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Visions of Practice in Legal Thought

William H. Simon*

This essay contrasts the vision of law practice expressed in the established professional culture with a vision derived from recent Critical legal writing.

The professional vision appeals to an ideal of practice as an activity that transcends both personal ethics and politics. In this ideal, practice takes place in a realm between public and private where personal responsibility is attenuated and fundamental social conflicts have been resolved. The jurisprudential foundation of this ideal is the notion that lawyers mediate between the determinate, articulated interests of a client and the determinate, articulated constraints of a legal or social system. Both the client's interests and the constraints of the system are seen as constituted prior to the lawyer's activity. The basic message of the professional vision is Stoic: the lawyer achieves fulfillment by participating in a world that is largely (though not entirely) already made.

Recent Critical legal writing challenges the notions of client and of system on which the professional vision is premised. This writing suggests, first, that the professional vision overestimates the determinacy of client interests and systemic constraints and, second, that it ignores the way the lawyer's activities influence, as well as implement, such interests and constraints. These criticisms are linked to an alternative vision of practice, one which sees indeterminacy both as an unavoidable reality and as a moral and political opportunity. The Critical vision appeals to an ideal of practice as an activity that constitutes and transforms the actors and the system in which they act and that thus implies both personal responsibility and political commitment. The Critical view also suggests that the specific activities with which the professional view identifies law practice are an arbitrarily limited subset of the activities that law practice might appropriately involve.

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The first part of this essay sketches the professional understanding of the lawyer-client relationship and then describes the view suggested in Critical legal writing. The second part discusses the differing understandings of the relation of lawyer and client to the legal or social system. This latter aspect of both visions is developed less explicitly than the former, but I have found useful illustrations of the professional view in recent articles by detractors of Critical legal writing, including some of the contributions to this Symposium.

The Critical vision I sketch here shares with the professional one a utopian quality that makes it, at best, an incomplete account of law practice. Like the professional vision, the Critical one envisions the lawyer as having at least a moderate degree of autonomy in the conduct of her work and the client as at least moderately dependent on or vulnerable to the lawyer. Neither vision addresses the extent to which practice in fact takes the form of highly constrained bureaucratic routine and of subordination to powerful clients. Although a complete critique of the professional vision would require important qualifications to the premises of lawyer autonomy and client vulnerability, I think it is worthwhile to examine critically the professional understanding of practice within the framework of these premises. To an important degree, the premises do reflect actual conditions of practice. And even where actual conditions differ, the premises are influential as part of the ideal from which professionals evaluate and reform their activities.

I. REPRESENTATION: THE CONSTRUCTION OF THE CLIENT

In the established professional conception of the lawyer-client relation, the client's identity consists of a bundle of interests. These interests are subjective in the sense that the client is the only legitimate judge of what they are. Most fundamentally, they arise independently of the lawyer-client relation itself. Law practice is instrumental to the advancement of these ends. The lawyer's duty is to manipulate the world outside the attorney-client relation in ways that serve the client's interests. The lawyer violates her duty when she substitutes her own judgment about the client's well being for the client's judgment (paternalism) or when she takes advantage of the client to further her own interests (exploitation).¹

Critical legal writing has challenged this conception by sug-

1. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(A), EC 7-1, EC 7-7 (1980).

gesting, first, that the client's interests are in fact too indeterminate to play the role assigned to them and, second, that the client's understanding of his interests is affected by the experience of the representation his interests are supposed to determine.²

Both problems are reflected in the basic recurring dilemma of professional doctrine on representation. This doctrine proves unable to reconcile or to choose between two competing interpretations of the professional notion of the client. One interpretation portrays the client as an actual or potential participant in social relations that represent fulfillment and empowerment. The other portrays the client as an isolated individual for whom social relations represent vulnerability and oppression. These competing interpretations of the client parallel two competing interpretations of the function of legality. One sees legality as a means of dispute resolution and social integration. The other sees legality as a safeguard for the individual against social oppression.

These competing interpretations have produced two distinct versions of the professional understanding of the lawyer-client relation. The first is largely identified with conservatism and has been substantially discredited in elite professional circles, although some of its tenets have resurfaced recently in the politically heterogeneous movement for informal dispute resolution and delegalization. The second, which is generally, though not invariably, associated with liberalism, currently dominates the professional literature. The most intense concern of the conservative approach is that lawyering will undermine intact social relations by fostering alienation and aggressive individualism; the most intense concern of the liberal approach is that

2. This part draws on R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 *NLADA BRIEFCASE* 119 (1977); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *N.Y.U. REV. L. & SOC. CHANGE* 369 (1982-83); Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 *S. CAL. L. REV.* 1215 (1980); Kelman, *Choice and Utility*, 1979 *WIS. L. REV.* 769; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563 (1982); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29.

I don't mean to suggest that only writers identified with Critical Legal Studies have discussed these problems. For discussions of the problem of indeterminacy, see works cited in notes 11-14, *infra*. And for discussions of the problem of the constitutive or reflexive nature of practice, see Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179 (1982); Sander, *Varieties of Dispute Processing*, 70 *F.R.D.* 111 (1976). Nor do I mean to suggest that the style of practice suggested by the Critical vision has been invented by legal academics. The contribution of Critical writing has been to improve our capacity to describe and to understand a kind of lawyering previously exemplified in a variety of contexts, including especially some of the progressive politics of the 1960's and 1970's.

lawyering will sacrifice individual interests to collective action. While the anxieties of the conservatives are expressed most clearly in the doctrines of solicitation and maintenance, the anxieties of the liberals are expressed most clearly in the doctrine of conflict of interest.

A. *The Conservative View*

The conservative view starts from the premise that the bundle-of-interests conception is appropriate only in the distinctive *fallen state* in which people are compelled to seek legal representation.³ This view sees people as fundamentally cooperative, solidaristic creatures and sees social relations as expressing and fulfilling their basic needs. So long as these relations remain intact, there is little, if any, role for lawyering. Lawyering is associated with litigation and other adversary activity. So viewed, it is not merely useless to intact social relations, but presents a danger to them. The conservative view recognizes that the lawyer's intervention may affect the client's perception of his interests. Intact social relations depend to a significant extent on their taken-for-granted character. By introducing the perspective of egoistic interest calculation and aggressive instrumental strategizing, the lawyer subverts this character and thus threatens the relations. Legality and lawyering can play a productive role only where social relations have broken down. Here egoism and antagonism are already facts of life. In such situations, the legal system, while unlikely to repair the relation, helps the parties work through

3. The conservative view of legality is expressed in the traditional condemnation of lawyer "intermeddling" in intact relations and of "stirring up" disputes and in the conflation of legality with dispute resolution or the prevention of violence. See, e.g., ABA CANONS OF PROFESSIONAL ETHICS Canon 28 (1908); 4 W. BLACKSTONE, COMMENTARIES *135-36; Note, *A Critical Analysis of Rules Against Solicitation By Lawyers*, 25 U. CHI. L. REV. 674, 675-78 (1958). Although considered anachronistic in some respects, the view survives, for example, (1) in anthropological writings that ascribe it to tribal society, see, e.g., Nader, *Styles of Court Procedure: To Make the Balance* in LAW IN CULTURE AND SOCIETY 69 (L. Nader ed. 1969), (2) in proposals to delegatize areas involving relatively long term and intimate relations, such as family or neighborhood disputes, see, e.g., Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); Wynne, *What Are the Courts Doing to Our Children?*, 64 PUB. INTEREST 3 (1981), and (3) in critiques of the "law explosion" that deplore the social conflict engendered by claim assertion, see, e.g., Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

Describing these premises as "conservative" is somewhat arbitrary. The premises have been associated with almost every point on the political spectrum, including radical antilegalist attacks on the legal profession. I use the term conservative here because, insofar as the premises have been influential within the legal profession, they have been associated most often with a Burkean view that tends to defend established practices and institutions as manifestations of organic harmony and to be relatively skeptical about the possibilities of purposive social organization.

their hostility and resolves their dispute in a way that contains it and minimizes damage to the social fabric.

The conservative view requires that law practice be confined to the realm of manifest conflict and segregated from the realm of intact social relations. It relies on the rules prohibiting maintenance and solicitation to achieve this segregation. The maintenance prohibition restricts the lawyer's ability to acquire an interest in another's claim and to pursue it for his (the lawyer's) own benefit; the solicitation prohibition restricts the lawyer's ability to propose that he pursue claims for another's benefit. In the conservative view, these rules play an important role regardless of the extent to which the claims in question are valid and the consent to representation is informed. The maintenance prohibition limits the creation of new relations that have no purpose other than dispute-generating claim assertion. Both prohibitions discourage legal intervention before conventional social relations have broken down; they insure that the client's interest in claim assertion, and in the egoistic, instrumental attitude claim assertion entails, has arisen independently of the lawyer's suggestion.

The most fundamental problems with this view have arisen as it has become acceptable to question that conventional intact social relations are presumptively valuable and that the preeminent purpose of the legal system is dispute resolution. Throughout much of their history, the conservative premises have had to compete with other premises that suggest that some social relations may be oppressive and that it is part of the mission of the legal system to safeguard against such oppression.⁴ These contrasting premises are less hospitable to the maintenance and solicitation prohibitions, tolerating them only as a form of consumer protection against the dangers of misinformation and overreaching. With the expansion of explicitly interventionist regulatory and welfare activities during the 1960's and 1970's, the conservative premises came under increasing pressure. And when the Supreme Court struck down the solicitation rules of the *Code of Professional Responsibility* in the late 1970's, it repudiated concerns about generating disputes and suggested that such rules could be justified only to a limited extent and only as a form of consumer protection, not as a safeguard of solidaristic social relations.⁵ The recent concern about excessive lawyering and litigation and the movement toward informal dispute resolution show that the theme

4. See Note, *supra* note 3, at 678.

5. See *Bates v. State Bar*, 433 U.S. 350, 372-77 (1977); see also *In re Primus*, 436 U.S. 412 (1978).

of safeguarding solidarity is not dead.⁶ But this theme must contend with the contrasting theme that the legal system's role is to regulate social relations, even at the cost of creating disputes.

