

LAWYERS, LAW, AND SOCIAL CHANGE— UPDATE YEAR 2010

STEVE BACHMANN*

TABLE OF CONTENTS

INTRODUCTION	500
I. GENERAL THEORY: MIND AND MATTER.....	503
A. Darwin and the Brain.....	505
B. Fundamentalism, Plato, and Reaction	507
C. Marxism	510
D. Feminism	511
E. Legal Thought and Legal Teaching	513
II. PRACTICES OF ORGANIZING: CHANGING SOCIETY	515
A. The Republican Resurgence	518
B. Obama.....	523
C. ACORN.....	525
III. THEORIES OF ORGANIZING: CHANGING ORGANIZING	528
A. Class	528
B. Culture	531
C. Corporations	535
D. Darwin	537
1. Individuality	538
2. Recruiting	539
3. Maintenance	541
4. Ideologies.....	543
IV. WHERE LAWYERS FIT IN	545
A. Help Wanted	545
B. Do You Really Want to Be a Lawyer? (1).....	548
C. Do You Really Want to Be a Lawyer? (2)	549
D. Get a Day Job!	550
E. Civics	552
F. Narrative and Cliché	554
CONCLUSION: BACK TO THE FUTURE AND BACK.....	559

* B.A., Harvard College, 1972; J.D., Harvard Law School, 1976; M.F.A., University of New Orleans, 1984; author of *UNBECOMING JANE: AUSTEN, PROUST & DARWIN (& CASANOVA & STENDHAL)* (2009); *EXTREME PROUST: PHILOSOPHY OF THE “MADELEINE MOMENT”* (2007); *LAWYERS, LAW, AND SOCIAL CHANGE* (2001); *NONPROFIT LITIGATION: A PRACTICAL GUIDE WITH FORMS AND CHECKLISTS* (1992); *CONSTITUTION FOR BEGINNERS* (1987). I would like to thank Anjali Bhargava, Katy Mastman, Liz Kukura, and Julia Hiatt for bringing me into this process, and Katherine Greenberg, Alexa Rosenbloom, Alexis Flyer Rodriguez, and Gabriel Jaime for bringing it to fruition. Il miglior fabbro.

INTRODUCTION

*A man with thirty summers on his head
Has seen his best, and is as good as dead*¹

In 1984, the *N.Y.U. Review of Law & Social Change* published an article by me entitled “Lawyers, Law and Social Change.”² The purpose of this article³ is to investigate what something written some twenty-five years ago might offer to people interested in this topic for the next twenty-five years. At the very least, I view this article as a critique of something written twenty-five years ago, after twenty-five years of reading, thinking, and living the topic.

The main thesis of the 1984 article was that lawyers could expect to have only a limited impact in social change work.⁴ Truly meaningful social change would be implemented by organizing masses of people. Lawyers can be most useful in assisting those efforts through legal work when they practice in areas such as corporations, where they can structure organizations in a way to maximize organizing efficacy; taxes, where they can advise progressive organizations as to how to receive the greatest benefits from the tax system without limiting their permissible organizing activities; and criminal defense, where they are instrumental in minimizing the amount of time arrested organizers have to spend in confinement.⁵ Beyond such limited roles, I argued that lawyers could expect to have no direct or significant impact on social change. Moreover, to the degree that lawyers directly involve themselves in social change work, to that degree they adversely affect the implementation of social change: sustainable social change requires the mobilization of masses of “ordinary” people who achieve change for themselves, not “experts” or “lawyers” who try to accomplish the change for them.⁶

While I believe this thesis still holds true, this article will explore the degree to which my perspective on the role of lawyers and social change has been modified after twenty-five years. I have been particularly struck

1. JOHANN WOLFGANG VON GOETHE, *FAUST: PART TWO* 97–98 (Philip Wayne trans., Penguin Books 1959) (1832).

2. Steve Bachmann, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984). This essay was supplemented and reprinted in STEVE BACHMANN, *LAWYERS, LAW, AND SOCIAL CHANGE* 35–107 (2001). To avoid confusion, all subsequent citations to the 1984 article will refer to the book’s pagination.

3. I began working on this article in the fall of 2008 and completed the majority of it in December 2009. The dates are relevant because my discussion of certain recent historical events will be limited by what I knew when I finally surrendered this article to the printers.

4. BACHMANN, *supra* note 2, at 39.

5. *Id.* at 66–70.

6. *Id.* at 39, 64.

by developments in evolutionary brain science,⁷ especially new information concerning our conceptions of consciousness, and how this knowledge might affirmatively contribute to progressive theory and practice. These lessons are critical in light of the continuing exploitation of vulnerable groups through systemized inequality,⁸ physical violence,⁹ and ideological manipulation through physical¹⁰ and metaphysical means.¹¹ Exploitation, violence, and resistance still depend mainly upon organizing masses of people.¹² While lawyers are not the primary vehicle for social change, they do have a role to play both in organizing groups and establishing legitimacy for various efforts.

In Part I, I explore dialectical materialism as a theoretical basis for discussion of social change. Dialectical materialism has been a useful starting point for dialogues about social change because of its incompatibility with the fundamentalist perspectives that have historically led to the oppression and marginalization of socially weaker groups. Recent developments in evolutionary brain science provide additional

7. Cf. Patricia Cohen, *Next Big Thing in English: Knowing They Know That You Know*, N.Y. TIMES, Apr. 1, 2010, at C1 (discussing the growing application of evolutionary psychology to English literature).

8. See, e.g., Tony Judt, *Ill Fares the Land*, N.Y. REV. BOOKS, Apr. 29, 2010, at 17, 17 (observing that the current socio-political climate is one marked by “growing inequalities of wealth and opportunity; injustices of class and caste; economic exploitation at home and abroad; corruption and money and privilege occluding the arteries of democracy”). Such inequality continues to occur in part because of efforts to alternatively valorize or disguise its existence. See Stefan Collini, *Blahspeak*, LONDON REV. BOOKS, Apr. 8, 2010, at 29, 29 (criticizing the use of rhetoric “intended to deflect attention from the basic fact that the most important determinations of [socioeconomic status] are . . . the pre-existing distribution of wealth and power in society”); Judt, *supra*, at 18 (describing ubiquitous “symptoms of collective impoverishment” that “are so endemic that we no longer know how to talk about what is wrong”); Nicholas Spice, *Don’t Look Down*, LONDON REV. BOOKS, Apr. 8, 2010, at 11, 12 (discussing the “refusal of all parties” to discuss gross inequalities in British education).

9. See generally NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007) (describing the ruling orders’ tendency to use torture, assassination, martial law, coups, and war to maintain control).

10. See, e.g., Duff Wilson, *Poor Children Likelier to Get Antipsychotics*, N.Y. TIMES, Dec. 12, 2009, at A1 (finding that low-income children on Medicaid are prescribed antipsychotic medication at higher rates and for less severe conditions than privately-insured children).

11. JEAN BAUDRILLARD, *THE VITAL ILLUSION* 25 (2000) (concluding that the structures of popular culture suppress individuality).

12. The most advanced forms of organization in contemporary society remain the state and the multinational corporation, which enhances their abilities to exploit and destroy. See NOAM CHOMSKY, *FAILED STATES: THE ABUSE OF POWER AND THE ASSAULT ON DEMOCRACY* 110 (2006) (noting the United States’ adoption of characteristics of failed and outlaw states); KLEIN, *supra* note 9, at 23 (describing the mobilization of corporate and governmental resources for brutal forms of coercion). For examples of organizing as a tool of resistance against societal oppression, see KIM BOBO, JACKIE KENDALL & STEVE MAX, *ORGANIZING FOR SOCIAL CHANGE: MIDWEST ACADEMY MANUAL FOR ACTIVISTS* (3d ed. 2001).

support in favor of the dialectical materialist perspective. Additionally, this theoretical framework has led me to adjust some of my notions of what lawyers can contribute to social change work, particularly in constructing public narratives that create consciousness for individuals and delegitimize the status quo.

In Part II, I analyze the lessons on the relationship between organizing and social change that can be drawn from the past twenty-five years. In 1984, I argued that organizing masses of people is the key to social change; events since then have provided further support for this proposition. Modern conservative¹³ groups appear to have embraced this premise and as a result have enjoyed substantial success through organizing activities, to a degree equal to, if not surpassing, that of progressives.

In Part III, I discuss how experiences in organizing over the past twenty-five years could lead us to reconsider some of our conventional wisdom about organizing. While dialectical materialism provides a general philosophical orientation for various branches of progressive practice, the more particular questions of organizing remain. I explore the degree to which my original emphasis on socioeconomic factors, such as class, needs to be supplemented with an attention to other material factors relating to culture, organizational behavior science, and evolutionary brain science.

In Part IV, I connect the above threads to social change work by

13. Throughout this article, I use the terms “conservative,” which I equate with “the Right,” and “progressive,” which I use interchangeably with “the Left.” About twenty years ago I argued, “The Right tends to support and intensify unequal concentrations of power between human beings. The Left tends to support and accelerate trends towards more equal distributions of power between human beings.” Steve Bachmann, *The Politics of the First Amendment*, 6 CARDOZO ARTS & ENT. L.J. 327, 329–30 n.15 (1988). Historically, the Right has identified with privilege, while the Left has opposed established elites. See NORMAN DAVIES, *EUROPE: A HISTORY* 696–97 (1996). More recently, the Right supports interests relating to the exclusivity of property rights, while the Left focuses on interests relating to the distribution of social benefits. Compare Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 56 (2006) (identifying conservative concerns over protecting private property rights as a source of opposition to the public trust doctrine), with Sagit Leviner, *From Deontology to Practical Application: The Vision of a Good Society and the Tax System*, 26 VA. TAX REV. 405 (2006) (arguing in favor of redistributive tax systems from a community-oriented view of society).

Of course, this Left/Right dichotomy fails to capture the nuances that exist on both sides. Modern American conservative groups disagree over the ideal involvement of government, ranging from none at all (radical libertarian), to only enough government to protect property (conservative), to only enough government to protect property and morality (moral majority). See, e.g., DONALD T. CRITCHLOW, *THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY* 22–23 (2007) (characterizing some of the ideological differences among conservatives in the context of the founding of the publication *National Review*). Liberal groups differ on conceptions and definitions of equality, either equality of respect (neoliberal), equality of opportunity (liberal), or equality of condition (socialist). See, e.g., Walter Benn Michaels, *What Matters*, LONDON REV. BOOKS, Aug. 27, 2009, at 11 (arguing that the neoliberal focus on anti-racism and anti-sexism obscures continuing class disparities).

lawyers. While I still believe lawyers play a subordinate role in social change, developments in history and science over the past twenty-five years suggest new areas where lawyers have significant parts to play, particularly in the arenas of voter registration and protection, and in the (de)construction of ideology.

I.

GENERAL THEORY: MIND AND MATTER

[T]he prevailing view is that brain patterns were established during the millennia when humans were hunters and gatherers, and we live with the consequences.¹⁴

In my 1984 article, I explored the philosophical tradition of “dialectical materialism,”¹⁵ a worldview that focuses on the interplay between mind and matter: mind derives from matter, while simultaneously, matter derives from the mind, which conceptualizes and constitutes matter. I return to this discussion as a starting point for framing a dialogue on “social change,” because it both provides a way of understanding reality and encourages individuals to take a proactive role in shaping that reality.¹⁶

14. David Brooks, Op-Ed., *Is Chemistry Destiny?*, N.Y. TIMES, Sept. 17, 2006, § 4, at 14.

15. The term was first used by the Russian Marxist G.V. Plekhanov in 1891 to describe a philosophical approach to logic, ontology, and epistemology that began with Hegel, Feuerbach, and Marx. Since then, it has been associated with persons as diverse as Mao Zedong and Theodor Adorno. See H.H. Acton, *Dialectical Materialism*, in 2 ENCYCLOPEDIA OF PHILOSOPHY 389 (Paul Edwards ed., reprint ed. 1972). My vision of dialectical materialism aligns itself with the work of neo-Marxists working outside the orthodoxies developed by successful Communist parties in Russia and China, particularly with Adorno. See, e.g., ERNEST BLOCH, *THE PRINCIPLE OF HOPE* (Neville Plaice, Stephen Plaice & Paul Knight trans., The MIT Press 1986) (1938-1947); GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* (Ken Knabb trans., Rebel Press 2004) (1967); HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (1954). Thus, I have not engaged the thesis/antithesis/synthesis language that attends some discussions of dialectical materialism.

16. From the perspective of 2010, I would note that much of the “theory” (legal, political, aesthetic, or otherwise) that occurred between 1980 and 2000 served more as a substitute for political action than a guide to real political action, given a political environment that was both frustrating and hostile. See PIERRE BOURDIEU, *FIRING BACK: AGAINST THE TYRANNY OF THE MARKET* 2, at 19 (Loïc Wacquant trans., The New Press 2003) (2001) (calling on scholars to avoid “‘paper revolutionism’ devoid of genuine target or effect”); TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* 147 (1995) (“The new academic Left tended to mistake strong language for steady, consequential political engagement.”). Dialectical materialism provides an alternative to this nihilistic despair; one that, hopefully, provides more truth and more hope. As Marx has argued, “The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it.” Karl Marx, *Theses on Feuerbach*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY: KARL MARX AND FRIEDRICH ENGELS* 243, 245 (Lewis S. Feuer ed., 1959).

In 1984, I identified five components of dialectical materialism:

1. A thing consists not only of the objective material, but also of the subjective mind that conceives of it.
2. Things are many sided, and perhaps infinitely so.
3. Things change (i.e., to understand something one must know its past and future as well as its present).
4. Consciousness derives from matter
5. Thought is affected by material conditions, e.g., social, political, economic, and biological.¹⁷

Since 1984, a number of developments in science, including those involving evolutionary theory and brain science, have reinforced key components of dialectical materialism, in particular the role of matter in creating mind, along with the role that mind plays in creating “reality.”¹⁸ Thanks to these developments, phenomena of consciousness have been linked to chemical states and physical networks in the brain.¹⁹ The physiology of the brain has, in turn, been explained in terms of evolutionary development,²⁰ providing perspective on both the power and the limits of the reactions and networks of the brain.²¹

17. BACHMANN, *supra* note 2, at 44. One sentence that I cited in 1984 as a particularly compelling summary of dialectical materialism was from the philosopher Theodor Adorno: “The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder, that they come to contradict the traditional norm of adequacy.” THEODOR ADORNO, *NEGATIVE DIALECTICS* 5 (E.B. Ashton trans., The Continuum Publ’g Co. 1973). See BACHMANN, *supra* note 2, at 44. Another way of putting this is to say that a thought or concept inside a human head is never adequate to describe or understand an external subject, and that external subjects exist only insofar as they may be comprehended by human intellect. The first part of this formulation makes it “materialist” (because of the focus on external material reality); the second part makes it “dialectical” (because a second agent—the human subject—must still comprehend the external input).

18. See, e.g., NICHOLAS HUMPHREY, *SEEING RED: A STUDY IN CONSCIOUSNESS* 13–19 (2006) (explaining how when a person sees something, she both acquires ideas and creates visual sensations about what she sees).

19. See DAVID J. LINDEN, *THE ACCIDENTAL MIND: HOW BRAIN EVOLUTION HAS GIVEN US LOVE, MEMORY, DREAMS, AND GOD* 144 (2007) (arguing that consciousness is largely a product of brain functions that are themselves products of human evolution). See generally HELEN FISHER, *WHY WE LOVE: THE NATURE AND CHEMISTRY OF ROMANTIC LOVE* (2004) (using data from brain scans, psychological literature, animal studies, and questionnaires to explore the phenomenon of romantic love and its biological aspects).

20. See, e.g., R. DALE GUTHRIE, *THE NATURE OF PALEOLITHIC ART* 227 (2005) (“Many of our behaviors and emotions are from older parts of the brain dating back to the early roots of mammals and evolved before we and they diverged from a common stock.”).

21. The capacity to create narrative is a potent example of how evolutionary processes resulted in a function that was important for survival, but in a way that may have been flawed; while the ability to create narrative is an important tool for us to organize and understand our surroundings, it prevents us from perfectly perceiving the world around us. See LINDEN, *supra* note 19, at 83 (observing that, as the result of evolutionary needs, our sensory perceptions emphasize important information and ignore other stimuli); NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* 62–84

In addition to structuring a discussion on social change by grounding it in scientific observations, dialectical materialism also provides intellectual grounds for opposition to the various fundamentalisms that attempt to stifle progressive movement.²² Its postulates about the relationship between mind and matter (and the implied politics) are particularly relevant when thinking about two major theoretical movements I consider progressive—Marxism and feminism.²³ Additionally, these postulates are relevant when thinking about the past, present, and future of legal education.²⁴

A. *Darwin and the Brain*

My conception of dialectical materialism is consistent with the development of evolutionary theory and brain science since 1984. Advances made in evolutionary theory provide support for dialectical materialist theory, which in turn supports progressive movements and social change.²⁵

Under Darwinian theory, the motors of evolution include the mutation and mixing of genes through sexual reproduction,²⁶ and how well or not they interact with external factors like climate and other competing forms of life.²⁷ These basic principles help drive our understanding of human perceptions, motivations, and inclinations, and suggest the degrees to which they may or may not contribute to survival and reproduction.²⁸

(2007) (exploring the concept of narrative fallacy, including the flush of dopamine that seems to occur when a brain forms patterns).

22. See *infra* Part I.B.

23. See *infra* Parts I.C–D.

24. See *infra* Part I.E.

25. See *infra* Parts I.C–E.

26. See, e.g., WILLIAM R. CLARK, SEX & THE ORIGINS OF DEATH 63–66 (1996) (describing the evolutionary advantages of reproduction through sex because of the creation of offspring that are genetically different from their parents); LINDEN, *supra* note 19, at 243 (“[V]ariation in gene structure underlies brain structure.”); CARL ZIMMER, EVOLUTION: THE TRIUMPH OF AN IDEA 230–33 (2001) (observing that sex may provide an evolutionary advantage because it allows the mixing and selection of genes between two organisms, as opposed to one organism reproducing itself through cloning).

27. See Joe G. Kingsolver, *Physiological Sensitivity and Evolutionary Responses to Climate Change*, in CARBON DIOXIDE, POPULATIONS, AND COMMUNITIES 3 (Christian Korner & Fakhri A. Bazzaz eds., 1996) (discussing evolutionary adaptations to environmental factors). See also Nicholas Wade, *Human Culture, an Evolutionary Force*, N.Y. TIMES, Mar. 2, 2010, at D1 (examining genetic adaptations to “sustained cultural changes, like new diets”).

28. See DAVID F. BJORKLUND & ANTHONY D. PELLEGRINI, THE ORIGINS OF HUMAN NATURE: EVOLUTIONARY DEVELOPMENTAL PSYCHOLOGY 27 (2002) (“Our current genetic makeup . . . most likely reflects adaptations to our hunter-gatherer past, which may or may not be adaptive for us today.”); Jonah Lehrer, *Depression’s Upside*, N.Y. TIMES, Feb. 28, 2010, Magazine Section, at 38 (“We are not a blank slate but a byproduct of imperfect adaptations, stuck with a mind that was designed to meet the needs of Pleistocene hunter-

The physical construction of the human brain is grounded in an evolutionary history that reveals more about humanity's ability to survive during various phases of human history than it does about our ability to ascertain "truth."²⁹ That is, rather than solely seeking to discern the factual reality of our physical and social environments, our brains evolved to create, or even fabricate, aspects of reality in order to promote human survival. It is critical to note the degree to which narrative devices such as cause-and-effect and plot are in fact only convenient—and possibly false—human means for surviving reality. The research suggests that patching things into something connected and "coherent" is simply something that human brains are wired to do.³⁰ Paleontologist R. Dale Guthrie has proffered at least one evolutionary explanation for why this propensity has developed in the human brain: "Tracking is a highly cultivated ability that enables the hunter to imagine the other animal's emotions and behavior. . . . [A] tracker creates a template or story upon which he works to piece together what may have happened and what may be happening."³¹ In other words, at least 40,000 years of hunting have pushed the human brain to become a story-making machine—even though these coherent narratives may have little or nothing to do with actual reality.³²

Brain science and evolutionary theory have provided scientific grounds supporting both the dialectical and materialistic components of dialectical materialism. The material bases of mind are growing clearer with every scientific discovery. The dialectical aspect, which acknowledges the mind's role in creating "reality," is also being increasingly explored,³³ despite its counter-intuitive message that "truth" is in fact "fiction"—or at least, always provisional.

gatherers on the African savanna."'). See also GARY MARCUS, *KLUGE: THE HAPHAZARD EVOLUTION OF THE HUMAN MIND* (2008) (arguing that the human brain is a "kluge," a haphazard design—effective but not ideal—that continues to be replicated as a process of evolution).

29. See BJORKLUND & PELLEGRINI, *supra* note 28, at 215 (observing that humans evolved "several specific cognitive abilities" in order to exist in a social community, and that as a result, "formal logic is something that humans are not particularly good at, unless the logic is in the context of social exchange").

30. LINDEN, *supra* note 19, at 225 ("[O]ur brains have become particularly adapted to creating coherent, gap-free stories The creation of [these] coherent narratives in the brain is not limited to manipulation of low-level perception . . . but extends to higher perceptual and cognitive levels.").

31. GUTHRIE, *supra* note 20, at 227.

32. LINDEN, *supra* note 19, at 225–26. See also DAVID BERREBY, *US AND THEM: THE SCIENCE OF IDENTITY* 109 (2005) (describing experiment wherein participants "were unaware that some of their 'memories' were actually alterations or additions"); TALEB, *supra* note 21, at 62–84 (describing various tendencies of the human brain to exaggerate facts or invent patterns for narrative consistency, despite the accompanying lack of accuracy); William Easterly, *The Anarchy of Success*, N.Y. REV. BOOKS, Oct. 8, 2009, at 28, 28 ("Humans are suckers for finding patterns where none really exist . . .").

