BUILDING POWER AND BREAKING IMAGES: CRITICAL LEGAL THEORY AND THE PRACTICE OF LAW

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INTRODUCTION

Most lawyers on the left have a pessimistic view of their own political role in bringing about fundamental social change. Some think that the law is simply a tool used by the ruling class to protect its own economic interests, a view which by definition means that no important gains can be won in the legal arena. Those who believe this tend to relegate themselves to the role of protecting oppressed people against the worst abuses of an unjust system while awaiting the development of a revolutionary movement "at the base." Others graduate from law school believing that meaningful reforms can be won through legislative and judicial action, and often devote several years of hard work for little pay to the goal of getting people more rights. But they then discover that the expansion of legal rights has only a limited impact on people's real lives, and that even these limited gains can be wiped out by a change in the political climate. The consequence is that by their mid-thirties many lawyers have either lost their early idealism or have had their original cynicism confirmed. And even the most committed find themselves at a loss as to how to integrate their politics with their everyday work as lawyers.

In this Article we present a more optimistic approach to radical law practice that is based on a view of the legal system different from those described above. We reject both the orthodox Marxist view that the law is simply a "tool of the ruling class"[1] and the liberal-legalist view that power-

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1. The "orthodox Marxist" view is commonly called "instrumentalist" because it sees the law as an instrument of power used directly by the State to serve the interests of dominant groups. This outlook is reflected in claims that judges routinely reach outcomes that favor the wealthy while pretending to apply the law neutrally to the parties before them. Another version of the instrumentalist position argues that legislators and judges invent legal rules that bring about socioeconomic consequences which benefit those already in power. Here the claim might be, for example, that the development of contract law in the nineteenth century was intended to lend State power to the enforcement of exchange-transactions, thereby facilitating capital accumulation.

Instrumentalist thinking is false because it misunderstands the relationship between the elaboration of legal ideas and the maintenance of social hierarchies. Hierarchical social relations are fashioned and reproduced principally through cultural conditioning rather than through the direct use of force. One element of this conditioning process is the creation of legal concepts and doctrines to establish the political legitimacy of the existing order. Judicial

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less groups in society can gradually improve their position by getting more rights. Instead we argue that the legal system is an important public arena through which the State attempts—through manipulation of symbols, images, and ideas—to legitimize a social order that most people find alienating and inhumane.[2] Our objective is to show the way that the legal system works at many different levels to shape popular consciousness toward accepting the political legitimacy of the status quo, and to outline the ways that lawyers can effectively resist these efforts in building a movement for fundamental social change. Our basic claim is that the very public and political character of the legal arena gives lawyers, acting together with clients and fellow legal workers, an important opportunity to reshape the way that people understand the existing social order and their place within it.[3]

Our perspective on the nature of the legal system has been strongly influenced by the work of the Conference on Critical Legal Studies, which over the last five years has been developing a new critical analysis of the role of law and legal institutions in maintaining the status quo.[4] The actual legal strategies that we propose, however, have emerged principally from the efforts of practitioners within the National Lawyers Guild who have struggled to discover new forms of legal practice that would go beyond a purely defensive or reformist stance. This Article is a first attempt to link the theoretical advances made by the Conference with the accumulated practical experience of creative Guild attorneys, and in so doing to outline a new

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opinions play an important part in this process of legitimation because the rules which they enunciate assert that existing social norms are the consequence of rights and obligations established through legitimate or just political processes. And one means of reinforcing this appearance of legitimacy is through applying these rules in a more-or-less even-handed way. Since the rules express (and help to constitute) existing hierarchical norms, it is the relatively neutral application of these rules that best serves to reinforce the apparent legitimacy of the existing social order in people's minds. The function of law is thus not so much to "enforce" existing social relations as to legitimize them, so that enforcement by State power is largely unnecessary. This is not to deny that the constant threat of force and the occasional use of it play an important part in both the direct control of dissident groups, and in generating feelings of powerlessness that lead people to *want* to find justifications for the status quo.

For an excellent and more detailed critique of the instrumentalist view, see Gordon, *New Developments in Legal Theory,* in THE POLITICS OF LAW 281 (D. Kairys ed. 1982).

The "orthodox Marxist" position actually bears little relationship to Marx's own view, which itself emphasized the ideological and mystifying role of law. *See* Marx, *On the Jewish Question,* in THE MARX-ENGELS READER 26 (R. Tucker ed. 1978).

2. For a fuller theoretical presentation of this view using phenomenological and psychoanalytic methods, see Gabel, *Reification in Legal Reasoning,* 3 RESEARCH IN LAW AND SOCIOLOGY 25 (1980), *reprinted in* MARXISM AND LAW 262 (P. Beirne and R. Quinney eds. 1982).

3. *See generally* Klare, *Law-Making as Praxis,* 40 TELOS 123 (1979).

4. The Conference on Critical Legal Studies is a group composed primarily of law teachers, lawyers, law students, and social scientists who are developing a critique of the legal system and legal education. The group met first in 1976 and has held conferences at least annually since then. Those interested in a bibliography or membership information should write Mark Tushnet, Georgetown University Law Center, Washington, D.C.

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theory of practice that can be of value to lawyers who often lack the time or opportunity to situate their work within a broad political context.

The work of the Critical Legal Studies Conference is closely allied with the neo-Marxist social theory that has gained increasing influence in the United States and Western Europe since the rise of the New Left in the 1960's. A central feature of this strand of radical thought has been a shift of focus away from the tendency of classical Marxism to explain all aspects of social life as resulting from "underlying" economic factors, such as ownership and control of the means of production. While not disregarding the importance of economic factors, neo-Marxist theory places much greater emphasis on the role of social alienation in shaping the contours of social life and argues for a theory of politics that makes the overcoming of alienation a central political objective.[5] The source of alienation in capitalist societies (although by no means only capitalist societies)[6] is to be found in the prevalence of hierarchy as the dominant form of social organization. The nature of this alienation is best described as the inability of people to achieve the genuine power and freedom that can only come from the sustained experience of authentic and egalitarian social connection. The predominance of hierarchy in both public and private life leads to a profound loss of this sense of social connection because it breaks down any possibility of real community, and forces people into a life-long series of isolating roles and routines within which they are unable to fully recognize one another in an empowering and mutually confirming way. Instead, people come to experience one another as powerless and passive in relation to the hierarchies within which they live and work, and, because this collective powerlessness is manifested throughout the social order, individuals internalize this powerlessness in the formation of themselves. Alienation and powerlessness therefore become a self-generating source of social repression that leads to the reproduction of class, race and sex hierarchies from generation to generation.

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5. This shift in emphasis characteristic of neo-Marxist thought is evidenced in the psychoanalytic Marxism of the Frankfurt School, *see, e.g.*, H. MARCUSE, EROS AND CIVILIZATION (1955), and in the existential Marxism of Jean-Paul Sartre, *see* J.P. SARTRE, CRITIQUE OF DIALECTICAL REASON (A. Sheridan-Smith trans. 1976), and is implicit in socialist-feminist theory, *see* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST-FEMINISM (Z. Eisenstein ed. 1979).

6. Although our focus in this article is on the role of the legal system in maintaining the alienated hierarchies of capitalist societies (with emphasis on the United States), we believe that our critique probably applies with equal force to the legal systems of state-bureaucratic socialist societies, which are also characterized by the presence of hierarchy and collective powerlessness. One reason for the neo-Marxist rejection of the economism characteristic of so-called "scientific" Marxism has been precisely the failure of revolutions carried out in the name of this version of Marxism to fulfill their promises in the societies where they have occurred. Although it would be wrong to explain the failure of these revolutions by reference to the inadequacy of theory alone, it is equally false to blame these failures exclusively on practical circumstances (e.g. "the material conditions were not ripe," "the pressures of world capitalism forced the adoption of the bureaucratic state," etc.). Like liberal ideology

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The principal role of the legal system within these societies is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement. The need for this legitimation arises because people will not accede to the subjugation of their souls through the deployment of force alone. They must be persuaded, even if it is only a "pseudo-persuasion," that the existing order is both just and fair, and that they themselves desire it. In particular, there must be a way of managing the intense interpersonal and intrapsychic conflict that a social order founded upon alienation and collective powerlessness repeatedly produces. "Democratic consent" to an inhumane social order can be fashioned only by finding ways to keep people in a state of passive compliance with the status quo, and this requires both the pacification of conflict and the provision of fantasy images of community that can compensate for the lack of real community that people experience in their everyday lives.[7]

The legal system accomplishes this legitimation in two main ways. First, all forms of serious social conflict are channeled into public settings that are heavily laden with ritual and authoritarian symbolism. Each discrete conflict is treated as an isolated "case"; the participants are brought before a judge in a black robe who sits elevated from the rest, near a flag to which everyone in the room has pledged allegiance each day as a child; the architecture of the courtroom is awesome in its severity and in its evocation of historical tradition; the language spoken is highly technical and intelligible only to the select few who have been "admitted to the Bar." This spectacle of symbols is both frightening and perversely exciting. It signifies to people that those in power deserve to be there by virtue of their very majesty and vast learning.[8] When disseminated throughout the culture (through, for example, the schools and the media), these symbols help to generate a belief not only in the authority of the law, but in authority in general. They lead

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in capitalist societies, scientific Marxism legitimates bureaucratic socialism by allowing apologists for socialist hierarchies to assert that since the workers now "own the means of production," the new state apparatus could not but be benign. The critical edge of the neo-Marxist writings to which we refer is their insistence on the primacy of liberating human desire as the foundation of radical political theory. As such, the neo-Marxist critique can be directed as forcefully against existing socialist societies as it can against contemporary capitalism.

7. Marx seemed to recognize this when he said that in the legal state, each person becomes an "imaginary member of an imaginary sovereignty . . . divested of his real, individual life and infused with an unreal universality." Marx, *On the Jewish Question,* in THE MARX-ENGELS READER 26 (R. Tucker ed. 1978).

8. One of the finest descriptions of the role of "majesty" in legitimizing social hierarchies is given in Hay, *Property, Authority, and the Criminal Law,* in ALBION'S FATAL TREE 17 (D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson and C. Winslow eds. 1975). For important studies of the relationship between identification with authority figures and repressed sexuality, see generally S. FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO (1921); W. REICH, THE MASS PSYCHOLOGY OF FASCISM (V. Carfagno trans. 1970).

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people simultaneously to feel that they are legitimately "underneath" those who occupy the positions of power, and to admire and identify with these figures in their fantasy lives. Taken as a whole, this display of legal symbolism lays the deep psychological foundation for a political culture that substitutes identification with authority for real democratic participation and that substitutes fantasies of patriotic community for an actual community founded upon love and mutual respect.

Supporting this tableau of authoritarian symbols is legal reasoning itself, an ideological form of thought whose distinctive legitimizing characteristic is that it *presupposes* both the existence of and the legitimacy of existing hierarchical institutions.[9] In a genuinely humane social order, the law would express provisional forms of moral consensus about all aspects of social life, arrived at through a genuinely participatory process. In our current system, such discussion is foreclosed by virtue of the abstract or removed character of the political process. Instead, the legality of hierarchy is frozen in ahistorical rules which assume that the social relations expressed through the existing institutions of property, contract, and the modern corporation are extensions of human freedom. Thus landlord-tenant law allows one to argue for increasing tenants' rights, but not to challenge the very existence of landlords and tenants because it has already been decided (by "founding fathers") that freedom requires the protection of private property in its current form. Labor law allows workers to unionize in order to improve their bargaining power relative to owners of capital, but not to challenge the division of people into laborers and capital-owners that generates antagonistic social relations based upon bargaining power. Blacks can demand legal equality with whites, but they cannot demand the elimination of the societal conditions that produce institutional racism.

In other words, the conservative power of legal thought is not to be found in legal outcomes which resolve conflicts in favor of dominant groups, but in the reification of the very categories through which the nature of social conflict is defined.[10] Since these categories are themselves justified

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9. For an analysis of the role of "presupposed norms" in legal reasoning and their experiential origins in the consciousness of judges, see Gabel, *supra* note 2, at 35. Duncan Kennedy has shown the way that legal thought helps to constitute these norms in his study of Blackstone's Commentaries. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

10. "Reification" is the attribution of a thing-like or fixed character to socially constructed phenomena. This process is an essential aspect of alienated consciousness, leading people to accept existing social orders as the inevitable "facts of life". Reification results from an authoritarian conditioning process through which people "command" one another to acquiesce to the status quo by denying to one another the possibility of a better and more authentic form of social connection. In this way obedience to the status quo becomes a psychological precondition to recognition as a member of the group. R.D. Laing has shown the way that reification contributes to the formation of both the normal and psychotic sense of self within the family. *See generally* R.D. LAING, THE DIVIDED SELF (1960); R.D. LAING AND A. ESTERSON, SANITY, MADNESS AND THE FAMILY (1964).