As this latter theme has become prominent, the conservative project of segregating law practice from intact social relations has become untenable. One cannot interpret the absence of manifest disputes as presumptive evidence of social health or the provision of dispute-generating legal assistance as mere destructive "intermeddling." People may acquiesce in social relations and fail to seek legal assistance because of ignorance or weakness resulting from the kind of oppression the legal system is supposed to guard against. In failing to confront this basic fact, the conservative response to the problem of reconciling the individual and collective implications of client interest proves unsatisfactory.

B. *The Liberal View*

The dominant view in professional discourse is not the conservative one, but a liberal one. The liberal view insists that the legal system and lawyering are equally concerned with dispute resolution, with dispute-generating regulatory intervention, and with a third function—facilitation of transactions that are consensual but that would not take place without legal intervention. It insists that the bundle-of-interests notion of the client should not be restricted to the circumstances of a manifest dispute, but it also insists that this notion is compatible with collective and conciliatory, as well as individual and adversarial, practice. It sees cooperative social relations as potentially instrumental to individual interests.⁷

Thus, while the most important challenge for the conservative view is to find a plausible way to distinguish circumstances in which legal intervention is appropriate from those in which it is not, the most important challenge for the liberal view is to derive a way to determine whether a client's interests are best served by relatively individual and adversarial or by relatively collective and conciliatory practice. The conservative view expects the lawyer to take the client as she finds him—in the fallen state of alienation and antagonism—and to adopt an individual, adversarial mode of practice. The liberal view aspires to a more flexible approach. It recognizes that at every

6. See, e.g., Manning, *supra* note 3; Sander, *supra* note 2.

7. See, e.g., H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 367–68 (tent. ed. 1958); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Critical point in the representation, lawyer and client face a range of choices from relatively individual to relatively collective ones. At the outset, if the client appears as an isolated individual, the lawyer must consider whether joint representation with others is appropriate. If the client appears as a group or organization—say, a divorcing couple or a dissolving partnership—the lawyer must consider whether disaffiliation for the purposes of representation is appropriate. Thereafter, lawyer and client will have to make a series of decisions as to whether to go it alone or with others (and if with others, which others) and whether to structure the relation in ways that tend to maximize the client's security at the expense of solidarity and flexibility or in ways that tend to maximize solidarity and flexibility at the expense of security. These choices overlap another series of choices between relatively adversarial and relatively conciliatory ways of dealing with outsiders; lawyer, client, and their allies must decide repeatedly whether to press every immediate advantage regardless of injury to the interests of others or to forgo immediate advantage in the hope of long term cooperation from, or out of concern for, outsiders. The issue of individual or collective practice and the issue of adversarial or conciliatory practice lead to similar but partially distinct problems; since I have discussed the latter issue at length elsewhere,⁸ I will focus on the former here.

Because the client is the only authoritative judge of his interests, the best answer the liberal view has to the question of how the lawyer is to find out these interests is to suggest that he ask the client. There are at least two problems with this response.

The first problem is that the process of asking itself tends to narrow the range of practical options. In part, this is simply a matter of material cost. Asking involves explanation and discussion, which take time and effort that cost money. In group litigation, asking can be so expensive as to preclude any sort of action at all. The Supreme Court's decision that individual members of putative plaintiff classes in large scale consumer damage actions must be asked has made it impossible to undertake many such actions.⁹ And if lawyers were required to ask individual members of more formally organized groups, such as corporate shareholders, before proceeding, much of the representation undertaken in their names would become prohibi-

8. See Simon, *supra* note 2; see also Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

9. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (requiring that "individual notice be sent to all class members who can be identified with reasonable effort").

tively expensive. Where the lawyer is dealing with a single individual, the expense may be less, but it is still often a significant factor. Much of the representation available to middle and lower income individuals is economically feasible only through routinized case handling that does not permit elaborate asking. Furthermore, asking alters the range of possibility because it requires the lawyer to disclose all the relevant facts to those he asks.¹⁰ Such disclosure can have strategic consequences. Each member of a group of actual or potential collaborators may have information that, if collaboration does not work out, it would be in his interest to keep from others. For example, the husband in a divorcing couple considering joint representation may know that his income will increase sharply in a few years; or an entrepreneur may have important information about a business opportunity whose value depends on keeping the information confidential. Once such information is disclosed in the asking process the range of alternatives available to the parties has changed. Through the asking process, the lawyer may compromise the client's interests even before she has determined who the client is.¹¹

The second problem is that the client's answers are often unreliable. The asking process calls for a decision in which the client relates her own subjective interests to the universe of available courses of action. But the client cannot be presumed to understand the available courses of action, which are defined by the specialized knowledge for which she relies on the lawyer, and the lawyer cannot be presumed to understand the client's interests, which are by definition subjective. Under these circumstances, there is no reason to believe that the lawyer can provide the client with the precise kind and amount of information she needs to decide reliably or that he can avoid shaping the information he gives her in accordance with his own preconceptions of her ends. Thus, the client's encounter with the lawyer may influence her understanding of her ends. Of course, the strength of this influence will vary with the circumstances. It seems likely to be especially strong in situations where lawyer and client come from different social backgrounds—for example, in criminal defense¹²—or where the opportunities for communication are se-

10. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(c) (1980).

11. Cf. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 76 (1978) ("'full' disclosure is impossible if the lawyer elicits full communication from each client and fully observes the duty of confidentiality to both").

12. See, e.g., Alschuler, *supra* note 2, at 1310 ("Most criminal defendants do not understand our system of criminal justice and cannot be made to understand.").

verely limited—for example, with absent class members.¹³

An important body of recent scholarship has emphasized how costly and problematical the asking process is and how much more limited a role it plays in practice than the one assigned to it in the liberal view. This literature has shown that, in addition to asking, lawyers in fact rely on a largely tacit set of presumptions about the interests of people with general characteristics of the client.¹⁴

Moreover, it is becoming increasingly apparent how dubious some of the presumptions have been. Consider the presumptions that dominated private practice prior to the 1960's. They can be described with only moderate oversimplification as follows: Collective action was presumed to be in the interests of investors, managers, and entrepreneurs pursuing profits and—after 1935 and to a more limited extent—industrial workers pursuing economic goals; it was presumed not to be in the interests of most other clients. For example:

Joint Representation. Professional Responsibility doctrine which prohibited or discouraged joint representation of individuals with “potentially” conflicting interests tended to presume common interests for investors and managers organized as a corporation.¹⁵ On the other hand, the doctrine tended to presume conflicting interests requiring separate representation in situations involving individuals who were not formally affiliated.¹⁶ The doctrine also was used to oppose most forms of noncorporate group legal services or litigation. Efforts by the NAACP, labor unions, and the American Automobile Association to insure effective individual representation for members or to further collective goals by coordinating individual claims were attacked on conflict-of-interest grounds.¹⁷

13. See, e.g., Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1242–44 (1982) (discussing difficulties encountered in ascertaining preferences of absent class members).

14. See Alschuler, *supra* note 2, at 1205–06; Bellow, *supra* note 2; Rhode, *supra* note 13, at 1197–1202, 1233–43; Yeazell, *From Group Litigation to Class Action—Part II: Interest, Class, and Representation*, 27 U.C.L.A. L. REV. 1067, 1108–21 (1980).

15. Until recently, the treatment of conflict-of-interest problems ignored intracorporate conflicts and focused on individuals and noncorporate groups. See, e.g., E. CHEATHAM, *CASES AND OTHER MATERIALS ON THE LEGAL PROFESSION* 168–92 (1938); H. DRINKER, *LEGAL ETHICS* 103–30, 161–67 (1953). But see ABA Comm. on Professional Ethics and Grievances, Formal Op. 202 (1940); ABA Comm. on Professional Ethics and Grievances, Formal Op. 86 (1932).

16. See, e.g., ABA Comm. on Professional Ethics and Grievances, Formal Op. 224 (1941); ABA Comm. on Professional Ethics and Grievances, Formal Op. 40 (1931); 1 *Hearings Before the Subcomm. of the Senate Comm. of the Judiciary on the Nomination of Louis D. Brandeis to Be Associate Justice of the United States*, 64th Cong., 1st Sess. 281–305, 792–800, 896–99 (1916); 2 *id.* at 17–25, 68–70.

17. See Bodle, *Group Legal Services: The Case for BRT*, 12 U.C.L.A. L. REV. 306 (1965). Most such attacks have been blocked by Supreme Court doctrine holding group litigation

Organizing. Law practice for wealthy clients often focused on the design of institutional arrangements (financing schemes, management structures, fiduciary relations, trade associations) to facilitate collective action.¹⁸ But practice for middle and lower income clients focused almost exclusively on individual approaches. While the leaders of the corporate bar were considered creators of organizations for investors and managers, it was unheard of for a legal aid lawyer to get involved in, say, forming a tenants union or a welfare rights organization.¹⁹

Civil Procedure. The kind of representative or class litigation that occurs every time a corporation brings suit was treated no differently from suits involving individual litigants, and its propriety was taken for granted. Other forms of private group litigation were treated as distinctive and problematical, and most group litigation not involving conventional commercial interests was precluded or discouraged, in part because the interests of group members were presumed to conflict.²⁰

These presumptions were challenged extensively during the 1960's and 1970's. Professional discourse became more willing to recognize intracorporate conflicts of interest and noncorporate common interests in collective action.²¹ Indeed, at their most extreme, these trends occasionally reversed the older presumptions. Activists who found intracorporate conflicts of interest all over the place (because some shareholders were opposed to investing in South Africa, making napalm, or fighting unionization) sometimes spoke in connection with the War on Poverty or the legal services program of the urban low income "community" in just the way corporate lawyers spoke of the corporation—as if it were a fully constituted entity with determinate, articulated, unitary interests.²²

The trends of the 1960's and 1970's have slowed and even reversed in the legal literature of the past few years. Reflecting partial

activities protected by the first amendment. *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *NAACP v. Button*, 371 U.S. 415 (1963).

18. See J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 335-38, 342-52 (1950).

19. E. JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 12-14 (1974); J. KATZ, *POOR PEOPLES' LAWYERS IN TRANSITION* 38-45 (1982); Galanter, *Why the "Haves" Come Out Ahead: Speculations On The Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 149-51 (1974).

