

High Theory and Low Practice: A Dream and Five Theses  
on Being a Left Lawyer and Legal Worker<sup>1</sup>

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## INTRODUCTION

Why would anyone want to publish a contentious, mildly profane (with latently juvenile passages), dated essay from 1981? After completing a year of graduate study after actively practicing law and teaching for ten years after law school, my essay was originally “shopped” to the student editors of a few reputable legal journals, all of whom advised me to delete the Dream sequence to be considered for publication. I had an attitude, other things to do and never followed up. Furthermore I’m not even a “real” academic, but exist at the bottom of the educational food chain as a part time clinical instructor at a student run legal clinic and practitioner in a two-person neighborhood law office. Wasn’t the world different then? Now we’re not involved in any foreign, neo-colonist adventures on other continents, nor are we victims of an expanding National Security State or the human fodder of multinational banks who create “value” out of speculative air (remember stagflation?). We don’t have a severely restricted and under-funded Legal Services Corporation, a Republican controlled House and are certainly not in an era of the ascension of a neo-liberal president at the service of Goldman Sachs. **Oops.**

Never mind.

Now that we appear to live in an era of potential mass mobilizations and can imagine the possibilities of achieving more humane alternatives, the role of lawyers, law students and legal workers in such a movement is paramount. However, while law schools now tolerate a variety of opinions, those on the self-proclaimed academic left have had little effect or reflection in legal doctrine. Furthermore, the gulf between academia and any self-conscious political movements appears tenuous, at best. Military recruiters are now welcomed on campus by liberal law school deans, terrified about losing government (directed) funding for their universities (The military is, of course, an equal opportunity employer, willing to allow any student, regardless of his or her sexual orientation to participate in the culture of “military justice.”).

The bridge between “theory” and “practice” remains significant. To the extent there is any theoretical legal discourse, it is rare to see Karl Marx in the end notes. Mao, Lenin or Fidel are *verboten* and any remote reference to the labor theory of value is not to be mentioned in polite academic company. (Are credit default swaps considered commodities?) Worse yet, the ultimate indignity is to be accused of being a “formalist” in the sphere of political theory or an “essentialist” when discussing race or sexual politics.<sup>2</sup>

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<sup>2</sup> Here is a political decoder ring to use when reading my essay:

|                     |                         |
|---------------------|-------------------------|
| Delete:             | Substitute:             |
| Mao Tse-tung, Lenin | David Harvey            |
| Radical             | Progressive or critical |
| Seize state power   | Structural change       |
| State               | Political apparatus     |
| Television          | Internet                |

Also use the words “post-structuralist” and “post-modern” a lot and include plenty of quotes from Lacan, Agamben, and Foucault. Include gay and lesbian families within the definition of the family as a unit of consumption. Keep in the Pashukanis.

When re-reading my essay however, I am struck by how my reflections about my legal work in those years are still informative. As Mark Twain said, “History doesn’t repeat itself, but sometimes it rhymes.” I have the same “hard days” in my law practice. The day before writing this introduction, a student was likewise having conflicting feelings about our attempt to forestall the eviction of a foreclosed owner of property because of a technical infirmity in a recorded power of attorney. On a similar note, I testified in support of legislation which allows former homeowners to pay the fair market value of rent to a foreclosing bank. I felt embarrassed about appearing before a legislative sub-committee and pleading with them to allow a former homeowner to *pay* money to the bank- not questioning the underlying private property norm.

I felt less embarrassed when I realized that such legislation was supported by a coalition of more than 60 groups—the Massachusetts Alliance Against Predatory Lending (MAAPL). For many years, in both my law school and private office, I have worked with City Life/Vida Urbana, one of MAAPL’s leading lights, which is a diverse, multi-racial community group located in Boston which has enhanced my awareness of the use of legal ideas and “images of law.” City Life utilizes the metaphor of the “sword and the shield” to keep people in their homes. Homeowners and renters come together to support each other talk about their problems. Lawyers and law students advise and represent City Life/Vida Urbana members in court. In the event of a court order to vacate (an “execution” in legal parlance!), members and supporters blockade the residence and utilize methods which allow a homeowner to keep their home, with the support of politicians and willing lenders.<sup>3</sup> (My lived experience, not a fancy paper, told me I’m on the right track.)

My recent practice has also been informed by my work with Occupy Boston, a local expression of the Occupy Wall Street Movement. OWS certainly changed the national conversation. Everybody now knows “the 1%.” (In Thesis V, my math was a little off. I talked about “us” being 96%.) Legally, many of the lawyers working with OWS opened up “legal ideas” in expanding the definition of public space in both their (our) criminal defense function and in affirmative suits using various theories of the first amendment, including an expanded notion of the freedom of assembly. However, OWS’s strength, may also prove a weakness. Because the OWS was only a brief physical moment (the encampments), and now is mostly a “virtual” community, it’s *de facto* leadership has not had the opportunity to formulate a plan for what comes next. Further, is it right for OWS to look to lawyers to define the movement? Ironically, in Boston, the banner of OWS has largely been carried by us lawyers, seeking to expand doctrinal notions of the first amendment with an eye fixed on opening up space for future mass mobilizations. Accordingly, the anti-capitalist message has frequently been channeled into pre-defined legal categories. Other than necessary criminal defense, has the limitations of legal definition taken the rebelliousness/ insurrectionary impulse out of the movement? How has this affected

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<sup>3</sup> See Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181 (2010) for a description of the Harvard Legal Aid Bureau’s work with City Life/Vida Urbana. See also [clvu.org](http://clvu.org).

the “images of law?” What do we mean when we use the terms “civil disobedience” or “civil resistance”? Were the arrests acts of “civil disobedience”? Other than as a “meme,” how does our legal work relate to acquiring or “seizing” state/political power? Perhaps my essay will engender a framework for further discussion for how to relate to such movement.

Power to the people (such terms to be defined).

### PRELUDE TO A DREAM

It had been a hard day. In the morning while working at my part-time job as a supervising attorney at the Harvard Legal Aid Bureau, a student and I had concocted an elaborate third party beneficiary theory for a case we were working on. The student felt guilty because the effect of our flight into doctrine was to begin to get some concessions from the opposing party's attorney. The student felt we were misusing the legal process to gain an advantage and didn't think we had that hot of a substantive case. I argued that we shouldn't get so uppity about our tactics when for once it was working to a poor person's advantage. Reverberating in my head was Stephen Wexler's admonition:

Knowing that (s)he will face an unreasoning lawyer machine, the poor people's lawyer can either make (her)self a better machine . . . or structure for (her) self a practice in which (s)he will not fall into the lawyer's game. The most dangerous thing in the game itself is not the way the other side plays, but the tendency of the poverty lawyer to play the game (her)self.

We lose because we are playing a game and the rules are against us, but while the game is on, the other side, the judges, the clerks, even your own typists come grudgingly to see that you are doing something important. Everyone wants to feel (s)he is bright and that (s)he is doing something important; lawyers like to feel that they 'know the law.' But the lawyer's game is a trap; it is a way to feel useful and not be useful.<sup>4</sup>

Later that morning, a different student returned from court after getting a stay of execution for her clients in an eviction case. She and the landlord's attorney had previously negotiated a settlement where the eviction was put off so long as the tenant paid rent on the first of the month. The student's court appearance was in response to the issuance of an immediate execution by the judge (a black, female, ex-legal services attorney). It seems that our opposing "brother at the bar" had gone to court *ex parte* and got the execution because he alleged that no rent had been paid to his clients. In fact, the tenants paid twelve hours late, a week before the motion was heard. The landlord's lawyer lied. Our "brother at the bar's" action makes real the words of Big Daddy in Tennessee Williams' "Cat On a Hot Tin Roof"—MENDACITY.

I got a call from one of my partners in my community law office and we discussed the theory of preemption as it applied to the interlocutory appeal of an aspect of our three-year-old tort suit against Boston Edison, the owners of the Pilgrim I Nuclear Plant. We also spoke of the imminent appeal of a recently won victory of a rank and file caucus of the Teamsters Union.

I then had a drink with Duncan Kennedy, a self-styled "maverick" Harvard Law School Professor. We engaged in our ongoing argument where he maintained that the state is nothing but a juridical illusion. He challenged me to show him a significant distinction between Harvard and the Cambridge Housing Authority as it

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<sup>4</sup> Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1060-1061 (1970).

pertained to the effect on tenants in the area. I talked about violence, urban riots, and the power of the Housing Authority Police.

While riding the train home, I glanced at the newspaper and saw that some unnamed Department of Defense official was proposing a national police force. The article stated that if the National Guard goes off to war “[t]he governors can’t be left without the forces to deal with civil disturbances . . . (the key task of) a ‘stay-behind’ force would be guarding factories from sabotage and terrorism.”<sup>5</sup>

### *DREAM*

That night, I had a dream. I first heard Frank Sinatra and Bob Dylan singing “Tie a yellow ribbon, ‘round that old oak tree” accompanied by the Mormon Tabernacle Choir and the Navy Band. A big truck with a television crew was coming down my street. Perched atop was a man with a bullhorn in a director’s chair. In back of the television cameras, Ronald Reagan was walking in the middle of the road with a huge limp phallus sticking out of his pants. All around him were white men in three-piece suits who likewise had long, erect phalluses protruding from their groins. Tied to each phallus was a woman kneeling on a rolling platform which was attached to each man’s organ. The women were nude except for denim lettering spelling out such names as “Calvin,” “Yves,” or “Gloria” attached to their rears. Each woman’s breast, waist, and hip had a sign describing her measurements. Young women with “36-24-36” were joined to men in front, while older women of varying shapes were in back.

The men were handing each other money, their place in the procession changing as they exchanged cash. Some of the men walked together, some alone, although groups tended to be nearest the front. Interspersed throughout the crowd were bureaus mounted on motorcycles. In each bureau was a man who would grab some of the money being traded and convert it to jelly beans which were thrown to onlookers. They also separated some of the men in three piece suits when the men began to argue as well as made sure everyone stayed in the street.

Floating overhead in a cloud of wheat dust shaped like a scale was the Supreme Court, dressed in saffron robes. Each judge was wearing blinders which limited his vision to the procession below. Warren Burger had a walkie-talkie which communicated with the director of the television crew. Sometimes the wheat cloud floated in front of the parade, sometimes behind. Flying directly below the judges was a group of predominantly male lawyers dressed in black shrouds. The lawyers’ clothing restricted their vision to the court above them. All of the people in the procession were tied together by patterns of yellow ribbon, bound on the edges by the surveillance of the bureaus on motorcycles.

Encircling the group were soldiers dressed in tight and revealing red, white, and blue jumpsuits and carrying long-nosed sub machine guns. Each soldier had a helmet with a rose-colored visor covering his or her face. Both Reagan and the judges had a button which could control what the soldiers saw. If the judges pressed “you lose,”

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<sup>5</sup> *US is Pondering National Militia*, BOSTON GLOBE, April 23, 1981, at 30.

each soldier saw an attacking vampire bat, while if Reagan pressed his “command lever,” the soldiers saw threatening giant red ants. At other times, the soldiers were unable to see clearly and had great difficulty in distinguishing among objects outside the procession.

On the street, the men were laughing while most of the women were crying. The television camera focused on Reagan’s smiling face. Atop the truck, the television director intermittently communicated with Warren Burger and then broadcast the words “every man has the right to get a head.” The lawyers were the first to pick up the chant and were soon followed by everyone else. Occasionally a lawyer would fly up to the Court and whisper something to them. Thereafter, after hearing from the Chief Justice, the television director would broadcast a slight modification of the initial broadcast. “Every person has a right to get a head.” “Every person so long as he or she is yellow has a right to get a head.” Etcetera, etcetera . . . .

They were coming to my house to ask me to join my “siblings at the bar” in the procession. Suddenly the apparition of Liberal Legalism appeared. He was a middle-aged white man with carefully coiffed gray hair who was dressed impeccably in a pinstripe shroud. My kid whispered that he’s seen him before on television. Liberal Legalism had a piece of yellow ribbon in his hand and asked me to come float with him and the others. He offered me some “reflective equal librium” pills. All I had to do was tie a yellow ribbon to my ear, sign a social contract which said I was just the same as everyone else, take three pills and repeat the words “natural right” into a magic blank slate. Thereafter, I would instantly be bounced up into the sky to float below the Supreme Court. Before I could make up my mind, a soldier approached me. Liberal Legalism flew off into the air, put his hand under one of the judge’s saffron robes, and murmured something about preemption.

At that moment, the Spirit of Critical Legal Studies appeared. He was a tall young man dressed in a Superman shirt with star patches covering his tattered jeans. He told me that through a process of non-instrumental transcendental hermeneutics we could engage in unblocked intersubjective discourse. He couldn’t talk directly to either the lawyers or the judges however. He immediately sat down and put one of his hands into his pants while with the other started writing on a legal pad. After I declined his challenge to see who had the longest penis, he started fondling himself. I tried to glance over his shoulder, but couldn’t quite make out what he was writing. It was something about expanding his doctrine. After writing a short piece, he forgot to show it to anyone.

Just as I had given up all hope, the ghost of Labor Defenders Past arrived on the scene. The ghost was an elderly male who was draped in a red flag with a hammer and sickle on it. Without talking to me, he tried to shout something to Reagan and the Judges but they didn’t understand him. He then urged some of the women to cut their own ribbons, but they couldn’t comprehend him either. He ignored the connections binding the soldiers to either Reagan or the judges.

Just as the ghost of Labor Defenders Past was saying to me “sorry kid but at least you’ll be remembered as a great proletarian hero,” a group of Left Lawyers showed up. They were mostly women and were so busy that I didn’t notice what they were wearing. After talking with them for a while, I could see they were attached to people

outside the procession by red ribbon. As a matter of fact, for the first time I noticed my family, friends, neighbors, and others outside the procession. I became more and more aware that we were likewise connected to each other. I further began to see some red ribbons mixed with the yellow ones inside the procession. Some of the people outside of the marchers were breaking into the procession, talking to the women and helping them break free from the men in the three piece suits. They were also fighting with the soldiers, trying to break open their helmets. Some of them were also talking to the soldiers. As some of the women and soldiers in the procession began to escape, the Left Lawyers held up mirrors in front of their bosses' faces to shield them while they got away. The Left Lawyers also fought and talked just like the rest of the outsiders. Making sure that I was attached to others by my red ribbon, one of the Left Lawyers handed me a piece of yellow cloth which wasn't attached to anything and invited me to join the fray. After fighting alongside some of the outsiders for a while, I took one "reflective equal librium" pill and flew up to talk to the judges.

I woke up.

### PREFACE TO THESESES

The following discussion is but a small reflection and summary of my current experience as part of a tradition of left lawyers and legal workers and the left political movement of which we are a part. The tradition of left lawyers is international, including Lenin who in the October Revolution of 1917 effected the most successful eviction action in Western history, as well as Fidel who demonstrated the limits of change within existing legal institutions and by his example showed when it was necessary to go outside such institutions. In our own country, I feel bound to the practice and work of such of my comrades at the bar as Maurice Sugar and Ernie Goodman of Detroit,<sup>6</sup> Harriet Bouslog Sawyer in Hawaii, Ben Margolis in Los Angeles, Ann Fagin Ginger in San Francisco,<sup>7</sup> Katy Rorbach and Tom Emerson in New Haven, and Arthur Kinoy in New York City,<sup>8</sup> from preceding generations. This essay is a continuation of the work of some of my contemporaries such as Paul Harris of San Francisco,<sup>9</sup> Ken Cloke from Southern California,<sup>10</sup> and Holly McGuigan of Philadelphia.

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<sup>6</sup> See Maurice Sugar, *The Birth of the Guild*, 33 GUILD PRAC. 2 (1976).

