RESISTANCES AND POSSIBILITIES: A CRITICAL AND PRACTICAL LOOK AT PUBLIC INTEREST LAWYERING

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I
INTRODUCTION: CRITICAL LAWYERING

A critical perspective is beginning to emerge in the field of lawyering for the disadvantaged. It has been variously referred to as "critical lawyering,"[1] "rebellious idea of lawyering,"[2] and "the new public interest law."[3] It is an approach that questions the effectiveness of well-established concepts of lawyer-advocacy on behalf of poor and otherwise marginalized groups, and raises troubling issues for many whose ideas of lawyering for the disadvantaged have

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1. Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991) [hereinafter Trubek, *Critical Lawyering*].

2. Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 71 GEO. L.J. 1603 (1982-83) [hereinafter Lopez, *Reconceiving Civil Rights Practice*].

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

remained essentially unchanged since the War on Poverty.[4] The "critical lawyers" (as we will call them) observe that neither our society nor our ideas about how to change it have improved much since that time. If anything, things have gotten worse for marginalized people and their advocates in the eighties.[5] The new critical approaches to poverty lawyering are a response to this increasingly inhospitable and apparently intractable situation,[6] as well as a rejection of older models of lawyering which have not succeeded in bringing about promised change.[7]

In this Article, we attempt to illustrate the "critical lawyering" perspective in three ways: first, by identifying some aspects of the traditional approaches to public interest lawyering rejected by the critical lawyers; second, by providing an overview of the critical lawyer's constructive vision; and third, by recounting the stories of two new practitioners as they negotiate difficult transitions from traditional to critical lawyering approaches. We then make a number of observations regarding the matrix of personal, professional, and practical obstacles faced by public interest practitioners who seek to radically change their approach and realize the transformative potential of the critical lawyering vision.

Our observations regarding "resistances" and "possibilities" correspond to the dual goals of this Article. We seek both to advance critical lawyering as a viable alternative to traditional public interest practice and to explore the practical difficulties of its realization. We hope that this Article may both inspire practitioners of public interest law to begin to rethink their own practices, as well as contribute to an emerging body of scholarship by examining some of the practical barriers to the realization of the critical lawyering vision.

A. The Traditional Conception of Public Interest Law

To avoid confusion, we have chosen in this Article to use the term public interest law in its broadest possible sense, to capture all of the ways in which legal services are provided to individuals, groups, and causes which for finan-

4. For a brief synopsis of the history of public interest lawyering during the last 20 years, see Johnson, *supra* note 3. *See also* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980'S AND BEYOND (1989); COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA: A REPORT (1976); JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); BURTON A. WEISBROD, JOEL F. HANDLER & NEIL K. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC ANALYSIS AND INSTITUTIONAL ANALYSIS (1978).

5. *See generally* Anita P. Arriola & Sidney M. Wolinsky, *Public Interest Law in Practice: The Law and Reality*, 34 HASTINGS L.J. 1207 (1983); John Dooley & Alan Houseman, *Legal Services in the 80's and Challenges Facing the Poor*, 15 CLEARINGHOUSE REV. 704 (1982).

6. Peter Gabel, *Dukakis's Defeat and the Transformative Possibilities of Legal Culture* TIKKUN, Mar.-Apr. 1987, at 13 [hereinafter Gabel, *Dukakis's Defeat*].

7. *See* Lopez, *Reconceiving Civil Rights Practice*, *supra* note 2; GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992) [hereinafter LOPEZ, REBELLIOUS LAWYERING].

cial or organizational reasons would not otherwise be represented.[8] Public interest law also has a much narrower meaning, referring specifically to the phenomenon of independently funded public interest law centers which began to emerge in the United States during the sixties.[9] In addition to public interest law centers, many poverty lawyers in the United States have also been employed by the government funded Legal Services Corporation founded in the 1960s.[10] We understand public interest lawyering to include, in addition to those examples, other types of radical lawyering, poverty lawyering, and specialized advocacy for diffuse interests such as consumers and the environment.[11] Additionally, as the resources available to most providers of legal services for underrepresented groups shrank during the 1980s, lawyers in private practice doing work on a no-fee or pro bono basis have become increasingly significant providers of legal services to low-income or otherwise disadvantaged groups and thus are also included in our definition.[12]

Several interrelated premises common to the traditional approaches to public interest lawyering are becoming increasingly problematic. They include the faith in available policy solutions (the War on Poverty, for example), the reliance on procedural strategies to attain benefits for those traditionally underrepresented, and the effectiveness of advocacy in traditional arenas (such as the litigation strategy which culminated in *Brown v. Board of Education*[13]). Public interest law was seen as correcting the deficiencies of the legal marketplace and legitimizing the welfare state by providing representation to otherwise unrepresented groups.[14] Emphasis was placed on "process-oriented" responses to social inequities.[15] Traditional public interest law relied on the ability of advocacy in traditional legal forums, particularly the courts, to obtain sought-after changes.[16] This approach rested in a belief in the efficacy of "rights" as a vehicle for disempowered groups to establish claims to social

8. For a comprehensive survey of the various definitions of public interest law, see JEREMY COOPER, KEYGUIDE TO INFORMATION SOURCES IN PUBLIC INTEREST LAW (1991). Cooper concludes, as we do, that "whereas the details surrounding the precise definition of the term 'public interest law' are the subject of some controversy and divergence, there is a remarkably consistent consensus as to what constitutes its broad themes." *Id.* at 5.

9. *See, e.g.*, Charles R. Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 118 (1974) (drawing distinction between poverty or civil rights lawyers and public interest law firms).

10. For an historical account of the early years of the legal services program, see EARL JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974). *See also* JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

11. Johnson, *supra* note 3.

12. ARON, *supra* note 4.

13. 347 U.S. 483 (1954).

14. ARON, *supra* note 4.

15. The paradigmatic example is the case of Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOKLYN LAW REVIEW 729 (1990).

16. *See* Susan M. Olson, *The Political Evolution of Interest Group Litigation, in* GOVERNING THROUGH COURTS (Richard A.L. Gambitta, Marlynn L. May & James C. Foster eds., 1981); *see also* LOUISE TRUBEK & DAVID TRUBEK, *Civic Justice Through Civil Justice: A New*

goods.[17] Traditionally, public interest lawyers sought solutions to the social problems confronted by their clients within the legal system.[18]

Multiple and competing visions of lawyer professionalism also formed part of the old approaches to public interest lawyering. While we can provide no single model of the traditional public interest lawyer as "professional," the interplay of various "ideals" significantly shaped the approaches of traditional lawyers to their practices. Thus, they factor into the construction of critical lawyering. One longstanding conception of the legal professional is of an individual who engages in the zealously partisan representation of her clients' interests; however, this ideal competes with notions of the lawyer as an officer of the court who must consider the public interest as well as the interest of her clients.[19] Intertwined with this tension is the debate over the need for the lawyer to maintain a degree of professional independence from the client.[20] In formulating their new approaches to lawyering practices, critical lawyers are constrained to an extent by the concepts and professional ideals formulated by a previous generation of public interest practitioners.

B. The Critique of Public Interest Lawyering

The emerging critical literature on lawyering for the disadvantaged is diverse and multifaceted. Some critiques pinpoint the seemingly inevitable distortions and misunderstandings which arise out of lawyer/client discourse,[21] while others look more broadly at the potential for political mobilization for social reforms.[22] Some of the critiques are visionary[23] while others provide

Approach to Public Interest Advocacy in the United States, in ACCESS JUSTICE IN THE WELFARE STATE 119, 122-25 (Mauro Cappelletti ed., 1981).

17. The critical legal studies "critique of rights" is well known. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). More recent re-examinations of the use of individual legal rights as an instrument of social change include Judy Fudge, *What Do We Mean By Law and Social Transformation?*, 5 CANADIAN J. L. AND SOC'Y 47 (1990); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) [hereinafter Schneider, *Dialectic*]; Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

18. *See* Johnson, *supra* note 3, at 175 ("The architects of [old public interest law] believed that improving access to legal services and instituting procedural rationality would yield substantive results. Although the ultimate goal of public interest law was to effect substantive changes in social life, most lawyers' immediate strategies were often procedural.").

19. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); William Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) [hereinafter Simon, *Visions of Practice*]; William Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985); William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1989) [hereinafter Simon, *Ethical Discretion*].

20. Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

21. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law*]; Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Mrs. G.*].

22. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal The-*

more practical suggestions for reform.[24] The following is our overview of the central tenets of the critical lawyering vision:

HUMANIZE: resist reduction of client stories to legal categories;[25] frame issues in human terms.[26]

POLITICIZE: use critical legal theory to provide insight into the contingent nature of client disempowerment;[27] apply feminist and anti-racist analysis to help resist marginalization of clients' voices.[28]

COLLABORATE: encourage participation of clients and client groups in practice decisions;[29] attempt to dismantle the lawyer/client hierarchy.[30]

STRATEGIZE: seek to access client experiences regarding strategies for struggle and resistance;[31] develop a healthy skepticism regarding traditional advocacy arenas;[32] continually re-evaluate advocacy effectiveness from a client perspective.

ORGANIZE: encourage organization and collective efforts by clients;[33] work with existing social movements and client groups.