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by the utopian imagery of political democracy, the legal system can assert that the era of freedom and equality has already arrived, and that the status quo is the consequence of genuine popular choice. It is through the association of this legitimizing political imagery with the spectacle of authoritarian ritual that the legal system acquires its mass-psychological power. Like religion in previous historical periods, the law becomes an object of belief which shapes popular consciousness toward a passive acquiescence or obedience to the status quo.

And yet precisely because the hierarchies of the legal system are sustained only by people's belief in them, legal conflicts of every type can become opportunities to crack the façade of legitimacy that these hierarchies project. The State's strategy of legitimation dictates a counter-strategy of delegitimation, or what Gramsci called "counter-hegemonic struggle."[11] The idea here is to find a way of working in the legal arena that consistently challenges the State's control over the way that we are to both feel and think about the nature of social reality. The remainder of this Article is directed toward developing such a strategy.

First, we discuss the difference between a rights-oriented and a power-oriented approach to law practice and argue that the latter approach is essential to a delegitimation strategy. Second, we attempt to show what a power-oriented approach to law practice might look like. We do so primarily through the use of actual case histories which reveal the possibilities of exerting "counter-pressure" against the system in cases with high-visibility political content (major political trials or nationally significant Supreme Court cases), low-visibility political content (an important criminal trial in a local community), and cases with only implicit political content (a divorce or landlord-tenant case). Our basic aim is to present an approach to law

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11. *See generally* A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 275-276. (Q. Hoare and G. Nowell Smith eds., 1971). Gramsci's main contribution to Marxist thought was to show how dominant groups maintain their social position through the creation of ideologies that have sufficient appeal to win over important segments of the lower and middle classes. The word "hegemony" refers to the dominant "sway" that these ideologies are able to gain over the more fragmented and undeveloped ideologies of potentially revolutionary groups. "Counterhegemonic struggle" was his way of describing the effort to organize potentially revolutionary sectors of the population around a world-view that could effectively challenge the legitimizing ideologies of dominant groups. In emphasizing the struggle for consciousness as something distinct from class struggle defined in a narrow economic sense, Gramsci was among the first to recognize the partial autonomy of cultural conflict from conflict based upon economic factors.

Like the term "reification," the term "hegemony" is sometimes criticized as needless jargon that is unfamiliar to most people and difficult to understand. When jargon is in fact needless, it obviously should be avoided, but sometimes important social phenomena cannot be described in ordinary language and new or unfamiliar terms must be found to capture these phenomena in words. The sense of "dominant sway" conveyed in the word "hegemony" and the sense of the flattening-out of possibilities conveyed in the word "reification" are qualities of experience suppressed in ordinary language, and for this reason these words become important to the development of an adequate critique of existing social life.

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practice that can overcome the split most radical lawyers currently feel between their politics and their legal work, and to give concrete examples of such an approach in a variety of legal settings.

I

A Power-Oriented Approach to Law Practice

A first principle of a "counter-hegemonic" legal practice must be to subordinate the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness. This obviously does not mean that one should not try to win one's cases; nor does it necessarily mean that we should not continue to organize groups by appealing to rights. But the great weakness of a rights-oriented legal practice is that it does not address itself to a central precondition for building a sustained political movement—that of overcoming the psychological conditions upon which both the power of the legal system and the power of social hierarchy in general rest. In fact an excessive preoccupation with "rights-consciousness" tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves. As Karl Klare and Alan Freeman have shown so clearly in their respective studies of the labor and the civil rights movements,[12] the long-term effects of a legal strategy based primarily on the acquisition of legal rights tends to weaken the power of popular movements because such a strategy allows the State to define the

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12. *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 Minn. L. Rev. 265 (1978); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978). Each of these excellent studies shows in case-by-case detail how the Supreme Court can respond to destabilizing social movements by creating whole new bodies of law that appear to recognize the legitimacy of the movements' demands, and yet end up validating the very social conditions that the movements originally sought to transform. In the case of labor law, Klare describes how the Court's interpretation of the Wagner Act gradually reshaped the labor movement's initial demands for greater control over the workplace into a set of contractual collective bargaining rights which served to safeguard management power over labor-time and production. Freeman's parallel effort in the area of race-law suggests that the Court's interpretation of the fourteenth amendment following *Brown v. Board of Education* in fact served to maintain the institutionalized oppression of blacks (in part obscuring the existence of societal racism by pretending that discrimination is the result of isolated individual acts). In each instance, a transformation in legal appearances was effected while leaving the underlying power relations more or less the same.

It is likely that neither Klare nor Freeman would assert that legal victories won on behalf of workers and minorities have been of no value to the people affected by them. But the deeper point they make is that whatever economic and social gains were achieved through these victories were accompanied by the gradual dissipation of the claim for fundamental alterations in the nature of social relations. This is precisely the bargain that the State hopes to strike when confronted with direct political action: more rights in exchange for a return to passivity.

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terms of the struggle. By granting new legal rights that seem to vindicate the claims of the individuals and groups asserting them, the State can succeed over time in co-opting the movements' more radical demands while "relegitimizing" the status quo through the artful manipulation of legal doctrine.

A legal strategy that goes beyond rights-consciousness is one that focuses upon expanding political consciousness through using the legal system to increase people's sense of personal and political power. As we will show, this can mean many different things depending upon the political visibility of any given case and the specific social and legal context within which a case arises. But in any context, a "power" rather than a "rights" approach to law practice should be guided by three general objectives that are as applicable to minor personal injury cases as to major cases involving important social issues. First, the lawyer should seek to develop a relationship of genuine equality and mutual respect with her client. Second, the lawyer should conduct herself in a way that demystifies the symbolic authority of the State as this authority is embodied in, for example, the flag, the robed judge, and the ritualized professional technicality of the legal proceeding. Third, the lawyer should always attempt to reshape the way legal conflicts are represented in the law, revealing the limiting character of legal ideology and bringing out the true socioeconomic and political foundations of legal disputes. Reaching these objectives may have a transformative impact not only upon the lawyer and client working in concert, but also upon others who come into contact with the case, including the client's friends and family, courtroom participants such as jurors, stenographers, and public observers, and, in some cases, thousands or even millions of people who follow high-visibility political cases through the media. Of course, any particular lawyer's actions in a single case cannot lead to the development of an anti-hierarchical social movement; we believe, however, that if lawyers as a group begin to organize themselves around the realization of these goals, their impact on the culture as a whole can be much greater than they currently believe is possible.

A precondition for the effective implementation of this strategy is for lawyers to reconceptualize the way that the legal system itself is organized. Too many of us have tended to accept uncritically the model of the legal system that we learned in law school, a model that pictures the legal system as a set of institutions designed to protect and vindicate people's rights. It is not a sufficient or even an accurate critique of this model to say that the ruling class controls the legal system and therefore keeps oppressed people from getting their rights, because such a critique continues to assume that the legal system is principally concerned with rights-distribution rather than with the control of popular consciousness through authoritarian and ideological methods (one of which is the belief in "rights" itself).[13] This mis-

13. The point is not simply that rights-consciousness inherently implies the necessity of social antagonism (since rights are normally asserted against others). It is that this very way

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taken assumption leads lawyers to spend too much time on improving "legal skills" narrowly conceived, and to devote their intellectual energies almost exclusively to the discussion and mastery of doctrine and procedure.

If one looks at the institutions of the legal system from a power-oriented rather than a rights-oriented perspective, the very nature of these institutions takes on a different appearance from that portrayed in the conventional model. Instead of seeing the judiciary, for example, as an integrated hierarchy of trial and appellate courts organized for the purpose of establishing the proper scope of procedural and substantive rights, one sees diverse locuses of state power that are organized for the purpose of maintaining alienation and powerlessness. In this perspective the lower state courts, for example, are designed primarily to provide administrative control over the minor disturbances of everyday life in local communities in order to maintain social order at the local level. It is for this reason that lower court judges are often indifferent to the intricacies of legal doctrine and are more concerned with the efficient management of high-volume court calendars through plea-bargaining and the informal mediation of civil disputes. One might say that at this level the manifestation of restrained force and symbolic authority is much more important than legal ideology as such, and an excessive concern by judges with "the law" would actually interfere with the rapid processing and control of street crime, evictions, and small business matters. Conversely, the United States Supreme Court is primarily concerned with reinforcing the legitimacy of the dominant national culture through the publication of *ideas.* Its justices write their opinions not so much to guide the lower courts as to educate the population as a whole in the proper legal way to think about the institutional hierarchies that comprise the socioeconomic and political systems. And in so doing they help to constitute and sustain these hierarchies, by interpreting social conflict according to a form of thought ("constitutional" interpretation) which presupposes their legitimacy.

It is only by reconceptualizing the legal system in terms of these distinct ideological levels or locations that lawyers can struggle effectively to build

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of thinking about people involves a bizarre abstracting away from one's true experience of others as here with us existing in the world. An alternative approach to politics based on resolving differences through compassion and empathy would presuppose that people can engage in political discussion and action that is founded upon a felt recognition of one another as human beings, instead of conceiving of the political realm as a context where one abstract "legal subject" confronts another.

A genuinely socialist politics would presumably be based on such a view of group life, but many lawyers on the left insist that the use of rights-rhetoric remains necessary for effective political organizing today. This may be so; it probably is the case that in some circumstances the demand for rights is the equivalent of a concrete demand for power. But it is a mistake to believe that one can think and speak in a false and alienated language without reinforcing false and alienated perceptions of the nature of social reality. That one must use the language of rights in court does not necessarily mean that one must use it with one's clients and in everyday political activity.

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the power of popular movements within any one of them.[14] Only such an analysis could help to resolve such strategic political issues as, for example, whether tenant lawyers in a local community should focus on organizing with tenants to obstruct the processing of evictions through local housing

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14. Reconceptualizing the legal system as diverse locuses of power which function in radically distinct ways also allows one to make sense of legal phenomena that appear contradictory when viewed from within the framework of the conventional textbook model. Plea bargaining, for example, appears in the conventional model to contradict the elaborate attempts of criminal law and procedure to assure that an accused is convicted only of the particular crime for which he or she is actually responsible. But this apparent contradiction evaporates if one realizes that the doctrinal structure of the criminal law is not really supposed to have anything to do with the routine negotiation of guilty pleas that occupies ninety percent of what goes on in local criminal courts.

The liberal theory of criminal responsibility and its attendant doctrinal manifestations (for example, the requirement of "mens rea") are simply a particular component of the structure of liberal thought generally. Like the law of contracts, criminal law doctrine signifies that the social order is made up of a multitude of discrete individuals, each of whom is equally free and therefore equally responsible for his or her actions. And like the law of contracts, it also presupposes the legitimacy of the existing distribution of property, which is itself justified by the same principles of freedom and equality (unequal distribution resulting from lack of merit or bad luck). The distinct ideological purpose of the criminal law is to associate "guilt" with voluntary actions that violate the liberal belief-system. The criminal law is therefore not directed principally to the criminal, but to the law-abiding citizen. It is not intended to control criminal behavior directly but to foster both a generalized obedience to existing authority and an identification with this authority through the fashioning of mass support for "punishment of the outlaw." At this ideological level the criminal law has roughly the same function as T.V. cop shows; it transmits images of the guilty and the innocent mind.

At the level of the plea bargaining system, however, the law becomes merely the currency of an infinite series of "deals" through which the state administers the concrete use of force. Lower court judges, prosecutors, defense counsel, police, bailiffs and court clerks are not interested in the liberal theory of justice (except in their private capacities as "citizens"). They are interested in the processing of local stability. For them an alleged burglary becomes just another "111.5", and the manner in which the defendant is processed is shaped not by ideological abstractions, but by concrete structural relationships among concrete social groupings which order the flow of people from the "street-system" through the "court-system" to the "jail-system" and finally back to the "street-system." The police understand that their role in this process is to direct their resources efficiently so as to keep the lid on unassimilated communities, to strike the correct balance between random stops on the streets to check identifications, mere disciplinary observation (car patrols), and actual arrests. And it would be only a slight overstatement to say that no one cares who is "guilty" or "innocent" within the meaning of the criminal law because everyone, including defense attorneys, is preoccupied solely with getting the requisite number of people in and out of the "force-bureaucracy," or in other words with *doing their job*. Whereas the criminal law is aimed at the psychology of the middle classes in their "civic" capacity as "good citizens," the plea bargaining system is designed to assure the subdued administration of physical power in concrete local settings.

The relationship between the criminal law and the plea bargaining system is that the latter is legitimated by the former—not by its compliance with the principles of the criminal law but by its psychological association with these principles as they are embodied in the symbolic authority of the police officer, the robed judge, and the "official" character of the courtroom itself. Thus, while the defendant is hustled through a series of rooms and buildings by armed men, the public is meant to see "The Law" in action.

