Lawyers and Social Change Lawbreaking: Confronting a Plural Bar

Kathryn Abrams

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation
Lawyers and Social Change Lawbreaking: Confronting a Plural Bar, 52 U. Pitt. L. Rev. 753 (1990)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
A lawyer is a lawyer—but only to a point.

Jerold S. Auerbach, Unequal Justice

Martha Minow teaches us that "where you stand" determines what you see on the question of social change lawbreaking. Surveying a range of potential clients, she explains how life experience, group affiliation, and political commitments affect one's inclination to use, heed or break the law in the struggle for social transformation. Exploring these multiple perspectives is one way in which Minow attempts to persuade practicing lawyers that they should consider taking social change law-breakers as clients.

Minow addresses a discrete segment of the bar: lawyers who have no regular involvement in social change, and who view compliance with existing rules of professional responsibility as important. Moreover, she addresses them as individuals, appealing to the internal decisionmaking process by which each decides whether and how to represent such clients. There is, however, another arena in which one might pursue the questions Minow raises: one that comprehends not

1. Associate Professor of Law, Boston University Law School. I would like to thank Jack Beermann, Bob Bone, Joe Brodley, Jane Cohen, Stan Fisher, Steve Gerrard, Bill Kell, David Seipp, Joe Singer, Graham Strong and participants in a spirited and instructive Boston University Faculty Workshop. I am particularly grateful to Avi Soifer and Steve Shiffrin, who spent considerable time with previous drafts, and were not afraid to give me a nudge when I headed off in a wrong direction. Thanks are also due to Cathy Claypoole, who proceeded with patience, intelligence and resourcefulness down the many paths the research for this piece required.


4. Id. at 743.
the internal decisionmaking employed by individual lawyers about representing social change lawbreakers, but the external judgments imposed by members of the organized bar on those lawyers who accept Minow's challenge. In this essay, I will examine some of the arguments that mainstream members of the bar and of legal academia have offered against involvement by lawyers with social change lawbreaking. I explore these arguments not only to highlight the subtle but forceful counterweight they provide to innovative arguments such as Minow's, but to make a second point, which looks beyond the specific question of representing social change lawbreakers. These arguments against involvement with social change lawbreaking reflect a view of the legal profession as homogeneous in its views of the nature of the relationship between lawyer and client, the utility of the legal process in ameliorating social problems, and the merits of going outside legal channels when legal efforts fail. I will argue that this unitary construction of the profession has long been descriptively flawed. Moreover, it has been rendered increasingly problematic by doctrinal and methodological developments that have caused salient groups of lawyers to reconsider their relationship to their clients, as well as their views of the neutrality and legitimacy of the legal process.

In Part I, I will examine two arguments often raised to discourage legal involvement in social change lawbreaking. The first is the argument that such involvement violates the lawyers obligation to provide "zealous representation" only up to the "boundary" imposed by positive legal rules. The second is the related argument that involvement with social change lawbreaking violates the lawyer's institutional role, which is to attempt social change by acting within the legal process, rather than challenging it or acting outside it. I will explain how each of these arguments assumes certain types of attitudinal homogeneity within the profession.

In Part II, I will argue that far from evincing such homogeneity, lawyers reflect a range of views almost as diverse as those of the clients surveyed by Minow. Moreover, I will suggest that lawyers' perspectives vary for many of the reasons to which Minow points. Sustained representation of groups that have been systematically excluded or disadvantaged by the legal regime may impart to lawyers a distinctive view of the merits of that regime or their role within it. The attitudinal heterogeneity produced by this influence has recently been amplified by the failure of civil rights reforms to deliver more than formal equality, and by two methodological challenges that have penetrated mainstream le-
gal discourse: the critique of legal objectivity and the valuation of exper-
eriential knowledge. After describing these developments, I will explain
how the varying commitments they produce have led some lawyers to
challenge established norms of legal practice, by transforming elements
of legal persuasion, disrupting or failing to comply with courtroom pro-
cedures, and breaking laws to promote social change.

Part III will examine the questions this pluralism of perspectives
raises for the development of ethical norms within the profession and,
more immediately, for those in law schools responsible for training its
prospective members. Recognition of the legal system as being impli-
cated in the systematic exclusion of oppressed groups, and (related)
challenges to the neutrality of critical elements of the legal process
raise difficult questions about what establishes the boundaries on the
"lawyer's role." They require us to consider how the conduct of lawyers
committed to social change on behalf of particular client groups should
differ from that of their general or commercial practice counterparts or
that of their clients. In conclusion, I outline the questions that should
be the subject of focused inquiry among individuals and groups within
the profession, and argue that the organized bar should strive to sup-
port a professional image of sufficient flexibility and heterogeneity to
make such inquiry possible.