33. See, e.g., HUMPHREY, *supra* note 18.

B. Fundamentalism, Plato, and Reaction

Dialectical materialism cuts against the philosophical grounds of retrogressive movements,³⁴ which today might be subsumed under the category of “fundamentalism.” Fundamentalism has been defined as “a movement or point of view characterized by adherence to fundamental or basic principles.”³⁵ Fundamentalism can justify this adherence only if it can establish that the mind can literally apprehend reality (and from it derive basic, fundamental principles). Philosophically, fundamentalism derives from Platonic idealism, which postulates that universal, abstract essences exist and that the human mind can apprehend them.³⁶ Dialectical materialism cuts at the foundations of this perspective because it holds that reality is too rich for the mind to comprehend. Moreover, dialectical materialism posits that the mind is inherently inadequate to apprehend reality, either because of its physical construction³⁷ or because of the tools used to identify and describe reality.³⁸

By way of example, the fundamentalism of American conservatism reveals itself in one its founding texts, Richard Weaver’s *Ideas Have Consequences*, written in 1948.³⁹ Weaver’s “central philosophical question” was “whether there is a source of truth higher than, and independent of, man,” a question he answered in the affirmative.⁴⁰ He asserted that human development regressed starting “in the late fourteenth century . . . when man had abandoned his belief in transcendental values in

34. See *infra* notes 90–95 and accompanying text for definitions of progressive and regressive social change. Generally, I put it in terms of more or less equality.

35. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 735 (3d ed. 1992).

36. A.D. Woozley, *Universals*, in 8 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 15, at 194, 194–98.

37. See *supra* Part I.A.

38. Friedrich Nietzsche has been credited with making “the first argument . . . that a single true view of reality was rendered impossible by the structure of language.” WILLIAM R. EVERDELL, *THE FIRST MODERNS: PROFILES IN THE ORIGINS OF TWENTIETH-CENTURY THOUGHT* 349 (1997). More recently, this argument has been divided into five core principles of modernist thought: self-reference and recursion, radical subjectivity, multiple perspective, inductiveness, and discontinuity. *Id.* at 347. It is no accident that fundamentalism has been considered by many to constitute a panic attack in the face of modernity’s certain uncertainties. See, e.g., KAREN ARMSTRONG, *THE BATTLE FOR GOD*, at xiii (2001) (describing various forms of religious fundamentalism as “motivated by common fears, anxieties, and desires . . . [in] response to some of the peculiar difficulties of life in the modern secular world”).

39. See JEROME L. HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* 50 (1990) (identifying *Ideas Have Consequences* as perhaps “the most revered and influential [of the traditionalist texts] among conservatives”). See also JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 46–47 (2004) (recognizing Weaver and his work as emblematic of the nostalgia that imbued postwar conservatism).

40. HIMMELSTEIN, *supra* note 39, at 50 (internal quotation marks omitted).

favor of William of Occam's nominalism."⁴¹ As a bit of background, William of Occam denied the existence of mind-independent universals or essences, arguing that universals were only names, lacking any non-mental reality.⁴² As such he provides an early intimation of anti-fundamentalism by denying any reality inhering in language, an arbitrary invention of fallible human beings. That he was excommunicated for this early version of "dialectical materialism" should surprise no one. That he continued to cause discomfort to people like Weaver centuries later should also surprise no one: he denies them a certain means by which they can order the universe, including other human beings.

The philosophical battle between "essentialism" and "nominalism" continues, as evidenced in the writings of one of the world's most prominent fundamentalists, Pope Benedict XVI. Taking his cue from the Gospel of John (which equates God with Word, or "Logos"), he argues, "The basic reason that man can speak with God is because God himself is speech, word."⁴³ Elaborating on John further, he states:

"In the beginning was the Word [logos], and the Word [logos] was in communication with God." . . . [T]he Christian mysteries are Logos-mysteries. They reach beyond the limits of human reason, but they do not lead into the formlessness of frenzy or the dissolution of rationality in a cosmos understood as irrational.⁴⁴

If God is postulated as Word, Logos, logical, then the cosmos can be considered essentially rational, and cannot be "understood as irrational."⁴⁵ This point is critical to understanding fundamentalism. If God, Being, and Creation are rational, they become accessible to humanity, which is blessed with logos (i.e., language and rational capacity). All fundamentalists subscribe to the notion that Logos (Word) and Ontos (Being) connect in a fundamental fashion.

Another school of fundamentalism that threatens progressive goals is market-oriented fundamentalism, which one leading thinker has defined as "a widely held creed that the markets will take care of all our needs."⁴⁶

41. MICKLETHWAIT & WOOLDRIDGE, *supra* note 39, at 47.

42. Woosley, *supra* note 36, at 203.

43. Benedict XVI, *On the Theological Basis of Prayer and Liturgy*, in THE ESSENTIAL POPE BENEDICT XVI: HIS CENTRAL WRITINGS & SPEECHES 155, 162 (John F. Thornton & Susan B. Varene eds., 2007).

44. Benedict XVI, *The Regensburg Tradition and the Reform of the Liturgy*, in THE ESSENTIAL POPE BENEDICT XVI, *supra* note 43, at 167, 174 (first and second alterations in original).

45. *Id.*

46. GEORGE SOROS, OPEN SOCIETY: REFORMING GLOBAL CAPITALISM, at xii (2000). Soros observed that market fundamentalism is only the latest incarnation of the nineteenth century predilection towards laissez-faire governance, which supports private interests but fails to protect the common interest. *Id.* See also Jackson Lears, *Naderland*, LONDON REV. BOOKS, Apr. 8, 2010, at 7 (criticizing the view that wealth might be utilized to bring about

Adam Smith and his views on economics have been cited to justify asymmetrical power relationships rather than to explain actual phenomena.⁴⁷ Smith's faith in the market appears anchored in a belief in a beneficent supernatural Being, or Order, a belief that was explored as a general matter by Nietzsche and Veblen⁴⁸ and traced in particular to his embrace of Stoic theology.⁴⁹ Smith described the Stoic world as one "governed by the all-ruling providence of a wise, powerful, and good God, [and] every single event ought to be regarded, as making a necessary part of the plan of the universe, and as tending to promote the general order and happiness of the whole."⁵⁰ Such observations correlate with his "invisible hand" by which the "selfish rich" are led (almost "by deception") "to help the poor and to serve the interest of society at large;"⁵¹ and as a result, market fundamentalists characterize the exploitation of unequal relations as fair transactions⁵² and encourage

economic social change).

47. See EMMANUEL TODD, *AFTER THE EMPIRE: THE BREAKDOWN OF THE AMERICAN ORDER* 63 (C. Jon Delogu trans., Columbia Univ. Press 2003) (2002) (observing that traditional economics "perceives . . . an ideal, perfectly symmetrical world in which the status of all nations is equivalent and all work for the common good," a perception that does not align with "the troubling fact that globalization is not organized around a principle of symmetry but of asymmetry").

Smith is more than his "Hollywood" version. For example, he anticipates Veblen with his comments on the noxious rich: "With the greater part of rich people, the chief enjoyment of riches consists in the parade of riches, which in their eyes is never so complete as when they appear to possess those decisive marks of opulence which nobody can possess but themselves." ADAM SMITH, *THE WEALTH OF NATIONS BOOKS I-III* 277 (Penguin Classics 1986) (1776). He anticipates discussions of the degradation of labor under the factory system: "[The ploughman's] understanding, . . . being accustomed to consider a greater variety of objects, is generally much superior to that of the [mechanic], whose whole attention from morning till night is commonly occupied in performing one or two very simple operations." *Id.* at 231. He anticipates Marx when he observes that "masters, being fewer in number, can combine much more easily." *Id.* at 169. He also observed, before Marx, that rural people "dispersed in distant places, cannot easily combine together." *Id.* at 230.

48. See FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS* 25 (R.J. Hollingdale trans., Cambridge Univ. Press 1986) (1878) ("[A] theory like that of free trade, presupposes that universal harmony *must* result of itself in accordance with innate laws"); Gary G. Hamilton & Misha Petrovic, *Thorstein Veblen and the Organization of the Capitalist Economy*, in *THE OXFORD HANDBOOK OF SOCIOLOGY AND ORGANIZATION STUDIES: CLASSICAL FOUNDATIONS* 351, 356 (Paul S. Adler ed., 2009) ("With Adam Smith . . . the ultimate ground of economic reality is the design of God") (quoting Veblen).

49. A.L. Macfie & D.D. Raphael, *Introduction* to ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 5-8 (A.L. Macfie & D.D. Raphael eds., Oxford Univ. Press Liberty Classics ed. 1982) (1792). A rigorous theologian might note that Stoicism has its roots in Greek philosophy, where both Plato and Aristotle, consistent with fundamentalists like Pope Benedict, embrace the notion that mind can identify reality.

50. SMITH, *supra* note 49, at 36.

51. Macfie & Raphael, *supra* note 49, at 8.

52. See, e.g., FERNAND BRAUDEL, *AFTERTHOUGHTS ON MATERIAL CIVILIZATION AND CAPITALISM* 62-63 (Patricia M. Ranum trans., paperback ed. 1979) ("The basic inequality

activity that may have led to the most serious economic turmoil in decades.⁵³

Whether you call it Platonism, essentialism, universalism, or fundamentalism, the perspective of dialectical materialism rejects these views. It repudiates the notion that the human brain can precisely ascertain any essences in reality; at best, it can create only provisional approximations of external stimuli. With this understanding at its core, dialectical materialism thus provides an intellectual starting point for opposition to creeds that would order and oppress humanity in the name of something perfect.

C. Marxism

In addition to providing suggestive grounds for opposing reactionary fundamentalism, dialectical materialism also suggests productive avenues for Marxism, a school of thought associated with progressive action. Since the beginning, Marxism has been influenced by dialectical materialism;⁵⁴ neo-Marxist thinkers have built on these works and contributed useful progressive theories to the debate.

While this article focuses on writers that postdate my 1984 article, many mid-twentieth century French thinkers did not work their way into the American consciousness until at least the 1980s.⁵⁵ Dialectics and materialism can be found in the works of Georges Bataille, whose “base

of partners that underlies the capitalistic process is visible on every level of social life.”).

53. See, e.g., *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 2 (2008) (statement of Alan Greenspan, former Chairman, Federal Reserve) (admitting that reliance on “the self-interest of lending institutions to protect shareholder’s equity” has been “a central pillar of our financial markets’ state of balance”); Robert H. Frank, *Flaw in Free Markets: Humans*, N.Y. TIMES, Sept. 13, 2009, Business Section, at 4 (arguing that free market competition can protect “society from excessive financial risk” only when certain conditions exist); Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009, Magazine Section, at 36 (describing two major contemporary schools of economics and arguing that recessions and depressions can only be avoided when economists accept that markets do not function perfectly); George Soros & Judy Woodruff, *The Financial Crisis: An Interview with George Soros*, N.Y. REV. BOOKS, May 15, 2008, at 8, 8 (asserting that the financial crisis was the result of “market fundamentalism,” or the belief “that markets are self-correcting,” and that “generally the intervention of the authorities . . . saves the markets when they get into trouble”).

54. See, e.g., Danny Goldstick, *Applying Dialectical Materialism*, 16 NATURE, SOC’Y & THOUGHT 277, 277 (2003) (“For textbook purposes, Marxist philosophy is commonly divided into dialectical materialism and historical materialism, and historical materialism is often said to be the application of dialectical materialism to history.”); Robert L. Heilbroner, *Through the Marxian Maze*, N.Y. REV. BOOKS, Mar. 9, 1972, at 9 (explaining the dialectics of Marxist thought); Robert Skidelsky, *What’s Left of Marx*, N.Y. REV. BOOKS, Nov. 16, 2000, at 24 (identifying the strains of thought that influenced Marx’s development of dialectical materialism).

55. See, e.g., MARK POSTER, *FOUCAULT, MARXISM & HISTORY* (1984).

materialism” analyzed the “social body as a kind of sociological metabolism, or as a waste-management system” where abundance and heterogeneous transgression served as constituting concepts as important as scarcity and homogenizing hegemony.⁵⁶ Guy Debord, with his experiences during the May days of 1968 in France, raised the question of how human bodies might most effectively organize themselves into action in post-industrial history.⁵⁷ Further, Foucault’s “biopolitics” focused on collective, disciplinary action on individual bodies, as well as “a second seizure of power . . . directed not at man-as-body but man-as-species” where the general “population” was the subject for management and regulation.⁵⁸

In 2000, Marxist philosophers Michael Hardt and Antonio Negri “rehabilitate[d] . . . ‘communism’”⁵⁹ with the publication of their book, *Empire*. Hardt and Negri posited that “sovereignty has taken a new form, composed of a series of national and supranational organisms,” which they titled *Empire*.⁶⁰ This new global form “is characterized fundamentally by a lack of boundaries,”⁶¹ lacking a “territorial center of power and . . . fixed boundaries” as a result of “[t]he declining sovereignty of nation-states and their increasing inability to regulate economic and cultural exchanges.”⁶² Similar to dialectical materialism, *Empire* opposes fundamentalism by rejecting the notion that global order could arise according to some omniscient, transcendent force or power.⁶³ *Empire* is also consistent with the fluidity and interplay between mind and matter that characterize dialectical materialism: its terms are “completely indeterminate, even though they are nonetheless concrete.”⁶⁴

D. Feminism

Dialectical materialism also provides theoretical support for feminism—although given the range of authors who might be termed “feminist,” composing a singular definition of “feminism” is difficult.⁶⁵ For

56. EUGENE THACKER, *THE GLOBAL GENOME: BIOTECHNOLOGY, POLITICS, AND CULTURE* 122–23 (2005). See also GEORGES BATAILLE, *EROTISM: DEATH & SENSUALITY* (First City Lights 1986) (1957).

57. See DEBORD, *supra* note 15.

58. THACKER, *supra* note 56, at 22–23. See also MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979* (Michel Senellart ed., Graham Burchell trans., Palgrave MacMillan 2008) (2004).

59. Ed Vulliamy, *The Observer Profile Michael Hardt: Empire Hits Back*, *OBSERVER* (London), July 15, 2001, at 23.

60. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE*, at xii (2000).

61. *Id.* at xiv.

62. *Id.* at xii.

63. *Id.* at 3.

64. *Id.* at 20.

65. A wide variety of perspectives and priorities falls under the heading of “feminist,”

the purposes of this article I will rely on a somewhat simplified definition of feminism as an objection to discrimination against women and the ideologies that have been relied on to justify such discrimination.

Patriarchal ideology contrasts masculine spirit to feminine body and argues that the thought of the former is superior because it is unconnected to and uninfected by earthly clay to the degree of the latter.⁶⁶ Dialectical materialism would directly oppose this position by arguing that there exists no thought without matter to create it, and thus, even if such spiritual/material distinction may be validly drawn, neither may be privileged over the other.

Consistent with its contempt for the body, patriarchal thought also denigrates emotion, dismissing it as effeminate, to the point of being worthless as a source for insight.⁶⁷ Dialectical materialists would agree with neuroscientist Jill Taylor, who has pointed out how “thought” is inseparable from emotion at the threshold of perception, in that the brain

including liberal feminism, which advocates the equality of men and women through political and legal reform, *see, e.g.*, BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (2d ed. 2000); radical feminism, which focuses on a patriarchal, capitalist hierarchy as the source of gender-based oppression, *see, e.g.*, ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967-1975* (1989); multiracial feminism, which explores the experiences of women of color and the intersection of oppression based on gender, race, and class, *see, e.g.*, Maxine Baca Zinn & Bonnie Thornton Dill, *Theorizing Difference from Multiracial Feminism*, in *FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES* 353 (Carole R. McCann & Seung-Kyung Kim eds., 2003); and other theoretical offshoots. Within each feminist movement, various definitions for “feminism” exist, predicated on different notions of the source of oppression, the goals of feminist activity, and the recommended means for pursuing these goals.

Dialectical materialism is consistent with this multitude of definitions, because it naturally questions the notion of essences or the idea that there could be any single definition for terms like “female.” This makes the matter of trying to contain something like feminism within the confines of a definition of “female” all the more problematic. *Cf.* John Lancaster, *Short Cuts*, LONDON REV. BOOKS, Oct. 8, 2009, at 28 (noting the difficulty in defining sex as many female athletes have male Y chromosomes and variations in hormone levels); Jeré Longman, *South African Runner's Sex-Verification Result Won't Be Public*, N.Y. TIMES, Nov. 20, 2009, at B10 (describing controversy over sex-determination testing for female athlete given “athletes who may have both male and female characteristics”).

66. *See, e.g.*, BRAM DIJKSTRA, *IDOLS OF PERVERSITY: FANTASIES OF FEMINE EVIL IN FIN-DE-SIÈCLE CULTURE* 210–34 (1986) (summarizing the works of patriarchal writers who described men and women as two complementary, and completely different, types of beings, characterizing intelligence and morality as male, and weakness and physicality as female).

67. *E.g.* GERDA LERNER, *THE CREATION OF FEMINIST CONSCIOUSNESS: FROM THE MIDDLE AGES TO EIGHTEEN-SEVENTY* 46–47 (1993) (discussing the consequences of “[t]he concept that women are born inferior . . . [and] are more subject to emotions . . . than men”). *See also* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L.J. 81 (1987) (arguing that, because women's joys and sufferings differ from men's, feminism must go beyond the liberal focus on equality and autonomy and focus also on happiness and pleasure, including the erotic).

automatically “scan[s] all incoming stimulation” to establish whether to feel emotional responses (anxious or calm, threatened or intimate), before any “thinking” even occurs.⁶⁸ The feminist historian Gerda Lerner has pointed out how such patriarchal prejudices have impoverished the range of human consciousness for centuries.⁶⁹

In the face of patriarchal dichotomy between intellect and emotion, between conscious thought and physical reflex, dialectical materialism establishes that there is no such thing as disembodied reason separable from human bodies. There is no pure reason, no pure spirit; rather, human existence is the result of the intrinsic intertwining of reason and spirit. “Reason” comes from imperfect bodies developed over millions of years of evolution. To argue the contrary is to create theoretical justification for intolerance and oppressive violence.⁷⁰

E. Legal Thought and Legal Teaching

Today, the main method for teaching law is the case method.⁷¹ Developed at Harvard Law School in the 1870s, the case method centers on exploring fundamental legal doctrines through discussion of certain critical cases. Rather than lecturing, professors employ rigorous questioning to lead students to induce these doctrines.⁷² By the late 1960s and into the 1970s, this use of the Socratic method had developed a reputation for being oppressive, abusive, and reactionary.⁷³

From the perspective of dialectical materialism, this should come as no

68. JILL BOLTE TAYLOR, *MY STROKE OF INSIGHT: A BRAIN SCIENTIST'S PERSONAL JOURNEY* 17 (Plume 2009) (2006). See generally JONAH LEHRER, *HOW WE DECIDE* (2009).

69. See LERNER, *supra* note 67, at 10, 46–52 (noting that misogynist beliefs that women were inferior and incapable of abstract thought prevented women from forming an authentic self and made them uncertain of their right to think).

70. See DIJKSTRA, *supra* note 66, at 209, 401 (arguing that the forces underlying cultural hatred of women led not only to fantasies of gynocide, but also to actual genocide by the Nazis). Once the mind presumes to separate itself from and privilege itself over material existence and manual labor, it produces barbarism. See ADORNO, *supra* note 17, at 366–67 (arguing that the sanitization of intellect and culture and the separation of mind from manual labor made possible the atrocities committed during the Holocaust).

71. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 18 (1995). While the practice of Socratic questioning in a law school class first took root at Columbia Law School, Harvard Law School developed and popularized the practice. *Id.* at 13, 18.

72. *Id.* at 14–16.

73. See SCOTT TUROW, *ONE L* 296 (1977) (observing that the Socratic method “can become an instrument of terror”); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 54, 60–61 (David Kairys ed., 3d ed. 1998) (characterizing the case method of teaching as “bullying” and criticizing it for misleading students by setting up a false dichotomy between legal reasoning and ethical or political discourse). See also JEROME FRANK, *COURTS ON TRIAL* 225 (1950) (criticizing the case method for creating a “core of somewhat neurotic attitudes” and for perpetuating mythical beliefs in the American legal system); JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971) (offering a negative portrayal of the Socratic method in popular culture).

surprise. By divorcing theoretical discussions of casebook law from the work of law as lawyers practice it, the casebook method privileges mind over matter. As Adorno observed, incompetence—and potentially fascism—lurks in such idealism.⁷⁴ The quality of legal teaching and of law school graduates degenerates under the case method in the absence of insight gained through connections with reality and actual practice.⁷⁵ The humanity of the people participating in this context suffers for similar reasons. Historically, this began as an unbalanced valorization of thinking and theory (fit for philosophers) over labor and practice (fit for slaves),⁷⁶ and it culminates now in the “survival of the fittest” mentality underlying the casebook method.⁷⁷

One stark example lies in the defense of torture. For generations, a broad consensus has existed among civilized nations that torture is beyond the pale;⁷⁸ however, under the Bush Administration, some of this country’s top legal minds found ways to justify its legal use.⁷⁹ Had legal teaching not been so strongly divorced from reality and its method not so saturated with contempt for real-life context and consequences, these arguments might never have gained the level of credence they did. If the autarky of mind in America does not lead to Auschwitz, it does seem to lead to Abu Ghraib.⁸⁰

Clinical legal education retains the dialectical nature of the exchange between student and teacher; in addition, it focuses on forcing students to confront the lived human experiences behind litigation and the surrounding social contexts implicated in judicial decisions. Clinical education was already being advocated in 1949 by Jerome Frank, a leader of the legal realist movement,⁸¹ and its array of advocates has only continued to grow.⁸²

74. See ADORNO, *supra* note 17, at 366–67.

75. The case method fails to adequately educate law students on the impact human competence, interest, and personality have on legal outcomes—on “the human side of the administration of justice.” FRANK, *supra* note 73, at 235. Additionally, clinical legal education may be more engaging, and therefore more effective, for many students than the case method is. See *id.* (“It is like the difference between kissing a girl and reading a treatise on osculation.”).

76. See MARCUSE, *supra* note 15, at 41–42, 166–67.

77. DUXBURY, *supra* note 71, at 16–17.

78. For example, Article 3 of the Geneva Conventions of 1949 prohibits torture against civilians and prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

79. Frank Rich, Op-Ed., *The Banality of Bush White House Evil*, N.Y. TIMES, Apr. 26, 2009, Week in Review Section, at 14 (observing that Justice Department memoranda authorizing the United States to use torture in the War on Terror were written by graduates of top law schools who had worked at prestigious firms).