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courts, or engage in collective bargaining over lease contracts with big landlords, or press for more rights through individual appeals and reform litigation. The setting of a priority on an issue like this requires discussion among groups of lawyers and tenants in particular communities about whether one approach will generate more political consciousness and power among tenants as a whole than would another. Similarly, it is doubtful that criminal lawyers can have much impact on the Burger Court's shaping of the popular perception of the causes of crime so long as they unreflectively limit their actions to arguing an endless series of search-and-seizure motions in empty courtrooms and filing invisible amicus briefs for the benefit of the Court majority. If the Burger Court is aiming the rhetoric of its opinions at mass consciousness, left lawyers must theorize about how to use their cases as opportunities to contest the Court's world-view in the media and other public contexts.[15] Certainly some of this theorizing does go on today, but in an unsystematic way. So long as lawyers primarily "talk law" among themselves and limit their perception of work to the giving of legal advice alone, they are unwittingly following the State's theory of how they should practice.

II

Counter-Pressure in High-Visibility Political Cases

Although a central objective of this article is to argue that all legal cases are potentially empowering, the classic political case remains one which receives widespread public attention because it emerges from a social conflict that has already achieved high visibility in the public consciousness. Examples of such cases in recent years include the political trials that arose out of the student and anti-war movements, and the many Supreme Court cases that have emerged from the civil rights and women's movements. Such cases contain unique possibilities and also difficulties for the lawyers and clients involved in them, because the aim is not only to win on the legal issues raised by the case, but to speak for the movement itself. Precisely because the State's objective is in part to defuse the political energy that has given rise to the case, the legal issue is often one which deflects attention from and even denies the political nature of the conflict.

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15. Right wing lawyers and politicians have done this effectively in California, using liberal criminal law decisions of the California Supreme Court as opportunities for publicly disseminating an anti-crime/pro-family/pro-America world-view. The consensus formed in part through this campaign has led to the passage of a state-wide proposition known as "The Victim's Bill of Rights" (significantly restricting bail, plea bargaining, and the scope of the exclusionary rule), to the election of an ultra-conservative governor, and to near-successful attempts to recall Chief Justice Rose Bird and three of her colleagues. The campaign against Bird, who is a single woman, was used to fuse the idea of being tough on crime with the idea that feminism is destroying the family.

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A. The Chicago Eight Trial

Perhaps the clearest example of this "deflection" was the so-called "conspiracy" trial of the Chicago Eight, in which the issue as defined by the prosecutor was whether the defendants who had helped to organize the antiwar demonstrations outside the Democratic National Convention in 1968 had conspired to cross state lines with the intent to incite a riot.[16] The political meaning of the demonstrations was to challenge the morality of the Vietnam War and the political process which served to justify it, but this meaning was, of course, legally irrelevant to the determination of whether the alleged conspiracy had taken place.[17]

Using a case like this to increase the power of an existing political movement requires a systematic refusal to accept the limiting boundaries which the State seeks to impose on the conflict. Had the lawyers and clients in the Chicago Eight trial presented a legal defense in a normal professional way, they would have deferred to the authority of Judge Hoffman and politely tried to show, perhaps with success, that the defendants did not "intend" to incite a riot or did not "conspire" to cross state lines to do so. But the lawyers and clients understood very well that even a legal victory on these terms would have meant a political defeat for their movement. They understood that the prosecutor's real purpose was to channel the political struggle in the streets into an official public chamber, to recharacterize the protestors as hooligans, and to substitute a narrow and depoliticized legal description of the meaning of the Chicago events for their true meaning. In this context State power consists not so much in the use of direct force, but in the use of the sanctity of the legal process to recast the meaning of the disruption that took place.

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16. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

17. In rare instances, almost everyone understands the political nature of a case:

> All of us, I think, see the recent Chicago trial as a defeat for the integrity of the judicial process. All of us, I think, see in that trial a tawdry parody of our judicial system.
>
> But it is important to understand the roots of this disaster. When you try political activists under a conspiracy charge—long considered to be the most dubious kind of criminal charge—difficult to define or to limit—and when a trial becomes fundamentally an examination of political acts and beliefs—then guilt or innocence becomes almost irrelevant. The process becomes a matter of political opinion instead of legal judgment, and the sense of a courtroom as an independent, open and judicious tribunal becomes lost.
>
> And we lost something else, too. Whatever the ultimate verdicts, who has really won this case? Think of yourself as a young man or woman, emerging into political concern. If you had witnessed what happened in Chicago, which of you would believe that our system was open, fair-minded, and humane? Which of you would come away from this trial with a renewed faith in our judicial system?

THE TALES OF HOFFMAN ii-iii (M. Levine, G. McNamee, and D. Greenberg eds. 1970) (quoting John Lindsay, Mayor of New York City).

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In concert with their courageous clients, William Kunstler and Leonard Weinglass were able to reverse the government's strategy and cause it to backfire, seizing upon the media's coverage of the trial to strengthen the resistance that had begun in the streets. By openly flaunting the hierarchical norms of the courtroom and ridiculing the judge, the prosecutor, and the nature of the charges themselves,[18] they successfully rejected the very forms of authority upon which the legitimacy of the war itself depended. As Judge Hoffman gradually lost the capacity to control "his" room, he was transformed on national television from a learned figure worthy of great respect into a vindictive old man wearing a funny black tunic. In the absence of an underlying popular movement, the tactic of showing continuous contempt for the proceedings might simply have been an unproductive form of "acting out." But within its concrete historical context, this tactic was the most effective way to affirm to millions of supporters following the trial that their version of the meaning of the Chicago protests was right and could not be eroded by the State's appeal to a mass belief in authoritarian imagery.

B. The Inez Garcia Trial

The importance of this kind of symbolic resistance was demonstrated in a somewhat different, although equally powerful, way in the two murder trials of Inez Garcia, which took place almost ten years later during an intense period in the rise of the women's movement. While the Chicago Eight defense reveals the way that a total refusal to recognize the legitimacy of legal authority can in some circumstances be politically effective, the Inez Garcia trials show that it is sometimes possible to infuse an existing "nonpolitical" legal defense with unique and powerful political meaning.[19]

Inez Garcia shot and killed one of the men who helped to rape her. Twenty minutes after the rape she looked for and found the two men; as one pulled out a knife she killed him and shot at the other as he was running away. At her first trial facing a first degree murder charge, she was represented by an excellent male criminal lawyer. He defended her on the grounds of "impaired consciousness," a psychiatric defense which argued that Garcia was suffering from a temporary loss of conscious control over her behavior. If successful, such an approach provided a complete defense to murder. The trial strategy was secondarily aimed at achieving a conviction on a lesser included offense, such as second-degree murder or manslaughter. This strategy was somewhat successful from a legal point of view, as Garcia was found guilty of second degree murder, and given a sentence

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18. *See In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

19. Most of the details concerning the second *Garcia* trial come from conversations between Paul Harris and Susan Jordan. For a discussion of Inez Garcia's first trial and appeal, *see generally* C. GARRY & A. GOLDBERG, STREETFIGHTER IN THE COURTROOM 217-41 (1977).

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less severe than the one she would have received for a first-degree conviction.

Politically, however, the defense was a failure: it contradicted the defendant's belief in the rightness of her own act, and it failed to place Garcia's conduct in the context of a rising women's movement that was demanding recognition of the violent effect of rape and sexual harassment upon women. In her defensive and apologetic posture, Garcia was humiliated by psychiatric testimony that exposed her personal life in a denigrating way, and offended by the argument, made in her defense, that she was "sleepwalking" and unconscious of what she was doing. The contradiction between this legal characterization of her conduct and her true feelings erupted on the stand when she testified: "I took my gun, I loaded it, and I went out after them. . . . I am not sorry that I did it. The only thing I am sorry about is that I missed Luis."[20] Earlier in the trial, Garcia had reacted violently to the judge's decision to disallow testimony about the emotional trauma of rape. She leaped up from the counsel table and said: "Why don't you just find me guilty? Just send me to jail. . . . I killed the fucking guy because he raped me!"[21] Obviously, after that, the jury could not accept the attempted portrayal of Garcia as a demure and innocent woman who was so overcome that she could not be held responsible for her acts.

Garcia's conviction was reversed on appeal because of an improper jury instruction.[22] In the retrial she was represented by radical-feminist attorney Susan Jordan. The defense was a creative combination of the traditional rules of self-defense and the historical reality of the victimization of women by men.[23] The task Jordan faced was to translate the male-oriented rule of self-defense into a form that would capture the real experience of a woman facing possible attack by a man. She also had to combat, within the confines of the courtroom, the sexist myths that would influence the jurors.

The rule of self-defense is based on one's right to use reasonable force if, and only if, one reasonably perceives that there will be an imminent attack. The heart of the defense is the defendant's state of mind—it is necessary to convince a jury that the defendant acted in a reasonable manner given the circumstances.

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20. *Id.* at 236.

21. *Id.* at 231.

22. People v. Garcia, 54 Cal. App. 3d 61, 126 Cal. Rptr. 275, *cert. denied*, 426 U.S. 911 (1975).

23. *See generally* Schneider and Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RIGHTS L. REP. 149 (1978); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980); Donovan and Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation* 14 LOY. L.A. L. REV. 435 (1980-81).

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In Garcia's situation, the juror's understanding of whether Garcia acted "reasonably" would almost certainly be influenced by cultural myths about the act of rape. The rape myths are that women invite it, that they encourage it, and they like it, and that ultimately the rape is their own fault. Jordan directly confronted these stereotypes by the creative use of voir dire. The jurors were questioned individually, one by one in the judge's chambers. Each juror was asked questions which were designed to bring out any underlying sexist stereotypes. Although this was a painful process, initially opposed by the judge, and irritating to some jurors, the process paid off. The final jury of ten men and two women was able to view the rape not as a sexual act caused by male-female flirting, but rather as a violent assault. This view of rape as an act of violence was key to the acceptance of the self-defense theory.

Jordan also faced the problem of Garcia's obvious anger at the men who raped her. If this anger was viewed by the jury as the motive for her shooting, then it would negate self-defense and lead to a verdict of manslaughter. The defense, therefore, attempted to show that the anger was a justified and reasonable response to her rape. Expert witnesses testified to the psychological effects of rape, especially a rape committed on a latina, Catholic woman. Instead of the traditional tactic of trying to hide the woman's anger, the defense affirmed this anger and explained it in human terms which broke through the male prejudices embodied in the law's traditional view of the reasonable person. The result was a complete acquittal.[24]

The two trials of Inez Garcia demonstrate that in the right circumstances it is possible to win a case with a political approach when a more conventional legal approach would fail. Inez Garcia took the action that she did at a time when the women's movement was actively challenging the forms of patriarchal domination characteristic of man-woman relations throughout the social structure, and the central symbol of this domination was the act of forcible rape itself. With a male attorney in her first trial in effect apologizing for her action and the anger that produced it, Garcia was separated from the movement supporting her, and indeed from her own self. In pleading "impaired consciousness" she was forced to deny the legitimacy of her own action and simultaneously the legitimacy of the "unreasonable" rage that women throughout the country were expressing in response to their social powerlessness in relation to men. The form of the first trial turned Garcia into an isolated object of the legal system, a mere "defendant" requesting mercy from a "masculine" legal structure. Even a victory in the first trial would have had negative political consequences because it would have affirmed the wrongness of both her action and the feeling that provoked it, while legitimizing the authority of a benevolent State.

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24. People v. Garcia, Cr. No. 4259 (Super. Ct. Monterey Cty. Cal., 1977).

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The most important feature of the second trial was that it reversed the power relations upon which the first trial was premised. The defense both affirmed the validity of Garcia's action, and allowed Jordan to join Garcia as co-advocate for a vast popular movement, to speak to the jury not as a State-licensed technician "representing" an abstract "defendant," but as a woman standing together with another woman. Together, the two women were able to put the act of rape itself on trial and to address the jurors, not as "jurors" but as human beings, about the meaning of being a woman in contemporary society. The effect of this was to transform the courtroom into a popular tribunal and to divest the prosecutor and the judge (who, as men, could not abstract themselves entirely from the evident signs of their own gender) of some of the symbolic authority upon which the legitimacy of the "legal form" of the proceeding depended. This shift in the vectors of power within the room also allowed the jurors to escape their own reification, to discover themselves as politically responsible for making a human, rather than a merely formal, decision based on an application of existing law. Thus the conduct of the second trial, coupled with the widespread publicity attendant to it, served to expand the power of the movement from which the political basis of the case derived, and to delegitimate the apparent necessity of existing legal consciousness. This last point deserves special emphasis, for breaking through the sedimented authoritarian forms of a legal proceeding in an overtly political case has radical implications beyond those of the particular case itself: it signifies that the existing order is *merely possible*, and that people have the freedom and power to act upon it. In the special context of a public trial, such action demonstrates the living disintegration of symbolic State power in a heavily ritualized setting, one that is normally a principal medium for the transmission of authoritarian imagery.