20. See Yeazell, *supra* note 14, at 1102-07.

21. On intracorporate conflicts, see G. HAZARD, *supra* note 11, at 43-86; Note, *Developments in the Law—Conflicts of Interest*, 92 *HARV. L. REV.* 1244, 1334-73 (1981). On noncorporate common interests, see J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978); Yeazell, *supra* note 14.

22. See generally D.P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1969) (criticizing the theme of "community" in rhetoric of the War on Poverty).

disillusionment with the progressive lawyering of those decades, a large conflict of interest literature has emerged criticizing some of this lawyering as too quick to risk client interests in the name of collective action.²³ And while some corporate writing remains more sensitive to intracorporate conflict than the older doctrine, a new literature uses economics to argue that the market neutralizes much intracorporate conflict.²⁴

The great virtue of the recent conflicts literature has been to demonstrate how indeterminate the liberal notion of client interests is. But the efforts of this literature to rescue the liberal conception from the problems it has explicated do not seem successful.²⁵ Two types of solutions have been suggested. The first calls for a more subtle or elaborate asking process. Proponents of psychologically informed interviewing and counseling techniques represent one example of this response;²⁶ proponents of elaborate notice and intervention procedures in class actions represent another.²⁷ This response has the disadvantage of encumbering collective action, at best by making it more expensive, at worst by uncovering or engendering conflict among collaborators. Moreover, as its proponents have acknowledged, given the problems of communication, even the most elaborate asking process will not consistently yield reliable answers.²⁸

The other solution is to assert that presumptions about interests are inescapable and to embrace them.²⁹ Presumptions can be redeemed by making them explicit, testing them against knowledge of actual interests, and discarding the ones which correlate poorly with

23. See, e.g., Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471-72 (1976); Rhode, *supra* note 13, at 1185; Yeazell, *supra* note 14, at 1112.

24. See, e.g., Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Symposium, 35 STAN. L. REV. 1 (1982).

25. The analysis prescribed by liberal conflict-of-interest doctrine is similar to the one generally recognized as unworkable in the area of equal protection minimum rationality review. You need first to define the extent to which the "interests" of a set of individuals converge (as in equal protection, you need to define a legislative purpose); then you need to define what classifications of these individuals will serve these common interests appropriately (as in equal protection, you need to determine what classifications of addressees of the statute will appropriately further the purpose). Of course, in constitutional law, it is widely recognized that both stages of the analysis are hopelessly indeterminate and freighted with political considerations. See Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

26. See, e.g., T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976).

27. See, e.g., Bell *supra* note 23, at 505-11; Rhode, *supra* note 13, at 1251-57.

28. See Rhode, *supra* note 13, at 1235-37.

29. See, e.g., Yeazell, *supra* note 14.

the client characteristics on which they are based. This response so drastically attenuates the principle of the subjectivity of interests that it is doubtful that it can qualify as a revision, rather than a repudiation, of the professional premises. However one characterizes it, the position has evident drawbacks. Most obviously, it requires the sacrifice of atypical clients whose interests do not in fact coincide with the presumptions. In resorting to presumptions, this response dispenses with the most morally appealing feature of the professional doctrine, its aspiration to respect the client as a concrete individual.

Moreover, the evidence with which such presumptions might be verified is ambiguous and suspect. For one thing, the evidence is subject to disproportionate influence by institutions such as the media that dominate the processes by which the public culture is articulated. For another thing, even if the presumptions accurately measure people's subjective understanding of their own interests, that understanding may be based on inaccurate notions of risk and possibility. For example, some writers argue that the interests of class litigants in short term material gains are less problematical than interests in more long term and less tangible political or public achievement. But even if litigants do tend to understand their interests this way, their understanding may reflect mistaken assumptions about the relative risks and possibilities of realizing the two types of goals. Since part of the lawyer's job in the liberal view is to correct such misconceptions, he should not be permitted to take for granted notions of interest that are based on them.³⁰

Most importantly, while the presumption approach does not necessarily entail the traditional bias of the liberal view against collective practice, it is in fact linked to that bias in current professional discourse. Despite the insights of the last two decades, the fallback position of the liberal view in noncorporate private practice remains the presumption of disaffiliation wherever differing interests are per-

30. For example, Yeazell asserts that common plaintiff interests can be presumed more reliably in consumer damage class actions than in public injunction actions because nearly everyone would like more money, while nonpecuniary goals tend to be more controversial. Yeazell, *supra* note 14, at 1110-12. But even granting a pervasive preference for wealth, one can plausibly hypothesize a variety of important conflicts in consumer actions—for example, between class members who are current customers of the defendant and who risk that the damage award will be passed on to them in the form of price increases exceeding their recoveries and class members who are not current customers. Similarly, the interests involved in suits seeking public goals such as environmental quality may seem to be more in conflict than the interests in consumer damage actions only because some members of the putative class subscribe to mistaken factual beliefs—for example, that a plaintiff victory may cause unemployment.

ceived. This presumption is explicit in the doctrine on joint representation. The *Code of Professional Responsibility* discourages and sometimes prohibits joint representation in situations involving "differing interests,"³¹ and commentators have interpreted the "common interest" requirement for class representation of Rule 23 of the Federal Rules of Civil Procedure to mandate disaffiliation (subclassing or denial of certification) where differing intraclass interests are identified.³² But this presumption is unjustified. Most opportunities for collective practice involve interests that differ in some respects (and that coincide in others). There is no reason to believe that the risks or sacrifices of collective practice tend to outweigh the benefits.

Consider, for instance, Derrick Bell's critique of the NAACP school desegregation litigation.³³ Bell says that many absent members of the plaintiff classes disagreed with the strong probusing positions of the NAACP Legal Defense and Education Fund lawyers and would have preferred that the lawyers shift their efforts toward securing more resources for schools in black neighborhoods. In part on the basis of the conflict provisions of the *Code* and of Rule 23, Bell concludes that such people should be disaffiliated and represented separately in the lawsuit, so that distinct subclasses could press for different remedies. Under the influence of conflicts doctrine, Bell ignores competing factors that might favor joint representation. For example, he does not consider that division among plaintiffs might contribute to a result less satisfactory to both plaintiff groups than the one favored by either group would be to the other. This might happen if each group succeeded in discrediting the other's position without establishing the credibility of its own, and the court thus decided to defer to the school board. In a conflict between the school board and the larger class of blacks, a unified plaintiff class may be better able than competing subclasses to achieve a remedy that is satisfactory to all blacks.

Nor does Bell consider that disaffiliation may sacrifice long term benefits that might accrue from an alternative response to class con-

31. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

32. See, e.g., Bell, *supra* note 23, at 505-11 (subclassing); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 378, 387 (1972) (denial of certification). For an illustration of the presumption of disaffiliation in a more mundane context, see the strained bar association argument—admittedly uninformed by actual practice or experience—that lender and purchaser should have separate counsel for the title examination in a residential real estate purchase. ABA SPECIAL COMM. ON RESIDENTIAL REAL ESTATE TRANSACTIONS, *Residential Real Estate Transactions: The Lawyer's Proper Role—Services— Compensation* 10-11, 23 (1978).

33. Bell, *supra* note 23.

flict: intraclass resolution. One option for black parents dissatisfied with the position of class counsel would be to seek to further their views within the Legal Defense Fund or other organizations representative of the undivided class.³⁴ A potential byproduct of such efforts is to contribute to the democratization of the organization or class, to strengthen it by making its leadership more sensitive to its members or by broadening patterns of member participation. When this occurs, the litigation provides the occasion for the development of organizational capacity that provides more general benefits to its members. These types of benefits have to be sacrificed when, instead of promoting intraclass resolution, lawyers promote disaffiliation, in effect submitting the conflict to the state. Of course, there are many situations in which state resolution of disputes within a disadvantaged class might be in the interests of some members, and the situation Bell describes may be one of these. But the doctrines to which he appeals do not help determine if it is. The problem with the presumption of disaffiliation is that, to the extent it provides any guidance at all, it does so only by obscuring considerations favoring collective practice.³⁵

There is a further problem with the liberal understanding of the lawyer-client relation. Not only are the client's interests indeterminate at any given moment, but the client's understanding of her interests may change in the course of representation. Here is an

34. Cf. A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970) (obstacles to disaffiliation may prompt internal political activity that increases organizational effectiveness).

35. The principal exception other than the business organization to the presumption of disaffiliation in private practice is the labor union. Contemporary labor law recognizes that organizational arrangements that subject some workers to collective coercion may be in the interests of all workers because such arrangements may empower the workers in relation to employers. Labor law also recognizes that defining communities and conflicts of interests among workers for the purposes of affiliation and representation is fundamentally political in that the definitions determine both member vulnerability to internal redistribution and member power vis-a-vis outsiders. See R. GORMAN, *BASIC TEXT ON LABOR LAW* 66-92 (1976). The regime that permits this type of organization is understood to be a political creation designed in part to redistribute power and wealth. Only by treating labor law, like business organizations, as a special case governed by peculiar principles of substantive law can the professional culture continue to fall back on the presumption of disaffiliation and to treat conflicts analysis generally as apolitical and doctrinal. But the distinction is arbitrary. The possibilities of collective action created by, for example, substantive laws governing nonprofit incorporation, class actions, and the first amendment, make engaging in collectively coercive practice potentially in the interests of wide varieties of clients in many situations. See J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978); Galanter, *supra* note 19.

Ronald Garret's defense of the idea of group rights draws attention to two other specialized areas in which the presumption of disaffiliation is conventionally suspended—churches and Indian tribes. Garret, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

account by Gary Bellow of an episode from practice that illustrates this phenomenon.