80. Cf. ADORNO, *supra* note 17, at 366–67.

81. FRANK, *supra* note 73, at 234–36.

82. See, e.g., Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Clinical Experiences in U.S. Law Schools*, 75 TENN. L. REV. 343, 362 (2008) (advocating for law school clinics, which “not only teach students knowledge and skill, they also integrate

One should also note the broader political contexts of legal education and the history of formal legal education. Most lawyers in the early American republic learned through a version of clinical legal education: they served as apprentices reading laws with a senior lawyer before they staked out on their own.⁸³ The need for law schools may have been obvious more to law schools than to lawyers.⁸⁴ More significantly, when a law school degree becomes a predicate for certification as an attorney, individuals from lower socioeconomic classes are more easily denied access to the legal profession. This “credentials” revolution thus protects middle and upper class privilege.⁸⁵ It also promotes ideologies favorable to those class groups by legitimating certain outlooks and practices, and delegitimizing others.⁸⁶

In short, if legal teaching introduced more materialism into its dialectics, two goals could be achieved: lawyers might become more competent,⁸⁷ and protections would be established against the prejudice, insensitivity, and violence that can result when idealism is divorced from practice.⁸⁸

II.

PRACTICES OF ORGANIZING: CHANGING SOCIETY

*I couldn't survive my own pessimism if I didn't have some kind of sunny little dream. . . . Human beings will be happier—not when they cure cancer or get to Mars or eliminate racial prejudice or flush Lake Erie but when they find ways to inhabit primitive communities. That's my utopia. That's what I want for me.*⁸⁹

valuable ethical and social concerns”).

83. See FRANK, *supra* note 73, at 230. Frank argues against dedicating three years to teaching case law dialectics. *Id.* at 236–37. See also Christopher T. Cuniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 85 (1997) (“There has never been a persuasive justification for uniformly requiring all law students . . . to spend their third year of legal training within a law school.”). However, case law teaching can process more students at less cost than clinical teaching, through larger class sizes and fewer input requirements. DUXBURY, *supra* note 71, at 19.

84. Cf. DUXBURY, *supra* note 71, at 19 (“[T]he primary merit of the case method is its low cost.”).

85. BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 78–81 (1989).

86. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 14 (2008) (“[D]isciplines tend to reproduce themselves As a result, we would expect law faculties to reproduce themselves ideologically, even in the absence of an explicit individual desire to discriminate, by defining alternative ideological research projects as marginal or unimportant.”).

87. See FRANK, *supra* note 73, at 237–38.

88. See ADORNO, *supra* note 17, at 366–67.

89. David Standish, *Interview with Kurt Vonnegut*, PLAYBOY, July 1973, at 20,

In one sense “social change” is a meaningless term, in that any sort of change in social arrangements equals social change. In this article, I maintain the position I have advocated previously,⁹⁰ that social change worthy of the name should involve a drive to greater equality⁹¹ and community.⁹² More equality makes happier and healthier people, irrespective of economic class.⁹³ Moreover, it contributes to community, by which I mean a social structure that combines social support with respect for individual autonomy.⁹⁴ The template set down by our Paleolithic past suggests that humans remain “wired” to thrive in egalitarian and communitarian societies.⁹⁵

It is important to note the degree to which some social change is impacted by advances in technology. Arguably, the development of birth control has done more to advance the status of women in society than all the rational arguments for women’s rights over a number of centuries and all the demonstrations for women’s rights over the past few decades.⁹⁶ The development of the computer and the internet may lead to further revolutions in human social relations, in terms of how they influence

reprinted in CONVERSATIONS WITH KURT VONNEGUT 76, 80 (William Rodney Allen ed., 1988).

90. To a degree my stance is defined by embracing historical movements associated with leftwing, rather than rightwing, ideologies. *See supra* note 13.

91. *See* BACHMANN, *supra* note 2, at 172 (“Because power distributions have been and remain so unequal and so detrimental to the dignity of human beings, I postulate that in the foreseeable past and foreseeable future, most impulses towards the Left should be considered progressive, humane, and/or good.”).

92. *See id.* at 37 (advocating communitarianism and “an appreciation of community” as laudable social goals).

93. *See* RICHARD WILKINSON, MIND THE GAP: HIERARCHIES, HEALTH AND HUMAN EVOLUTION 11 (2001) (arguing that greater equality in society is positively correlated with longer life expectancy rates and overall better health); RICHARD WILKINSON & KATE PICKET, THE SPIRIT LEVEL: WHY MORE EQUAL SOCIETIES ALMOST ALWAYS DO BETTER 181, 213 (2009) (noting that greater inequality in a society increases the prevalence of mental illness, death rates, discrimination, and other harmful effects, not just within disadvantaged groups, but across the population); Judt, *supra* note 8, at 19 (“Inequality, then, is not just unattractive in itself; it clearly corresponds to pathological social problems that we cannot hope to address unless we attend to their underlying cause.”). *See generally* RICHARD WILKINSON, UNHEALTHY SOCIETIES: THE AFFLICTIONS OF INEQUALITY (2001) (connecting health inequalities with social and economic inequalities).

94. *See* BACHMANN, *supra* note 2, at 37–38 (citing FRED R. DALLMAYR, TWILIGHT OF SUBJECTIVITY: CONTRIBUTIONS TO A POST-INDIVIDUALIST THEORY OF POLITICS 140–42 (1981)).

95. *See* GUTHRIE, *supra* note 20, at 256 (noting that Paleolithic humans not only had to cooperate both to hunt and kill large prey, but that the size of the prey encouraged egalitarian sharing and distribution).

96. *See* MICHELLE GOLDBERG, THE MEANS OF REPRODUCTION: SEX, POWER, AND THE FUTURE OF THE WORLD 11–12 (2009) (arguing that reproductive rights are directly related to women’s economic freedom, educational possibilities, health, and social status).

human brains⁹⁷ and how they effect political dynamics within a society.⁹⁸

The importance of technology in spreading and supporting social change forces us to confront the question of how to make social change. In confronting this question, we must also ask ourselves whether the work traditionally engaged in the pursuit of social change is effective. In other words, does social change work work? As I did in 1984, I believe that organizing constitutes an effective avenue for actualizing social change. Events since then, including the rise of the new Right and the election of President Obama, have confirmed that belief. Certain structuralist approaches to history might argue for passivity.⁹⁹ Such approaches undercut the need to organize, by arguing that social change happens as a result of external factors. However, I believe that individuals cannot rely on external factors to drive social change but must instead take an active role to create it.

In short, I believe that human history requires, at least in part, humans taking steps to act. Historical conditions may help some human actions and thwart or pervert others; however, these historical conditions alone are not responsible for the course of human history. External and social conditions are important, but they only go so far; after that, it is what people do with them that determines the shape of history.¹⁰⁰ Both previous progressive movements¹⁰¹ and advances in evolutionary science¹⁰² show us

97. DON TAPSCOTT, *GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD* 97–98, 100–09 (2009) (describing scientific evidence that digital immersion—spending significant time on activities such as playing video games and using the internet—can change the brain, including how information is processed).

98. MORLEY WINOGRAD & MICHAEL D. HAIS, *MILLENNIAL MAKEOVER: MYSPACE, YOUTUBE, AND THE FUTURE OF AMERICAN POLITICS* 111 (2008). See also Noah Shachtman, *Social Networks as Foreign Policy*, N.Y. TIMES, Dec. 13, 2009, Magazine Section, at 62 (describing how the United States is using social networks to further its foreign policy goals, including facilitating access to Twitter during pro-democracy protests in Iran).

99. For example, consider the remarkable similarities between the Peloponnesian War and a nineteenth century Polynesian War. See MARSHALL SAHLINS, *APOLOGIES TO THUCYDIDES: UNDERSTANDING HISTORY AS CULTURE AND VICE VERSA* (2004). The number and significance of comparisons between the two wars could support a determinist approach to social change, suggesting that the only way two wars, in different times and eras, could be so similar is if events are somehow preordained. If that were the case, then fighting to bring about social change and to overcome the preexisting order is futile.

100. Karl Marx, *Excerpts from The Eighteenth Brumaire of Louis Bonaparte*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY*, *supra* note 16, at 318, 320 (“Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given, and transmitted from the past.”).

101. In 1984, I cited the 1930s labor movement and the 1960s civil rights movement as instances when significant social change was achieved directly as a result of organizing efforts. BACHMANN, *supra* note 2, at 49.

102. The findings of evolutionary science concerning the benefits of organization remain tentative yet intriguing. See, e.g., BERREBY, *supra* note 32 (identifying evolutionary

that the most important thing to do to create social change is to organize.

A myriad of historical phenomena might be cited as examples of how organizing people might implement social change. Since 1984, the following phenomena have helped confirm this belief: the Republican resurgence, the election of Barack Obama, and the experiences of the community organizing group ACORN.

A. *The Republican Resurgence*

When I first approached this subject in 1984, it remained unclear whether Reagan represented a resurgence of reactionary politics or a historical aberration. Out of the previous fifty-two years, Republicans had only held the White House for twenty of them.¹⁰³ In terms of Congressional control, Democrats controlled the House of Representatives during the forty years from 1955 to 1995¹⁰⁴ and lost the majority in the Senate to Republicans for only six years in that period (from 1981 to 1987).¹⁰⁵

From the perspective of 2009, it seems clear that Reagan's electoral victories indicated something more than incidental fortuity. Since 1984, Republicans have been very competitive in running for Congress¹⁰⁶ and the White House.¹⁰⁷ When they are unable to win enough popular votes, their conscientious focus on and presence in the judiciary has been important in advancing the Republican agenda.¹⁰⁸

and neural bases for group formation around shared traits); ERIC CHAISSON, *EPIC OF EVOLUTION: SEVEN AGES OF THE COSMOS* 392 (2006) (describing the social organization of insects, which is "almost entirely programmed by genes"); RICHARD MCELREATH & ROBERT BOYD, *MATHEMATICAL MODELS OF SOCIAL EVOLUTION: A GUIDE FOR THE PERPLEXED* (2007) (illustrating mathematical models based on scientific theories of reciprocity, altruism, and other forms of social interaction).

103. AmericanHeritage.com, People, The Presidents, <http://www.americanheritage.com/people/presidents/> (last visited Mar. 16, 2010) (click on links of names of individual presidents to see party affiliation).

104. Office of the Clerk, U.S. House of Representatives, House History, Party Divisions of the House of Representatives (1789 to Present), http://clerk.house.gov/art_history/house_history/partyDiv.html (last visited Sept. 9, 2010).

105. U.S. Senate, Art & History Home, Origins & Development, Party Division in the Senate, 1789-Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Sept. 9, 2010).

106. *Supra* notes 104–01.

107. *See* AmericanHeritage.com, *supra* note 103.

108. One potent example of conservative presence on the judiciary influencing politics was "the Court's shameful decision in *Bush v. Gore*, when five conservative justices declared George W. Bush president on grounds that they had themselves rejected in past cases and that they conceded would have no application in future ones." Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37, 37. The broader and more subversive effects of a conservative presence in the judiciary are discussed in RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT-WING BLOC* (2009) (focusing on the Supreme Court appointments of the openly

In short, Reagan's election represented a reassertion of conservative power. The consequences have been significant: economic inequality has dramatically increased,¹⁰⁹ and the federal government's budget has emphasized military spending over funding social welfare programs.¹¹⁰ The Right accomplished a transformation of society through democratic consent, largely because of its own careful organizing and an absence of counter-organizing (or even affirmative de-organizing) by the Left.¹¹¹

When the Democratic Party represented a majority in Congress, they nonetheless failed to pass legislation benefiting "lower class constituents," including a measure that would help unions organize and expand the Democratic base.¹¹² At the grassroots level, many liberal activists spent their energies focusing on identity politics, which promoted difference instead of unity¹¹³ and substituted arguments over language in lieu of real political action.¹¹⁴ By doing little to contribute to organizing, and by doing much that undercut efforts at progressive organizing, the Left proved to be a significant factor contributing to the Right's resurgence.

Additionally, the Right engaged in effective organization and mobilization of their base. While much has been written concerning the conservative ascendancy,¹¹⁵ a good summary can be accomplished by a

conservative John Roberts and Samuel Alito as examples of rightwing political influence over judges with serious implications for constitutional jurisprudence). *See also* JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* (2009) (observing that politicians have sought to "pack" the Court with justices that share their political beliefs, enabling such ideologies to retain influence long after they have passed out of popularity among the American public).

109. *See* Robert B. Reich, *How to End the Great Recession*, N.Y. TIMES, Sept. 3, 2010, at A21 ("In the late 1970s, the richest 1 percent of American families took in about 9 percent of the nation's total income; by 2007, the top 1 percent took in 23.5 percent of total income.").

110. *See* HOWARD ZINN, *THE TWENTIETH CENTURY: A PEOPLE'S HISTORY* 319 (1984) (observing that, among a group of industrialized countries, the United States dedicates the largest percentage of its gross national product to military expenditures). *See also* FRANCES FOX PIVEN & RICHARD A. CLOWARD, *THE NEW CLASS WAR* (1982) (examining the efforts of conservative, corporation-oriented parties to dismantle social welfare programs).

111. *See infra* notes 116–29 and accompanying text.

112. Bachmann, *supra* note 13, at 351–52.

113. *See* BACHMANN, *supra* note 2, at 197–98 (citing GITLIN, *supra* note 16, at 146–47, 226, 230, 234, 236–37).

114. *See* GITLIN, *supra* note 16, at 146–47.

115. *See generally* SIDNEY BLUMENTHAL, *THE RISE OF THE COUNTER-ESTABLISHMENT: THE CONSERVATIVE ASCENT TO POLITICAL POWER* (Sterling Publ'g Co. 2008) (1986) (describing the rise, beginning in the 1980s, of a new conservatism, characterized by a specific mode of ideological politics and the realignment of elites); CRITCHLOW, *supra* note 13 (exploring the ideological inconsistencies marking the new conservative coalition and how conservative ideologies achieved political power in the second half of the twentieth century); HIMMELSTEIN, *supra* note 39 (examining the social conditions and political strategies that contributed to the sustained growth of American conservatism); MICKLETHWAIT & WOOLDRIDGE, *supra* note 39 (describing American

simple review of the self-conscious organizing efforts undertaken by the Right during the 1970s.

In August 1971, shortly before his nomination to and confirmation as an associate justice of the Supreme Court, Lewis Powell circulated through the Chamber of Commerce a memo concerning attacks on the “free enterprise” system and how to save it:

[I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. *Strength lies in organization*, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.¹¹⁶

The Right did not ignore Powell’s advice;¹¹⁷ it began organizing, with the help of subsidies from wealthy individuals and corporations.¹¹⁸ Such organizing manifested itself in the founding and financing of a number of organizations and efforts,¹¹⁹ influencing school curricula,¹²⁰ and forming

conservatism and arguing that this conservatism is what sets the United States apart from other wealthy nations); RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970s (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (presenting a number of scholarly articles on the conservative ascendancy in the 1970s); TELES, *supra* note 86 (tracing the increasing influence of the conservative legal movement that resulted from popular organizing beginning in the 1970s).

116. Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971) (emphasis added), *available at* <http://old.mediatransparency.org/story.php?storyID=22>. Some of Justice Powell’s suggestions for organizing efforts included evaluation of social science textbooks, balancing faculties, monitoring television, direct political action, and “exploiting judicial action” with “a highly competent staff of lawyers,” as exemplified by the ACLU. *Id.*

117. *See* Lears, *supra* note 46, at 9 (“Powell . . . urged the defenders of capitalism to retake the field . . . by establishing think tanks, media outlets and university professorships . . .”).

118. *See* Lewis H. Lapham, *Tentacles of Rage*, HARPER’S MAG., Sept. 2004, at 31, 34–35 (detailing the extent and scope of the conservative organizing that began in the 1970s, funded in part by donations from “senior officers of the Fortune 500 companies”).

119. Some of the more significant organizations include the Business Roundtable, founded in 1972, *see* MICKLETHWAIT & WOOLDRIDGE, *supra* note 39, at 79; STOP ERA, in 1972, *see* Marjorie J. Sprull, *Gender and America’s Rights Turn*, in RIGHTWARD BOUND, *supra* note 115, at 71, 78–79; the American Association of Christian Schools, in 1972, *see* Joseph Crespino, *Civil Rights and the Religious Right*, in RIGHTWARD BOUND, *supra* note 115, at 90, 101; the Heritage Foundation, in 1973, *see* MICKLETHWAIT & WOOLDRIDGE, *supra* note 39, at 77; the Committee for the Survival of a Free Congress, in 1974, *see id.* at 82; the Conservative Caucus, in 1974, *see id.* at 82; the Eagle Forum, in 1975, *see* Sprull, *supra*, at 78–79; Students in Free Enterprise, in 1975, *see* Bethany E. Moreton, *Make Payroll, Not War: Business Culture as Youth Culture*, in RIGHTWARD BOUND, *supra* note 115, at 52, 58; the Cato Institute, in 1977, *see* MICKLETHWAIT & WOOLDRIDGE, *supra* note 39, at 77; the National Conservative Political Action Committee, in 1978, *see id.* at 82; and the Moral Majority, in 1979, *see id.* at 83. *See also* CRITCHLOW, *supra* note 13, at 120–22 (identifying conservative organizations and corporate donors that were active in funding

political action committees (PACs).¹²¹ This organizing groundwork of the 1970s led to a conservative resurgence. The battle between Jimmy Carter and Ronald Reagan over the 1980 presidential election illustrated the growing strength of the conservative movement,¹²² and popular support for the Right continues to run high, even after the ups and downs of that presidential campaign have been forgotten.¹²³

Significantly, after taking the White House in 1981, conservative organizers did not rest on their laurels. When the 1980s Moral Majority foundered, the 1990s Christian Coalition arose to take its place.¹²⁴ Talk radio became a new media specialty of the Right, a potent tool for sharing ideas, reinforcing values, and mobilizing voters.¹²⁵ When Bill Clinton was elected president in 1992, the Republicans responded with their “Gingrich Republicanism,” which relied on “a very substantial measure of grassroots organization . . . at the state, county, and local levels in almost all regions of the nation.”¹²⁶ During the 2000 presidential election campaign, the

conservative policy and research).

120. Conservative influence over public school curricula can be seen by the increased focus on economics: the U.S. Chamber of Commerce has distributed its “Economics for Young Americans” kits into some 12,000 schools, Moreton, *supra* note 119, at 57, and the “undergraduate business major became America’s default core curriculum,” *id.* at 62.

121. The number of corporate PACs increased exponentially. “In 1974, labor ‘political action committees’ (PACs) outnumbered corporate PACs by 201 to 89. Two years later the ratio was reversed, with 433 corporate PACs and 224 labor ones, and by 1984 companies had a 4 to 1 advantage” MICKLETHWAIT & WOOLDRIDGE, *supra* note 39, at 79. *See also* CRITCHLOW, *supra* note 13, at 128 (“By 1978 the National Conservative Political Action Committee . . . became the largest conservative political action committee in the country, distributing more than \$1.2 million in cash and in-kind contributions to political campaigns in its first five years.”).

122. *See* Donald T. Critchlow, *When Republicans Became Revolutionaries: Conservatives in Congress*, in *THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY* 703, 712 (Julian E. Zelizer ed., 2004) (“[A] revitalized conservative movement in the Republican party set the stage for the 1980 election between Carter and the hero of many conservatives, Ronald Reagan.”).

123. *See* MICHAEL SCHALLER & GEORGE RISING, *THE REPUBLICAN ASCENDANCY: AMERICAN POLITICS, 1968-2001* (2002) (tracing the increasing popularity of the Republican Party). *See also* ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 189 (2001) (“[F]or the first time in modern American history, virtually all the branches of government are effectively controlled by Republicans and conservatives.”).

124. Paul Weyrich and Reverend Jerry Falwell founded the Moral Majority in 1979, mobilizing millions of devout Christian voters and connecting them with social conservatives. MICKLETHWAIT & WOOLDRIDGE, *supra* note 39, at 83–85. The Christian Coalition was formed in 1989 from the remnants of Reverend Pat Robertson’s presidential campaign. *Id.* at 111. The meticulous organizing skills of Ralph Reed contributed to the organization’s expansion, as evidenced by the growth of its members so that at “the end of 1990, the Christian Coalition had amassed 125 chapters with 57,000 members. By 1997 it had 2000 chapters and 1.9 million members.” *Id.*

125. *See id.* at 112–13 (chronicling the rise in popularity and influence of Rush Limbaugh and his talk radio show).

126. BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS:*

Right's strong focus on organizing could be seen in the candidates' contrasting approaches to the Florida recount: "While Republicans were mobilizing protesters, Gore was imploring journalists."¹²⁷ The Bush administration's power was underscored in the 2002 congressional elections, when the GOP strategically recruited candidates, mobilized its base, and targeted thousands of voters from key demographic populations.¹²⁸ Even after Barack Obama's election, Karl Rove continued to urge conservative activists to organize.¹²⁹ Some of them did so by utilizing online messaging tools such as Twitter and Facebook,¹³⁰ others by employing phony "astroturfing" methods.¹³¹ Moreover, during the summer of 2009, a number of commentators observed how opposition to Obama's health care initiative seemed to draw directly from the playbook of progressive organizer Saul Alinsky,¹³² while also employing more contemporary modes of organizing involving online media.¹³³

POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER 66 (rev. and updated ed. 1999).

127. JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* 178 (2001). During the controversy over the election, a scuffle by Republican protesters to delay and obstruct ballot recounts, which later became known as the "Brooks Brothers riot," was yet another example of Republican street organizing success. *Id.* at 156, 178–79.

128. CRITCHLOW, *supra* note 13, at 267–69.

129. See Karl Rove, *How the GOP Should Prepare for a Comeback*, WALL ST. J., Dec. 11, 2008, at A17 (recommending several organizing initiatives to mobilize Republican supporters, including training party leaders, registering likely Republican voters, and utilizing new media).