C. Tinker v. Des Moines School District

The conspiracy trials of the middle to late sixties and the Inez Garcia case illustrate the way that the social relations of the courtroom itself can become a focus of political struggle, reshaping the way that millions of people see the authority of the State as well as the political meaning of the legal issues raised by the trial. A very different type of high-visibility political case is the major Supreme Court decision through which the State attempts to mediate potentially volatile areas of social conflict principally through the use of ideas. Of course the manifestation of symbolic authority is of some importance to the ideological power of Supreme Court decisions because without the background image of the black-robed Justice sitting in a far-off chamber, the decisions themselves would lose some of their mystique. But the locus of political struggle in, for example, abortion, affirmative action, and labor cases is essentially different from that of the conspiracy trials because there is no concrete setting, like a courtroom, in which State authority is manifested directly. Instead, the issues raised in these cases

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are debated in the media, while the Court itself remains invisible to the public eye. Since the locus of struggle takes place at the level of public debate about ideology per se, lawyers must engage the struggle at this level, and contest the State's attempt to limit the way the issues raised by these cases are publicly understood.

A good example of how this kind of ideological struggle might be waged is suggested by the history of *Tinker v. Des Moines Independent Community School District*, a case which began in a lower federal court in Iowa in 1965, but was not finally decided by the Supreme Court until 1969.[25] The case arose when the four children of the Tinker family wore black armbands to their schools to mourn for those who had died in Vietnam and to support Robert Kennedy's proposal for an indefinite extension of the Christmas 1965 truce.[26] When the local school board received word of the protest, it quickly met and passed a regulation forbidding the wearing of armbands in school. The principal legal issue presented by the case was whether the first amendment's guarantee of freedom of speech protected the children's right to wear armbands in school. But the symbolic and political dimensions of the case, when seen in the context of the time, were far more significant than this narrow and abstract statement of the legal issue suggests.

In December of 1965, two central political dynamics were occurring simultaneously in American life. One was the developing momentum of the anti-war movement, which was seeking to break through the wall of silence on foreign-policy issues that had been a legacy of the anticommunism of the 1950's. The other was the student challenge to authoritarian, administrative control of the educational system, a challenge that had begun in spectacular fashion a year before with the rise of the Free Speech Movement at Berkeley. The *Tinker* case offered a unique opportunity to further both of these movements because it brought to public consciousness two powerful images of resistance to the status quo: that of a midwestern family banding together to peacefully express their opposition to an immoral war and to militarism in general; and that of innocent and unafraid school children challenging the power of fearful adults to control the public space of the school classroom in the name of order and discipline. To understand the political potential of a case like *Tinker*, one must remember that wars like the one in Vietnam do not result simply from economic or political "interests," narrowly conceived; they result also from the disciplinary hierarchies of the school-

25. Tinker v. Des Moines Indep. Com. School Dist., 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd by an equally divided court*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969).

26. The four children ranged in age from 8 to 15. The Tinkers' father was a minister who worked for the American Friends Service Committee. Another plaintiff, fifteen year old Christopher Eckhardt, also wore an armband. His mother was an official in the Women's International League for Peace and Freedom.

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system, which train students to become passive recipients of the dominant ideology through which those interests are justified, and ultimately lead students to accept their induction notices without protest. During the four-year period in which their case was litigated in the appellate courts, Mary Beth Tinker and her siblings became important symbols of resistance to the passivity and conformism which made the war possible in the first place.

When a case with this kind of political potential reaches the appellate level, the most important element of a counter-hegemonic strategy is to expand the base of liberating and oppositional energy generated by the case's public exposure. This means doing more than writing a brief on legal doctrine and making a ten minute argument in an empty room. It may mean, for example, attempting to organize meetings around the country with progressive high school teachers and student groups, developing support protests, and actively seeking media coverage which gives a progressive analysis of the underlying issues.

The response of the courts to such potentially controversial cases often conforms to a two-stage pattern of containment: first, deny outright the legitimacy of the plaintiff's claim and hope that the movement dissipates in the face of a clear assertion of authority; then, if denial fails, grant the claim so as to appease the challenge to the State's authority, but do so in the form of a "right" which can be integrated into the dominant ideological framework. To the extent that a left strategy limits itself to a civil liberties approach without concentrating on the broader antihierarchical potential of the case, the State will be able to defuse the energy released at the beginning of the suit regardless of whether the plaintiff's right is ultimately vindicated. This description of judicial containment arguably explains what happened in *Tinker*. The initial response of the federal district court was to firmly support the school board's ban on armbands in the name of institutional control. The court emphasized that "the disciplined atmosphere of the classroom"[27] was entitled to "the protection of the law";[28] the very fact that "debate over the Viet Nam war had become vehement in many localities"[29] made the school board's action all the more reasonable. Had the Tinkers not felt the support of an underlying social movement, they might well not have appealed, either out of respect for State authority, or because of legal expenses or simple discouragement. But in 1966, student rebellions of every type were increasing in number and intensity, from draft-card burnings to sit-ins to the blockading of troop trains. And the energy released by the movement led to a broadening of student demands that included not only an end to the war, but a radical transformation of the entire social order. In this context the Tinkers did appeal, and it was in the midst of this

27. *Tinker*, 258 F. Supp. at 973.
28. *Id.*
29. *Id.*

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generalized crisis of legitimacy that the Supreme Court had to decide the case.

The majority opinion in *Tinker* is an excellent example of the ideological limitations of a civil liberties victory. The Court vindicated the Tinkers' right to wear armbands in school as a form of symbolic expression akin to pure political speech, but this right is articulated as a narrow exception to the presumptive authority of school officials to prescribe and control conduct with regard to all other aspects of school activity. Clothing and hairlength are specifically exempted from the scope of the recognized right,[30] and even those forms of expression protected by the decision are subject to suppression if they are a "material and substantial interference with school work or discipline."[31] The liberal message that a student may wear an armband is thus accompanied by a conservative meta-message that firmly reinstitutes the essential authoritarian structure of the high school.

One could not have expected more from the Supreme Court, since its function is to preserve rather than to revolutionize existing institutional arrangements. Regardless of the decision's limitations, the fact that the Court was compelled to recognize the Tinkers' claim was an important victory for progressive forces. Whenever the State recognizes even a limited new right on behalf of a powerless group, new possibilities for action are created that can no longer be summarily forbidden.[32] Because the State must

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30. 393 U.S. at 507-08.

31. *Id.* at 511.

32. In order to use the law as an effective tool for building power, people must be aware of their rights, and lawyers must be available to assist them to organize on the basis of those rights. A concrete example is provided by a controversy at Mission High School in San Francisco. (The following is based on an interview with attorney Stan Zaks and legal worker Bernadette Aguilar.)

In 1970 a three-judge federal court, relying on *Tinker*, held the California Education Code sections prohibiting the passing out of partisan and propaganda materials on school grounds to be unconstitutional. Rowe v. Campbell Union High School; Zeltzer v. Campbell Union High School; O'Reilly v. San Francisco Unified School Dist., No. 51060 (N.D. Cal. 1970). *Rowe* and *Zeltzer* protected the right of high school students to pass out an underground newspaper. *O'Reilly* protected the right of students at Mission High School to pass out leaflets.

Approximately a year after the decision, at the same Mission High School involved in *O'Reilly*, latino students attempted to pass out leaflets against police brutality and in support of seven young men accused of killing a policeman. The students were part of an attempt to organize a political youth group at the high school. They had never heard of *Tinker* or *O'Reilly*.

Even though the administration was aware of the court decisions, the vice principal confiscated the leaflets, and threatened the students with suspension. These students were not politically experienced, were at the inception of the organizing process, and certainly had never heard of the ACLU. The only positive contacts they had with the law were the small youth group meetings they had attended at the San Francisco Community Law Collective across the street from their high school.

At lunch hour they went to the Law Collective for help. They were scared and intimidated. A test-case, resolved in their favor years later, would have been useless to their twin goals of developing student power at the school and of supporting the Los Siete defendants.

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respect its own rules in order to preserve its legitimacy, progressive lawyers and students have been able to use the new breathing space created by *Tinker* to foster and protect such previously unauthorized activity as the publication of underground high school newspapers and the passing out of political leaflets on school property.[33]

Yet just as the courts at first refuse to recognize new and potentially destabilizing rights, they respond to the granting of such a right by trying to limit the "region of power" protected by it through the time-honored process of distinguishing cases. Distinguishing cases is a central stabilizing feature of legal reasoning because it allows judges to conceptualize new assertions of power, sanctioned by the creation of the new right, as fitting within the background hierarchical categories out of which the new right was granted. For example, when a group of Pawnee Indian students sought to wear long hair as an expression of cultural identity, the Tenth Circuit was able to ignore the possibility of protecting their behavior as political speech under *Tinker*, and instead relegate it to the vast background area of school board control.[34] As a general rule, the more the collective power of a social movement subsides, the more courts feel able to use the technique of distinguishing cases to reassert the hegemony of the dominant ideological framework. In spite of the Tinkers' personal victory, the social hierarchy of educational institutions continues to condition and limit the capacity of students to think freely and to express themselves. It remains an open question how much of an impact a case like this might have had if there existed a left-legal intellectual community that self-consciously sought to press the range of public debate on such cases far beyond the limits imposed by existing legal ideology.

Taken together, the Chicago Eight trial, the Inez Garcia trial, and *Tinker* illustrate the importance of understanding what we earlier called the

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However, the *Tinker* and *O'Reilly* decisions, combined with the availability of community lawyers, provided them with immediate leverage.

Several phone calls later the principal and vice principal walked across the street to the Law Collective. They apologized for the "misunderstanding," assured the lawyers that the students could pass out their leaflets, and exited, commenting about "outside agitators." The students had a new sense of their power to confront the school authorities. They realized they could use the first amendment as a weapon to help them change the power relationships in the school and in the Mission community.

33. *See, e.g.*, Bright v. Los Angeles Unified School Dist., 18 Cal. 3d 450, 134 Cal. Rptr. 639, 556 P.2d 1090 (1976). The California Supreme Court in *Bright* recognized *Tinker* as "a landmark decision" in the area of student rights, stating that *Tinker* "boldly" proclaimed students' freedom of speech in the school environment, as contrasted with the "older and, until *Tinker*, the prevailing view [which] regarded the school administration's authority nearly absolute." *Id.* at 456.

34. *See* New Rider v. Board of Educ. of Indep. School Dist. No. 1, Pawnee County, Okla., 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097, 1099 (1973) (Douglas, J., dissenting) (petitioners' hair-length was meant to "broadcast a clear and specific message . . . [of] pride in being Indian . . . clearly bring[ing] this case within the ambit of *Tinker*").

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"ideological location" of a given case in formulating an effective political approach. Because they were all high-visibility cases, each was potentially capable of influencing the consciousness of very large numbers of people and of strengthening their confidence in the power of counterhegemonic public action. But the cases were also very different in terms of how the authority of the State was manifested, and each required the discovery of widely divergent strategies for realizing a common objective.

III

COUNTER-PRESSURE IN LOW-VISIBILITY POLITICAL CASES

In 1971 the Latin community in San Francisco's Mission District was experiencing "brown power" and intense organizing by radical and liberal groups. The most effective radical organization was called "Los Siete" ("The Seven"), named after seven young men who had been acquitted of murdering a policeman after a long, contested trial. Los Siete ran a community clinic, organized a formidable labor caucus, pushed for community control of police, and published a community newspaper.

Los Siete's members were often harassed by police who operated out of the then infamous Mission police station. On a busy shopping day, two of Los Siete's most active members, a latin man and a black woman, were selling their newspaper *Basta Ya,* on the sidewalk in front of the largest department store in the Mission. The store manager called the police. When the police arrived they berated the young man, called him "wetback" and told him to go back to Mexico. The police confiscated the papers and arrested both the man and the woman for trespass, obstructing the sidewalk, and resisting arrest.[35]

There was no publicity of the arrest. The store owners saw the arrest as a vindication of their right of private property. The police viewed it as a demonstration of their power in the Mission district and a warning to community groups. The district attorney's office treated the case as a routine misdemeanor. The defendants felt the arrests had been an act of intimidation and racism. The woman was treated as a prostitute at the City Jail, examined for venereal disease and put in quarantine for two days while awaiting the results of the test. The excuse given for such treatment was that she had been charged with obstructing the sidewalk, an offense associated with prostitution.