<sup>7</sup> See Ann Fagin Ginger, *The Movement and the Lawyer*, 26 GUILD PRAC. 12 (1967). For in-depth interviews of Charles Garry, Frank McTernan, Mary Kaufman, Fay Stender, Paul Harris, and Harry Margolis, among others, see ANN FAGAN GINGER, *THE RELEVANT LAWYERS* (1971).

<sup>8</sup> For an influential analysis which guided and summed up the practice of the current generation of left lawyers, law teachers and legal workers, see Arthur Kinoy, *The Role of the Radical Lawyer and Teacher of Law*, in *LAW AGAINST THE PEOPLE* 279 (Robert Lefcourt ed., 1971).

<sup>9</sup> Paul Harris, *In-Laws and Out-laws: The Community Law Firm*, 5 LINCOLN L. REV. 14 (1969); Paul Harris, *You Don't Have to Love the Law To Be A Lawyer*, in *RADICAL LAWYERS* 84 (Jonathan Black ed., 1971). *Contra* Gene Ann Condon, *Comments on You Don't Have to Love the Law to Be A*

At this historical moment, the task of the left lawyer is to combine a deep, thorough, particular, reflective, and in Arthur Kinoy's words, "brutally honest" understanding and analysis of our own society and a vision of its less alienated possibilities (High Theory) with action that seeks to transform illegitimate sources of power, hierarchy, and domination, realizing in our own social relations a model for the future (Low Practice). In accord with a materialist view, theory must grow out of our collective historical experience and in turn such theory must change our practice. Above all, the left lawyer or legal worker should see herself in relation to others and not as an isolated, aloof "champion of the people;" as part of, not separate from, a developing, mass, transformative social movement. Does our work empower organized groups and their members? Do we learn from our activity? Does our practice unmask and demystify while at the same time help us to clarify and generate our vision of the future?

Although beyond the scope of this essay, I assume that the state is central to any process of transformative activity and that the immediate political objective of such activity is to seize state power.<sup>11</sup> This is only possible through the work of organized groups or groupings of people. Further, it is crucial that the form of organization and social relations within such groupings should prefigure our social ideal.

Whether to defend clients or initiate suits on their behalf, engage in criminal or civil work, encourage pro se representation or function as trial counsel, negotiate or bring a "test case," participate in community legal education, teach in law school, or train paralegal workers is solely a question of tactics to effect the goal of empowering groups and their members. Distinctions as to form and substance should be as meaningless to us as the dichotomies of public and private law, the personal and the political. In our critique of such false distinctions, we should be aware that formalism is not only a system of internally consistent rationality which seeks to divorce itself from its social and historical context, but also exists as a method of practice. Thus our analysis should not only attempt to reveal the actual incoherence of legal doctrine as formal rationality, but the illusory nature of "trial skills" and technique. Our theory should help us to create new modes of legal practice which not only achieve our

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*Lawyer*, 29 GUILD PRAC. 19 (1970). For a response to Condon see Paul Harris, *A Brief Response*, 29 GUILD PRAC. 25 (1970).

<sup>10</sup> See Kenneth Cloke, *Law is Illegal*, in RADICAL LAWYERS 27 (Jonathan Black ed., 1971); Kenneth Cloke, *The Economic Basis of Law and the State*, in LAW AGAINST THE PEOPLE 65 (Robert Lefcourt ed., 1971).

<sup>11</sup> For the classic statement of the initial necessity to seize state power see VLADIMIR ILYICH LENIN, *The State and Revolution*, in 2 SELECTED WORKS (1952). There has been much recent debate about the nature of the state. For what is generally acknowledged to be the best summary of the current positions on the left, see Gold, Lo & Wright, *Recent Developments in Marxist Theories of the Capitalist State*, in vol. 27 no. 6-7 MONTHLY REV. (1975). For a recent discussion which incorporates many of the contending analyses, see ERIK OLIN WRIGHT, *CLASS, CRISIS AND THE STATE* (1978); GORAN THERBORN, *WHAT DOES THE RULING CLASS DO WHEN IT RULES* (1978). For a fascinating contemporary view of the state and law by the Chairman of the Department of Theory at the University of Łódź in Poland see Jerzy Wróblewski, *State and Law in Marxist Theory of State and Law*, 20 WAYNE L.R. 815 (1976).

strategic objectives (i.e., “winning” cases) but serve to defrock the mysterious and magical vestments encasing the law. Legal doctrine should seek to explain the world as it is, its main purpose being to have impact *outside* the legal forum.

*THESIS I - IN AN ERA OF ADVANCED MONOPOLY  
CAPITALISM, THE PRIMARY FUNCTION OF LAW IS TO  
REPRODUCE THE DOMINATION AND OPPRESSION OF ONE  
CLASS OVER ANOTHER<sup>12</sup>*

All discussions of law must recognize its dialectical, contradictory nature. Law does not exist in the hypothesized, undifferentiated world of John Rawls’ “original position,” or in the mind of Ronald Dworkin’s Hercules.<sup>13</sup> Rather it is the active expression of men and women living within a social and material universe at a particular historical moment. Any understanding of law thus mandates a view of its internal development and dynamic. In his historiographical essay “On Contradiction” written in 1937 in opposition to dogmatist formulations of theory and practice which resulted in the deaths of thousands of his fellow members of the Chinese Communist Party, Mao Zedong stated:

In order to understand the development of a thing we should study it internally and in its relations with other things; in other words, the development of things should be seen as their internal and necessary self-movement, while each thing in its movement is inter related with and interacts on the things around it.<sup>14</sup>

Mao further suggested that in viewing the process of development within a society, at a particular historical moment we can isolate and identify one aspect of contending

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<sup>12</sup> By “class” I do not only intend one group’s relation to the means of production, but also recognize the historically independent genesis of patriarchy, national oppression, and technocracy. At this historical moment however, all of these forms of oppression are so intertwined that it is impossible to isolate only one aspect as the key to revolutionary transformation. Therefore, I use the concept “advanced monopoly capitalism” to represent all of the above-mentioned forms of domination. To the extent that I would be forced to choose priorities of action, I deem the seizure of the state apparatus to be a crucial immediate task as I believe the state to be the locus of organized force and coercion, the background structure of all forms of social control. *See infra* Thesis III.

Although I do not claim to be a sage, if the reader is interested in my prior thoughts as an expression of the practice of others in my milieu, my earlier views on the relation among class, race, and sex are found in Goldstein & Hunter, *Counter-Culture Law*, in vol. 1 no. 3 COMMUNITIES MAG. (1972); Goldstein, Schlissel, & Epstein, *Sexism and the Practice of Law*, in vol. 2 no. 5 GUILD NOTES (1973).

<sup>13</sup> JOHN RAWLS, A THEORY OF JUSTICE 11 (1971); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

<sup>14</sup> MAO TSETUNG, *On Contradiction*, in SELECTED READINGS 87-88 (1971). *See also* P. Beirne, *Marxism and the Sociology of Law: Theory or Practice*, 2 BRIT. J. OF L. AND SOC. 78 (1975).

social forces “whose existence and development determine or influence the existence and development of the other contradictions.”<sup>15</sup>

From our North American vantage point in 1981, law’s primary function is to reproduce existing forms of oppression prevalent in society as it currently exists. Just as Marx hypothesized that the first act of human beings in history is to produce and reproduce their lives,<sup>16</sup> so the primary activity of people within legal institutions is to produce and reproduce life as it exists in this era of advanced monopoly capitalism. If the social relations among people are stratified, so is the effect of the law. If one class dominates another, law is principally a mirror of this domination. Oppression is reproduced by real people being converted into abstract, juridical subjects, divorced from their contingent and relational historical characteristics. As pointed out by Lukács in an essay which develops the application of the concept of reification to life in the present period, “capitalism has created a form for the state and a system of law corresponding to its needs and harmonizing with its own structure.”<sup>17</sup>

Lukács, noting Weber’s contribution as a “perceptive historian of modern capitalism,” discusses the rise of concomitant notions of predictability, rationality, systematization, and the development of a closed system where rules are applied to all “possible or imaginable cases.”

Whether this system is arrived at in a purely logical manner, as an exercise in pure legal dogma on interpretation of the law, on whether a judge is given the task of filling the ‘gaps’ left in the laws, is immaterial for our attempt to understand the *structure* of modern legal reality.<sup>18</sup>

Giving a more concrete illustration, Isaac Balbus, in his book *The Dialectics of Legal Repression*,<sup>19</sup> posits the notion of “repression by formal rationality.” He argues that insofar as a label of “crime” is affixed to individual behavior, any violent act such as the destruction of property in a ghetto rebellion is depoliticized and abstracted from its social context. Thus both those arrested and others think of actors as “criminals,” fostering the concept of an isolated individual in opposition to the collective state, thereby undermining the development of any shared class consciousness:

Formal legal rationality dictates that the administration of justice respond only to specific acts, that only the empirical question of whether or not a formally proscribed act has been committed is a relevant criterion for the application of a punitive sanction . . . . (T)he law (thus) takes no notice of the characteristics of the alleged offender; rich or poor, black or white, ideological dissident or staunch supporter of the existing order, all are held to be equal in the eyes of the court and all are guilty or innocent by virtue

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<sup>15</sup> MAO, *supra* note 11, at 110.

<sup>16</sup> KARL MARX, *Feuerbach, Opposition of the Materialist and Idealist Outlook*, in 1 THE GERMAN IDEOLOGY 42 (C.J. Arthur ed., 1977).

<sup>17</sup> GEORG LUKÁCS, *Reification and the Consciousness of the Proletariat in HISTORY AND CLASS CONSCIOUSNESS* 95 (Rodney Livingstone trans., 1971).

<sup>18</sup> *Id.* at 96.

<sup>19</sup> ISAAC BALBUS, *THE DIALECTICS OF LEGAL REPRESSION* (1973).

of their acts alone . . . . Formal legal rationality thus circumscribes the conflict between the state and the accused into a conflict over the facts.<sup>20</sup>

Stated in another way, the basis of our legal ideas is grounded in notions of formal and procedural equality. Such ideas are above all a method of reification, turning what is social, unique, personal, and living into an abstract thing, indistinguishable from other things. This form of reification—legal fetishism—is homologous to the nature of a market economy in advanced capitalism.

Evgeny Pashukanis, in his essay “The General Theory of Law and Marxism,” first published in 1924, states that

We (can) perceive law, not as a characteristic of abstract human society, but as an historical category which responds to specific social environs and which is constructed on the contradictions of private interests.<sup>21</sup>

The basic argument of Pashukanis is to correlate commodity exchange with the moment when a person acquires a legal personality; a being as a bearer of rights as opposed to customary privileges. Following such an analysis, the nature of juridical relations were ascertained by Marx in the first volume of *Capital*.

For Marx, in a society based on commodity production, both products and persons appear in the process of exchange only as abstractions. The social relationships of human beings are not direct and personal, but rather abstract in the nature of value relationships between commodities:

The equality of the kinds of human labour takes on a physical form in the equal objectivity of the products of labour as values; the measure of the expenditure of human labour-power by its duration takes on the form of the magnitude of the value of the products of labour; and finally the relationships between the producers, within which the social characteristics of their labours are manifested, take on the form of a social relation between the products of labour.

The mysterious character of the commodity-form consists therefore simply in the fact that the commodity reflects the social characteristics of men’s [*sic*] own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things. Hence it also reflects the social relation of the producers to the sum total of labour as a social relation between *objects*, a relation which exists apart from and outside the producers. Through this substitution, the products of labour become commodities, sensuous things which are at the same time supra-sensible or social.<sup>22</sup>

Furthermore, within a society of commodity exchangers, persons in their role as exchangers come to be controlled by commodities, the object of their exchange. This

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<sup>20</sup> *Id.* at 8.

<sup>21</sup> EVGENY PASHUKANIS, *The General Theory of Law and Marxism*, in PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW 54 (P. Beirne & R. Sharlet eds., 1980).

<sup>22</sup> KARL MARX, 1 CAPITAL 164-165 (Ben Fowkes trans., 1977).

control is manifest in human consciousness as the workings of a “market” beyond human intervention:

The value character of the products of labour becomes firmly established only when they act as magnitudes of value. These magnitudes vary continually, independently of the will, foreknowledge and actions of the exchangers. Their own movement within society has for them the form of a movement made by things, and these things, far from being under their control, in fact control them.<sup>23</sup>

Marx then argues that the juridical relation expresses itself as a contract. Since “guardians of commodities” must place themselves in relation to each other as persons whose will resides within the commodity, each must therefore behave such that he or she does not appropriate the commodity of the other and will only agree to alienate the object only if there is mutual consent. Thus the “guardians” must recognize each other as owners of private property. Thereby does the legal relationship between persons take the form of a contract and is a “mirror” of the economic relationship itself determined by this relation. Within a society of commodity traders, persons exist for one another through and as owners of their commodities.

As human relationships become mediated by money, an abstract form of commodity exchange, so the juridical relationship is mediated by a notion of a legal subject who is an abstract bearer of rights. Pashukanis argues that it is only in the conditions of commodity production that the abstract legal form is generated—i.e., the capacity to have a right in general as distinguished from specific legal claims and privileges:

The social, productive relationship appears simultaneously in two incongruous forms: as the value of a commodity and as the ability of man [*sic*] to be the subject of rights.

In the same way that the natural multiplicity of the useful qualities of a product is in a commodity a simple mask of its value, while the concrete species of human labour are dissolved into the abstract human labour as the creator of value—so the concrete multiplicity of man’s relationship to an object appears as the abstract will of the owner, while all the concrete peculiarities, which distinguish one representative of the species *Homo sapiens* from another, are dissolved into the abstraction of man in general as a legal subject.<sup>24</sup>

Finally, in his “Critique of the Gotha Programme,” Marx recognizes the practical trap embodied in a notion of equal right. In criticizing the program of the newly unified German Worker’s Party which stated that “the proceeds of labor belong undiminished with equal right to all members of society” and which demanded a “fair distribution of the proceeds of labor,” Marx seized upon the phrase “fair distribution:”<sup>25</sup>

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<sup>23</sup> *Id.* at 167-168.

<sup>24</sup> PASHUKANIS, *supra* note 18, at 76.

<sup>25</sup> KARL MARX, *Critique of the Gotha Program*, in 3 SELECTED WORKS 9 (1966).

Do the bourgeoisie assert that the present-day distribution is fair? And is it not, in fact, the only fair distribution on the basis of the present-day mode of production? Are economic relations regulated by legal conceptions, or do not, on the contrary, legal relations arise from economic ones? Have not the socialists sectarians also the most varied notions about 'fair distribution.'<sup>26</sup>

Thus the equality of a person as a juridical subject established by the legal form is an abstraction from the domination extant in a class society where the production of commodities permeates every sphere of life. In the main therefore, law serves to reproduce domination.<sup>27</sup>

*THESIS II - THE SECONDARY FUNCTION OF LAW IN AN ERA  
OF ADVANCED MONOPOLY CAPITALISM IS TO PROVIDE AN  
OUTLET FOR THE REPRESENTATION OF IDEAS WHICH  
REFLECT INTRA AND INTERCLASS CONFLICT*

Since law does not exist “in the air,” independent of human actors, legal ideas are directly articulated by people who act within historically given and transmitted social and institutional roles. Therefore, when speaking of legal ideas, I mean what such people as government officials, police, judges, legislators, lawyers, and legal academics do, say, write, think, and feel. (I will later discuss the resulting “images of law”—i.e., what the receivers of legal ideas do, say, write, think, and feel.) Commensurate with a materialist analysis, such legal ideas are derived from and represent the existing historical conflicts such as the classic tension between forces and relations of production at a particular moment. For example, legal doctrine, as expressed through appellate court opinions, may either reflect or be behind or ahead of the current state of the tension between forces and relations of production. Additionally, legal ideas may be used by human actors to shape and transform those tensions. However, it is not the ideas themselves, but conscious activity outside the mere expression of such ideas—practical human activity—which is the basis of political transformation.