These premises form an evocative, yet sketchy, outline of an alternative vision of lawyering, which we see as a starting point for practitioners seeking to avoid the limitations of traditional lawyering. In this Article, we suggest how practitioners might get to the "there" of the critical lawyering vision from the "here" of the dominant (and often unsatisfactory) traditional practice. Our project is both a theoretical and a practical one. The emerging literature on critical lawyering presents a viable alternative to the dominant lawyering practices which it critiques; however, we see many practical obstacles which could seriously impede the efforts of public interest lawyers who want to transform their lawyering. In order for critical lawyering to become more than an attractive but unrealized vision, it is necessary to begin to identify these obstacles and the factors which empower or disempower practitioners in their encounters with them. What we are describing is essentially an ideological

ory and the Practice of Law, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983) [hereinafter Gabel & Harris, *Building Power*]; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987) [hereinafter White, *Mobilization*].

23. Simon, *Visions of Practice*, *supra* note 19; Simon, *Ethical Discretion*, *supra* note 19.

24. *See* Trubek, *Critical Lawyering*, *supra* note 1; LOPEZ, REBELLIOUS LAWYERING, *supra* note 7.

25. Alfieri, *Reconstructive Poverty Law*, *supra* note 21; White, *Mrs. G.*, *supra* note 21.

26. Trubek, *Critical Lawyering*, *supra* note 1.

27. Simon, *Visions of Practice*, *supra* note 19; Gabel & Harris, *Building Power*, *supra* note 22.

28. White, *Mrs. G*, *supra* note 21; Schneider, *Dialectic*, *supra* note 17.

29. Lopez, *Reconceiving Civil Rights Practice*, *supra* note 2; Paul Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

30. William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 [hereinafter Felstiner & Sarat, *Enactments of Power*].

31. LOPEZ, REBELLIOUS LAWYERING, *supra* note 7.

32. Trubek, *Critical Lawyering*, *supra* note 1.

33. White, *Mobilization*, *supra* note 22.

struggle over the constitution and re-constitution of the meaning of lawyer's practices.[34] Our goal is to identify those arenas in which this struggle is located, where partial and provisional shifts in meaning, which we call "transformative moments," can and do occur.

C. *Narratives of Transformative Moments*

In order to illustrate both the possibilities for the development of alternative critical approaches to public interest lawyering and the sources of resistance which limit the realization of those possibilities, we have chosen to recount the stories of two new public interest lawyers.[35] Each story focuses on a transformative moment in which a lawyer, encountering the limits of traditional public interest practice, shifts to new models of lawyering. In our analysis following each story, we explore the factors which enabled or hindered our practitioners to make these radical moves toward alternative models of practice. We conclude with some general observations regarding the factors which seem to impact most significantly on these transformative moments.

Our reasons for utilizing the narrative method are fourfold. First, we believe that legitimate and effective alternative approaches to social change lawyering must emerge from actual lawyers' practices and their reflections on those experiences, rather than theoretical meta-narratives which serve to legitimate particular approaches to social change lawyering in the abstract.[36] Second, we believe that many of the sources of resistance arise from assumptions

34. For an insightful theoretical discussion of lawyering practices as ideological battleground, see Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, *in* LAWYERS' IDEALS-LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1 (Robert L. Nelson, David M. Trubek, Rayman L. Solomon eds., 1992) [hereinafter Nelson & Trubek, *New Problems and New Paradigms*].

35. The value of storytelling to legal scholarship has been frequently affirmed in recent literature. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Steven Winter, *The Cognitive Dimension of the Agon Between Literal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989). Like Winter, we believe that narrative is "an iconoclastic tool of persuasion to legal and social change." *Id.* at 2228. *See generally* Symposium, *Legal Storytelling*, 87 MICH. L. REV. (1989). For other observations on the use of narrative in legal scholarship, see Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992); Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1 (1990). *Cf.* Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992) (suggesting that the use of narrative has not gone far enough, particularly with respect to the image of "Bad Mothers").

36. The notion that reflection upon practice can give rise to knowledge which may provide the foundation for constructive social change is by no means new. *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1968). The idea of a reflective practitioner as a researcher in the practice context is comprehensively advanced by DONALD SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). Nancy Fraser and Linda Nicholson also provide a parallel description of the task of scientists in the postmodern era; that they, like the lawyers in our stories, must "problematize, modify, and warrant the constitutive norms of their own practice even as they engage in it." Nancy Fraser & Linda Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, *in* UNIVERSAL ABANDON? 83, 87 (Andrew Ross ed., 1988).

regarding the professional role of lawyers and appropriate routes for social change advocacy which public interest lawyers themselves have internalized. These are basic assumptions which, by forming part of the lens through which we view the world, become transparent to us.[37] Our stories help us to reveal the role played by such assumptions in the practices of individual lawyers. Third, by providing thick descriptions[38] of lawyers' experiences, we hope to capture some of the complexity of the contexts in which the possibilities and resistances we describe are manifested, as well as illuminate the contextual way in which the lawyers, as reflective practitioners, work out their solutions.[39] Finally, our narratives provide an opportunity to analyze the role of gender in the construction and re-construction of lawyering practices.[40] Our choice of the narrative form in particular reflects its suitability as a method of feminist analysis.[41]

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37. Richard Delgado observes that:

> Social reality is constructed, patterns of perception become habitual, tempting us to believe that the way things are is inevitable or the best that can be in an imperfect world.
>
> Stories, parables, chronicles and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. . . . These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.

Delgado, *supra* note 35, at 2413 (citations omitted).

38. *See generally* CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture, in* THE INTERPRETATION OF CULTURES 3, 10 (1973) (describing the complex network of conceptual structures which give multiple levels of significance to any single action).

39. Lawyering practices, like social meaning, are socially constructed, within the parameters of particular contexts. For a useful discussion of the process of social construction of meaning which draws extensively on experientialist cognitive theory, see Steven Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989). *See also* Winter, *supra* note 35.

40. *See infra* note 71. We consider that our Article provides a partial response to the questions articulated by Carrie Menkel Meadow in *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989), on the "feminization of the legal profession."

> [W]e might look at particular forms of practice that have already experienced some form of 'feminization' (where women lawyers are numerous as, e.g. in some public interest or government sector law offices) and compare them with comparable 'male dominated' offices to see whether gender has played or can play a role in redefining both substantive doctrinal developments and practice. Could [the] call for the elaboration of an 'ethic of care' emerge from 'thick descriptions' of law offices where alternative legal work is carried on?

Id. at 317.

41. On the use of narrative as feminist method, see INTERPRETING WOMEN'S LIVES: FEMINIST THEORY AND PERSONAL NARRATIVES 4 (Personal Narratives Group eds., 1989) ("Since feminist theory is grounded in women's lives and aims to analyze the role and meaning of gender in those lives and in society, women's personal narratives are essential primary documents for feminist research . . . ."); *see also* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1992).

Our first story concerns a young litigator in a private law firm who takes a civil action for sexual assault on a pro bono basis. The second is about a young practitioner in a public interest law firm affiliated with a law school clinic confronting the challenge of designing a program to address the needs of a community of poor women and children.[42]

II
A STORY OF A PRO BONO COLLABORATION: SUSAN AND KATHY

A. The Story

Susan is a twenty-seven-year-old attorney who recently started working at a big corporate law firm in downtown Toronto. She chose the firm in part because they had told her she would be able to spend some of her time working on a no-fee basis for clients who could not otherwise obtain legal assistance. Susan had a long-standing commitment to feminist issues and eventually wanted to be able to use her legal skills on behalf of women. After she had been practicing awhile, she put her name on a list of volunteer attorneys kept by a feminist advocacy organization that did outreach, public education, and litigation on a wide range of legal issues that particularly affected women. Susan did not have to wait long before her first pro bono referral case was sent from the organization. The client, Kathy, had been sexually assaulted by her psychiatrist, Dr. Mann, when she was a sixteen-year-old inpatient at a psychiatric ward in a local hospital.

Kathy was now thirty-five years old. Several years earlier she went to the police with her account of the sexual assaults she had endured while a patient of Dr. Mann. As a result of her report, a charge was made and a criminal trial held. At the trial, Dr. Mann did not deny that sexual contact had occurred. Instead, he claimed that Kathy had been a consensual participant in the encounters, despite the fact that his clinical notes described her at the time as having extraordinarily low self-esteem and suicidal tendencies.

Although Dr. Mann was found guilty at the criminal trial, he was given a very light sentence because of what one sentencing report described as the "non-predatory" nature of his crime.[43] Kathy, who had made several serious

42. While the stories are fictional accounts, they draw upon situations in which we have had an opportunity to participate or observe. Recognizing that the extent to which general conclusions regarding transformative lawyering practices can be drawn from these two stories is questionable, we make no claims to do so. Our purpose in presenting them is simply to provoke a more grounded discussion about the ways in which lawyering practices can be transformed. While we try to suggest that the conversation can be a general one, including private firm pro bono work as well as public interest firms, litigation and non-litigation approaches, we also recognize that our discussion is limited by its focus on the situation of young, white, female practitioners. Our hope is that this Article will encourage others to contribute stories grounded in other experiences and perspectives to add to our own.

43. For an extended and useful discussion of the social constructions which give rise to this type of an assessment, see SUSAN ESTRICH, REAL RAPE (1987). In Estrich's analysis, the fact that Kathy knew the doctor, that she used no physical force to repel his advances, and that

attempts on her life after the incidents with Dr. Mann, was deeply disappointed with the entire criminal process, especially the sentencing. Even though the doctor had been convicted, Kathy felt that she had been put on trial by the doctor's "defense" that the encounters had been consensual.[44] Dr. Mann's argument seemed to have been implicitly adopted in the findings of the pre-sentence report. It appeared to Kathy that while her own character had been subject to minute scrutiny, the significance of the doctor's violation had been minimized during the entire criminal process. Therefore, as she told Susan, she wanted to pursue any avenue available to her to restore her sense of self-esteem and to challenge the trivialization and marginalization of the crime committed against her. The only legal course of action available to her now was to sue Dr. Mann for assault and seek monetary damages, which is what brought her to Susan.

