "an entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order and the class interests that dominate it" (quoting CARL BOGGS, GRAMSCI'S MARXISM 39 (1976)).

191. Clare Dalton, *Book Reviews*, 6 HARV. WOMEN'S L.J. 229, 244 (1983) (reviewing THE POLTICS OF LAW, *supra* note 149); *see also* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (arguing that legal liberalism, tied to a commitment to individualism and process, undermined the left's search for community and substance).

justify law's neutrality. To advance this critique, CLS scholars sought to undermine the law-politics line they viewed as the root of the problem.[192] By exposing hidden contradictions in judicial doctrine, they aimed to reveal how law was used to systematically prefer individualism over collective solidarity,[193] while showing the incoherence of any theory of judicial review resting on "neutral principles." In this vein, Mark Tushnet argued that Ely's representation reinforcement principle failed to offer a neutral justification for judicial review since "representation-reinforcing review necessarily involves judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation."[194] More broadly, Tushnet claimed that any "liberal account" of judicial restraint was only plausible on the basis of a shared normative commitment that placed the society over the individual, and thus depended "on communitarian assumptions that contradict its fundamental individualism."[195]

The legal liberal strategy of expanding constitutional rights drew the most critical focus,[196] igniting a project of "trashing" rights as "the most valid form of legal scholarship available at the moment."[197] This deconstructionist project

192. *See* Kairys, *supra* note 190, at 248 ("[T]he separation between law and politics becomes a myth.").

193. The thrust of CLS scholarship was to expose the hidden justifications for judicial doctrine in order to show how it was used to legitimate deradicalized politics. *See* KELMAN, *supra* note 21, at 6. While Kennedy applied this methodology to private law, *see* Kennedy, *supra* note 184, others moved it into public law, showing how judicial privileging of liberal individualism narrowed the radical aspirations of labor law, *see, e.g.*, Klare, *supra* note 64; Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); antidiscrimination law, *see, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); family law, *see, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. 623 (1980); tort law, *see, e.g.*, Richard L. Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199 (1981); and local government law, *see, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). Whereas the realists turned the formalists' tools against them—exposing the logical ambiguities or inconsistencies in law—CLS adherents imported critical theory, a mix of linguistic theory and Marxism from Continental Europe. *See* UNGER, *supra* note 23, at 3–4 ("If the criticism of formalism and objectivism is the first characteristic theme of leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second."); *see also* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

194. Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1038 (1980).

195. Tushnet, *supra* note 43, at 785.

196. *See* Anthony Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541, 1553 (1984).

197. Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1229 (1981). Freeman also asserted that the was "advocating negative, critical activity as the only path that might lead to a liberated future," while claiming that "[t]he point of delegitimation is to expose

was designed to challenge what Roberto Unger called "false necessity"[198]: a collective legal consciousness that understood liberal rights as the only viable form of politics.[199] Other CLS scholars described the political damage this overreliance on rights could do for progressive causes by channeling energy into abstract legal concepts.[200] In Mark Tushnet's formulation, rights might be useful in some contexts, but "only until people discover the critique of rights."[201] He went further to suggest that "[i]t is not just that rights-talk does not do much good. . . . [I]t is positively harmful" to the extent that the focus on negative rights obscures the need for positive ones.[202] In the welfare context, William Simon noted how the indeterminacy of welfare rights could leave claimants at the mercy of bureaucrats who exercised their discretion to undermine rights in practice.[203]

The critical program was not entirely negative.[204] It also encompassed efforts to reimagine a regime of rights that would advance collective ends,[205] while reenvisioning doctrinal analysis in a way that would explicitly engage with underlying social conflict about norms. Unger, for instance, proposed

possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship." *Id.* at 1230–31.

198. ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987).

199. *See* Kairys, *supra* note 190, at 249 (stating that liberalism depicts society as "inevitable and natural and unable to be modified"); Tushnet, *supra* note 181, at 1526 ("We saw law as a form of human activity in which political conflicts were worked out in ways that contributed to the stability of the social order ('legitimation') in part by constituting personality and social institutions in ways that came to seem natural.").

200. *See* David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 529, 561 (1977) ("Social movements may mobilize the symbols of legality and employ legal procedures to wrest real victories at the expense of dominant groups; yet this very commitment to legality may forestall other forms of activity—e.g., political mobilization, or ideological challenge—that might effect more substantial or enduring change."); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984) (arguing that rights are unstable, indeterminant, convert real experiences into abstractions, and "impede[] advances by progressive social forces").

201. Tushnet, *supra* note 200, at 1386.

202. *Id.*

203. William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1223 (1983) (outlining the problem of bureaucratic "discretion").

204. *See* Binder, *supra* note 182, at 910 ("Critical legal scholars must aim at the development of alternative identities that are not premised on the acceptance of oppression, while realizing that identities are socially constituted, not imagined. As a result, even though culture is rooted in self-perceptions, it cannot be altered without changing social structure.").

205. UNGER, *supra* note 23, at 53 ("The central idea of the system of destabilization rights is to provide a claim upon governmental power obliging government to disrupt those forms of division and hierarchy that, contrary to the spirit of the constitution, manage to achieve stability only by distancing themselves from the transformative conflicts that might disturb them.").

using "deviationist doctrine" to envision new political possibilities, suggesting how doctrinal areas of law could be reframed to promote communitarian values.[206] He also proposed the creation of new institutional forms that would reenergize democracy in ways that departed from narrow liberal capitalism.[207] Along these lines, other scholars argued that it was time for CLS to "start thinking about how . . . community organizations, cooperative businesses, participatory unions,"[208] and other structures could be harnessed toward progressive ends.[209] This experimentalism was promoted to counter the debilitating "institutional fetishism" that hindered progressive politics.[210] Friendly critics of CLS counseled more openness to empiricism,[211] others to clinical education.[212]

Social movements were not the explicit subject of these critical exchanges but they formed the clear backdrop—the political ideals that legal liberalism had thwarted through its narrowly rights-based orientation. Robert Gordon, in reflecting on the rise of CLS, argued that the fixity of orthodox legal training was belied by "thousands of local actions in churches, workplaces, fields, families, relationships, and schools, coalescing into broadly transformative sea changes."[213] Yet within CLS, the image of the activist liberal lawyer, portrayed

206. *Id.* at 17; *see also* Dalton, *supra* note 191, at 245 (reviewing the application of Unger's ideas to contract law and stating that "[d]eviationist contract doctrine would consist of the application of the countervision to every area of contract law, although a 'specialized role' might be reserved for the currently dominant vision" (quoting Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 633 (1983))). For Unger's masterwork, see generally ROBERTO MANGABEIRA UNGER, POLITICS: THE CENTRAL TEXTS (Zhiyuan Cui ed., Verso 1997) (1987).

207. *See* UNGER, *supra* note 23, at 40–41.

208. Binder, *supra* note 182, at 890.

209. *See*, *e.g.*, David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441 (1982–83) (promoting worker cooperatives as a critical institutional alternative to traditional corporations).

210. *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 6 (1996).

211. *See* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 589 (1984). Law and society scholars also sought to learn from CLS. *E.g.*, Frank Munger & Carroll Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y 257, 258 (1984) ("In choosing to meet conventional legal scholars on their own ground, members of the [Law & Society] Conference have assimilated critical studies to methods of conventional reasearch."); Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 172 (1987) (stating that law and society scholarship "advances a discourse of universality, elides its own sources, denies its own history and location, and speaks as if there were no perspectives," and praising CLS as a reminder to keep alive critical impulses in law and society research).

212. *See* Tushnet, *supra* note 181, at 1542.

213. Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641, 643 (David Kairys ed., 3d ed. 1998).

as antagonist in the unfolding critical drama, was presented in simplified terms. As Gordon asserted:

> [E]ven though liberal lawyers had learned from the legal realists that all law was social policy, their working methods kept technical (narrowly legal) issues at the forefront of legal analysis; the conventions of scholarship dictated that if social context were to be discussed at all, it could only be done casually and in passing.[214]

This was liberal lawyer as strawman—a ready foil for condemnation. It also presumed a particular archetype. To suggest that liberal lawyers drank at the fount of legal realism presumed they were elites who had attended Ivy League law schools, which only had begun to admit women and students of color in any significant numbers. And it belied the history of black progressives who (although engaged with realism) were strenuously anti-legal liberal in their basic social change orientation, both leading up to and through the height of the civil rights era. From this vantage point, CLS was self-criticism, at times bordering on self-laceration, by mostly white male academic elites who lamented that the reformist lawyering they supported had not achieved its most radical aspirations.[215] This self-criticism constructed an ideology of legal liberalism that was more a foil for left-liberal critiques of the decline of the political liberal project than it was an accurate empirical picture of what reform lawyers had actually done for (and to) political progressivism at mid-century.

### c. Response

The power of CLS was that it linked a critique of law to a critique of politics. In pressing its argument about the indeterminacy of law, critics sought to convince progressives of the insufficiency of liberalism in order to advance more radical collective action. Mainstream liberals responded at both levels, rejecting CLS's most extreme antifoundationalist claims in order to reclaim the political value of rights.

Mainstream liberals fought back against the CLS charge that legal liberalism was necessarily coopted and thus politically limiting. They rejected the idea that rights were incompatible with meaningful progressive politics, chastising critics by noting that while "[l]iberal rights *theory* may be

214. *Id.* at 644–45.

215. For a dramatic example of this self-critique, see Trubek & Galanter, *supra* note 8, at 1064, which states that when law and development scholars criticize foreign development programs "they must condemn the results of their own actions."

incoherent . . . certain liberal rights themselves need be defended, not disparaged."[216] Liberals relied on the idea that rights were, in Gordon's terms, "double edged: The underdogs who have won them can also be coopted by them; the overdogs who concede them . . . are always vulnerable to being undermined by their radical potential."[217] Liberal defenders also argued against Kennedy's notion of a "fundamental contradiction" between individual rights and communitarian solidarity. They instead suggested a dialectical relation in which rights could "express political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social or political movement, particularly at its early stages."[218] Others criticized CLS for not theorizing the democratic ideal they accused law of undercutting, nor specifying the political pathway to achieve it. From this standpoint, while CLS scholars exposed the limits of law as a tool for progressive transformation, they did not provide an exit from law that advanced authentic change. Meanwhile, as liberals pointed out, the conservative movement was building a sophisticated legal apparatus, modeled on and explicitly designed to contest liberal rights organizations, which demonstrated deep faith in the power of legal change to reorder social and political relations.

From a theoretical perspective, CLS's challenge to the law-politics divide confronted constitutional theory with the "interpretivist" question[219]: If law had no objective meaning, where were judges to look in making what were essentially political choices?[220] While CLS argued for abandoning liberalism as

216. Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 515 (1984); *see also* Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626–27 (1984) ("When the center is insecure, a challenge from the left, whose adherents, so those in the center think, should be at least sympathetic bystanders, is likely to be infuriating.").

217. Gordon, *supra* note 188, at 95.

218. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 590 (1986). Schneider also acknowledged the power of rights to constrain, though suggested that it depended on "the particular movement that asserts the right and the particular time at which it does so." *Id.* For important analyses of the role of rights in feminist scholarship, see generally DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 2–3 (1986); and Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

219. *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740 (1982) (arguing that judges must "read the legal text, not morality or public opinion" in responding to the interpretivist challenge).

220. *See, e.g.*, Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 767 (1982) (questioning whether constitutional interpretation can escape engaging with social morality); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 1 (1986) (arguing that CLS and law and economics as interpretive frameworks "distort the purposes of law and threaten its very existence").

a frame of reference, conservatives responded that the answer could be found in the Constitution's "original meaning."[221] Looking to a different history, progressive "republicans" pushed back against CLS and conservatives simultaneously by arguing that the Constitution rested on a set of communitarian values, not just individual rights, which gave substance to contemporary liberal ideals. In Michelman's terms, the republican tradition emphasized "self-government realized through politics," which depended on a constitutional commitment to "situated judgment, dialogue, and civic friendship."[222] Countermajoritarianism could be reconciled with democracy by understanding the Justices as "modeling . . . active self-government" by making deliberative decisions in the public interest.[223] In this view, the Court could affirm democracy by deciding cases based on "civic friendship"—which could mean invalidation of majoritarian legislation or, on the cusp of the Rehnquist Court, deference to progressive local solutions threatened by federal power. However, republicanism—like rights-based liberalism—still foundered on the fundamental question: Whose public interest?[224] And, as scholars pointed out, the republicanism that progressives sought to revive was historically associated with exclusion and authoritarianism, which made it an unlikely bridge to the politics of inclusion championed by critical race and feminist scholars.[225]

As mainstream liberal efforts to reclaim rights suggested, for many progressive legal academics, the problem with CLS was its dangerous rejection

221. *See* THE FEDERALIST SOC'Y, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (1986) (reproducing Attorney General Edwin Meese's argument in favor of a "jurisprudence of original intention" to support pro-law-enforcement and pro-religion interpretations of the Constitution).

222. Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25, 74 (1986).

223. *Id.* at 74; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) (stating that republican commitments included deliberation in politics based on civic virtue).

224. In Laura Kalman's words, "republicanism offered the hope of a public interest that law could serve." KALMAN, *supra* note 8, at 159.

225. *See* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1611 (1988) (doubting the republican promise of social consensus through deliberation for African Americans historically subordinated by "shared values" of racial exclusion). For seminal feminist scholarship of this period, see generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Diane Polan, *Toward a Theory of Law and Patriarchy*, *in* THE POLITICS OF LAW, *supra* note 149, at 294; David Cole, *Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59 (1985); Kenneth L. Karst, *Woman's Constitution*, DUKE L.J. 447 (1984); Catharine A. MacKinnon, *Feminisim, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); and Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

of legal liberalism without a clear vision of plausible alternatives.[226] In one sense, the CLS critique of legalism swept so broadly as to encompass nearly all forms of political action that were oriented toward changing state rules.[227] What did it mean to divorce authentic left politics from the liberal state? Was the objection to the form of politics (litigation and other law reform strategies) or to the outcome (rights-based rules, whether enacted by legislatures or defined by courts)? Was CLS's problem with law, rights, or power? And what type of nonrights-based regimes enacted the values of equality espoused by CLS?

These were the questions raised by progressive scholars of color, who agreed with the CLS critique of legal neutrality, but expressed ambivalence about its repudiation of legal liberalism. In his seminal intervention on *Brown*, Derrick Bell took aim at liberals who sought to ground that decision on "neutral principles," like the right to equal protection under law,[228] instead arguing that *Brown*—and the judicial retrenchment that occurred in its wake—could best be understood through the lens of white interest convergence: "Racial remedies may . . . be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites."[229] Bell thus reframed adjudication through a sociological lens by suggesting that judicial decision making in the racial justice context was shaped by its "value to whites"—providing "immediate credibility to America's struggle with Communist countries," offering "much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home," and promoting the modernization of the Southern economy.[230] Judges were not simply searching for principle, but responding to important social concerns and white anxiety. That could lead, as in *Brown*, to racial progress, or as in the Burger Court desegregation cases

226. Pushing this theme, Harlon Dalton critiqued CLS for its "failure or refusal to develop a positive program," Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 440 (1987), while Anthony Cook argued that "the oppressed could make rights determinate in practice," Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1035 (1990).

227. For a cogent analysis of intra-left disputes over the role of law in social change coming out of CLS, see Wendy Brown & Janet Halley, *Introduction*, *in* LEFT LEGALISM/LEFT CRITIQUE 1, 6–8 (Wendy Brown & Janet Halley eds., 2002).

228. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

229. *Id.* at 523.

230. *Id.* at 524.

(such as *Swann v. Charlotte-Mecklenburg Board of Education*[231] and *Milliken v. Bradley*[232]) to retrogression. This insight was thus double-edged, showing how civil rights decisions that depended on white attitudes provided opportunities for racial reform but also limited its scope.

Building on this insight, scholars in critical race theory (CRT) initiated a broader project to show how dominant interpretative practices, even those championed by the mainstream and radical left, marginalized important viewpoints and interests,[233] contributing to the "exclusion of minority scholars from . . . the central areas of civil rights scholarship."[234] Yet in issuing this critique, CRT scholars (echoing the black progressive break from realism a generation earlier) also offered a pragmatic defense of law, which emphasized the value of rights in both stemming the worst abuses against minority groups and serving as a platform for further political mobilization.