Left scholars have written countless pages about the “base-superstructure” problem within Marxian theory and as it pertains to law.<sup>28</sup> Much of the writing by

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<sup>26</sup> *Id.* at 16.

<sup>27</sup> See also Isaac Balbus, *Commodity Form and Legal Form: An Essay on the Relative Autonomy of the Law*, 11 *LAW AND SOC. REV.* 571 (1977); C. Arthur, *Towards a Materialist Theory of Law*, 7 *CRITIQUE* 31 (Winter 1976-1977); Redhead, *The Discrete Charm of Bourgeois Law: A Note on Pashukanis*, 9 *CRITIQUE* 113 (1978); PASHUKANIS, *supra* note 18, at 1; C. Arthur, *Introduction to LAW AND MARXISM: A GENERAL THEORY BY EVGENY B. PASHUKANIS* 9 (1978); A. Fraser, *Legal Theory and Legal Practice*, 44-45 *ARENA* 123, 131-135 (1976); Holloway & Picciotto, *Capital, Crisis and the State*, 2 *CAPITAL AND CLASS* 76 (1977).

<sup>28</sup> E.P. Thompson, *The Rule of Law*, in *WHIGS AND HUNTERS* 258 (1975); Karl Klare, *Law Making As Praxis*, 40 *TELOS* 123 (summer, 1979); Mark Tushnet, *A Marxist Analysis of American Law*, 1 *MARXIST PERSPECTIVES* 96, 105 (1978); Mark Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law*, 1977 *WISC. L. REV.* 81;

legal academics has criticized the work of left practitioners as being “instrumental” or “reductionist.” Andrew Fraser comments that “[a]ny serious examination of the few attempts which have been made in recent years to develop a radical theory of the legal process reveals a disturbingly high level of intellectual poverty and theoretical sterility.” Fraser then asserts that “radical legal theorists seem concerned above all else to establish their own authenticity as militant opponents of the legal system and a mainstream legal theory which is regarded as the servile handmaiden of a repressive state apparatus . . . .”<sup>29</sup> Karl Klare more charitably attributes our (I am including myself within the group of left legal practitioners) retarded development (he alludes to reasons why “a specifically Marxist legal culture has been slow to develop”) to the necessity of responding to immediate political problems. “As a result, *they* have had little opportunity to develop alternate theoretical models for understanding the American legal system.”<sup>30</sup> The left bar who are obliquely referred to as “vulgar Marxists” (the ultimate indignity!!) are accused of reducing Marxism to a type of economic determinism; base determines superstructure in every instance, and law is nothing but the external, violent imposition of the will of the ruling class. From their vantage point of the intense class conflict of the classroom (as distinguished from those of us with less perspective who have been serving “the labor, civil rights, anti-war, women’s, and other popular movements over the generations”),<sup>31</sup> the left legal academics, many of whom teach at elite American law schools, then proceed to posit a theory of the “relative autonomy” of law which serves to justify or magnify the importance of changes in legal doctrine as a form of “praxis”—i.e. transformative activity, or posit law as a control on the actions of the rulings class.<sup>32</sup> Although a full “knock-down, drag-out” discussion is beyond the limits of this essay, I offer the notion that in addition to grossly mischaracterizing and failing to distinguish the differences among left practitioners,<sup>33</sup> the focus of the legal academics’ concern when discussing

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Fraser, *supra* note 24; A. Fraser, *The Legal Theory We Need Now*, 4-5 SOCIALIST REV. 147 (1978); David Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW AND SOC. REV. 529 (1977).

<sup>29</sup> Fraser, *supra* note 24, at 123. He also makes an almost identical claim in *The Legal Theory We Need Now*, *supra* note 25, at 147.

<sup>30</sup> Klare, *supra* note 25, at 124 fn. 5 (emphasis added).

<sup>31</sup> *Id.*

<sup>32</sup> See EUGENE GENOVESE, *The Hegemonic Function of the Law*, in ROLL JORDAN, ROLL 27 (1974). (“The juridical system may become, then, not merely an expression of the willingness of the rulers to mediate with the ruled; it may become an instrument by which the advanced section of the ruling class imposes its viewpoint upon the class as a whole and the wider society.”)

<sup>33</sup> The two books frequently criticized by the academics as being an expression of instrumental Marxism are LAW AGAINST THE PEOPLE, *supra* note 5, and THE RADICAL LAWYERS, *supra* note 6. Both books represent the views of approximately forty different authors. In addition to those already mentioned, both books include the work of such disparate writers as Richard Wasserstrom, Florynce Kennedy, William Kunstler, George Crockett, Howard Moore, Stephen Wexler, and George Jackson. In line with my own criticism of legal academics, I do not wish to characterize all of them as having the same view.

“base” and “superstructure” misses Marx’s essential point—that *human activity*, not ideas, changes history. Ideas come from material reality, they don’t float down from the sky. Thus the “base-superstructure” puzzle is unlocked when viewed primarily as an issue of method—materialism versus idealism.

All discussion of the “base-superstructure” problem begins with Marx’s “Preface” to *A Contribution to the Critique of Political Economy* written in 1859, the introduction to his planned major work of which *Capital* was only his initial offering:

My investigation led to the result that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life . . . . In the social production of their life, men [*sic*] enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general. *It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.* At a certain state of their development the material productive forces of society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they have been at work hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an epoch of social revolution. With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed. In considering such transformations a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophic in short, *ideological forms in which men become conscious of this conflict and fight it out.* Just as our opinion of an individual is not based on what he thinks of himself, so can we not judge of such a period of transformation by its own consciousness; on the contrary, *this consciousness must be explained rather from the contradictions of material life, from the existing conflict between the social productive forces and the relations of production.* No social order ever perishes before all the productive forces for which there is room in it have developed; and new, higher relations of production never appear before the material conditions of their existence have matured in the womb of the old society itself.<sup>34</sup>

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They likewise have widely divergent positions. Nevertheless, I believe that they share some common points of reference as legal academics. The academics have started their own professional association, The Conference on Critical Legal Studies, which is an attempt to formalize their unofficial ties. As a final qualification, I don’t mean to suggest that the two groups, left practitioners and legal academics, are distinct and necessarily in opposition. Many people, myself included, are members of both. My point is to contrast what I perceive to be fundamental points of reference to encourage criticism and debate which is intended to lead to a higher level of unity, cooperation and struggle.

<sup>34</sup> KARL MARX, *Preface to A Contribution to the Critique of Political Economy*, in 1 SELECTED WORKS 502, 503-504 (1966) (emphasis added).

In the immediately following paragraph of the Preface, Marx discusses his resolve to criticize post-Hegelian philosophy as he had done in his earlier work, *The German Ideology*, written in 1845. Thus, looking at the predominant theme in the Preface as a whole, its focus seems to be a concern with the validity of the materialist method in opposition to idealism as well as the articulation of a practical plan, an exposition of the various elements of political economy, which will illustrate the opposition. If such an interpretation is correct, then the conflict of legal ideas is not only the expression of the dominant class, but is itself generated by class conflict. Ideas don't have an independent life of their own, but are expressed by actors in a world permeated by class antagonisms. The central political questions at any particular historical moment are: "What is the class structure? How is it maintained? As to ideology, what are the ruling ideas? What is the relation between the ruling ideas and the class structure and the institutions which maintain it?"

The ruling ideas are nothing more than the ideal expression of the dominant material relationships which make the one class the ruling one, therefore, the ideas of its dominance. The individuals composing the ruling class possess among other things consciousness, and therefore think. Insofar therefore, as they rule as a class and determine the extent and compass of an epoch, it is self-evident that they do this in its whole range . . . as thinkers, as producers of ideas, and regulate the production and distribution of the ideas of their age; thus their ideas are the ruling ideas of the epoch.<sup>35</sup>

Since a materialist analysis recognizes the conflict and contention of ideas, in past periods of transformation from one mode of production to another, which ideas are "ruling" is unsettled, is "up for grabs" (to use legal historian Morton Horowitz's favorite words to characterize such periods.)<sup>36</sup>

Even in non-revolutionary periods, ideology in general and legal ideas in particular are the representation of material tensions. Conflicting legal ideas are articulated both as a result of intra-class tensions among different factions of the ruling class as well as inter-class antagonisms.<sup>37</sup> However, even though there may be a conflict of ideas, such still exist within the parameters of a basic structure or "social formation."<sup>38</sup> Changes of the basic structure can only occur as a consequence of

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<sup>35</sup> MARX, *supra* note 13, 64-65.

<sup>36</sup> This is particularly well illustrated by E.P. Thompson in WHIGS AND HUNTERS, *supra* note 25, and by Douglas Hay in his article *Property, Authority and the Criminal Law*, in ALBIONS' FATAL TREE (1975), both of which document the ideological aspects of the transition from feudalism to capitalism in England. See also Lazonick, *The Subjection of Labour to Capital: The Rise of the Capitalist System*, vol. 10 no. 1 REV. OF RADICAL POL. ECON. 1 (Spring, 1978) and Michael Tigar & Madeline Levy, LAW AND THE RISE OF CAPITALISM (1977).

<sup>37</sup> The articulation of intra and inter-class conflict need not be made by the person whose class interest directly corresponds to the expression of her view. For example, a judge within the legal form prevalent in advanced monopoly capitalism may express ideas which are the result of inter-class struggle. My analysis posits the origin of such ideas in the existing world of material conflict.

<sup>38</sup> See particularly Louis Althusser's essay, *Ideology and Ideological State Apparatuses*, in LENIN AND PHILOSOPHY (1971) and *Contradiction and Overdetermination*, in FOR MARX" (1977) for a

human activity which seeks to transform the social relations of production, outside the realm of the opposition of ideas.

If one accepts a materialist interpretation of the origin of ideas, the relationship between ideas and the basic structure may be reciprocal, although such reciprocity is mediated by human activity. Ideas affect human actors who by their activity seek to transform the material conditions of their life.

The creation and advocacy of revolutionary theory plays the principal and decisive role in those times of which Lenin said, “Without revolutionary theory there can be no revolutionary movement.” When a task, no matter which, has to be performed, but there is as yet no guiding line, method, plan or policy, the principal and decisive thing is to decide on a guiding line, method, plan or policy. When the superstructure (politics, culture, etc.) obstructs the development of the economic base, political and cultural changes become principal and decisive. Are we going against materialism when we say this? No. The reason is that while we recognize that in the general development of history the material determines the mental and social being determines social consciousness, we also—and indeed must—recognize the reaction of mental on material things, of social consciousness on social being and of the superstructure on the economic base. This does not go against materialism; on the contrary it avoids mechanical materialism and firmly upholds dialectical materialism.<sup>39</sup>

Therefore, while not themselves transformative, ideology and legal ideas, to the extent they are progressive, forward-looking to the possibility of a non-alienated vision of the future, can be a guide to action so long as they are the focus of activity outside of the legal forum.<sup>40</sup>

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discussion of the concept of “social formation.” Its simplest definition is “the full, detailed complexity of the reality ‘signaled’ by (an) image.” Kevin Ryan, *Materials for a Marxist Study of Law* (unpublished manuscript 1980) (in possession of author).

<sup>39</sup> MAO, *supra* note 11, at 116.

<sup>40</sup> For a specific application of this as it pertains to the activity of the left lawyer, see *infra* Thesis III. Kevin Ryan, in his unpublished manuscript referred to in footnote 35, provides a clear description of the relationship between base and superstructure which is extremely helpful in an analysis of legal ideas. At pages 2-3 of his essay he writes:

Consider, for a moment, Marx’s image of a building. What propositions can be made about the structural relationships comprised in the building? If we focus on one of the levels of the superstructure, say the third floor, it should be clear, initially, that the characteristics of this floor are *not strictly and solely determined* by the foundation. There is a wide range of possible structurations available for the design of this floor. The limits of this range are, however, set by the foundation: there are certain structural limits past which the foundation is no longer able to support the floor. Also the structure of each of the other floors places limits on the range of possible structures available for the third floor. If we want to put heavy machinery on the fourth floor, for instance, this necessarily puts structural constraints on the design of the third floor; if we want an open air second floor, this also imposes certain limits on the possible characteristics of the third floor. Finally, the characteristics of the whole structure, of the entire building, both base and superstructure, affect the structure of the third floor. If our building is seventy stories tall, this determines a range of possible third floor structurations,

*THESIS III - WHILE STATE FORCE IS ITS BACKGROUND AND FOUNDATION, LAW'S PRIMARY AND SECONDARY FUNCTIONS ARE DIRECTLY AFFECTED BY IDEOLOGICAL CONTROL*

If you wish to challenge the private property norm, you can't try to overturn a will by suing the Executrix with a legal theory which states "from each according to her ability, to each according to her need." You'll lose. (As a matter of fact, unless you are a relative or a specific donee of property under the will, the court would not have "jurisdiction" since you lack "standing to sue.") If you get caught trying to "liberate" the deceased's estate and distribute it to those who need it, unless you are a legally authorized agent of the state, you would get arrested, your action most likely categorized as a "crime." If you are poor or of color, you'll probably end up in jail. Finally, most people who see or hear about you for ten seconds on the television news will think that you are a "criminal" who was convicted by an impartial and fair process.<sup>41</sup>

Within a given mode of production and reproduction, law is coercive and ideological, backed by the actual or potential use of force through mechanisms of the

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excluding some options while making others particularly attractive. In sum, the range of possible structurations of a particular level of the superstructure is determined by: (1) the characteristics of the base; (2) the characteristics of each of the other levels; and (3) the characteristics of the totality, of the whole structure. But the relationship between the foundation and the superstructure is not uni-directional. The very existence of the third floor (and of each of the other floors) places constraints on the structure of the foundation and on the range within which it can be altered. The heavier the third floor, the more sturdy the necessary foundation. It is likely (though not necessary) that a change (especially a 'significant' change) in the third floor will require a change in the foundation. In addition, the building as a whole imposes structural limits on the foundation—a skyscraper demands certain things in a foundation not demanded by a two-story house. In sum, the range of possible structurations of the foundation is determined by: (1) the characteristics of each floor; and (2) the characteristics of the building as a whole.

<sup>41</sup> In describing how law establishes the parameters within which choices are articulated, Ken Cloke, in his essay *The Economic Basis of Law and the State*, in *LAW AGAINST THE PEOPLE* *supra* note 5, at 70-71 writes:

Law begins with an occurrence, an historical event in relationships between parties which are, for the most part, historically determined . . . . The beginning is jurisdiction, wherein the process of legal adjudication is anarchic and almost totally immune from real planning or foresight, since it accepts all the social givens and insists upon an acceptable 'case or controversy' before it acts. Thus the major purpose of jurisdictional questions is the maintenance of established order. Both jurisdictional requirements and procedural problems which reach jurisdiction must be seen as reflecting the social need to adjudicate *acceptable* controversies, and to restrict the legal adjudication of problems which question the basic inequality by holding that there can be no action until a legally-recognized injury has occurred.

(Emphasis added)

state.<sup>42</sup> Behind the judge's bench is the lock-up. Law itself consists of the expression of legal ideas by people who have a special relation to the state apparatus, the ultimate source of organized force. They are police, government officials and employees, judges, legislators, lawyers, and legal academicians.<sup>43</sup> Legal ideas are the expression of what those with a special relation to state power do, say, write, think, and feel, and are represented to everyone else as an "image of law."<sup>44</sup> These images in turn affect what everyone else does, says, writes, thinks, and feels. Some social control is maintained by the use of naked coercion, but at this historical period in the United States, force operates mostly in the background and on the boundaries of legally regulated social life.