Los Siete asked the Community Law Collective, a local law office which acted as "house counsel" to many community organizations, to defend their members and to help them develop a legal-political analysis of the case. The attorneys explained that although there was a first amendment

35. The defendants were represented by Stan Zaks and Paul Harris, who provided the details that follow.

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issue present, it was doubtful that such a right could be vindicated at the lower court level. At trial, it would be the defendants' testimony against the testimony of two policemen, a security guard, and possibly the store manager. Even though the defendants had sold their newspapers on the sidewalk without harassing store customers, the State's witnesses would place them on store property obstructing customers, and the police would swear the latin man had pushed them and refused arrest. The jury would be almost all white and predisposed toward the State's witnesses. If the trial was before one of the few liberal municipal court judges, the defendants might receive thirty days in jail if convicted; if before one of the many conservatives, the sentence would probably be six months in jail. If, on the other hand, the defendants were to plead guilty, the district attorney would drop all the charges except trespass, and would offer a sixty-day suspended sentence.

If the lawyers had acted as apolitical professionals in this situation, they almost certainly would have advised their clients to plea bargain. First, it makes sense to accept probation in the face of a likely jail sentence. Second, preparation and trial would be quite time-consuming and remuneration would be small. But for the lawyers to have given such "normal" advice in this context would have made them mere extensions of the system. It is not in the interests of the State in this situation to send defendants to jail and risk an increase of organized anger in the community. Rather, the State's strategy is to break the spirit and limit the options of the community movement. It is the plea bargain which best accomplishes this purpose, by simultaneously vindicating the police, legitimating the store owner's property rights, and making community activists feel powerless and humiliated. Moreover, in offering defendants a six-month suspended sentence, the State is also offering them a two-year probation period, the obvious effect of which is to inhibit any future activism. In this context the plea bargain becomes the iron fist in the velvet glove, and the defense lawyer who passively participates in arranging such an outcome becomes partly responsible for its consequences.

Understanding the dangers of "copping a plea," the lawyers and clients attempted to define what was really at issue and to explore a radical approach to the case. The issue was the exercise of political power, in the form of selling *Basta Ya* on the streets of the Mission community. Selling the newspaper served three purposes. First, the person-to-person contact was an effective organizing tool for Los Siete, helping them to build support for their community programs. Second, the street-corner sales were the primary means of distributing the paper and therefore of getting the information in the paper out to the community. Third, the very act of selling their paper in the streets of the Mission district made the activists feel some power in the face of overwhelming police authority, and the sight of young latinos passing out their radical newspaper helped to create a vague but important sense of indigenous power in the community residents as well. To maintain this sense of power it seemed necessary to reject the psychological defeat inherent in the plea bargain, and to risk a trial.

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The tasks facing the lawyers in this case were, first, to empower their clients and Los Siete as an organization and, second, to win the trial. Both goals would be furthered by an overtly political defense, the first because a political defense would insist that the defendants were right to be reaching out to the community; the second because this particular trial could only be won by challenging the narrow "legal" definition of their action as criminal obstruction and trespass.

The lawyers' first tactic was to go on the offensive by filing a motion to suppress the seized newspapers on the grounds that the arrest and seizure violated the first amendment. This tactic was no different from one that any good defense lawyer would use once plea bargaining had been rejected, but here the purpose was not so much to vindicate a legal right as such, but rather to force the State to *defend* its actions. Surprisingly, the municipal court granted the motion, much to the irritation of the district attorney who was then forced into the defensive posture of filing an appeal. The defense lawyers asked a young corporate attorney interested in "pro bono" work to prepare the appeal. The coalition of community lawyers and corporate lawyer increased the ideological pressure on the district attorney's office. Although the corporate attorney wrote an excellent brief and argued the case, the municipal court decision was reversed.[36]

Next came the trial plan. The first strategic issue was whether to try to pack the courtroom with community people. Traditional lawyers are wary of this tactic for fear that the presence of third world and "radical" people will frighten the jury and create subconscious hostility. However, lawyers can often use crowded courtrooms to their advantage by dealing with the jury's anxiety and hostility toward the community presence in voir dire, and by openly discussing any negative preconceptions the jurors might have in opening and/or closing arguments. Due to a lack of publicity it was not possible in this case to fill the courtroom with community supporters, but enough were present to prevent the defendants from feeling isolated.

The second issue related to the clients' participation in the preparation and conduct of the trial. In the traditional view of the lawyer-client relation-

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36. People v. Flores, No. 1711 (Cal. App. Dep't Super. Ct., San Francisco, Cal., 1971). The corporate lawyer in this case justifiably commented that he had never been treated so rudely and had never seen such ignorant, unprepared judges. Young corporate attorneys who take "pro bono" cases are often shocked by the conduct of judges in minor state-court proceedings. In their appearances on behalf of corporate clients, they are accustomed to the high-culture civility of the federal courts where lawyers are treated with great respect and where careful attention is paid to the form and substance of litigation. This sophistication is both a cause and an effect of the ideological location of the federal courts, which are conceived to be higher in the status-hierarchy than state court systems and which therefore must present an appearance that conforms more closely to national legal ideals. For the corporate attorney who worked on this appeal and lost what he believed to be a meritorious claim, this case presented a sharp contradiction to his world-view, a world-view that had not yet made room for judges who were rude and unprepared.

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ship, the lawyer is defined as the professional who "handles" all legal aspects of the case without client participation. By treating the client as someone who cannot understand the conduct of her own trial, the traditional approach increases the client's sense of powerlessness in the face of the intimidating spectacle going on in the courtroom. In this case the lawyers took the opposite approach, asking the clients to take an active part in all aspects of the case where prior legal training was not absolutely required. Thus the defendants wrote voir dire questions and assisted in the selection of jurors. The lawyers discussed each aspect of the case, explaining their tactics and incorporating many of the suggestions of the clients. In this manner the clients began to feel some control over the process which the State had forced them into.

As for the trial itself, a traditional approach would have been to argue the client's version of the facts against the State's version, relying on a reasonable doubt defense and keeping the content of the newspaper itself out of evidence. A more liberal approach would have been to focus on the first amendment aspects of the case, emphasizing the abstract right of dissenters to freedom of speech. The radical approach was to stress the political realities involved; to admit and defend the true nature of *Basta Ya*, and to expose the police department's racism and its attempts to harass and intimidate members of Los Siete.[37]

The trial ended successfully for the defendants despite the judge's persistent attempts to ridicule the attorneys and to prohibit their making any mention of the first amendment.[38] Instead of feeling that they had won by disguising their politics through either the traditional or liberal approaches, the defendants felt a sense of power and truth because the political meaning of their actions had been presented and vindicated. After the trial the defendants went back with other members of Los Siete to distribute newspapers in the same location, while the police and storeowner looked on. "Basta Ya" means "Enough Already." The case delivered to the arresting officers, the local police station, and the conservative merchants a clear message: if you mess with Los Siete, they have the spirit and resources to hit back.

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37. Of course, specific facts must be carefully woven into the radical lawyer's overall theory of the case. The theory of this case was that the arrests were motivated by police and merchant hostility toward Los Siete. The specific facts which supported this theory were often those which rebutted the police version: for example, no customers complained about being obstructed; one policeman was not in a good position to see what had occurred; and the police contradicted each other on descriptions and important details. The lawyer handling a "political case" must not rely on political overview at the expense of bringing out all evidence favorable to the defense.

38. For example, when one of the police officers significantly contradicted himself on cross-examination and weakly attempted an explanation, the judge cut off further cross-examination on that issue. When defense counsel strenuously objected, the judge said, in front of the jury, "That's enough, Mr. Harris. You're like a little boy who got caught with his hand in the cookie jar."

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The *Basta Ya* example speaks to a common misconception of how to politicize a case. People mistakenly believe that all political cases are of the magnitude of the Chicago Eight trial. They look at the drama of that case—the gagging of Black Panther leader Bobby Seale in court, the political comments of the defendants and witnesses, the stature and experience of the lawyers—and they do not believe they can do a "political trial." But the Chicago Eight, Angela Davis, and Inez Garcia cases are not the only models.

Low-visibility cases which contain political elements, such as *Basta Ya*, are presented in courtrooms throughout the country on a frequent basis. What is critical to understand is that one can transform a "solely criminal" case into a political case by making a few simple changes in approach and technique. This is possible because the courtroom is a small, closed, intensified experience for the jury and for the participants. Everything which takes place is magnified. Since the district attorney and judge will almost always define the case as nonpolitical, and will attempt to create an atmosphere of neutral application of objective laws, any injection of political and social reality will have a powerful impact. Using the *Basta Ya* trial, we can look at voir dire, opening statement and cross examination to illuminate this analysis.

The two young lawyers in the *Basta Ya* trial had a combined experience of less than four trials. They could not carry off a week-long antiracist voir dire as Charles Garry did in many of the Black Panther cases;[39] their clients faced only misdemeanors and there was very little visible community support in the courtroom itself. An extensive voir dire in this context may have been viewed as overkill. However, it was simple to ask a few questions which had the effect of setting a political tone to the trial. For example, the first juror was asked the following: "The community newspaper that was being passed out was called *Basta Ya*, which means 'Enough Already!' Have you ever heard of it?" Since the juror's answer was no, the next question, spoken with enough clarity and strength to grab the attention of all the jurors, was, "*Basta Ya* has articles very critical of the police for harassing latinos and Mission residents. Would that prejudice you against Raul Flores?" By the fourth or fifth juror, this question became shortened to, "Would the articles criticizing police brutality make it hard for you to evaluate the evidence with an open mind?" One of the jurors, an older Italian man was asked the following series of questions: "Mr. Flores speaks both English and Spanish. Are you familiar with people who have the ability to speak two languages?" Answer: "Of course; in my family, my wife and I, and son do." Question: "Do you take pride in your heritage, your culture?" Answer: "Very much. It's important." Question: "Would you think badly of Mr. Flores if, when he testifies, he speaks with a heavy

39. *See generally* C. GARRY & A. GOLDBERG, *supra* note 18, at 97-152, 181-216.

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Spanish accent?" Answer: "No, not if I can understand him." These types of questions give jurors some understanding of the racial and political issues behind the formal charges.

In opening statement, one need not give a political lecture to the jury, nor are most judges likely to allow such an approach. However, a few sentences can inform both the jury and the judge as to the actual nature of the case. For example, the following was one of two or three political comments in the *Basta Ya* opening statement: "Raul Flores will take the stand and testify. You will see that he is 23 years old, married, with one small child. He has been active for many years in community groups, militantly organizing against police abuse and brutality in the Mission district." At the very least, this type of statement puts the jury on notice as to the political context of the trial.

Cross-examination is the most overrated aspect of the trial. In a low-visibility case it is quite difficult for a lawyer to be able to expose the racism and bias of police officers. Consequently, one must try to shed light on that bias rather than attempt to tear the mask off:

Question: "Officer, you are assigned to the Mission police station, correct?" Answer: "Yes." Question: "For two years you have worked out of the Mission station, right?" Answer: "That's right." Question: "You've seen people selling *Basta Ya* up and down the streets of the Mission, haven't you?" Answer: "Yes, I have." Question: "And you have seen *Basta Ya* in the little newsboxes on the corners?" Answer: "I've noticed them occasionally." Question: "Before you arrested Mr. Flores and confiscated his papers, you were aware that the front page photo and headline were about police brutality in the Mission, weren't you?" Answer: "No, I don't think I was aware of that." These questions gave the jury some insight into the political motivations of the police, even though they did not fit the romanticized notion of a great political cross-examination.

One does not have to be defending the Chicago Eight, or Inez Garcia, to bring political reality into the courtroom. One does not have to be a William Kunstler or a Susan Jordan to use the above examples in trial. If we remember that behind each case there is a social reality which the law is trying to hide and suppress, we can find acceptable and practical methods to politicize our cases.[40]

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40. Our use of *Basta Ya* as an example of how to politicize low-visibility cases should not be taken to mean that we think trials provide the sole or even the most important legal context within which to build local movements. The aim of each case is to make the kettle boil and the location of the heat varies with the circumstances. The following comments by Gary Bellow illustrate the way that discovery and pleading strategy can further political organization:

> If litigation is directed toward the different goal of organizing, the potentials and methods in pursuing a law suit significantly change. . . . Let me give you an example: In Tulare County, I was involved in a law suit on behalf of a Tenants' Union attempting to improve conditions in a farm labor camp by withholding rent.

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IV

COUNTER-PRESSURE IN "NONPOLITICAL" CASES

The advantage of overtly political cases is that they provide opportunities to dramatize the real basis of existing social conflicts and to challenge the State's efforts to control the way that these conflicts are portrayed within existing legal categories. The lawyers and litigants can both speak for oppositional groups that are already partially constituted and actively contribute to the formation of such groups through the politicizing of the lawsuit itself. Thus, as yet uncommitted but sympathetic supporters can see the courage of the participants in the case and may internalize this courage as a source of power in themselves, furthering their own willingness to identify with the movement's goals and perhaps to take action in support of them.