130. See Christopher Rhoads, *Playing Catch-Up, the GOP Is All Atwitter About the Internet*, WALL ST. J., Jan. 30, 2009, at A1 (describing efforts by Republicans to make greater use of new social networking technologies in order to increase their electoral competitiveness).

131. "Astroturfing" is "a tactic used by professional lobbyists to make their efforts appear to be part of grass-roots movements." Stephanie Strom, *Firm Wants U.S. Inquiry in Lobby Case*, N.Y. TIMES, Aug. 29, 2009, at A14. See also Editorial, *Another Astroturf Campaign*, N.Y. TIMES, Sept. 4, 2009, at A20 (detailing a campaign by the oil lobby to block climate change legislation through "a grass-roots citizen movement" funded by the oil industry and inaccurately representing aspects of the opposed legislation).

132. See Noam Cohen, *Know Thine Enemy*, N.Y. TIMES, Aug. 23, 2009, Week in Review Section, at 5 ("It is an irony of the current skirmishing about health care that those who could be considered Mr. Alinsky's sworn enemies—the groups, many industry sponsored, who are trying to shout down Congressional town hall meetings—have taken a page (chapters, really) from his handbook on community organizing."). Saul Alinsky is widely considered to have been one of the founding fathers of American community organizing. See *id.* (describing Alinsky as an "activist . . . whose street-smart tactics influenced generations of community organizers, most famously [President Obama]").

133. For example, as part of the opposition to health care reform in 2009, "[t]he Family Research Council, a conservative Christian organization, issued an electronic 'Town Hall Kit' to help its followers, including pastors, set up their own meetings 'to inform and activate the people in your pews and communities' against the health care overhaul proposals moving through Congress." Katherine Q. Seelye, *Actual Town Hall Not Included*, N.Y. TIMES, Aug. 26, 2009, at A14. See also James P. Othmer, Op-Ed., *Don't Tweet About Health Care*, N.Y. TIMES, Sept. 14, 2009, at A21 (observing the successful use

Any article discussing the past twenty-five years of organizing and its interaction with the law must address the Federalist Society, an organization of conservative legal activists. Interestingly, the Federalist Society was not officially founded until 1982,¹³⁴ just as conservatives were beginning to enjoy political and social victories resulting from a decade of organizing.¹³⁵ This timing suggests either that law follows good organizing or that law needs good organizing; either way, the two seem to mutually reinforce each other. Within a few years of the Federalist Society's founding, Harvard Law School—perceived by many on the Right to be an institution that was “out of control” in its promotion of far-Left ideologies—was brought “under control” through an organizing campaign aimed at conservative Harvard Law School alumni and ultimately at the law school itself.¹³⁶ Today, the Federalist Society is one of the Right's “most vigorous, durable, and well-ordered organization[s],” endorsing judicial candidates and “building the support structure of the conservative legal network.”¹³⁷ The Federalist Society's narrative production has expanded my appreciation of what lawyers can do to effect social change.¹³⁸

B. Obama

At least one person on the Left has appreciated the message that organizing can have historical impact: Barack Obama, a former community organizer in Chicago, Illinois. How his experience organizing translated into his successful 2008 presidential campaign was manifested in a number of ways at a number of junctures.

While in some ways Howard Dean's presidential campaign of 2004 served as the prototype for Obama's organizing innovations,¹³⁹ a

of web sites and messaging services like YouTube and Twitter to undermine health care reform efforts). *But see* Kate Zernike, NYTimes.com, The Caucus Blog, Notes from the Tea Party Convention (Feb. 6, 2010), <http://thecaucus.blogs.nytimes.com/2010/02/06/notes-from-the-tea-party-convention> (observing that a session on using new technology “got hung up on basics” due to the lack of tech-savvy among Tea Party convention attendees).

134. *See* TELES, *supra* note 86, at 138 (“The first Federalist Society activity was a symposium on federalism at Yale Law School held in April 1982.”).

135. *See supra* notes 116–19 and accompanying text.

136. *See* TELES, *supra* note 86, at 196–98. *See also* George Hicks, *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J.L. & PUB. POL'Y 625 (2006) (arguing that the conservative shift of Harvard Law School's student body is due in large measure to the organizing efforts of the school's Federalist Society).

137. TELES, *supra* note 86, at 179.

138. *See infra* Part IV.F.

139. *See* WINOGRAD & HAIS, *supra* note 98, at 155, 157, 184 (describing Dean's innovative campaign tactics, many of which were utilized to greater effect during Obama's campaign). While Dean lost his presidential bid, he was elected chairman of the Democratic National Committee. He thus played a large role in orchestrating the

combination of advances in technology,¹⁴⁰ along with a favorable demographic drift,¹⁴¹ allowed Obama to inaugurate a new era in mobilizing the electorate. In both the primary campaigns and the general election,

the Obama campaign collected names and contact numbers both from the Internet and at big rallies, including even his acceptance speech in Denver, attended by more than 75,000 people. Most of those digitized names were called, e-mailed, and text-messaged, often more than once, by election day. At some of the rallies the members of the audience were asked to call and e-mail their friends and families and ask them to vote.¹⁴²

These qualitatively new tactics translated into quantitatively impressive numbers. By the end of 2008, Obama's campaign was estimated to have accumulated ten million addresses in its database.¹⁴³ The nearly \$750 million Obama raised exceeded "what all of the candidates combined collected in private donations in the previous race for the White House."¹⁴⁴ Even after the election he had close to "\$30 million in the bank," and his "final tally of individual contributors surpassed 3.95 million."¹⁴⁵ Obama's success could be credited to his appreciation of community organizing: he performed better than Democratic front-runner Senator Hillary Clinton in states where caucuses, rather than general elections, determined the allocation of delegates.¹⁴⁶ Had Clinton taken more seriously her own knowledge of community organizing, she might have put into place the offices, lists, phone lines, doorknockers, car drivers, and phone callers, which could have mobilized sufficient supporters to various caucuses and might have neutralized the numbers delivered by Obama offices.¹⁴⁷

Shortly after his inauguration, Obama employed some of his

Democratic party's recapture of Congress in 2006, which included some of tactics developed during his presidential bid. *See id.* at 118–19, 121.

140. *See id.* at 1–2 ("The presidential campaign of 2008 is the first real test of the willingness of candidates to embrace social networking technologies . . .").

141. *See id.* ("Recent survey research on the political attitudes of [youth] show a high tolerance for lifestyle and ethnic differences and support for an activist government to societal and economic issues . . .").

142. Elizabeth Drew, *The Truth About the Election*, N.Y. REV. BOOKS, Dec. 18, 2008, at 92, 92.

143. *Id.*

144. Michael Luo, *Obama Hauls In Record \$750 Million for Campaign, with Plenty Left to Spend*, N.Y. TIMES, Dec. 5, 2008, at A29.

145. *Id.*

146. Susan Davis, WSJ.com, Washington Wire Blog, Obama's Caucus-State Magic (Feb. 6, 2008), <http://blogs.wsj.com/washwire/2008/02/06/obamas-caucus-state-magic/>.

147. *See* ROGER MORRIS, PARTNERS IN POWER: THE CLINTONS AND THEIR AMERICA 119, 133–34 (1996) (detailing Clinton's background with and apparent dismissal of community organizer Saul Alinsky).

organizing tactics to mobilize support for his first proposed budget,¹⁴⁸ and he has continued to build on these organizational tactics.¹⁴⁹ Karl Rove criticized these efforts as ineffective,¹⁵⁰ but Republicans were soon using community-organizing tactics during the health care battle to fight the community organizer they had mocked during their convention.¹⁵¹

C. ACORN¹⁵²

In my 1984 essay, I discussed my personal experience as an attorney for the community organization known as the Association of Community Organizations for Reform Now (ACORN).¹⁵³ Aspects of ACORN's work are worthy of comment here, as they show how organizing (and lawyers for organizers) can indeed effect change, sometimes in ways one cannot anticipate.

ACORN's approach to community organizing involved the establishment of grassroots neighborhood groups, with the ultimate goal of achieving political power.¹⁵⁴ In 2004, ACORN experienced its first counterattack launched by conservatives, signifying that its activities might have a national impact. In a flurry of legal actions taken against ACORN, a rightwing district attorney in Colorado convened a grand jury, though she ultimately failed to secure an indictment. A private RICO lawsuit filed in Ohio ended when the plaintiffs dropped the charges after ACORN's discovery efforts revealed that the case was being subsidized by parties connected to the Republican National Committee. Two private cases filed against ACORN in Florida were dismissed and abandoned, the first culminating with the court awarding ACORN damages for defamation.¹⁵⁵

148. See Helene Cooper & Carl Hulse, *Obama's Effort on Budget Echoes Fall Campaign*, N.Y. TIMES, Mar. 18, 2009, at A16.

149. See Jim Rutenberg & Adam Nagourney, *Melding Obama's Web to a YouTube Presidency*, N.Y. TIMES, Jan. 26, 2009, at A1 (citing administration's goal of harnessing the presidential campaign's innovative organization to support administration policies); Sheryl Gay Stolberg, *Obama Steers Health Debate Out of Capital*, N.Y. TIMES, June 30, 2009, at A1 (documenting the President's mobilization of grassroots supporters and use of new social networking technologies in his campaign to pass health care reform legislation).

150. Karl Rove, *The President Is "Keeping Score,"* WALL ST. J., Apr. 2, 2009, at A17.

151. See Cohen, *supra* note 132 (detailing Republican use of tactics similar to those of Alinsky and other progressives). See also Mark Leibovich & David D. Kirkpatrick, *On Center Stage, Palin Electrifies Convention*, N.Y. TIMES, Sept. 4, 2008, at A1.

152. Much of the information in this section and Part IV comes from my experience working as ACORN's General Counsel and is not always covered by sources amenable to citation.

153. BACHMANN, *supra* note 2, at 40–43.

154. *Id.* at 41.

155. See Brief of ACORN as Amicus Curiae in Support of Petitioners at 15–16 & nn.39–47, *Crawford v. Marion County Elections Bd.*, 553 U.S. 181 (2008) (No. 07-21) (citing Final Order of Dismissal with Prejudice and Judgment in Favor of ACORN, *Stuart v. ACORN*, No. 04-22764 (S.D. Fla. Dec. 6, 2005); Final Order of Dismissal with Prejudice as

While none of these attacks succeeded in stopping ACORN from organizing, they did require the diversion of valuable resources from organizing work to defensive efforts.

Despite these impediments, ACORN continued to organize, and to do so effectively. The significance of ACORN voter mobilization endeavors became clear once again in 2006, when the Republican Party pushed for the Department of Justice to prosecute ACORN voter registration efforts. In Missouri, the Bush Administration replaced U.S. Attorney Todd P. Graves, "who had shown reluctance to bring vote fraud-related cases," with Brad Schlozman.¹⁵⁶ Schlozman showed no such reluctance, filing four indictments against ACORN election workers on November 2, 2006, just before the November 4 election, in apparent violation of DOJ guidelines.¹⁵⁷ *The Wall Street Journal* duly printed an editorial publicizing the indictments on November 3.¹⁵⁸ Following the election, the Justice Department filed a grand jury referral against Schlozman to investigate whether he had perjured himself in statements to Congress concerning the ACORN indictments.¹⁵⁹

Because of, or in spite of, November 2006, Republican officials continued their attempts to influence voter registration, and thereby elections, by politicizing the Justice Department. Several U.S. Attorneys were fired on December 7, 2006, including David Iglesias.¹⁶⁰ Iglesias had been "[r]ated a top performer by department officials early in 2005," only to be criticized a year later by Republican lawmakers for "lax voter fraud prosecutions," including failing to prosecute ACORN workers.¹⁶¹ These attacks on the independence and integrity of the Justice Department led to a public scandal, climaxing in 2007 with the resignation of Attorney General Alberto Gonzales from the Justice Department.¹⁶²

In 2008, the Right did its best to smear Obama with what it perceived to be the tar on an ACORN brush.¹⁶³ Conservative media outlets

to Specified Pleadings, *Rousseau v. ACORN*, No. 04-61636 (S.D. Fla. Nov. 23, 2005)).

156. Evan Perez, *Investigation into U.S. Attorneys Scandal Advances*, WALL ST. J., June 16, 2008, at A3.

157. *Id.* See also Editorial, *The Acorn Indictments*, WALL ST. J., Nov. 3, 2006, at A10 (reporting approvingly on the Missouri indictments); Editorial, *It's Subpoena Time*, N.Y. TIMES, June 8, 2007, at A28 (citing "Justice Department[] guidelines [that told] prosecutors not to bring vote fraud investigations right before an election").

158. See Editorial, *The Acorn Indictments*, *supra* note 157.

159. Perez, *supra* note 156.

160. Christopher Drew & Eric Lipton, *Anger of Swing State Republicans Eased U.S. Attorney Toward Exit*, N.Y. TIMES, Mar. 18, 2007, § 1, at 1.

161. *Id.*

162. Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1.

163. Indeed, as much as this section should be read from the perspective of ACORN and its attempts to organize, it also provides some insight as to rightwing organizing strategies and tactics.

attempted to claim that Obama had been employed as ACORN's counsel, based on his participation as trial counsel for ACORN in a 1990s lawsuit; while this claim was factually unsupported, conservative organizers repeated it in efforts to paint Obama as a radical candidate.¹⁶⁴ ACORN also became the target of allegations that it was pursuing massive voter registration fraud around the country.¹⁶⁵ Most remarkably, during the third presidential debate, Republican front-runner Senator John McCain stated that ACORN was "now on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy."¹⁶⁶ Following this, ACORN's offices and workers were subjected to vandalism, hate messages, and physical threats.¹⁶⁷ Reports of an FBI investigation of ACORN surfaced two days later, information that the McCain campaign sought to bring to the foreground of the campaign.¹⁶⁸

One can debate how much ACORN deserved all this attention—it was hardly the only progressive organization seeking to empower marginalized populations or increase voter registration. At the time of the 2008 presidential campaign, ACORN had merely been continuing its work of organizing and mobilizing low- and moderate-income people.¹⁶⁹ By

164. *E.g.*, Editorial, *Obama and Acorn*, WALL ST. J., Oct. 14, 2008, at A20 ("Acorn is now getting more attention as John McCain's campaign makes an issue of the fraud reports and Acorn's ties to Mr. Obama."). The case in which Obama's participation served as the basis for these inaccurate allegations was *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1996). At the time, I held the position of General Counsel for ACORN, a post I did not share with the future President.

165. These allegations were made in traditional news media outlets as well as newer, more subjective forms of media. *E.g.*, Editorial, *Justice and Voter Fraud*, WALL ST. J., Oct. 27, 2008, at A18 ("If voter fraud would ever be ripe for investigation, this would seem to be the year with the Association of Community Organizations for Reform Now (ACORN) having been caught filing thousands of bogus voter registrations in at least 14 states."); Michael Massing, *Obama: In the Divided Heartland*, N.Y. REV. BOOKS, Dec. 18, 2008, at 26 ("[C]olumnists like Jonah Goldberg, Charles Krauthammer, Mark Steyn, Michael Barone . . . and Ann Coulter . . . all join[ed] together to produce firestorms of manufactured rage about Obama's purported ties to Bill Ayers, Tony Rezko, Jeremiah Wright, ACORN, Castro, Chavez, Ahmadinejad, and Karl Marx.").

166. Katharine Q. Seelye, *McCain's Warning About Voter Fraud Stokes a Fiery Campaign Even Further*, N.Y. TIMES, Oct. 26, 2008, at A19. *See also* Bob Herbert, Op-Ed., *The Real Scandal*, N.Y. TIMES, Oct. 21, 2008, at A29 (noting McCain's statement and describing the allegations on which it was based).

167. Greg Gordon, *Death Threat, Vandalism Hit ACORN After McCain Comments*, MCCLATCHY, Oct. 17, 2008, <http://www.mcclatchydc.com/251/story/54360.html>.

168. *See* Michael Falcone, *F.B.I. Offices Examining Activities of ACORN*, N.Y. TIMES, Oct. 17, 2008, at A19; Seelye, *supra* note 166.

169. *See* BACHMANN, *supra* note 2, at 104–05. While ACORN's goals are laudable, like any other organization, its record has not been without error. *See, e.g.*, Steve Friess, *ACORN Charged in Voter Registration Fraud Case in Nevada*, N.Y. TIMES, May 5, 2009, at A18 (detailing allegations of voter registration fraud against the Las Vegas ACORN branch); Sara Jean Green, *Local ACORN Cleans Up Act After Scandal*, SEATTLE TIMES, October 29, 2008, at A1 (describing fraudulent voter registrations by the Washington

engaging in organizing efforts with the goal of creating measurable progress, ACORN may have affected the course of history: by increasing voter registration and turn-out among low-income and minority voters, ACORN's voter mobilization (in conjunction with the organizing efforts of similar groups across the country) played a role in tipping the election towards Obama.¹⁷⁰

III.

THEORIES OF ORGANIZING: CHANGING ORGANIZING

*Hedge funds really need a community organizer.*¹⁷¹

Organizing can be a highly effective endeavor. Like many other ways in which humans engage the world (and history), it holds potential—and, of course, limits. Yet like so many other ways in which humans engage the world, lessons may be learned concerning its forms, practices, and modes of engagement. This section attempts to provide an overview of lessons and questions for the field of organizing that have arisen (for me, at least) over the past twenty-five years. That this list could prove exhaustive is impossible; but even a cursory review of certain issues may help the social changer at least think about these matters and act with a sense of orientation, as opposed to blindly flailing about in the cauldron of history. Specifically, I believe organizing for social change would benefit through refining the role of class, enhancing an appreciation of culture, expanding a knowledge of corporations and corporate behavior, and, finally, exploring further avenues opened by Darwin.

A. Class

I continue to find Marx's conception of class, predicated on "self-conscious organization," useful.¹⁷² Marx focused on the proletariat, who

ACORN branch and its efforts to prevent such issues).

170. See Conor Dougherty, *Minority Turnout Was Critical to Obama's Election*, *Data Show*, WALL ST. J., July 21, 2009, at A3 (noting Obama's success in swing states could be attributed in part to an increase of nearly five million voters in the 2008 presidential election, the vast majority of them people of color, an increase "reflect[ing] a long-term demographic shift . . . [and] attest[ing] to the success of the Democrats' extensive campaign to register their supporters and get them to the polls"); Greg Gordon, *More Minorities Voted This Year, but White Turnout Dropped*, *McCLATCHY*, Nov. 18, 2008, <http://www.mcclatchydc.com/homepage/story/56113.html> ("Barack Obama's 8.5 million-vote margin over John McCain was fueled by a more than 20 percent surge in minority voting . . . appear[ing] to reflect the success of . . . liberal voter registration groups . . .").

171. Open Letter from Clifford S. Asness, Managing and Founding Principal, AQR Capital Mgmt., LLC (May 4, 2009), available at <http://zerohedge.blogspot.com/2009/05/cliff-asness-i-am-ready-for-my.html>.

172. See BACHMANN, *supra* note 2, at 46.

not only shared similar material conditions of oppression in the factory, but, by being concentrated in a factory and forced to work cooperatively, was also more amenable to being connected and organized.¹⁷³ It also explains his dismal perspectives on the French peasantry: while they experienced similar socioeconomic conditions, they worked in family units isolated from one another, and this hindered their development as an effective class.¹⁷⁴

That being said, the question becomes how do Marx's nineteenth century observations apply to the twenty-first century? During the twentieth century, Marx's focus on the blue-collar proletariat became outdated because factory workers' centrality to the economies of wealthy countries declined.¹⁷⁵ As the twenty-first century progresses, farmers and factory workers are no longer the center of progressive organizing; instead, the white-collar, post-industrial economy has become dominant because of the information it can gather, analyze, reconfigure, and mobilize.¹⁷⁶

During the twentieth century, white-collar workers themselves began to become proletarianized.¹⁷⁷ Initially these white-collar workers resembled Marx's French peasantry: similar in condition, but scattered and unable to form common bonds.¹⁷⁸ However, with the invention of broadband, the ability for relatively isolated white-collar people to become less isolated and more socially engaged changed dramatically.¹⁷⁹ The

173. *Cf. id.* at 57 n.68 (describing the labor movement in the 1930s in the United States, wherein "industrialization brought large numbers of workers together, which allowed for mass organizing drives, and ultimately massive agglomerations of worker power").

174. *See id.* at 46 n.31 (citing Marx, *supra* note 100, at 338–39).

175. *See* DANIEL BELL, *THE COMING OF POSTINDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* 14 (1973) (describing post-industrial society as characterized in part by increased focus on "the professional and technical class"). *See also* Ursula K. Heise, *Science, Technology, and Postmodernism*, in *THE CAMBRIDGE COMPANION TO POSTMODERNISM* 136, 141 (Steven Connor ed., 2004); Julian Murphet, *Postmodernism and Space*, in *THE CAMBRIDGE COMPANION TO POSTMODERNISM*, *supra*, at 116, 123, 133.

176. *See* Ruy Teixeira, *Postindustrial Hopes Deferred: Why the Democratic Majority Is Still Likely to Emerge*, *BROOKINGS REV.*, Summer 2003, at 40, 41 (describing the impact of postindustrial economy—characterized by "ideopolises" organized around the production of ideas and services—on Democratic politics). *See also* HARDT & NEGRI, *supra* note 60, at 409–11 (describing the "social worker" as the predominant constituency of labor power).

177. SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE* 253 (1976) ("[T]raditionally elite independent jobs—entrepreneurial, privileged white collar, professional, and technical occupations—are reduced to the condition of wage labor. No longer can professional and small-business people look confidently to a future of controlling their work processes, finding creative outlets in work, or holding decision-making power.").

178. *See* BACHMANN, *supra* note 2, at 46 n.31 (citing Marx, *supra* note 100, at 338–39).

179. *See* WINOGRAD & HAIS, *supra* note 98, at 142–43 (citing research documenting the dramatic changes broadband access has on individual internet usage and using the

political effects of such technological advancements were evident in the 2006 congressional elections¹⁸⁰ and brought to the fore in the 2008 presidential campaigns, when Obama applied the lessons of community organizing to a generation of people who grew up on this new technology.¹⁸¹ He took people similarly situated materially and exploited new technology to join them together in a movement that elected him president.