Greater amounts of state force are more directly and frequently employed against those whose lives, culture, personalities, and ideas do not conform to the prevailing "ruling ideas." For example, a poor person or member of a national minority is more likely to get arrested, beaten-up by the police, convicted of a crime, jailed, evicted, have her wages garnished, her car repossessed, and her children taken away due to her "unfitness" than a rich, white, male corporate executive or his family.

That state coercion operates in the background at this time is not to posit that such a condition is static. As the veil of legitimation is removed, force becomes the predominant form of class rule. With Ronald Reagan representing one segment of the ruling class, he has declared war against poor and working people, increased militarization at home and abroad, tacitly encouraged a fundamentalist and authoritarian religious backlash against the hard-won victories of the second wave of the Women's Movement, and passively supported racist murder and the rise of the Nazi Party and the Klan. With the reincarnation of the Subcommittee on Security and Terrorism of Strom Thurman's Senate Judiciary Committee, the words of Arthur Kinoy in characterizing the political climate a decade ago seem chillingly relevant:

(T)he response of the rulers has been to turn increasingly to intermediate forms of repression which pave the way, unless checked, to the ultimate transition to the open terrorist dictatorship . . . . (T)he dominant section of the American ruling circles . . . is moving rapidly and openly in the direction of experimentation with sweeping repressive measures of a legal and extra-legal character. In words which today invoke a

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<sup>42</sup> See LENIN, *supra* note 8. See also FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (International Publishers ed., 1942) (1884).

<sup>43</sup> ENGELS, *supra* note 39, at 156:

In possession of the public power and the right of taxation, the officials now present themselves as organs of society standing *above* society . . . . Representatives of a power which estranges them from society, they have to be given prestige by means of special decrees, which invest them with a peculiar sanctity and inviolability.

(Emphasis added)

<sup>44</sup> For an extended discussion of this concept which contrasts the images law presents (freedom) with its reality (enslavement) in the English legal system, see Z. Bankowski & G. Mungham, *IMAGES OF LAW* (1976). See also BERNARD EDELMAN, *OWNERSHIP OF THE IMAGE* (1979) for an Althusserian discussion of the legal form.

prophetic chill, an astute Southern politician said thirty years ago that when fascism came to the United States, it would come ‘wrapped in the American Flag.’<sup>45</sup>

However, at this moment, the predominant mechanism of social control is affected by the legitimation of beliefs. Law, backed by force and legal images thus affects everyone’s (including those with a special relation to the state) behavior, beliefs, values, attitudes, ways of looking at the world, and notions of common sense and fairness. Antonio Gramsci elaborated the above distinction by contrasting “domination” (direct physical coercion) with “hegemony” or “direction” (consent, ideological control.) He recognized that not even the most repressive regime could sustain itself through the organized and direct force applied through the state. Legitimacy and popular support were necessary to maintain stability, particularly during times of tension.<sup>46</sup>

To argue that social control is obtained through ideological hegemony does not obviate the fact that America is historically evolving into a totalitarian society where the contradictions between the forces and relations of production express themselves in particular kinds of control which seek to encompass all areas of the activities of its members.<sup>47</sup> As an outgrowth of the preceding Thesis, the productive apparatus determines the socially needed occupations, skills, attributes, individual needs, and aspirations. To the extent these values are created by a political and ideological structure, the state and society become one. Thus is social control transferred from “organs of civil society” to organs of political society (the state). Although control is more subtle with increased reliance on psychological forces such as feelings of “atomization, alienation, intimidation and terror,” social institutions such as the family, school and sports are “turned into means of political, ideological and economic control,” vested with a “semblance of rationality.”<sup>48</sup> As stated by Rusche and Kirchheimer in 1939, “the etiology, evolution and nature of control are directly related both to the economic order and to the relations between rulees and rulers.”<sup>49</sup>

In his “Contribution to the Critique of Hegel’s Philosophy of Right,” Marx pointed out that to win broad support, a rising class must appeal to interests wider than its own. He emphasizes that no class can exercise domination and hegemony (i.e. become a ruling class) unless it can make itself a representative of general and

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<sup>45</sup> Kinoy, *supra* note 5, at 280-281.

<sup>46</sup> ANTONIO GRAMSCI, *State and Civil Society and Notes on Italian History*, in PRISON NOTEBOOKS (Quinton Hoare & Geoffrey Nowell Smith eds., 1971). For an elaboration of his concept of “hegemony” see JOHN CAMMETT, ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM, ch. 10 (1967) and CARL BOGGS, GRAMSCI’S MARXISM Ch. 2 (1976).

<sup>47</sup> See D. Nevares-Muñiz, *Toward a General Theory of Control*, 46 REV. JUR. UPR 525 (1977); S. Spitzer, *Toward a Marxian Theory of Deviance*, in SOC. PROBLEMS (June, 1975).

<sup>48</sup> Nevares-Muñiz, *supra* note 44, at 527.

<sup>49</sup> GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939).

universal interests.<sup>50</sup> In evaluating Marx's point, I agree with the assessment of radical criminologists Drew Humphries and David Greenberg when they state:

No doubt this (referring to Marx's assertion) is an overstatement; a class need not gain universal enthusiasm to rule. But it must accommodate the interests of other classes, and thus cannot introduce forms of control that allied subordinate classes strongly oppose. As the slave South illustrates, there are even limits to the forms of control that can be imposed on exploited classes if class rule itself is not to be jeopardized.<sup>51</sup>

Friedrich Engels perceptively recognized that legal ideas operate hegemonically as well on those with a special relation to the state:

The reflection of economic relations as legal principles is necessarily also a topsy-turvy one: it goes on without the person who is acting being conscious of it; the jurist imagines (s)he is operating with *a priori* propositions whereas they are really only economic reflexes; so everything is upside down. And it seems to be obvious that this inversion, which so long as it remains unrecognized, forms what we call *ideological conception*, reacts in its turn upon the economic basis and may, within certain limits, modify it.<sup>52</sup>

In our own technological culture the images of law are the primary ideological form of legitimation. It is crucial that people believe in the *abstract* that everyone is treated equally by those with a special relation to the state. The disjunction between the abstract notion of equality and the particular, everyday operation of legal institutions is the central phenomenon which enhances the perpetuation of the status quo and the domination of a ruling class. In a recent journal article which surveyed recent sociological studies of American legal culture, Austin Sarat noted that while most people support the concept of free speech abstractly, when applied to concrete groups of people such as communists, socialists, or atheists, a majority would deny the exercise of such rights. Further, in assessing attitudes about police, lawyers and courts, Sarat concluded that de Tocqueville was wrong in his argument that experience with the legal system educates the citizen, stimulates more "responsible" public opinion and greater loyalty.<sup>53</sup> Most recent studies demonstrate that the *less* contact people have with police, lawyers and courts, the more "positive" the image. Since poor people and those of color have more contact, their attitudes are more "negative"—i.e. they perceive that unequal treatment obtains. Sarat's theory is most pronounced when surveying attitudes towards courts. Most people's knowledge of

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<sup>50</sup> Karl Marx, *Introduction to Contribution to the Critique of Hegel's Philosophy of Right*, in KARL MARX, EARLY WRITINGS 55-56 (T.B. Bottomore ed., 1964).

<sup>51</sup> Friedrich Engels, *Social Control and Social Formation: A Marxian Analysis*, in TOWARD A GENERAL THEORY OF SOCIAL CONTROL 4, (Donald Black ed., 1981). *See also* Genevieve, *supra* note 29.

<sup>52</sup> Friedrich Engels, *Letter to C. Schmidt in Berlin*, Oct. 27, 1890, in 3 SELECTED WORKS 492-493(1970).

<sup>53</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Meyer & Max Lerner eds., 1966).

courts is highly indirect, identifying law with the mythical pronouncements of the Supreme Court. Most citizens thus lack direct experience with judges and courts, which ignorance enhances support for the institution. To the extent people become involved in lawsuits as winners or losers, support for the courts becomes rapidly eroded . . . regardless of whether they are a plaintiff or defendant.<sup>54</sup>

Most people thus acquire images of law through indirect experience, what they hear from friends, read about in the newspaper, see on television or in movies; in short, as participants in the culture in which they live. The effect of media in shaping ideology is pervasive and infiltrates and reacts upon law itself.<sup>55</sup> While recently awaiting the call of my case in a state Probate Court, I observed opposing attorneys vehemently arguing over their respective clients “rights of visitation of their children.” Amid all the vituperation, the husband turned to the wife and said: “This is worse than *Kramer v. Kramer*.” To illustrate the effect of media on legal ideology a current genre of movies about the American family offers the unstated ideal of an isolated adult without primary relationships.<sup>56</sup> The ideal supports a definition of the family as the smallest possible unit of consumption. (Why buy commodities for only one household when you can do it for two?) *Kramer v. Kramer* pushes a notion of formal equality between men and women. In the climactic courtroom scene of a contested

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<sup>54</sup> Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW AND SOC. REV. 427 (1976). In a related argument, Mark Tushnet, in discussing the functions of a highly rationalized bureaucracy in repressing politically organized groups, writes:

Deference to administrative bureaucracies allows courts to conceal the divergence between the individualistic premises of the rules they apply and the collectivistic premises of the rules . . . bureaucracies apply. The dominant structure thus provides ideological support for capitalist state activities with the least impairment of the support given to the defining relations of society.

Mark Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 59 TEXAS L. REV. 1351 (1979). See also Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 342 fn. 39 (July, 1980).

<sup>55</sup> For a recent account of the role of news media in the shaping of culture and ideology, see Todd Gitlin, *News as Ideology and Contested Area: Toward a Theory of Hegemony, Crisis and Opposition*, 48 SOCIALIST REV. 11 (Nov.-Dec., 1979); TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT* (1980).

<sup>56</sup> For example *AN UNMARRIED WOMAN* (20th Century Fox 1978), *ORDINARY PEOPLE* (Paramount Pictures 1980), *ALICE DOESN'T LIVE HERE ANYMORE* (Warner Bros. 1974), and *KRAMER V. KRAMER* (Columbia Pictures 1979) are a few of the most popular. Even the form of such movies reinforces the norm of “aloneness.” To illustrate, the first shot in *Kramer v. Kramer* reveals Meryl Streep silhouetted against a black background, like a Manet painting. After she has left her child and husband, a crucial image projects Dustin Hoffman standing alone, framed by the doorway. Further, Ms. Streep, in her role, is not portrayed as depending on other women for support, but “finds herself” in individual psychotherapy. In the movie, her best friend even testifies against her at the contested custody trial which many interpret as the denouement of the film.

custody trial Dustin Hoffman asks: “Is there any law which says that a man can’t be as good a parent as a woman?” I would answer: “Yes.” Formal equality is but a mask for the history of the development of the bourgeois family with the separation of the public from the private, work from personal life, alienated labor from feelings, a man’s world from a woman’s.<sup>57</sup> Women have cultivated the culture of emotions and have usually developed the primary attachment to their children. This is not to suggest that women should be confined to their own world or that the development of such traits should not be encouraged in men. The public-private dichotomy is a form of domination and should be effaced in all areas of social life. Rather, formal equality obfuscates any historical and class analysis of what is in fact unequal.<sup>58</sup>

Akin to my argument in Thesis I *supra*, when responding to changes within the family, legal ideas and images “commodify” personal relationships. In accord with a materialist method, one of Engels’ significant contributions was to show that changing ideas about the family are derived from changes in the forms of social institutions. (Just as with political economy, he illustrated that consanguinity lags behind actual changes in the structure of the family.)<sup>59</sup> Sheila Rowbotham, in her book *Woman, Resistance and Revolution*, suggests that Marx and Engels’ equation of prostitution with the development of private property is but a metaphor for the nature of interpersonal interaction in the modern, western world.<sup>60</sup>

All human beings in class society met as the prostitute met her client. Just as the prostitute gives the substitute of love for money, the worker hands over his work and his

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<sup>57</sup> See ELI ZARETSKY, *CAPITALISM, THE FAMILY AND PERSONAL LIFE* (1976); ENGELS, *supra* note 39; Karen Sacks, *Engels Revisited: Women, the Organization of Production and Private Property*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* (1975); SHEILA ROWBOTHAM, *Dialectical Disturbances*, in *WOMEN, RESISTANCE AND REVOLUTION* (1974).

<sup>58</sup> Fran Olsen, in a written summary of her talk *The Politics of Family Law* given to the League of Left Study Groups at Harvard Law School on April 15, 1981, suggests when discussing the “tender years doctrine” that preference be given to the primary attachment figure of the child, whomever that may be. Such a theory would, she argues, emphasize law’s “utopian” aspect in opposition to its “legitimizing” one.

<sup>59</sup> ENGELS, *supra* note 39, 26-27.

<sup>60</sup> See FREIDRICH ENGELS, *PRINCIPLES OF COMMUNISM*, as quoted in H. KENT GEIGER, *THE FAMILY IN SOVIET RUSSIA* 21 (1968) (“Community of women is a condition which belongs entirely to a bourgeois society and which today finds its complete expression in prostitution. But prostitution is based on private property and falls with it.”). See also KARL MARX & FREIDRICH ENGELS, *The Communist Manifesto*, in *SELECTED WORKS* 50 (1968):

The bourgeois sees in his wife a mere instrument of production. He learns that the instruments of production are to be exploited in common, and naturally can come to no other conclusion than that the lot of being common to all will likewise fall to the woman. He has not even a suspicion that the real point aimed at is to do away with the status of women as mere instruments of production.

life for a daily wage. The existence of such commodity exchanges made a mockery of other human relations.<sup>61</sup>

As productive relations within advanced monopoly capitalism have developed, the institution of the family has drastically been transformed.<sup>62</sup> Legal ideas and images have likewise gone through accelerated and dramatic transformations in all areas of family life: divorce, alimony, child support, custody, abortion, pregnancy disabilities, guardianship, and parent-child relations to name but a few areas of change.<sup>63</sup>

An example of this rapid transformation is provided by the recent litigation involving actor Lee Marvin and Michele Triola. As more and more people are getting divorced, fewer and fewer couples are getting married. Excepting the custody and support of children, marriage—i.e. state recognition of a primary, heterosexual relation between adults—has been the law's main connection to the family. If a couple chooses not to marry, the state is denied an important form of social control over the relationship. Unless conduct is characterized as a crime (e.g. sodomy or "unnatural acts" against gay men and lesbians) or the parties choose to consciously invoke the background property norm through an express contract, the law is unable to penetrate, mold and direct the relationship. In *Marvin v. Marvin*,<sup>64</sup> Michelle Triola "Marvin," actor Lee Marvin's abandoned housemate (she took his name shortly after the break-up without his knowledge) brought suit for breach of an express oral agreement. She claimed to have given up a lucrative singing career in return for becoming his full-time companion, cook and housekeeper in exchange for his promise to support her and share all property accumulated during their relationship. The lower courts dismissed her action, while the California Supreme Court reversed and remanded for trial. In the event that the Plaintiff would be unable to prove an express agreement at trial, the California Supreme Court sanctioned a *quantum meruit* theory to protect the "parties lawful expectations" (the difference between the reasonable value of services rendered and the support received). The Court further suggested other possible theories of legal obligation such as a partnership, joint venture, constructive

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<sup>61</sup> ROWBOTHAM, *supra* note 54, at 64.

<sup>62</sup> See U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, ser. P-23 no. 84 DIVORCE, CHILD CUSTODY AND CHILD SUPPORT (1979) (predicting that the divorce rate will soon reach forty percent). One of every five families with children is maintained by a single parent. The number of unmarried people is also greatly increasing. See also P. GLICK, U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, ser. P-23, no. 78 THE FUTURE OF THE AMERICAN FAMILY (1979); Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976); J. DONZELOT, THE POLICING OF FAMILIES (1980).