In Tulare County, I was involved in a law suit on behalf of a Tenants' Union attempting to improve conditions in a farm labor camp by withholding rent. I took a deposition from the head of the Housing Authority which ran the camp—at a place where the tenants could come and watch. I insisted that the deposition be taken in front of those tenants so they could see me challenge him, question him, and get information from him that they had previously been unable to obtain. They left with the sense that he was not invulnerable and that they were not totally without leverage or protection. It helped them, I think, continue the fight. It didn't matter that the case went on for two years, that the Supreme Court denied certiorari on it and that we in fact lost the legal issue. By the time the Supreme Court did rule, new housing was being built for the residents of the camp, over \$5,000 in money had been returned to them in back rent, and a set of rules and procedures had been agreed upon that would bar any kind of retaliatory evictions in the future.³⁶

It is difficult to make sense of this episode in terms of the professional notion of practice as instrumental to the client's articulated, preexisting interests. Of course, the ultimate gains—new housing, damages, procedural protections—probably corresponded to some of the initially articulated interests of the clients. But those interests were qualified by the client's initial notions about other interests—in job security, in peaceful relations with their employer, in avoiding demands on their time—that would have affected their willingness to take collective action and the vigor and aggressiveness with which they might undertake it. The ultimate gains appear to have depended on a change these latter notions underwent as a consequence of the way the lawyer structured the deposition. The deposition does not appear to have been instrumental to any initially articulated goal. It does not appear to have produced valuable information or to have had any strategic impact on the adversary. Its importance lies in the way it affected the clients. One interpretation of what happened is this: The experience of confronting their adversary together in circumstances where he was obliged to acknowledge them as a group and as other than subordinates and to account to them in some minimal way increased their sense of solidarity with each other and reduced their sense of vulnerability to their adversary. It intensified the sense of each of them of a common interest in collective prac-

36. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1088 (1970) (quoting G. Bellow).

tice, a sense which both made them more willing to become vulnerable to each other and empowered them in relation to the adversary.

From the perspective of the professional vision, it is troubling that the lawyer contributed to this change in the client's understanding of their interests through the way he structured the representation. The lawyer consulted his own understanding of the clients' interest, an understanding that they had not articulated and probably did not share initially. Yet, the professional view cannot plausibly condemn this practice as paternalistic or exploitative, for the clients ultimately did come to share the lawyer's interpretation. In order to condemn the practice as unwarranted by the client's interests, the professional would have to look only at the clients at the beginning of the representation and ignore them later. But nothing in the professional conception of interests provides any basis for suggesting that the clients' earlier understanding of their interests is more authentic or reliable than their later one.³⁷

Thus, both versions of the professional understanding of the client have common problems. Neither has a satisfactory basis for deciding between relatively individual and relatively collective practice. The conservative approach relies on presumptions that turn solely on an implausible distinction between manifest disputes and intact social relations; the liberal approach, in the frequent situations where asking does not yield unambiguous answers, falls back on an equally implausible presumption of disaffiliation. And neither approach adequately confronts the way the client's understanding of his interests is influenced by the experience of representation. The conservative approach recognizes the problem but responds only by trying ineffectually to confine it; the liberal approach does not recognize it at all.

C. *The Critical View*

The literature from which I derive these criticisms suggests that

37. Nor can the incident be reconciled with the professional vision by portraying the later understanding as simply the consequence of information provided by the lawyer. In the first place, the change in understanding occurred through an experience which is not aptly described as "information." More fundamentally, this experience was structured by the lawyer; had he taken other approaches, the clients would have arrived at other understandings of their interests. See, e.g., Bellow, *supra* note 2, at 121-22 (suggesting that certain styles of representation "cool out" or numb the inclinations of poor clients for aggressive claim assertion). Since the interests are thus a function of the representation, the representation cannot be seen, as it is in the professional vision, as instrumental to the interests.

the response to the problems of representation should involve not only efforts to devise new procedures or get more information about clients, but also reexamination of the basic premise of the professional culture that representation is instrumental to preexisting subjective ends. It suggests an alternative vision that dispenses with that premise.

The Critical vision resembles the conservative professional approach in seeing social relationships as an integral part of individual identity, rather than as merely instrumental to subjective individual interests, and in acknowledging that representation is potentially constitutive of the client's identity. But unlike the conservative view, it does not presume that intact relations are valuable or that the constitutive tendency of representation is to alienate the client from social relationships. Moreover, it sees the constitutive tendency of representation, not as a danger to be guarded against, but as an opportunity to be embraced.

The Critical view is animated by an ideal of practice as a process of constituting or reconstituting nonhierarchical communities of interest. Like the liberal view, the Critical one is open to both individual and collective practice. But instead of appealing to ostensibly preexisting subjective interests as governing norms, it appeals to the ideal of nonhierarchical community. Thus, the Critical view is compatible with aggressive lawyering in situations where the interests of the client or client community involve a challenge to external hierarchy. Its most ambitious projects of this kind envision the two mutually reinforcing processes exemplified in the example recounted by Bellow, one in which the client is encouraged to enter into nonhierarchical relationships by the experience of solidarity and another in which she is empowered to withdraw from or challenge hierarchical ones.³⁸

But the Critical view is also compatible with fully collective and conciliatory approaches in situations involving disputes within an actual or potential nonhierarchical communal relation. Subject to the important qualification regarding hierarchy, the Critical view sup-

38. See text accompanying note 36 *supra*. For further specific examples of practice that exemplify this vision, see Gabel & Harris, *supra* note 2. For a more extended account, emphasizing the difficulties as well as the possibilities of practice animated by this vision, see L. White, Looking Back over the Year at Forest Hills (June 1981) (Legal Services Institute, unpublished manuscript). The vision of practice as creating nonhierarchical relations in the course of challenging hierarchical ones is developed and illustrated on a broad scale in E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1963) and in L. GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA (1976).

ports the challenge to the professional vision developed in the recent literature of mediation and informal dispute resolution. And it is consistent with Brandeis' notion of "counsel to the situation" in which the lawyer attempts to reconcile disputing family members or business associates conventionally held to have interests that conflict too severely to permit joint representation.³⁹ Such practice is not designed to serve the clients' preexisting interests, but to reconstitute them as a community defined by common interests.

The Critical view does not claim that the ideal of constituting or reconstituting nonhierarchical communities of interest is more determinate than the professional ideal of loyalty to subjective interests. Although there have been efforts to develop a theoretical account of the notion of nonhierarchical community,⁴⁰ the Critical view of practice does not rely on or hope for a determinate explication. It is not reluctant for the lawyer to make controversial, intuitive judgments in interpreting and applying the ideal of nonhierarchical community. Although it recognizes that such judgments are often unverifiable, it aspires to a distinctive kind of verification. The precept that the lawyer further the client's interests, as she understands them, is qualified by the precept that she also try to enhance the client's capacity to express her own interests. The authoritative test of the lawyer's judgment is that the client come to share it under conditions in which the lawyer believes that the client's understanding is not affected by conditions of hierarchy.⁴¹

I do not want to exaggerate either the novelty or the distinctiveness of the Critical view. The problems of the professional vision have been discussed by a broad range of writers in recent years. And the Critical understanding of practice does not eliminate the problems of cost and communication. It too relies on both asking and presumptions. Nevertheless, the Critical vision understands asking and presumptions differently from the professional one.

The professional notion of asking connotes either a series of discrete communications between lawyer and individual clients or a communication between lawyer and a previously constituted organization of clients. In either event, it connotes a largely passive role for the client; his participation is limited to telling the lawyer what the

39. See Frank, *The Legal Ethics of Justice Brandeis*, 17 STAN. L. REV. 683, 698-703 (1965); see also J. AUERBACH, *JUSTICE WITHOUT LAW* (1983); Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982).

40. For a notable example, see R. UNGER, *supra* note 2, at 236-89.

41. See J. HABERMAS, *LEGITIMATION CRISIS* 102-10 (1975).

lawyer wants. Since organization merely serves as a conduit for individual preferences, and representation is merely instrumental to such preferences, neither communication among clients nor direct client participation is valued. By contrast, the Critical notion that a community of interest is something to be created in the course of representation, rather than a premise of representation, suggests the importance of communication among clients and direct participation. Communication among clients and direct participation are valued for their potential to increase understanding and solidarity and to safeguard against hierarchy.⁴² Bellow's noninstrumental use of the deposition in the Tulare County litigation, which appears at best anomalous in the professional vision, exemplifies the theme of participation. So does his program of "focused case pressure" in poverty law—small-scale claim aggregation that sacrifices prospects of broad remedies and rule change in order to increase client involvement and control.⁴³ And from the perspective of participation, the most promising developments in recent class action doctrine might seem, not the notice and intervention provisions on which conflicts doctrine has focused, but the remedial provisions that give class members a direct role in monitoring the decree.⁴⁴

In the professional vision, presumptions are empirical summaries of information about the preferences of people who share the characteristics of the client. Although not expected to be certain or precise, they are understood to be derived from the uncontroversial method of generalization from observed behavior and to be independent of the lawyer's own moral and political commitments. On the other

42. The Critical view overlaps the critique of the professional vision in the jurisprudence of "process values," which interprets procedure as an expression of respect for personal dignity. See, e.g., Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). Since there are many versions of this jurisprudence, it is hard to define the ways in which the Critical view differs from it, but the following distinctions seem more or less applicable to most versions. First, the "process values" emphasized in this jurisprudence tend to be exclusively values of individual dignity, not the values of group solidarity emphasized in the Critical writing. Second, the "process values" jurisprudence focuses on the most formal and ceremonial legal practice—the judicial hearing—and often adopts what Critical legal writing considers a sentimental interpretation of judicial procedure which ignores the extent to which such procedure is dominated by professionals and alienates litigants. Third, unlike the constitutive dimension of practice emphasized in the Critical view, the expressive dimension emphasized in the "process values" literature does not seem to be related to empowerment. Practice expresses the client's interests, but does not necessarily implement them. Thus to some Critical writers, the "process values" jurisprudence sometimes seems to recommend process as a form of consolation for the inability to achieve practical ends. See Simon, *supra* note 2, at 91-113; see also Gabel & Harris, *supra* note 2; Galanter, *supra* note 19.

43. See Bellow, *supra* note 2.

44. See, e.g., *Morgan v. Kerrigan*, 530 F.2d 401, 429 (1st Cir. 1976).

hand, the Critical vision is more insistent about the ambiguity of behavior, and it is willing to consider that people might have interests of which they are not aware. It therefore does not understand judgments about people's interests as empirical or as generalizations from behavior. It suggests that such judgments implicate controversial moral and political commitments.