Along these lines, Mari Matsuda argued that "looking to the bottom" at the experiences of those "who have seen and felt the falsity of the liberal promise" offered a different perspective that ultimately could affirm the promise of rights.[235] Specifically, "looking to the bottom" would show how the "dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color," who by force of their subordination embraced the "right to participate equally in society with any other person," while simultaneously recognizing that "[r]ights are whatever people in power say they are."[236]

Kimberlé Crenshaw deepened this attack with her seminal *Harvard Law Review* article, in which she took CLS to task for conflating the legitimating effects of liberal law reform with systemic racism, which was "just as important as, if not more important than, liberal legal ideology in explaining the persistence of white supremacy."[237] In addition, she accused CLS scholars of "disregard[ing] the transformative potential that liberalism offers," without an alternative.[238] Trashing rights was harmful in this view because it suggested

231. 402 U.S. 1 (1971).
232. 418 U.S. 717 (1974).
233. *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 167–85 (1995).
234. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566 (1984).
235. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).
236. *Id.* at 333, 338.
237. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988).
238. *Id.*

that law reform efforts, rather than the logic of racial subordination itself, "contributed to the ideological and political legitimation of continuing Black subordination."[239] From this perspective, rights were "the means by which oppressed groups have secured both entry as formal equals . . . and the survival of their movement in the face of private and state repression."[240] What was needed, in Patricia Williams' view, was therefore "not the abandonment of rights . . . but an attempt to become multilingual in the semantics of evaluating rights."[241] How to become fluent in this semantics—and whether it would lead to a better society—was the question that hung over progressive constitutional theory as the last decade of the millennium began.[242]

### 2. The Critique of Lawyer Neutrality: Client Autonomy in Representation

The 1970s brought legal profession scholarship its own legitimacy crisis—and a similar pattern of progressive response. As the legal liberal project went into decline, critics of public interest lawyers suggested that their lack of political neutrality was partly to blame—pushing the legal system to address social problems outside of its competence and undermining the conventional notion of client loyalty.[243] The other professional crisis came from outside

239. *Id.* at 1381.

240. *Id.* at 1384–85.

241. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 149 (1991).

242. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (applying intersectional analysis to violence against women of color and arguing that failure to develop solutions at the intersection of race and gender compounds the mariginalization of black women caught between antirape and antiracism paradigms); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 773 (1990) (claiming that mainstream race reform discourse reflected a resolution of the race debate through a tacit enlightened integrationism that replaced prejudice with neutrality). For other seminal CRT scholarship, see generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); and Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

243. These concerns also emanated from the right, expressed in the growing charge of lawyer activism within legal services, which the Reagan administration had attempted to defund and depoliticize. *See* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 547–48 (1985) (describing Reagan's budget cutting); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233, 234 (stating "[t]he real goal of the proposed restrictions" on legal services by the Reagan administration was "to discourage public interest litigation"). Conservative scholars criticized the rights industry, claiming it had become unhinged from any social base. Liberal lawyers in this picture were charged with pursuing a partisan vision disconnected from client interests enabled by vehicles like the class action. *See* RICHARD E. MORGAN, DISABLING

legal liberalism, arriving in the Watergate scandal, which revealed that high-level government lawyers were involved in a massive cover-up of criminal wrongdoing.[244] These twin challenges—too much independence from clients who lacked power and too little from those who held it—once again focused attention on the professionalism problem.

**a. Defense**

Born into a legitimacy crisis,[245] first-wave legal profession scholarship sought to defend the core principle of lawyer neutrality: the idea that lawyers were duty-bound to zealously advance client interests, even if it meant acting against their own personal morality, which was "differentiated" from and thus not compromised by actions taken in accord with professional role.[246] As laid

AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME (1984); Marshall J. Breger, *Accountability and the Adjudication of the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 349, 349–50 (1985); *see also* Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435 (1996) (presenting a conservative critique of accountability to clients by focusing on class conflicts). Supporters rallied to respond to the "perils of public interest law," Mark J. Green, *The Perils of Public Interest Law*, NEW REPUBLIC, Sept. 20, 1975, at 20, by reasserting a pluralist defense, while emphasizing the importance of litigation in producing deterrence and publicity, creating new forums for challenges to air grievances, catalyzing legislative action, and legitimating community values. *See* TAKING IDEALS SERIOUSLY: THE CASE FOR A LAWYERS' PUBLIC INTEREST MOVEMENT (Robert L. Ellis ed., 1981); John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1136–43 (1976). For positive evaluations of public interest law's impact on legal development, see generally SANFORD JAFFE ET AL., PUBLIC INTEREST LAW: FIVE YEARS LATER 7–8 (1976); Charles R. Halpern, *The Right to Habilitation: Litigation as a Strategy for Social Change*, *in* THE RIGHT TO TREATMENT FOR MENTAL PATIENTS 73 (Stuart Golann & William J. Fremouw eds., 1976); Stephen C. Halpern, *Assessing the Litigative Role of ACLU Chapters*, *in* CIVIL LIBERTIES: POLICY AND POLICY MAKING 159 (Stephen L. Wasby ed., 1976); and Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976).

244. Watergate precipitated the appointment of the Kutak Commission in 1977, leading to what would become the Model Rules of Professional Conduct in 1983.

245. Watergate also provoked a revision to the ABA accreditation standards to include substantial instruction in professional responsibility at law schools, which fueled the rise of legal ethics scholarship. Before that, such scholarship was virtually nonexistent. There were important early ethical treatises and codification projects, but serious scholarship on professionalism in law was scarce. *See* Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 22 (1951) (arguing that the concept of zealous advocacy meant achieving detachment from client ends by cultivating "a sense of craftsmanship"). For other early works on legal ethics, see generally Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); and Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

246. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3 (1975). Murray Schwartz associated the neutral advocacy idea with the principles of "professionalism"—which works to "maximize the likelihood that the client will prevail"—and "nonaccountability"—"which relieves the advocate of legal, professional, and moral accountability

out by Richard Wasserstrom, this conception of role neutrality presented two fundamental problems that mapped onto the very issues raised by the crisis the profession was then confronting. First, neutrality could suggest lack of regard for client interests in ways that encouraged the pursuit of a lawyer's own ends—the problem raised by public interest lawyering.[247] Second, neutrality could suggest lack of regard for the morality of client ends in ways that might facilitate the bad acts of powerful clients—as Watergate and new corporate legal scandals revealed.[248] Early legal profession scholarship took aim at these different targets.[249]

For those worried about the taint of client misconduct, the task was to justify lawyer neutrality against the charge that it simply facilitated the bad acts of powerful clients who could game the system. Scholars like Monroe Freedman justified lawyer neutrality on process grounds predicated on the value of the adversarial system itself: For that system to work, it required lawyers to present unfiltered versions of client claims in court in order to advance the vindication of individual rights.[250] For lawyers to play this systemic role, they had to devote their full powers to maintaining client trust, which

for proceeding according to the first principle." Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 671 (1978). While Schwartz accepted neutrality in the context of advocacy, he argued that the nonadvocate had a duty to avoid using unconscionable means to achieve unconscionable ends—a version of the independence ideal. *Id.*; *see also* Murray L. Schwartz, *The Zeal of the Civil Advocate*, 8 AM. B. FOUND. RES. J. 543, 544 (1983).

247. Wasserstrom, *supra* note 246, at 1 ("[T]he lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion.").

248. *Id.* (stating that "the lawyer's stance toward the world at large" was "at best systematically amoral and at worst more than occasionally immoral"). Although Wasserstrom acknowledged that the adversary system was better than "any other that has been established," and thus justified some version of the partisan role, he worried that if the system did not work well overall, justice might not be served by lawyers encouraged to "avoid direct engagement with the moral issues as they arise." *Id.* at 10, 13.

249. For a critical account of excessive lawyer zealousness, see generally MARVIN E. FRANKEL, PARTISAN JUSTICE (1980), which argues that there would be more justice if litigants were less partisan. Also see Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1078 (1979), which reflects on the "indigestibility of the idea that the lawyer is, as it is said, a hired gun."

250. For Freedman's full-throated defense of zealous lawyering, see generally MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1952–53 (1988); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); and Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467 (1992). For critical responses to Freedman, see William R. Meagher, *A Critique of Lawyers' Ethics in an Adversary System*, 4 FORDHAM URB. L.J. 289 (1976), and John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

meant promising to promote their clients' cause to the limit of the law—even if sometimes that resulted in miscarriages of justice.[251] Taking a different tack, but coming to a similar conclusion, conservative Charles Fried defended lawyer neutrality not as a means to a systemic end, but as fostering professional relationships that were "good in themselves."[252] By neutrally deferring to a client's "individual autonomy," and adopting the client's "interests as his own," the lawyer enacted the "classic definition of friendship,"[253] which justified assisting in client actions that the lawyer himself might view as morally abhorrent.[254] Offering his own interpretation of moral philosophy, Fried linked the lawyer's "amoral ethical role" to the achievement of client autonomy as the highest value in a liberal democratic society.[255]

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251. To build this trust, lawyers were required to devote their full powers to keeping client confidences even if it meant knowingly presenting false testimony to the court. *See* Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, LITIG., Winter 1975, at 26. Freedman believed that distortions resulting from client malfeasance were outweighed by the aggregate benefits of adversarial adjudication, while distortions resulting from unequal access to law posed a political problem, not one to be resolved within the lawyer-client relationship. Overall, Freedman believed the benefit of complete client candor to facilitating legal representation would outweigh the damage done by dishonest clients. Proponents of zealous advocacy often used criminal defense as the paradigmatic case for why robust professionalism benefited the system. For arguments in this vein, see generally DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973).

252. Charles Fried, *The Lawyer as Friend, The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1075 (1976). For other influential accounts of the lawyer-client relationship built on moral philosophy, see ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980), and Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. 231 (1979). For critical responses to morally derived lawyering frameworks, see Edward A. Dauer & Arthur Allen Leff, Correspondence, *The Lawyer as Friend*, 86 YALE L.J. 573 (1977), and Andrew Kaufman, 94 HARV. L. REV. 1504 (1981) (reviewing GOLDMAN, *supra*).

253. Fried, *supra* note 252, at 1071.

254. *Id.* at 1080 ("If the legal system is itself sensitive to moral claims, sensitive to the rights of individuals, it must at times allow that autonomy to be exercised in ways that do not further the public interest.").

255. A decade after Charles Fried, Stephen Pepper offered the most robust defense of the "amoral ethical role of the lawyer," based on what he termed the "first-class citizenship model." Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613, 615 (1986). In Pepper's view, first-class citizenship meant the exercise of individual autonomy, which in a "highly legalized society such as ours" depended on access to law through lawyers. *Id.* at 617. In order for citizens to realize autonomy, they needed unmediated access to law through lawyers who would not "substitute" their own "moral beliefs" by acting as "judge/facilitator." *Id.* at 617–20. Pepper asserted that clients in this view were entitled to lawyer assistance to pursue all courses of action in situations where the law was "manipulable and without clear limits." *Id.* at 626. Charles Wolfram was another strong proponent of neutral partisanship. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986); Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978); Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195 (1987); Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, LAW & CONTEMP. PROBS., Winter 1984, at 293.

The defense of lawyer neutrality, although primarily used to justify advocacy at odds with the public interest, also operated as an implicit critique of public interest lawyering itself—associated, as it had become, with lawyer activism.[256] The mainstream defense of lawyer neutrality thus converged with an internal critique of public interest lawyering leveled by new entrants to the legal academy who were products of the very legal liberalism they now called into question. Although qualitatively different from process and rights-based defenses of lawyer neutrality, these internal critiques of public interest lawyering embraced the core value of client autonomy.

Bell's famous broadside against NAACP lawyers challenged legal liberalism on its own terms[257]—arguing that although legal liberal lawyers could play an important representative function in theory, they were simply not doing so in fact. Bell accused NAACP lawyers of "serving two masters" by pursuing their own (and their funders') "integration ideals" over the wishes of African American families to pursue good quality schools irrespective of whether they were integrated with white students.[258] Bell grounded his critique in conventional notions of professionalism, arguing that the lawyers' lack of deference to the interests of some class members created a conflict that could "prevent full compliance" with the lawyers' "basic professional obligations."[259]

Bell's intervention was explosive. He was striking at the legal organizational heart of the civil rights movement and what he viewed as the white paternalism that had come to define its mission. Bell himself had just broken the color line of elite law school teaching, having become the first African American tenured faculty member at Harvard Law School after serving as a lawyer in the Civil Rights Division of the Department of Justice and assistant counsel to the NAACP. In other words, he was a product of legal liberalism, but also an outsider. As an elite academic, he was the first to have standing to articulate out loud a critique of white paternalism that black lawyers and activists had long held in private—and he did so in the pages of a bastion of legal progressivism, the *Yale Law Journal*. It was the race-critique of white legal liberal disregard of black interests, folded into the language of a professional

256. Public interest law challenged the law-politics division that the realists had demarcated—with law (*i.e.*, apolitical adjudication) assigned to courts and politics (*i.e.*, policy and rule making) assigned to legislatures and agencies. Its critics focused on public interest law's use of courts to solve political problems by creating new rules rather than simply applying established ones. *See* William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 491 (1984).

257. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

258. *See id.* at 489–93.

259. *Id.* at 499 (quoting NAACP v. Button, 371 U.S. 415, 460 (1963) (Harlan, J., dissenting)).

critique of lawyer conflict of interests, which gave *Serving Two Masters* its tremendous punch, prompting a proliferation of legal ethics scholarship grappling with the problem of conflicts of interest in the law reform context.[260]

Whereas Bell focused on the accountability problem in class representation, newly minted clinical educators, many having just exited poverty law practice,[261] emphasized accountability to individual low-income clients.[262] For these scholars, the autonomy threat was not that of lawyers pursuing their own definition of the public interest, but rather disregarding the individual wishes of the most vulnerable clients out of an aggrandized sense of their own expertise or for the sake of organizational efficiency.[263] From this perspective, promoting client autonomy was not primarily about either systemic justice or individualism as an intrinsic moral good, but rather about producing better substantive outcomes in particular cases. In the first wave of clinical education, the move to "client-centered" lawyering was designed to reverse the polarity of deference in the lawyer-client relationship by reformulating the meaning of expertise to encompass knowledge of the nonlegal merits of a case—about which the client knew best. Only by relying on the client's expert judgment about the nonlegal merits could the lawyer help the client achieve "the *greatest client satisfaction*."[264] In contrast to lawyers who "primarily seek the best 'legal' solutions to problems without fully exploring how those solutions meet clients' nonlegal as well as legal concerns," the client-centered approach envisioned a lawyer who "helps identify problems from a client's perspective," "actively involves the client in the process of exploring

260. *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (arguing for renovation of the concept of "class representation"); *see also* Stephen C. Yeazell, *From Group Litigation to Class Action—Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980).

261. *See* William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 552–53 (1980).

262. *See* Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 557 (1980) (reviewing literature on micro—"what does the lawyer do, for whom, in what context, and why?"—and macro issues—"what can law and lawyers accomplish?"); *see also* Kandis Scott, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 345 (1987).

263. Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108 (1977) ("In most discussions between lawyer and client, the lawyer does almost all of the talking, gives little opportunity for the client to express feelings or concerns, and consistently controls the length, topics and character of the conversation.").

264. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 144–45, 148 (1977).

potential solutions," and "encourages a client to make those decisions which are likely to have a substantial legal or nonlegal impact."[265]

Some clinical scholars sought to reconcile this emphasis on client autonomy with a commitment to social reform through a distinctive vision of poverty lawyering.[266] Within the realm of interviewing and client counseling, techniques of active listening and information-gathering were to be used by lawyers to reframe the client "problem" in the broadest possible terms, encompassing legal and nonlegal goals, and thereby limiting the scope of lawyer discretion to a narrow set of strategic decisions.[267] In stark contrast to realist calls for lawyerly independence in counseling, clinical scholars argued that this autonomy-enhancing approach, when directed toward poor clients, would promote the public interest by redistributing legal resources, enhancing quality, and achieving better aggregate outcomes for the poor.[268] Gary Bellow suggested that when done right, accountable individual representation could actually strengthen the "use [of] law for political or social change."[269] As Bellow recounted: "[M]y own experience in legal aid work in the past ten years suggests than an explicit political perspective, directed towards specific changes in particular institutions that affect the poor, and accountable individual legal service are intertwined."[270] In adopting a "focused legal-political action" approach, Bellow believed in the possibility of fusing strong reform lawyering with greater client participation, thus "reconciling

265. DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 17, 19–20 (1991).

266. Gary Bellow and Bea Moulton in their seminal clinical text on the "lawyering process" explicitly invoked the process theorists' emphasis on expertise and legal craft. *See generally* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY (1978).

267. BINDER & PRICE, *supra* note 264, at 148 (stating that the "principle of leaving the final decision to the client should usually be applied to auxiliary decisions as well" as decisions about central goals). Early clinical approaches focused on the role of the lawyer in litigation. *See* Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 FORDHAM L. REV. 1, 9 (1991).

268. "Why," Bellow asked, "should professional legal advice to the poor become shallow, cautious, and incomplete?" Bellow, *supra* note 263, at 110.

269. *Id.* at 119.