It was clear to Susan after their first meeting that Kathy had suffered a great deal of emotional trauma as a result of the deep violation of personal and professional trust she had experienced by Dr. Mann. Susan realized how much Kathy had done to overcome the damage that had been caused during that period in her life. She had been married and divorced. She had obtained custody of her two young children and had recently returned to college. She was open about her sexual identity as a lesbian and was active in a gay rights group. Although she was continuing to undergo therapy with a female psychiatrist who specialized in counseling survivors of sexual assault, Kathy had long since overcome the problems which had led to her admission as an inpatient on Dr. Mann's ward.

As Susan got to know Kathy better during their first few interviews, she learned that Kathy was very protective of her privacy, insistent on controlling all aspects of her potential lawsuit, and deeply suspicious of bureaucracy, authority figures, and the processes and procedures of the courts. In fact, Kathy had summarily dismissed the first attorney referred to her by the women's advocacy organization. As she told Susan, the other attorney had sent out a routine court document for filing with Kathy's address on it without prior

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some time passed before her complaint was filed are all factors which contribute to the social characterization of her victimization as other than "real rape." *See also* Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, 18 INT. J. SOC. L. 125 (1990) (discussing the way in which the social construction of rape in the court room leads to speculation about the victim's responsibility for the rape); Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992).

44. It is a common observation that in rape (or sexual assault) trials, it is the victim rather than the accused who is "on trial." *See* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1058 (1991) ("Rape is the only crime which involves a role reversal between the accused and the accuser — thereby placing the victim on trial. The female victim must prove her innocence while the male defendant is treated as if he had been defamed."); *see also* Lynda Holmstrom & Ann Burgess, *The Victim and the Criminal Justice System*, 3 INT'L J. CRIMINOLOGY AND PENOLOGY 101, 107 (1975) ("[I]t becomes clear that in people's minds the victim is as much on trial as the defendant . . . ."); ESTRICH, *supra* note 43.

consultation. Kathy considered the publication of her address on the document without her knowledge to be an irredeemable breach of trust and promptly dismissed the attorney. Susan was surprised and distressed to hear this story. She knew the other attorney was competent and well-respected. She realized that she would probably have done the same thing herself, had she not been so clearly forewarned of Kathy's deep and abiding concerns about privacy.

Although Susan had not been practicing for very long, Kathy's recounting of the previous lawyer's failing set off professional warning bells. Was Kathy going to be one of those difficult clients that no one wants to have to deal with because they are frequently inquiring about the progress of their case and are a drain on time and resources? Ignoring the warnings she had heard about the potential headaches that a client like Kathy posed for an attorney, Susan decided to tell Kathy that she would be pleased to take on her case. She felt that in the course of their initial meetings, she had been able to identify with the older woman's perspective and had begun to gain her trust. When Kathy replied that she felt comfortable with Susan as her new attorney, Susan was particularly pleased and looked forward to obtaining a successful outcome for Kathy.

Some months after Susan had been retained, the attorney for Dr. Mann sent her a "routine" request for Kathy's psychiatric records. When Susan explained the request to Kathy, she responded with a flat refusal. Although Susan found herself sympathizing with Kathy's response, because of Kathy's intense desire to protect her privacy, she also knew that there were no legitimate "legal" grounds on which to base such a refusal. Susan found herself caught in a double bind — any failure to obey her client's instructions would be grounds for a negligence suit, yet a continuing refusal to produce the records would not be looked upon favorably by the court and might even lead to a contempt of court charge against Susan.

If Kathy could not be convinced to change her mind, it appeared that Susan's only choice would be to withdraw from the lawsuit in order to avoid one or the other of these disastrous possibilities. After all, she had her career to be concerned about and neither a negligence suit nor a contempt of court proceeding was going to appear very impressive to the partners who employed her or her future clients. Susan had many good reasons at that point to be less concerned about the achievement of Kathy's goals through the lawsuit than she was about doing the right thing in terms both of the formal ethics codes and the informal codes which governed practice among lawyers in her community. As she understood it, she had a duty to act as a zealous advocate on behalf of her client and to scrupulously follow her client's instructions as long as they were not illegal. Yet, in order to become a respected member of a legal community which values fair dealings between lawyers, and as an officer of the court, she was obliged to follow the accepted rules and procedures. But, Susan wondered, what if the court and the legal community portrayed as a nec-

essary pre-trial procedure something which amounted, in your client's opinion, to a dangerous personal violation?

When Susan was first faced with Kathy's rebellion, she took it personally, and became frustrated and resentful. "Why won't she take my advice?" she thought, "Why can't she just accept that the exchange of documents is a routine part of the litigation process and let me get on with my job?" Susan had come to take pride in her ability to work strategically within the rules of court in order to obtain favorable settlements and court victories for her clients. Most of what she had learned about litigation had been gleaned from colleagues at her firm. She, like them, saw litigation as a challenging game that could be played skillfully. Much of her sense of professional pride came from her colleagues' acknowledgement of "moves" she had made well.

Naturally, she consulted several of them about Kathy's refusal. Their responses were surprisingly uniform. "If your client really wants the financial rewards she might reap from this lawsuit," they said, "she should follow your (expert) advice." "Clients who don't pay for your time have a tendency to waste more of it if you let them" was more of the popular wisdom that was dispensed to her, as well as, "if a client refuses to accept your advice, you can suggest that they might want to find another attorney." They reiterated Susan's earlier concerns that Kathy sounded like a "difficult" client, and perhaps not worth the trouble of representing on a no-fee basis.[45]

While Susan was somewhat suspicious of advice in this vein, it corresponded to some of her own worries about continuing with the case. Since the issue of the records had come up, Kathy had been calling her on a daily basis. The lawsuit was becoming increasingly time-consuming and Susan's other work was piling up. It was beginning to look less and less likely that the case would actually proceed to trial, let alone end up with a favorable result.

While she understood the advice that had been dispensed to her, and was concerned about her own situation, she disliked all the options apparently available. She began to wonder why it was that this case presented such a problem for her. On reflecting, it did seem to her that Kathy's situation was different from most other clients that she dealt with. First, it was not clear to her that Kathy's primary purpose for bringing the lawsuit was a financial one. It seemed to be about something much less material. Second, Susan knew that it was unlikely that Kathy would be able to hire other counsel. For all Susan knew, her refusal to carry on with the case could be the end of the matter for Kathy as well. The relationship she had started to form with Kathy, one based on mutual trust and a shared sense of (feminist) outrage at the leniency with which the legal system had treated Dr. Mann, made it difficult for Susan to maintain the implicit distinction between Kathy as the autonomous and

45. This characterization of the "conventional" view of lawyering finds support in Felstiner and Sarat's research on divorce lawyers. "Lawyers resent and resist the few clients who take an active role in their cases, considering them hostile and problematic rather than helpful and persistent." Felstiner & Sarat, *Enactments of Power*, *supra* note 30, at 1452.

profit-maximizing client and herself as the hired gun professional advisor that underlay her colleagues' advice.

Dissatisfied as she was with her options, Susan had few places to look in her search for alternatives. Neither the Rules of Professional Conduct nor the Code of Ethics provided any useful guidance. She did not personally know anyone who regularly did this type of work and might have been able to help her. The only place she could think of to turn to was the women's advocacy group who had referred the case to her. Troubled by her apparent inability to translate what increasingly seemed to her Kathy's very legitimate objection into a correspondingly legitimate legal framework, she arranged an appointment to speak to one of the women employed by the group. Although this woman was not an attorney, Susan thought she might have some advice for her on how to handle Kathy's situation, and Susan was becoming desperate.

Susan met with Lisa, one of two paid staff members at the women's advocacy office. Lisa was a very young-looking woman in jeans with cropped hair, and Susan felt a bit foolish coming to ask this woman, who looked even younger than Susan was, and was not even a lawyer, to help her with her first pro bono case. But Susan went ahead anyway. As she recounted the story of the records and her client's objection to Lisa, it appeared to her that maybe it was not as much of a dilemma as she had imagined it to be. Hearing herself explain the situation, it seemed to Susan that her concern about the court's requirement for production of the records sounded trivial compared to her client's revulsion at the idea of Dr. Mann having access to the records of her current psychiatrist.

When Susan was finished, Lisa started to talk. She did not comment on Susan's dilemma directly, but instead told Susan about the women's advocacy group, how she had become involved, and about some of the women she had met working there. Lisa spoke about what she learned from the women she worked with and how she related to them. It became clear to Susan that the women's advocacy group had a very different relationship with the women that they worked with than the lawyers she knew had with their clients. Many of the staff and volunteers, including Lisa, had first come to the organization for help after they had experienced a violation similar to Kathy's.[46] They were familiar with and respected the need of women like Kathy to maintain their sense of self-possession. Instead of dismissing Kathy as difficult, Lisa admired her for taking charge of her life.