<sup>63</sup> See *Developments in the Law—The Constitution and the Family*, 91 HARV. L. REV. 1156 (1980); MARY ANN GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1972); Frances Olsen, *Towards A History of Child Custody Law As Ideology* (unpublished SJD Dissertation, Harvard Law School, 1981). For an argument which elucidates the changes, but sees them as reinforcing the nature of patriarchy, see Janet Rifkin, *Toward A Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

<sup>64</sup> *Marvin v. Marvin*, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

or resulting trust.<sup>65</sup> The *Marvin* case was the consummate media event, a four year item in the *National Enquirer* as well as a regular feature nationwide in daily newspapers, periodicals and on television.<sup>66</sup> It was also widely discussed and analyzed in law journals, and like or analogous legal theories began to germinate in most every jurisdiction.<sup>67</sup> *Marvin* illustrates that as the institution of the family changes, so does the prevailing legal doctrine which creates a sanction for the law's reach and a conceptualization of this newly emergent relationship. Legal ideas and images reduce personal relationships to objects and encourage people to view themselves as commodities subject to bargain and exchange.<sup>68</sup>

Thus, in every area of social life, law and its images operate as an important aspect of an all-encompassing hegemonic ideology which attempts to legitimate, shape and control what people think and feel about the institutions and classes which oppress them as well as what they feel about themselves and their own personal relations. Should things get out of hand, state force is waiting in the wings to contain activity within well-defined boundaries.

*THESIS IV - THE PRIMARY TASK OF THE LEFT LAWYER AND  
LEGAL WORKER IS TO PRACTICE IN ACCORD WITH HER  
UNDERSTANDING OF THE CONTRADICTIONS WITHIN LAW  
TO AFFECT THE CONTOURS OF IDEOLOGY AND POLITICAL  
ACTIVITY OUTSIDE OF LEGAL INSTITUTIONS.*

Left lawyers and legal workers should operate in the interstices of all areas of social life where law affects people. Because of our own special relation to the state, left lawyers and legal workers most frequently operate on behalf of those who have direct contact with legal institutions such as courts, government agencies and police.

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<sup>65</sup> *Id.* at 110, 122-123.

<sup>66</sup> For an account of *Marvin* as a media event see D.A. Denison, *Marvinizing*, in *THE REAL PAPER* 4, Jan. 30, 1979.

<sup>67</sup> Countless academic and professional journals have written about the dissemination and implications of the theory. For a representative sampling see Jane Draper, *Recovery for Services Rendered by Persons Living in Apparent Relation of Husband and Wife Without Express Agreement for Compensation*, 94 ALR3d 552 (1979); Carol Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker's Services*, 10 FAMILY L.Q. 101 (1977); Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 931 (1977); Comment, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359 (1978); Note, *Property Rights of a Same-Sex Couple: The Outlook After Marvin*, 12 LOYOLA OF L.A. L. REV. 409 (1979); Comment, *Property Rights Upon Termination of Unmarried Cohabitation*, 90 HARV. L. REV. 1708 (1977).

<sup>68</sup> The most recent suit filed against tennis star Billie Jean King by her former lover, Marilyn Barnett, is yet another sordid media event which illustrates the commoditization of non-marital personal relations. See also M. KING, *THE COHABITATION HANDBOOK: LIVING TOGETHER AND THE LAW* (1975) and B. HIRCH, *LIVING TOGETHER: A GUIDE TO THE LAW FOR UNMARRIED COUPLES* (1976).

However the “practice of law” in the broadest sense can be located in a context beyond such direct contact. As discussed within Thesis III *supra*, most people have little contact with law. Legitimation is effected through indirect images. Direct contact with legal apparatuses provides people with their most vivid and important experiences with law. The more immediate the contact, the less belief in the equality and rationality of the law. The eroding of the image of law’s “evenhandedness” brings into play its coercive aspect, which realization may lead to active opposition and resistance among those dominated by its form. Thus, unmasking the law can occur before one has direct contact with state legal institutions.

The practice of unmasking in whatever context realizes the contradiction within law between the illusion of fairness and its reality. This illusion is not only maintained by images disseminated from without, but by the law itself. To maintain the illusion of fairness, within the given mode of production people must believe that individual outcomes of cases result in “just” results. Thus a perceived correspondence emerges between outcomes and notions of fairness. While recognizing that formal equality is a mask for class domination and though there exists an enormous disparity between the norm of equality in the abstract and its particular application, some results must accord with the law’s unarticulated norm. Therein lies the fundamental contradiction of the legal system.

The utilization of this fundamental contradiction is highly dependent on the particular nature of class struggle at a specific moment. As Lenin noted:

Revolutionaries who are unable to combine illegal forms of struggle with *every* form of legal struggle are poor revolutionaries indeed. It is not difficult to be a revolutionary when revolution has already broken out and is at its height. . . It is far more difficult—and of far greater value—to be a revolutionary when the conditions for direct, open, really mass and really revolutionary struggle *do not yet exist* to be able to champion the interests of the revolution . . . in non-revolutionary bodies and often enough in downright reactionary bodies . . . .<sup>69</sup>

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<sup>69</sup> VLADIMIR ILYICH LENIN, LEFT WING COMMUNISM, AN INFANTILE DISORDER 102 (Foreign Languages Press ed., 1970) (1935). See also Cloke, *Law is Illegal*, *supra* note 7, at 41:

During ‘parliamentary’ periods of struggle, as opposed to ‘revolutionary’ periods, in other words during low levels of class struggle when the state and judicial system appear to have a life of their own, distinct from class contradiction, it is manifest that efforts to force the legal system to comply with its false promises can only raise peoples’ understanding of the class character of the judicial system. The dialectic requires forms of action consistent with the level of popular awareness concerning the nature of the problem, and a close correlation between strategy and tactics. While the struggle may be ‘illegal,’ its target and mode of operation during this period, are highly legal, since the projected goal is easily reconcilable with existing legal principles. Gradually however, since law is an attempt to camouflage or crush conflict, but in any event to eliminate it, the peaceful nonviolent, parliamentary struggle is transformed into violent revolutionary struggle. This does not mean that all ‘legal’ work stops, but that legal work is then combined with ‘illegal’ work, and the two occur in the alternative and at

Revolutionary transformation is not an event, not the storming of the Winter Palace. Rather it is a process. In parliamentary periods of bourgeois liberal democracy where ideological hegemony prevails over state force as a mechanism for social control, the contradiction between the illusion and reality of fairness provides a guide to the concrete tasks of the left lawyer and legal worker. On the one hand, outside legal institutions we should strive to de-legitimize law by pointing out both its failure to fulfill its ideals as well as the paucity of those ideals. De-legitimation encompasses a revelation (both to ourselves and others) of the class, racial and sexual domination masked by the law. Along with such de-legitimation we should simultaneously proffer a vision of the less alienated forms of social life. On the other hand, within legal institutions we must defend and “legitimate” the ideal of liberal democracy against more repressive forms of state coercion in order to protect left political activity.<sup>70</sup> While attempting to legitimate those ideals, we must also expand them within law, push them as far as they can go. Within legal forums, we must seek to establish those legal ideas whose effect is to guarantee the maximum amount of freedom to organize, expand and operate for progressive groups and their members (*see* Thesis V *infra*).

Thus in a defensive posture, law provides a “buffer” or breathing space for individuals and groups, functions to check future repression, furnishes time to organize, keeps people out of jail, and neutralizes the class enemy. In the rare case of a well-publicized “political trial”<sup>71</sup> it can guarantee a forum for the dissemination of

the same time. This transition can be described best by the attitude of the law toward attempts at peaceful change. As the legal institutions begin to brand

attempts to enforce their false promises as subversive and illegal, and as the oppressed class becomes more powerful and conscious of the antagonism of its interest to those of the ‘legal’ minority, illegality becomes legal and law becomes illegal.

<sup>70</sup> Kinoy, *supra* note 5, at 288-289.

<sup>71</sup> All legal occurrences, as all social activity, is “political” in that it produces and reproduces the conditions of life. In instances where an event is designated a “political trial,” whether civil or criminal, the courtroom is used as a self-conscious form for a clash of ideologies. The trial is directed toward a large audience outside the courtroom. As Malcolm Burnstein, lawyer and left activist who was chief counsel for the Free Speech Movement in Berkeley in the 1960’s wrote: “A political trial is characterized by the fact that public opinion and public attitudes on one or more social questions will inevitably have an effect on the decision.” *Trying a Political Case*, 28 GUILD PRAC. 33 (1969).

The most stark example of a political trial is Fidel Castro’s self-defense in his trial for an abortive raid on the Moncada Barracks in 1953. Even though his trial was conducted at a closed session open only to selected members of the press, his defense laid out a blueprint of the social reforms necessary after a successful seizure of state power. See F. CASTRO, HISTORY WILL ABSOLVE ME (1961), and a commentary contained in HUBERMAN & SWEEZY, CUBA, ANATOMY OF A REVOLUTION (1960). See also OTTO KIRCHHEIMER, POLITICAL JUSTICE (1961), Nathan Hakman, *Political Trials in the Legal Order*, 21 J. PUB. L. 95 (1972); Michal Belknap, *The Trials of Labor Defense: The Smith Act Cases and the Transformation of Communist Party Litigation Strategy*, 2 JOUR. OF CRIM. DEF. 287 (1976), and all the books and articles cited by the authors. Political trials have become so widespread in recent history that a legal publishing

left political ideas. In its affirmative face, law as part of an overall political strategy can give strength to individuals and organizations by providing a measure of transformation in people's lives. Even within the legal forum, affirmative litigation can force one's opponent to respond to issues as articulated and defined by left and progressive forces. While changes within "legal doctrine"<sup>72</sup> may be related to and have impact outside legal institutions, legal ideas *themselves* have little direct influence. Only in their representation as images of law do they affect the prevailing mechanisms of ideological hegemony. Further, the outcome of a decision, independent of the stated reasoning, is also an important influence on the social world. Legal arguments advanced in distinctly legal forums are *primarily* made to obtain a desired result, not to themselves articulate an alternate vision (not as an ideological device to, in Gramsci's vocabulary, establish "counter-hegemony.")<sup>73</sup>

It is often suggested that a lawyer or legal worker speaks two different languages; one inside the courtroom, one outside. I believe it is more accurate to characterize the lawyer and legal worker's predicament as speaking both languages at the same time. I'm sure any legal person has had the experience described by Philadelphia lawyer Holly McGuigan in her talk about the role of the radical lawyer at a meeting of the Boston National Lawyers Guild chapter in October, 1980. We get in an argument with a friend, spouse or lover and at some time are accused of "being an asshole because you're trying to cross-examine me and you sound just like a lawyer." We immediately realize a distinction between talking and acting like a person (realspeak) and as a lawyer (lawspeak.)<sup>74</sup> Within legal institutions, with an understanding of the law's contradictions and with a view to obtaining favorable results and "legitimizing" the law's unstated goals, we should also try to efface the distinction between lawspeak and realspeak. However, we should also be aware that unless we are engaged in a political trial or are addressing non-legal persons such as members of a jury, such effacement is directed primarily to legal elites, those with a special relation to the state.<sup>75</sup>

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company has even included a volume detailing the mechanisms of a political defense in their Criminal Law Series. See SINK, *POLITICAL CRIMINAL TRIALS* (1974).

<sup>72</sup> In an adjudicatory context, by "legal doctrine" I mean the articulation, whether written or oral, or reasoning for purposes of deciding a case which is presented to a person, usually a judge, who by virtue of her special relation to the state has the power to so decide. For a fuller discussion of doctrine as well as a critique of Roberto Unger's notion of "expanded doctrine" see Goldstein, *Context and Form: Critique of Notions of the Antimony of Legal Doctrine and Politics*, in ALSA FORUM (Fall, 1981).

<sup>73</sup> See *supra* note 43.

<sup>74</sup> See, e.g., Danet, *Language in the Legal Process*, 14 LAW AND SOC. REV. (1980), (containing her discussion of the history, form and development of "occupational jargon."). See also MELLINHOFF, *THE LANGUAGE OF LAW* (1963).

<sup>75</sup> Why judges often articulate "expanded doctrine" is explained by consideration of the development of my argument thus far. First, the doctrine is wholly within the context of a given system of production and reproduction. Second, judges' personalities, like everyone else's are not static but reflect on both conscious and subconscious levels material conflict existing in the world. See *supra* note 34. This is often reflected as the conscious antimony of

The above highly theoretical statement may have profound implication for how one practices law everyday, particularly as to our activity within courts. Despite modest recent attempts to rehabilitate it,<sup>76</sup> legal formalism is dead. Beginning with Holmes' opening salvo of "law is what courts do in fact,"<sup>77</sup> through the American legal realists,<sup>78</sup> to left legal academics,<sup>79</sup> legal ideas as a self-contained, transcendent, rational and internally consistent body has been universally "pooh-poohed" by all but the most ahistorical, idealist rationalizers of the status-quo.<sup>80</sup> Within the parameters of bourgeois legal philosophy, such legal realists as Jerome Frank have also questioned the relation to doctrine itself to legal outcomes.<sup>81</sup> The realists' banner has recently been picked up by such modern radical positivists as Donald Black and carried forth onto the battlefield of one foundation or government funding source to another under the rubric "sociology of law."<sup>82</sup> However, there has been little critique of the efficacy of "trial skills and technique." If anything there is a mystification of such "skills" by both the mainstream and progressives in American legal culture. Edgar and Jean Cahn, in their 1964 proposal to set up publically funded neighborhood law firms, place much reliance on the lawyer who possesses "unique" professional advocacy skills.<sup>83</sup> Ann Fagan Ginger put forward the notion of a lawyer as an extraordinary

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competing legal ideas such as property versus freedom. As stated by Tigar & Levy, *supra* note 33, at 323:

One reifies into ideology the principles of property and contract upon which the capitalist system rests, and predictably allows for the use of state power to to protect those freedoms. The other consists of those legal principles which the bourgeoisie promoted as essential to the political task of winning power.

<sup>76</sup> See, e.g., Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent ed., 1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law* (1959).

<sup>77</sup> Oliver Wendell Holmes, *The Path of Law* (1897)

<sup>78</sup> See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Col. L. Rev. 431 (1930); Karl Llewellyn, *The Bramble Bush* (1930); Karl Llewellyn, *Some Realism about Realism*, 44 Harv. L. Rev. 1222 (1931); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev. 809 (1935); Roscoe Pound, *Mechanical Jurisprudence*, 8 Col. L. Rev. 605 (1908); John Dewey, *Logical Method and Law*, 10 Cornell L. Rev. 17 (1924), for a representative sample by its most eloquent spokespersons.

<sup>79</sup> See Duncan Kennedy, *Legal Formality*, 2 J. of Legal Stud. 351 (1973). See also Judith Shklar, *Legalism* (1964).

<sup>80</sup> To name but a few who gravitate to this neck of the woods, see Dworkin, *supra* note 10; Rawls, *supra* note 10; Ronald Dworkin, *Taking Rights Seriously* (1977); Charles Fried, *Right and Wrong* (1978).

<sup>81</sup> See, e.g., Jerome Frank, *Courts on Trial* (1949).

<sup>82</sup> Donald Black, *The Behavior of Law* (1976). For a critique of Black, see David Greenberg, *Donald Black's So-Called Theory of So-Called Law* (unpublished paper presented at the Conference on Critical Legal Studies in Minneapolis in May, 1981).

<sup>83</sup> Edgar Cahn & Jean Cahn, *The War on Poverty: A Civilian Perspective*, 72 Yale L.J. 1317 (1964).

participant in the movement, likewise possessed of a special set of skills called “technique.”<sup>84</sup> The National Trial Lawyers Association has established an influential and widely attended intensive seminar in trial skills, which format has been emulated at many law schools.<sup>85</sup> Although there has been a rapid increase and acceptance of law school clinics where students handle civil and criminal cases for indigents, a countervailing trend for “simulation” is developing. With the renewed emphasis on technique to the exclusion of an historical analysis of the social, political and ideological context of legal phenomena, we are witnessing the rise of a new formalism which is perfectly suited to the growth of the technocratic, bureaucratic welfare state. Just as the realist critique was consistent with the paradigm “scientific naturalism,”<sup>86</sup> so the current internal incoherence of legal ideas has led to a reification of “skills.”