The Critical notion of interest bears some resemblance to doctrines such as the Marxist notion of objective interests, which asserts that groups sharing certain social circumstances are classes regardless of how the individual members understand their interests at any given moment,⁴⁵ and the notion expressed in recent public law jurisprudence that certain disadvantaged groups constitute "natural classes" for the purposes of equal protection or standing doctrine.⁴⁶ The Critical view shares with these doctrines the belief that social circumstances create and limit possibilities of affiliation (though within broad and as yet undetermined limits) and the notion that our normative judgments explicitly or implicitly classify people by, for example, distinguishing advantaged from disadvantaged, or powerful from powerless. On the other hand, the Critical view differs from these notions to the extent that they suggest that the affiliation of these groups has been decreed by history or that their definition can be derived from science or legal doctrine. The basic test of the lawyer's judgment of the client's interests is that the client come to share that judgment under conditions which lawyer and client agree are nonhierarchical. The expectation that the client will do so is as much a hope as a prediction, and it can be fully vindicated only where the client has had an opportunity to disappoint and refute it.

The Critical notions of asking and of presumptions imply a further contrast with the professional vision. While the professional vision sees the lawyer as the servant of the client's interests, the Critical vision sees the lawyer as an actual or potential member of the same community of interest as the client. The lawyer's understanding of the client's interests is derived in substantial part from the lawyer's own moral and political commitments. Since the lawyer's presumptions should be tentative and rebuttable, she has to remain open to persuasion by the clients; she as well as the client is vulnerable to

45. See, e.g., Balbus, *The Concept of Interest in Pluralist and Marxian Analysis*, in 1 *POLITICS AND SOCIETY* 151, 167-68 (1971).

46. See, e.g., J. VINING, *supra* note 21; Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 126 (1976).

change in the process of representation.⁴⁷

Despite this vulnerability, the lawyer often will be in a position of power in relation to the client. The Critical vision substitutes for the professional fiction that the lawyer is always accountable to the client the prescription that the lawyer seek to create a client capable of holding her accountable. The check on the lawyer's power lies in the possibility that she will succeed in creating a community in which members are capable of calling each other to account. Short of such success, the Critical vision suggests that the responsibility for making at least partially unverifiable judgments, and the risk of being wrong, are inescapable.

The Critical vision raises without answering a host of practical questions and problems. It also seems to impose formidable responsibilities and risks on the lawyer—responsibilities for changing the client; risks of being changed herself. But it would be a mistake to complain that this vision is more utopian than the professional one. To some extent, the Critical vision merely acknowledges a basic fact of contemporary law practice—that lawyers commonly make, and have to make, judgments in terms of their own moral and political commitments about what their clients' interests are. Its most basic difference from the professional vision is that it sees this fact, not as something to be regretted and minimized, but as the source of the most rewarding and exhilarating potential of practice.

II. WITHIN THE BOUNDS OF THE LAW: THE CONSTRUCTION OF THE SYSTEM

In the professional vision, once the lawyer figures out the client's interests, she is supposed to pursue them "within the bounds of the law"⁴⁸ or within the constraints of the legal or social system. This premise fuels some of the most strongly felt rhetoric of the recent detractors of Critical legal writing.

Although some of the detractors affect a light-hearted air, they suffer from dark visions. Phillip Johnson finds an emblem for his view of this writing in a novelistic account of a window-smasher whose screaming rage turns from radical slogans to threats of mur-

47. The notions that the lawyer interprets the client's interests in terms of her own values and that she views herself as an actual or potential member of the client community implies limits on the lawyer's ability to represent people with whom her values conflict. I develop this aspect of the Critical vision in Simon, *supra* note 2.

48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

der.⁴⁹ Owen Fiss finds in this writing "the deepest and darkest of all nihilisms." He thinks it a threat to the racial jurisprudence of the Warren Court and even to "our social existence and the nature of public life as we know it in America."⁵⁰

Neither author mentions any passage in the Critical literature that seems to warrant such imagery or characterization. Even Louis Schwartz, who has combed Duncan Kennedy's after-dinner speeches with the zeal of J. Edgar Hoover on a security case, has failed to find anything resembling an endorsement of nihilistic destruction or violence.⁵¹ When Johnson recognizes that the Critical writers do not act like nihilists, this recognition leads him not to reject his initial interpretation, but to conclude that the Critical writers lack the courage of their convictionlessness.⁵² At this point, the attitude of outrage changes to one of patronizing *deja vu*.

I think that both the outraged and patronizing modes reflect a mistaken understanding of the social meaning of practice that pervades professional culture. The detractors take this understanding for granted and assume that it is shared by the Critical legal writers. In fact, however, some of the principal themes of Critical legal writing challenge this understanding and suggest an alternative and more plausible view.⁵³ Because the detractors fail to see the significance of this aspect of the Critical writing, they fail to join issue on the relation of practice to the legal or social system.

A. *The Professional Notion of the System*

The professional understanding holds that there is a necessary and determinate distinction between professional practice on the one hand and transformative practice on the other. The pre-Realist version of this understanding characterizes the distinction as simply between law and politics. Law is identified with adjudication (and

49. Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247 (1984).

50. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 763 (1982).

51. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 421-23 (1984). Although Schwartz twice asserts that the Critical writers favor violence, *id.* at 423, 437, he cites no authority for the assertion.

52. See Johnson, *supra* note 49, at 261, 281-83.

53. This part draws on D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281 (D. Kairys ed. 1982); Klare, *Law-Making as Praxis*, TELOS, Summer 1979, at 123; and especially Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). While there is no general agreement among people associated with Critical Legal Studies about anything in this article, I sense that there is less agreement about Part II than about Part I.

perhaps also with counseling and negotiation "in the shadow" of adjudication), and adjudication in turn is understood as the process of enforcing a previously established, determinate set of rules. Politics, on the other hand, is identified with legislative and electoral activity, which is understood as the process of deciding which rules will be established.

Though the pre-Realist position is hard to maintain in the academic world these days, it still exercises a powerful influence on the professional culture. For example, when Derrick Bell complained that the NAACP's strong pro-busing positions in desegregation cases were contrary to the interests and desires of many members of the plaintiff classes, some NAACP lawyers replied that they *had* to take these positions because they were required by the Constitution.⁵⁴ In another mood, Bell himself lapsed into pre-Realism when he replied to Jack Bass's characterization of the civil rights decisions of Southern federal judges as a political achievement that, in fact, the decisions were no more than what "the law require[d]." ⁵⁵ And of course, pre-Realism is rife in the rhetoric of conservatives who oppose class actions aimed at law reform and lobbying on the part of poverty lawyers on the ground that, because they are designed to change rather than merely enforce the rules, such practices are not within the appropriate scope of legal representation.⁵⁶

Post-Realist lawyers acknowledge that the bright-line law/politics distinction is untenable. They concede that the rules to which lawyers appeal in adjudication are indeterminate; that adjudication involves a good deal of the type of fighting about what the rules will be that the pre-Realist defines as political; and that some legislative activity has a place in law practice.⁵⁷

The basic jurisprudential response of the post-Realist professional to the Realist demonstration of the indeterminacy of rules has been to reinterpret legality in terms of a system, not of rules, but of institu-

54. Bell, *supra* note 23, at 480 n.32 (quoting Nathaniel R. Jones and J. Harold Flannery); *id.* at 492 n.64 (quoting Nathaniel R. Jones). Bell notes that the courts in fact rejected some of their positions. *Id.* at 482-87.

55. Bell, Book Review, 91 YALE L.J. 814, 815 (1982).

56. See Agnew, *What's Wrong With The Legal Services Program*, 58 A.B.A. J. 930 (1972); see also Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. REV. 282 (1982); cf. 42 U.S.C. § 2996f(a)(5)-(6), (b) (1976) (federally funded poverty lawyers precluded from "any political activity" including specified forms of lobbying); 45 Fed. Reg. 50658, 50663-64 (Nov. 8, 1982) (proposed regulations to restrict class actions by federally funded poverty lawyers).

57. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974) (group litigation and legislative representation are within the proper scope of legal representation by poverty lawyers).

tional forms and practices. Although individual rules are admitted to be manipulable, the system of institutional forms and practices is asserted to be relatively determinate. Thus for the post-Realist, the critical distinction is between intra and extrasystemic activity, between working *within* the system and fighting *about* the system.⁵⁸ This view does not assume that the institutions and practices that make up the system are changeless, merely that one can clearly distinguish between changes that represent development or vindication of the system and changes that represent transformation of it.

The post-Realist associates intrasystemic activity with three characteristics. First, it is *ordered*. This means that it is intellectually or culturally structured. Idealists like Fiss invoke this consideration when they describe legal activity as rational or principled,⁵⁹ but even skeptics like Johnson who dismiss such claims seem to believe that conventional legal activity ("pragmatic accommodation") has a structure that distinguishes it from extrasystemic politics.⁶⁰ Second, activity within the system is *established*. This means that it is perceived generally as vindicating customary expectations and practices. Third, activity within the system is *voluntary*. In contrast, fighting about the system is seen as relatively disordered, disruptive of established expectations and practices, and coercive.

Although there is no consensus on where the line runs, the professional culture is premised on the idea that such a line exists somewhere. Professional expertise generally is understood to consist of some distinctive capacity to define and operate a determinate system. And professional culture ascribes a fundamental ethical value to activity within the system.

Post-realism has attenuated rather than replaced the law/politics distinction. It still sees adjudication as *relatively* apolitical and as the core instance of law practice, and while it acknowledges that an activity such as lobbying overlaps the legal and the political, it consid-

58. For theoretical elaborations of this premise, see H. HART, *THE CONCEPT OF LAW* (1961); H. HART & A. SACKS, *supra* note 7. There is no agreement within the professional vision as to the range of institutions and practices that the system includes. The narrowest interpretations are close to pre-Realism: The system includes only distinctively legal institutions and practices that can be distinguished as enforcement rather than as reform. When these distinctions come under pressure, one response is to move to a more inclusive level. Then the relevant system becomes the larger governmental or even social system, and the boundary between included and excluded practices is defined in terms of the distinction between reform and more fundamentally transformative practices. See text accompanying notes 66-67 *infra*.

59. See Fiss, *supra* note 50, at 754.

60. See Johnson, *supra* note 49, at 279.

ers such activities peripheral to law practice. While it tends to see all law practice as distinctively intrasystemic, it sees much political activity as pressing against—and often breaking through—the bounds of the system.