The longer she talked with Lisa, the more Kathy's objection seemed to make sense to Susan. Kathy had learned the hard way the risk that is posed by exposing one's innermost self to others, and Dr. Mann had already abused her trust once. Indeed, the very possibility that her records might be open to

46. Two powerful critiques of legal responses to violence against women, which arise from or were inspired by the authors' personal experiences, are ESTRICH, *supra* note 43 and Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

inspection was affecting Kathy's ongoing therapy sessions. If Kathy had to provide those records to the author of her past misfortunes she would, in some sense, be forced to return to a stage of her life she had struggled to put behind her. Susan realized that there was something terribly wrong with a system which, in order to provide a remedy to a woman who had been the victim of a sexual assault, required that she relive this experience in the public atmosphere of the court. Kathy would be submitting herself once again to the additional violence of the court's treatment of the crime, and the opposing counsel's treatment of her during cross-examination.[47] To provide them with further ammunition for what was undoubtedly going to be an attempt to cast Kathy as a mentally unstable person seemed a step in the wrong direction. "After all," Susan reflected as she left the office after her meeting with Lisa, "my goal is to try to further Kathy's ongoing struggle to piece together her life after the doctor's assault, not to somehow collaborate in another experience of disempowerment."

Building upon these insights, Susan began unconsciously to realign her professional priorities and expectations. It was almost as if, in the philosophical tug-of-war between her relatively new-found professional allegiances and her long-standing feminist commitment, the old values won out. Her identification with Kathy's cause, whether because of the mutual trust they had begun to develop or as a result of the different perspective Lisa had demonstrated, led Susan to search diligently for a way to subvert the requirement of production of psychiatric records. In doing so, she consciously isolated herself from many of her colleagues at the firm, some of whom might have considered her new course of action a dangerous waste of time. While Susan stood to gain little or no professional recognition for her efforts if successful, she could lose a great deal. She was concerned, yet committed.

Once Susan had begun to grasp Kathy's point of view about the records, it was easier to understand how Kathy approached the entire lawsuit. Instead of thinking about maximizing the amount of damages for which she could argue, Susan began to think about how to use the lawsuit to get across Kathy's message about the seriousness of the doctor's breach of trust. Refusing to produce the psychiatric records began to seem like a very important part of that message. Susan went back to Kathy without having resolved the dilemma, but with a renewed desire to try. After a few more conversations, they were able to come up with a plan.

Once Susan had confirmed that large monetary damages were not Kathy's primary goal, she was able to generate a number of alternative courses of action which had not been suggested by her colleagues. Her ability to come

47. *See supra* note 46. Attempts to constrain the violence of the legal process on rape and sexual assault victims include: rape shield statutes, limited disclosure of victims' identities, and giving evidence by videotape. *See* Paul Marcus & Tara McMahon, *Limiting Disclosure of Rape Victim's Identities*, 64 S. CAL. L. REV. 1019 (1991); Lisa Thielmeyer, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797 (1992).

up with creative alternatives stemmed in part from the fact that she was working much more closely and collaboratively with her client than she, and most of the litigation lawyers in the firm, usually did. Instead of dividing the process of decision making into "technical" legal arenas, in which she usually made most of the decisions, and "substantive" decisions about the conduct of the lawsuit, where she would defer to the client's wishes, Susan was now actively collaborating with her client in every aspect of the lawsuit.

They discussed the potential ups and downs of making a political statement out of refusing to produce the records. It seemed that while Kathy clearly had a point to make, it would be a shame to risk having the entire case thrown out of court for it. Then, Susan came up with another idea. "What if," she said to Kathy, "we abandon your claim for ongoing emotional distress? It will mean a lot less money if you win, but you've told me many times how much better you are now than you were even five years ago. If we don't argue that you're still suffering the consequences, then we don't have to produce your current records."

Kathy's response was positive, but still concerned. "I am still suffering the consequences," she said, "and to say I'm not would also minimize the seriousness of what he did, which is exactly what I'm trying to fight against."

In the end, they settled on a compromise approach which seemed to accomplish both goals: to preserve both the lawsuit and Kathy's privacy by dropping the claim for ongoing damages but building into Kathy's evidence her criticisms of the treatment of her victimization by the legal system. Kathy would still have a good chance for a significant award of damages for the assault, her pain and suffering, and loss of income up to the time of the suit, while preserving the integrity of her ongoing therapy and her own self-presentation by maintaining control over the records and making a political statement concerning her reasons for doing so.

B. Analysis: Elements of a (Potentially) Successful Collaboration

What is perhaps most remarkable about Susan and Kathy's collaboration is its almost accidental quality. Why did Susan react as she did initially to Kathy's refusal? More importantly, what facilitated the change in her thinking? While we can never know the "real" answers to those questions (Susan herself probably does not know), we can engage in some speculation about the factors which influenced her initial and subsequent approaches, in order to make some educated guesses about more and less favorable conditions for transformative moments like Susan's.

At the outset, Susan's underlying assumptions about the nature of her personal obligations and professional role shaped the way she framed the problem presented by Kathy's case. While her own psychological make-up and political convictions provided a foundation, she was likely to have developed most of her ideas about the roles and responsibilities of lawyers in law

school and in her professional workplaces.[48] In fact, several elements of a familiar outlook underlay her initial approach to the case. They were:

> a) an idea that clients have goals and interests which are formulated outside of and prior to the litigation process;
> b) an understanding of legal expertise as value-neutral technical knowledge which can be deployed on behalf of a variety of client interests; and
> c) a concomitant separation of the appropriate roles of lawyer and client, the lawyer not questioning the client's goals and the client not questioning the lawyer's expertise.[49]

In order to appreciate Susan's eventual rejection of these elements, it is necessary to examine each in more detail. First, the notion that clients bring problems to lawyers which contain fully formed and particularized goals and interests, although linked to the very powerful professional vision of the lawyer's role as a zealous advocate, is problematic.[50] What really happens when a client first arrives in a lawyer's office is that she tells the lawyer a complicated story which contains a series of deeply interwoven legal and extra-legal elements. The lawyer's "expertise" enables her to reduce the initial "mess" to a legal "problem" which can be "solved" in a number of different ways. Experienced lawyers are able to do this task much more quickly and efficiently than new lawyers, who sometimes struggle with "irrelevant" details before identifying the "real" (legal) questions.

Of course, the lawyer's process of determining relevance is self-referential, in the sense that only problems which fit the frameworks set up by the lawyer are going to be unearthed in this process, while others, more resistant of purely "legal" solutions, will be dropped out. Indeed, a lawyer's area of specialty may further contribute to this process, leading litigators, for example, to identify options which involve lawsuits. In this way, the lawyer imposes an agenda and a set of goals on a client which may not necessarily coincide with the client's own priorities.[51] Ironically, the better the lawyer is

48. For a clear and insightful theoretical discussion of the need to examine the legal workplace as an "arena" in which professional ideology is constructed, see Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS-LAWYERS' PRACTICES, *supra* note 34, at 177 [hereinafter Nelson & Trubek, *Arenas of Professionalism*].

49. For a more complete discussion of these issues, see *supra* note 19.

50. There is a significant amount of literature examining the social construction of "disputes" which tends to subvert this notion. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming, . . .*, 15 LAW & SOC'Y REV. 631 (1980-81); David Trubek, *The Construction and Deconstruction of a Disputes-focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1980-81); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court and the Construction of Community in an New England Town*, 22 LAW & SOC'Y REV. 409 (1988); Barbara Yngvesson & Lynn Mather, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980-81).

51. William L.F. Felstiner and Austin Sarat's work on divorce lawyers is perhaps the best available analysis of this process. *See generally* William L.F. Felstiner & Austin Sarat, *Law and*

at doing this task of issue identification, the less likely it is that the client's story will play a dominant role in the process. The understanding that the lawyer's technique of issue identification is a fundamental part of the process of the formulation of what are considered to be the client's aims and goals carries troubling implications for the notion of the lawyer as hired gun. Not only do lawyers supply the ammunition in this analogy, but they collaborate in determining where the weapon will be pointed and when to pull the trigger.[52]

The second assumption of this "hired gun" formulation is the idea that legal expertise is a kind of technical knowledge which can be "deployed" on behalf of any particular end or interest. By thinking of one's legal knowledge as technical in this way, it is easy to reduce the treatment of individual cases to a series of similar mechanical exercises and difficult to make relevant and important distinctions. The better a lawyer gets at the mechanical exercises, the less likely she is to vary her approach to the treatment of different cases.[53] When applied to public interest practice, this way of thinking can lead to the erroneous assumption that making one's skills available to disadvantaged clients is all one can and should be required to do to rectify the social inequities that are thought to require and justify public interest law.[54]

This understanding of the nature of legal expertise and its uses furthers the characterization of the lawyer-client relationship as an arm's-length transaction. In this view, held by most of Susan's colleagues as well as many traditional public interest practitioners, the roles of lawyer and client are quite distinct. The lawyer is committed to deploy her services to the best of her ability on behalf of the client and not to breach any confidences, while the client pays the bills (if she is able) and trusts the lawyer's capabilities to achieve her ends. The lawyer is neutral and autonomous as to the morality or politics of the client's goals, so long as they are not illegal or likely to cause immediate physical harm to anyone.[55]

Ultimately, Susan rejected this model of the lawyer/client relationship. While at the outset Susan might have been inclined to discount Kathy's objection about disclosure as a "personal" reaction irrelevant to the "legal" problems that were in her realm of expertise, ultimately, she failed to convince

Strategy in the Divorce Lawyer's Office, 20 LAW & SOC'Y REV. 93 (1986); William L.F. Felstiner & Austin Sarat, *Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737 (1988); William L.F. Felstiner & Austin Sarat, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989), Felstiner & Sarat, *Enactments of Power*, *supra* note 30.

52. *See generally supra* note 51.

53. *See* Simon, *Ethical Discretion*, *supra* note 19.

54. *See supra* note 17 and accompanying text.