I. LAWYERS AND SOCIAL CHANGE LAWBREAKERS: TWO ARGU-
MENTS

The published literature on the involvement of lawyers with social
change lawbreaking is surprisingly slight. In comparison with the vast
literature on civil disobedience by lay citizens, there is only a small
sampling of articles on the role of lawyers, spurred primarily by the
direct action campaigns of the civil rights movement and the student
protests of the Vietnam war, with a small, recent renaissance
prompted by such movements as the Greenham Women's Peace Camp
and Operation Rescue. Nor is there sustained discussion of the matter

5. See, e.g., Civil Disobedience in America: A Documentary History (David Weber
   ed. 1978); Carl Cohen, Civil Disobedience: Conscience, Tactics and the Law (1971);
   Michael Walzer, Obligations: Essays on Disobedience, War and Citizenship (1970);
6. See Legal Aspects of the Civil Rights Movement (Donald King & Charles Quick
   eds. 1965); Lindsey Cowen, The Lawyer's Role in Civil Disobedience, 47 N.C.L. REV. 587 (1969);
   Robert Drinan, Changing Role of the Lawyer in an Era of Non-Violent Action, 1 LAW IN TRANS-
   SITION Q. 123 (1964).
7. See, e.g., Ann Scales, Militarism, Male Dominance and Law: Feminist Jurisprudence as
in the major treatises on professional responsibility. There are, however, provisions of the Model Code and Rules which have been understood to be germane to this question; from these provisions, and from related professional norms, legal commentators have fashioned at least two arguments against lawyers' involvement with social change law-breaking. Both bear examination.

The first argument is that such involvement violates the obligation of the lawyer to provide the client with "zealous representation" up to, but not exceeding, the bounds established by positive law. This obligation reflects two norms that are central to the traditional definition of the lawyer's role: the much-contested precept that the lawyer should exercise all feasible vigilance and energy in prosecuting the client's case; and the complementary principle that the lawyer must not carry such vigilance beyond the limits of legal behavior. Both of these norms occupy a central place in the lawyer codes. According to proponents


8. See, e.g., Charles Wolfram, Modern Legal Ethics 702-03 (1986) (discussing test cases, desuetude and civil disobedience).


10. The duty of "zealous representation" is imposed in the Model Code of Professional Responsibility Canon 7 (1983 as amended 1990); and the limit imposed by the legal boundary—more important to the question at hand—is reflected in several provisions. Foremost among them is Model Code of Professional Responsibility DR 7-102(A)(7), which provides that "a lawyer shall not . . . counsel or assist his client in conduct that the lawyer knows to be illegal." Model Code of Professional Responsibility EC 5-1 notes similarly that "[t]he professional judgment of a lawyer should be exercised within the bounds of the law." It is noteworthy that even in those provisions where lawyers are encouraged to use their moral faculties, they are reminded that they must exercise these faculties under the same positive law constraints. Model Code of Professional Responsibility EC 7-8, for example, states that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations. . . . [i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible" (emphasis supplied). The obligation to operate within the bounds of the law has also been reinforced by provisions which permit, or in limited circumstances require, the lawyer to reveal the confidences of a client when the client proceeds beyond the bounds of lawful action. See, e.g., Model Code of Professional Responsibility DR 4-101(C)(3) (permitting revelation); Model Rules of Professional Conduct
of this first argument, any legal assistance to social change lawbreakers that extends beyond outlining consequences of possible courses of action and recommending compliance with the applicable law violates these norms, because it contemplates the lawyer's involvement in action which is beyond the bounds established by positive law. This argument was made by former Dean Lindsey Cowan of the Georgia Law School in his 1969 challenge to legal involvement with civil disobedience:

The lawyer's role . . . is to provide a full legal analysis of the implications of the proposed violation; to advise against it if his conclusion is that the law is valid, even though unjust or immoral; and to notify the authorities if he has reason to believe that the violation will occur. The client's obligations to his own conscience are not a matter within the lawyer's professional concern.11

A more recent version of this argument, reflecting greater sensitivity to context, but evincing the same pointed reservation, has been offered by Professor Charles Wolfram:

Any course of action other than advising compliance plainly violates the lawyer codes and, possibly, other law. Whether the occasion is sufficiently extraordinary and the prospects of legal reform sufficiently unlikely to warrant law violation as an ethical matter is obviously a question of conscience of the most dire sort.12