Of course what will happen next remains an open question. Obama's opponents are beginning to explore the potential of newer media for their future organizing efforts.¹⁸² The extent of their success will turn in part on the degree to which class constitutes the premier way by which people experience their lives. In the United States, attempts to organize people from the same socioeconomic class have been impeded by differences across other identities, including materially experienced differences in age, race, gender, and sexual orientation;¹⁸³ at the same time, these identities have sufficient commonalities for people to form groupings around, regardless of class differences.¹⁸⁴ The Republican Right has attempted to exploit these means of dividing people with otherwise potentially similar socioeconomic interests.¹⁸⁵ By focusing on identity politics¹⁸⁶ and failing to organize effectively, progressives have missed opportunities to unite people with shared interests that could be advanced by joint progressive action.

communication service Skype as an example of how, thanks in part to broadband access, technological improvements have impacted communication abilities).

180. See *id.* at 119 (discussing the Democratic National Committee's efforts to mobilize voters through both "online interaction[s]" and "more traditional ways of organizing grassroots campaigns").

181. *Id.* at 2–3.

182. Rhoads, *supra* note 130; Jake Sherman, *Conservatives Take a Page from Left's Online Playbook*, WALL ST. J., Aug. 19, 2009, at A4.

183. See BACHMANN, *supra* note 2, at 197 (attributing "disorganization in the ranks of the disenfranchised" to "identity politics").

184. JACKSON LEARS, *REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA, 1877-1920*, at 112–13, 153 (2009) (documenting the role racial and ethnic loyalties played in dividing socioeconomic classes when it came to labor issues at the end of the nineteenth century and radial agrarian politics in 1878). This list of characteristics can be extended, but one divisive economic issue must be noted: the differences between those on welfare and the working poor. While both are comparably powerless in relation to the means of production, differences between these constituencies have interfered with organizing efforts to unite them. Much of ACORN's history can be explained as attempts to appreciate this reality and overcome it. See GARY DELGADO, *ORGANIZING THE MOVEMENT: THE ROOTS AND GROWTH OF ACORN* 45–50 (1986).

185. Charles M. Blow, Op-Ed., *Whose Country Is It?*, N.Y. TIMES, Mar. 27, 2010, at A19 (discussing Republican exploitation of the frustration and fears of the "disproportionately white, evangelical," and undereducated, in the context of support for health care reform being led by individuals who also happen to be female, Jewish, gay, or African-American).

186. BACHMANN, *supra* note 2, at 197–98.

Class remains a powerful approach for conceptualizing political action because similar socioeconomic experiences can bring people together, as Obama's electoral success—due in large measure to the mobilization of individuals with shared class interests—has demonstrated. Yet the past twenty-five years have also shown how other material experiences can divide people who could otherwise unite to advance shared interests. Class is an important narrative for comprehending politics, but it can no longer claim to be the only viable narrative.

B. Culture

While class focuses on one set of material forces that group and divide people, culture provides a different set of perspectives and emphases.¹⁸⁷ Cultural narratives remain variegated.¹⁸⁸ One of their most articulated instances is David Hackett Fischer's *Albion's Seed*, which gives a detailed account of the origins and development of majority American culture, arguing that it derives primarily from four cultures developed in the British Isles: Puritans from eastern English counties, who settled the northeast;

187. Culture may be defined as “socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 35, at 454. Historian David Hackett Fischer uses the term “folkways” to describe culture, citing twenty-six empirical folkway indicators: speech, building, family, marriage, gender, sex, naming, child-rearing, age, death, religion, magic, learning, literacy, food, dress, sport, work, time, wealth, inheritance, rank, association, order, power, and freedom. DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 11 n.10 (1989).

188. See, e.g., JOHN L. COMAROFF & JEAN COMAROFF, *ETHNICITY, INC.* (2009) (discussing the variable meanings, iterations, and uses of terms like ethnicity and cultural identity); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991) (identifying major issues of cultural disagreement in contemporary American society and analyzing the historical underpinnings and political consequences of these disputes); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1997) (categorizing the world's major cultures and exploring the potential for conflict generated by cultural differences); MICHAEL LIND, *MADE IN TEXAS: GEORGE W. BUSH AND THE SOUTHERN TAKEOVER OF AMERICAN POLITICS* (2003) (tracing the development of different cultural narratives in the state of Texas); CARL OGLESBY, *THE YANKEE & COWBOY WAR: CONSPIRACIES FROM DALLAS TO WATERGATE* (1976) (explaining how struggles between two different elite cultural groups, Northeastern liberal detentists, or Yankees, and Southwestern conservative militarists, or Cowboys, were manifested in the assassination of President Kennedy and the Watergate scandal); KEVIN PHILLIPS, *THE COUSINS' WARS: RELIGION, POLITICS, AND THE TRIUMPH OF ANGLO-AMERICA* (1999) (tracing the evolution of majority American culture, from British aristocratic roots to current democratic norms, as influenced by civil wars and political realignments); THOMAS SOWELL, *BLACK REDNECKS AND WHITE LIBERALS* (2005) (describing some of the characteristics unique to white Southern culture, traceable to British origins, and remarking on the continuing social and economic influence of these traditions on American blacks living in ghettos). Cultural divisiveness is neither new, nor is it uniquely American. See, e.g., FREDERICK BROWN, *FOR THE SOUL OF FRANCE: CULTURE WARS IN THE AGE OF DREYFUS* (2010) (highlighting cultural divides in nineteenth century France between scientific modernists and religious conservatives, a clash that came to the fore in the 1890s).

Royalist elites from southern England, who settled Virginia; Quakers from the northern midlands, who settled the Delaware Valley; and border country highlanders from Scotland and Ireland, who settled the Appalachians.¹⁸⁹

It is hard to do justice to Fischer's exhaustive analysis in a paragraph, but by way of summary we might note some observations he emphasizes concerning each culture: Historically, the eastern part of England was a region of religious dissent (e.g., Lollards, Marian Martyrs, Puritans) and political rebellion (e.g., Jack Straw, Wat Tyler, John Ball, Peasants' Rebellion, Oliver Cromwell).¹⁹⁰ In the northern midlands, religious values were expressed by Quakerism, and political values focused largely on opposition to the slave trade.¹⁹¹ Quakers, like their Viking ancestors, accorded exceptionally high status to and respect for women (whose burial mounds in Scandanavia compared to those for males).¹⁹² As opposed to the egalitarian views espoused by the Quakers, the Royalists who settled Virginia came from regions where slavery and serfdom lasted the longest¹⁹³ and where support for entrenched power interests was particularly strong.¹⁹⁴ These characteristics were then transplanted to Virginia, where order was maintained through strict social hierarchies that were often enforced by violent means.¹⁹⁵ Violent tendencies also carried over into recreational activities; "Virginia's favorite amusements were bloodsports."¹⁹⁶ Similarly, the borderlanders who settled the Appalachian region frequently engaged in violence against authorities and against each other.¹⁹⁷ The prevalence of violence throughout their society may have also affected gender roles: "men were warriors, women were workers" and subordinate members of society.¹⁹⁸ Education was low, inequality was high, and "[w]here the warrior ethic [was] strong, the work ethic [grew] weak."¹⁹⁹ Common education was emphasized in Puritan and Quaker cultures, and deemphasized in Royalist and borderlander culture.²⁰⁰

Many of Fischer's cultural characterizations suggest an easy melding of Puritans and Quakers into Yankees, and of Anglicans and Highlanders

189. FISCHER, *supra* note 187, at 6, 785-88.

190. *Id.* at 44-49.

191. *See id.* at 446-51, 601.

192. *See id.* at 495.

193. *Id.* at 241-43.

194. These areas (Wessex, Mercia, and Sussex) supported King John in the Magna Carta struggle, the Catholics during the Tudor Reformation, and King Charles during the English Revolution. *Id.* at 212-16.

195. *Id.* at 398-401.

196. *Id.* at 362.

197. *Id.* at 623-32.

198. *Id.* at 676.

199. *Id.* at 740-41.

200. *See id.* at 814.

into Cavaliers. The former embraced traditions of egalitarianism and education, while the latter embraced hierarchy and violence.²⁰¹ These cultural values translate into contemporary politics: progressive values track those of the Quakers and Puritans, and are predominant in the regions settled by those groups, and the same is true of conservative values and the Royalist and borderland groups.²⁰² These trends ripened into violent conflict during the Civil War, but the tensions existed before²⁰³ and have continued into the present day.²⁰⁴ Based on these patterns, Fischer analyzed American elections through the lens of cultural interpretation and regional politics from 1968 to 1988.²⁰⁵ His analysis remains relevant for elections from 2000 onwards, as regional politics have continued to dominate electoral trends: Republicans continue to win majorities in the regions settled by Royalists and borderlanders, while the Democratic base remains strong in areas first inhabited by Puritans and Quakers.²⁰⁶

After recognizing the influence of culture, the task becomes understanding the grounds of culture. Culture manifests itself in patterns of thinking and behavior that are so pronounced that one can identify them as patterns and correlate them to groups,²⁰⁷ but what causes the

201. Gender relations among the Puritans were marked by inequality in marriage but less so in religious settings, and laws protected women more so than in other regions. *See id.* at 83–86. The Puritans also demonstrated a “zeal for learning and literacy.” *Id.* at 132. Family structures among the Quakers were marked by a strong sense of egalitarianism, *id.* at 483, and “[b]y and large they favored literacy and feared learning but were painfully ambivalent about both attainments,” *id.* at 531. By contrast, the Appalachian region was characterized by xenophobia, prejudice, violence, and cultural conservatism. *See id.* at 650–51. In Virginia, the colonial mood was “reinforced by the values of an English culture that tended to be profoundly conservative in every sense—elitist, hierarchical, and strenuously hostile to social change.” *Id.* at 253.

202. *See id.* at 889–95 (observing persistence of cultural patterns by region and questioning factors that have contributed to this persistence).

203. PHILLIPS, *supra* note 188 (observing similar religious, ethno-cultural, and imperialist themes that trace through Anglo-American history and were solidified in the English Civil War, the American Revolutionary War, and the American Civil War).

204. *See, e.g.*, LIND, *supra* note 188 (detailing the origins of majority culture values in Texas, and the impact changing racial and ethnic demographics have had on the popularity of some of those historical trends); OGLESBY, *supra* note 188, at 8 (calling “attention to the persistence of Civil War splits” in the political atmosphere of the United States during the 1960s and 1970s).

205. FISCHER, *supra* note 187, at 884–87.

206. Election results from 2008 show the greatest shifts towards Republican voting from Oklahoma through Tennessee into West Virginia, suggesting that Highlander culture was intensifying in its support for Republicans, while at the same time isolating itself from the rest of the country. *See* Adam Nossiter, *For South, a Waning Hold on National Politics*, N.Y. TIMES, Nov. 11, 2008, at A1.

207. *See, e.g.*, PETER J. RICHESON & ROBERT BOYD, NOT BY GENES ALONE: HOW CULTURE TRANSFORMED HUMAN EVOLUTION 1 (2005) (“The American South has long been more violent than the North. . . . For example, over the period 1865-1915, the homicide rate in the South was ten times the current rate for the whole United States, and twice the rate in our most violent cities. Modern homicide statistics tell the same story.”).

patterns? For example, one psychological experiment determined that, when subjected to insult, “Southerners showed much bigger jumps in cortisol [stress] and testosterone [aggression] than insulted Northerners.”²⁰⁸ In other words, cultural conventions about violence and honor correlated with hormone levels. How much of this physiologically measurable reaction derives from genes (nature) and how much from environment (nurture)? These issues are likely to engender debate for quite some time, and there are staunch advocates on each side.²⁰⁹ On one side stand “environmentalists” who argue that the influence of environmental factors and lived experiences overrides genetic instincts to a strong degree.²¹⁰ On the other side are those who believe that much of human history is genetically determined.²¹¹ An intermediate position, one I adopt here, emphasizes the fact that the human mind is predisposed to create certain “wirings” at certain critical junctures in its development.²¹²

Narratives that focus on class, race, and gender are important to those who want to organize people into groups. Culture is another narrative, full of suggestive leads for understanding what material influences help bring people together or keep them apart. The study of culture, its existence, its manifestations, and its origins, is in its earliest phases. But it is clear that culture can create inertias for or against political positions that one would like to advance or oppose in particular constituencies. Moreover, it remains to be seen how deeply these cultural inertias are ingrained. They extend over historical time and appear in biochemical manifestations. As evolutionary science advances, the organizer will need to pay attention to the degree to which some of these inertias have a deep genetic basis.²¹³

208. *Id.* at 3.

209. See CHAISSON, *supra* note 102, at 392 (“We are now in the midst of an ongoing debate concerning the relative importance of the gene and the environment . . .”).

210. See, e.g., ROBERT M. SAPOLSKY, *MONKEYLUV: AND OTHER ESSAYS ON OUR LIVES AS ANIMALS* 5 (2005) (“[I]mperceptibly subtle differences in environment can utterly change the effects of genes on behavior.”).

211. See generally GREGORY COCHRAN & HENRY HARPENDING, *THE 10,000 YEAR EXPLOSION: HOW CIVILIZATION ACCELERATED HUMAN EVOLUTION* (2009).

212. BERREBY, *supra* note 32, at 101. Another intermediate position holds that genes and environment necessarily interact to influence human behavior, rather than either factor governing primarily. See CHAISSON, *supra* note 102, at 370 (“Part of our anatomy, abilities, attitudes, and desires, as well as our outlook on life and way of thinking, all derive to some extent from the genes of our ancestors, molded partly by the environments in which they lived.”); RICHESON & BOYD, *supra* note 207, at 9 (“*Every bit* of the behavior . . . of every single organism living . . . results from the interaction of genetic information stored in the developing organism and the properties of its environment.”).

213. After the appalling racism of the twentieth century it is hard not to embrace a generally plastic conception of humanity. However, some evidence can be cited to the contrary. See, e.g., COCHRAN & HARPENDING, *supra* note 211, at 187–224 (exploring the evolutionary origins of the fact that Ashkenazi Jews have the highest average IQ of any ethnic group). See also NOAM CHOMSKY, *PROBLEMS OF KNOWLEDGE AND FREEDOM: THE RUSSELL LECTURES* (2003) (pointing out that, as a political and philosophical matter, some

C. Corporations

Much can and should be learned from contemporary studies of the modern corporation, since its profit and nonprofit forms constitute the mode of organization for so many groups. As a matter of general history, corporate forms have instructed human organization since the ancient Roman Empire and the medieval Catholic Church.²¹⁴ The history of corporations within the United States begins with chartered corporate enterprise in New England and Virginia.²¹⁵ Ironically (or not) it was a for-profit corporation that helped to facilitate the first western revolution, the English Revolution, in that, at the very least, it forced future anti-Royalists to learn how to work together in an organized fashion within an organizational structure.²¹⁶ In this section I urge the Left to pay more attention to what business and managerial schools have for some time been thinking and writing about: the rise, decline, and revival or death of organizations.²¹⁷ How do movements begin, and how do they coalesce into groups? When do like-minded people join together in an organization, and how? Once an organization has been formed, how is it maintained? It is time for progressives to familiarize themselves with the literature concerning these phases and apply those lessons to their own organizing enterprises. Some of my experiences from the past twenty-five years have raised particularly pointed questions.

For example, my wife and I each started our careers working for organizations in the early stages of their existence. Most young organizations die out;²¹⁸ ours did not. Even though my organization was

genetic hardwiring is necessary for people to avoid being easy targets of manipulation).

214. COMAROFF & COMAROFF, *supra* note 188, at 118–19. Despite (or perhaps because of) the long history of the corporate form shaping societies, the Comaroffs have a dour view of how the corporate form may soon construct national and individual identity. *See id.* at 126–30.

215. GORDON BROWN TINDALL & DAVID EMORY SHI, 1 AMERICA: A NARRATIVE HISTORY 53–73 (5th ed. 1999).

216. KAREN ORDAHL KUPPERMAN, PROVIDENCE ISLAND, 1620-41: THE OTHER PURITAN COLONY (paperback ed. 1995).

217. *See, e.g.*, JIM COLLINS, HOW THE MIGHTY FALL: AND WHY SOME COMPANIES NEVER GIVE IN (2009) (exploring the causes of the failure of “great” companies); HELGA DRUMMOND, INTRODUCTION TO ORGANIZATIONAL BEHAVIOR (2000) (exploring key theories of organizational behavior and their implications); HANDBOOK OF ORGANIZATIONAL CHANGE AND INNOVATION (Marshall Scott Poole & Andrew H. Van de Ven eds., 2004) (compiling social science research and theoretical perspectives on organizational change); DAVID SKEEL, ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY COME FROM (2005) (describing corporate risk-taking, competition, and structure, and the balance of power between government regulators and corporate leaders).

218. More than half the businesses started in the United States operate for five years or less. Scott A. Shane, NYTimes.com, You’re the Boss Blog, Failure Is a Constant in Entrepreneurship (July 17, 2009), <http://boss.blogs.nytimes.com/2009/07/15/failure-is-a-constant-in-entrepreneurship>.

nonprofit and my wife's was for-profit, both enterprises faced similar growth issues over time, many of them relating to the depersonalization that accompanies expansion in terms of numbers, size, and geography.²¹⁹ There seem to be plenty of books on how to start a business and how to maintain a business.²²⁰ More literature should be written concerning the transition from a new business, through a transitional company, to a large, established corporation.²²¹

There is also the question of leadership. Many insurgent movements begin in an unorganized state, as a result of the comparative lack of power and resources characterizing new movements relative to a well-organized ruling class.²²² Because of this lack of organization, insurgent movements can prove unusually dependent upon charismatic leaders. This dependence, in turn, has made these leaders into particularly attractive targets for members of the established elites, who seek to dismantle a young, unorganized movement by removing the leader that holds it together (e.g., the Gracchi, Spartacus, Caesar, Jesus, Marat, Robert Kennedy, Martin Luther King). When insurgent movements prove successful, their leaders often conclude they are indispensable to the movement and hold on to power at the expense of the egalitarian origins of the movement (e.g., Caesar, Cromwell, Napoleon, Stalin, Mao, Castro, Ralph Nader, Robert Mugabe, Hugo Chavez). At this point the leader becomes "toxic," an issue that has been addressed in corporate studies²²³

219. Weber discusses these issues in terms of institutionalization of charisma, sect to church; the contrast between small group democracy and mass democracy; and the contrast between personality-based economic enterprise and bureaucratic capitalism. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 145, 152, 254 (Talcott Parsons trans., Dover 2003) (1904-1905); MAX WEBER, *SOCIOLOGICAL WRITINGS* 88, 162 (Wolf V. Heydebrand ed., 1994).

220. See, e.g., JANA MATTHEWS, JEFF DENNIS & PETER ECONOMY, *LESSONS FROM THE EDGE: SURVIVAL SKILLS FOR STARTING AND GROWING A COMPANY* (2003) (collecting stories from entrepreneurs whose businesses faced failure and who found a way to nonetheless succeed); EDITH PENROSE, *THE THEORY OF THE GROWTH OF THE FIRM* (3d ed. 1995) (outlining a general theory of the growth of firms, in terms of increases in sales, profits, or size, as well as improvements in quality).

221. While little has been written tracing the evolution of corporate organizations, two noteworthy exceptions are AMAR V. BHIDÉ, *THE ORIGIN AND EVOLUTION OF NEW BUSINESSES* (2000) (examining the origins of new businesses and the factors that lead some to succeed and others not to, and the economic and social contexts surrounding such organizations), and JAMES C. COLLINS & JERRY I. PORRAS, *BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES* (1994) (studying the qualities over time of successful companies in comparison to similar companies with less success and setting forth principles for creating long-lasting, high quality organizations).

222. See BACHMANN, *supra* note 2, at 143 (arguing that the poor will only be able to lift themselves out of poverty and achieve social and political change through organizing). See also SMITH, *supra* note 47, at 169 ("The masters, being fewer in number, can combine much more easily.").

223. See, e.g., STEPHEN R. BLOCK, *WHY NONPROFITS FAIL: OVERCOMING FOUNDER'S SYNDROME, FUNDPHOBIA, AND OTHER OBSTACLES TO SUCCESS* 135-54 (2004) (discussing

and to which progressive organizers should pay greater heed. Greater awareness of the dangers posed by toxic leaders may have prevented or mitigated ACORN's major scandal of 2008, when it was discovered that the brother of ACORN founder Wade Rathke had embezzled almost one million dollars from ACORN and affiliated charities in 1999 and 2000, and that founder Wade Rathke had, in defiance of democratic principles, corporate propriety, and legal prudence, failed to disclose that information to board members or law enforcement.²²⁴

Lessons on the relevance of organizational leadership studies would again have been helpful to ACORN in 2009, when a conservative activist entered ACORN offices dressed as a pimp and asked for help in his prostitution enterprise.²²⁵ Unfortunately, in a number of ACORN offices, employees were videotaped expressing a willingness to help him, and the results were circulated over the internet.²²⁶ The negative fallout from these incidents was enormous,²²⁷ and observers criticized ACORN's failure to adequately "manage its staff" as being responsible for the scandal.²²⁸

D. Darwin

Materialist theory focuses on the outside material forces that induce humans to form or not form groups.²²⁹ Evolutionary sciences, which have taken radical strides since 1984,²³⁰ are an important source of our knowledge of human group formation (or resistance to it). Understanding

the problems associated with "founder's syndrome"—the entrenchment of a founder's powers and privileges). See also JEAN LIPMAN-BLUMEN, *THE ALLURE OF TOXIC LEADERS: WHY WE FOLLOW DESTRUCTIVE BOSSES AND CORRUPT POLITICIANS—AND HOW WE CAN SURVIVE THEM* (2005); Terry Leap, *Keys to Spotting a Flawed CEO—Before It's Too Late*, WALL ST. J., Dec. 1, 2007, at R3 (identifying "warning signs" and "measures . . . to reduce the likelihood of hiring a dysfunctional CEO"); Gary Wilson, *How to Rein In the Imperial CEO*, WALL ST. J., Jul. 9, 2008, at A15 (discussing problems with "[e]ntrenched management" and lack of accountability of "Imperial CEO[s]").