55. This ideal of the "lawyer's amoral role" is the subject of much debate. In support of this notion, see Stephen L. Pepper, *The Lawyer's Amoral Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. For responses to Stephen Pepper, see David Luban, *The Lysistration Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 and Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role,"* 1986 AM. B. FOUND. RES. J. 651. Critiques of the ideal are also found in Simon, *Ethical Discretion*, *supra* note 19 and LUBAN, *supra* note 19.

either Kathy or herself of the distinction. Instead, she was influenced by the example set by her client, who had learned from experience not to place her trust in the "black box" of professional "expertise," and the women's advocate, who respected and learned from the women she worked with because she was one of them. Also, Susan was new to the lawyering game, and perhaps had not yet become fully invested in its internal rules and legitimations. Instead, her personal admiration of Kathy's strength, her feminist convictions, and the trust relationship that they had begun to establish led Susan to continue to struggle to reconcile Kathy's refusal and the successful continuation of her lawsuit.

Eventually, Susan became convinced that the advice she had received from her colleagues, implicitly relying on the familiar lawyering model we have described, was not appropriate for the situation she found herself in. While she probably was not yet able to articulate it in this way, she rejected the traditional model of lawyer/client interaction in favor of a more democratic and collaborative approach. The approach that she eventually took echoes a number of the themes raised by the critical lawyering literature. She was able to humanize her approach through establishing a personal relationship with her client and working to understand the client's perspective. Susan brought to the case a background of feminist critique of existing social institutions, including the courts, which was also shared by her client. They were able to collaborate effectively on the basis of their shared political goals and the trust relationship they had developed. This led to their development of the strategy which was able to maximize their ability to achieve their goals through the legal system without sacrificing Kathy's self-possession or dignity. Ultimately, Kathy's rebellion created the opportunity for Susan and Kathy to work together in sharing and rethinking their approaches to the case and allowed them to develop a new strategy which would be satisfactory to both.[56]

Once Susan changed her perception of Kathy's role in the lawyering process, she was able to view Kathy's objection in a different light. She could accept it as a contribution to the unfolding strategy of the case rather than as an impediment to her own further progress. It allowed her to begin to search for opportunities, both within the parameters of the lawsuit and beyond them. Susan was able to give value to Kathy's desire to protect her dignity and privacy by refusing to disclose the psychiatric records, subjecting Kathy's "psychiatric condition" to scrutiny. Susan began to approach the conduct of Kathy's litigation as dependant upon a continuing consensus between herself and her client, not merely with respect to the ends which are to be reached, but also the means used to obtain the ends.

Susan's transformative moment was not without its consequences. By aligning with her client in her strategic use of the litigation process, she risked

56. We are not suggesting that every client rebellion necessarily contains hidden opportunities for new tactics, but simply that sometimes they might. If practitioners do not actively hold themselves open to these possibilities, they will invariably miss them.

isolation and criticism from her lawyering community, which had previously been the primary source of her pride in her lawyering skills and an important support network for feedback and advice. As a pro bono practitioner, Susan had to maintain a delicate balance between the work she did for her paying clients (and for her employers at the firm) and the small amount of pro bono work that she was able to indulge in. Not only could she not allow the pro bono work to take over her practice, she had to carefully maintain in separate boxes the "good" lawyering techniques and practices which she had already learned at the firm, and the new approach which she was beginning to develop with Kathy.[57]

Because Susan and Kathy's story ends in the middle of the lawsuit, we do not know whether the tactic they agreed upon was "successful" or not, nor whether either Susan or Kathy was transformed in some way by their collaborative experience. What we sought to draw out of Susan and Kathy's story was much more modest. We have simply examined the factors which both enabled and obstructed the ability of each, in their roles as lawyer and client, to engage collaboratively, strategically, humanistically, and critically in ways which give rise to a lawyering practice more responsive to the needs and goals of the client. In our second story, we examine this conflict in the larger context of the design of a law school clinic.

III
RE-EVALUATING LAWYERING APPROACHES IN A LAW SCHOOL CLINIC

A. The Story

Diane is a young attorney whose first job after law school was with a public interest law firm. Having been a successful student in the law school clinic attached to the firm, Diane was hired by the firm to develop a new clinic focusing on women's issues. As a committed feminist and one of those people who had gone to law school to "save the world," as she put it, she was thrilled with the job. As a student, she had been troubled by the omission of explicitly feminist projects in the clinical program, which focused on a wide range of poverty issues while apparently overlooking their disproportionate impact on women. As a staff attorney, she would now have an opportunity to remedy that oversight.

For some time, Diane had been particularly concerned about the

57. It has been suggested to us that this distinction between "good" pro bono lawyering practices and "good" traditional lawyering (for paying clients) may be an arbitrary one; and that good lawyering always, or frequently, involves the degree of collaboration with one's client that we have described. We recognize that this is certainly an issue which merits further discussion which it will not receive here, since we have chosen in this Article to focus on public interest lawyering practices only. With respect to Susan, there does remain a distinction between the traditional lawyering which she learned (and was expected to perform) at the firm, and the new methods which she was developing in her pro bono practice — whether it is a necessary or useful distinction remains open for discussion.

problems of working class women who were caught between the demands of their workplaces and families. She had read a lot about the stress and poverty experienced by the growing number of female-headed single parent families in America. She was aware of the intersection of racism and sexism which doubly burdened women of color in her community as elsewhere.[58] She knew that a significant population of "working poor" families, most of them African American, lived in the north end of the city in which she now worked. It seemed appropriate that she should try to design the women's advocacy project to respond to the overwhelming needs of this community.

As Diane initially approached the design of her project, she needed to think of a way to frame her issue (women's dual obligations to work and family) in a way which would render it susceptible to some sort of "legal" intervention. At first, she was at a loss. Although she had known from the beginning of law school that she was going to pursue some sort of public interest work, few of her courses had seemed even vaguely relevant to the tasks she was now confronting. Despite her own feelings of inadequacy for the task at hand, the firm seemed to have great faith in her. She was being left virtually on her own to design and implement this entire clinic. Before she was hired, the idea that she would have a great deal of autonomy in her work had sounded attractive (and lawyerly) to Diane, yet once she was in the door, she quickly changed her mind. A little guidance and support from knowledgeable peers was exactly what she needed. She began to develop a network of friends among other public interest-oriented attorneys in her area and to discuss her fledgling project with them. At this early stage of her career, the opinions of her more experienced colleagues were influential with Diane, and her approach to the design of the project reflected that influence.

Diane spent several troubled weeks in her new office staring out her window at the State Capitol across the street, and hashing out ideas for projects with other attorneys before she came up with the idea for her new project. The firm's proximity to the Capitol was not coincidental, since it had a distinguished record of legislative and administrative activism at the state level. Diane was already familiar, from work she had done during her student days at the firm, with the Family and Medical Leave Act that had been recently enacted by the State. The Act was potentially useful, because it provided protected leave for working parents who required it for care-taking or medical reasons. Diane decided that the Act would provide a convenient legal focus for her project to assist working mothers in the city. By focusing on the Act in the period after its inception, she could both assist the women she wanted to work within the community and attempt to ensure that the Act was interpreted in the most generous way possible by the courts.

58. *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988).

Having finally defined a task for herself, Diane quickly developed a three-pronged strategy to ensure the Act's effective implementation. She would do public education about the Act's protections, lobbying at the state and federal levels, and carefully selected litigation to encourage expansive interpretation of its provisions. This strategy seemed to be one way that, with only her time and that of her students, her project could have a real impact on the lives of the working single mothers that she was most concerned about. Diane threw herself headfirst into the project and soon became an expert on the new Act. She spoke at continuing legal education seminars and litigated several of the formative cases on its interpretation. She spent a great deal of time working in administrative and legislative arenas at both the state and federal levels. However, during the first year of her project, through administrative rule making and several conservative judicial interpretations, the Act's provisions became narrowed and its usefulness limited. Although this seriously hampered her ability to use the Act effectively to help working parents in her community, Diane felt she could not abandon the work she had done on the Act. She had invested too much time and energy developing the expertise needed to use the Act on behalf of parents caught between a job and their caretaking responsibilities. She could neither jettison it nor envision a viable alternative approach to achieve her programmatic goals.

During the following year, Diane continued to act on behalf of a limited number of working parents, both men and women, who had been unfairly dismissed from their jobs, could not afford a "regular" lawyer, and whose cases raised significant issues under the Act. She had her share of successes. Yet, even when she won, Diane found herself frustrated with the nature of the help she was providing. By the time her cases reached hearings, the family crises which had given rise to them had long since passed, and her clients had somehow managed to survive and carry on with their lives without her assistance. In fact, the court cases seemed, in many instances, a source of stress and a drain on time and resources (even though she did not charge a fee) for her already overtaxed clients. Even when she was successful, Diane felt she had only achieved a moral victory, which was of little value to most of her clients.[59] The damages that she could obtain were too small to make a difference in their lives, and although reinstatement was an option, it was not an attractive one for most clients. The long delay before hearings meant that most of her clients had already obtained another job out of financial necessity. Those who had not taken other jobs usually could not envision going back to the place that had battled so long and hard to keep them out, even with a court order to reinstate them.[60]

59. For a discussion of the limits of litigation strategies based on a study of victims of discrimination, see KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

60. There is an extensive literature on the impact of continuing relationships on decisions regarding litigation, beginning with Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). For a recent and comprehensive survey of the

While Diane was accumulating legal expertise in this area, she was also feeling increasingly dissatisfied with her inability to measure up to her initial aspirations. She was disillusioned with the court process and frustrated by the limited scope and arbitrariness of her own efforts. The small number of working parents she had represented seemed unconnected to any particular community or workplace, and she dealt with them only for the duration of their court cases. Several of the individuals she had represented had been men. She had only managed to represent one African American woman in her entire two years.