270. *Id.* at 121. Bellow and other scholars generally chafed at the lack of strategic focus of legal aid and its retreat from a reformist vision. For work exploring the tension between law reform and individual service in legal aid practice, see generally EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM (1978); JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 122 (1982); and HARRY P. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF LAW (1975).

accountability to individual clients and the need for larger systemic changes in the private and public institutions that daily shape their lives."[271]

**b. Critique**

Just as in the constitutional law debate over the law-politics line, the core issue in lawyering scholarship during the critical legal period was the problem of discretion. Whereas constitutional law scholars concerned about law's neutrality sought to minimize the exercise of judges' discretion to shape policy outcomes in adjudication, so too did legal profession scholars concerned about lawyer neutrality attempt to limit lawyers' discretion to shape client goals in representation. Toward this end, defenders of lawyer neutrality worked to shore up the division between substantive goals, with respect to which lawyers were required to defer to clients, and procedural means, with respect to which lawyers could exercise discretion. Clearly identifying and differentiating autonomously derived client goals from lawyer strategic advice was the lynchpin of this scheme.

Critical scholars in the legal profession field—again echoing the arguments made in the CLS critique of adjudication—fundamentally rejected the premise that there could be a defensible line between substantive client ends and procedural legal means, and questioned the political value of endeavoring to draw one. From the CLS perspective, client autonomy was too indeterminate to justify lawyer neutrality and too individualizing to support progressive politics.

William Simon's critique of the "ideology of advocacy" made this case most forcefully, arguing that because client "ends are subjective, individual, and arbitrary, the lawyer has no access to them."[272] Counseling clients thus inevitably required a lawyer to refer back to her own values in helping the client shape his own—and, in this sense, lawyers were in fact never neutral.[273] Because client autonomy from lawyer influence was not possible, the ideal of lawyer neutrality simply masked the political choices lawyers were making to support client goals that the lawyer was involved in shaping.[274] Since lawyers were

271. Bellow, *supra* note 263, at 122 (arguing that institutions can be forced to change when they are "(a) confronted with a substantial number of complainants; (b) with a real stake in the outcome; (c) who do not have to absorb the attorney and other costs"); *see also* Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Ethics in Public Interest Practice*, 58 B.U. L. REV. 337 (1978).

272. Simon, *supra* note 56, at 53.

273. *Id.*

274. Moreover, any attempt to assign lawyer discretion to the realm of "means" further disregarded the degree to which a lawyer's purportedly "procedural" decisions about strategy in fact affected client

deeply implicated in constructing individual problems as legal disputes, Simon suggested that the main result of the ideology of advocacy was to obscure the lawyer's substantive role in channeling group conflict into the adversarial system—where "the sacrifice of substantive ideals is not acutely felt."[275] In this sense, by clinging to the illusion of accountability to autonomous client choice, lawyers were reinforcing the status quo.

From this vantage point, Simon criticized both Bell and the clinical scholars. Taking aim at *Serving Two Masters*, Simon argued that Bell posited a determinate set of community interests that did not exist and, in so doing, precluded the idea that lawyers might productively shape class interests or that the path pursued by the lawyer might be more preferable overall than a divided solution. Against clinical scholars, Simon argued that clinical education's emphasis on neutral skill training shifted "attention away from cases and statutes and the professional discourse of lawyers and judges toward the practical tasks of lawyering" within the "community-of-two," and thus the clinical vision appeared "a product not so much of the legal services and public interest practice, as of the abandonment of this kind of practice."[276] In addition, he rejected clinicians' justification of client-centeredness by reference to poor clients, arguing instead that the client-centeredness students learned in the clinical context would generally be carried into corporate practice where the idea of respecting client autonomy would facilitate the exercise of corporate client power.

Exposing lawyering as discretion all the way down was designed to bring normative disputes about "substantive ideals" explicitly into the lawyering process in ways that critics hoped would ultimately build solidaristic connections and advance progressive values. In this vein, Simon proposed a critical vision of lawyering that questioned the basic premise that representation

outcomes—once again involving the lawyer in determining ends. *Id.* at 51. Simon argued that the "ideology of advocacy" was not justified on systemic grounds—since there was no reason to believe that "the kind of impartiality enhanced by adversary advocacy is likely to lead to more accurate, socially efficient decisions," and dismissed the boundary drawing compromise of the realists since there was no way of "confining the roles to the situations to which they are appropriate." *Id.* at 76, 78. Specifically, because considerations of the public interest could not be confined to the counseling domain, clients would inevitably come to see them as facts to be manipulated in the service of their own selfish pursuits. For another critical perspective arriving at a similar conclusion, see Duncan Kennedy, *The Responsibilty of Lawyers for the Justice of Their Causes*, 18 TEX. TECH. L. REV. 1157, 1159 (1987), which states: "I think you *are* tarred with bad actions of clients that you facilitate in your work as a lawyer."

275. Simon, *supra* note 56, at 124.

276. Simon, *supra* note 261, at 488, 496, 556.

was "instrumental to preexisting subjective ends."[277] Instead, he proposed a model "animated by an ideal of practice as a process of constituting and reconstituting nonhierarchical communities of interest" compatible with "aggressive lawyering in situations where the interests of the client or client community involve a challenge to external hierarchy," but also with "fully collective and conciliatory approaches in situations involving disputes within an actual or potential nonhierarchical communal relation."[278] Lawyers were thus urged to embrace a robust and politically ambitious conception of professional role that linked discretion to the fundamental values of the legal profession, which to critics like Simon were rooted in a progressive vision of the public good. This vision was fully consistent with realist conceptions of independent professional judgment to promote public values in the corporate counseling context,[279] as well as reform-oriented public interest lawyering. In this way, the critical attack on client autonomy simultaneously challenged mainstream apologists of corporate lawyering and clinical proponents of client-centeredness in the poverty law context.

Critical scholars coming out of the law and society tradition, led by Richard Abel, agreed with the idea that lawyering should serve as a vehicle for progressive reform, but rejected the progressive functionalism that supported the vision of lawyerly independence promoted by Simon. Abel, in contrast, viewed lawyering as a fundamental part of deeper social conflict. Independence was neither empirically possible nor normatively desirable, since in practice it operated to mask lawyers' economic and social mobility projects that ultimately produced lawyer alienation and inequality of services.[280] Abel asserted that the "power to change" rested in lawyers aligning themselves with radical social movements and fighting for transformation alongside political allies,[281] while he also argued for the withdraw of legal services from the most empowered actors to level the playing field in the struggle.[282]

277. Simon, *supra* note 256, at 485.
278. *Id.*
279. *See generally* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).
280. RICHARD L. ABEL, AMERICAN LAWYERS 226–39 (1989) (describing the consequences of American lawyers' pursuit of professional mobility and status).
281. Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 5, 14 (1985) (arguing that progressive lawyers can achieve significant change "only by uniting in larger collectivities").
282. *See* Richard L. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POL'Y 5, 12 (1979).

This view resonated with scholarly efforts to theorize a critical legal approach to progressive practice built less on rights and more on power.[283] Instead of "sublimating" substantive political conflict, CLS scholars urged a model of lawyering in which lawyers would use the legal system as a place to air political grievances and assert alternative political visions. In this vein, Peter Gabel and Paul Harris sought to "link the theoretical advances made by [CLS] with the accumulated practical experience of creative" lawyers to break the power of the legal system as a tool of legitimation.[284] In this framework, radical lawyers were to view the legal system as "diverse locuses of state power that are organized for the purposes of maintaining alienation and powerlessness," and to then use those arenas to "build the power of popular movements."[285] Gabel and Harris illustrated this strategy with prominent examples from National Lawyers Guild practice: flouting courtroom decorum in the Chicago 8 trial to reject "the very forms of authority upon which the legitimacy of the [Vietnam] war itself depended"; defending a rape victim accused of murdering her attacker by permitting her to name her anger in court; linking an appellate civil liberties case over the right to protest the war to community organizing; and breaking down the professional role by asking clients prosecuted for selling radical newsletters to take an active part in the trial, focusing on the political realities and police racism behind the case.[286] With these examples, Gabel and Harris aimed to develop an alternative to legal liberal lawyering: a "power-oriented" or "counter-hegemonic" approach essential to a "delegitimation strategy," which subordinated "the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness."[287]

283. *See generally* Adelaide H. Villmoare, *The Left's Problems With Rights*, 9 LEGAL STUD. F. 39 (1985) (arguing that the left needs to move away from liberal legal notions of rights in favor of more flexible conceptions of their strategic power).

284. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370 373 (1982–83) ("[T]he conservative power of legal thought is not to be found in legal outcomes which resolve conflicts in favor of dominant groups, but in the reification of the very categories through which the nature of social conflict is defined.").

285. Gabel & Harris, *supra* note 284, at 377–78. For other accounts of radical lawyers, see generally RADICAL LAWYERS, *supra* note 149; Abel, *supra* note 281; Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984–85); and Paul Harris, *The San Francisco Community Law Collective*, 7 LAW & POL'Y 19 (1985).

286. Gabel & Harris, *supra* note 284, at 381.

287. *Id.* at 374, 375. For an account of radical lawyering in the movement for Native American rights, see JOHN SAYER, GHOST DANCING THE LAW: THE WOUNDED KNEE TRIALS (1997), which shows how the American Indian Movement used the courtroom as a political forum on U.S.-Indian relations.

### c. Response

The response to CLS reproduced long-standing schisms over the role of lawyers in democracy. Those wedded to elite views of lawyer independence sought to rehabilitate the civic ideal of the "lost lawyer," who straddled law and politics by exercising judge-like practical wisdom to resolve legal disputes.[288] Others offered vigorous defenses of public interest lawyers in the face of withering ethical attack in which they were faulted for crossing the line into politics and thus undermining professional legitimacy. Responding pragmatically to CLS critics, Cornel West pointed out that the CLS critique of courts also tarred the legal liberal lawyers who claimed rights in the first instance:

> Some of the CLS "trashing" of liberalism at the level of theory . . . spills over to liberal legal practice. This spillover is myopic: it assails the only feasible progressive practice for radical lawyers in the courts. This myopia becomes downright dangerous and irresponsible when aimed at civil rights lawyers whose very effort to extend American liberalism may lead to injury or death in conservative America.[289]

Against the backdrop of this critical debate, legal profession scholars confronted two crucial questions that went to the heart of the meaning of representation. First, without the anchor of client autonomy, were there any fundamental principles to guide the exercise of lawyer discretion and to ensure accountability of lawyer to client? While progressives like Simon championed the exercise of discretion to promote "nonhierarchical communities of interest,"[290] given the critical insistence on the unavoidability of normative conflict,[291] it was impossible to rule out alternative, and less progressive, professional choices. Second, Simon's position hinged on a confidence that lawyers could exercise moral judgment to make desirable

288. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 149–53 (1993). For other ruminations on a profession in "decline," see generally MILNER S. BALL, THE WORD AND THE LAW (1993); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VA. U. L. REV. 563 (1994); Warren E. Burger, *Remarks: The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995); and Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV 34 (1992).

289. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1800 (1990).

290. Simon, *supra* note 256, at 485.

291. UNGER, *supra* note 23, at 60 (stressing the inevitability of "a small number of opposing ideas: principles and counterprinciples").

social choices on behalf of marginalized client constituencies. Yet, given how that judgment was often mediated by race and class privilege, why should the progressive commitment to challenging hierarchy cede so much power to elites? Why wasn't the principle of respect for client autonomy, though imperfect, necessary to protect nonelite communities from the threat of lawyer domination?

In response to these questions about professional values, some scholars sought to navigate a position between the mainstream claim that lawyer neutrality was possible and desirable and the critical claim that such neutrality was illusory and pernicious.[292] David Luban's *Lawyers and Justice* was the high-water mark of this approach, which accepted the plausibility of autonomous client decision making, but denied that it counseled in favor of a neutral conception of the lawyer's role.[293] Responding to proponents of lawyer neutrality on their own philosophical ground, Luban argued that a lawyer's commitment to client autonomy had to be justified by the institutional values such a commitment advanced[294]—which, in the case of the American civil adversary system, were organized around the goal of "finding truth and protecting legal rights."[295] But since the adversary system systematically failed to achieve this goal, it similarly failed to justify the strong version of lawyer neutrality claimed by well-known proponents like Stephen Pepper.[296] In Luban's view, instead of relying on the "adversary system

292. One approach that echoed the republican turn in constitutional law was to deny that the legal profession was rooted in the values of liberal individualism, which justified the client autonomy view, and instead to suggest that it was grounded in civic republicanism, which justified lawyering that promoted the public good. *See* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 263 (1992) (locating republican professional values in early legal ethicist George Sharswood's ideals—including a duty to court and to represent the poor, as well as a rejection of "consciously press[ing] for . . . unjust judgment" (alteration in original) (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1884), *reprinted in* 32 A.B.A. REP. 1, 97–98 (1907))). *But see* David Luban, Book Review, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589, 606 (1993) (stating that the opposition between communitarianism and liberalism was "overdrawn"). Others shifted the grounds of defense for legal activism away from philosophy, arguing that public interest law was necessary to counteract the informational and organizational advantages of repeat players in the legal system, like corporations. *See* Note, *In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436 (1981).

293. LUBAN, *supra* note 108; *see also* David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983). For a response, see Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER, *supra*, at 172.

294. *See* LUBAN, *supra* note 108, at 129 (stating the "fourfold root of sufficient reasoning").

295. *Id.* at 92.

296. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 4 AM. B. FOUND. RES. J. 637, 641 (1986). In a flawed adversary system, the good of helping the client realize his autonomy

excuse" to justify "role morality," lawyers were therefore bound to generally follow ordinary morality, which meant that they could not personally disavow the bad acts of their clients.[297] Because client autonomy was only as morally good as the ends to which it was put, lawyers had an obligation to stop clients from committing autonomous acts that were socially harmful.[298]

Conversely, when lawyers used law to advance the fundamental political value of promoting openness in a democratic society, by combatting discrimination or poverty, the strength of those fundamental values could justify overriding client control.[299] In this regard, Luban defended public interest lawyering from the charge of interference in client decision making and the broader political process. Lawyer control over client selection and decision making to advance political ends—the "double agent" problem—could be justified by the political ends themselves.[300] In Luban's formulation, client decision making was a relative good to be balanced against the collective values pursued by public interest law.[301] Luban's work constituted a philosophical defense of legal liberalism in which the lawyer's moral activism was seen as promoting democratic legitimacy—responding to the procedural failure of democratic politics—even as it potentially trampled on

would "be outweighed by the bad of the immoral action"—a problem exacerbated in a context in which not everyone had access to lawyers and thus "those who don't have [first-class citizenship] *are* hurt by others having it." Luban, *supra*, at 642, 644.

297. LUBAN, *supra* note 108, at 149, 154.

298. "It is good that people act autonomously, that they make their own choices about what to do; what they choose to do, however, need not be good." Luban, *supra* note 296, at 639.

299. *See* LUBAN, *supra* note 108, at 171 (stating that lawyers had a duty to "make the law better by law reform activity").

300. The Supreme Court provided some support to this idea in holding that public interest lawyers engaged in protected political speech when they solicited clients for impact lawsuits. *See In re* Primus, 436 U.S. 412, 437–38 (1978).

301. In this regard, Luban stressed the obligation of lawyers in the class action context to ensure "as best they can that the groups and individuals they are consulting are indeed sufficiently representative of the client class." LUBAN, *supra* note 108, at 345. Once this was done, the lawyers were empowered to make decisions in pursuit of the litigation goal, even one that "the majority of the class disfavors" since requiring majority clearance by unmobilized classes would impose far too great a practical burden and disable politically important suits. *Id.* at 345–47 (using examples of the NAACP's desegregation suits and those in favor of deinstitutionalizing mental health patients). Against the charge that public interest lawsuits constituted an illegitimate usurpation of legislative lawmaking—the "objection from democracy"—Luban adopted a proceduralist defense, pointing to systemic legislative failure for minority groups and "silent majorities" disabled by collective action problems as a normative justification for public interest litigation. *See id.* at 358, 368–70; *see also* David B. Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2224 (1989). For a friendly critique of Luban's arguments, see generally Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990).

client autonomy.[302] This theory of moral activism supported Brandeisean independence and public interest lawyering in one fell swoop: Lawyers were justified in exercising independent judgment to steer clients in the direction of the public good and to engage in law reform that deepened democracy.[303]

Despite this defense, the concept of moral activism continued to come under assault. The 1983 Model Rules of Professional Conduct, though backing off of the advocacy ideal,[304] left little room for moral activism, reinforcing the emphasis on client control over the "purposes to be served" by the representation, while making clear that lawyers remained unaccountable for client ends.[305] Instead, the Model Rules equated lawyers' commitment to the public good with the occasional provision of free legal services to the poor.[306] The continued rise of big law firms and evidence of corporate lawyer identification with their clients put pressure on the ideal of ethical

302. Deborah Rhode and William Simon arrived at similar conclusions about the democratic role of lawyers in advancing justice, although each did so based on different conceptions of justice. *See generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000) (promoting a concept of justice that involved lawyers accepting personal moral responsibility for their professional acts and more equitable access to legal services); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (1998) (advancing a concept of justice based on core values of the legal system).