Even when a case gets to court, there is rarely an opportunity for the manipulation of the intricacies of evidentiary rules. Most cases enter the lowest level trial court and, whether civil or criminal, are “resolved” before trial. An extremely small number are appealed, of which one commentator suggests that the appellate courts accept the trial courts’ finding in ninety-eight percent of all instances.<sup>87</sup> Although the recent “sociology of law” movement should be criticized for positing a false separation of fact from value and its reduction of law to only that which is an observable act (thereby totally ignoring any of law’s ideological aspects),<sup>88</sup> within a framework of advanced monopoly capitalism, it does evidence a power in its description and prediction of legal phenomena. For example, Donald Black begins with a definition of law as “governmental social control.”<sup>89</sup> Thereafter, he attempts to elucidate how law varies within its social context. Black’s work focuses on two types of variations, those of quantity and style. By quantity he means increase in the amount of state intervention

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<sup>84</sup> Ginger, *The Movement and the Lawyer*, *supra* note 4, at 14.

<sup>85</sup> See, e.g., description of the Trial Advocacy Workshop of the Introduction to Advocacy Program in the Harvard Law School Bulletin (1981/1982).

<sup>86</sup> Edward Purcell, *The Crisis of Democratic Theory* (1973).

<sup>87</sup> Frank, *supra* note 78, ch 3; D. Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 *Social Problems* 255 (1965) (on the dynamics of lawyering in criminal cases); Sally Engel Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 *Law and Soc. Rev.* 89 (1979) (showing the ineffectiveness of court sanctions). See also Craig Wanner, *The public ordering of private relations. Part one: initiating civil cases in urban trial courts*, 8 *Law and Soc. Rev.* 421 (1974); Craig Wanner, *The public ordering of private relations. Part two: Winning Civil Court Cases*, 9 *Law and Soc. Rev.* 293 (1975); Marc Galanter, *Why the ‘haves’ come out ahead: speculations on the limits of legal change*, 9 *Law and Soc. Rev.* 95 (1974); Stewart Macauley, *Non-contractual relations in business: a preliminary study*, 28 *Am. Soc. Rev.* 55 (1963). For a study of Massachusetts lower criminal courts, see Stephen Bing, *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston* (1970) (finding that ninety-six percent of all criminal matters were disposed of in the District Court. For only two percent was there a new trial before a higher court with a jury.).

<sup>88</sup> Donald Black, *The Boundaries of Legal Sociology*, 81 *YALE L.J.* 1086 (1972); Jack Gibbs, *Definitions of Law and Empirical Questions*, 2 *LAW AND SOC. REV.* 429 (1986). See generally GEORGE HOMANS, *THE NATURE OF SOCIAL SCIENCE* (1967).

<sup>89</sup> BLACK, *supra* note 79, at 2.

(e.g. getting put in jail is a greater degree of state intervention than getting stopped by a cop and then let go). By style of law he means how the social control is structured (e.g. as criminal as opposed to a form of conciliation.) Using this mode of analysis, Black and other of his contemporaries analyze several social characteristics; stratification (inequality of wealth), morphology (the distribution of people in relation to each other—e.g. division of labor, intimacy), culture (customs, mores, values, and for Black the ideological components of law),<sup>90</sup> organization (the capacity for classic action), and other social control (non-state determinants of normative behavior.)<sup>91</sup> After the historical study of diverse legal cultures, Black has developed several general hypotheses. For example, between parties to a legal action, law varies directly with stratification, culture and organization, while its relation to differentiation is curvilinear (i.e. the more differentiation, the more law up to the point of symbiosis), and inverse to other control mechanisms. Although Black's analysis does not study socialist legal systems such as China and Cuba and fails to be able to determine which social characteristics have greater weight in a particular situation (e.g. stratification or intimacy) all could be considered various aspects of class relations as I have previously defined them.<sup>92</sup> The work of other investigators when studying some of the above social characteristics could likewise be best understood as elements of a class analysis.<sup>93</sup>

Regardless of how characterized, the "sociology of law," reveals the overall class bias of the legal institutions as to the outcome of cases, beyond the content of legal rules or technique. The outcomes in cases thus have more to do with who the *parties* are than who is the lawyer, how "well" a motion is argued or brief written or whether an attorney conducted a "searing" cross-examination. I'm not suggesting that rules or technique are irrelevant. Only that it is not as important as we think.

If one assumes that within a legal forum, the lawyer's most important consideration is to obtain a desired outcome, an understanding of the social context of law mandates a new approach to practice. The "sociological" approach is already standard in jury selection techniques, used by the ruling class in such trials as the Ford Pinto criminal prosecution in Indiana as well as by left and progressive movements.<sup>94</sup>

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<sup>90</sup> Within Black's analysis what law should do is to teach legal culture which for him are the "principles, rules, justifications of law by which the processing of people is justified." He thus characterizes lawyers as "virtuosos in legal culture." (Class notes of Donald Black's *Sociology of Law*, Harvard Law School, Fall 1980).

<sup>91</sup> See BLACK, *supra* note 79, at 2, for the following exposition of his theory.

<sup>92</sup> See *supra* note 9.

<sup>93</sup> See Galanter's notion of "repeat players vs. one-shotters", *supra* note 84; VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY COURTS* (1977) (discussing the correlation of sanction with the prior relationship between the victim and a criminal defendant.).

<sup>94</sup> For an account of Hans Zeisel's role in helping officials of the Ford Motor Company escape the "slammer" by testifying in support of changing the venue of the trial 75 miles south of where the injury occurred, see Mays, *Hans Zeisel: The Time of His Life*, Vol. 8 No. 8 STUDENT LAWYER 23 (April, 1980) (I suppose that anyone would have a good time if he or she were receiving \$1000 per day to testify!). For the classic study of the American Jury, see

What is needed is to develop a similar approach to the non-jury, everyday lowest level trial courts, the forum of most people's contact with law. For example, since there is more variation in law with an increase in the amount of social information given a third party<sup>95</sup> such as a judge, it may be an advantage to withhold as much information as possible in order to obtain a desired result. Last summer, I represented people who were arrested while protesting draft registration at the main post office in Boston. At bail hearings, many of the protesters refused to give the court any information except their name, as is their prerogative under the new federal Bail Reform Act.<sup>96</sup> In fact, many of their backgrounds included convictions for similar political acts. Those who gave no information to the court were treated in the same manner as those who gave the requested information to the magistrate. All were released on their "personal recognizance." By withholding information and absent any other cues (such as "freaky appearance") the magistrate, over the objections of the Assistant U.S. Attorney (a young, female, recent law school graduate), granted the same bail normally granted for similar misdemeanors.<sup>97</sup>

In other situations a lawyer or legal worker may want to emphasize the most favorable social characteristics of her client while exposing undesirable traits of an opponent to obtain a desired outcome. Unless a client chooses to make a political statement by her appearance, the practical lawyer's saw which instructs a client to dress "conventionally" is good advice. Operating upon the hypothesis that a reduction in social distance between a party and a judge will result in a more favorable ruling, other devices to maximize intimacy with a judge or jury may include

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ZEISEL & KALVIN, *THE AMERICAN JURY* (1966). The work of the National Jury Project with offices in New York, Boston, Atlanta, Chicago, and San Francisco has been of great aid in obtaining acquittals or hung juries in the recent spate of political trials such as those of Joan Little in North Carolina, Willie Sanders and Susan Saxe in Boston, Yvonne Wanrow in Washington, and Inez Garcia and Angela Davis in Northern California to name but a few well-publicized examples.

<sup>95</sup> For a full discussion of the adversaries' relation to third parties, see BLACK & BAUMGARTNER, *CENTER FOR CRIMINAL JUSTICE, HARVARD LAW SCHOOL, A TYPOLOGY OF THIRD PARTIES* (1981).

<sup>96</sup> 18 U.S.C. § 3041 et seq. (1966).

<sup>97</sup> Failure to give *any* information to police has likewise proved a successful tactic in mass arrest situations. For example, approximately 850 people protesting financial institutions' support for nuclear energy and weapons were arrested on Wall Street on Oct. 29, 1979 (the golden anniversary of the stock market crash). Many of those arrested neither carried nor provided identification to the police. They were summarily released from jail after their arraignment. For the effects of social information on officials' behavior see Thomas Beidelman, *Intertribal tensions in some local government courts in colonial Tanganyika II*, 11 *JOUR. OF AFR. LAW* 27 (1967); Darrell Steffehsmeier & Robert Terry, *Deviance and Respectability: An Observational Study of Reactions to Shoplifting*, 51 *SOC. FORCES* 417 (1973); Frances K. Heussenstamm, *Bumper stickers and the cops*, 8 *TRANSACTION* 32 (1971); JOSEPH GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 13-35, 111-138 (1963); HUNTER THOMPSON, *HELL'S ANGELS: A STRANGE AND TERRIBLE SAGA* (1967); JACQUELINE WISEMAN, *STATIONS OF THE LOST: THE TREATMENT OF SKID ROW ALCOHOLICS* (1970).

making direct eye contact or talking personally (realspeak) as opposed to formally (lawspeak). The use of such tactics are but examples of what every lawyer who practices at the lower level courts already knows. Even given the overwhelming class bias of the legal rules and their unequal application on behalf of the rich and powerful, an understanding of how to manipulate social facts frequently accounts for the ultimate success of a lower court lawyer when representing parties of similar class background and social characteristics. (The same probably applies to lawyers at every strata of the legal profession, however I am discussing the lowest level trial courts since this is where most people have direct contact with law.) Thus in the face of the avalanche of paper, appeal to rules and the fanciest of trial techniques, a neighborhood lawyer often prevails in opposing a legal services advocate.<sup>98</sup>

To suggest a new method of practice doesn't mean I've "flipped out" by aligning myself with the positivists or "scientific naturalists." Instead given the homology between the commodity and legal form and recognizing the primary function of law as the reproduction of the domination and oppression of one class over another, a "materialist" conception of practice within courts acknowledges the primacy of practical activity over theory.

Doctrine and technique do however play a part in legal outcomes. Most lawyers think so. Jerome Frank, in designating legal ideas as "magical" and comparing lawyers to wizards, asked whether lawyers fit any of the following classes of "professional practitioners of magic:"

- (1) The first class devoutly believe in the efficacy of their rites.
- (2) The second are occasionally skeptical but, in varying degrees manage to fool themselves.
- (3) The third class are outright skeptics, who deliberately gull their public.<sup>99</sup>

A recent study by Robert Schwartz repudiates the notion of the lawyer as "skeptical." In soliciting the opinions of a representative sample of attorneys as to the importance of skills to the practice of law, "analyzing cases," "legal research," and "knowledge of the substantive law" was deemed more important than "investigating the facts of a case" or "counseling clients."<sup>100</sup> If most lawyers are not skeptics on a conscious level, then neither are judges. Legal officials don't ignore rules. Rules, as an element of law, establish the boundaries of decision (*see* Thesis III *supra*).<sup>101</sup> Not

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<sup>98</sup> As to the highly stratified nature of the practicing bar see the classic studies of JEROME CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962) and *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966). *See also* JEROLD AUERBACH, *UNEQUAL JUSTICE* (1976).

<sup>99</sup> FRANK, *supra* note 78, at 68.

<sup>100</sup> Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 *GOLDEN GATE U. L. REV.* 321, 324, 330 (1973).

<sup>101</sup> *See* Tushnet, *supra* note 51, at 1346 (discussing law as "incomplete hegemony" of the ruling class in that it sets the framework for discussion and imposes limits on what can be

only is there a disjunction between law's appearance and reality, but the appearance itself makes law into an ideology which "stills the spirit."<sup>102</sup> In the words of Jan Myrdal, "[w]e are not the bearers of consciousness, we are the whores of reason."<sup>103</sup> Possibly due to their "self-deluded" consciousness resulting from their involvement with reading numerous appellate court cases, many lawyers and legal academics forget about the boundaries.<sup>104</sup> However, there has been criticism about even practicing within the adversary model at all. John Griffiths notes that the entire criminal process should properly be viewed as a II status degradation ceremony,<sup>105</sup> while Bill Simon in his devastating critique in his article "The Ideology of Advocacy" points to a "procedural fetishism" which not only reifies the client, but functions to sublimate conflict and turn it into "stylized aggression"—i.e. transfer substantive concerns which threaten to produce conflict into manageable procedural concerns.<sup>106</sup> The lawyer maneuvers the client into "a role defined in terms of a formal, undifferentiated hostility which results from the other lawyer's partisanship."<sup>107</sup> Unlike Griffiths, who offers a utopian theory of a "family model," Simon suggests a method of "non-professional advocacy." However, his theory mainly talks about political struggle between lawyers and clients and only hints at its implications for practice outside the law office.<sup>108</sup>

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treated as a serious proposal); see also A. Katz, *Studies in Boundary Theory*, 28 *BUFF. L. REV.* 383 (1979) (a Hegelian, dense, and very fancy discussion of "boundaries" as a theory of the forms of consciousness).

<sup>102</sup> Lester Mazor, *The Crisis of Liberal Legalism*, 81 *YALE L.J.* 1032, 1034 (1972).

<sup>103</sup> JAN MYRDAL, *CONFESSIONS OF A DISLOYAL EUROPEAN* 201 (1968), as quoted in Mazor, *supra* note 99, at 1034.

<sup>104</sup> E.g. David Trubek, in a review essay of Balbus' *THE DIALECTICS OF LEGAL REPRESSION*, offers the possibility of law as an "escape" from the contradiction between its ideals of equality and its application as domination. He suggests that law "mediates" between the social structure and the ideal and "legitimizes a society challenged by its own ideals." Trubek really goes overboard and even suggests that "law may contribute to the elimination of alienation." See Trubek, *supra* note 25, at 542, 543 fn. 5 (1977).

<sup>105</sup> John Griffiths, *Ideology in Criminal Procedure or a Third Model of the Criminal Process*, 79 *YALE L.J.* 359, 371 (1970).

<sup>106</sup> Bill Simon, *The Ideology of Advocacy*, 1978 *WIS. L. REV.* 29, 119-125.

<sup>107</sup> *Id.* at 125.

<sup>108</sup> *Id.* at 130 et seq. In his recent article *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *STAN. L. REV.* 487 (1980), Simon critiques what he calls a "psychological vision of law" current in law schools and legal education. As part of his argument, he criticizes as "instrumental" lawyers who view courtroom behavior as "not a means of communication, but as a tool of manipulation." *Id.* at 540. He then posits a theory of "shared norms" which appeal to ideals of "transcendence and universality." I believe this view fails to distinguish between primary and secondary functions of law and legal institutions. The courtroom *is* a setting where outcomes should prevail. Further, to posit the notion of the transcendence of legal ideas is itself an idealist formalism. It does not consider the class setting of legal phenomena and elevates ideology over practice as determinants of social transformation. Rather than positing technique as "value free" (as Simon maintains), it is an aspect of tactics in accord with a

Of course, one should have an assumption about a client's autonomy. The client should participate in her own case and make all important decisions. A lawyer or legal worker must frame and explain all alternatives to her client. It is a mystification of the legal process to refuse explanation due to its being "too technical." Further, the legal person must be aware of the power of her role as a professional and the influence that may have on her relationship with her client. The lawyer or legal worker's own ideological view of law must necessarily shape even the most mundane decisions about her practice. For example, how one negotiates with another attorney depends on how one views legal doctrine, courts and power. Ted Finman, in comparing different legal services offices, noted that an office's ideology (defined as the self-description of program goals and their perception by lawyers and the community) was the most important component in their actual performance.<sup>109</sup> Ideology in fact shaped and directed the everyday practice of each office. Whether a lawyer saw an eviction as a reaction to high rent being charged for a run-down apartment or as an instance of a tenant who refused to pay rent legally due the landlord, whether a client is seen as an individual with a problem or as a concrete manifestation of a social phenomenon was found to be solely a function of the lawyer's ideology.