A second argument against rendering legal assistance to social change lawbreakers is that such assistance transgresses the lawyer's role of working for legal and social change within the framework provided by the legal system. This argument is applicable not only to those lawyers discussed by Minow, who counsel or represent social change lawbreakers, but to lawyers who break substantive laws or procedural rules, to advance their own reformist goals or those of their clients. According to this view, a person who joins the bar has embraced not only a role reflecting solicitude toward the positive law, but a particular role in changing it. Although this role is not spelled out explicitly in the Model Code or Rules, provisions dealing with the lawyer's contribution to legal change locate such contribution within the framework established by the legal system.13

1.6(b)(1) (1990) (requiring revelation when client has disclosed plans to commit a "criminal or fraudulent act . . . likely to result in death or substantial bodily harm to a person").
11. Lindsey Cowen, supra note 6, at 587, 593.
12. CHARLES WOLFRAM, supra note 8, at 703.
13. EC 8-1 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1990) recommends the use of "legal remedies to achieve redress of grievances" and EC 8-2 proposes that lawyers "endeavor by lawful means to obtain appropriate changes in the law." Even EC 8-9, which advises
Beyond the simple observation that involvement with social change lawbreaking runs afoul of specific ethical considerations, proponents of this claim offer several versions of the argument against departing the lawyer's traditional realm in efforts to achieve legal or social change. One version of the argument is that, outside the legal framework, the lawyer, qua lawyer, has little to offer her client. This version was offered, for example, by William Taylor, then General Counsel to the U.S. Commission on Civil Rights:

If a person, following the dictates of his conscience, chooses to disobey a law and then to accept the penalty rather than to contest his rights in court, the lawyer is almost irrelevant to the process. He may feel impelled as a citizen to take a position on the issues which gave rise to the act of civil disobedience or on the act itself, but as a lawyer he has no role to play.¹⁴

A second version is that, given the lawyer's numerous professional advantages in achieving change by legal means, she has less moral justification than the average citizen for attempting to secure change by illegal action. This argument, too, was offered by Dean Cowan:

The lawyer, as a professional constantly working with and in the law, has a greater opportunity than does the layman to rectify allegedly unjust or immoral laws within the existing legal structure. Accordingly there may be fewer times when he is justified in resorting to civil disobedience . . . ¹⁶

A final argument is that legal involvement in social change lawbreaking may undermine the legitimacy of legal mechanisms for achieving change. A lawyer may be regarded by the public as the expert at altering legal boundaries through institutional means. When she departs this legal institutional context to seek change through extra-legal methods, her actions may cast aspersions on both the legal institutions and their products. This argument was offered in a recent article by Professor Judith McMorrow:¹⁶

If the rule of law means, in ordinary language, that rules have some moderate

lawyers to "encourage, and . . . aid in making, needed changes and improvements" in the legal system, describes this activity as necessary to "maintain[] the role of law and . . . facilitat[ec] orderly changes."


¹⁵. Lindsey Cowen, supra note 6, at 597.

constraining force on the individual predilections of decisionmakers... then the individual actors who are charged with implementing the law must take seriously the goal of having something beyond purely individual choice govern the implementation of law... When these essential actors—lawyers and judges—disregard law unequivocally, individual citizens cannot help but question the legitimacy of our political system and the ideal of the rule of law.17

These arguments are noteworthy, not simply for the opposition they reveal to the kinds of representation Minow challenges us to consider, but for the assumptions that they make about the attitudes of the practicing lawyer. Each argument is based on several assumptions about the way the lawyer views her task, the way she understands her relationship to the client, the way she views the institutional framework within which she operates. As I will argue below, these assumptions turn out to be more controversial, and less universally embraced, than many proponents suspect.

The obligation of zealous representation within the bounds of positive law suggests a commitment to one’s client which, if it does not, in fact, originate with the assumption of a professional obligation, can at least be circumscribed by it. Professional responsibility does not precisely require that a lawyer remain neutral about her client’s ends. Though the requirement of “disinterest” or “detachment” protects the lawyer who takes on an unpopular client,8 the lawyer codes allow for the attorney who begins with or develops strong commitments to the goals sought by her client. Yet the delimited scope of this obligation assumes that the lawyer’s commitments are of a sort that can readily be superseded when she reaches the bounds of what she can legally provide for a client. It assumes, in other words, that the attorney feels greater affiliation with the role constraints—such as the “boundary” limitation—that define her profession than with the goals or experience

17. Id. at 146. I should add that while Professor McMorrow takes a broad view of the extent to which legitimacy concerns animate lawyers, this view does not lead her to foreclose all involvement with civil disobedience by lawyers. As to direct involvement, she takes a restrictive view, arguing that uncertainty about the way that lawyers’ disobedient actions will be construed by the public should lead them to exercise greater caution than would the average citizen. Id. at 148. This “caution” may permit involvement, but may also lead lawyers to reject involvement despite the fact that “normal appeals... have failed,” id., or to commit an act of civil disobedience and feel obliged to resign from the bar, id. at 151. When a lawyer is responsible simply for counseling a client who may later elect to engage in civil disobedience, she enjoys a greater range of choice. Because neither the act nor the ultimate decision is (or should be) hers, but is, rather, that of her client, she may discuss with the client the option of civil disobedience and choices such as raising the necessity defense or relying on the possibility of jury nullification that may be relevant to the client’s decisionmaking process. Id. at 155-63.

of any particular client. It assumes that she is willing to take the extant positive law as a neutral or legitimate limit, even when it works to the systematic disadvantage of her client or client group.