Moreover, the admission of politics to the system has been grudging. Within the system, the more political activities tend to be denigrated or ignored in relation to the more legal ones, just as fighting about the system tends to be denigrated or ignored in relation to working within the system. The dominant attitude of the professional culture toward the political and the extrasystemic is one of distaste or indifference.

Take, to begin with, electoral politics. Even though legislatures are dominated by lawyers, and lobbying is a common activity of lawyers, elite professional culture makes almost no reference to electoral politics except in the form of pervasive, unexplicated stereotypes. These stereotypes portray electoral and legislative activity at the bottom of a hierarchy of modes of rationality and ethical orientations. At the top of the hierarchy is judicial activity, which appears as a realm of reason and principle and of ethical universalism. Below it is administrative activity, a fallen but not unredeemable realm where reason and principle have become pragmatic expertise and where universalism must compromise with self-interest and group interest. And then finally, there is legislative activity, a realm of lay judgment relatively unbound by reason and principle and dominated by interest.⁶¹ (Although the profession, post-Realism, must pay at least lip service to the notion that there are some “political” elements involved in adjudication, the notion that anything “legal”—i.e., rational and principled—might go on in the legislative sphere still comes as a surprise.⁶²) The devaluation of electoral politics is reinforced by the law school curriculum, which remains obsessed with adjudication, pays modest but respectful attention to administration, and largely ignores electoral offices. And it is further reflected in the career ambitions of elite academic lawyers and their more successful students, which rank often quite dull jobs as judges and judicial

61. Even the deference paid to the legislature as the more “representative” branch is often portrayed as the price of *judicial* legitimacy. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 94–95 (1970). The proponents of deference rarely seem interested in explicating the concept of representativeness or in examining the way legislatures and elections actually work. See Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 242–46 (1981).

62. See Brest, *The Conscientious Legislator's Guide To Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

clerks far above more important and stimulating administrative jobs and make little room at all for legislative jobs.

The attitude of indifference toward or distaste for the political is further exemplified by the approach to governance that prevails in law schools and law firms. The term "political" has invariably pejorative connotations when applied by members to activity within these organizations. Even if one ignores the disfranchisement of non-professionals, law schools and firms are often autocratic or oligarchic organizations. The autocracy or oligarchy rules through the manipulation of personal insecurity, through the ability to diffuse collective action by negotiating private individual deals, or simply through default and apathy on the part of the peers. Far from being regretted, this situation of collective impotence and individual indulgence is celebrated under the euphemism of "collegiality." "Political" activity is condemned as a threat to the basic values of professional work, which are identified with a nirvana of atomized contentment.

If the posture of professional culture toward parliamentary politics and the politics of the workplace is largely indifference or distaste, its posture toward the politics of popular mobilization is sheer anxiety and even terror. Various groups have regarded popular mobilization as a form of law practice or law enforcement at various points in American history, including the revolutionary period and the period of civil rights activism during the 1950's and 1960's.⁶³ But within the professional culture, popular mobilization is never seen as part of law practice; it is almost always identified, with unmistakably pejorative connotations, as political and extrasystemic. Those whose political fears focus on the working class often speak as if the paradigmatic form of popular mobilization were the lynch mob. (Thus, Owen Fiss's nightmare of an oppressed underclass.⁶⁴) Those whose political fears focus on the poor and their allies among the intelligentsia often speak as if the paradigmatic form of popular mobilization were the arson riot. (Thus, Phillip Johnson's nightmare of an enraged underclass.⁶⁵)

This view of the nature of professional and political practice held within the professional culture strikingly parallels a view that has influenced the radical left. Like the professional of the established

63. See generally *LAW AND RESISTANCE* 1-36 (L. Veysey ed. 1970); F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 181-258 (1977); J. REID, *IN A REBELLIOUS SPIRIT* (1979).

64. See Fiss, *supra* note 50, at 763.

65. See Johnson, *supra* note 49, at 247, 256-59, 281 n.91.

culture, the professional revolutionary insists on the sharp distinction between legal or intrasystemic practice on the one hand and political or extrasystemic practice on the other. And like the professional, she sees the former as relatively ordered, established, and voluntary and the latter as relatively disorderly, disruptive, and coercive.⁶⁶ But the professional revolutionary reverses the establishment professional's normative commitment. For the revolutionary, only political or extrasystemic activity has value as a form of self-expression. Intra-systemic activity is merely instrumental to genuine political activity. It is seen either as a form of sabotage, which exacerbates the weaknesses of the system in order to hasten its breakdown and to clear the way for genuine politics, or as a shield, which uses the system's formal commitment to civil liberties to protect genuine politics.⁶⁷ Although both types of practice are considered useful, their value lies in facilitating more fundamental activity which takes place outside of and against the system.

B. *Critical Writing and the Professional System*

Both the detractors' outraged and patronizing modes arise from the understanding of the distinction between working within and fighting about the system which they share with the professional revolutionary. Reading this understanding into the Critical legal writing, the detractors interpret the Critical attack on the professional efforts to define and defend the system as embracing a practice that is disordered, disruptive, and coercive. But when they find the Critical writers engaged in or proposing activities that they think of as intrasystemic, the detractors conclude that the writers are not serious about their pretensions to transformative practice.

Both responses miss the point. Critical legal writing challenges not so much a particular system as the premise that there *is* a system of the kind the professional supposes. It challenges the insistence of the professional culture on the distinction between intrasystemic and extrasystemic activity.

A longstanding theme in left historiography emphasizes that activity conventionally thought of as intrasystemic is often widely perceived as disordered, disruptive, and coercive. For example, the society maintains a police force which, with a wide range of discre-

66. I have in mind the romantic rather than the Leninist view of the professional revolutionary. See J. BILLINGTON, *FIRE IN THE MINDS OF MEN* 5-9 (1980).

67. See Kinoy, *The Role of the Radical Lawyer and Teacher of Law*, in *LAW AGAINST THE PEOPLE* 276-99 (R. Leftcourt ed. 1971).

tion, enforces the law by breaking down doors, shooting and manhandling people, throwing them in jail or out on the street, and seizing their property. More fundamentally, routine private moves within the system that involve no immediate violence often have consequences perceived as disorderly, disruptive, and coercive. Many of the most striking illustrations of this point involve the catastrophic effects of capital movement. Although typically understood by those who make them as thoroughly intrasystemic, the moves sometimes radically alter the society in ways perceived by those who suffer from them as violent upheaval. Consider the physical and emotional devastation caused to Northeastern cities and many of their lower class residents by the capital movements of the last 30 years. Only the most successful revolutionary nihilist activity could have caused greater experience of disorder, disruption, and coercion than the investment flows of this period.

Conversely, several recent studies have emphasized that activity conventionally thought of as extrasystemic is often, perhaps usually, understood by its practitioners to involve a high degree of structure, to vindicate established norms and practices, and to involve voluntary or cooperative arrangements. For example, E. P. Thompson has recently responded to the previously dominant interpretation of the eighteenth century English grain riots as "spasmodic" disruption by showing that the riots were structured by a complex legal and moral vision deeply rooted in both the enacted norms and customary practices of the society.⁶⁸ The rioters saw their activities as a form of law practice designed to vindicate established order against the disruptive activities of merchants and investors. They based much of their practice on appeals to legal norms that the courts and the magistrates acknowledged, and even extralegal aspects of their practice were tolerated by the authorities. Another example of this point is Michael Walzer's study of what no less an authority than Albert Camus considered the seminal instance of modern revolutionary nihilism—the regicide of Louis XVI. Walzer's analysis of the speeches at the King's trial suggests that the regicides justified the killing of the King by a complex jurisprudence that drew on the legal practices of the old regime. He concludes that the regicide should be understood as both "a revolutionary act [and] the proper conclusion of a legal proceeding."⁶⁹

68. See Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, PAST & PRESENT, Feb. 1971, at 76.

69. M. WALZER, REGICIDE AND REVOLUTION 86 (1974).

The point is not to deplore capital movement or to recommend regicide and rioting, but to suggest that the "bounds of the law" or of the legal or social system are far broader and more ambiguous than the professional and the professional revolutionary tend to assume. The range of norms and practices that professionals conventionally understand as legal or intrasystemic are an arbitrarily limited subset of the universe of norms and practices that in fact constitute the system.

At any moment, a modern society is constituted by a universe of current and remembered norms and practices that are ambiguous and contradictory. In such circumstances, different groups can commit themselves to different norms and practices, each believing that its own commitments express the true identity of the system. A group like Thompson's villagers may appeal to a threatened set of customary norms and practices against a newer set that it interprets as an assault on the system; yet its opponents may repudiate the customary norms and practices as anachronistic survivals and defend its own commitments as the natural outgrowth or adaptation of the system. Or two groups may agree that a prevalent practice—say, fornication or marijuana-smoking—violates the system's express norms, and yet disagree as to whether enforcement of the norms would vindicate or transform the system. Or two groups that agree on substantive norms may disagree about the allocation of enforcement authority—civil rights demonstrators, for example, may defy official commands on the basis of their own interpretations of the applicable laws.⁷⁰

Ambiguity and contradiction not only encourage competing views; they make each view relatively unstable internally. One day a group stops seeing a particular rule as a deduction from a general principle and starts to see the rule as an arbitrary limitation on the principle. Or the group stops seeing a customary practice of nonenforcement of a rule as legitimated by the prosecutorial discretion of constituted authority and starts to see constituted authority as delegitimated by the practice. Of course, much of the left politics of the 1960's involved such changes—appeals based on reinterpretations of long established norms. Even when such changes of understanding entail important changes of social practice or structure or inspire turbulent protest, the people conventionally described as challenging

70. *See, e.g.*, *Walker v. Birmingham*, 388 U.S. 307 (1967) (sustaining contempt conviction of civil rights demonstrators, who ignored injunction on the basis of their own—concededly correct—judgment that it was unconstitutional).

the system often see themselves as vindicating it. Whether one characterizes their efforts as working within the system or fighting to change the system depends on whether one accepts their interpretation of what the system is about, and that issue is not very much different from the question of whether one is willing to embrace their commitments.