The vast majority of legal cases do not, however, have this immediate potential for public impact. Ordinary divorce, personal injury cases or unemployment hearings are political in that they involve the influence of large social forces upon individual lives, but they are not normally experienced as such; rather, they appear simply to be minor ruptures in a "private" personal life. A divorce may provoke intense anxiety about economic

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> I took a deposition from the head of the Housing Authority which ran the camp—at a place where the tenants could come and watch. I insisted that the deposition be taken in front of those tenants so they could see me challenge him, question him, and get information from him that they had previously been unable to obtain. They left with the sense that he was not invulnerable and that they were not totally without leverage or protection. It helped them, I think, continue the fight. It didn't matter that the case went on for two years, that the Supreme Court denied certiorari on it and that we in fact lost the legal issue. By the time the Supreme Court did rule, new housing was being built for the residents of the camp, over $5,000 in money had been returned to them in back rent, and a set of rules and procedures had been agreed upon that would bar any kind of retaliatory eviction actions in the future.
>
> What we did there was to use the litigation for building the tenant's organization. Had we focused solely on the legal issues and on the litigation none of those tenants would be in that housing today.
>
> Consider another example: assume an attorney is seeking an injunction and he must make a decision as to the type of preliminary relief he will ask of the court. What criteria should govern this decision? An attorney focusing on political organizing might well delineate the narrowest rather than the broadest ground in seeking preliminary relief. For example, in a landlord-tenant dispute he might seek a restraining order preventing the landlord from using force or self-help. This is, of course, a clear legal right in California, and the likelihood of obtaining such an order would be high. Why would it be sought? Twenty tenants would go in with the attorney to court asking that they not be thrown out by the landlord before he goes to court. And they'd walk out with a paper in their hands restricting the landlord's power. More than the protection, they'd have won a victory. They can go back to the forty other tenants who didn't go to court and say "We won our first fight. Now we'll try a harder fight."

Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1087-88 (1970) (excerpt from interview).

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security, emotional isolation, and the time and expense of childcare. These are all social problems that call for social solutions. But as a result of the fragmentation produced by the existing social order, each isolated divorce client experiences these problems as personal in nature and sees the legal process solely as something that must be paid for to make the break-up official and to protect property and custody rights. How is it possible to politicize such cases?

Finding an answer to this question is among the most important tasks facing attorneys, for several reasons. First, these minor cases comprise the bulk of every community lawyer's practice. If the lawyer perceives these cases as routine and politically meaningless, he or she will increasingly perceive his or her work in this way. Maybe this is a principal reason why so many lawyers eventually give up their radical aspirations, if they don't quit legal work altogether. Second, the legal system itself contributes to social fragmentation by treating conflicts as isolated cases arising in each person's private life. One way that the dominant ideology contributes to alienation and powerlessness is by generating a false distinction between public and private life, a distinction that translates collective social problems into individual personal matters. Unless lawyers find a way to counter this perception, they cannot help but reinforce it by relating to their clients through this ideological framework. Third, the experience of minor lawsuits is one of the few times that most people actually encounter the public sphere directly, and the experience almost always intensifies the alienation they already feel. The degrading and manipulative way that these cases are routinely processed in the adversary system only increases people's sense of hopelessness about politics and about human nature in general.

We propose three principal approaches to politicizing nonpolitical cases which we believe will enable both lawyers and clients to begin to overcome this alienation. They are: 1) the disruption of the State's attempt to individualize and isolate such cases by discovering the inherent political content of common types of cases and using this political content to build community organization; 2) the politicization of local courtrooms and other "legal" public spaces that are currently colonized by government officials; and 3) the de-professionalization of the lawyer-client relationship at a widespread level. The unifying objective of all these approaches is to utilize legal conflict as a tool to increase the experienced power of all those affected by the conflict, including lawyers themselves, their clients, and the communities to which they are naturally linked.

A. Discovering the Common Thread

Here are some examples of potential alternative practices that would have as their objective the politicization of non-political cases:

1. A family law practice might be organized with the aim of politicizing issues the State currently characterizes as purely private or personal in

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nature. Such a practice could include any or all of the following elements: (1) creating new legal forms to support non-traditional relationships that challenge the idea that lasting love and intimacy are available only within isolated "family units" (this is perhaps the most political aspect of the gay-rights movement[41]); (2) developing a holistic multi-service center providing medical and psychological assistance to families breaking down under the strain of such social forces as stress at the workplace, unemployment, and the privatization of personal life;[42] (3) developing new approaches to traditional divorce and child-custody cases which make the process of separation as educational and empowering as possible (including, for example, the use of face-to-face mediation instead of lawyer-to-lawyer adversary proceedings,[43] and group-forming strategies like the pro se divorce clinic in which women and/or men can discover their common experience of being imprisoned within traditional family roles while working together to change their status[44]).

2. A low-level criminal defense practice might concentrate on breaking the routinization of "criminal control" in a particular section of an urban area. The aim would be to link certain types of crime that repeatedly occur in a given area, e.g., small drug sales by addicts, with their socioeconomic roots, and working with existing neighborhood groups to build consciousness about the way that the defendant's problem is actually the community's problem as an oppressed area within the socioeconomic structure. The guiding principle here would be to penetrate the right wing's appeal for law and order and crime control by seeking to reduce crime through increased community solidarity and resistance to the socioeconomic destruction of the area. One aspect of such a practice might be the development of progressive community arbitration projects that would be designed to educate both

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41. *See, e.g.*, Hinman & Advocates for Gay & Lesbian Employees v. Dept. of Personnel Administration, No. 308568 (Sup. Ct. Sacramento, Cal., filed April, 1983), asserting that a dental plan available only to spouses of city employees discriminates against gays with "domestic partners" in violation of the state equal protection clause. The political importance of such a case obviously goes beyond the legal claim that gays have an equal right to dental benefits. By forcing the State to publicly defend the marriage requirement, the case provides an opportunity for the gay movement to intensify its challenge to existing family structures (including the ideological structure of "family law") which regiment and limit the expression of desire.

42. On the theory that the labor movement needs to place greater emphasis on the relationship between work conditions and personal life, the Institute for Labor and Mental Health in Oakland, California, has begun just such a center for members of local trade unions.

43. For a description of the differences between mediation and the adversary process, see Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice*, in PEOPLE'S LAW REVIEW 42-48 (R. Warner ed. 1980).

44. A relatively optimistic description of the value of one such clinic, conducted at the Legal Services Institute in Boston, was given by Jeanne Charn at the Critical Legal Studies Conference in Minneapolis, Minnesota, on May 15, 1981.

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"criminals" and the group to which they belong about the social causes of their own activity.[45]

3. An entertainment law practice could strengthen the political base of community artists, not only by helping them gain legal protection for their work, but also by helping them organize to resist exploitation by publishers, galleries, and the networks, and by discovering alternative methods of financing neighborhood cultural centers where groups of artists could both live and work.[46]

4. In a landlord-tenant practice which primarily consists of fighting evictions on a case-by-case basis, lawyers can politicize cases by encouraging organizing efforts among tenants and by simply suggesting that people discuss their common difficulties *as tenants.* Such a suggestion helps reveal that the political issue at the root of landlord-tenant conflicts, is not whether tenants "need more rights," but rather what the destructive effects of the housing market itself are on people's communities and home lives. Moreover, if efforts are made to link newly formed groups of tenants to an existing local tenants' organizing committee, it becomes easier for people to overcome the isolation and frustration that is brought about by the sense that they alone face eviction lawsuits or have trouble with their landlord. The more that such organization takes place in the private sphere the more possible it becomes to articulate political claims in the courts, and the more difficult it becomes for local government officials to ignore such claims as legally irrelevant. By politicizing a common set of human problems that the legal system would turn into a series of isolated cases involving the static categories of "landlord" and "tenant," these efforts expose an arena of social conflict and thereby expand and deepen the political meaning of a dispute.

Obviously, these examples are both simplistic and overly utopian if conceived as isolated attempts by individual lawyers. But if hundreds of lawyers begin to form networks that make the development of this kind of practice their self-conscious aim, they will have a real impact, not so much from the instrumental gains that they will make in individual cases, but from their contribution to the development of an authentic politics. If *every* dispute is founded ultimately upon conflicts and contradictions within the

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45. The Community Board Program in San Francisco has been very successful in presenting an alternative to "crime control." Created in 1976, largely through the vision and efforts of attorney Ray Shonholtz, the program has six offices, and trains laypersons, including many community activists, to act as conciliators. Neighborhood problems and misdemeanors are brought before a "community board" that attempts to deal with the underlying social issues as they affect the actual participants.

46. Columbia College in Chicago has attempted to meet such concerns in its five year-old Art, Entertainment and Media Management Department. The department chairperson, Fred Fine, suggested to one of us that the remarkable growth in stature of the College's undergraduate and graduate programs evidences the pressing need for lawyers to address these issues.

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system as a whole, every such dispute raises the potential for thematizing in both reflection and collective action the relationship between private life and public totality. The activity of engaging in this politicization of legal practice is the activity of realizing the liberating politics of a future, more humane society in the present. It is the experience of engaging in this form of politics that is the true source of its transformative power.

B. The Politicization of the Courtroom

It is not an exaggeration to say that the single most powerful collective image of political authority is that of the courtroom. The robed judge who sits elevated from the gathering, the official and hushed character of the legal proceeding, the architecture of the room, the complex procedural technicalities—all of these and many other features of the courtroom ritual serve to reinculcate the political authority of the State, and through it the legitimacy of the socioeconomic order as a whole. Because the social power of hierarchies in the private sphere depends upon the continuing acceptance of the political authority which the courtroom encodes and symbolizes, a conscious effort to undermine the sanctity of the courtroom can become an important strategy for throwing the entire social order into question.

The delegitimation of the courtroom was a conscious strategy of the defense team in the Chicago Eight trial, but it is wrong to think that such a strategy is only possible in overtly political cases that receive national attention. Nor is it necessary or even desirable for such a strategy to take the form of overt "contempt of court."[47] The strategy proposed here is a more widespread practice of much longer duration, through which a great many lawyers in every kind of case make it a part of their political work to "gently" deconstruct the courtrooms in their local communities, and in so doing contribute to eroding the symbolic power of the State's authority from the bottom up. The following two examples[48] illustrate what is meant by such "gentle" deconstruction:

1. Several years ago Stephanie Kline, a radical healthworker, was falsely charged with murder and possession of explosives. Bail was set at $75,000, and her lawyer moved to have it reduced. In the Oakland Municipal Courts there is a "prisoner's dock" adjoining the holding cell, located to the right or left of the judge's elevated bench. At a bail hearing crowded with Kline's supporters, the bailiff escorted Kline to her dock to the right of the judge. Several yards away to the front-left of the judge sat her defense lawyer. Between them was the district attorney's table, located to the front-right of the judge. The defense lawyer asked the judge to allow the defendant to come over and sit with him. The judge refused. Defense counsel then

47. *See In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

48. These examples are drawn from the practice of the San Francisco Community Law Collective.

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got up and walked between the D.A. and the judge to the prisoner's dock. Neither the bailiff nor the judge stopped him. He argued for reduction of bail standing next to his client, a location which required the judge to turn to her right to hear the plea. The D.A. argued from his table.

2. Two codefendants in San Francisco pleaded guilty to marijuana smuggling. One was represented by a young National Lawyers Guild attorney, the other by a prestigious New York dope lawyer. At the sentencing hearing, the young lawyer arrived with his client's wife and children, aged seven and ten. When they walked into the courtroom, the bailiff ordered the children to leave, stating that it was a standing rule of the judge that children were not allowed in the courtroom. This would be the children's last opportunity to see their father before he began serving his sentence. The lawyer explained to the bailiff that the children were not babies[49] and argued that they had a right to be there based upon constitutional guarantees to privacy of family relationships and to a public trial. The bailiff replied that they were dealing with a standing rule. The lawyer told the wife and children to stay and asked the bailiff to inform the judge of his position, which the bailiff did. The judge then entered without ever raising the issue. No motion had to be made to allow the children to stay and the children were not forcibly removed. The other defendant's children remained in the outside hall, never seeing their father because his lawyer obeyed the standing rule.

If we understand the courtroom as a symbolically organized public space that is designed to reproduce, through repeated visible rituals, a collective obedience to political authority, both of these examples show the seizure and transformation of this space through the most ordinary human actions. The lawyers neither produced flashy legal stratagems, nor affirmed the authority of the proceeding by contemptuously railing against it. Rather, they refused to recognize the legitimacy of the official and authoritative façade by acting in accordance with an authentic human morality against which this façade, because it is constructed upon images, is always powerless. In forcing the actors in their false drama to recognize them as actual and ordinary persons, the lawyers were able, however briefly, to transform the courtroom with all of its choreographed style and pretense into a mere room inhabited only by other ordinary people.