224. See Stephanie Strom, *Funds Misappropriated at 2 Nonprofit Groups*, N.Y. TIMES, July 9, 2008, at A21.

225. Scott Shane, *Conservatives Draw Blood from Acorn, Favored Foe*, N.Y. TIMES, Sept. 16, 2009, at A14.

226. Scott Shane, *A Political Gadfly Lampoons the Left via YouTube*, N.Y. TIMES, Sept. 19, 2009, at A9.

227. As a result of the scandal, the Senate voted "to prohibit the Department of Housing and Urban Development from giving federal housing money to [ACORN]," and "the Census Bureau dropped Acorn as one of 80,000 national unpaid 'partners' helping promote the 2010 census." *Id.*

228. Clark Hoyt, Op-Ed., *Tuning In Too Late*, N.Y. TIMES, Sept. 27, 2009, Week in Review Section, at 12.

229. See BACHMANN, *supra* note 2, at 45.

230. For instance, the decoding of the human genome in 2000 was a major achievement with significant implications for the progress of evolutionary science. See Nicholas Wade, *Genetic Code of Human Life Is Cracked by Scientists*, N.Y. TIMES, June 27, 2000, at A1.

the evolutionary drives and philosophical theories behind human group formation and other human behaviors is an important tool for increasing the efficacy of organizing.²³¹ While scientists continue to debate which traits are genetically inherited and which are socially developed,²³² there does seem to exist some consensus over other physiological issues pertaining to the matter of grouping in general. For the purposes of this article, I will simply highlight illustrative issues that have arisen in four critical areas relating to organizing: the actuality of individuality (group formation); membership recruitment (getting people into the group); organizational maintenance (keeping people in the group); and ideological justification (why one should bother).

1. *Individuality*

The prevalence of human social groups seems remarkable given the incredible diversity that exists among individuals.²³³ Given the diversity of humans, and the corresponding diversity of motivations, interests, and reactions, bringing more than one individual into alignment with another constitutes no automatic or easy accomplishment. Group formation occurs along a spectrum of possible structures; at one end of the spectrum, humans organize themselves through love, sympathy, and reasonable persuasion.²³⁴ At the other end, they are organized through terror, violence, and lies.²³⁵ Within this range, organizing can be (1) purely self-conscious, (2) purely unconscious, or (3) a mix between the two. An example of self-conscious organizing is the ideal anarcho-syndicalist

231. Cf. Stuart Elliot, *Is the Ad a Success? The Brain Waves Tell All*, N.Y. TIMES, Mar. 31, 2008, at C7 (explaining how marketers have been able to use developments in neuroscience to create more effective advertisements).

232. See, e.g., Brooks, *supra* note 14 (citing a neuropsychiatrist who “argues that of course culture and environment powerfully shape behavior, but brain structure and chemistry” play a critical role in accounting for generalized differences between the genders).

233. See J. CRAIG VENTER, *A LIFE DECODED: MY GENOME: MY LIFE* 136, 338 (2007) (finding that “up to forty-five thousand base pairs of genetic code [were] in [the author’s] genome and in that of the chimp, but [did] not seem to be common in other people” and concluding that “the most accurate representation” of a human genome sequence requires analysis of some six billion base pairs of code). Cf. WILLIS H. JOHNSON, LOUIS E. DELANNEY, ELIOT C. WILLIAMS & THOMAS A. COLE, *PRINCIPLES OF ZOOLOGY* 324 (1969) (citing the grass frog, *Rana pipiens*, as one example of a “species that occup[ies] a very wide geographic range . . . [such that] the subpopulations at the extremes of the range, when brought together, are not able to function as members of the same species”).

234. See, e.g., JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., Beacon Press 1984) (1981) (discussing rational positions, ideally reached through discussion between parties enjoying comparable power).

235. Hitler’s Third Reich provides a drastic example of this mode of organizing. For good histories of Hitler’s Germany, see generally ALAN BULLOCK, *HITLER: A STUDY IN TYRANNY* (rev. ed. 1962); MICHAEL BURLEIGH, *THE THIRD REICH: A NEW HISTORY* (2000).

commune of free and equal consenting adults pursuing a common project.²³⁶ An example of unconscious organizing is a group of people responding in similar fashion to similar external stimuli, but their knowledge of or coordination with others is limited to nonexistent.²³⁷ An example of organizing characterized by only partial self-conscious awareness is the political party of the Orwellian nightmare, where leaders lead followers, and the followers either do not know why they are being led, or they do not realize that they are being led at all.²³⁸ When one extrapolates beyond two or three persons to larger social groupings, the phenomenon of human organization appears all the more remarkable.

2. Recruiting

Disparities between individuals are quite marked, and the more people in a group the more differences among them to account for, thus making the formation of groups a difficult task.²³⁹ Evolutionary science is a valuable source of information about bringing people into new groups. Much of neoclassical economic theory has been built around the notion of the rational, deliberative human actor.²⁴⁰ Yet developments in neuroscience have demonstrated that human thought is imbued with emotion.²⁴¹ Conservatives have made better use of this knowledge than progressives have, utilizing emotional appeals to gain public support for

236. In particular, one group of self-consciously organized individuals played a key role in the founding of the United States: the Pilgrims of Plymouth Rock, who entered into the Mayflower Compact to “combine ourselves together into a civil [sic] body politick [sic], for our better ordering and preservation.” *THE MAYFLOWER COMPACT* (1620), reprinted in *AMERICAN HISTORICAL DOCUMENTS 1000-1904*, at 62 (Charles W. Eliot ed., 1910). In purposefully joining together to pursue a common aim, the Pilgrims illustrate the self-conscious end of the spectrum upon which organizing efforts may be situated.

237. Sartre described this type of organization as a “fused group,” constituted by individuals induced into group consciousness through a common threat or through shared material circumstances. See JEAN PAUL SARTRE, *CRITIQUE OF DIALECTICAL REASON* 345–404 (Alan Sheridan-Smith trans., Jonathan Rée ed., Verso 2004) (1960).

238. See generally GEORGE ORWELL, 1984 (1949) (imagining a society governed by a totalitarian regime that ruled through fear and obscuration).

239. Of course, the categories that can be used to divide—for example, differences based on religion, ethnicity, or language—are often the very same categories relied on to inspire group unity and loyalty. See BERREBY, *supra* note 32 (discussing manifold sources for solidarity and hostility between humans).

240. See, e.g., DUNCAN K. FOLEY, *ADAM’S FALLACY: A GUIDE TO ECONOMIC THEOLOGY* (2006) (criticizing the classical concept of socially beneficial, self-interested, purely rational beings operating in the field of economics entirely separately from other arenas of human life and undermining the traditional view that economics can be separated out from political and social issues); TODD, *supra* note 47, at 63 (critiquing “textbook economics”).

241. See TAYLOR, *supra* note 68, at 17 (“[B]iologically we are *feeling creatures that think*.”). See also ROBERT TRIVERS, *NATURAL SELECTION AND SOCIAL THEORY* 277 (2002) (observing that the brain does not register a nervous signal in consciousness until long after the signal has reached the brain).

their goals.²⁴²

Other factors besides emotions affect human responses to various messages.²⁴³ One such factor involves priming or subliminal suggestions.²⁴⁴ Marketers and branders have become well versed in priming, which is a phenomenon critical for inducing people to buy certain products over others.²⁴⁵ Similarly, priming could be a powerful tool for organizers to effectively spread their messages.²⁴⁶

Organizers should also appreciate how sensitive people are to other subliminal cues, particularly visual ones.²⁴⁷ Thus, organizers should pay

242. See generally DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007) (arguing that emotional responses among voters play a larger role in politics than logical reasoning). Westen notes in the introduction, "This book is likely to be of particular interest to the 50 million Democratic voters who can't figure out why their party has lost so many elections despite polls showing that the average voter agrees with Democratic positions on most policy issues" *Id.* at ix.

243. For discussions on the degree to which real economists have begun to pay attention to some of these "irrational" phenomenon, see generally GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* (2009); DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); FOLEY, *supra* note 240; JUSTIN FOX, *THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET* (2009); TIM HARFORD, *THE UNDERCOVER ECONOMIST* (2005); STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

244. MARTIN LINDSTROM, *BUYOLOGY: TRUTH AND LIES ABOUT WHY WE BUY* 74–75 (2008). See also DONALD LORITZ, *HOW THE BRAIN EVOLVED LANGUAGE* 156 (1999) (providing an example of priming in the context of word recognition). For example, one study demonstrated that "subjects recognize the word *nurse* more quickly after having first been 'primed' by hearing or seeing the word *doctor*." *Id.* at 168–69. One word recognition theory posits that this is so because recognition units are activated, or "fired," when a word is detected, "and the more they fired, the more easily they would fire the next time." *Id.* at 168.

245. See LINDSTROM, *supra* note 244, at 68–87 (tracing the history of the use of subliminal imaging, and its reported effects on everything from self esteem to theft rates to the amount of money people are willing to pay for a beverage).

246. See *id.* at 74–75 (discussing the use of priming in political advertisements).

247. "Philip Morris, for example, offers bar owners financial incentives to fill their venues with color schemes, specially designed furniture . . . and other subtle symbols that, when combined, convey the very essence of Marlboro . . ." *Id.* at 78–79. Consumers pick up on the similarities between the visual environment and the cigarette brand's packaging, which subconsciously triggers an urge to smoke that brand of cigarette. See also FARHAD MANJOO, *TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY* 74–80 (2008) (discussing the power of images, even fabricated or ambiguous ones, to influence or reinforce human perceptions); TRIVERS, *supra* note 241, at 309–11 (discussing the importance of physical symmetry for mate selection among various animal species as well as humans); Murphet, *supra* note 175, at 117 (discussing the impact that the modern deluge of visuals of commercialized and sexualized bodies has on self-image).

Anecdotes from the Reagan Administration illustrate the greater appreciation Republicans have shown for using visual images to trump language. See HEDRICK SMITH,

attention to such issues as dress and grooming.²⁴⁸ Issues of priming aside, organizers can also take steps to ensure that the people to whom they are reaching out feel comfortable, which often means engaging local people to “mute[] the outsider role of the organizer and reduce[] the foreign experience of an organizing drive.”²⁴⁹

3. Maintenance

Holding a group together requires consideration of the number of members in the group; as Adam Smith has observed, there may be limits to the number of humans that can remain in a viable group.²⁵⁰ Again, this can be traced back to human diversity: too many members in a group, each with distinct personalities and motivations, can make group cohesion impossible. In identifying where the limits on membership size lie, answers may be derived from prehistoric anthropology. Paleontologist R. Dale Guthrie observed that Paleolithic bands seem to have typically consisted of twenty-five to forty individuals, with approximately five adult hunters. This suggests that the human brain was originally predisposed to work with about five other people and that people find it hard to deal with the complexity of more than forty or so other people.²⁵¹ Contemporary literary studies have found that humans can “comfortably keep track of three different mental states at a time,” but challenges and difficulties arise when that number is increased.²⁵² Similarly, “[t]he Navy Seals . . . typically operate in 13-man units led by two officers and a chief, and frequently break down into subgroups depending on this mission,” a principle of group formation successfully employed in 2008 by the U.S. Ryder Cup golf team.²⁵³

THE POWER GAME: HOW WASHINGTON WORKS 420 (1988) (“You’re always looking for a picture you don’t ever have to explain. The picture tells the story regardless of what Ronald Reagan says.”).

248. While looking like a hippie may not be the issue today that it was for organizers in the 1970s, “looking like a lawyer” remains an issue for lawyers. See Christina Binkley, *Inside a Bastion of Old-School Power Attire*, WALL ST. J., Feb. 5, 2009, at D8 (observing that as the economy has slowed and job opportunities have become scarcer, “power dressing” has become more prominent at major law firms and business casual has declined). “Looking like a lawyer” may take on special significance when representing marginalized constituencies, a lesson 1960s civil rights lawyer Marian Wright Edelman learned when she first encountered rural Mississippi African Americans: “[They had] heard there was a Black lady lawyer in town . . . and . . . came to look for and at me. When they saw me in blue jeans and an old sweatshirt, they were crestfallen. I never wore jeans in public again in Mississippi” MARIAN WRIGHT EDELMAN, *LANTERNS: A MEMOIR OF MENTORS* 79 (1999).

249. DELGADO, *supra* note 184, at 70.

250. SMITH, *supra* note 47, at 169, 230.

251. GUTHRIE, *supra* note 20, at 157, 255.

252. Cohen, *supra* note 7.

253. See John Paul Newport, *Team USA’s Management Victory*, WALL ST. J., Sept. 27,

British evolutionist Robin Dunbar has argued that the human brain has evolved to “reckon with about 150 individuals.”²⁵⁴ Consistent with this point is the fact that humanity’s closest relatives (the chimpanzees) begin to break into new groups once they reach around 100 members.²⁵⁵ However, questions remain concerning the quality of relationships. Guthrie argued that the shift from small bands to larger tribes involved a suppression and impoverishment of personality.²⁵⁶ Kurt Vonnegut seems to have placed himself in Guthrie’s camp when he correlates certain quantities of people with certain qualities of life.²⁵⁷

In addition to managing the size of the group, effective organizers must consider how to keep group members together. Solidarity tactics might include pep rallies (which wolves do) or sharing food (which chimpanzees do).²⁵⁸ In the marketplace, efforts at group cohesion find a correlate in the phenomenon of branding, where commercial corporations aspire to establish positive associations through consistent combinations of colors, images, and words.²⁵⁹ By creating a recognizable visual, corporations are able to utilize human emotion to create a subconscious form of group loyalty, which is demonstrated by maintaining a consumer base.²⁶⁰ With so many different groups and causes in today’s society, not to mention countless other ways to fill time or distract attention, it is crucial that progressive organizers find a way to market their organization effectively, to create the same kind of brand loyalty enjoyed by top consumer products, lest they lose their members to other organizations.

2008, at W9 (discussing how team-building strategies were crucial to the American team’s victory).

254. BERREBY, *supra* note 32, at 219.

255. CAROLE JAHME, *BEAUTY AND THE BEASTS: WOMAN, APE AND EVOLUTION* 46 (2002).

256. GUTHRIE, *supra* note 20, at 420.

257. See KURT VONNEGUT, *PALM SUNDAY: AN AUTOBIOGRAPHICAL COLLAGE* 180–81 (1981) (“Human beings are supposed to live in stable, like-minded, extended families of fifty people or more. . . . [In the United States] we were agreeing, among other things, to do without such families. It is a painful, unhuman agreement to make. Emotionally, it is hideously expensive. . . . Marriage is collapsing because our families are too small. . . . Quantities of relatives of any sort are what we need.”); Standish, *supra* note 89.

258. GUTHRIE, *supra* note 20, at 247, 308.

259. See, e.g., CHUCK PETTIS, *TECHNOBRANDS: HOW TO CREATE & USE “BRAND IDENTITY” TO MARKET, ADVERTISE & SELL TECHNOLOGY PRODUCTS* 70–75 (1995) (describing the creation and success of the “Intel Inside” brand campaign, centered around the repetition and ubiquity of a simple visual image). A variation on this theme is typography, where the shapes of letters affect the ways in which messages are received. See, e.g., Edward Rothstein, *Typography Fans Say Ikea Should Stick to Furniture*, N.Y. TIMES, Sept. 5, 2009, at C1 (“[A]dvertisers, logo designers, magazine and book publishers and catalog creators spend millions on fonts because they know the medium has a message.”).

260. See LINDSTROM, *supra* note 244, at 99 (“[A] lot of consumers have almost a religious sense of loyalty to their favorite brands and products.”).

Nor are groups homogenous institutions. Unique organizational structures exist within groups; this intra-group organization is significant to the group's success. After the individuals are organized into a group, the significance of organizing *within* the group must be acknowledged. Chimpanzees are quite adept at forming alliances to make or break an alpha male.²⁶¹ Lower-ranking male baboons will form coalitions with other lower ranking baboons in order to oust higher ranking males,²⁶² and female gorillas will similarly band together to keep an unruly male gorilla "in line."²⁶³ Though male bonobos are bigger, females maintain solidarity and will gang up on a male if necessary.²⁶⁴ These examples from the primate world demonstrate how complicated and volatile intra-group dynamics remain, providing important lessons for social change organizers.

4. Ideologies

Many conservative thinkers have cited Darwin and his theories on survival of the fittest as scientific proof that entrenched privilege and resource inequalities are both appropriate and natural.²⁶⁵ Darwin's work, however, can also be useful to progressive organizers. As Darwinian science develops, progressives can gain insight helpful to advancing progressive goals and also undermine the inaccurate rationalizations conservatives have put forward to advance their positions.

Conservatives start with a Darwinian point concerning the unique nature of every individual²⁶⁶ and extrapolate it into an assertion that every person is a self-centered, self-serving, isolated monad.²⁶⁷ Yet evolutionary research suggests that humans have been "hard-wired" towards equity, empathy, cooperation, and solidarity, because of the evolutionary benefits that accrue when those traits are exhibited.²⁶⁸ For instance, game theory

261. See, e.g., FRANS DE WAAL, CHIMPANZEE POLITICS: POWER AND SEX AMONG APES 140 (rev. ed. 1998) (1982) (discussing the role of coalitions in challenges to alpha males).

262. JAHME, *supra* note 255, at 156.

263. DE WAAL, *supra* note 261, at 12.

264. JAHME, *supra* note 255, at 299, 361; DE WAAL, *supra* note 261, at 10–11, 17.

265. See, e.g., BERREBY, *supra* note 32, at 211 (describing the views of social Darwinist William Graham Sumner).

266. See *supra* Part III.D.1.

267. See AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM (1964) (articulating a moral system that values acting in one's own self-interest). See also KURT VONNEGUT, GOD BLESS YOU, MR. ROSEWATER: OR PEARLS BEFORE SWINE 52–53 (1965) ("Enlightened Self-interest gives them [mental processes] a flag, which they adore on sight. It is essentially the black and white Jolly Roger, with these words written beneath the skull and crossbones, 'The hell with you, Jack, I've got mine!'").

268. See, e.g., CHAISSON, *supra* note 102, at 392 ("Competition is not the sole driving force in evolution; cooperation is also a factor . . ."); TRIVERS, *supra* note 241, at 3–55 (discussing reciprocal altruism—"I'll scratch your back if you scratch mine"—from an evolutionary perspective). Nor are humans unique in this respect. See, e.g., Gautam Naik, *Deep Inside Bacteria, a Germ of Human Personality—Scientists Hope to Fight Infections*

suggests evolutionary grounds for altruism and fair play, contradicting the theory that humans could have evolved solely through short-sighted self-interest.²⁶⁹ Cooperation in hunting seems to have been a necessary characteristic among land predators hunting large mammals,²⁷⁰ but the instinct for social interactions goes beyond successful food-obtaining strategies. Empathy can be observed in rats, which have been shown to stop pressing a lever to obtain food once they notice that doing so delivers an electric shock to a neighboring rat,²⁷¹ and monkeys have been observed choosing starvation over inflicting pain on other monkeys.²⁷² In an experiment involving capuchin monkeys, two would receive cucumbers, and then only one would be given more highly prized grapes: "Upon noticing their partner's salary raise, monkeys who had been perfectly willing to work for cucumber suddenly went on strike. Not only did they perform reluctantly but they got agitated, hurling the pebbles and sometimes even the cucumber slices out of the test chamber."²⁷³ Such instances of empathy and solidarity constitute more than an interesting aside: ability to succeed socially has been linked to ability to survive physically. In a study of baboons in Kenya, females with the best social connections proved to have the most surviving offspring.²⁷⁴

These traits were not lost when the human species evolved: through his review of art from the Paleolithic period, Guthrie argues that Old Stone Age modes of production pushed humans into cooperative and irenic patterns of behavior.²⁷⁵ Conservative arguments that support inequalities in resource distribution are based on a flawed ideology that relies on a purely self-involved actor, the existence of which is belied by the evolutionary inclination toward equity and cooperation. Evolutionary science thus provides additional support for progressives seeking to

by Blocking the Social Creatures' Ability to Sense When They Have Sufficient Numbers to Attack, WALL ST. J., Sept. 8, 2009, at A18 (observing that bacteria display social behaviors).

269. See TRIVERS, *supra* note 241, at 3–55.

270. See GUTHRIE, *supra* note 20, at 216, 256. The complexity of having to cooperate and interact socially with other members of one's species also may have led to an increase in brain size and neural complexity. *Id.* at 218–19.

271. FRANS DE WAAL, *THE AGE OF EMPATHY: NATURE'S LESSONS FOR A KINDER SOCIETY* 70 (2009). While several hypotheses were presented for the rats' reactions, including fear for their own well-being or distraction, de Waal argues that the rats responded out of "an innate emotional response" to the pain of their fellow rats. *Id.* "One rat's distress may simply distress another." *Id.*

272. *Id.* at 75.

273. *Id.* at 187.

274. *Id.* at 33.

275. GUTHRIE, *supra* note 20, at 256, 422. For additional discussion of how modern human behavior evolved in pre-modern times, see S. BOYD EATON, MARJORIE SHOSTAK & MELVIN KONNER, *THE PALEOLITHIC PRESCRIPTION* (1988) (arguing that people today are still very similar to Paleolithic hunter-gatherers, and that health and quality of life will be improved by following a diet and exercise routine emulating the Paleolithic lifestyle).

organize a counter to conservative ideology.

IV.

WHERE LAWYERS FIT IN

*The study of law can be disappointing at times, a matter of applying narrow rules and arcane procedures to an uncooperative reality; a sort of glorified accounting that serves to regulate the affairs of those who have power—and that all too often seeks to explain, to those who do not, the ultimate wisdom and justness of their condition.*²⁷⁶

The thesis of my 1984 article was that organizing is a far more effective tool for achieving social change than legal strategies, and that if lawyers wanted to affect social change, their best option would be to assist organizing efforts.²⁷⁷ After twenty-five years, I still hold to that thesis, albeit with some emendations. In my 1984 article I made some suggestions for lawyers who wanted to participate in bringing about social change. I argued, “The lawyer’s facilitative role is most obvious and significant in three substantive areas of law: the first amendment, corporations and taxes, and criminal law. Additionally, to be effective, a progressive lawyer should be aware of the rules of civil procedure and ethics.”²⁷⁸ After twenty-five years, those propositions should be supplemented by the following observations.