Diane's efforts in the legislative and administrative arenas at both the state and federal levels appeared similarly futile. At the state level she found herself struggling to preserve the Family and Medical Leave Act. At the federal level she observed a distressing series of compromises to the original draft bill in order to facilitate the bill's passage. Recent developments surrounding the federal ERISA statute made it appear likely that the state act and the moderate advances which it had achieved could be almost completely wiped out as a result of federal court decisions declaring the area of family and medical leave preempted by federal legislation.[61] Additionally, the public talks she had given about the Act had been attended mostly by lawyers and legislators, not the people who might benefit from the Act. Wherever Diane looked to measure her progress, it seemed she was only able to point to a disconnected process of struggle that bore little relation to the actual lives of the people she had set out to help.

Diane became deeply discouraged.[62] She began to feel as if her three years of effort to work for poor working families in her city had been largely unproductive. She began to try to imagine how she might have approached her project differently. Although she tried to discuss her problems with her colleagues at the firm and in the public interest lawyering community, she was disappointed by many of the responses she received. It seemed as if whenever Diane tried to voice her frustrations with the traditional strategies (litigation, public education, and legislative lobbying), her comments were dismissed or trivialized by many of the more experienced attorneys. Many of her "veteran" friends thought that such self-critical discussions could only be defeatist and counterproductive. Instead of encouraging a cooperative community environment in which attorneys could collectively explore the limitations of what they were doing and consider how to improve their work, the veterans silenced and divided the group. She was upset that they did not seem to take her problems seriously. She felt that by refusing to talk about these issues with her, the more experienced attorneys were both denying her the opportunity to learn

literature, see Barbara Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623.

61. *See* Gabrielle Lessard, *Conflicting Demands Meet Conflicts of Law: ERISA Preemption of Wisconsin's Family and Medical Leave Act*, 1992 WIS. L. REV. 809.

62. For a discussion of frustration and "burn-out" of public interest lawyers in the context of the limitations of traditional forms of practice, see Gabel, *Dukakis's Defeat*, *supra* note 6.

from their experience as well as foreclosing their own opportunities for growth and improvement.

While Diane was going through this process the fall semester was beginning. A new group of students arrived at the office. Among them was a graduate student named Rachel who was writing a thesis on alternative lawyering practices. Rachel and Diane quickly became friends and had many lengthy discussions about their shared disillusionment with the limitations of traditional public interest lawyering practices. Rachel shared with Diane some of the literature on alternative lawyering strategies. As a result of this reading and her ongoing relationship with Rachel, Diane felt freer to openly question her earlier approach. By now, she was also more experienced and more confident. She spoke up about some of the ideas in the literature on alternative approaches to lawyering strategies that Rachel had shared with her at the firm meetings, and began to think seriously about how she could utilize them in her own work. Without really being aware of it, Diane and Rachel were beginning to change the way some of the other lawyers and students at the clinic thought about these issues as well, or more accurately, people were beginning to think about questions that they had not paid much attention to before. Just by talking about these new ideas, they were having an effect on the culture of the clinic. Diane's work environment was slowly evolving into one more collaborative and open to criticism.

Diane decided that to remedy the problem of disconnection from her client group she needed to change her starting point. She realized that working only on the cases that came into the office and on the policy issues of the day allowed her agenda to be dictated by outside events. She now wanted to develop a more coherent strategy. She felt that in order to work effectively for the client group she had targeted, the working poor, predominantly African American community in her city, she should first talk with the women she wanted to help. She would ask them to tell her about the problems they were having in balancing the requirements of workplace and family. Then she could try to figure out ways in which her skills and resources could be of assistance to them.

The new approach felt risky. First Diane had to abandon the Family and Medical Leave Act as the focus of her advocacy, so that her program could be receptive to a wider range of women's concerns. Yet, the Act was the only area in which she felt she had developed any expertise as a lawyer. Giving it up made her feel like when she had started the job just out of law school, except that she no longer believed she could rely on the lawyering skills, litigation, and lobbying that had provided the foundation for her first attempt. She felt even more at sea than she had before. However, she now had the strength of her own frustration with the traditional approaches as well as the support of a like-minded person at the firm, Rachel.

In thinking about how to get to talk to the women she wanted to work for, Diane wondered whether it might be possible to organize a small group of

women in a neighborhood or workplace setting. If she were able to work closely with such a group, Diane could be confident that her advocacy would be both more responsive to the women's concerns and more effective. Yet few groups of that sort seemed to exist in the city. Diane also realized that in order to convince a group of women to work with her, in addition to their many other obligations and responsibilities, she had to have something to offer them. It seemed as if she was in a Catch-22 situation: she could not figure out something useful to do without talking to the women in the community, yet they would not want to listen to her unless she was going to do something useful for them.

Diane realized that it would be crucial to have allies in her effort to reach the women in the poor African American community in her city. Although her colleagues at the law firm were becoming more supportive, they had their own projects to worry about, and none of them were working with the community she needed to reach. Her first idea was to attempt to form an alliance with the local legal services office, which she was certain must do a lot of work on behalf of people from the community. She knew that most of the legal services work was litigation oriented, either direct service representation of individuals or larger class action lawsuits. It seemed that the open-ended work that she wanted to do, organizing groups of women to tell her what needed to be done, would complement nicely the case work and impact litigation that was being done by legal services in the area. Perhaps she could mobilize the community around issues arising in a big lawsuit, or do outreach and public education to inform more people of their rights and encourage them to seek out legal representation when they needed it.

When she contacted the director of the local office, she received an encouraging response. They did do a lot of work for the people she was concerned about, the director told her, and they were even planning a big impact litigation case about discrimination in housing that they could use some help with. Diane suggested that they think about starting a joint project in some of the targeted neighborhoods, and they set up a series of meetings to discuss it further.

Unfortunately, the promise of the initial phone call soon turned to disappointment. Diane's discussions with the legal services lawyers felt more like big business negotiations than meetings to work out how to do the most good for a disadvantaged community. It was true that her firm frequently competed with the legal services office for increasingly scarce funding, but she had thought that their roles as competitors could be set aside if they were working together for a common goal with shared funding. That was not to be the case. The legal services lawyers had a clear idea of what they wanted to do, which did not include any of Diane's ideas about support groups, community mobilization, education, or outreach, at least in the ways that she had envisioned them.

Although Diane was prepared to make some compromises in order to get

her project off the ground, it became clear that her approach was very different from that of the legal services lawyers. While Diane wanted to focus on a less formal, more grassroots outreach and education effort, the legal services lawyers were less interested in finding more clients than in efficiently providing services to existing clients. They had already decided that, in this situation, a class action lawsuit was the best way to utilize efficiently limited legal resources to benefit the entire community. However, even one such suit would put a severe strain on the resources of their small office, which was why they were eager to work with Diane and more importantly, with her students.

Despite Diane's repeated efforts to explain to the lawyers with whom she was negotiating that her ideas could complement and co-exist with their own litigation strategies, they remained unconvinced. Despite her relative youth and inexperience, Diane stuck to her guns. One day, the director finally told her that he did not think that her project would ever get off the ground. That ended the negotiations, and Diane was left on her own, once again, to develop the project with her own resources and those of her students.

After a brief hiatus, Diane and the students started to find out more about the community they wanted to work with. They did some research at the city library to identify the areas of town where the highest proportion of working poor families lived. Diane and almost all of her students were middle class and white, while their target clientele were poor and African American. They began phoning around to neighborhood and community organizations to set up meetings with anyone who would talk with them. After many fruitless calls, they had an enthusiastic response from an underfunded neighborhood center in one of the areas they had identified.

Shortly thereafter, Diane had a meeting with Joy, the director of the center. Diane was amazed by the amount of knowledge about her community that Joy was able to convey in a short half-hour meeting. She realized that Joy could be the ally she had been looking for. They discussed the problems of the neighborhood center, particularly its perennial lack of funds, and Diane realized that she had something to offer Joy: Diane's experience as a fundraiser. A partnership was agreed upon, with the neighborhood center providing space for Diane to set up a legal outreach clinic, and Diane agreeing to include funding for the center's overhead in all fundraising efforts for the clinic.

Much of the first several months time that Diane and the students had regular hours at the neighborhood center was spent helping out with various activities at the center, including the weekly food pantry. Diane became a familiar face around the neighborhood center, known to all of the regulars and volunteers who worked on the youth programs and staffed the desk. While the clinic did not obtain many clients during this period, Diane was able to make contacts and investigate opportunities for useful student projects in the future. Among the projects that she started to develop was a food and nutrition project which emerged directly from the ongoing volunteer work at the food pantry. The students in that project would continue working in the pan-

try during its scheduled hours, as well as providing screening and advice on eligibility for Food Stamp and other nutrition programs and working on obtaining increased supplies of nutritious food for the pantry. Diane also developed a collaborative project with the local battered women's advocacy group in which her students would go to the local shelter on a regular basis to help the residents locate housing. Since Diane had learned that many of the shelter residents came from neighborhoods around the center, and that they were likely to experience discrimination from landlords because of their race, their children, or even because they came from the shelter, volunteering for the battered women's advocates fit in well with the work she wanted to do at the neighborhood center.

Diane was pleasantly surprised when the semester came to an end and she received a number of positive assessments from her students. Far from being bored by the project, as she had feared, they had been challenged by it. They were hopeful about its future, and some even wanted to continue helping out. While only a couple of them had even worked with a client, the clinic had made them think more deeply about the complexities and contradictions of using lawyering skills to benefit disadvantaged neighborhoods and communities.