303. *See* Luban, *supra* note 66, at 720–25, 732–34 (reviewing the concept of "progressive professionalism" in both its Progressive Era formulation associated with Brandeis's "lawyer for the situation" and in the new wave of public interest lawyering in the 1960s and 1970s). Other scholars have argued in favor of lawyer independence. *See generally* GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978) (advocating that lawyers advise and dissent to powerful clients); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995) (arguing in favor of lawyer "objectivity"). For different positions in the debate over public interest law, compare David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 330 (1996), which argues that "procedure-based theoretical justifications are merely an 'uncontroversial gloss' for substantive values and that it is impossible to remove a substantive account of the good from public interest law without sacrificing the ability of its lawyers to do anything at all," with Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altrusitic Young Lawyers*, 47 ME. L. REV. 3, 10 (1995), which concludes that public interest lawyering "in many cases . . . is simply special interest lawyering [and] that most public interest lawsuits redistribute resources, rather than add to them."

304. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983).

305. *Id.* r. 1.2 cmt [1]. For critical reviews of the Model Rules, see generally RUDOLPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM (1989); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989); and William H. Simon, *The Trouble With Legal Ethics*, 41 J. LEGAL EDUC. 65 (1991).

306. On pro bono, see generally THE LAW FIRM AND THE PUBLIC GOOD (Robert A. Katzmann ed., 1995); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); and Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113 (1991).

independence in corporate practice.[307] Discomfort with moral activism cut across ideological lines. Conservatives continued to hammer away at activist conceptions of lawyering,[308] strenuously reasserting professional tradition in the face of the progressive "moralizing of law,"[309] even as they were busy building their own infrastructure of conservative public interest groups.[310] Meanwhile, progressive legal scholars like Harvard's David Wilkins chafed at the notion of moral activism, arguing that it gave too much discretion to individual lawyers in ways that raised significant concerns about horizontal equity,[311] particularly as the legal profession became more stratified,[312] and

307. On the growth of law firms and their impact on client relations, see generally MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry Into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985); and Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985).

308. *See* Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281 (1982) (arguing against law reform and for legal aid). For progressive perspectives, see Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995), which claims that the legal services program's institutional choices reinscribe professional values that undercut its reform potential; and Stuart A. Scheingold, *The Dilemma of Legal Services*, 36 STAN. L. REV. 879, 890 (1984) (reviewing KATZ, *supra* note 270), which argues in favor of neighborhood activism as contributing to "an effective strategy for reform when employed with other tactics." For critical accounts of the legal services program, see generally CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES (1992), and Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29 (1984).

309. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 37 (1981). For other examples of the conservative reassertion of tradition, see ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984), and Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990). For a discussion of trends in legal ethics scholarship during this period, see David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040 (1991), which argues that the "pendulum among both legal academics and law students is swinging rapidly away from the past decade's infatuation with theory drawn from other disciplines, back in the direction of law's aboriginal grand tradition." Also see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990), and M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67 (1990).

310. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 60 (2008) (discussing the "origins of conservative public interest law").

311. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 511 (1990).

312. For portraits of stratification in the legal profession, see generally JEROME E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962), which provides an account of solo lawyering, and JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982), which argues that the bar was divided into "two hemispheres," one serving corporate clients and the other individuals. Also see MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF

lawyers remained unequally distributed by class and race.[313] As Wilkins's concerns underscored, for scholars outside of the white male academic elite, there remained lingering concerns over top-down visions of moral activism. How would morally activist lawyers construct justice across the divide of race, class, gender, and other differences?

Into this mix, poverty law scholars offered a new critique of lawyer activism that built upon earlier concerns about client autonomy. These scholars—many of whom came of age as lawyers in the post-civil-rights era and cut their professional teeth in legal services practice—generally accepted the critical insight that lawyers inevitably influenced client decision making, but drew different conclusions, arguing against the extension of "white knight" lawyer activism in favor of expanding the space for client empowerment.[314] In this literature, an emphasis on strengthening clients' political consciousness was intertwined with a view of lawyers as agents of social control built on race and feminist critiques of legal liberalism.[315] Following the interpretative turn in constitutional law, legal representation came to be seen as part of a linguistic battle,[316] in which the authority to tell client stories was part of a fundamental power struggle.[317] Scholars offered critical accounts of poverty lawyers whose

PRACTICE (1994), and EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK (1986). For a discussion of how stratification affected professional attitudes, see generally Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1 (Robert L. Nelson et al. eds., 1992), which argues that professial ideals are influenced by the practice sites where lawyers work. Also see LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE (2001).

313. For more radical perspectives on the role of black lawyers in this debate, see generally Philip M. Lord & Patricia L. Smith, *The New Black Lawyer as Community Builder*, 7 BLACK L.J. 62 (1981), and Harold McDougall, *The Role of the Black Lawyer: A Marxist View*, 7 NAT'L BLACK L.J. 31 (1981).

314. *See* Book Note, *White Knight*, 108 HARV. L. REV. 959, 964 (1995) (reviewing GREENBERG, *supra* note 85). For an account of how civil rights litigation could disempower, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61, 81 (1996), which states: "The legal system requires that you tell a different narrative from the one that happened."

315. *See*, *e.g.*, Austin Sarat, *". . . The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 352 (1990) (reporting that interviewees in a study on welfare recipients viewed "the legal services office caught within the welfare bureaucracy").

316. *See* Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2461 (1989) (recounting stories of legal representation, "in one . . . the client is struck mute while in the other the lawyer is silenced").

317. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 43 (1992) (stating that lawyers use stories and arguments to "help establish meaning *and* distribute power"). For other discussions of the role of narrative in advocacy, see generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991), and William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

attempts to fit client problems into legal frameworks reinforced the injustice they were seeking to contest. An important threat to client empowerment was the "regnant" lawyer, who viewed himself as "the preeminent problem-solver[] in most situations" and believed subordination could be redressed by legal expertise.[318]

Lucie White's self-reflection on her own lawyering for a welfare client, "Mrs. G," set the standard for critical analysis. Her frame was to accept the normative desirability of due process,[319] but then deny that it was afforded in practice. Her article on Mrs. G examined the law-in-action, focusing on the problem of discretion in the welfare bureaucracy and linking that problem to critical theoretical accounts that suggested how power differentials within the lawyer-client relation made the lawyer part of the apparatus of disempowerment. Framed as a meditation on how Mrs. G was able to maneuver around obstacles to her participation in the welfare hearing—built on race, gender, and class subordination—the story was also notable for positioning the lawyer as an agent of social control. Though well-intentioned, the lawyer sought to fit the client's story of why she spent an accident insurance award on a "shopping trip" within the legal category of "life necessities" in order to avoid the client's having to repay the money to the state welfare agency.[320] However, Mrs. G's "survival skills" disrupted this "conspiracy" and asserted the truth—that she used the money to buy her daughters "Sunday shoes"—as a way to break her silence and undermine the lawyer's own view of Mrs. G as a "victim."[321] In this way, Mrs. G, along with other subordinated women like her, had "evaded complete domination through their *practice* of speaking."[322] It was, at bottom, a story of how speaking out served as a tool to resist client marginalization.[323] It was also a story in which the client's effort to assert her own authentic narrative corresponded with success on the legal merits (Mrs. G won her welfare case)—

318. *See* LÓPEZ, *supra* note 317, at 24, 29 (stating that regnant lawyers "litigate more than they do anything else," "connect only loosely to other institutions or groups in their communities," and "believe subordination can be successfully fought if professionals, particularly lawyers, assume leadership").

319. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3 (1990).

320. *Id.* at 24, 27.

321. *Id.* at 47–49.

322. *Id.* at 50.

323. *See* Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1040 (1994) (noting the influence of Foucault: "White's meticulous focus on the language used in the hearing room itself . . . vividly illustrated the ways in which legal discourse operates as an instrument of power to exclude, silence, and oppress.").

and in that regard it avoided the potential conflict between client empowerment and effective legal strategy.

Anthony Alfieri similarly focused on "client narrative" to explore "interpretive violence" in the food stamp case of his client, Mrs. Celeste.[324] Again, the idea drawn from critical theory was to parse the language of the lawyer-client exchange, showing how the "normative meanings and images" articulated by the client went "unheard" by the lawyer in his own quest to fit those meanings into a legal storyboard compelling within the framework of law.[325] Ultimately, there could not be full lawyer-client connection: "It is futile for the lawyer to attempt to revise his storytelling to attain the fullness of his client's narratives; such a goal is beyond the lawyer's epistemological and interpretative reach."[326] All that was possible was a "limited means of revising the client meanings and images constructed in lawyer storytelling."[327] In this sense, the traditional practices of lawyers constituted an "interpretive struggle" which was "violent": Client "voices are silenced and stories are forgotten," sacrificing "client self-empowerment."[328] The veneer of lawyer "neutrality" contributed to the "legitimacy of silencing client narrative."[329]

Out of these critiques came an affirmative program that fused client participation in the lawyer-client relationship to external challenges to power. Alfieri theorized a "reconstructive" approach that, while not able to "wholly eradicate the violence of silencing traditions," could "allow the poverty lawyer to assign an empowering meaning to client narratives and to envision an alternative to the image of the unspeaking client."[330] Legal practice, then, became a way "to incorporate the empowering meaning of client narratives into the poverty lawyer's hearing and telling of client story."[331] Drawing a

324. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2125–30 (1991).
325. *Id.* at 2111.
326. *Id.*
327. *Id.*
328. *Id.* at 2118.
329. *Id.* at 2133.
330. *Id.*
331. *Id.* at 2138. For other important interventions in the empowerment literature, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992), which studies pro se litigants in Baltimore's rent court and showing how they were silenced in the process. Also see Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Enthnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Pratice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search*

distinction between domination within the lawyer-client relationship and subordination outside it, White showed how lawyers could create space within legal processes to promote subordinated peoples' belief in their collective agency—challenging what she called the "third dimension of power."[332] Lopez's critique of "regnant" lawyering was set against a "rebellious" alternative in which lawyers treated clients as "capable, with a will to fight."[333] Collaboration among co-equal problem-solvers was the dominant theme of this work, in which "[c]lients, like lawyers, offer the special practical know-how" that is laced together with "the efforts of other problem-solvers—the client himself, his family, friends, neighbors, community activists, organizers, public employees, administrators, policymakers, researchers, funders."[334] In this way, poverty law practice could "avoid" the "conventional separatism that characterizes so much of activist work" and the preemption of "other representatives" through an "integrated view of lawyer and client as part of a larger network of cooperative problem-solvers."[335]

Following this theme, scholars offered diverse ways of linking together poverty lawyering with strategies for community-based reform, while remaining attentive to the potential for lawyer overreaching.[336] Scholars focused on

*for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996); and Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

332. Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 752, 760–68.

333. LÓPEZ, *supra* note 317, at 50.

334. *Id.* at 50, 53–54.

335. *Id.* at 55.

336. *See generally* Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992); Rebecca Arbogast, et al., *Revitalizing Public Interest Lawyering in the 1990's: The Story of One Effort to Address the Problem of Homelessness*, 34 HOW. L.J. 91 (1991); Gary L. Blasi, *Litigation on Behalf of the Homeless: Systematic Approaches*, 31 WASH U. J. URB. & CONTEMP. L. 137 (1987); Stacy Brustin, *Expanding Our Vision of Legal Services Representation—The* Hermanas Unidas *Project*, 1 AM. U. J. GENDER & L. 39 (1993); Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1992); Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992); Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1995); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993); Paul R. Tremblay, *Rebellious Lawyerering, Regnant Lawyering and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992); Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992); Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990) [hereinafter White, *The Paradox of Lawyering for the Poor*]; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535

empowering clients to tell their stories unburdened by the influence of lawyers, who lacked cultural, racial, and class identification.[337] Doing this meant moving outside of traditional sites of legal practice and not privileging lawyer expertise.[338] As White asserted, in "shaping the law to respond to the needs of subordinated groups—the *power* to tailor must shift to those that the tailoring seeks to help."[339] Alfieri argued for a separation between the lawyer's professional and political roles: "The poverty lawyer's role in political confrontation is limited. . . . In no circumstance should she participate in [direct] action. Nor should she assume the role of political counsel on matters of tactics and strategy."[340] Whereas legal liberalism assumed the myth of "inherent indigent isolation and passivity," the new scholars sought to challenge that myth by activating "class consciousness" to facilitate "the organization and mobilization of grass roots client alliances."[341]

Law-and-society scholars reacted to the poverty law literature by probing its empirical assumptions and exploring the complexity of power in the context

(1987–88); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Richard F. Klawiter, Note, ¡La Tierra Es Nuestra! *The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625 (1990).

337. *See* Lois H. Johnson, *The New Public Interest Law: From Old Theories to a New Agenda*, 1 B.U. PUB. INT. L.J. 169, 185–86 (1991).

338. *See* Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49, 51–53 (1991) (stating that critical lawyers should "frame issues in human terms," should not trust bureaucracy, and should recognize that "every arena contains opportunities for, and obstacles to, change"); *see also* Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983 (1994).

339. White, *The Paradox of Lawyering for the Poor*, *supra* note 336, at 886. In reflecting on the empowerment literature, Buchanan distinguished between the lawyer as facilitator (building on Paolo Freiere), promoting empowerment through legal process, and the lawyer as strategist, focused on gaining advantages for disempowered people. Buchanan, *supra* note 323, at 1043–46. For critical perspectives on this literature, see generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639 (1995); and Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873 (1998).

340. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 709 (1987–88). This cut against proposals by role activists like Luban and Simon, who argued for greater lawyer discretion to influence client goals and strategies. For an exploration of the role division between lawyers and activists, see generally James Douglas, *The Distinction Between Lawyers as Advocates and as Activists; and the Role of the Law School Dean in Facilitating the Justice Mission*, 40 CLEV. ST. L. REV. 405 (1992). Alfieri also expressed skepticism of legal efficacy, discounting that law "can be marshaled into an effective instrument to alleviate poverty." Alfieri, *supra*, at 671.

341. Alfieri, *supra* note 340, at 663, 665.

of client counseling.[342] William Felstiner and Austin Sarat's famous study of divorce lawyers reinforced the picture of lawyer control, but also showed how clients were able to negotiate for more power, both over the "reality" of the case as well as over "responsibility."[343] In their view, "it was often difficult to say who, if anyone, was 'in charge,' who, if anyone, was directing the case," which meant that the lawyer-client interaction was not "captured by simple models of professional or lay dominance."[344] Others suggested that poverty scholars, in their important effort to construct a client-driven approach, were erecting a straw man target in the "regnant lawyer." Ann Southworth used her study of Chicago lawyers to argue against the "myth of rights" conception of legal liberal lawyers, which she charged did not provide a "complete and accurate picture of both the process and the substance of lawyering for the poor."[345] Instead, her research suggested "that at least some of these lawyers—particularly lawyers who serve grass-roots organizations and business lawyers who work with community groups and minority entrepreneurs—generally believed that they should defer to their clients' decisions."[346] Cutting more deeply, Joel Handler took aim at the "micropolitics" of poverty law stories, such as Mrs. G's, which he claimed disserved the cause of challenging structural inequality by focusing too narrowly on power imbalances in the lawyer-client relationship. Poverty law scholars were thereby charged with attacking the wrong target—blaming legal allies for failures that were the result of massive

342. *See* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); *see also* Lucie E. White, *Seeking "... the Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992).

343. Felstiner & Sarat, *supra* note 342, at 1451.

344. *Id.* at 1496, 1498.

345. Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213, 218 (1993) (reviewing LÓPEZ, *supra* note 317). Southworth argued that the regnant model was based on "untested claims about current civil rights and poverty law work" that "makes it difficult to assess the basic premises of López's argument, particularly his claim that most activist lawyers fail to collaborate with their clients." Southworth, *supra*, at 215; *cf.* Matthew Diller, *Poverty Lawering in the Golden Age*, 93 MICH. L. REV. 1401, 1414 (1995) (reviewing MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993)) (arguing against the proposition that lawyers, rather than political opposition, were the main barrier to progressive reform: "The failure of the NWRO stands as a testament to the enormous barriers to organizing poor people around the issue of welfare rights.").

346. Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1106 (1996). For additional evidence of lawyer deference in transactional matters, see Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1125. Also see Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

political countermobilization—and proposing a political program that gave up on the progressive aspiration for structural change.[347]

Picking up this theme, other friendly critics took aim at the political implications of the poverty law scholars' theoretical position, arguing that their concept of empowerment was inadequate. For these critics, "[e]mpowerment requires a further step—that people actually gain political power and have greater control over their lives."[348] Reprising his critique of lawyer neutrality, Simon argued that the "dark secret" of progressive lawyering—missed by the poverty law scholars—was that client interests were hopelessly indeterminate and disharmonious, making it inevitable (and often good) that lawyers were there to influence client interests.[349] Within clinical education, Gary Blasi made a parallel critique, arguing that the theoretical framework of the new poverty law disabled practical struggle by undermining the value of lawyer expertise, which he sought to reclaim by building on insights of cognitive science to show how experienced practitioners developed stored "problem schemas" that promoted problem-solving.[350] In the heat of this debate, Harold McDougall suggested that social movements could be a way to merge the poverty law scholars' commitment to bottom-up accountability with the pursuit of structural change: building progressive values at the community level, engaging in politics that created law, and expressing the voices of the disempowered and disadvantaged in society.[351] Yet, for now, the terms of debate focused primarily on the role of lawyers in promoting empowerment—leaving for later scholars to investigate the empirical and

347. *See* Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

348. Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 584 (1987).

349. William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1111 (1994) ("The idea that the indivdual could be legitimately constrained by the group, though essential to effective collective action, doesn't sit easily with the tendency to see all constraint as power and all power as oppressive.").

350. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 317–18 (1995); *see also* Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1994) [hereinafter Blasi, *What's a Theory For?*] (critiquing reliance on critical theory and reasserting importance of social science to lawyering).

351. *See* Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 86 (1989) (stating "that communities formed at the juncture of social movements and government policy might prove to be useful models"); *see also* McDougall, *supra* note 267, at 2, 40–43 (discussing "modes of . . . advocacy" and arguing for the "need for a working model of legal practice, informed by the theoretical and pragmatic perspectives developed, to examine the work of public interest advocates representing socal movements in a post-modern legal system").

theoretical dimensions of lawyering on behalf of already empowered social movement groups.

To summarize, the perspective on lawyering that emerged during the period of critical legalism focused on two professional problems. One problem highlighted the potential for lawyer domination of vulnerable individual clients or classes—the problem of *too much* lawyer independence. The other focused on the collapse of professionalism and capitulation to powerful client interests—the problem of *too little* lawyer independence. One progressive response, advanced by CLS scholars like Simon and liberals like Luban, coalesced around the embrace of ethical discretion as a version of the realist independence ideal. To get there, these scholars had to respond to the domination critique, which they did by showing that the affirmative case for the client autonomy view either failed as a matter of institutional justification (because the adversary system was flawed) or on its own terms (because client autonomy was a myth). In so doing, these scholars sought to construct a unified response to the accountability critique that simultaneously justified the professional independence of the public interest and corporate lawyer. Yet for scholars concerned about lawyer domination, the ideal of moral activism did not fully respond to the concern raised by Bell and the poverty law scholars about elite lawyers exercising discretion in ways that could undermine community and agency rather than advance "justice." Even well-intentioned activism by lawyers who failed to fully appreciate the interests of their clients could disempower activism by marginalized constituencies the lawyers claimed to serve. The vision of progressive justice upon which the moral activist view rested failed to satisfy those who saw it as inherently indeterminate and prone to reinforce subordination based on race, gender, and other identities. Yet for progressive scholars concerned about the dramatic rightward political tilt of the country, the scholarly move toward community-based lawyering and bottom-up struggle failed to meaningfully articulate an affirmative political program that connected local empowerment with a transformative legal vision and the potential of larger political reform. This fracturing of progressive thought over the adequacy of elite representation and the efficacy of local resistance was the essential legacy of critical legalism.

### D. Pragmatic Legalism: Rebuilding Law From the Bottom-Up

By the 1990s, the president of the Law and Society Association declared that "faith in the progressive possibilities of law has been

shaken."[352] As the millennium turned, instead of progressive transformation, there was conservative ascendance: the rise of a well-financed and sophisticated conservative public interest law movement, strengthened by a deeply conservative Rehnquist Court, which progressives charged with abandoning all pretense to neutrality in *Bush v. Gore*.[353] The 1990s also underscored that the Democratic Party no longer firmly stood for the New Deal-Civil Rights values that had powered mid-century progressivism, but rather embraced aspects of the deregulatory (*e.g.*, repeal of Glass-Steagall), anti-entitlement (*e.g.*, LSC restrictions, welfare reform), and anti-minority (*e.g.*, Don't Ask, Don't Tell, the Defense of Marriage Act, immigrant welfare cuts, the 1994 Violent Crime Control and Law Enforcement Act) ideology of the conservatives. In this political context, scholars on the left sought to recuperate law's progressive potential through pragmatic steps. Dissatisfied with top-down accounts of judicial review and legal representation that located ultimate decision making authority in a narrow group of elite lawyers and judges, scholars searched for new sources of legal meaning that justified the advancement of progressivism amid a sea of "value pluralism."[354] Key to this search was finding a connection between the dynamism of local resistance and the structural transformation projects associated with legal liberalism—now in deep retreat. For the generation of scholars rising in the legal academy, who came of age after the collapse of liberalism, its basic premises—regulation, redistribution, and rights protection—seemed like goals worth fighting for, rather than representing the stunted aspirations of a coopted left.

As the last section showed, the critical legal debate over law's neutrality and its aftermath crystallized progressive divisions over the role of courts and lawyers in social change, which had become organized around two foundational critiques. The accountability critique emphasized the contradiction between legal liberalism and legal neutrality. In constitutional law, this critique was framed in terms of the lack of accountability of activist judges to autonomous law, and in the legal profession, the critique focused on the lack of accountability of activist lawyers to autonomous clients. The efficacy critique stressed the contradiction between legal liberalism and sustainable social change. Although these critiques converged against legal liberalism, their nuances placed them in tension with one another in ways that mapped onto intellectual tensions within

352. Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11, 12 (1995).
353. 531 U.S. 98 (2000).
354. *See* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 116 (2000) ("[T]he foundational normative values of lawyering are substantively plural and, in many cases, incommensurable.").

progressive thought. Concerns about accountability pushed some mainstream and CRT scholars back toward the very rights-based principles that CLS found politically stifling, while CLS's insistence on trashing legal neutrality made it less attentive to how nonelites would be ensured a voice shaping the agenda in its alternative radical vision.

These divisions drove progressive legal debate within constitutional and legal profession scholarship toward a *pragmatic legalism* by century's close. Scholars in this pragmatic mode sought to ground law in a set of normative principles that reflected the experiences and aspirations of the marginalized groups which progressivism claimed to serve, while also finding spaces within which to advance progressive political alternatives to ascendant conservatism. Conservativism had succeeded in reshaping progressive legal debate in two ways. First, by fundamentally contesting the meaning of the public good, it reinforced the intellectual move away from comprehensive theoretical frameworks justifying the law-politics divide. Second, by scaling back the signature achievements of legal liberalism, it changed the baseline for evaluating what counted as effective progressive political interventions. In this context, legal scholars struggled to develop a new set of pragmatic intellectual and political principles to *rebuild* an account of law's role in progressive reform that was at once accountable and effective in the new environment. No longer championing broad transformation, the progressive legal vision turned toward identifying space for smaller victories, creating opportunities for local engagement, and limiting political damage. Grand theory gave way to mid-level analysis, while deep critique was superseded by pragmatic reformism. One again, these trends were visible in parallel strands of constitutional law and legal profession writing.

### 1. Decentering Courts in Constitutional Theory

The seeds of the pragmatic turn in constitutional theory were sewn in the waning phase of CLS. Robert Cover's 1983 *Nomos and Narrative* proved to be a bridge from the radical uncertainty of interpretivism ushered in by the CLS indeterminacy critique to the pragmatic search for alternative sources of constitutional meaning. Acknowledging that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,"[355] Cover proposed looking at how noncourt actors contributed to

355. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

shaping the normative universe—the "nomos"—as a way to understand how constitutional norms change: what he referred to as the process of "jurisgenesis." Drawing on Cover, prominent scholars took tentative steps to reclaim law as a force for social integration, while being sensitive to imposing dominant meanings on diverse social interests. Echoing the call of CRT scholars, and drawing upon law and society studies of legal consciousness, Martha Minow argued for grounding legal interpretation in the language and practices of ordinary people to reconstruct communities of meaning that would give new content to legal rights in socially just ways.[356] In her view, looking to the "bottom" responded to the indeterminacy critique by "treating rights as a particular vocabulary implying roles and relationships within communities and institutions, [suggesting] how rights can be something—without being fixed, and can change—without losing their legitimacy."[357] Identifying legal pluralism spotlighted the resistance strategies of subordinated people and suggested that building on their legal meanings could lead to larger social change. Yet, for scholars focused on structural reform, legal pluralism remained too focused on grassroots legal mobilization outside of institutional politics and thus continued to beg the question of how bottom-up interpretative practices could be connected to a state-oriented politics of progressive transformation.

Within constitutional law, there was a discernible shift in perspective and methodological focus. If top-down, heavily theorized constitutional law was at a conceptual dead-end, then perhaps looking to the bottom for constitutional meaning would provide an exit. Out of Cover's concept of "jurisgenesis," a distinctive constitutional approach began to emerge, one that found power in the assertion of alternative constitutional claims by ordinary citizens. Latching onto the critical insight that law was "relatively autonomous" from society and therefore could be seized, converted, and reframed by the subordinated,[358] scholars began outlining a program that linked popular mobilization to legal reform.

In this vein, scholars widened their analyses beyond the court, looking instead to lawmaking practices of the "people" who created constitutional change from the bottom-up. Rather than political theory, scholars embraced history from below, using studies of local—often nonelite—actors to

356. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1910 (1987).
357. *Id.* at 1892.
358. *See* Tomlins, *supra* note 18, at 49, 51.

demonstrate how legal reform percolated up.[359] Bruce Ackerman helped ignite this new movement with a theory of constitutional amendment "beyond Article V" effectuated by mass citizen action that culminated in "constitutional moments" in which policy makers and courts adopted new legal interpretations denied by prior generations.[360] Ackerman, whose first volume of *We the People* was published in 1991, sought to reconcile judicial review with democracy by differentiating "normal politics" from "constitutional politics."[361] In periods of normal politics, the Supreme Court served its democratic function by exercising judicial review to support the constitutional values produced in the prior period, even if that meant striking down the legislative products of normal politics. In times of constitutional politics, old values were contested and revised by "new majorities" that transformed constitutional orders through "higher lawmaking": the founding, Reconstruction, and the New Deal were the key exemplars.[362] In these moments, it was politics from below that mattered, though Ackerman was less interested in mechanisms of grassroots change (or who precisely was in the lead) than in identifying its essential role in constitutional development. The key move was to repudiate the salience of the countermajoritarian difficulty by reframing constitutional decisionmaking as validating the higher lawmaking choices of the people. As Ackerman argued, "the courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep support for their innovations."[363] In this view, if the "citizenry" did not like the court's direction, it could mobilize again to create a new order.

Other scholars of citizen mobilization were less theoretically ambitious, but more grounded. Randall Kennedy's legal history of the Montgomery Bus Boycott was a pointed rejoinder to critics of legal liberalism, choosing to fight them on ground they valued most: grassroots social movement activism.[364] In Kennedy's telling, "[l]itigation served as the

359. A critical intervention here was Forbath's magisterial history of the pre-New Deal labor movement. *See generally* FORBATH, *supra* note 36.

360. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15–17 (1998).

361. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 7 (1991). For critical reviews, see generally Jane S. Schacter, *A Moment for Pragmatism*, 113 MICH. L. REV. 973 (2015), and Sidney Tarrow, *The People Maybe? Opening the* Civil Rights Revolution *to Social Movements*, 50 TULSA L. REV. 415 (2015).

362. ACKERMAN, *supra* note 360, at 40.

363. ACKERMAN, *supra* note 361, at 10.

364. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989); *see also* Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 LAW & HIST. REV. 59, 61 (1991) ("This

Negro's most successful and aggressive form of political activity throughout the first half of this century."[365] To prove this, he highlighted several important ways that law mattered to the boycott. For example, when Martin Luther King, Jr. was prosecuted for participating in the boycott, his lawyers transformed the court into "an empowering forum."[366] The Montgomery Improvement Association's lawsuit against the bus segregation ordinance succeeded at the moment the city was set to enjoin the boycott itself such that "without the suit and the eventual support of the Supreme Court, the boycott may well have ended without attaining any of its expressed goals."[367] In addition to sustaining the boycott, the lawsuit "helped to create a state of mind that was absolutely essential to the Movement, a consciousness that King articulated with more power and grace than anyone: a sentiment of righteous outrage."[368]

James Pope similarly drew upon grassroots study to push back against the CLS claim that rights were demobilizing by showing how radical labor leaders went "outside the formally recognized channels of representative politics" to assert their own "constitution of freedom" in which the right to strike was protected under the Thirteenth Amendment.[369] However, unlike Kennedy, Pope's story of "constitutional insurgency" presented a negative role for movement lawyers, who sought to soften the activists' radical interpretation by presenting their arguments in free speech terms—undermining labor's most radical aspirations.[370]

Yet Pope's idea of studying "legal consciousness . . . from the bottom up" began to catch on.[371] Jack Balkin argued that "to understand the

study of the Montgomery bus boycott illustrates the pervasiveness of law in the modern struggle for racial justice that we call the civil rights movement. At each juncture, law served as a political weapon in the arsenal of each side. Ultimately, litigation determined the success of the boycott."). For a first-hand account of the boycott, see FRED D. GRAY, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM (1995).

365. Kennedy, *supra* note 364, at 1064. "King and his associates met defeat of various sorts in the legal arena. But much of the current thinking about law and its relationship to the Movement unduly minimizes the benefits that blacks received through their participation in state and federal judicial forums." *Id.*

366. *Id.* at 1065.

367. *Id.*

368. *Id.*

369. James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943–44 (1997).

370. *Id.* at 943, 958–59. In this view, the radical rights consciousness of the grassroots leadership conflicted sharply with that of its lawyers, who were "embedded in a robust professional culture that sets them apart from movement leaders as well as activists." *Id.* at 958.

371. *Id.* at 958. For other important contributions in this vein, see generally Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005), and Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, 76 N.Y.U. L. REV. 1456 (2001).

Constitution's proper role in forging a democratic culture, we must understand something about the nature of social hierarchies and how social groups struggle for power and status within those hierarchies."[372] In terms echoing earlier realist themes, progressive scholars developed theories of minimal judicial review that were designed to leave open space for precisely this type of "struggle for power." Robin West expressed lingering progressive skepticism of judicial review, arguing that "the appropriate forums for progressive constitutional advocacy under the Fourteenth Amendment should be Congress and state legislatures, rather than the courts."[373] Paralleling West's call for avoiding the "adjudicated Constitution," Cass Sunstein argued for judicial decisions to be "narrow rather than wide" and "shallow rather than deep" in order to reduce the burdens of decisions and costs of judicial mistake, thereby giving fuller scope to the democratic process.[374] Mark Tushnet, an earlier champion of CLS trashing, argued against the notion that the Court was always supreme, positing rather that "disagreements over the thin Constitution's meaning are best conducted *by the people*, in the ordinary venues for political discussion."[375] This scholarship was notable for both its faith in democratic politics to ultimately get the issues right and also its newfound engagement with empirical social science. In defending their theories, both Sunstein and Tushnet focused on judicial errors and the risk of political backlash. Within this literature, the question was no longer what courts should do, but what they actually did—leaving Erwin Chemerinsky to ask whether progressives were "losing faith" in the progressive promise of judicial review.[376]

### 2. Decentering Lawyers in Professional Theory

Scholars of the profession also responded to the critiques of lawyers leveled during the period of critical legalism.[377] One strand of criticism centered on

372. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2315 (1997).
373. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 1 (1994).
374. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–11, 46 (1999).
375. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (1999).
376. Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1416 (2000).
377. For a definition and analysis of the "professionalism problem" during this period, see Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 284–85 (1998), which argues that the professionalism problem clusters around a critique of amoral

representation, raised both by Bell in the context of public interest lawyering and by clinical scholars writing about poverty lawyering.[378] This literature highlighted the risk of lawyer overreach and generally offered a version of lawyering that emphasized client control. As one poverty law scholar put it, "[t]oday, we question anyone's right to make . . . an attempt to speak for those who have not spoken for themselves."[379] The second critical strand focused on legal efficacy. On one side, scholars continued to express skepticism that litigation, now seen as a "dysfunctional family member,"[380] could make a difference in movements for social change.[381] On the other side, building on Handler's broadside against the "micropolitics" of poverty law theory, scholars asked whether the focus on client autonomy and empowerment could scale up to the kind of structural challenges associated with legal liberalism.[382] These two critiques were, of course, deeply interconnected. Was it possible for lawyers to advance progressive social change while staying accountable to clients?[383]

Reacting against the critical literature, some scholars sought to rebuild an image of progressive lawyers as deeply sensitive to community needs,[384]

advocacy on the one hand, and on the other, around critical analyses of lawyers unhappy with the structure of their work and barriers to access to justice.