A. Help Wanted

Whereas in 1984 I was only beginning to appreciate this point, by 2009 it has become clear to me: while lawyers are not necessary for the traditional organizing work that requires massing people in neighborhoods, lawyers are very necessary for the complicated organizing work that cuts closer to the heart of the economic system. My

276. BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE 437 (Three Rivers Press rev. ed. 2004) (1995).

277. See BACHMANN, *supra* note 2, at 39. Many skeptical of the efficacy of social change lawyers have derived this conclusion from the belief that courts are not the best institutions from which to achieve social change. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (presenting competing views of the institutional abilities of courts, examining the conditions under which courts may bring about significant social reforms, and concluding that ultimately courts are rarely effective at producing such reforms).

The President may share a similar perspective. See Jodi Kantor, *As a Professor, a Pragmatist About the Supreme Court*, N.Y. TIMES, May 3, 2009, at A1 (“Former students and colleagues describe Mr. Obama as a minimalist (skeptical of court-led efforts at social change) . . .”).

278. BACHMANN, *supra* note 2, at 64.

experience with ACORN is illustrative of this point. In 1984, ACORN's work involved mainly community organizing, which generally does not raise many issues of governmental regulation.²⁷⁹ Most of what we had to worry about implicated the five legal areas noted. None of it was overly complicated.

However, as the 1980s proceeded, ACORN helped to start housing organizations and labor unions.²⁸⁰ Processing real estate involves its own set of complications, but fortunately ACORN Housing Corporation was able to bring in qualified counsel to assist it in this particular field. On the labor front, we learned that establishing a labor union, which faces much more federal red tape,²⁸¹ is significantly more complex than forming a community organization.²⁸²

Perhaps the most dramatic example of the new need for legal expertise was ACORN's experience with electoral politics and voter registration.²⁸³ The many questions surrounding this area of the law have become quite complicated, perhaps by design: incumbents like to remain incumbents and thus prefer a restricted franchise, which they can monitor, as opposed to an open, democratic franchise, which remains unpredictable.²⁸⁴ While this proposition generally holds true across the political spectrum, some

279. For a description of the kind of direct action activity characteristic of ACORN's work during this period, see DELGADO, *supra* note 184, at 71–73. This sort of activity is fairly straightforward, and much of it can be done without significant legal training.

280. These organizations include ACORN Housing Corporation, Inc.; ACORN Community Land Association, Inc.; and United Labor Organizations. United Labor Organizations was begun as an independent labor union in New Orleans and eventually bifurcated into two locals of the Service Employees International Union (SEIU). One was Local 100 in New Orleans (whose charter was revoked in 2009). The other was Local 880, based in Chicago, which grew into SEIU Health Care Illinois and Indiana.

281. For example, the Labor Management Relations (Taft-Hartley) Act, first passed in 1947, established legal requirements with which labor unions had to comply. *See* Labor Management Relations Act, 1947, Pub. L. 80-101, 61 Stat. 136 (codified as amended in scattered sections of U.S.C.). The passage of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act created a complex system of regulations and reporting requirements for labor unions to follow. *See* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519 (codified as amended in scattered sections of U.S.C.). For an informative discussion on the history of labor relations and the influence of judicial decisions in shaping class struggle in the United States, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

282. My initial conclusion was that this could be explained by capital's fear, if not panic, when faced with organized labor. Labor union history shows that one way the state tries to control insurgent movements is to legalize them and then contain and trap them in a welter of regulations. *See* Klare, *supra* note 281; Ken Silverstein, *Labor's Last Stand: The Corporate Campaign to Kill the Employee Free Choice Act*, HARPER'S MAG., July 2009, at 38.

283. *See supra* Part II.C.

284. *See, e.g.*, BACHMANN, *supra* note 2, at 206 (citing GINSBERG & SHEFTER, *supra* note 126, at 18, 21–22, 46, 66, 86, 191) (positing theories as to why neither major political party has engaged in massive voter mobilization since the nineteenth century).

Republican politicians and pundits have been particularly determined in pursuing lawsuits²⁸⁵ and supporting voter registration rules that would restrict voting.²⁸⁶ Various conservative thinkers continue to manufacture theories²⁸⁷ and engage in actions intended to restrict the franchise.²⁸⁸

This increase in the use of legal tactics to depress voter turnout may be a matter of history repeating itself,²⁸⁹ however, the situation is likely to worsen, given that the socioeconomics of twenty-first century global capitalism has less use for democracy than the nineteenth century version: as wealth and power become increasingly consolidated, appealing to the populace becomes a less effective, and less frequent, tool for governance.²⁹⁰

285. See, e.g., Patricia Lopez, *Ritchie Is Sued over Voter-Registration Records*, STAR TRIBUNE (Minneapolis, Minn.), May 29, 2009, at 2B (describing suit brought by conservative advocacy group and Republican legislators over discrepancy between vote totals from canvassing boards and number of registered voters). The number of election-related lawsuits has risen dramatically in recent years. See Marcia Coyle, Nat'l Law Journal, *Election Law Litigation Has Doubled Since 2000*, LAW.COM, Feb. 19, 2009, <http://www.law.com/jsp/article.jsp?id=1202428407304> ("The amount of election law litigation has more than doubled nationwide since the hotly contested 2000 presidential election, and more of that litigation is being fought in federal courts In the pre-2000 period, the country averaged 94 election law cases per year; the post-2000 average is 237."). Of course, not all of these are examples of conservatives seeking to restrict the franchise; in several instances, progressive activists have successfully used litigation to expand voting rights. See Stephanie Simon, *Latino Activists Seize on Texas Ruling to Boost Voting Power*, WALL ST. J., July 25, 2009, at A3 (reporting a recent ruling that "offers a road map for activists" who "plan to press politicians to give Latino residents more influence" when making redistricting decisions).

286. E.g., Gary Fineout, *Overhaul of Florida Voting Rules Is Proposed*, N.Y. TIMES, Apr. 16, 2009, at A21 (describing changes proposed by Republican lawmakers in Florida that would impose additional requirements on voters). For a broader discussion on the consequences of restrictive voting rules, see Editorial, *The Acorn Story*, N.Y. TIMES, Oct. 17, 2008, at A32 (observing that "one-third of eligible voters are not registered," largely due to "overly restrictive registration rules"); Ian Urbina, *Hurdles to Voting Persisted in 2008*, N.Y. TIMES, Mar. 11, 2009, at A18 (reporting that several million voters failed to vote in the presidential election of 2008 "because they encountered registration problems or failed to receive absentee ballots," and many additional voters "were 'discouraged' from voting due to administrative hassles, like long lines and voter identification requirements").

287. See, e.g., Thomas Basile, *Inventing the "Right to Vote" in Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), 32 HARV. J.L. & PUB. POL'Y 431 (2009) (arguing that the Equal Protection Clause likely did not create a fundamental right to vote).

288. See, e.g., John Schwartz, *U.S. Judge Opposes Republicans on Elections*, N.Y. TIMES, Dec. 3, 2009, at A26 (describing continuing enforcement of court's injunction of GOP tactics linked to suppression of voting by racial minorities).

289. While poor whites may have shared more interests with poor blacks than with wealthy whites during and immediately following Reconstruction, race was used to divide socioeconomic classes and prevent the lower classes from uniting against entrenched interests. See generally WILLIAM IVY HAIR, *BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900* (1969) (describing race relations in Louisiana following Reconstruction and the obstacles that impeded the populist movement's attempt to break down racial barriers); ROGER W. SHUGG, *ORIGINS OF CLASS STRUGGLE IN LOUISIANA* (1939) (documenting the use of race to divide groups with common class interests).

290. See TODD, *supra* note 47, at 17 ("In developed countries a new class is emerging that comprises roughly 20 percent of the population in terms of sheer numbers but controls

Because these retrogressive legal tactics can be most effectively countered by progressive legal strategies, the need for progressive lawyers in this specialized area grows.

B. *Do You Really Want to Be a Lawyer? (1)*

In evaluating the 1960s War on Poverty, former Senator Daniel Moynihan bluntly argued that it was waged less for the sake of the poor than for the professionals; that is, the War on Poverty became a project to engage and divert a growing professional class.²⁹¹ Moynihan's assessment may suggest that society will work to ensure that positions for social work lawyers will remain open, in part to maintain social stability.²⁹² Two years later, his comments were substantiated by a more centrist Democratic

about half of each nation's wealth. This new class has more and more trouble putting up with the constraint of universal suffrage."'). Implicit in Todd's remarks is that certain developments in the most contemporary "modes of production" of wealthier nations are giving rise to an ideology and practice of neo-mandarinism, a term coined by Noam Chomsky to describe a capitalist order governed by a cultivated but ruthless elite. See NOAM CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* (1967). China may now embody this order in its purest form. See Slavoj Žiždek, *20 Years of Collapse*, N.Y. TIMES, Nov. 9, 2009, at A23 (raising the possibility that political democracy could impede economic growth, and citing China's "authoritarian capitalism" as potentially "more efficient, more profitable, than . . . liberal capitalism"). Russia appears to be taking note. See Clifford J. Levy, *In Chinese Communist Party, Russia's Rulers See a Role Model for Governing*, N.Y. TIMES, Oct. 18, 2009, at A6 ("What [Russian leaders] admire, it seems, is the Chinese ability to use a one-party system to keep tight control over the country while still driving significant economic growth."). Of course, as Todd points out, softer versions are arising in the West in France, the United Kingdom, and the United States. See TODD, *supra* note 47, at 17–19. Commentators in these countries have voiced their concern. See, e.g., BOURDIEU, *supra* note 16, at 33 (critiquing an arrogant ruling class that is characterized by "very high cultural capital" and subscribes to a "racism of intelligence"); Walter Benn Michaels, *What Matters*, LONDON REV. BOOKS, Aug. 27, 2009, at 11, 11 ("[A] diversified elite is not made any the less elite by its diversity and, as a response to the demand for equality, far from being left-wing politics, it is right-wing politics."). In the United States, Obama and his administration illustrate one version of this phenomenon: senior members of the administration and high-ranking appointees were drawn from "Washington insiders" with elite educations and backgrounds. David Brooks, Op-Ed., *The Insider's Crusade*, N.Y. TIMES, Nov. 21, 2008, at A35 (identifying the elite universities attended by many senior members of the administration and concluding that "[e]ven more than past administrations, this will be a valedictocracy—rule by those who graduate first in their high school classes"). See also Thomas L. Friedman, Op-Ed., *Our One-Party Democracy*, N.Y. TIMES, Sept. 9, 2009, at A29.

291. See Daniel Patrick Moynihan, *The Professionalization of Reform*, in THE GREAT SOCIETY READER: THE FAILURE OF AMERICAN LIBERALISM 459, 470 (Marvin E. Gettleman & David Mermelstein eds., 1967) (observing the increase in the number of professionals and professions, and that "an enormous number [of professionals are] involved in various aspects of social welfare and reform").

292. See Elinor Graham, *The Politics of Poverty*, in THE GREAT SOCIETY READER, *supra* note 291, at 213, 217 ("[T]he social-service orientation of the War on Poverty . . . provides a legitimate outlet for the energies of a group that poses a greater threat to the political system and moral fabric of the society than the inadequately educated poor who are the official objects of aid.").

leader. In 1969, then-Congresswoman Edith Green, ranking Democrat on the House Education and Labor Committee, observed: “[P]robably our most enduring monument to the problem of poverty has been the creation of a poverty industry. There are more than 100 companies in Washington, D.C., alone which specialize in studying and evaluating the poor and the programs that serve them.”²⁹³ Despite the dedication of professionals and resources to solving the problem, poverty still exists, and one could argue that the biggest thing that has changed since we began waging the War on Poverty is the increase it has created in employment opportunities for professionals.

These factors may give a person pause when she contemplates pursuing a legal career for the purpose of effecting social change. ACORN has exemplified a partial response to this issue: it attempts to engage, whenever possible, “ordinary” people in solving their own problems and to resort to lawyers or other professionals only when necessary.²⁹⁴ Other progressive lawyers have advocated a client-centered approach to lawyering that aims to mitigate the paternalism that can occur between a professional attorney and an unsophisticated client.²⁹⁵ Whether these approaches solve the issue of professionals working to secure their own profession rather than to advance the goals of their professed clients, however, remains another question. The phenomena of reforms that increase professional opportunities rather than solve social problems simply may be an inherent feature in the dynamics of capitalism.²⁹⁶

C. *Do You Really Want to Be a Lawyer? (2)*

It is one question to ask whether professionals serve themselves or their clients. It is another question to ask whether professionals can in fact remain professionals; that is, whether they can enjoy the “independence of judgment, esoteric knowledge, and immunity to outside criticism that characterize professionals.”²⁹⁷ In 1976, legal work, like many professions, was increasingly focused on material acquisitions and becoming less

293. PHILLIPS, *supra* note 109, at 41. Teles points to this example to demonstrate the difficulties outsiders may face when attempting to challenge entrenched interests. TELES, *supra* note 86, at 16.

294. See BACHMANN, *supra* note 2, at 42–43 (noting ACORN’s preference for community participation and limited resort to litigation).

295. See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (discussing the development of client-centered lawyering and the inherent tension between a client-centered approach and the traditional autonomy accorded lawyers’ professional decisionmaking abilities).

296. See ERIC HOBSBAWM, *THE AGE OF CAPITAL: 1848-75*, at 21 (Vintage Books 1996) (1975) (observing that in the mid-1800s, bourgeois society was incapable of “provid[ing] enough posts of adequate status for the educated”).

297. Moynihan, *supra* note 291, at 470.

enjoyable, less prestigious, and increasingly alienating.²⁹⁸ That trend has continued, and, since legal work is now being outsourced to other countries, it is not likely to stop.²⁹⁹ While law used to enjoy some cache, practicing it is not what it used to be.³⁰⁰ Even the inspiration that might attend legal work with a public purpose is not immune to disintegration: fifteen years ago Harvard Law School began including a discussion of “burnout” in a course on providing legal services to indigent clients.³⁰¹ The young lawyer must confront all of the issues that attend legal work, regardless of the cause or client. I would urge any person who thinks about becoming an attorney to prepare herself with strategies for coping with disillusionment and emotional fatigue.

D. Get a Day Job!

During the late 1970s and early 1980s, it was possible for progressive attorneys to contemplate a career in private law practice, given a statutory provision that provided for the award of attorneys’ fees to prevailing parties in civil rights cases.³⁰² Conservatives understood that this provision was a critical resource for progressive legal advocacy; thus, subsequent years saw conservatives on the judiciary cutting back the scope of the attorney fee award statute.³⁰³ As legislative revival of this statute is unlikely, beginning attorneys tend to focus on obtaining a salaried position at a public interest institution or at a large law firm with a generous pro bono policy. Since there may be more attorneys seeking these positions than there are positions available, those who would pursue a career in social change lawyering may want to consider other options.

One option is to develop expertise in some area of traditional private practice, providing one with sufficient independence to pursue more controversial work. From the generation of lawyers that preceded mine,

298. See BOWLES & GINTIS, *supra* note 177, at 253 (“[T]raditionally elite . . . jobs . . . are reduced to the condition of wage labor. No longer can professional and small-business people look confidently to a future of controlling their work processes, finding creative outlets in work, or holding decision-making power.”).

299. Rama Lakshmi, *U.S. Legal Work Booms in India: New Outsourcing Industry Is Growing 60 Percent Annually*, WASH. POST, May 11, 2008, at A20; Niraj Sheth & Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, WALL ST. J., Nov. 26, 2008, at B1. Of course, this observation may not discourage the young reader from a career in law, as it is not clear how much autonomy and fulfillment are provided in other jobs generated by capitalism. See BOWLES & GINTIS, *supra* note 177, at 253.

300. Even large law firms are being forced to switch from hourly billing to flat fee contracts, potentially reducing profits. Nathan Koppel & Ashby Jones, *“Billable Hour” Under Attack*, WALL ST. J., Aug. 24, 2009, at A1. Law students are finding it hard to get jobs at these firms, even as they drown in debt from student loans. Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools*, N.Y. TIMES, Aug. 26, 2009, at B1.

301. See BACHMANN, *supra* note 2, at 168.

302. 42 U.S.C. § 1988(b) (2006).

303. See BACHMANN, *supra* note 2, at 203–04 & n.17.

two lawyers who followed such a path come to mind: Maurice Sugar and Arthur Kinoy. Sugar, who contributed a significant amount of work to the fledgling labor movement in Detroit during the 1930s,³⁰⁴ supported himself through private practice work, including criminal defense and constitutional litigation.³⁰⁵ When his efforts with the labor movement hit a roadblock, he was able to withdraw and retire.³⁰⁶ By opening a general practice, Arthur Kinoy and his partners were able to participate in cutting-edge civil rights litigation during the 1950s and 1960s.³⁰⁷

Another potential source for progressive legal employment is government, whether at the state or federal level. When I graduated from law school in 1976, most of the “real action” supposedly thrived at the federal level, in part because of the critical role the federal government played in promoting civil rights and fighting poverty.³⁰⁸ Since then, the significance of localized work has risen more to the foreground: state legislatures have played a crucial role in vindicating federal constitutional rights.³⁰⁹ Justice Brennan has also suggested that state courts may be more protective of fundamental rights.³¹⁰ Additionally, state attorneys general are becoming increasingly active in civil actions and criminal prosecutions targeting corporate white-collar crime, securities fraud, internet fraud, and environmental degradation.³¹¹

304. See CHRISTOPHER H. JOHNSON, *MAURICE SUGAR: LAW, LABOR, AND THE LEFT IN DETROIT, 1912-1950*, at 13–14 (1988) (describing some of Sugar’s accomplishments with the Detroit labor movement and his impact on the relationship of law to labor).

305. See *id.* at 47–54 (noting the difficulty Sugar had finding employment after graduation from law school and the dearth of lawyers devoted to labor cases).

306. *Id.* at 295–98.

307. See ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* 83–90 (1983) (describing the motivations of Kinoy and his partners in starting their firm, some of their early work, and some of the questions they had to confront in attempting to serve as progressive lawyers).

308. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (observing that, under the Supreme Court’s Fourteenth Amendment jurisprudence, there had been a “legal revolution which . . . brought federal law to the fore”).

309. See generally JOHN J. DINAN, *KEEPING THE PEOPLE’S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* (1998) (examining the role played by state institutions in protecting individual rights).

310. See generally Brennan, *supra* note 308 (observing the ability of state courts to use federal constitutional decisions to expand the protections granted under state constitutions).

311. See e.g., Vanessa Fuhrmans, *UnitedHealth Settles Class Actions*, WALL ST. J., Jan. 16, 2009, at B3 (describing a settlement agreement in several class actions brought against a major insurer on claims of systemic underpayment, reached after the state attorney general’s office investigated payment practices); Adi Ignatius, *Wall Street’s Top Cop*, TIME, Dec. 30, 2002, at 64, 66 (documenting New York State Attorney General Eliot Spitzer’s record prosecuting fraudulent corporations, “organized crime, gun manufacturers, air polluters, [and] Korean grocers who don’t pay minimum wage”). See also Damien Paletta & Brett Kendall, *Supreme Court: The Term Ends: States Get More Power to Challenge National Banks*, WALL ST. J., June 30, 2009, at A4 (reporting a Supreme Court

E. Civics

Lawyers often enjoy better training and access to resources that enable them to make contributions and exert influence to a greater degree than an “ordinary” citizen is able. Lawyers may play a special role in a variety of ways, affecting local issues, politics, and theories of governance and judging.

Just as an attorney should not restrict her vision to the national stage,³¹² neither should she restrict her focus to the landscape set by established political parties. The Working Families Party in New York provides an example of how third parties can impose a progressive vision onto the political dialogue of a state.³¹³ However, third parties often cannot achieve electoral impact without the proper “fusion” laws in place; so if a lawyer cannot work with a viable third party, she can work to change her state’s election laws.³¹⁴

decision that will enable state attorneys general to sue national banks in certain cases under state laws).

312. See *supra* notes 308–11 and accompanying text.

313. See David M. Halbfinger, *A Small Party Pushes to Be a Statewide Force*, N.Y. TIMES, Oct. 31, 2008, at A25 (describing the Working Families Party’s statewide electoral success and its support for certain Democratic candidates in exchange for increasing the influence of the Working Family Party’s platform). See also Raymond Hernandez, *Region’s House Democrats Facing Pressure on Health Care Overhaul*, N.Y. TIMES, Nov. 23, 2009, at A21 (observing the “growing clout of the Working Families Party” in the context of the debate on national health care reform).

314. “Fusion” is shorthand for an electoral system that allows one candidate’s name to appear on the ballot line of more than one party, and voters for a single candidate endorsed by multiple parties are “fused.” See Peter H. Argersinger, *“A Place on the Ballot”: Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980) (defining “fusion” as “the electoral support of a single set of candidates by two or more parties”). The practical effect of fusion is to make minor parties relevant in a political system dominated by two major parties: when a minor party can put a major party candidate forward on its ballot line, it may be able to attract enough votes to qualify for a spot on the ballot (as many state balloting rules make parties eligible for a place on the ballot if they obtained sufficient electoral support in the previous election). STEVE COBBLE, CTR. FOR A NEW DEMOCRACY, *A REPORT ON STATE FUSION LAWS* 2 (1992) (on file with author). Once the minor party qualifies for a place on the ballot, it can run other candidates that have not been approved by the major parties. Additionally, if a major party candidate is elected with significant support from the minor party, that candidate has a greater incentive to respond to the minor party’s agenda than if that candidate had been elected solely with major party support. See Halbfinger, *supra* note 313 (“Victory would mean a chance to demand that newly empowered—and deeply indebted—Democratic lawmakers press the [Working Families Party’s] liberal agenda . . .”). Fusion can make life complicated for major parties, often pushing them from the center towards the right or the left. COBBLE, *supra*, at 2. Thus in most states, the majority parties have passed legislation making fusion illegal, on the grounds that it is too complicated and interferes with the state’s “interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1996). Proponents of fusion argue that fusion promotes democratic participation and the right to associate. The Supreme Court resolved this argument in *Timmons*, holding that fusion was a matter for state resolution and not a constitutional right. 520 U.S. 351.