This is not to say that all political actors understand their practice as vindicating the social systems in which they act. The revolutionary nihilist and the professional revolutionary do not understand their practice in this way. They view their practice as radically extrasystemic. But the professionals are wrong to associate this view with transformative practice in general. Much and perhaps most transformative practice has been understood by the actors involved as vindicating rather than destroying the established social system.

Thus, when the professional asserts that progressive social change comes through intrasystemic activity, the principal difference between him and Critical legal writing concerns what he means by system: a structure that is determinate and that separates a kind of activity that is relatively ordered, established, and voluntary from a kind of activity that is relatively disordered, disruptive, and coercive. Take, for example, the civil rights movement, which both Fiss and Schwartz use as an example of intrasystemic change. For all the differences between Fiss' appeal to hermeneutics and Schwartz's rhetoric of practicality, both writers seem to have remarkably similar notions of system. Schwartz writes: "[One of the] greatest political and judicial revolutions of our time [was] wrought, in the . . . decisions of the Warren Court, by products of conventional legal education, using their skill in making and modifying rules, their alertness to social and economic change, and their prudent penchant for balance and compromise."⁷¹ Except perhaps for the reference to "balance and compromise," this might be a summary of part of Fiss's argument as well. It is, however, misleading.

To begin with, Fiss and Schwartz seem to lapse into pre-Realism by conflating the achievements of the civil rights movement with "the decisions of the Warren Court." As every post-Realist (and Schwartz at least purports to be one) should acknowledge, doctrinal discourse is influenced by its social context; appellate court decisions govern only a narrow range of social life; and legal rules are not self-enforcing. Surely it is not controversial to insist that the achieve-

71. Schwartz, *supra* note 51, at 455 n.205.

ments of the civil rights movement, including the decisions of the Warren Court, are due to a conjunction of judicial decisionmaking (in which some of the most important initiatives were taken at the trial court level), electoral politics, and popular mobilization.⁷²

Post-Realist professionals who recognize this fact have to decide whether to dismiss the undeniably political aspects of the civil rights movement as extrasystemic or to embrace them within their system. Dismissing them would be difficult, in view of the movement's limited but important success and the integral relation of its political activities to the judicial ones exalted by professional culture. But the professionals have been able to reconcile the movement with their notion of system only by forgetting or denying a large measure of the experience of disorder, disruption, and coercion that the movement involved. "Conventional" legal culture has absorbed the new conceptions of race relations, judicial authority, and litigation strategy associated with the movement, but at the time these conceptions emerged, most conventional lawyers condemned them as heretical; the new conceptions succeeded as much in spite of as because of the conventional legal culture of the day.⁷³ Similarly, although the still-unsettled electoral realignments of the 1960's and 1970's are part of our system, they have become a part of it only in consequence of often brutal social dislocations brought about by agricultural modernization in the South, investment and disinvestment in the Northeast, and Lyndon Johnson's decision to betray century-old commitments of the Democratic party to Southern oligarchies. Most importantly, especially in the South, where the success of the movement was greatest, this success depended on often violent and consistently disruptive popular mobilization. If the victories of the civil rights movement are to be attributed to intrasystemic practice, then calling out the troops, group trespass, intentionally provocative mass demonstrations, violations of judicial injunctions, and public defiance of magistral authority are integral parts of the system.⁷⁴

The civil rights movement exemplifies the tendency of transformative politics to escape the professional's distinction between working

72. See generally C. CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960's* (1981); V. NAVASKY, *KENNEDY JUSTICE* 159-242 (1971); F. PIVEN & R. CLOWARD, *supra* note 63, at 181-258 (1977); H. SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY* (1980). Each of these works suggests that elite contributions to the civil rights movement were usually reactive to the initiatives of popular mobilization.

73. See Wright, *Professor Bickel, The Scholarly Tradition, and The Supreme Court*, 84 HARV. L. REV. 769, 770-71 (1971).

74. See works cited in note 72 *supra*.

within and fighting about the system. To an important (although sometimes ambiguous) extent, both the civil rights activists and their antagonists understood their efforts as vindicating an established order. For the civil rights activists, the dominant themes of that order were nationalism, equal protection, individual and group dignity, freedom of expression, and civil disobedience. For their antagonists, the principal themes were federalism, freedom of association, private property rights, organic harmony, and respect for magistral authority. Racists who bombed churches and attacked demonstrators thought of themselves as defending the customary practices of the established order, and they were vindicated at least temporarily by police and prosecutors who declined to prosecute and courts which acquitted them when they were prosecuted. Civil rights activists who engaged in sit-ins or mass demonstrations in defiance of local officials thought of themselves as defending the most fundamental constitutional norms of the established order, and they were vindicated more enduringly by different officials who intervened on their behalf, different courts which invented new doctrines to justify their conduct, and moralists who portrayed their activity in the language and imagery of the established traditions of Protestant moralism and popular government.

The challenge to the distinction between working within and fighting about the system implies a broader notion of practice than that of the professional vision. Although this notion remains undeveloped, it is illustrated by a variety of prescriptive suggestions in the Critical literature.⁷⁵ In discussions of doctrine, Critical writers have sought to develop the ideal of nonhierarchical community by pushing established arguments past their conventional limits to emphasize transformative implications that are denied or minimized by professional writing. For example, in criticizing as arbitrary the limitation of equal protection safeguards to a relatively small number of groups and disabilities, some writers have developed a more ambitious ideal of judicially protected equality.⁷⁶ The counterpart to this type of argument in the area of lawyering is one that starts with a conventional notion of law practice and develops it in ways that cut across the conventional distinctions between legal and political, enforcement and reform, and reform and revolution. Such efforts ex-

75. See Kelman, *Trashing*, 36 STAN. L. REV. 293 (1983).

76. See Unger, *supra* note 53, at 602-16; Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); see also Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

tend traditional legal strategies in ways that have the potential to complement or even generate initiatives of popular mobilization, electoral politics, or workplace politics. Bellow's notion of "focused case pressure"—which repudiates the conventional distinction between "service" (individual case work without cumulative significance) and "law reform" (class actions aimed at rule change) in favor of efforts to encourage small-scale popular mobilization through the coordination of small individual claims focused on local problems—exemplifies this quality.⁷⁷ So do many of the lawyering efforts associated with the civil rights and welfare rights movements of the 1960's and 1970's, especially including the efforts associated with Edward Sparer to combine law reform efforts in welfare with recipient mobilization.⁷⁸

C. Practicality and Pragmatism

Detractors such as Johnson and Schwartz invoke terms such as "practical," "pragmatic," and "compromise" more or less interchangeably to describe the qualities that they value and find lacking in Critical legal writing.⁷⁹ I think these criticisms exemplify a further set of confusions characteristic of professional culture.

Sometimes the detractors' complaints seem to arise from a refusal to distinguish between two ways of talking about a legal or social system. One can take the detached perspective of the theorist or the engaged perspective of the participant. Critical writing suggests that if one takes the detached perspective, one must acknowledge the indeterminacy of the system: that it consists of ambiguous and conflicting practices, that there are many ways in which its members can act while remaining in it, and that there are many ways in which it can develop without losing its identity. On the other hand, if one takes the participant's view, one can bridge indeterminacy through imagination and will. One can do this because the activities and understandings of members have a constitutive status within the system. The system consists of what its members think and do, and it changes as their thoughts and activities change.⁸⁰

The professions traditionally have sought to overcome the distinc-

77. See Bellow, *supra* note 2.

78. See F. PIVEN & R. CLOWARD, REGULATING THE POOR 208, 248-340 (1971).

79. E.g., Johnson, *supra* note 49, at 262, 279; Schwartz, *supra* note 51, at 423, 455 n.205.

80. "[O]ur own society is the only one which we can transform and yet not destroy, since the changes which we should introduce would come from within." C. LÉVI-STRAUSS, TRISTES TROPIQUES 392 (J. Russell trans. 1961). See generally *id.* at 391-92.

tion between detachment and engagement. The professional aspires to practice in a system that is constituted independently of her own activity. She pursues this ambition by attempting to combine a detached perspective that denies or minimizes indeterminacy with an engaged perspective that denies or minimizes imagination and will. In this effort, she often convinces herself that a largely determinate system can be defined from a detached point of view and that one can commit oneself to such a system without having to make controversial or conflictual choices.

Sometimes the detractors' references to practicality and pragmatism seem to assume this traditional professional view without recognizing the way it is challenged in the Critical writing. When the Critical writing develops detached theoretical accounts of the legal and social system that emphasize ambiguity, contingency, and contradiction, the detractors often respond by complaining that the writers provide no "alternative" to the norms and practices that they analyze, that they give no advice to the subjects of their writing about what they should do. But this is not an appropriate response to a detached account. An account of a social system that emphasizes ambiguity, contingency, and contradiction is, *if correct*, fully adequate for the purpose of providing a detached understanding of the system. People who undertake to interpret a system do not necessarily assume an obligation to improve or replace it. An anthropologist who reinterprets a tribal ritual understood by its practitioners to encourage the growth of breadfruit trees by propitiating ancestor spirits as an encoding of innate mental categories need not fear criticism if he fails to recommend an alternative mode of spirituality or food production. And in the nonprofessional social sciences, writers are permitted to give detached accounts of their own cultures without assuming prescriptive duties.

On the other hand, when the Critical writers adopt an engaged perspective, the detractors often complain that their prescriptions depart from detached analysis and rely on imagination and will. But these would be appropriate criticisms only if the professional premise that detached analysis can yield determinate prescriptions were correct, and that is precisely what the Critical writers dispute.

In their more cynical or disintegrated moods, professionals sometimes concede that determinate prescriptions cannot be grounded in detached theoretical knowledge. They repudiate the traditional professional aspiration to theory, but continue to insist on the professional commitment to engage concrete social problems. In these

moods, their complaint about the Critical writers seems to be that detached theoretical knowledge, at least the Critical kind that focuses on ambiguity, contingency, and contradiction, has no practical value. Although it is not clear exactly what kind of knowledge the detractors would consider to have practical value, they seem to have in mind a kind of atheoretical common sense that differs from theory in being insusceptible to detached explication and differs from imagination and will in being wedded to some relatively narrow subset of the established social practices of the day.