378. *See generally* Bell, *supra* note 257; *see also* Simon, *supra* note 10. Other scholars expressed similar concerns about the power dynamics of legal representation in different contexts. *See* Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW, *supra* note 213, at 115, 117 ("[I]f advocacy constructs identity, if it generates a script that identity bearers must heed, and if that script restricts group members, then identity politics compels its beneficiairies. . . . It begins to look like power."); *see also* Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329, 330 (2006).

379. Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 TENN. L. REV. 1065, 1067 (1997).

380. *Id.* at 1068.

381. STEVE BACHMANN, LAWYERS, LAW, AND SOCIAL CHANGE 39 (2001) ("Organized masses of people, not lawyers, play the critical roles, and the significant victories (or losses) occur outside of the sphere of law.").

382. *See* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 455 (2001).

383. For different perspectives on this question, see generally Madeleine C. Petrara, *Dangerous Identification: Confusing Lawyers With Their Clients*, 19 J. LEGAL PROF. 179 (1994–95); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996); and Lucie White, *"Democracy" in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997).

384. *See* Karen L. Loewy, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869, 1891 (2000) (concluding that "lawyering for social change is . . . legitimate" because the law is a "reflection of social morality and the role of the lawyer in the legal profession supports" it, while concerns about domination can be "assuaged by taking measures to level power differentials between lawyers and clients and by examinging the exceptions to the usual functioning of the democratic system").

while still wielding law to reshape power in "politically depressing" times.[385] The early steps were tentative: With public interest law deeply contested, scholars searched for a new frame that might capture the type of activist work that lawyers sought to pursue. A 1995 symposium at Harvard Law School brought together some of the leading thinkers who proposed a variety of frameworks for melding accountability and efficacy—while reframing the very terms of the debate. As public interest law had been hopelessly contested by the right and delegitimized by its association with legal liberalism, scholars explored other meanings. Minow offered the concept of "political lawyering" to capture the notion of "a lawyer collaborating with disadvantaged people, not serving them from a distance. . . . [A] lawyer helping people with little power claim their rights as well as their authority to take action."[386] The idea was both to emphasize the collective nature of representation and political struggle,[387] and to distance lawyering from test-case litigation. As Minow put it: "Political lawyers use litigation, legislation, mass media, and social science research, assessing the consequences of each particular approach by reference to long-term visions of freedom, equality, and solidarity."[388] In dark times, lawyers were urged to "help invent new forms of coalition politics," while striving to "bear witness and name what happens to people, even or especially when all else seems impossible."[389]

Echoing these themes, Bellow emphasized how his own work had spanned courts and other domains, sometimes ignoring "litigation entirely in favor of bureaucratic maneuvering and community and union organizing. Even when pursuing litigation, we often placed far greater emphasis on mobilizing and educating clients, or strengthening the entities and organizations that represented them, than on judicial outcomes."[390] Connecting this deemphasis of court-centered advocacy with a rejection of lawyer neutrality, Bellow asserted that "[w]e were not detached professionals offering advice and representation regardless of consequences; we saw ourselves responsible for,

385. Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 323 (2007).

386. Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. REV. 287, 288 (1996).

387. *See id.* (referencing Hannah Arendt to invoke a notion of politics in which "all people can participate in this fundamental activity, and . . . express the ideals of freedom and equality").

388. *Id.* at 289.

389. *Id.* at 290, 294. For Minow's explication of the role of law in progressive politics, see generally Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171 (1993).

390. Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300 (1996).

and committed to, shaping those consequences."[391] Social vision was crucial, necessary to avoid unreflective practice that legitimated the status quo, but that vision had to be shaped in "enduring alliance between server and served" in a way that "generates bonds and dependencies" and "permits us to talk seriously about purposive judgment—when and whether to intervene or seek influence—in situations in which one has unequal power in a relationship."[392] In a similar vein, Louise Trubek advocated for building collaboratives embedded in communities where sustained lawyering effort would advance community-directed goals,[393] while Jennifer Gordon argued for a "worker-led movement for better communities and better lives," in which the first step was the organizational development of "a strong, democratic organization run by workers."[394] In Gordon's view, there were "dangers" in relying on legal services because such services promoted passivity and because legal solutions were not "long-term" as employers could "change their policies in response to a complaint or lawsuit."[395] Nonetheless, law was important as a means of educating workers and empowering them with the knowledge to run and sustain their own organization to build power.[396]

These themes fed into an emerging discussion of "community lawyering."[397] This literature reflected both a move away from litigation (responding to the problem of efficacy) and toward community (responding to the problem of accountability), and was visible across substantive areas.[398]

391. *Id.*
392. *Id.* at 302–03.
393. Trubek, *supra* note 383, at 419–33 (describing the "client nonprofit," which integrates lawyering into its operation, and the "social justice law firm").
394. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 438, 447 (1995) (describing "how the law could function to *support* organizing campaigns").
395. *Id.* at 437, 440.
396. For a similar argument in the environmental justice context, see Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 707 (1995), which describes a model of advocacy designed to "create an active, powerful community presence that can wield political influence."
397. *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229 (1999); *see also* Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 148 (2000); Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008).
398. Environmental justice was an early exemplar, built around the idea of community mobilization against the siting of environmental hazards in low-income communities of color. Environmental justice had to rely on leveraging legal frameworks, like environmental review processes, to facilitate political mobilization in a context in which there were few, if any, affirmative rights to claim. *See, e.g.*, LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL

Scholars promoted the provision of nontraditional services to community "partners" to allow "community members to set their own goals and choose their own methods."[399] The community was defined as "people united by common geographical proximity as well as to a significant extent by race, experience, and cause."[400] And lawyering in this vision spanned a broad range of practical roles: "mediator, facilitator, problem-solver, collaborator, or statesman."[401] The aspirations of community lawyering were cast in broad terms:

> Rights and remedies may be more effectively enforced. The physical conditions of a neighborhood may be improved, including the availability and condition of housing and other services. . . . Feelings of pride, connectedness, and power . . . may be increased. Individuals may develop the skills, knowledge, and motivation necessary to continue building their communities and solving problems.[402]

This shift to the local community level reflected dissatisfaction with legal liberalism, but also changing political reality. As 1980s deregulation gave way to 1990s devolution, there was greater scope for legal intervention in systems of local governments, often conducted in connection with nonprofit organizations engaged in service delivery and community economic development.[403] Yet even at the community level, familiar political and practical disputes reemerged. Focusing on community development, some scholars

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RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 153 (2001) (describing a decentralized, collaborative approach to environmental advocacy which endows individuals with "self-confidence and increased capacity"); *see also* Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to Be Rebellious Lawyers in the '90s*, 4 B.U. PUB. INT. L.J. 1 (1994); Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67 (1994); Diane Schwartz, *Environmental Racism: Using Legal and Social Means to Achieve Environmental Justice*, 12 J. ENVTL. L. & LITIG. 409 (1997). For a description of community lawyering in the public defense context, see Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004).

399. Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 445 (2002).

400. *Id.* at 450.

401. *Id.* at 451.

402. *Id.* at 453.

403. *See generally* Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45 (2002); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249 (2004); Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 GEO. J. ON FIGHTING POVERTY 75 (1996); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L.REV. 825 (1992).

identified models of "lawyering for empowerment,"[404] in which the goal of lawyers was to keep client groups out of entanglements with governmental and private sector actors. Others, pivoting toward "new governance," embraced the progressive possibilities of public-private partnerships,[405] promoting local political collaborations, multidisciplinary practice,[406] and nonrights-based approaches to solving social problems.[407] As this debate underscored, the move toward community-based organizational representation reflected ongoing concerns about whose voices counted in defining and executing community goals, and whether the lawyer could ever stay neutral in the construction of community interests.[408]

Building on these discussions, scholars within the critical tradition of the prior wave of clinical scholarship sought to clarify and reposition its aims by differentiating it from the negative critique of lawyers and tying it to an affirmative program of collaborative social change attuned to structural subordination. In this vein, Ascanio Piomelli argued that the core of what he termed the "collaborative" vision of lawyering was not critique but a "call to involve clients in the actual *implementation* of remedial strategies. Clients not only get to decide what their lawyer will do, but they participate in carrying out those decisions, often by speaking out on their own behalf and/or working with community groups."[409] Echoing earlier discomfort with

404. Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999).

405. *See* Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575, 575.

406. Louise Trubek was a prominent advocate of multidisciplinary collaboration. *See* Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455, 465; Louise G. Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 FORDHAM URB. L.J. 1739, 1745 (2001); *see also* Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000).

407. Simon, *supra* note 10, at 178 (emphasizing the "rhetoric of problems and solutions").

408. While some scholars were comfortable with lawyers collaborating with community members to construct ultimate objectives, others remained skeptical of lawyer overreaching. *Compare* Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000), *with* Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

409. Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 440 (2000) [hereinafter Piomelli, *Appreciating*]; *see also* Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 456, 459 (describing efforts to "jointly strategize with clients about how to frame stories and arguments . . . to look for opportunities to boost the status and role of clients" and understanding lawyer expertise as "one potentially relevant set of skills among many"). For different views of collaboration, compare Blasi, *What's a Theory For?*, *supra* note 350, at 1078–79, which advocates for deference to lawyer expertise in some situations in which there is conflict between the lawyer's view and the client community's

elite representation, the emphasis was on promoting direct democratic engagement, not change through professional leaders: "It is a vision of society and social change that values participatory democracy and broadly-based popular political mobilization over professional-driven efforts to craft and implement wise and attainable reform."[410] Collaborative lawyering theorists questioned the efficacy of impact litigation and stressed the power of the people to shift politics through collective action.[411]

The new poverty law scholarship developed alongside, and increasingly interacted with, a law and society literature that sought to redirect the study of lawyering along empirical lines. This empirical impulse was spurred by the seminal research of Austin Sarat and Stuart Scheingold, who beginning in the late 1990s convened scholars across law and social science to investigate what they termed "cause lawyering." Their theoretical framing linked the social scientific study of legal practice to discussions of legal ethics: A cause lawyer was a "moral activist" who shared "with her client responsibility for the ends" of the representation,[412] thus contesting what Simon had called the "ideology of advocacy."[413] This framing positioned cause lawyers as both vindicating professionalism and calling it into question. The cause lawyer's attempt to "reconnect law and morality" made "tangible the idea that lawyering is a 'public profession,'" but also threatened that ideal by "destabilizing the dominant understanding of lawyering as properly wedded to moral neutrality and technical competence."[414]

As a result of this framing, the project focused on the "causes" and content of cause lawyering[415]: why lawyers undertook it and what their work looked like.[416]

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view, with Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 460 (1993), which argues for "shared decision making by fellow collaborators."

410. Piomelli, *Appreciating*, *supra* note 409, at 454. Katherine Kruse associates the interest in democratic theories of lawyering with the "jurisprudential turn" in legal ethics. *See* Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 493 (2011).

411. *See* Piomelli, *Appreciating*, *supra* note 409, at 456 n.139 ("Collaborative lawyering theorists are not the only ones to question the efficacy of impact litigation." (citing GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991))).

412. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 3 (Austin Sarat & Stuart Scheingold eds., 1998).

413. Simon, *supra* note 56.

414. Sarat & Scheingold, *supra* note 412, at 3.

415. Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING, *supra* note 412, at 31.

416. *See* Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 96

Toward this end, the project emphasized the complex relationship of legal autonomy to notions of cause lawyering:

> Law must somehow and to some extent trump politics if cause lawyering is to be successful. But in order to accomplish anything substantial, cause lawyers must necessarily become embroiled in controversial issues of politics and public policy. In so doing they put the legitimacy of an independent law at risk and thus subject their project to backlash and to the *force majeure* that is at the disposal of the state.[417]

In this way, law was an opportunity and constraint—an "arena of struggle."[418] Although not initially focused on the relation between lawyers and social movements, Sarat and Scheingold noted that some cause lawyers "wish to go beyond defensive strategies . . . to ally themselves with, or become a part of, social movements," yet they recognized that with "left wing movements in so many nations in such disarray" there were "two equally unattractive options": reduced expectations or futility.[419] The cause lawyering research was incredibly generative, powering a renaissance of the field. However, it did so in a way that also circumscribed analysis by organizing investigation around understanding the motivation and roles of lawyers, and thus the literature generally avoided inquiry into the social and political consequences of legal mobilization. Moreover, by defining the cause lawyer in contrast to the conventional lawyer—the latter commited to Simon's "ideology of advocacy"—Sarat and Scheingold distorted analysis by creating an either-or paradigm that missed Simon's central point: Lawyers were never neutral.

The cause lawyering project stimulated interest in differentiating and categorizing types of cause lawyering, both in terms of approaches to client relations and tactical emphases.[420] Outside of the formal boundaries of that project, scholars similarly worked to distinguish the various ways that lawyers deployed expertise in the service of social change—moving away from the impact litigation model—while also reclaiming litigation as a productive tool. Broadening the meaning of advocacy, scholars suggested how lawyers worked at multiple levels in various domains to pursue change for marginalized

(Austin Sarat & Stuart Scheingold eds., 2001); Stephen Ellmann, *Cause Lawyering in the Third World*, *in* CAUSE LAWYERING *supra* note 412, at 349.

417. Sarat & Scheingold, *supra* note 412, at 8 (footnote omitted).

418. *Id.*

419. *Id.* at 9.

420. *See* Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 664 (2004).

constituencies.[421] Law reform litigation came in for reconsideration,[422] particularly as the growing LGBT rights movement used litigation to advance equality claims while assiduously attempting to avoid the pitfalls of legal liberalism. Reacting against the "myth of rights,"[423] in which lawyers naively believed court decisions would change society, scholars emphasized the process of legal mobilization, in which law generally and litigation specifically were deployed as tools to advance discrete political goals.[424] From this vantage point, scholars reexamined lawyer expertise against the backdrop of new test-case litigation. For example, in the context of emerging LGBT rights litigation, William Rubenstein advocated lawyer expertise over strategic litigation decisions in contexts where there were mechanisms to assure that the ends pursued reflected the majority interests of the constituency.[425] However, as Rubenstein's intervention highlighted, deep disagreements over the meaning of accountability and the utility of litigation persisted, with proponents of law reform lawsuits more comfortable with lawyers exercising professional control, while community lawyering advocates remained skeptical of litigation-centered strategies that impeded democratic participation and robust client decision making. In this debate—where the fault lines often mapped onto identity-based divisions—disputes over client and community participation

421. *See* Barbara L. Bezdek, *Reflections on the Practice of a Theory: Law, Teaching, and Social Change*, 32 LOY. L.A. L. REV. 707, 715 (1999) ("Social . . . should be understood by law teachers to encompass the substance and ferment of familiar 'movements.'"); Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 561 (1998) (arguing that political change "requires us to focus on alternative and multiple strategies for reducing poverty"); Loewy, *supra* note 384, at 1878 (showing that "multi-layered strategies of legal advocacy organizations recognize the necessity for these different approaches"); *see also* Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173, 177 (2001).

422. *See* Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1144 (1995) (calling the NAACP's litigation work "transformative in purpose, yet cunningly incremental in execution").

423. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (Michigan University Press 2004) (1974).

424. In this respect, legal scholars borrowed from Michael McCann's seminal sociolegal work on legal mobilization. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 5 (1994). For an important application in the LGBT rights context, see MARTIN DUPIUS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION AND THE POLITICS OF RIGHTS (2002).

425. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1675–80 (1997). Peter Margulies offered a novel approach to addressing concerns about the adequacy of representation in the class action context that focused on predicting and reacting to how defendants pursued institutional exit and how the intersection of different strands of identity created de facto subclasses. Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 NYU REV. L & SOC. CHANGE 487 (1999).

were intrinsically tied to disputes over whether court decisions could produce meaningful social change: Those who believed that top-down litigation could address important legal barriers to equality were willing to sacrifice some community input to advance law reform, whereas those who believed that transformation had to come from the bottom-up were dubious that even short-term investments in law reform litigation were worth the cost to building the consciousness and capacity of marginalized communities.