This doesn't suggest that a legal person shouldn't express and debate her views with a client. Only that "in the last instance" she should allow her client to make the ultimate decision about every aspect of her case. If a decision is incompatible with a strongly held value of a lawyer, the lawyer must withdraw from the case.<sup>110</sup> Finally,

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theoretical understanding of the contradictions within law and ideology. Unless one is engaged in a "political trial" as previously defined (*see supra* note 68), the *primary* activity within the courtroom is not to demystify but to obtain a desired result.

<sup>109</sup> Ted Finman, *OEO Legal Services Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1971 WIS. L. REV. 1001.

<sup>110</sup> I realize that this may pose "ethical" problems under the Code of Professional Responsibility. For a discussion of this and like "professional" issues see Bellow & Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978).

For a most difficult example of political struggle between lawyers and their clients, see the 1975 debate within the National Lawyers Guild over whether the Guild should continue to send law students to work for the United Farm Workers given the Guild's disagreement with the Farm Worker's policy of turning in scab undocumented workers to the Immigration and Naturalization Service. *See Position Papers—Undocumented Workers: Guild Summer Projects and UFWA*, vol. 4 no. 1 GUILD NOTES 15 (Jan., 1975). After a heated debate at its winter meeting of the National Executive Board, the Guild voted to continue work with the UFW but refused to have its members participate in turning-in illegal aliens to the Immigration Service. The Guild also offered some "comradely criticism" to the Farm Workers. The UFW rejected the Guild's offer of conditional assistance saying "we feel that a group of law students, legal workers, and lawyers cannot substitute their judgments for that of the workers." *President's Report: NEB Vote in UFWA Summer Project*, vol. 4 no. 2 GUILD NOTES 2 (Mar., 1975). Although individual Guild members continued to work with the United Farm Workers, it took several years for the two organizations to re-establish ties (after the UFW had abandoned its "undocumented worker" policy.)

lawyers and legal workers in our role as de-mystifiers of the legal process should encourage clients to represent themselves. It fosters client autonomy and lessens the dependence on “professionals.” “Pro se” representation at political trials is commonplace. However in other kinds of litigation it may also prove desirable for a lawyer and client to be “co-counsel.” Such a tactic obviates the appearance of a “conspiracy” of legal professionals. For instance, when there is a meeting in a judge’s chambers, a negotiation among counsel, or a bench conference during a trial, the client is not excluded.<sup>111</sup>

The above discussion is but a preliminary and sketchy attempt to suggest the contours of a form of practice derived from a theoretical understanding of the contradictions inherent in the legal form. Within legal institutions it attempts to accentuate the importance of the outcomes of cases while de-emphasizing the significance of doctrine and technique. Outside legal institutions, the primary role of the left lawyer and legal worker is to de-legitimize. It is thus crucial that one who works everyday within legal forums have a developed legal theory. In its absence, one can get “sucked into” the boundaries and uncritically accept things as they are.

*THESIS V - IN AID OF BUILDING AND MAINTAINING A  
TRANSFORMATIVE SOCIAL MOVEMENT, THE LEFT LAWYER  
AND LEGAL WORKER SHOULD DEFINE HER PRACTICE IN  
RELATION TO ORGANIZED GROUPS AND THEIR MEMBERS.*

If a lawyer and legal worker’s practice is to affect political activity, it is remiss to fail to elaborate on whose behalf it is carried out. The goal of the left legal person should be to strengthen organized groups as a means to the immediate seizure of state power.<sup>112</sup> Our own and each groups’ social relations should be a model of our vision of less alienated and oppressive possibilities.<sup>113</sup> A group could be defined in many ways: geographically (e.g. neighborhood), around a common area of oppression (e.g. workplace, sexual, racial minority), or by those engaged in a common left or progressive struggle (e.g. in opposition to repressive legislation, in support of anti-imperialist movements.).

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<sup>111</sup> For further suggestions as to the empowering of clients within the litigation process see Michael Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1 (1980), and Wexler *supra* note 1. Noticeable is a lack of any recognition of the development of the lawyer and legal worker’s own ideology and the duty to engage the client in dialogue.

<sup>112</sup> See *supra* note 8 as to the necessity to seize state power.

<sup>113</sup> Although somewhat beyond the scope of this essay, for an explication of less alienating work relations in a law office, see Harris, *In-Laws and Out-Laws*, *supra* note 6; Jim Douglas, *Organization, Ego and the Practice of Alternate Law*, 2 YALE REV. OF L. AND SOC. ACTION 88 (1971); P. Biderman, *The Birth of Communal Law Firms*, in RADICAL LAWYERS *supra* note 7, at 280; Robert Lefcourt, *The First Law Commune*, in LAW AGAINST THE PEOPLE, *supra* note 5, at 310; Goldstein & Hunter, *supra* note 9; Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1137- 1145 ( 1970), GINGER, THE RELEVANT LAWYERS, *supra* note 4.

The ideal form in social relations prevalent in the legal ideology and culture of advanced monopoly capitalism is the autonomous individual. The idea of collectivity and conscious being goes against the grain of such ideal.<sup>114</sup> Thus emerges a seeming paradox between the primary function of law to abstract and reify all aspects of interpersonal life and the ideal, isolated, individuated subject. While the legal form seeks to adjudicate *individual* cases, those individuals are at the same time abstracted from their actual social existence and treated as if they were equal, the bearer of rights in general (*see* Thesis I *supra*). To function as a self-conscious group is threatening to the ruling class. If it's "us" against "them" and "we" are ninety-six percent of the populace, guess who's going to win? Therefore, ideology and culture function to keep us divided and individualized, competing with each other according to our personal accomplishments. Particularly within law, lawyers are not "directed toward facing, analyzing, and assessing problems in a social context or developing plans for solving them with others."<sup>115</sup> Such independent action reinforces exclusiveness in our personal relations and keeps others from undermining lawyers' position and prestige.

The opposition to legal service lawyers' representation of groups provides a clear illustration of the ideology of individualism prevalent in American legal culture. Spiro Agnew's well-known polemic against legal services lawyers ("ideological vigilantes, who owe their allegiance not to a client . . . but only to a concept of social reform"<sup>116</sup>) well sums up the traditional attitudes of the elite bar toward the "appropriate" use of law on behalf of those dominated by it. To resolve the "problems" presented by legal services attorneys, Agnew suggests:

First . . . their clients should be *individual* poor people and legitimate, self-organized groups-not the poor as a class . . . . Second . . . legal services headquarters should establish policies and priorities . . . [which include] regulations on attorneys' private political activities, group representation and soliciting clients . . . . Finally, basic attitudes within this program should be changed.<sup>117</sup>

It is precisely this individual emphasis, coupled with an effectuation of rights in the abstract which motivated Agnew's partner in crime to recommend that OEO-funded legal services "be made a permanent part of our legal system."

Legal Services has reaffirmed faith in our government of law and that the poor are thus given a new reason to believe they are part of the system. The program can provide a

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<sup>114</sup> For a discussion of the origins of individualist ideas of law and ideology within liberal political theory see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); ROBERTO UNGER, KNOWLEDGE AND POLITICS ch. 2 (1975); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962).

<sup>115</sup> HELEN JENNINGS, SOCIOMETRY IN GROUP RELATIONS 4 (2nd ed., 1959).

<sup>116</sup> Spiro Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. JOUR. 930, 931 (1972).

<sup>117</sup> *Id.* at 932 (emphasis added).

most effective mechanism for settling differences and securing justice within the system and not on the streets.<sup>118</sup>

Despite the genesis of legal aid in the last quarter of the 19th century as a means of serving groups such as immigrants who populated the growing urban areas,<sup>119</sup> and its later availability to members of labor unions,<sup>120</sup> Reginald Heber Smith, pioneer of the legal aid movement, reaffirmed the necessity of providing services to individual clients. In addition, he noted that failure to administer “justice” impartially to such individual clients, “leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy.”<sup>121</sup> In his support for legal aid, the General Counsel for the United States Steel Corporation boldly stressed its significance to industry:

If these people [recipients of legal services] are unable to secure justice because of a lack of adequate legal representation, it will have a very direct effect upon their relationship with their employers in such ways as absenteeism, and in mental attitude which, in turn, affects productivity, efficiency, safety on the job, and even loyalty to the employer. So it is obvious that the activities of Legal Aid, or the absence of needed Legal Aid services, affect directly most large corporations.<sup>122</sup>

Such support was also echoed by George Meany:

The Executive Council [of the AFL-CIO] has also formally endorsed the purposes for which the National Legal Aid Association was formed and has expressed its commendation of the manner in which the Association [The National Legal Aid and Defender Association] has translated that purpose into action.

I take this opportunity to wish the Association well in its efforts to protect, in the processes of law, the rights of those who, because of financial impediment, would

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<sup>118</sup> Richard Nixon, Presidential Message to Congress, May 5, 1971, as quoted in P. Selznick, *Social Advocacy and the Legal Profession in the United States*, 19 JURID. REV. 113, 122 (1974).

<sup>119</sup> “The German Society” was set-up in New York City in 1874 to protect immigrants from “runners, boarding-house keepers and sharpers.” See REGINALD HEBER SMITH, JUSTICE AND THE POOR 134 (1919). See also H. TWEED, THE LEGAL AID SOCIETY, NEW YORK CITY 1876-1951 (1954).

<sup>120</sup> In 1902, with the help of unions, The Labor Secretariat was established to assist members with their legal problems. However, in 1914 management set-up the Ford Legal Aid Bureau in Detroit, staffed by employees of Ford’s legal department. The Ford Bureau primarily gave advice to workers because “The Bureau is more concerned about matters which affect the company than matters which affect the employee.” Their services mainly included searching titles for workers who bought homes under the company profit sharing plan and protecting against fraudulent insurance and wage garnishments. See SMITH, *supra* note 116, at 171-172.

<sup>121</sup> SMITH, *supra* note 116, at 10.

<sup>122</sup> John Tennant, quoted in the 1961 Supplement to EMERY BROWNELL, LEGAL AID IN THE UNITED STATES 17 (1951).

otherwise be helpless to assert them. The [Association] serves an important humanitarian and social need and should have the wholehearted support of every citizen who believes in the dignity of man [*sic*] and in his consequent natural right of opportunity for justice under law.<sup>123</sup>

Until the mid-1960's, the individual case approach was predominant in legal aid, the funding coming primarily from charities, bar associations, and the "in kind" services of the private bar.<sup>124</sup> Attempts in 1964 to establish federally funded "anti-poverty demonstration projects," also concentrated on an individual approach to providing legal services. For example, Harold Rothwax, the Director of New York City's Mobilization for Youth Legal Unit, one of such demonstration projects, saw the filing of numerous individual cases as "one of the basic forces of social change." He argues that a heavy caseload allows you to "populate the legal process."<sup>125</sup>

As a counterbalance to the traditional individual case approach, the Legal Services Program, although not specifically mentioned in the Economic Opportunity Act of 1964, was initiated under the general authority of the provision to encourage community action programs.<sup>126</sup> After the act was amended in 1966 to officially establish a Legal Services Program,<sup>127</sup> the leadership of the program articulated an

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<sup>123</sup> *Id.* at 18.

<sup>124</sup> See SMITH, *supra* note 116; see also BROWNELL, *supra* note 119. In the Preface to BROWNELL, *supra* note 119, at iii, Harrison Tweed, President of the National Legal Aid Association, in a plea for private funds, warned that if donations were not forthcoming ". . . government will take over both the financing and administration of the work, with grave risks to the rights and liberties of lawyers and laymen [*sic*] alike." Reginald Heber Smith, in his own request for private funds, made an observation which is as relevant today as it was 30 years ago: "The question of how far it is desirable or safe to rely on government money is very much in the minds of many thoughtful citizens today . . . . There is the ever-present danger that a grant of government money will be followed by government control . . . . [I]f the government becomes the lawyer's paymaster, it may soon become [her] master." *Id.* at xvi-xvii. Smith then revealed his deepest fears when he opined that if lawyers for the poor were paid out of public monies, the next step would be that all persons of "moderate means" would be supplied with a lawyer paid for by the government. "If it got that far, could an independent bar survive? If Legal Aid attorneys receive their salaries from the public treasury, will that . . . be the first step, the entering wedge, leading to 'socialization of the legal profession.'" *Id.* at xviii. Howard Phillips, Chair of the Conservative Causus in his own fundraising letter of Jan. 12, 1981, seeking to "completely eliminate the federal legal services program and to reject any and all funding for it," likewise seems most indignant that the Legal Services Corporation is publically funded. This is also a major theme of the Conservative Caucuses' advertisements taken out in lawyers' newspapers throughout the country. See, e.g., *Look Behind the Label: Is it 'Legal Services for the Poor' or a \$300 million Subsidy for Liberal Causes*, MASS. LAWYERS WEEKLY, May 11, 1981, at 11.

<sup>125</sup> See Harold Rothwax, *The Law as an Instrument of Social Change*, in JUSTICE AND THE LAW IN THE MOBILIZATION FOR YOUTH EXPERIENCE (Harold Weissman ed., 1969).

<sup>126</sup> Pub. L. No. 88-452, 78 Stat. 508, 42 U.S.C. §2941 (1964).

<sup>127</sup> Pub. L. No. 89-794, 80 Stat. 1451, 42 U.S.C. 2809 § 222h (1966).

ideology which, as one of its major<sup>128</sup> objectives, concentrated on serving organizations of poor people. This new approach immediately engendered a debate both inside and outside the program between those who favored individual cases against those who wanted to give priority to law reform and community organizing.<sup>129</sup> Studies of government agencies found the legal representation of individuals quite effective but indirectly questioned the organizing component by maintaining that the program guidelines lacked “exact criteria.”<sup>130</sup> Despite the utopian ideology disseminated from its central office in Washington, D.C. to local offices, Gary Bellow, in his assessment of the legal aid movement in the United States, maintains that “very few programs attempted to link legal services to organizing efforts in poor communities . . . .”<sup>131</sup>

As a result of the political debate about the Legal Services Program, after much rhetorical flourish about the desirability of “independence,” Congress in 1974 passed the Legal Services Corporation Act,<sup>132</sup> which transferred the operation and management of all non-criminal, federally funded legal services programs to a separate, non-profit, tax-exempt corporation. Despite the comparatively small amount of actual “test cases” and “radical activity,”<sup>133</sup> the 1974 Act explicitly encouraged the traditional, individual case approach while it de-emphasized law reform and community organizing. In addition to its prohibition against program attorneys handling cases involving non-therapeutic abortions,<sup>134</sup> school desegregation,<sup>135</sup> selective service violations<sup>136</sup> and voter registration,<sup>137</sup> it counterposed impediments to group representation<sup>138</sup> and the bringing of class

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<sup>128</sup> See, e.g., OFFICE OF ECONOMIC OPPORTUNITY, LEGAL SERVICES PROGRAM EVALUATION MANUAL 1-2 (1967) (stating that the Program’s purpose was: “4. To serve as advocate for the poor in the social decision making process. This can be done by representing a neighborhood association . . . . 5. To assist poor people in the formation of self-help groups . . . .”). See also E. JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974). As to the importance of ideology to the actual practice of legal services programs see Finman, *supra* note 106, and J. Denvir, *Toward a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1134 (1976).

<sup>129</sup> See A. Kenneth Pye, *The Role of Legal Services in the Anti-poverty Program*, 31 L. AND CONT. PROB. 211 (1966); E.C. Bamberger, *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME LAWYER 847 (1966); E.C. Bamberger, *Basic Principles*, 41 CAL. ST. BAR JOUR. 224 (1966).