The first case shows not only a lawyer standing in solidarity with his client, but also a challenge to the State itself: to reach the prisoner's dock, Kline's lawyer walked through a forbidden corridor; the judge had to acknowledge the meaning of his action by turning to the right; the prosecu-

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49. This does not imply that the rule should have been observed had the children been babies. On the contrary, babies, toddlers and other unsocialized presences tend to deflate the pretension of court proceedings, which is why judges routinely prohibit reading, whispering, and babies. In the absence of adequate state-funded child care, the arbitrary exclusion of a nondisruptive baby should be recognized as a violation of federal civil-rights laws.

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tor was deprived of the power of his place by the new configuration of space instituted by the defense counsel. In the second example, a "standing rule" was reduced to an arbitrary contingency by the simple affirmation of the innocence of the children and their love for their father. These kinds of actions reverse the power relations in the room by dissolving the network of images through which authority is normally maintained. Had the government officials wished to assert their own control, they could have done so only through the use of direct force.

There are two related reasons why force was not used in these cases. The first is that the self-evident justice of the lawyers' actions appealed to the humanity of the officials themselves. The officials' fundamental desire for authentic reciprocity, in spite of their efforts to deny it through participation in the courtroom hierarchy, allows them to be reached as human beings through spontaneous elicitations that escape their defenses. Second, it is precisely because state officials experience the moral power of the action which dissolves the legitimacy of their images, that they know it is not in their interest to use force. In the absence of a revolutionary popular movement, the interest of government officials remains legitimation, and the use of force to suppress morally authentic action is inherently delegitimating because it represents an explicit acknowledgement by the officials themselves that their power derives from force rather than consent to their authority. Thus, from the point of view of legitimation it remains preferable, in the lesser-of-evils sense, to wait out the break in the ritual and even to show, as best they can, that such a break can be accommodated. When the attorney walks over to Stephanie Kline, he disrupts the choreography of the ritual, but once he has arrived, the proceeding continues and gradually reassumes the character of a "bail hearing"; the argument is made to the judge and the legitimacy of the law is instituted once again. As long as the judge does nothing to further the development of the felt power of the audience, the inertia of the proceeding will gradually regenerate the required pacification and the ensuing collective isolation. The inevitability of this process is what accounts for the "wisdom" of Talleyrand's advice to rulers: "When in doubt, do nothing."

But this inevitability of the reinstitution of symbolic authority can only persist as long as the power of inertia can resist the accumulation of popular counterpressure. The gentle deconstruction of the courtroom cannot be limited to a few isolated instances which become inspiring anecdotes ("Only Kunstler could do that"); the potential for developing a concerted strategy exists every day on a widespread level. The development of such a strategy must occur in working groups of lawyers who are in the best position to understand the available space for action, but there are certain general principles which are relevant to the conduct of any trial.

The most basic principle refers not to a particular course of action but to a way of being. In conducting a trial the lawyer must resist the pressure to identify her being with the role that is allocated to her. This does not

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preclude acting like a lawyer in the making of motions or in the conduct of cross-examination; it means maintaining and living out an emotional distance between her true self and her "performance," so that she always expresses herself as merely "acting like" a lawyer and not *being* one. She must always maintain and express, in other words, a moral autonomy from the official character of the proceeding, and, in so doing, affirm herself as a source of authentic power and resistance. As a public actor whom the government officials must recognize as one of themselves, as a participant in the proceeding rather than merely as an observer, she can provide an important experiential example to the disempowered people in the room—her client, the jurors, and all those gathered behind the barrier that symbolically separates the public from the official legal arena. By maintaining this internal sense of moral autonomy, the lawyer will be ready to seize any opportunity for authentic action which presents itself in the course of the trial. Without it, she will not be able to discover the strength in herself to make spontaneous interventions like those made by the lawyers in the two cases described above.

In adhering to this position of simultaneous detachment and involvement, the lawyer will discover her greatest opportunity for honest and human interventions in her direct and indirect communication with the jury. However much jurors initially want to avoid jury duty, once empaneled they usually feel a degree of moral responsibility for doing justice that is important to them, especially because such a feeling is routinely denied them in the normal course of their lives. They are the object of great respect in the courtroom both because of the power that they hold to determine the outcome of the trial, and because they represent an ideological ideal as representatives of "the people." All of these factors help to make the jurors open to authentic forms of expression and argument.[50]

The greatest possibility for reaching the jury occurs in those moments, often quite extended, when the lawyer has an opportunity to talk to the jury directly without significant interference from the judge or opposing counsel. This extended communication typically takes place in opening and closing statements. At these times the lawyer can break the false reality of the courtroom spectacle by telling the truth to the jurors, speaking not like a courtroom orator but like an ordinary person who is serious about what she has to say. The "truth," as we are using the term, is the sociopolitical truth

50. It is the job of government officials to condition the jurors to the maximum extent feasible by authoritatively limiting the scope of their role and restricting both the content of what they hear and the manner in which they hear it. This is formally arranged primarily through the rules of evidence and through the giving of jury instructions by the judge, but the effectiveness of these formal devices depends upon the officials' ability to maintain the juror's belief in their legitimacy. This belief derives only from mystification; because the jurors are frightened by what is going on in the room, they tend to take their cues about how they are supposed to be and what they are supposed to think from the judge as the embodiment of official authority. It is this conditioning that the lawyer must try to undercut.

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which the court normally considers to be irrelevant to the legal resolution of the dispute. This truth must therefore be "gotten in," through the invention of an innovative approach as in the Inez Garcia trial,[51] or, even more often by speaking to jurors in a way which relates the "case" to experiences in society with which they can empathize.

The "black rage" psychiatric defense provides an example of the latter technique. This defense was developed by lawyers in the early 1970's to explain a black defendant's criminal behavior in terms of the oppressive reality of a black person's life in the United States.[52]

The basic idea of the defense is to relate the defendant's life to the history of discrimination suffered by black people, and to interpret the defendant's criminal action in this sociopolitical context. Because this defense is not a traditional one, however, it cannot be raised unless it is tied to a recognized legal theory—the insanity defense. Most state and federal jurisdictions now accept the following legal definition of insanity: "A defendant is insane if, . . . at the time of the alleged criminal conduct, as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."[53] In the typical black rage case, the defense characterizes the defendant's anger as a "transient situational disturbance," a psychiatrically recognized "mental disease" which means that the defendant temporarily cracked under pressure. The defense can then present sociopolitical reality to the jury under the legal rubric of evidence relevant to temporary insanity.

This approach does not put forward a traditional psychiatric defense relying on a psychiatrist who will testify to the defendant's mental condition and a psychologist to interpret a battery of tests. Rather, the lawyer puts on lay witnesses who testify to the racial and cultural day-to-day reality of the defendant's life. In the typical psychiatric case the defendant does not testify; in a well presented black rage defense the defendant does testify, in an attempt to give the jury some insight into the social pressures which drove him to a criminal act. It is only as an adjunct to this testimony that a psychiatrist or psychologist is called to give expert testimony, and this witness must be someone who can merge established psychiatric concepts with the socioeconomic reality the defendant has faced. In opening and closing statements, the lawyer does not try to persuade the jury that the defendant was "insane" (the lawyer does not have to frame his argument in terms of the legal category used to introduce evidence); rather, he fully explains the meaning of being black in America and how societal discrimina-

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51. *See* text accompanying notes 19-24.

52. *See generally* Harris, *Psychiatric Defense: Black Rage*, in CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CRIMINAL LAW SEMINAR SYLLABUS, 1-16 (1979).

53. 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.17 (1977); *see also* People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

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tion affected the particular individual who stands before them for judgment.

The black rage defense is not a radical fantasy. It has been used successfully on a number of occasions preserving the dignity of the clients by thrusting their true life experience into the courtroom. In one case the defendant was convicted, yet he thanked the lawyer and the psychologist for bringing the truth into court, and for helping him to understand how racism had warped his ability to respond to people and problems.[54] In another case, after an acquittal, a white juror phoned the defense lawyer to tell him that the trial had been one of the most traumatic events of her life—it had opened her eyes to the life of black America.[55] Furthermore, since the heart of the defense is not based on race but rather on the use of socioeconomic realities in the framework of a psychiatric defense, it has been used successfully on behalf of a white man charged with five bank robberies who suffered from having spent his entire adult life in prison.[56] It was also used

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54. Letter from defendant to Dr. Daniel Goldstine. United States v. Veale, Cr. No. 73-0602 WTS (N.D. Cal. 1973).

55. This incident took place after the trial of Lester Banks. United States v. Banks, Cr. No. 71-64 SAW (N.D. Cal. 1971).

56. United States v. Schneider, Cr. No. 74-241 SC (N.D. Cal. 1975). In this case a white man in his early thirties had allegedly robbed ten or so banks in a two month period while out on parole. After the judge rejected a plea bargain which would have allowed a fifteen to twenty year sentence, the defense was forced to trial.

The general psychiatric diagnosis was that of a schizoid personality. Schneider testified that he had two personalities: Abderaman, a gentle, sensitive person; and Aleman, a violent barbarian. During the crimes Aleman took over and Schneider stood outside himself, watching the bank robberies like one watches a motion picture. The trial psychologist was an expert in the use of drugs; although he had very few credentials outside his clinical experience with heroin addicts and LSD users, he was able to explain that the long term and heavy use of LSD causes flashbacks and extreme anxiety, and that heroin could be used as a "super tranquilizer." This framework set the stage for exposing the prison system the defendant had been in for eleven out of his past thirteen years.

The prison system and the disregard society has for parolees were the political realities in this case. Schneider testified to the brutality of prison. He explained the racism among the prisoners at San Quentin and how it was manipulated by the guards; he explained how the Aryan Brotherhood tried to recruit him because he was German, and how he rejected them because his best prison friend was black. In the end he was left alone by all sides, and often in trouble with prison authorities for speaking out. Schneider also testified to the use of contraband, and described a cult at McNeil Island which used LSD everyday. His psychedelic paintings, done in prison, bore witness to the huge doses of acid he used.

The main witness with regard to the defendant's six months on parole was a man who ran a drug rehabilitation center. He testified that Schneider came there for counseling the first few months after his release from prison, but that when the center closed down for lack of federal funding, Schneider and the others were left without any place to go, and without anyone they trusted. It was at this time that Schneider began to have more and more flashbacks and began to use heroin to reduce the fear and isolation he felt.

James Schneider could be depicted by his lawyer in two contrary ways: he could be described as a pitiful, weak heroin addict, petty criminal since the age of fifteen who had finally flipped out; or he could be described as a frightened, talented, sensitive person who was unable to cope with the violence of his environment. The lawyer chose the latter. The testimony described the tough, white, gang-oriented working class neighborhood in which

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successfully on behalf of a white draft resister who could not step forward for induction because of his outrage at the immorality of the Vietnam War.[57]

Although it is difficult to do effectively, satire or theater can also be used at times to bring political reality into the courtroom. A woman defendant in a well-publicized political case was in court on International Woman's Day. The courtroom was filled with her supporters, mainly women. A liberal male judge presided. It was an established custom to recess court early on certain holidays, or out of respect for a judge or well-known lawyer who had recently died. The woman's lawyer made a motion on behalf of his client to recess early out of respect for International Woman's Day. The courtroom exploded into applause. The client felt that support and its power. The district attorney was stunned. In order to avoid confrontation, the judge called a recess, "taking the motion under submission." Although the judge later denied the motion, he had been forced by the circumstances to take it seriously. The power relationships in the courtroom were significantly transformed that day, and a small shift in power was effected for the remainder of the trial.[58]

Many lawyers assume that it is dangerous to be political in the courtroom because it will reduce their chances of winning. This is incorrect as a general principle, particularly if "political" is understood to mean demonstrating the underlying social reality of the case. Although there are undoubtedly many instances when a traditional legalistic approach is the most appropriate course of action, it is also true that, as a general rule, judges, prosecutors, and lawyers feel a loss of power when the roles within which they exercise control are revealed to be artificial and manipulative. The greater the extent to which conditioned images of the courtroom are undermined by honest spontaneity and moral authenticity in speech and action, the more likely it is that the jury will react to the totality of the event with a free and human response.

Schneider grew up; since he was always the smallest kid, Schneider's father (a small man) insisted he take karate lessons so he wouldn't be "chicken." Schneider testified to taking part in gang fights, always terrified he'd be hurt, but unable to get any support for dropping out. His talent for writing was put in evidence by reading two of his prison poems to the jury. One poem, "The A-Bomb Generation," expressed his love of people and his fear of destruction; the other, about drug addiction, explained the psychology of the addict and his self-contempt. (The psychologist made a brief analysis of the poems so they would be admissible).

This defense was offered to the jury to enable them to understand the brutality of prison life and to see how a basically decent young man was driven to take refuge in drugs. This understanding created the empathy necessary for the jury to legally excuse the bank robberies. When the jury, relying on the psychiatric justification, found Schneider not guilty, the judge told them they had been "sold a bill of goods."