Therefore, at the cusp of the new millennium, scholars still struggled to link together visions of lawyering that could reconcile transformative social change with accountable client service.[426] Social movements began to emerge in these conversations, but on the margins: as aspirations, not central actors.[427] Within progressive legal thought, the vision of law as a cooptive force, limiting social transformation and locating power in the hands of legal elites, continued to hold sway. Although scholars had decisively rejected top-down visions of social change in favor of pragmatic bottom-up strategies that avoided the foundational critiques of courts and lawyers, they had yet to articulate an affirmative vision of how to connect bottom-up legal struggle to broad-based structural reform. Reflecting on this state of affairs, Orly Lobel criticized progressive scholars for moving "outside" the law, arguing that by abandoning transformative visions of law "in service of indirect effects," progressives risked ceding law as a "vehicle[] for conservative agendas."[428]

426. *See*, *e.g.*, Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155 (2006) (emphasizing lawyer responsibility to democracy); *see also* Michelle N. Meyer, Note, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 HARV. L. REV. 1510, 1528 (2006) (proposing to address the tension between cause and client by gaining the client's consent as a human subject, in which the client decides "that the potential benefits of being a cause plaintiff outweigh its risks").

427. *See* John O. Calmore, *"Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization*, 37 LOY. L.A. L. REV. 1167, 1204 (2004) ("Where and how does the lawyer enter the movement building and dynamics?"); Eric Mann, *Radical Social Movements and the Responsibility of Progressive Intellectuals*, 32 LOY. L.A. L. REV. 761, 766 (1999) (describing work of bus riders union challenge to city monthly bus pass and fare increase, in which "law as a tactic . . . is part of a broader strategy of building a multiracial, working class movement"); David R. Rice, *The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle*, 26 ENVIRONS 187, 194–97 (2003) (showing how the union integrated legal tactics into a wider repertoire of social movement activism); Austin Sarat, *Recapturing the Spirit of* Furman*: The American Bar Association and the New Abolitionist Politics*, LAW & CONTEMP. PROBS., Autumn 1998, at 5, 13–22 (reviewing work of new death penalty abolition movement and role of lawyers within it); *see also* Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 249 (1995) (promoting "the case for common cause between unionized workers, nonunion low-income earners, welfare recipients, and other groups represented by labor lawyers, Legal Services attorneys, welfare rights advocacy groups, community economic deveopment projects, civil rights organizations, and the public interest bar").

428. Lobel, *supra* note 6, at 959, 971.

As Lobel's analysis captured, the fundamental question for progressive scholars in the new millennium was whether law could be reclaimed as a tool of progressive social change while avoiding mistakes of the past. To move beyond the stultifying "critical legal consciousness" that had engulfed progressives in the wake of legal liberalism,[429] the challenge for scholars was to reimagine a program that encompassed a productive and meaningful role for courts, while acknowledging their political and practical limits; that leveraged lawyer expertise and commitment to social justice causes, while still keeping marginalized people at the forefront of agenda setting and strategic decision making; and that devised practical strategies to mobilize in favor of broad political transformation, while appreciating and building upon the contributions that legal reform could make. Moving forward along a different path would require repairing the fractures that had developed among progressive legal thinkers in the last half of the century or, at least, holding a genuine conversation about their internal divisions in a way that could deepen mutual understanding and exchange. This would require an effort to locate the benefits of litigation and adjudication within a framework of grassroots participation and organization, in which law would be shaped in response to, and thereby better serve, the interests of mobilized groups of marginalized people. Overall, the effort would need to embrace the importance of law to progressive social change, while ensuring that it was subsidiary to political struggle—a tool to be used by social movements or a target of their mobilization in the streets, but never as an end in itself. In short, reclaiming the transformative potential of law would mean once again seeking to define a solution to the law-politics problem for a new political age.

## III. THE LEGACY OF LEGAL LIBERALISM: BEFORE SOCIAL MOVEMENTS IN LAW

During the first half of the twentieth century, through the immediate aftermath of *Brown v. Board of Education*,[430] progressive legal scholars generally viewed lawyers as essential partners, and sometimes even leaders, in advancing a transformative and inclusive vision of law in American society. As the last Part argued, that scholarly perspective was fundamentally contested as the rise of political conservativism challenged the gains progressivism had achieved through the New Deal and Civil Rights Movement. The primary legacy of

429. *Id.* at 937.
430. 347 U.S. 483 (1954).

legal liberalism through the second half of the century was a fundamental skepticism about the power of law to change society in progressive directions—feeding into a prescriptive account of the limited role that lawyers and courts should play in progressive political projects. That skepticism rested in part on implicit empirical claims about what lawyers did and how effective court decisions were, but underlying the skepticism were fundamentally different views of the relation between law and politics. Could law meaningfully advance a different vision of society? Did it legitimate the status quo? Or was it a pragmatic tool—one among many—in ongoing struggle?

As legal scholarship in the new millennium came to focus on the role of social movements as legal actors in their own right,[431] creating new legal norms and shifting politics to effectuate them, these questions about the relation of law to politics would resurface in a different guise. The goal of this Part is to set the table for the contemporary debate over the role of social movements in constitutional law and legal profession scholarship—what I have labeled the "social movement turn in law"[432]—by outlining the critical takeaways from legal liberalism's legacy that have shaped the social movement literature. Its basic method is to reflect backward on the history presented in Part II to distill lessons at a higher level of theoretical generality. The contribution of this Part is to deepen understanding of the intellectual inheritance of legal liberalism at century's end, which shaped three important elements of progressive legal scholarship: (1) academic obsession with foundational critiques about law and lawyers' role in social change, matched by a failure to engage across disciplinary lines with critical social science perspectives on the barriers to social change outside of law; (2) persistent scholarly disjuncture between high-end constitutional law theory and ground-level lawyering theory, despite strikingly similar concerns about the role of law in progressive reform; and (3) entrenched internal discord among progressive scholars about the appropriate relationship between law and progressive politics.

### A. Foundational Critiques

One of the most important legacies of legal liberalism is the persistence of critical visions of law and lawyers in the pursuit of progressive social change. A key claim of this Article is that the enduring power of these foundational critiques, which emerged most prominently in the period of critical

431. *See, e.g.*, sources cited *supra* note 3.
432. Cummings, *supra* note 11.

legalism, have set the basic parameters for progressive legal debate—and help explain the current rise of social movements in law. As a testament to the power of the foundational critiques, when contemporary progressive scholars talk about the role of courts and lawyers in progressive political projects, legal liberalism is omnipresent as either a case to defend or distinguish. For example, in their recent article on *Roe v. Wade*,[433] Linda Greenhouse and Reva Siegel take issue with the legal liberal view that the Supreme Court's decision produced backlash by showing how, even before the case reached the high court, strategists for the Republican Party were using the abortion issue to recruit social conservatives, revealing how "conflict escalated without the intermediation of judicial review."[434] Civil rights historians, like Susan Carle and Kenneth Mack, have recovered alternative histories of civil rights lawyers and activists before *Brown* that suggest how, in Mack's terms, "the legal liberal interpretation of civil rights history is a myth."[435] In a similar vein, scholars of lawyering practice, such as Sameer Ashar, have stressed how—in contrast to legal liberal concerns about client disempowerment—contemporary public interest lawyers in certain social movement contexts are "less likely to subordinate clients."[436]

It is precisely the effort progressive scholars exert to push against the critical views of courts and lawyers that underscores their gravitational force. The critiques of courts and lawyers, emerging out of progressive scholarship, have become "foundational" in the sense that they serve as anchors that continue to orient contemporary debates—even as the world of politics and professional practice has changed dramatically since their invocation, and even as some scholars suggest that the critiques were never fair or accurate portrayals of mid-century progressive legal practice to begin with. As Part II recounted, the seeds for these foundational critiques, planted in the period of legal realism, sprouted after the decline of the civil rights movement, and became associated with concerns that court and lawyer activism risked damaging the legitimacy of the legal system while coopting the power of social movements. These critiques of lawyers and courts have become an academic obsession among progressive legal scholars at the very same time these scholars have largely ignored parallel critiques of social change outside of law through social movements.

433. 410 U.S. 113 (1973).
434. Greenhouse & Siegel, *supra* note 3, at 2033.
435. Mack, *supra* note 9, at 258; *see also* CARLE, *supra* note 70, at 5.
436. Ashar, *supra* note 3, at 1918.

This has happened because legal scholars are more interested in understanding the relation of law to politics than in investigating the complexities of politics itself. In this regard, Part II's account of progressive legal thought is important for capturing how the foundational critiques came to be framed in the literatures most relevant to progressive scholarship on courts and lawyers (constitutional law and the legal profession), and highlighting how those critiques relate to underlying concerns over the law-politics problem. As that Part detailed, progressive scholarship in the 1970s and 1980s launched twin critiques of law. One was a critique of court-oriented reform that centered on its efficacy: In its strongest version, the argument was that rights mobilization was not simply ineffective, failing to change behavior on the ground,[437] but that it was actively harmful, "legitimating" existing institutional arrangements in ways that limited the progressive political imagination and diverted energy away from social movements.[438] At the very same moment, scholars of the legal profession and lawyering sharpened their critique of lawyer accountability, an argument articulated with force by Derrick Bell with respect to class actions and amplified by poverty law scholars in the context of individual representation.[439] Here, the critical idea was that progressive lawyers' discretion to set political goals or construct legal claims in litigation allowed them to make decisions that often did not align with the best interests of marginalized clients and their communities.

The point to stress is that each of these critiques revolved around a particular reading of the law-politics problem. With respect to legal efficacy, the critique that emerged from the legal liberal period was that by overstepping the law-politics line—by using adjudication to resolve policy disputes—courts interfered with politics in ways that undercut its progressive potential. This critique cut from both the center and the left, with process-oriented scholars stressing the legitimacy costs and potential backlash from judicial overreaching,[440]

437. The idea that court decisions did not produce social change on the ground came out of a related sociolegal literature on the limits of court reform. *See* ROSENBERG, *supra* note 411, at 338; SCHEINGOLD, *supra* note 423, at 91.

438. *See* Freeman, *supra* note 193; Gordon, *supra* note 213; *see also* Simon, *supra* note 10, at 146 (stating that one critique of legal liberalism is "that the recognition and even enforcement of legal rights for the disadvantaged is unlikely to significantly improve their well-being in the absence of reforms fundamentally altering the distribution of wealth and power"). For an excellent synthesis of these critical views, see Lobel, *supra* note 6, at 948–58.

439. See Bell, *supra* note 257, and the discussion of poverty law scholarship, *supra* Part II.C.2.c.

440. This argument was made most forcefully in Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82–83 (1994), which argues that *Brown* caused backlash that set the civil rights movement back in the short term.

while left critics argued that overinvestment in law reform legitimated liberal individualism and undercut more radical solidaristic action.[441] Even as scholars in the 1990s adopted a bottom-up view of constitutional law development that emphasized the pragmatic engagement between citizen action and legal change, they offered a view of courts as reactive and circumspect: In contrast to accounts of courts on the forefront of social change, prominent progressive scholars stressed theories of "judicial minimalism" and advocated "taking the constitution away from the courts."[442]

With respect to lawyer accountability, the critique was that lawyers were insufficiently neutral relative to client ends—or, at least, that they permitted their own commitments to interfere with the goal of best representing the interests of clients and the broader disadvantaged constituency. Again, this critique emanated from different ideological positions. In the center, it originated from those who believed in a conventional view of legal professionalism—emphasizing client autonomy as the lynchpin of systemic legitimacy—and who therefore stressed the role of lawyers in presenting the most unfiltered view of client goals to decision makers.[443] On the left, scholars in the emerging CRT and poverty lawyering fields, while recognizing the problems with lawyer neutrality, believed that the lawyer's best chance to advance social change was to choose a political stance of client empowerment that deemphasized lawyer control in ways that resonated with the neutrality view.[444] To be clear, CRT and poverty law critics of lawyer accountability—from Derrick Bell to Lucie White—would have disagreed on political grounds with proponents of "thin" professional identity,[445] but the critics' concerns about the negative impacts of "professional-driven efforts" on "participatory democracy"[446] supported a normative view of lawyering that emphasized the protection of client autonomy. On the other side of this debate, liberal scholars like David Luban believed that lawyer neutrality was a relative good, subject to be overridden by more important substantive political values, while scholars influenced by CLS, like William Simon, argued that the impossibility of lawyer neutrality required that the lawyer's political values be made explicit so that the lawyer could be held accountable to a higher

441. *See supra* Part II.C.1.b and accompanying notes.
442. SUNSTEIN, *supra* note 374; TUSHNET, *supra* note 375.
443. *See supra* Part II.B.2 and accompanying notes.
444. *See supra* Part II.C.2.c and accompanying notes.
445. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 18 (2003).
446. Piomelli, *Appreciating*, *supra* note 409, at 454.

standard of justice. Both views converged around a more muscular vision of public interest lawyering than many left critics were comfortable with.

In the end, as the strongest critiques of legal liberalism were met with more pragmatic accounts of courts and lawyers in which rights and professional expertise were leveraged by community groups in favor of extralegal political change (like raising consciousness or shifting public attitudes), the idea that lawyers (either on the ground or in their judicial capacity) should assume a leadership position in movements for change was essentially defunct in the wake of the scholarly in-fighting that broke out after the decline of legal liberalism. Even those who spoke out to tentatively defend more modest roles for courts and lawyers did so in ways that downgraded lawyers' positions to adjuncts to other social change processes—lagging behind and supporting grassroots activisms, but never out front.[447]

Yet progressive scholars' obsession with the limits of law has carried forward its own blind spots. As this Article has shown, within the constitutional law and legal profession fields, scholars have focused on what they know best—courts and lawyers—finding fault with how each interacts with social activism on the ground. However, in training their critical lens on their own kind, legal scholars have largely ignored analogous limits on and parallel critiques of other actors and institutions in the pursuit social change outside of law. While critical scholars have therefore highlighted the limits of court enforcement and the legitimating effect of court pronouncements on inequality, they have failed to investigate related problems in other domains of policy making (*e.g.*, legislatures and the administrative state). Similarly, while critics of lawyers have rightfully noted their potential for professional overreach and canalization of politics into law, they have not turned a critical lens outward to think as seriously about processes of cooptation in other forms of outsider politics and the accountability risks that they raise.

In short, in making the case against courts and lawyers, progressive scholars have failed to assess the tradeoffs of viable alternatives to legal action. That is, they have failed to engage in a comparative institutional analysis of the benefits of and constraints on political mobilization outside of law. This failure weakens the force of critical legal analysis, which rests on the implicit counterfactual claim that there are avenues of social reform that are better than law. This counterfactual claim, in many cases, may be true. But it is an empirical claim that warrants empirical investigation. There is, in fact, a rich social science literature that raises concerns about the risks of leaders in

447. *See supra* Part II.D and accompanying notes.

professionalized social movement organizations seeking to maintain themselves in power, while pursuing agendas defined by funders and elite stakeholders.[448] And there is a related literature that raises cautionary notes about the potential for movements to be coopted by the conventional political process, making compromises that may allow power holders to claim they support a solution that does not alter facts on the ground and, in Frances Fox Piven and Richard Cloward's terms, "channel[ing] the insurgent masses into normal politics."[449] To put it more pointedly, social movement scholars are also worried about risks of professional accountability and movement efficacy in ways that speak directly to progressive debates over lawyers and courts. Drawing upon this social movement research, one can discern parallel challenges to mobilization for progressive reform through law and through politics—challenges that invite reappraisal of the role of law in transformative social change. Without mutual exchange between legal scholars and their social movement counterparts—and without a critical assessment of the social movement ideal upon which progressive scholars have increasingly relied—the foundational critiques of law remain one-sided: an overreaction to perceived failures of legal liberalism, but not a meaningful basis upon which to analyze current opportunities for reform and chart a viable path forward.

### B. Disciplinary Divisions

Reflecting back on the history of progressive legal thought presented in Part II, a second important legacy is the persistence of disciplinary divisions—both within legal scholarship and across the law-social science divide. The origins and consequences of these divisions—of constitutional law from legal profession scholarship, and of law from social science—are complex and beyond the scope of this Article to fully explore. However, it is important to mark these divisions here and to suggest how they may grow out of and continue to inform ongoing debate over the role of law in progressive social change.

In addition to showing the emergence and persistence of foundational critiques of law as a tool of progressive reform, this Article has also made the case that these critiques have structured debate in two separate fields that are intertwined by their association with legal liberalism. Specifically, the idea of

448. For a foundational piece exploring this theme, see Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327, 327–28 (1966).

449. FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL, at xxii (1977).

legal liberalism as a union of activist courts and activist lawyers in the pursuit of progressive social change has bound together the fields of constitutional law (concerned with the role of courts) and the legal profession (concerned with the role of lawyers). As Part II suggested, identical patterns of critical debate have shaped each field: with mainstream scholars arguing over the desirability of courts and lawyers following "neutral principles"; radical critics advocating the subversion of traditional roles in the project of structural transformation; and pragmatic scholars investigating how courts and lawyers could mobilize rights to promote indirect effects—consciousness raising, organizing, and movement building—on the ground. Yet—and this is the key point—despite these parallels, scholars focusing on courts and lawyers have largely not communicated with one another. As a result, although progressive constitutional law and legal profession scholarship have both grappled with similar questions of legal neutrality post-*Brown*, they have largely done so in separate intellectual spheres with very little cross-fertilization.