Although the Critical writers do not appear to intend their work only as a contribution to practice, they do suggest that their detached theoretical work does have practical worth. The engaged participant differs from the detached theorist in being privileged to bridge indeterminacy with imagination and will, but the engaged participant is still concerned with theory, including the type of theory that dissolves apparent determinacy into ambiguity, contingency, and contradiction. The practical value she sees in such theory lies in its capacity to free people from the constraints on practical activity that arise from mistaken beliefs about the range of activities permitted by the social order and their most basic moral commitments.

Now this contribution to practice is indirect, and many would regard it as insubstantial, but I doubt that a genuine pragmatist would so regard it. For like Critical legal writing, pragmatism also holds that practice is constrained by ungrounded or unconscious premises about social or moral necessity, and it also finds practical value in the Critical examination of such premises.⁸¹ Although some of the detractors appear to consider themselves pragmatists, they are nothing of the kind. Pragmatists do not, for example, simply *presume* that egalitarian social change requires mob terror and police violence.⁸² This kind of presuming is precisely what both pragmatists and Critical legal writers are trying to get rid of. Pragmatists would not accept, at least without considerably more evidence than anyone has yet presented, the propositions that if we reject some limited set of variations on the current structure of Western democratic capitalism we must give up economic productivity or that something like the current organizational structure of American corporations is necessary to the job security of employees—to mention just two of the

81. See, e.g., J. DEWEY, *LIBERALISM AND SOCIAL ACTION* 28–55 (1935).

82. See Johnson, *supra* note 49, at 256–59, 281 n.91.

very unpragmatic superstitions that Johnson invokes.⁸³

Johnson appears to believe that once you overcome your taste for "abstract theory" you have no further use for Critical thought.⁸⁴ But pragmatism is entirely in agreement with Critical legal writing that this is not the case, that homely, common sense "practical" judgments and "compromises" presuppose theories about the way the society is structured and what it permits. Although Foucault is the kind of theorist Johnson disdains as useless and pretentious,⁸⁵ the most prominent current exponent of pragmatism argues that Foucault ranks with Dewey in importance to pragmatism because of his efforts to explicate critically the tacit theoretical baggage that accompanies the everyday judgments and compromises of "practical" people.⁸⁶

83. *Id.* at 281 n.91.

In an earlier draft of his essay, Johnson quoted as authority Ulysses' speech in *Troilus and Cressida* asserting that the abolition of established hierarchy entails generalized barbarism and meteorological catastrophe. Primogeniture and monarchy are among the forms of hierarchy the speech mentions as essential to civilized order and good weather. P. Johnson, *Do You Sincerely Want to Be Radical?*, 44 (draft on file with author); W. SHAKESPEARE, *TROILUS AND CRESSIDA*, Act I, scene ii, lines 77-137. I hope that Johnson dropped this passage from the published version because he recognized that a good deal of hierarchy has been abolished since Ulysses' (and since Shakespeare's) time, not always with the consequences the speech presumed. However, I regret that Johnson still does not recognize that he has no more basis for his own assertions about contemporary hierarchy than Ulysses had for the assertions in the speech.

For some well-informed critiques of the notion that contemporary work hierarchies represent a pragmatic accommodation of liberty, security, and productivity, see D. GORDON, R. EDWARDS, & M. REICH, *SEGMENTED WORK, DIVIDED WORKERS* 165-227 (1982); C. SABEL, *WORK AND POLITICS* (1982).

84. Johnson, *supra* note 49, at 279-80.

85. *Id.* at 291 (dismissing Hegel, Habermas, Heidigger, Husserl, and Horkheimer).

86. See R. RORTY, *CONSEQUENCES OF PRAGMATISM* 203-07 (1981). See generally M. FOUCAULT, *DISCIPLINE AND PUNISH* (A. Sheridan trans. 1977). The rhetorical style that parades its hostility to theory as a token of its soundness and its unexplicated prejudices as "practical" knowledge has been popular with the liberal center since at least the New Deal. This Vulgar Centrism often poses as the descendant of the turn-of-the-century Progressive "revolt against formalism" by conflating formalism with systematic thought in general and its own style with pragmatism. Recent historians of the Roosevelt and Kennedy administrations, with which this style is especially identified, have had occasion to point out the fallacy of identifying Vulgar Centrism with pragmatism. For example,

Above all, Roosevelt was not a pragmatist. . . .

Even the idea of experimentation . . . does not relate to Roosevelt's haphazard, theoretically attenuated programs. His rejection of formal and theoretical ideas was close to the anti-intellectualism and common sense of most active men but bore no relationship to the technical interplay of reason and experience in the pragmatist conception of inquiry. In fact, Roosevelt was most unpragmatic in not appreciating the vital instrumental role of formal thought.

P. CONKIN, *THE NEW DEAL* 11-12 (1967)

Hardly anyone ever consciously acts impractically, and nearly everyone is willing to compromise on some terms. Words like "practical" and "compromise," which Johnson and Schwartz use to describe the kind of attitudes they like, are meaningless apart from some understanding of what the possibilities are. Although Schwartz thinks of the achievements of the civil rights movement as the work of practical people who were open to compromise, the rhetoric of practicality and compromise was used most notably by the detractors of the movement. In particular, it was used against the movement's brilliantly successful confrontationist strategy in the South by almost the entire liberal establishment, including the pseudo-pragmatists of the Kennedy administration. For the Kennedy lawyers, practicality and compromise meant that civil rights leaders should restrain the protest activities of their followers in favor of negotiations between the leaders and Southern oligarchs; it meant that federal officials should try to assume the role of mediator rather than the role of enforcer of constitutional rights. In the name of practicality and compromise, they repeatedly sought to mute or stall popular protest and repeatedly delayed or moderated federal intervention on behalf of civil rights activities until their hands were forced by the consequences of confrontation. No doubt their views were partly an expression of the Kennedy administration's relatively modest agenda in civil rights. But as Victor Navasky has emphasized, their views were also influenced by half-articulated, largely ungrounded, and completely abstract theories about what could be accomplished through popular mobilization as opposed to elite negotiation and about the constraints of federalism on federal official intervention.⁸⁷ Martin Luther King's famous "Letter from Birmingham Jail" replied to these theories in the language of conscience and Utopian vision,⁸⁸ but it could have replied in the language of pragmatism. The civil rights activists had the better sense of the practical possibilities of popular mobilization and of the practical limits of federal intervention; the people who criticized them in the name of practicality and pragma-

William James once divided people into tender-minded and tough-minded. The former, said James, seek refuge in systems, in which reasoned articulation and intellectual symmetry is the essence. The latter, on the other hand, are empiricists, usually willing to take experience for what it is. Although the Ivy League lawyers [of the Kennedy Justice Department] were "tough" in the Kennedy sense of the word, by the James test they were tender-minded insofar as their conduct came to be dictated by [their ungrounded theory of] federalism. . . .

V. NAVASKY, *supra* note 72, at 242.

87. See V. NAVASKY, *supra* note 72, at 159-242.

88. CIVIL DISOBEDIENCE: THEORY AND PRACTICE 72 (H. Bedau ed. 1969).

tism were victims of mistaken social theories.⁸⁹

If pragmatism connotes a style of practice that is wary of unexamined and untested presuppositions, that adopts a tentative and experimental attitude toward strategy, that is willing to combine activities conventionally held apart or separate activities conventionally associated, that has an open and expansive view of the range of possibly relevant knowledge, and that is committed to learn and revise in the light of experience, then the style of political practice most compatible with Critical legal writing is a pragmatist one.

D. *Ethical Implications*

Just as the Critical view rejects the professional sociological premise about the nature of the legal or social system, it rejects the professional normative premise, which sees the distinctive personal value of practice in conformity to (or marginal reform of) a previously constructed system. It rejects the professional tendency to ascribe value to determinacy and constraint in social relations and to acquiescence in established practices. Critical writing finds the value of practice in the experience of reconstituting and transforming the system. It emphasizes the distinctive possibilities for self-expression and solidarity in those aspects of the culture that permit appeal to transcendent norms against established practices and institutions. Since I think all normative questions are fundamentally religious, I don't disagree with Phillip Johnson's characterization of the Critical view as religious.⁹⁰ But this particular ethical view is not uniquely or distinctively religious. The most prevalent variety of religious consciousness in human history is not the one implicit in Critical legal writing but the one exemplified in professional discourse generally and in Johnson's own essay in particular—the one that sanctifies some subset of the established norms and practices of the society by treating them as necessary or natural.⁹¹ An important virtue of Critical legal writing has been to give expression to an alternative vision of ethical life.

III. CONCLUSION

The professional culture sees the lawyer as an agent, alternately,

89. Cf. J.M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 383-84 (1936) ("Practical men, who believe themselves exempt from any intellectual influences, are usually the slave of some defunct economist.").

90. Johnson, *supra* note 49, at 290.

91. See generally E. DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 121-336 (Collier ed. 1961) (religion as sanctification of society).

of the client and of the legal system. Within the culture, discussion is largely concerned with where to draw the line between the two roles. The thrust of the critique sketched here is that, regardless of where the line is drawn, the professional understanding is mistaken. The professional notions of client and of system are unsatisfactory for parallel reasons. Each notion turns out to be too indeterminate to support the premise of the lawyer as an agent. And each ignores that, even if one could identify a determinate client or system at any given moment, that client or system would be susceptible to change as a consequence of the lawyer's activities.

The negative aspect of Critical writing has been expressed most generally in the refutation of the professional premise that law practice can be defined and understood apart from fundamental moral and political commitments. Whether one regards this refutation as a substantial achievement depends in part on how influential one thinks the mistaken professional doctrines are. My impression is that the professional doctrines remain influential across the political spectrum and that some of the detractors who dismiss the critique as obvious and trivial are far more influenced by them than they recognize.

The affirmative or programmatic aspect of Critical legal writing consists of a series of particular proposals linked to the ideal of nonhierarchical community. Although this ideal remains only vaguely specified, the controversy that the proposals generate seems to arise less from this ideal or its vagueness than from the tendency of the proposals to cut across conventional distinctions between representing and influencing the client and between working within and fighting about the system (as well such related distinctions as those between law and politics, enforcement and reform, reform and revolution). The repudiation of such distinctions arises from the critique of the professional notions of client and system.