B. Analysis: Critical Lawyering in the Neighborhood Clinic

In order to be able to move out to the neighborhood center, Diane had to re-evaluate not only her reliance on the traditional lawyering skills of litigation and lobbying, but her background assumptions and beliefs about the public interest lawyer's role and her ability to achieve the goals she set for herself. Diane admitted that she had gone to law school to "save the world," the world had proved notoriously resistant to even her limited and localized efforts to bring change through lobbying for more progressive legislation and arguing for more expansive judicial interpretations of legislation already in place. She increasingly saw the enormous distance between the slow and unwieldy legal institutions in which she had spent her first two years of practice and the day to day lives of the women she claimed to be trying to help.

Yet why was it that, at that stage, rather than succumbing to frustration or burn-out, Diane was able to jettison most of her accumulated expertise and risk moving out of her office into the unknowns of the community center? Why was she able to radically reformulate her project? Again, while we can only speculate as to her "real" motivations, some salient factors jump out of the story. At first, Diane's own lack of experience made it difficult for her to consider experimenting with a way of lawyering that was not being done by other attorneys at the firm. Although her goals were laudable, she had no experience that would have predicted that her goals could not be achieved by the traditional means.

The presence of supportive colleagues and collaborators, which she had lacked until the arrival of Rachel, was crucial to Diane's ability to make

changes in her practice in response to the dissatisfactions she felt. While she had entertained reservations about the limitations of the firm's work even before she had accepted the job, she had been unable to voice or believe in those concerns in an environment which did not foster collaborative work among the attorneys or encourage mutual criticism. When the work environment changed with the influx of the new group of students, Diane found that she was better able to share her concerns and find them reflected among the staff at the firm. That process gave her the impetus she needed to scrap what she had been doing and try to come up with an alternative project that could satisfy her.

Diane's prior experience with the veteran attorneys might have given her an idea of what to expect when she entered into the negotiations with the legal services office. While she had not expected to encounter so much resistance to her joint proposal there (or she would not have bothered), she did not back down, as she had initially done with the veterans in her office. She no longer thought that the veterans knew better because of their greater experience. Because she refused to buy into their assumption that greater experience equals greater wisdom, Diane could see that the legal services lawyers had become trapped into the ways they had always thought and practiced. To admit that there might be better ways of doing things would jeopardize their claims to expertise and their professional stature, built up over years of practice.

While the decision to work with women in their own community also required a fundamental shift in Diane's role formulation, it was less threatening to her than to the veterans because she had less to lose. Still, two years of accumulated expertise on the Family and Medical Leave Act was a significant professional achievement, which took strength and conviction to leave behind. Working with the neighborhood center and with potential clients to identify issues and problems would require Diane to develop new skills and techniques very different from those of the "professional" role that her law school training had prepared her for. Her tentative efforts to modify and expand this role could have been easily undermined by critics. The veterans or the legal services lawyers might question whether her work fit into their narrow view of appropriate professional practice. Working with lawyers who were critical in this way would have made it virtually impossible for Diane to act upon some of her ideas. Fortunately for her, she survived her encounters with the critics, and benefited from her participation in a community of lawyers at the public interest law firm who were attempting in different ways to rethink their own approaches. Diane's approach was shaped by the culture of her working environment at the same time as she was reshaping it.[63] As a result of Diane's reshaping, a number of the students and staff in the firm were freer to work on innovative projects.

63. For a description of an interpretive approach which captures this dynamic understanding of the lawyer's relationship to the professional norms of the workplace, see Nelson & Trubek, *New Problems and New Paradigms, supra* note 34.

While Diane was inclined toward a particular type of practice because of her feminist orientation, she could not immediately design a project that lived up to her ambitions, nor had she yet done so in the neighborhood center. However, she seemed much closer at the end of the story than at the beginning. Her law school training, her working environment, and her inexperience initially hindered the development of Diane's critical approach to lawyering. However, Diane ultimately used those factors in a critique of her practice. Once she could rely on her own albeit negative experience to make judgments, had read some progressive literature on the topic of lawyering for the disadvantaged, and could look to Rachel for support and constructive criticism, Diane was able to make the move that she could not make two years earlier.

Of course, the move to the neighborhood center was not without its problems. Although Diane did not anticipate that she would have a problem attracting clients, she did. One of the paradoxes of critical lawyering is that it criticizes the lawyer/client hierarchy and the lawyer's claims to privileged knowledge, while maintaining that the lawyer has "something to offer" disadvantaged groups. In moving out of her law office and into the neighborhood center, Diane may have made it more difficult for people in the community to imagine themselves coming to her for a lawyer's advice. After all, she was young, she did not dress like a lawyer, and she did not act much like a lawyer either.

While Diane did anticipate that racial differences between the largely white staff of the legal clinic and the largely African American community at the neighborhood center would be an issue that she would have to overcome, she did not think that it would be an insurmountable one. She went in with plans to work cooperatively with the African American staff of the neighborhood center, and to obtain funding to hire and train an African American paralegal from the community. Because she had been invited to work with the neighborhood center, rather than simply deciding on her own that she would work there, she felt she would have more credibility from the outset.[64]

The story does not tell us whether the clinic ultimately succeeds or fails, but again, that is not really the point. The issues raised by Diane's move from the courtroom to the neighborhood center, the significance of colleagues, allies, professional personae, and racial identity to her design and implementation of a public interest clinic, are what we wanted to illustrate.

64. We have received widely varied reactions to this aspect of the story, which we believe are reflective of the range of perspectives on the nature of "community" and constitution of "identity" in contemporary society. While "communitarians" are likely to be enthusiastic about Diane's effort at community building, others, particularly members of traditionally disadvantaged groups, may well be more skeptical.

IV
GETTING FROM HERE TO THERE: SOME PRACTICAL OBSERVATIONS

The question underlying most of this Article has been largely a practical one, that is, how can lawyers make the move toward critical lawyering in their practices? We first attempted to clarify the "critical lawyering" approach by describing it as well as illustrating it, in the context of the two stories. We then followed each story with a discussion of some factors which seemed to either assist or hinder the subjects from moving toward a critical approach. Of course, lawyers' practices are highly particularized and present unique problems and dilemmas which are beyond the scope of this Article to address.[65] However, in this concluding section, we have made an attempt to draw out of the stories some more general observations regarding the most significant factors at play in the transition between traditional and critical approaches to lawyering. The factors we have identified are: sites, identities, professionalism, and material conditions. We expand upon each factor below.

SITES: What we mean by sites are physical and institutional locations in which lawyers and clients operate.[66] Lawyers rarely operate in only one location, and at least two significant "sites" could be identified in each of our stories.[67] In the first story, the sites were the lawyer/client interaction (physically, the lawyer's own office), the lawyer's situation within the private law firm (the location within the larger office), and the lawyer's meeting with the woman from the advocacy group (outside of the office). Another site which was not in the story, but loomed very heavily over it, was the courtroom which represented both the potential for the retribution sought by Kathy, as well as the risk of repeated victimization. In the second story, the relevant sites were the law school clinic (the proximity to the legal academy personified by Rachel, the graduate student), the legal services office (physically and philosophically situated in its own network of offices and ideas), and the community neighborhood center (outside of the legal networks altogether).

It is interesting to note that it was the sites which were outside of the traditional "legal" networks (the advocacy group and the neighborhood center) that proved, in each story, to be very useful catalysts for the development of critical lawyering approaches, while the traditional networks themselves (the private law firm and the legal services office), significantly hindered

65. We encourage practitioners interested in critical lawyering to write more, and greater detailed accounts of particular practice situations, as we recognize the need for increasingly detailed information about alternative styles of practice. Our project in this Article, however, was not to present a "nuts and bolts" analysis of the two situations we described, but to use them as the springboard for more general observations regarding the potential for, and the difficulties presented by, both moves towards more transformative practice.

66. Our definition of "sites" is analogous to Nelson and Trubek's "arenas" of practice. *See* Nelson & Trubek, *Arenas of Professionalism*, *supra* note 48.

67. We should note that, while we do not expand upon it in this Article, an observation of the way in which different lawyering sites are structured in relation to one another is one topic for further examination.

the ability of the attorneys to rethink their approaches. The legal clinic poses its own limitations as a site for critical lawyering. Students often expect traditional skills training through client representation and can create pressure on potential critical practitioners to modify their approach. But note also that students can be an important source of support and inspiration, as Rachel was for Diane. Other sites, like the lawyer's interaction with her client in the first story and the public interest law firm in the second, can be enabling or inhibiting depending on the lawyer's own approach and the various other factors.

Supportive networks of like-minded practitioners like the one that was beginning to develop at the public interest law firm in the second story, are one type of "site" for the development of critical lawyering practices.[68] Linkages might be developed among law school clinics through their national system where, for example, women's projects could meet periodically in local or state caucuses. Each site contains its own resistances and possibilities. There is much creative potential for the linkages between the advocacy group and the pro bono lawyer in our first story, and the law school clinic and the community center in the second story.[69]

IDENTITIES: The second factor which emerged as a significant one was identity. Both of the attorneys we wrote about were young, white, and female. At least part of their dissatisfaction with the traditional lawyering practices emerged from their feminist political orientation and theoretical background. On the other side, much of the resistance in both stories arose from more experienced and traditionally educated lawyers in both private practise and public interest law firms and clinics. The clients were all members of "out" (subordinated) groups, who were different from their attorneys in significant ways (sexual orientation and race) yet had points of commonality (being female). Part of the difficulty in encouraging people to come to the clinic in the second story resulted from the racial and class differences between the clients and the attorneys. Yet the attorney hoped that her development of allies in the neighborhood center and the demonstration of commitment to the community over time would help her to bridge those gaps. Similarly, the difference between the lawyer and the client in the first story had to be bridged by

68. The InterUniversity Consortium on Poverty Law is one example of such a network. It is a group of legal educators concerned with the integration of issues of race, class, and gender into law school curricula. Many of the Consortium participants are involved in innovative law school projects to this end. *See* Symposium, *InterUniversity Poverty Law Consortium*, 42 WASH. U. J. URB. & CONTEMP. L. 57 (1992); Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, J. OF LEGAL EDUCATION (forthcoming 1993). Consortium participants meet regularly to exchange ideas and comment on one another's projects. One of the most significant aspects of the Consortium network for one participant is its identity as a "safe place" in which one is able to share failures and frustrations as well as success stories. (Personal communication with Lucie White (May 1992) (on file with author)).