This observation invites consideration of the causes and consequences of the constitutional law-legal profession divide. Although deeper investigation would be necessary to prove the point, one possible explanation is rooted in the deep-seated tension over whether the purpose of law school is theoretical inquiry or vocational training. Studies of courts and lawyers have long been separated by a chasm of status within the legal academy, with constitutional law at the theoretical apex—the furthest from practice—while legal profession scholarship has always teetered uneasily on the border between theory and practice. Yet, particularly as both fields have recently become more empirically oriented and as they continue to grapple with the role that courts and lawyers should play in a changing political and professional world, remaining in separate silos may disserve deeper understanding of the core law-politics problem both fields hold in common. For example, to the extent that constitutional scholars debate whether court decisions produce good social reform outcomes (or whether they provoke backlash), it is useful to understand the political context, legal decision making process, and explicit goals espoused by the advocates bringing cases in the first instance. This lawyering context would provide useful information about strategic alternatives and expectations that would inform how scholars might judge the success or failure of specific court decisions. Similarly, to the extent that legal profession scholars focus on how lawyers use litigation or mobilize court decisions to advance broader social movement campaigns, understanding the mechanics of judicial decision making and the relation between court decisions and implementation on the ground would help scholars better

assess outcomes and judge lawyering tactics. In short, mutual exchange between constitutional law and legal profession scholarship could deepen the insights of both fields.

Looking back on progressive legal thought, one can also observe that as constitutional law and legal profession scholarship have remained distant, they have often shared common methodological tendencies—which have included a mutual historical ambivalence regarding empirical social science. As Part II recounted, empiricism was an aspiration of legal realism that was never fulfilled. Post-war legal progressives eschewed empiricism for theoretical defenses of ascendant legal liberalism. Then, in the post-legal-liberal period, empiricism was shunted to the side in a debate that pitted the mainstream liberal embrace of political philosophy against the CLS adoption of critical theory.[450] From the left, part of the retreat from social science corresponded to a reaction against the rise of economic analysis of law as a conservative rejoinder to progressive legal theory,[451] but it also reflected CLS's discomfort with empiricism's ability to ground jurisprudential theory in normative principle, as well as the CLS view of the law and society movement as too closely aligned with legal liberal reformism.[452] And yet, a generation later, as politics have moved far from CLS's radical goals, social science empiricism has become central to contemporary legal scholarship generally—embraced as a critical part of the social movement turn in law.

What explains this pattern and how should it inform evaluation of current social movement scholarship? Again, it is only possible to offer tentative thoughts here, but Part II's historical analysis suggests the answer relates to struggles over scholarly legitimacy within the legal academy. To the extent that the elite legal professoriate has viewed social science as a threat to its control over the meaning of law, it has been marginalized. When social science has been seen as a tool to build law's legitimacy (and that of the intellectuals who define it), it has been embraced. In this way, social science

450. *See* Pierre Schlag, *Critical Legal Studies*, *in* THE OXFORD INTERNATIONAL ENCYLCOPEDIA OF LEGAL HISTORY 295 (Stanley N. Katz ed., 2009); *see also* Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057 (1981).

451. *See* Tushnet, *supra* note 24, at 1208; *see also* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388 (1981) ("[T]he program of generating a complete system of private law rules by application of the criterion of efficiency is incoherent."); Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275 (1981).

452. *See* Hutchinson & Monahan, *supra* note 161, at 200–01; *see also* David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 8 (1990) (stating that law and society had an "implicit programmatic vision which resonated with the projects of liberal lawyers").

importation into law tracks its relation to progressive academic politics. It was a tool for progressives to critique conservative formalists in the *Lochner v. New York*[453] era and to position themselves as the central architects of the New Deal. It became marginalized in the hands of left-wing reformers in the law and society movement of the 1960s and 1970s, who began using empiricism to critique now-mainstream legal liberalism. Theoretical social science was approrpriated by the political right in the form of law and economics in the 1980s,[454] prompting a reaction by both the radical left, which embraced critical theory, and the mainstream left, which turned to history and hermeneutics.[455] Empirical legal studies then coalesced—and became mainstreamed—as a basis for liberal critiques of right-wing economics and as a vehicle for progressive scholars to carry forward the critical conversations started during legal liberalism. In the contemporary social movement turn in law, as scholars have advanced empirically driven analyses of social movements shaping progressive legal practice and adjudication, social science has become the terrain on which progressives debate the core issues of lawyer accountability and legal efficacy.[456]

### C. Progressive Discord

That progressive scholars are turning to empiricism in the new social movement scholarship to reprise ongoing debates over the process and meaning of democratic reform highlights a final legacy of legal liberalism: the splintering of progressive thought around different visions of the relation of law to progressive politics. This section mines the history presented in Part II to map progressive positions on the law-politics problem, presented in Figure 1.

453. 198 U.S. 45 (1905).

454. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973); *see also* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); *cf.* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985) (critiquing constitutional interpretation based on cost-benefit arguments).

455. *See* KALMAN, *supra* note 8, at 101–63.

456. This is the central point I make in *The Social Movement Turn in Law*. Cummings, *supra* note 11.

**FIGURE 1: Progressive Positions on the Law-Politics Problem**

| | Process | Liberal | Critical | Pragmatic |
|---|---|---|---|---|
| **Position in Politics** | • majority<br>• class-oriented | • minority<br>• identity-oriented | • majority<br>• class-oriented | • dynamic<br>• intersectional |
| **View of Law** | • negative<br>• concerned with legitimacy costs of courts acting against majorities<br>• preserve legitimacy through neutrality | • strong positive<br>• concerned with legitimacy costs of courts failing to act against majorities<br>• promote legitimacy through equality | • strong negative<br>• concerned with legitimacy as barrier to radical politics<br>• undermine legitimacy through critique | • weak positive<br>• concerned with legitimacy as a tool for reformist politics<br>• build new visions of legitimacy |
| **View of Politics** | • functional<br>• support majoritarian politics of reform | • partially flawed<br>• support counter-majoritarian politics of reform | • fundamentally flawed<br>• build majoritarian politics of transformation | • partially flawed<br>• support multifaceted politics of reform |
| **Role of Social Movements** | • reform law through institutional politics | • defer to law | • transform political system by mobilizing power outside of institutional politics | • reform law through combination of institutional and non-institutional politics |
| **Role of Courts** | • deferential judicial review in favor of majoritarian politics vs. elite power | • activist judicial review in favor of counter-majoritarianism vs. local politics of identity-based subordination | • generally misdirect radical politics but can be forum for political protest | • useful for leveraging indirect effects |

| | Process | Liberal | Critical | Pragmatic |
|---|---|---|---|---|
| **Role of Lawyers** | • exercise professional judgment in the public interest<br>• independent professional | • represent under-represented interests in court<br>• public interest lawyer | • expose politics of law<br>• radical lawyer | • leverage law to advance constituency goals<br>• cause lawyer |
| **Law-Politics Resolution** | • law independent from politics<br>• policy reform through administrative state | • law trumps politics<br>• law reform through federal courts | • law equals politics<br>• mobilize politics to reshape law | • law relatively independent from politics<br>• mobilize law in different spheres for discrete gains in politics |
| **Period** | • New Deal | • Civil Rights | • Conservative | • Polarization |

Process scholars focus on normative integration around procedural values on which society can build consensus with law's legitimacy based on the strength of these values. The process view sees the democratic system as essentially just and good. From this perspective, the essential democratic threat is from powerful elites to the legitimate expression of majority rule. Thus, in the Progressive Era, the threat was of industrialists dominating politics and the courts in ways that prevented workers and consumers from achieving ameliorative social reforms. In this context, maintaining the legitimacy of law means making sure that it is not distorted by the power of elites and that it aligns with the needs of the masses. Legal neutrality is understood in relation to the threat of elite domination: It is important that courts and lawyers are seen as standing apart from a politics controlled by elite interests and instead facilitate the expression of the public interest. This means that courts generally defer to the other political branches in creating policies that benefit the public. And when the court does exercise judicial review to overturn political decisions, it does so on the basis of neutral principles. The close association of law and public norms means both that norms operate as a strong constraint on state coercion—it is hard for the state to force the people to do something that is contrary to their strongly held views—and that the exercise of judicial review to invalidate legislatively enacted laws must be based on an underlying norm with wide social acceptance—or else risk widespread resistance or noncompliance. The role of

lawyers within this system is to promote normative integration, which is achieved in advocacy through neutral representation and in counseling through the application of independent expertise to promote the public interest.

The liberal view focuses on process defects from the point of view of minority groups that either are not elites or that hold unpopular views. In addition to elite domination of politics, liberals worry about the exclusion and subordination of less powerful groups and interests on the basis of identity, thus undermining pluralism. They view law's legitimacy as both reinforcing widely shared values and keeping democracy's promise to protect those excluded from political power. Legitimacy is therefore tied to the exercise of coercive power to protect vulnerable minorities. The fundamental question for liberals is when courts and lawyers should exercise this power and on what normative ground; they are less confident that institutional specialization (*i.e.*, assigning law reform to the administrative state) works or that neutral principles are ever really available to guide judicial decision making. In this sense, liberals seek to use law instrumentally to require minority protection when it conflicts with majority attitudes, primarily by authorizing countermajoritarian judicial action to enforce civil and political rights. Courts and lawyers are essential to the foundational goal of minority protection and thus liberals are comfortable with the idea of legal elites mediating between minority interests and democratic state institutions, which they view as otherwise well-functioning and just. Liberals acknowledge the legitimacy risks of judicial intervention, but view decision making that advances substantive progressive values as promoting legitimacy. Lawyers in this framework are advocates for underrepresented interests: public interest lawyers self-confident that law can change society for the good.

Critical theorists reject the liberal premise that democracy—at least in its liberal capitalist form—is just and therefore, for them, the key issue is not simply incremental reform but fundamental systemic transformation. The critical view, like the process view, sees the foundational democratic problem in terms of powerful elite domination of the political system and the solution in terms of unleashing the power of the majority of nonelites, viewed primarily through the lens of class oppression. However, for critical scholars, unlike their liberal counterparts, court-centered legal reform can serve as a barrier to structural transformation rather than a complement.

In general, critics agree that the idea of legal neutrality is largely an illusion created by powerful elites to hide the way that their political interests are served through the legal system. They see the ideal of neutrality as itself a powerful social norm that has been inculcated by elites to support the legitimacy of their rule. The power of this normative system is that it makes the use of state

coercion less important to social order; through the machinery of law, elites convince nonelites that the rules serve their interests—when in fact they do not. Legal norms serve to obscure the way that the private sphere is itself a legal construction that justifies coercion by those with social privilege against those without it. Legitimacy, in this view, is a normative façade—"legitimation" in the critical parlance—a product of elite control and obfuscation that hides inequality and impedes social transformation. Courts and lawyers, to the extent that they serve to promote the twin illusions of legal neutrality and legitimacy—even when they purport to be doing so to advance nonelite interests—are ultimately reinforcing a bankrupt status quo. For critics who think primarily in terms of broad-based class interests, the goal of politics is therefore to expose the way that law operates to hide structural inequality in order to clear the way for a new, more just, order to emerge.

In this sense, the critical position is mostly a critique of liberals, who are condemned as incrementalist. Critics agree that pro-progressive judicial decisions, to the extent that they provide some equality and liberty, reinforce legal legitimacy, but argue that is precisely the problem: Because courts can only make change at the margins, investing in legal reform is at best a diversion and at worst a strategy that ultimately strengthens perceptions of the just-ness of the very system producing injustice. Because of this, critics urge progressives to eschew court-based law reform in favor of transformative politics through social movement mobilization. Thus, in the critical view, legal liberalism competes with and undercuts more progressive alternatives. The role of the radical lawyer in this critical vision is to expose the political nature of law from the inside of the system, while aligning with social movements on the outside to build power necessary to produce and sustain authentic democratic change.

While pragmatic scholars agree with the basic critical analysis of the need for structural change, they adopt a more institutionally oriented approach to achieving it. A key insight of the pragmatic position is to identify hierarchy within the majority, which they deny has monolithic interests in relation to the direction and ultimate content of social change. Pragmatists suggest that, for those who lack power within the nonelite majority (for example, people of color, religious minorities, LGBT people), the elimination of one set of rules does not point a clear path toward another where their interests are taken into greater account. Pragmatic scholars are thus skeptical of the critical strategy of delegitimizing law and see a more secure path to change through the existing system, in which lawyers and courts can extend legal rights to create meaningful space for nonelite participation in the polity. Pragmatists agree that law is political, but see strategic value in maintaining its legitimacy against the

backdrop of minority status and the potential for repression when operating outside of institutional channels. There is a recurrent inward-looking nationalist strand that argues for opt out/uplift and a recurrent outward-looking collaborative strand that argues for solidarity with other progressives in the majority coalition—across differences in class, identity, and status—in an effort to produce a new type of participatory democracy in which nonelite voices would be heard and respected. The pragmatists argue in favor of the constitutive value of rights as tools in minority political struggles, emphasizing the value of mobilizing rights strategically to advance politics. The role of cause lawyers in the pragmatic vision is directed toward representing nonelite interests within marginalized constituencies and leveraging law to achieve discrete reformist outcomes. What distinguishes lawyering in this view from the liberal paradigm is its strong commitment to remaining accountable to nonelite voices, rejecting the value of alliances with elites that compromise representation by "serving two masters."[457]

In sum, within progressive legal thought since *Brown*, scholars have splintered in their approaches to understanding the role of law in democratic politics. Mainstream progressive thinkers—both process-oriented and liberal—have sought to defend a space for legal autonomy out of a belief that liberal democracy basically works and can be deepened through incremental reform; their debate has been over the degree to which law's legitimacy is threatened by its association with progressive political values. Critical scholars have sought to undermine legal legitimacy to create an opening for fundamental systemic transformation. Meanwhile, pragmatists have sought a middle ground, investing in law's legitimacy in order to gain basic legal recognition and protection, while also maintaining a critical perspective on liberal democratic law reform that foucses on the importance of nonelite participation in the democratic struggle to achieve full equality. As scholarly focus now turns intently to the role that social movements play in this struggle, a fundamental question is whether social movements can serve as a vehicle to bridge progressive division—or whether the social movement turn in progressive legal thought will continue to unfold around this fundamental debate.

## CONCLUSION

Every generation of legal scholars struggles to make sense of the intellectual inheritance received from those who came before, carrying on battles started

457. Bell, *supra* note 257.

long ago. For progressive scholars within the legal academy, those battles have been organized around a fundamental challenge: extending democracy's promise of equal justice under law to those on its margins. In addressing that challenge, progressives have confronted a double barrier: from the outside and from within. Their project of shifting power to those without it starts at a point of structural disadvantage and depends crucially on the idea that law is something more than just a tool of the status quo. Yet defining precisely what role law should play has confronted progressives with internal challenges since the ideal of democracy they espouse has generally presupposed a commitment to energized participation at odds with the professionalism inherent in juriscentric visions of social change. Moreover, to the extent that progressives have sought to mobilize law to advance transformative projects built on greater participation by nonelites within the polity, they have politicized law in ways that have risked the legitimacy of the very tool they have deployed.

The history of progressive legal thought has centered on negotiating this tension. From realism onward, it has succeeded in momentary resolutions that have responded to the politics of the time. Social movements have informed politics at each stage, as actors in the real world rather than objects of legal inquiry. Why that has changed—why social movements have taken on a more prominent role within progressive legal theory over the past decade—has been the central inquiry of this Article. To answer it, this Article has provided an original account of progressive legal theory to suggest that the emergence of social movements in law is a contemporary response to an age-old problem: how to harness law to advance progressive politics, while simultaneously maintaining a boundary between politics and law. As this Article has shown, that paradox—the core dilemma of progressive legal thought—has framed debate from realism through legal liberalism through Critical Legal Studies and its aftermath. The essential legacies of this debate are enduring critical visions of the role of law and lawyers in social change, and persistent progressive disagreement about how to mobilize law to advance social change without undermining the value of law as something distinct from politics. A core contribution of this intellectual history has been to show the parallel struggles over the law-politics problem within the academic fields most associated with legal liberalism—constitutional law and the legal profession—in order to explain the recent emergence of social movements in both fields as the newest progressive response to the law-politics problem. Whether social movements can bridge the law-politics divide—to deliver progressive change while preserving the integrity of law—is a critical question which progressive scholars in this tradition now confront.