Another arena of politics in which the lawyer may have a special role to play is the selection, evaluation, and retention of judges. With the election of Obama, progressives now may hope to play a role in supporting progressive people for seats on the federal judiciary.

In considering the notion of bringing progressive judges to the bench, progressives should be careful to ensure that their notion of qualification does not fall prey to the ideology of expertise.³¹⁵ The more a judicial career seems to qualify one to sit on the Supreme Court, as opposed to a political career where one has had to actually go to voters and find out what they think to secure office, the more an ideology of expertise is advanced. Judging becomes increasingly characterized as the province of elite, specially trained experts who practice a science.³¹⁶ The notion that rendering judicial decisions would have any grounding in popular sentiment is dismissed as inappropriate pandering. Progressives who believe the protection of minority rights requires an independent judiciary should see this notion for the false ideology that it is, because the history of the American judiciary reveals an elite protecting mainly elite minorities and white majorities.³¹⁷ Rather than seeking to promote judges based solely on years of judging, progressives should support judges who have proven responsive to the people and who have demonstrated a commitment to progressive legal interpretations.

Beyond the question of bringing progressive people to the bench, there remains the question of those already sitting. Since the federal judiciary and, more importantly, the Supreme Court are presently

315. See BACHMANN, *supra* note 2, at 158–61. I describe the “ideology of expertise” as the concept that, as a result of the increasing complexity of modern society, “ordinary” people need experts (professionals) to solve their problems for them. But the professionalization of many of these fields may have been a response to the need for more upper-middle-class employment opportunities, rather than any actual need for greater expertise. See *supra* Part IV.B.

316. See DUXBURY, *supra* note 71, at 14–17. Contrary to this belief in the science of law, law involves more practical experience than “scientific” expertise, as exemplified by the lack of previous judicial experience among members of the Supreme Court. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, & SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 40 (5th ed. 2008) (“Among the justices who had served on the Court by 2007, only 26 had had ten or more years of experiences on any tribunal—federal or state—and 38 had had no judicial experience at all. . . . [M]any of the most illustrious members of the Court were judicially inexperienced.”). More recently, the Chairman of the Senate Judiciary Committee expressed the hope to see “some more people outside the judicial monastery” on the Supreme Court. Sewell Chan, *Democrat Predicts Speedy Court Confirmation. Republicans Sound Note of Caution*, N.Y. TIMES, Apr. 12, 2010, at A18.

317. See generally LUCAS A. POWELL, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008* (2009) (arguing that, because the justices on the Supreme Court come from the class of professional elites, their perspectives—and thus their decisions—are sympathetic to and supportive of entrenched political interests).

dominated by Republican appointees,³¹⁸ progressives today are frequently confronted by a hostile judiciary.³¹⁹ In such a context, it is the responsibility of a progressive attorney to recognize that judicial decision making may be improperly influenced by the ideological perspectives held by the individuals who make up the federal bench.³²⁰ She may need to be prepared to engage in aggressive tactics, including impeachment.³²¹

F. Narrative and Cliché

This article opened with a discussion of narrative as a way in which humans organize their experiences. Evolution has given us a jerry-built brain that pushes to organize data regardless of truth; in part, perhaps, because Paleolithic humans needed to invent stories to help them track down food.³²² Thus, because of the limits of the brain, narratives are always suspect, but because of the practical necessities involved in living, narratives must be invented and used. By organizing experience in a certain way, narrative can help humans function; however, in doing so, narrative suppresses certain facets of human experience.³²³

318. See John W. Dean, *The New Nattering Nabobs of Negativism Are Gunning for Obama's Judicial Nominees: A Republican Strategy That We Must All Hope Fails*, FINDLAW, Apr. 17, 2009, <http://writ.news.findlaw.com/dean/20090417.html> (observing that the last five Republican presidents "are responsible for over 58 percent of the federal judiciary").

319. Compare the current situation to the political climate of 1801, when the newly-elected President Jefferson observed that the defeated Federalists "'have retired into the Judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased.'" RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 44 (1971) (quoting Letter from Thomas Jefferson to John Dickinson (Dec. 18, 1801)) (alteration in original).

320. See, e.g., Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008) (observing that the length of sentences ordered in criminal cases and departures from sentencing guidelines are affected by judges' ideological preferences, measured by the party of the appointing president and by the degree of alignment between the sentencing judge and the reviewing circuit court).

321. Inspiration may be drawn from the Republican response in the 1800s: "The Republicans . . . began impeachment proceedings against a notorious Federalist judge . . . and then moved against Supreme Court Justice Samuel Chase who had howled against the Jefferson's [sic] 'mobocracy.' This impeachment effort failed, but Chase watched his mouth ever after." STEVE BACHMANN, *CONSTITUTION FOR BEGINNERS* 67 (1987). See also ELLIS, *supra* note 319, at 96–107 (recounting Justice Chase's impeachment trial); TINDALL & SHI, *supra* note 215, at 375–76 (describing the impeachment proceedings against Justice Chase). The Republicans in the twentieth century (including Gerald Ford) were happy to follow the example of their nineteenth century namesakes. See WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 359 (1981). Cf. JEFFERY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* (1999) (examining in detail the impeachment of President Bill Clinton).

322. See *supra* notes 30–32 and accompanying text.

323. As per Proust:

This work of the artist, this struggle to discern beneath matter, beneath

There is also a political function to narrative. Narrative allows people to organize into groups. A fundamental organizing tactic involves the review of campaign actions by participants. In the words of community organizer Mike Silver, "The fundamental purpose of reviewing the action is to develop a *consensus* definition of the experience. This is mainly a process of reality construction."³²⁴ However, such "reality construction" can exact its price in terms of personal individuality: at its worst, it can drown personal individuality in totalitarian terror;³²⁵ more frequently, but just as dangerously, invented narratives can serve as soothing but mind-numbing cliché.³²⁶ By suppressing individuality, cliché enables elites and governments to control their constituents and override the will of the people.³²⁷

The instances of cliché abuse for population control are legion in the United States. Art high and low constitutes one potential avenue for population control because of its ability to contain and constrain the

experience, beneath words, something that is different from them, is a process exactly the reverse of that which, in those everyday lives which we live with our gaze averted from ourselves, is at every moment being accomplished by vanity and passion and the intellect, and habit too, when they smother our true impressions, so as entirely to conceal them from us, beneath a whole heap of verbal concepts and practical goals which we falsely call life. . . . Our vanity, our passions, our spirit of imitation, our abstract intelligence, our habits have long been at work, and it is the task of art to undo this work of theirs.

MARCEL PROUST, *TIME REGAINED*, IN *SEARCH OF LOST TIME* VI 299–300 (Terence Kilmartin & Andreas Mayor trans., D.J. Enright ed., Modern Library 1999) (1927).

There may be some evolutionary explanation for Proust's position: it seems that language replaced grooming as a means to social solidarity amongst our primate forebears. See ROBIN DUNBAR, *GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE* (1996) (observing that most human communication is centered around social information, and comparing language-based communications to the more physical communication of primates). In other words, as the effectiveness and breadth of human communication evolved, physical intimacy was suppressed. Human efficacy increased at the price of intimacy; the price for logos was eros.

324. DELGADO, *supra* note 184, at 88.

325. See, e.g., ORWELL, *supra* note 238.

326. See BAUDRILLARD, *supra* note 11, at 25 (positing that culture "clones us" and negates innate differences among people).

327. This point has been acknowledged by an array of political commentators under a number of concepts. See, e.g., ANTONIO GRAMSCI, *THE MODERN PRINCE AND OTHER WRITINGS* (Louis Marks trans., 1957) (discussing the concept of hegemony); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785–89 (2d ed. 1988) (arguing that the right to privacy established in the First Amendment is paramount, because discussion is only valuable when the individuals involved have been able to shape their own thoughts, free from the coercive influence of the government); Friedrich Engels, *Letters on Historical Materialism*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY*, *supra* note 16, at 395, 408 (discussing the concept of "false consciousness" and its vulnerability to "misunderstandings and distortions"); George Orwell, *Politics and the English Language*, in ORWELL: *IN FRONT OF YOUR NOSE, 1945-1950*, at 127, 127 (Sonia Orwell & Ian Angus, eds., Nonpareil 2000) (1968) (remarking on the decline of language, which "must ultimately have political and economic causes").

mind's ability to define things and imagine alternatives. Enzensberger has identified it as the "mind industry."³²⁸ An artist or writer can either participate in this industry by perpetuating cliché or oppose it by attempting to break or transcend cliché.³²⁹

Attorneys, with their talents for analysis and articulation, can play a unique role in the destruction of cliché at a number of levels. Professor Steven Teles's history of the Federalist Society³³⁰ provides a useful tool in thinking about this because it demonstrates how organized and conscientious lawyers can create a narrative for understanding (or obfuscating) reality. Teles has observed that "a regime is most likely to endure when it can make its ideas seem natural, appropriate, and commonsensical, consigning its opponents to the extreme."³³¹ The legitimating role played by lawyers and the courts thus influences a regime's ability to "make its ideas seem natural, appropriate, and commonsensical." As for law's role in supporting a particular hegemonic order, Teles writes:

[F]or legal ideas to be taken seriously by the courts they cannot be seen as wholly novel or outside the realm of legitimate professional opinion. . . . As a consequence, groups with disproportionate control of the institutions that produce and legitimate legal ideas, groups who have legal "authority," will enjoy a significant advantage in persuading judges and other significant legal actors that their demands are legal and appropriate.³³²

The Federalist Society consciously set out to impact which ideas were considered legitimate,

shaking the self-confidence of liberal lawyers by challenging their perceptions that they had a monopoly on serious legal thought. . . . Conservatives were insufficiently "articulate" and their ideas poorly developed, and the budding Society claimed that they could build an organization that could help make conservative ideas both convincing and respectable.³³³

328. HANS MAGNUS ENZENSBERGER, *The Industrialization of the Mind*, in CRITICAL ESSAYS 3, 11 (Reinhold Grimm & Bruce Armstrong eds., 1982) ("The self-appointed elites who run modern societies must try to control people's minds. . . . The few cannot go on accumulating wealth unless they accumulate the power to manipulate the minds of the many. To expropriate manpower they have to expropriate the brain.").

329. See STEVE BACHMANN, EXTREME PROUST: PHILOSOPHY OF THE "MADELEINE MOMENT" 129 (2007) ("The point of art is to assist us past cliché; but again, art can reinforce and create cliché . . .").

330. TELES, *supra* note 86, at 135–80.

331. *Id.* at 16.

332. *Id.* at 12.

333. *Id.* at 140.

The success of the Society is indicated not only by the power that some of its fellows have assumed in the legal and political fields;³³⁴ it is also indicated by the degree to which its ideas, previously largely disregarded by academic and professional establishment, have become mainstream.³³⁵ Inequality is seen as just and natural when, in actuality, the more unequal a society is, the more miserable everyone in it lives, including the rich.³³⁶ Widely-respected members of the legal profession manufacture apologies for torture.³³⁷ These are only a few examples of the ways in which conservative lawyers have legitimated previously unaccepted opinions.

This regime of conservative cliché needs to be challenged by the Left. The American Constitution Society has attempted to assume the role of counterweight to the Federalist Society, but its long-term prospects for success remain to be seen.³³⁸

As suggestive as the history of the Federalist Society has been concerning lawyers' role in the construction of public narrative (or reinforcement of oppressive cliché), two qualifying points must be reiterated. The first is that the cliché industry functions not only in courtrooms and law schools; it also functions in the public square. While progressive attorneys should engage in consciousness-creating activities promulgated in elite circles, they should remember that they often play a leading role in public discourse.³³⁹ They should respond to the language and ideas promulgated by conservative organizations at the grassroots level.³⁴⁰ As a general matter, they might want to contrast perceptions of American freedom with evidence of the lack of freedom in the United

334. See, e.g., *id.* at 158–60 (describing the prominent role Federalist Society leaders played in advising the Bush White House on judicial appointments).

335. See *id.* at 181–82 (“For a good deal of the period [before the Federalist Society’s prominence] the question that loomed over law and economics [the main legal perspective advanced by the Society] was not whether it was right or wrong, but whether it was worthy of being considered at all. . . . Today, law and economics is dominant in private law and plays an important role in much of the rest of legal education.”).

336. See *supra* note 93 and accompanying text.

337. See Rich, *supra* note 79.

338. See Charlie Savage, *Liberal Legal Group Is Following New Administration’s Path to Power*, N.Y. TIMES, Dec. 11, 2008, at A30 (“[T]he American Constitution Society, founded in 2001 to be a liberal counterweight to the conservative Federalist Society, is rising to power. . . . [T]he society’s affiliates are already well positioned to shape legal policy, hiring decisions and judicial nominations for years to come.”).

339. See, e.g., Peter Lattman, WSJ.com, Law Blog, Lawyers in the U.S. Senate Quiz: The Answers (Sept. 5, 2007), <http://blogs.wsj.com/law/2007/09/05/lawyers-in-the-us-senate-quiz-the-answers/> (noting that sixty percent of Senators hold law degrees, and a large number of those practiced before entering politics). According to the American Bar Association (the ABA), there are 1,143,358 lawyers in the United States as of December 2006, or less than one percent of the population, and yet the ABA reports that the 110th Congress had 174 attorneys in House of Representatives, or forty percent of 535 seats. *Id.*

340. See *supra* notes 119–34 and accompanying text.

States³⁴¹ and challenge the false assumptions of proponents of capitalist markets.³⁴² Lawyers would do well to remind themselves and the public that market theory does not always comport with reality³⁴³ and that human beings are more than just automatons seeking to maximize consumption.³⁴⁴ Human impulses towards empathy,³⁴⁵ self-actualization, and ecstasy³⁴⁶ constitute equally, if not more, compelling motivations relative to material desires. Indeed, in seeking to change the shape of public discourse, lawyers may wish to look to the Preamble to the U.S. Constitution, which implicitly sets out goals and criteria by which the government is to be judged.³⁴⁷

As Adorno has suggested, the material often trumps the ideological, and often in a very blunt fashion.³⁴⁸ In his book on the conservative legal movement, Teles focused on elite discourse to the degree that one might conclude that history moves only because smart people weave fascinating narratives.³⁴⁹ Teles failed to note the laundry list of conservative organizations that preceded the formation of the Federalist Society in 1982.³⁵⁰ His detail of conservative financing of the Federalist Society is impressive, but he does not seem to acknowledge how that money created

341. One could see the high rates of incarceration in the United States as evidence of the lack of freedom in this country. See, e.g., David Cole, *Can Our Shameful Prisons Be Reformed?*, N.Y. REV. BOOKS Nov. 19, 2009, at 41 (describing troubling trends in the high rates of incarceration, including dramatic racial differences and the consequences of the War on Drugs); David Runciman, *How Messy It All Is*, LONDON REV. BOOKS, Oct. 22, 2009, at 3, 3 (observing that a graph comparing American prison rates to those of other developed countries must “be recorded on a log scale, because otherwise the US would be off the chart, even off the page”).

342. See, e.g., John Lanchester, *Bankocracy*, LONDON REV. BOOKS, Nov. 5, 2009, at 35. In discussing the American financial system following the 2008 subprime mortgage crash, Lanchester suggests: “[P]erhaps we should try and think of a name for the new economic system, which certainly isn’t capitalism: that, remember, is all about ‘creative destruction’, and the freedom to fail. That’s exactly what we don’t have.” *Id.* at 36.

343. See *supra* notes 47, 52–53 and accompanying text.

344. See *supra* notes 268–71 and accompanying text.

345. *Id.*

346. See generally BACHMANN, *supra* note 329; ABRAHAM H. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* (Arkana 1993) (1971) (discussing the biological settings required for the actualization of humans).

347. U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”). For a report card as of 1987, see BACHMANN, *supra* note 321, at 154.

348. See ADORNO, *supra* note 17, at 365–66 (asserting that philosophy has “slipped into material questions of existence” and describing vividly the sensations of the physical world).

349. See TELES, *supra* note 86, at 179 (identifying the Federalist Society, composed of legal elites, as the most successful “case of conservative mobilization outside of economic and foreign policy, with the exception of welfare reform”).

350. See *supra* note 119.

salaries and jobs which allowed conservatives elites to manufacture ideas. He discussed a Federalist Society “public effort” to bring Harvard Law School “under control,”³⁵¹ but he focused more on the law and economics proponents who were brought into the law school, as opposed to those who were affirmatively excluded.³⁵² Finally, while Teles minimized the importance of electoral activity,³⁵³ one has to wonder how seriously he or anyone else would be taking the Federalist Society and law and economics if their members had not enjoyed so much success in having their colleagues appointed to judicial benches by elected officials.³⁵⁴

In 1984, I alluded to a conception of the law as an argument over values and their implementation. That values are implemented through discourse as well as material struggle is something that the last twenty-five years have underlined. Another quote from Obama provides a closing for this section as well as a segue to the next: “The law is also memory; the law also records a long-running conversation, a nation arguing with its conscience.”³⁵⁵

CONCLUSION: BACK TO THE FUTURE AND BACK

*Fail again. Fail better.*³⁵⁶

It remains unclear how much longer evolution’s experiment with humans will continue. To some degree, I see the last 50,000 to 100,000 years as a sporadic series of candles being lit in darkness. Sometimes there is more light and warmth; a lot of times it is dark to a depressing degree. One idea which has given me comfort comes from the English historian E.P. Thompson, who stated that, while we cannot change the facts of history, there are values expressed in history which we may either repudiate or affirm. In Thompson’s words, we have the opportunity to “shake Swift by the hand.”³⁵⁷ Various of my articles (including the 1984 article) have attempted to shake hands with the past and extend handshakes to the future. With this opportunity I have been allowed to shake hands with myself—and extend more offers to the future. The person who wants to engage in work that ratifies and extends the work of Swift and others like him may wish to keep these remarks in mind: on the

351. TELES, *supra* note 86, at 196.

352. *Id.* at 181–219.

353. *See id.* at 9 (observing that “nonelectoral dimensions of party activity have become increasingly important” in this “era of electoral displacement”).

354. *See, e.g., id.* at 158–60 (describing the prominent role Federalist Society leaders played in advising the Bush White House on judicial appointments).

355. OBAMA, *supra* note 276, at 437.

356. SAMUEL BECKETT, *WESTWARD HO* 7 (1983).

357. E.P. THOMPSON: *THE POVERTY OF THEORY & OTHER ESSAYS* 42 (1978).

one hand, we may stand on the brink of some new epoch in human progress; on the other hand, rust never sleeps.³⁵⁸

Yet to maintain the spirit of critique, I will add one corrective to Thompson's otherwise wise and moving meditation. To a degree, Thompson gives human actors too little credit for impacting history. Prior to 1960, one would have to work hard to conceive of non-white, non-upper class, non-manly persons appearing on history's stage as actors. It simply made limited sense, given the histories one had read and the histories one had lived. By contrast, by 1975, virtually everyone recognized that non-white, non-upper class, non-manly persons could appear on history's stage as actors.³⁵⁹ In one sense, that was what the 1960s were about: these non-white, non-upper class, non-manly persons demanding to be acknowledged. As a result, historians had to look at history anew.³⁶⁰ The historical facts did not change—non-white, non-upper class, non-manly persons had always been there; rather, it was a matter of posing the question, of deciding what to look for, and of acknowledging what was possible. And thus history changed, because of the efforts of recalcitrant Blacks, uppity women, stubborn Asian peasants, striking Latinos, rioting gays, and so forth.³⁶¹

In short, when one tries to make the history of one's own generation, one not only reaches out to shake hands with those from the past and those in the future. One also enjoys the potential of inducing the review, revision, and rewriting of history.³⁶² Even lawyers can sometimes do this,

358. NEIL YOUNG & CRAZY HORSE, *RUST NEVER SLEEPS* (Reprise Records 1979). See also BERTOLT BRECHT, *WAR PRIMER* 81 (John Willet trans. & ed., Libris 1998) (1955) (featuring a picture of Adolf Hitler) ("That's how the world was going to be run! / . . . / (In case you think the battle has been won) — / The womb is fertile from which that crept.").

359. See, e.g., PHILIP JENKINS, *DECADE OF NIGHTMARES: THE END OF THE SIXTIES AND THE MAKING OF EIGHTIES AMERICA* (2006) (documenting the advances in gender and racial equality that marked the 1960s and their impact on American society); MARK HAMILTON LYTLE, *AMERICA'S UNCIVIL WARS: THE SIXTIES ERA FROM ELVIS TO THE FALL OF RICHARD NIXON* (2006) (describing the upheaval along racial, gender, class, and other lines during the 1960s).

360. See Richard J. Evans, *Cite Ourselves!*, LONDON REV. BOOKS, Dec. 3, 2009, at 12 (describing the development of a school of thought by French historians during the 1960s).

361. While history has irrevocably changed, during the resurrection of the conservative movement that began in the 1980s, conservative historians began trying to minimize the importance and efficacy of previous social change organizing. For example, mainstream works concluded that the revolutions in France and Britain were tawdry and unnecessary. See e.g., SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* (1989); Mark Kishlansky, *Mighty Causes*, LONDON REV. BOOKS, June 11, 2009, at 31 (reviewing BLAIR WORDEN, *THE ENGLISH CIVIL WARS: 1640-1660* (2010)). Thus, the efforts to achieve present victories must not ignore the power of future historians to rewrite today's events.

362. Some instances of new interpretations of history made more possible and credible by the 1960s include, e.g., JOHN DOMINIC CROSSAN, *THE HISTORICAL JESUS: THE LIFE OF A MEDITERRANEAN JEWISH PEASANT* (1991) (exploring the life of Jesus from a historical and anthropological perspective); EUGENE D. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION* (1969) (tracing the conflicting tendencies of slave

but they may wish to pay attention to history (and yes, biology) to ensure that their impact on history has the greatest efficacy. And they should remind themselves and everyone else that if they get it wrong—or do nothing—they also risk having history rewritten in an even more dismal fashion. *La lutte continue.*

regimes); EDWARD W. SAID, *ORIENTALISM* (1978) (presenting a study of Orientalism).