57. Interview with James Larson, counsel for defendant, U.S. v. Lee Guse, Cr. No. 71-783 O.I.C. (N.D. Cal. 1972).

58. A similar kind of theatrical tactic was used effectively in the Chicago Eight trial when the defense lawyers tried to have counterculture folksinger Phil Ochs sing one of his anti-draft songs from the witness stand. *See* THE TALES OF HOFFMAN, *supra* note 17, at 111-12.

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C. *The Deprofessionalization of the Lawyer-Client Relationship*

There are many people who enter law school with a social conscience and a desire to transform society in a more humane and egalitarian direction, who later experience a split in their everyday lives between these goals and their role as lawyers. As lawyers, they function primarily as technical experts who "represent" oppressed people in the legal system. Many lawyers working for legal services offices and progressive state or federal agencies (such as OSHA or the NLRB) face increasing pressure as their cases multiply in the face of budget cuts. Impossible caseloads coupled with the bureaucratization of their workplaces impinge heavily on feelings of creativity and independence which these lawyers had expected to be a part of politically-oriented legal work. Indeed, their day to day work often differs little from that performed by corporate attorneys—they do legal research, give legal advice, write motions and briefs, and make legal arguments in court.

The split between the motivation of progressive lawyers to change society and the content of their daily legal work is extremely debilitating over the long term. As political people they don't feel they can do anything directly to transform society because this must await a mass movement, and they don't experience themselves as a part of such a movement. As lawyers they don't feel they can do anything because they see the legal system as a fixed environment in which they are under more or less constant pressure because they are almost always on the defensive, and must play the game by a set of rules which severely limits their options. Furthermore, they often find legal work to be both boring and deeply alienating after a few years of practice, because in their capacity as lawyers they are intellectually and emotionally starved. For this reason many eventually drop out, either by leaving law practice altogether or by making compromises in the kinds of cases they take. Whatever idealistic feelings led them to go to law school cannot withstand forever the degradation of their spirit that seems to be the inevitable consequence of legal work.

In order to overcome this destructive and depoliticizing process, lawyers must come to see that this split fundamentally derives from their own false consciousness, from their failure to understand the true nature of the legal system and the possibilities that are open to them to assert themselves as political people within the legal arena. This split originates in law school, where students are conditioned to internalize a sense of themselves as professionally trained experts who do not act out of their own critical sense of what is just and unjust, but as representatives of others. This idea about the role of "the lawyer" is linked to the image of the social order as a consequence of a democratic legal order which establishes the "rights and duties" of "citizens" to one another. The legal order is created and maintained through politically legitimate institutions like the courtroom where competing political claims to justice may be heard and evaluated by democratically

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elected government officials or their appointees. In this setting the citizen does not speak for himself because the political claim that he is asserting must be evaluated abstractly, in terms of the democratically constituted law which determines of its own accord the justice of the claim. The social order is perceived to be just because it derives from the political order as expressed through the law. It is for this reason that the citizen becomes a client who is represented by a legal expert: citizens are treated justly through the neutral and autonomous application of the law to their claims of right, as those claims are evaluated through a democratically constituted proceeding. The idea of the lawyer as a professionally trained technical expert, in other words, is an expression of the structure of liberal ideology as a whole.[59]

Few radical lawyers think that they believe in this ideological structure, but we act as if we do when we behave merely as representatives. In our private lives we may support major social change, but in our public lives we often act like agents of the State, which is to say agents of liberal ideology. We put ourselves at a distance from the political meaning of our clients' actions and allow this meaning to be redefined as a question of law. This in turn leads to a definition of the lawyer-client relationship as a relationship of roles: that of professional expert to private citizen. By conveying this professional mystique to our clients, and by transforming the action that has brought them to a lawyer into an abstract legal matter, we contribute to the clients' powerlessness, and suppress ourselves as political beings.

Once the lawyer *becomes* a professional and the client *becomes* a helpless layperson, the potential for oppositional energy that is produced by legal conflict will be dissipated, and the system will be the winner whatever the outcome of the case. The first step in combatting this process is to politicize the lawyer-client relationship by ridding it of its official and professionalized characteristics.

If a political lawyer can recoup her being from the role into which she has fallen and see the system as it really is, her practice can become a source of political strength for herself and her clients, and a source of opportunity to further the development of a true political or class consciousness. If the legal system is understood as nothing more than people in rooms who deploy their power through authoritarian symbols and imaginary laws, every social conflict that is channelled into such a room becomes an opportunity to challenge the dominant consciousness in a public setting. Normally this opportunity is denied to clients in their everyday lives because they are isolated from one another within powerful bureaucratic structures, but the

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59. An excellent critique of the liberal assumptions implicit in the adversary process is found in Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30 (1978). On the contradiction between the requirements of the professional responsibility code and effective public-interest law practice, see Bellow and Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978).

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conflict which brings them to a lawyer's office forces them into a crisis which disrupts their private routines. This crisis forces clients to come to terms, in some way, with their relationship to the system, and to the social order as a whole. The issue for a client is not initially a legal one that can be addressed by informing him of his abstract legal rights; the issue is a political one which requires that he assert his human needs in relation to others with whom he is in conflict. The lawyer is therefore in a crucial position—not "as a lawyer," but as an ordinary person with special experience—to empathically comprehend these needs and help the client to articulate them in the most effective and meaningful way possible.

In order to do this the lawyer must completely divest herself of the sense that she is merely a neutral and objective figure. This depends on perceiving every social conflict that gives rise to a legal proceeding as an opportunity for both her client and herself to develop a sense of interpersonal power through overcoming the alienation and powerlessness that normally envelops them both in their daily routines as private citizens. Of course, a critical aspect to the lawyer's job will be to provide the client with legal assistance, but this division of labor need not define the lawyer's *way of being* in relation to the client.

A description of a landlord-tenant lawyer's practice helps to reveal the lawyer's potential for creating a new kind of relationship. When a tenant first comes to the lawyer's office, the lawyer attempts to discuss what the tenant can do for himself.[60] The lawyer does this, first, in order to resist the client's tendency to see himself as powerless and to see her (the lawyer) as his savior, and secondly, because she wants him to understand her whole situation—to understand, for example, that she is a working person who must be paid for her time. She may ask, for example, if the tenant has met with other tenants in his building to discover their common problems in relating to their landlord, if he is aware of the work of the local tenant union, and so forth. Putting the client in touch with others in similar situations is itself an important part of her work and she brings this out early in her meeting with the client. If the client arrived feeling powerless and afraid of seeming foolish in front of an attorney, she hopes he will leave feeling at the center of a situation that he is competent to shape toward the realization of his own ends, with her participation and support.

Assuming that the client succeeds in organizing a meeting with other tenants in his building, he will have already taken a political action more threatening and more empowering than any he may have taken in his entire life. It is likely that he will never have spoken to these people before except in his capacity as an "other tenant," exchanging clichés while passing in the halls; now he will have spoken to them about a common serious problem

60. Much of this discussion is based on the practice of Ann Juergens in Oakland, California.

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and about challenging one symbol of the established authority to which they feel collectively subjugated: their landlord. When the lawyer attends their meeting, normally held at their building rather than her office, she will attempt to further the development of the group by outlining, on the basis of her training and experience, the political and legal strategies now open to them—"them" being understood as including herself as a full participant in their action rather than as an outside legal representative. At times the mere writing of a letter signed by the tenants rather than the lawyer takes on significance, as an assertion of collective power by a formerly unorganized group of individuals.

Thus in this practice the initial stage of the lawyer-client relationship involves the reciprocal strengthening of lawyer and client and, where feasible, the formation of a group. In addition, it involves the demystification of the legal system, since mystification is sustained in part by the "professionalism" of lawyers as a social group. If the situation eventually assumes more of the character of a legal case and goes to trial, the already cooperative relationship may enable the client to take an important role in the trial's conduct, having already come to see himself as capable of directing the course of events within which he is implicated. The more the initial stages of the lawyer-client relationship express friendship, equality, and mutual respect, the more likely it is that initial cooperation can lead to an effective partnership in the courtroom itself.[61]

Obviously, many objections can be made to this deprofessionalized model of the lawyer-client relationship. For example, it is often said that clients have unrealistic expectations about what they can achieve in the legal system, that unreasonable client demands can impede the lawyer's effectiveness in serving the client's own interests, and that many clients in fact want lawyers to handle their cases without having to be involved in the process themselves. These objections are not wrong exactly, but it is usually the case that those who raise them fail to understand the political significance of overcoming such obstacles through education and even struggle at an interpersonal level between the lawyer and the client. The most important political message a client may receive arises from the fact that a legal conflict

61. This last point is especially important because while it is true that not every case can lead to the formation of a tenant group or an activist criminal defense committee, there is no case which cannot contribute to the development of a client's political/psychological growth through the challenge to his sense of political helplessness. A personal injury case, as much as an eviction case or a job-discrimination suit, requires the client to come into contact with the "authorities" who have terrorized him since elementary school and have shaped the formation of his phantasmic "superego." One of these authorities is the lawyer herself. If the lawyer proves not to be a brilliant professional wizard but conducts herself like the ordinary person that she is, the experience of interacting with the lawyer can place the client in a paradoxical relationship to his own imaginary assumption about officials in general. Out of this experience of paradox the client can approach the discovery of his actual concrete existence as a political person, with no authority predetermining the contours of his possible life.

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forces the client to come into contact with the public sphere, a sphere which in his imagination is controlled by government officials endowed with virtually magical authoritarian powers. The maintenance of this imaginary sphere through symbols of psychological terror is the State's principal weapon against the formation of a radical political consciousness, because it has the effect of privatizing people's experience of their own daily lives; it functions to imprison people within isolated worlds and to depoliticize people's understanding of their true social and economic situations. A lawyer who merely handles her clients' cases can only serve to reinforce the imaginary boundary that exists in the client's mind between public and private life, and in so doing to reinforce the client's conditioned passivity; regardless of the outcome of the case the client will be grateful to the lawyer for having championed him in the terrifying public arena.

The client's discovery that he is capable of taking a public action on his own behalf is therefore extremely important psychologically, because this action *of itself* can make the "public sphere" vanish. By acting on his situation instead of being a function of it, the client may see "the State" dissolve before his eyes into a mere group of other persons who are trying to silence him. Such an experience can have a powerful politicizing impact on the client's view of his entire life, even if the legal outcome of the specific case is unfavorable.

For the lawyer, the experience of deprofessionalization can be equally significant, because it requires giving up the pseudo-power that the State has bestowed upon her in exchange for the actual power of discovering a way of working that is expressive of her true political being. The notions held by many lawyers that one should feel guilty about being a professional, that political change must be brought about by others, that lawyers "can't do anything"—all of these are merely expressions of a false consciousness resulting from a sense of powerlessness. To transcend this image is to transcend the split between one's authentic being and one's social self that is the universal basis of alienation, and to side with the power of desire against the forces which perpetually attempt to contain it.

V

Conclusion

Everything that we have said in this Article depends for its effectiveness on the development of a *movement* of lawyers who meet regularly to further develop the ideas that we have begun to present here, and who give one another the strength to take the risks that a truly politicized law practice requires. The possibility of utilizing social conflict to transform the legal arena from its current moribund state into an arena where a struggle for consciousness is waged obviously cannot be realized through the efforts of isolated practitioners. The network of government officials that is the legal

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system can and will easily neutralize their isolated efforts. These officials exercise their power on the basis of a popular fear of their authority which they are able to transform into a manifestation of "consent." This awe-struck passive consent which lies at the heart of contemporary American democracy derives from the reciprocally enforced isolation which ordinary people impose upon one another when they deny their desire for actual personal and political power. Within this orchestrated alienated matrix, isolated lawyers cannot even retain their own political strength on a sustained basis, much less communicate this strength to others.

Any transformative movement of lawyers must thus begin with the formation of small working groups, where lawyers who already know each other can begin to discuss what possibilities exist in their local communities for delegitimating legal work, and how they can develop a sense of collective support for one another's efforts. The general objective of such groups should be to break through the privatization of ordinary legal work, so that an alternative form of law practice like the one that we have begun to describe begins to achieve a degree of public legitimacy—so that, for example, a small group of lawyers that forms in Norman, Oklahoma can know that there are other groups of lawyers in Ann Arbor or San Francisco who are trying to realize the same or similar objectives.

Such an initial strategy follows from the theory of law and legal processes described above: that the role of the State in its legal or ideological capacity is to maintain the legitimacy of collective powerlessness through the authoritarian control of popular consciousness. The State's strategy affects lawyers as much as anyone and a measure of the State's success is the cynicism and sense of hopelessness that many progressive lawyers currently feel. The irony of this position is that it derives as much from our own false consciousness as it does from any actual powerlessness that is imposed upon us from the outside.[62] And with regard to the powerlessness that we impose upon ourselves, the way out remains through the door.

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62. *See* Lerner, *Surplus Powerlessness,* SOCIAL POLICY (Jan., 1979).

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