<sup>130</sup> See U.S. Compt. Gen., *The Legal Services Program- Accomplishments and Problems faced by Grantees*, in no. B-1 30515 G.A.O. REPT. 6 (Mar. 21, 1973).

<sup>131</sup> Bellow, *supra* note 51, at 338.

<sup>132</sup> Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. §2996-2996L (Sup. 4, 1974).

<sup>133</sup> See Bellow, *supra* note 51, at 339.

<sup>134</sup> 42 U.S.C. §2996 (f) (b) (8) (1974).

<sup>135</sup> 42 U.S.C. §2996 (f) (b) (7).

<sup>136</sup> 42 U.S.C. §2996 (f) (b)(10).

<sup>137</sup> 42 U.S.C. §2996 (f) (bX6) (c).

<sup>138</sup> 42 U.S.C. §2996 (f) (b) (must only be through eligible clients).

actions.<sup>139</sup> In addition, the Act attempted to limit the kinds of advocacy that could be engaged in by staff attorneys.<sup>140</sup>

In an ironic omen of the current shift from a federally funded program to the “private sector,” in the fall of 1977, eleven left and progressive private community law offices in the Boston area (mine included) created the Association of Neighborhood Legal Clinics (“ANCL”). ANLC applied and (to our surprise) received a Legal Services Corporation grant to operate a demonstration project. (Although I’m not clairvoyant, one could surmise that the project was initiated to “demonstrate” and document how the private bar is a more deserving recipient of government money than a federally funded group of “wild-eyed ideological vigilantes.” The Legal Services Corporation never looked into our eyes as all communication was by mail or telephone.) Each office would provide legal services to indigent clients and thereafter bill the corporation according to a low hourly rate with a specified maximum fee. All of the offices were located in neighborhoods and had long-established relations with left and progressive political groups. In addition to handling randomly referred cases of eligible individuals, ANLC offices used the money to further the goals of some of the groups with whom we had established ties. For example, lawyers from two office who, before the grant, had developed a close working relationship to the Boston Jobs Coalition (a multi-national group of forty-two organizations allied to guarantee the hiring of Boston residents on public construction projects) used ANLC funds to compel the City of Boston to conform their hiring policies to a reconstruction era law which required fifty percent of workers on municipally funded construction to be Boston residents (The agreement signed by the City also promises that twenty-five

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<sup>139</sup> 42 U.S.C. §2996 (e) (d) (5) (no class actions without the express approval of the Project Director in accordance with policies established by the program’s governing board).

<sup>140</sup> Section 6 (a) (5) of the Act initially read:

The Corporation shall insure that (a) no employee of the Corporation or of any recipient ( except as permitted by law in connection with such employee’s own employment situation), while carrying out legal assistance activities under this title, engage in, or encourage others to engage in, any public demonstration or picketing, boycott, or strike; and (B) no such employee shall, at any time, engage in, or encourage others to engage in, any of the following activities: (i) any rioting or civil disturbance, (ii) any activity which is in violation of an outstanding injunction of any court of competent jurisdiction, (iii) any other illegal activity, or (iv) any intentional identification of the Corporation or any recipient with any political activity prohibited (herein).

Pub. L. No. 93-355, 88 Stat. 382.

Pub. L. No. 95-222 §7(b) struck out provisions relating to prohibitions against political activities by staff attorneys and now reads:

No funds made available by the Corporation under this subchapter . . . may be used . . . (6) to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or anti-labor activities, boycotts, picketing, strikes, and demonstrations, as distinguished from the dissemination of information about such policies or activities, except the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients.

percent of such workers be minorities and ten percent women.). An evaluation study of ANLC revealed that its legal services were of “high quality” and that clients expressed great satisfaction with the work provided. The program continued for about two and a half years after which it was terminated by the Legal Services Corporation. In addition to area staff-attorney projects, ANLC had to compete for receipt of demonstration project funds with a long-established “pro-bono” group affiliated with the Boston Bar Association. The “pro-bono publico” work of this organization mainly consisted of individual cases handled by young associates in large corporate law firms. In balancing between which group was to receive funding, it is not difficult to surmise which received the money.<sup>141</sup><sup>142</sup>

Curiously enough, the notion of the individual as opposed to the group is posited by two disparate sectors within American legal culture. Many of the left legal academics rely on the ideal of the “autonomous individual,” deriving their desideratum from law itself.<sup>143</sup> For example, when posing “altruism” as a counter-ethic to “individualism,” Duncan Kennedy fails to conjoin “self” with a social configuration of “others.” “Altruism” for him means sharing (that which I own as a commodity) and sacrifice (a personal “expense,” something one gives-up).<sup>144</sup> The altruist has a “right” to her own inviolable sphere (her own space). “The altruist believes in the necessity and desirability of autonomy or liberty or freedom or privacy within which one is free to ignore both the plights of others and the consequence of one’s own acts for their welfare.”<sup>145</sup> In making an analogy between opposing

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<sup>141</sup> For a discussion of the rise and fall of ANLC see M. Matza, *Another Defeat in the War on Poverty*, vol. 8 no. 6 STUDENT LAWYER 19 (Feb., 1980).

<sup>142</sup> The literature about legal services is voluminous. In addition to those articles already cited, see Stephen Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America*, 40 GEO. WASH. L. REV. 754 (1976) for a comprehensive bibliography through 1976. For an account of recent developments see Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, vol. 34 no. 4 BRIEFCASE 106 (Aug., 1977); Howard Erlanger, *Lawyers and Neighborhood Legal Services: Social Background and the Impetus for Reform*, 12 L. AND SOC. REV. 253 (1978); Joyce Hee, Comment, *Community Law: An Alternative Approach to Public Legal Services*, 18 SANTA CLARA L. REV. 1054 (1978); Harry Stumpf, *Law and Poverty: A Political Perspective*, 1978 WIS. L. REV. 694. For a history and Comparison with Western countries, see BRYANT GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR (1980). Garth, in chapter three, illuminates the downplaying of law reform and the concomitant emphasis on group representation by Neighborhood Law Centres in England.

<sup>143</sup> Simon, in *The Ideology of Advocacy*, *supra* note 103, at 144, ends his article by declaring his allegiance to the realization of what he believes to be law’s ideal:

(T)he ideal of law and the values of individuality have been a potent historical alliance, and they may well prove more tenacious than the most entrenched contemporary institutions. In this light, the death of the legal profession may be a more conservative and more practical alternative to the death of law.

See also Trubek, *Complexity and Contradiction*, *supra* note 25, at 546 (discussing the desirability of the laws’ ideals of equality, individuality, and community).

<sup>144</sup> Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 111, at 1717.

<sup>145</sup> *Id.* at 1718.

concepts, Kennedy writes: “individualism is to pure egoism as altruism is to total selflessness or saintliness.”<sup>146</sup> To be an altruist does one have to approach being a saint? Rather the notion of a person as a social being who defines herself not as an isolated possessor of things which she owns and then gives up, but in *relation* to others is the central ontological antagonism to individuality. The relation to others is a function of each person’s creative and spontaneous<sup>147</sup> action toward objects of nature as well as other people. In acting and interacting, every present moment is thus “submerged and changed” by interpersonal and collective factors. A sense of oneself and the world is not static and fixed but is always changing due to the re-arrangement, re-shaping and breakup of new spontaneous factors upon it.<sup>148</sup>

Put in another way, in accord with Roberto Unger’s critique of liberal political theory, Kennedy’s “altruism” is a form of individualism where a group is but a collection of individuals. The entity of a group is not “viewed as a source of value in its own right.”<sup>149</sup> A collectivity with shared values and common ends proffers a better defined antinomy to individualism than does “altruism.”<sup>150</sup> No common ends are possible if one accepts an individual with the power to possess and transfer things which she owns (what Unger calls the theory of “subjective value and individualism”).<sup>151</sup> Unger concludes that to realize a system of “shared values” we need “a theoretical advance and a political event.”<sup>152</sup> At this state in our history, organized groups as previously defined provide a context for transformative activity

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<sup>146</sup> *Id.*

<sup>147</sup> See the writings of Marx contained in THE GERMAN IDEOLOGY, *supra* note 13, at 42-43, 50, and the *Philosophical and Economic Manuscripts of 1844*, in WRITINGS OF THE YOUNG MARX OF PHILOSOPHY AND SOCIETY (Easton and Guddat ed. and trans., 1962), particularly his discussion of the individual as a “social being” at 306: “The individual and generic life of man [*sic*] are not distinct.” My theory of personality is very much influenced by the work of J.L. Moreno. See, e.g., J.L. MORENO, WHO SHALL SURVIVE? (3rd ed. 1978). Moreno sees sociometry (his theory of the measurement of social relations through acts which produce a relational structure) as making “revolutions on a small scale” by motivating people to creative and spontaneous action. The doctrines of spontaneity and creativity are central to his theory. Within the “small scale revolution” paradigm, creativity represents a clear vision of a new order, spontaneity the masses being aroused to make the visionary order a reality. Without creativity, the spontaneity of a universe would remain empty; without spontaneity the creativity of a universe would become “perfectionism” and lifeless. For Moreno, creativity is the substance, the “arch substance”, while spontaneity is a catalyzer, the “arch catalyzer.” Spontaneity operates in the present (“here and now”) and propels an individual toward an “adequate” response to a new situation or a new response to an old situation. See *Id.* at 28, 36, 40.

<sup>148</sup> MORENO, *supra* note 144, at 40-47.

<sup>149</sup> Unger, *supra* note 111, at 82. This is an analogous form of Unger’s critique in the preceding chapter of his book wherein he questions the notions of “combination and analysis” (that the whole is equal to the sum of its parts) in liberal psychology.

<sup>150</sup> *Id.* at 88.

<sup>151</sup> *Id.* at 97-98.

<sup>152</sup> *Id.* at 103.

(leading to a political event) as well as the development of an ideology (a theoretical advance).

A different opposition to groups is subsumed under the rubric “public interest law.” Robert Rabin defines it as practice by “the attorney who selects clients principally on the basis of whether representation would involve working on socially desirable cases . . . .”<sup>153</sup> The “public interest” is primarily defined by lawyers apart from any particular group. This necessarily means that their strategy is to choose individual plaintiffs to “front” for cases where “important” legal issues arise, thereby utilizing legal doctrine to “make pluralism operative.”<sup>154</sup> Edgar and Jean Cahn portray the “current crop” of public interest law firms as “hothouse flowers” in that they are the product of limited, short-term foundation largesse.<sup>155</sup> In fact, in the last decade, the Ford Foundation has been the primary source of funds for such “public interest law firms” as the Sierra Club Legal Defense Fund, Natural Resources Defense Council, Center for Law and Social Policy.<sup>156</sup> Members of Washington, D.C.’s Center for Law and Social Policy expressed the view that: “In exercising their role in society, contemporary corporations cannot be condemned for having as their major concerns production, profit and the maintenance of power; and the social benefits achieved by corporations seeking these goals are obvious and impressive.”<sup>157</sup> Such groups as the ACLU fall within the category of public interest law. Although according to my scheme they could be deemed a group that is engaged in a left or progressive struggle, they do not represent people, but only a legitimating ideology. As Mel Wulf, an ACLU staff attorney remarked “our real client is the Bill of Rights.”<sup>158</sup> The ACLU is even a step behind other kinds of public interest law firms because, other than having a concept of legitimating the First Amendment, it has no other concept of what encompasses “the public interest.” As explicated in their statement on Campus Disorders: “To abandon the democratic process in the interest of ‘good causes’ is to risk the destruction of freedom not just for the present but for the

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<sup>153</sup> Robert Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1975-1976).

<sup>154</sup> Note, *The New Public Interest Lawyers*, *supra* note 110, at 1070-1071.

<sup>155</sup> Edgar Cahn & Jean Cahn, *Power to the People of the Profession—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005,1007 (1970).

<sup>156</sup> Rabin, *supra* note 150, at 228. As related by Bellow & Kettleon, *supra* note 107, at 338, the Ford Foundation does not include “civil rights activities” within their conception of “public interest law.” See THE FORD FOUNDATION & THE SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE OF THE ABA, PUBLIC INTEREST LAW: FIVE YEARS LATER (1976). In a similar vein, the Council for Public Interest Law does not include neighborhood legal services or public defender work in their description of the public interest; see COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE—FINANCING PUBLIC INTEREST LAW IN AMERICA 10-12 (1976). Nor does the Resolution adopted by the ABA’s House of Delegates in August, 1975 even consider community law offices or subsidized lawyers.

<sup>157</sup> Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095, 1096 (1971).

<sup>158</sup> Mel Wulf, as quoted in *The New Public Interest Lawyers*, *supra* note 110, at 1092.

future . . . .”<sup>159</sup> Thus by its focus on important legal “issues” or “rights” varieties of public interest law concentrates on effecting change within the legal form while ignoring the primacy of the activity of groups outside legal institutions. As Gary Bellow said in an interview eleven years ago:

Remember that in assisting group interest, the purpose of the organization is not to change legal doctrines. That’s the whole problem with the concept of law reform. That’s lawyer’s talk. The organization’s purpose is to bring about some change in the situation of its members and to establish some real modification of problems they fact. That may include changing legal rules, it may not.<sup>160</sup>

Given my above-mentioned definition of groups, the distinction among civil, criminal, law reform activity, individual cases, and community education is irrelevant unless considered within a group context. The suggested approach doesn’t preclude working on an individual person’s problems, but rather sees those problems in relation to an organization. For example, an individual divorce case may be chosen either randomly or as a referral from a community organization. Optimally, the organization could have criteria as to which cases get referred to a law office. If the office is private, both the legal people and the organization could establish a fee schedule either to be paid by the individual or the organization, could provide a support or liaison worker to help on the case, both as emotional support for the client and as an aid to the legal worker. The result of doing legal work would not only be to help an individual person but to enhance the legitimacy of the particular community organization.

Thus, by defining her practice in opposition to individualism or a primary reliance on legal doctrine and in accord with forms of collectivity, cooperation and “shared ends,” can the left lawyer and legal worker make her life historically relevant as part of a larger transformative social movement outside legal institutions.

## CONCLUSION

High theory and low practice generates more theory and more practice, theory, practice, theory, practice. On and on. A famous law school drop-out once wrote in his own Theses:

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<sup>159</sup> ACLU, STATEMENT ON CAMPUS DISORDERS 2 (1969), as quoted in William Stanmeyer, *The Jurisprudence of Radical Change: Herbert Marcuse’s ‘Great Refusal’ vs. Political Due Process*, 45 ST. JOHN’S L. REV. 1 (1970) (a liberal polemic in support of “reason” and due process).

<sup>160</sup> Gary Bellow, as quoted in *The New Public Interest Lawyers*, *supra* note 110, at 1087. See also Wexler, *supra* note 1 at 1053-1054 (“The lawyer who wants to serve poor people must put [her] skills to the task of helping poor people organize themselves . . . . [The] lawyer must seek to strengthen existing organizations of poor people and help poor people start organizations where none exist.”). For a recent model for group representation in a legal services context, see Cyndi Alexander, “LSCC: Model for Group Representation,” vol. 1 no. 10 THE COMMONER 1 (Jan.-Feb., 1981) (publication for legal services offices by the Mass. Law Reform Institute).

Social life is essentially practical, all mysteries which mislead theory to mysticism find their natural solution in human practice and in comprehension of this practice.

The coincidence of the changing of circumstances of human activity can be conceived and rationally understood only as revolutionizing practice.

The philosophers have only interpreted the world, in various ways; the point is to change it.<sup>161</sup>

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<sup>161</sup> KARL MARX, *Theses on Feuerbach*, I SELECTED WORKS 13-15 (1966) (1845).