69. *But see* Robert Condlin, *Tastes Great, Less Filling: The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986) (contending that the institutional constraints in many law school clinics function to limit their transformative potential).

the establishment of mutual trust and shared feminist commitment before they could work collaboratively.

The issues surrounding the constitution and re-constitution of identities are enormously complex, and we have barely touched upon them here. The shifting nature of identity, and its significance to both clients and lawyers, means that it is possible to find a space in which individuals of different identities may collaborate effectively.[70] This position does not mean that we ignore the importance of the recruitment of more diverse law school communities, and particularly, the students and lawyers who become involved in the clinical programs. This may help to encourage a greater understanding of the client communities as well as create more credibility for the programs working within them.

PROFESSIONALISM: Both of the stories raised complexities relating to knowledge and hierarchy embedded in the professional identity of lawyers.[71] In the first, the lawyer had to suspend her reliance on conventional lawyering expertise and disregard the advice of her colleagues in order to successfully collaborate with her client; yet, the reason the client had come to the lawyer in that story had been to avail herself of the lawyer's access to traditional lawyering expertise. In addition, we cannot overlook the fact that it was traditional lawyering practice, used creatively by public interest-minded litigators, that had given rise to a usable cause of action for that woman in the first place. Because of her personal background and experiences, the client in the first story had many good reasons to resist putting her faith completely in a professional's claim to "expertise." In this story, it was the client's questioning of the lawyer's advice that led to the lawyer's transformation, suggesting a rethinking of the notion of "expertise." Some questions to ask include: What knowledge do public interest lawyers possess that their clients to not? Does

70. The importance to advocates of reaching beyond barriers of class, age, gender, and race has been often emphasized by Lucie White. *See* Lucie White, *Seeking . . . "The Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992). "The risk of domination is inextricable from every humanist practice. Yet we must still seek to listen when others speak to us, and to be moved. We must still seek to hear in the words of others not just negotiations of power, but appeals to our most difficult memories, and deepest emotions. We must see, in our encounters with others, not just to map the power, or read the text, but also to recognize, in all its alterity, the other's face." *Id.* at 1510-11.

71. The effect of increasing numbers of women (particularly in public interest law) on evolving notions of professionalism, what Carrie Menkel Meadow has called the "feminization of the profession," must also be considered. Carrie Menkel Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Menkel Meadow, *supra* note 40. We believe that we have provided some support for Menkel Meadow's thesis that recent female entrants to the legal profession may function as agents of transformation: "I remain attached to the notion that at least some new female entrants to the legal profession may exert some levers of change against the profession by arguing that women's perspectives, enriched by diverse gendered, racial and ethnic experiences, offer the possibility of reconstructing certain aspects of the legal system and legal practice, beyond the change of doctrine, that is in some sense tied to women's particular lived experiences." *Id.* at 318. An earlier, but also important, study of women in the legal profession is CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW (1981).

the wisdom of the advice that public interest lawyers dispense depend entirely on their mastery of this type of knowledge? What types of knowledge do disadvantaged clients have that public interest lawyers do not? How can public interest lawyers utilize this knowledge in their advocacy?

Building on these insights, we see that in the second story, the initial choice of the public policy/litigation strategy was the route favored by reliance on conventional legal expertise. In order to set up a community-based clinic, the lawyer abandoned, in some ways, her claims to professional expertise in order to assume a role as a helper in the community. At the same time, part of the justification and motivation for the clinic was to make the brokering skills and insider knowledge of the law students and clinic lawyers available to the community. Broadening community and client knowledge about lawyers, legal institutions, and doctrine can assist in creating less hierarchical communities of interest among lawyers and clients, although there is always a tension between the legitimacy conferred by claims to legal expertise, and the distinctions and hierarchies thereby created. We call this tension the "paradox of professionalism." Acknowledgement of the paradox can also assist lawyers to develop a level of self-critique that will lead to their greater effectiveness.

Legal education is also an arena for the construction of conceptions of professionalism.[72] The second story highlights the opportunity to expand the parameters of professionalism in the law school clinic. The students working with Diane did not just have an opportunity to observe a transformative moment, they helped to construct it. On the other hand, the culture of law school is often described as a limited and limiting experience that discourages creative approaches and mystifies the neutral and autonomous lawyer role.[73] Recent experiments in law schools, particularly in innovative courses and clinics can serve to enable students to understand the range of permissible and appropriate lawyering practices.[74]

MATERIAL CONDITIONS: It is important not to overlook the role of "the bottom line" in each of these stories. In the first story, had the litigation not been a pro bono project and supported by the advocacy group, the sacrifice of the damage award might have had serious consequences for the attorney. Even public interest law firms are influenced in their selection of cases by their ability to recover money, either through awards of attorneys fees or client recoveries. The client may not have had an opportunity to make her case at all, let alone in the way in which she wanted to. Additionally, the ability of counsel to retain suitable expert witnesses to provide favorable interpretations of contestable issues, although not a factor in this case, is often crucial to the

72. Nelson & Trubek, *Arenas of Professionalism*, *supra* note 48.

73. DUNCAN KENNEDY, *Afar*, *in* Legal Education and the Reproduction of Hierarchy (1982); Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

74. The projects of the InterUniversity Consortium on Poverty Law are just a few examples. *See supra* note 68.

ability to win the battles over the construction of "truth" in the courtroom. The relationship between whose "truth" prevails and the resources available for the hiring of experts cannot be overemphasized.

In the second story, the move toward the less traditional clinic had a less apparent bottom line. It foreclosed some funding possibilities while opening others.[75] It is crucial that public interest attorneys are aware of both the potentially positive and negative effects of the shifting opportunities engendered by restructuring moves in their lawyering practices, since so much of their work is dependent upon its ability to generate its own support in the form of grants. While the move to the community center represented a significant reduction in the convenience and attractiveness of the lawyer's worksite and placed the students and lawyer in greater dependence on the client/community for resources and support, it is also potentially improved the ability of the lawyer to assist the community center pursue its own goals and priorities, including fundraising.

V
POSTSCRIPT

What we have attempted to do, through the telling and the analysis of the stories of Susan and Diane, is to identify some arenas of ideological struggle over the meaning of lawyer's practices and to further expand and contextualize the critical lawyering vision. We recognize that each of these aims is part of a much larger practical and theoretical undertaking, and we hope to have made a contribution to each of these larger aims.[76]

We believe that it is an encouraging time to be considering the possibilities for transformative projects. A number of recent developments have made it more possible for public interest practitioners, whether they are students, new lawyers, or experienced advocates, to rethink their approaches.

In particular, political changes in Washington may create new opportunities for transformative lawyering. For example, by the end of 1993, a new administration governing the new Legal Services Corporation may be in place which may be in a position to rethink how to provide legal services for the poor. The increased interest in alleviating poverty during the next administration may generate opportunities for local and national dialogue with nonlawyer activists in a number of issues areas, such as healthcare, community

75. Currently, law school clinics are able to obtain funding from law school and government sources which may not be available to free standing public interest law firms, but the advantages of easier access to funding may be partially offset by pressures created by student and law school demands, as we have noted above.

76. For a description of the collective project of "situated theoretical practice," see, Lucie White, *Paradox, Piece-Work and Patience*, 43 HASTINGS L.J. 853 (1992). "Much of this new advocacy literature is rigorously committed to a situated theoretical practice — to the slow learning that comes from multiple, partial perspectives, from uncertain readings by advocates of their own day to day work. In this view, the project of doing theory is itself 'reconstructed' into a collective practice." *Id.* at 854 (footnote omitted). It is to just such a process of "slow learning" and "collective practice" to which we hope to have contributed.

economic development, housing, and public service corps. (Practitioners and scholars in the fields of social science and cultural institutions may also be increasingly interested in legal practice as one element in the creation of a new social discourse, particularly in light of the role of law in the transition to democracy in Eastern Europe and parts of the Third World.[77]) Critical lawyering may be a catalyst for the creation of more collaborative and innovative projects in this period of continued fiscal constraints but expanded conversations.

We encourage those involved in such practices to share their ongoing projects with others, in the form of works in progress, publications, meetings, coalitions, and electronic communications. We feel that only through partial and imperfect efforts such as these can we continue the transformative project envisioned by critical lawyers. In the end, there are no final answers, only this continuing conversation among those engaged in the ongoing transformative struggle.

77. One such interdisciplinary project has recently begun in Wisconsin, where under the auspices of the Global Studies Research Program and the Haven Center for the Study of Social Structure and Social Change, a number of faculty members and graduate students interested in Nongovernmental Organizations and Democratization have begun meeting regularly for the purposes of supporting research and teaching in this area.