Similarly, the obligation to work for change within the legal framework, rather than outside it, rests on a range of assumptions about lawyers' beliefs. It assumes that lawyers are committed to legal institutions as a mechanism for achieving change, either as a matter of principle, or because such institutions hold out the promise of success to their clients or to a range of clients on an acceptably equal basis. It assumes that lawyers value these institutions, or their legal products, to such an extent that they would be concerned about the aspersions cast upon their legitimacy by lawyers' experimentation with extra-legal means. It assumes that lawyers, as a group, enjoy—and perceive themselves to enjoy—access to the institutional "levers" of change that is systematically greater than that of the people they represent.

In fact, if one surveys even the publicly-expressed attitudes of members of the bar—particularly those involved with clients committed to social change—it becomes clear that the profession is not nearly so homogeneous as proponents of these arguments suggest.

19. McMorrow takes the view that lawyers hold this commitment as a matter of principle. Because they customarily work within it, Judith McMorrow, supra note 16, at 145, and because they assume that role through a process of voluntary choice and socialization, id. at 146-47, lawyers are committed to the "rule of law" and to the use of legal institutions for achieving whatever change is feasible. Id. at 149-50.

20. Id. at 147 ("... lawyers take on the special responsibility to protect and care for the rule of law").

21. Cowen acknowledges that there are some circumstances under which lawyers might not enjoy such access and concedes that under such circumstances there is greater justification for involvement in extra-legal means. Yet the only restrictions on access he considers to be salient in this context involve formal exclusion of particular lawyers from the processes of legal change. See Lindsey Cowen, supra note 6, at 597 ("one can conceive of a situation in which a Negro lawyer is denied his right to vote ... is refused admission to the local bar association, is constantly harassed in his attempts to speak out ... only a few such limitations still exist"). McMorrow places a similar emphasis on formal exclusion or formal restrictions on citizenship when she considers those conditions that might lead lawyers or others to doubt the legitimacy of the political-legal system. See Judith McMorrow, supra note 16, at 145 n.25 (legal preclusion from participation resulting from apartheid in South Africa sufficient to give rise to doubts about legitimacy of political system). Neither Cowen nor McMorrow seems to consider the possibility that conditions of strongly disparate access—short of complete exclusion but traceable to race, class, political or gender oppression—might lead some lawyers to question the legitimacy of the political-legal system, or to conclude that they lack the lawyers' traditional access to "normal" political channels which mitigates the justification for lawbreaking. See infra Section II A.
II. LAWYERS, CLIENTS AND THE LEGITIMACY OF LEGAL INSTITUTIONS: MULTIPLE PERSPECTIVES

Attorneys enter the practice of law for many different reasons; influenced by diverse clients and numerous particularized experiences, it would hardly be surprising if they developed many different conceptions of their role, and their relationship to their clients. To catalogue the self-conceptions generated by different groups of practitioners, however, is a task well beyond the scope of this comment. My goal is considerably more modest: to suggest that for a particular group of lawyers—those who work with historically-oppressed client groups in hopes of generating legal and social change—the nature of their client contact and recent developments affecting their practice have generated substantial heterogeneity in their views of their relationships with clients and the efficacy and legitimacy of law in inducing social change.

A. Representation of Oppressed Groups and the Emergence of “Double Vision”

A lawyer who is affiliated over a course of years with a particular client group has the opportunity to glimpse the law from a distinct perspective. She may come to see, in a way she would not intuit, the kind of toll that litigation strategy may take on her clients’ dignitary interests or substantive goals. She may also gain a broader sense of the way that law is viewed by that population: as friend, foe, facilitator or some shifting combination. Over time, her clients’ view of the law may become a familiar accompaniment, or counterpoint, to her legal perspective. She may develop a kind of “double vision”: a habit of viewing legal institutions and their products through the eyes of the professionally-socialized lawyer and through the eyes of her client.

22. See David Wilkins, supra note 9, at 487-88 (divergent realities of different groups of practicing lawyers preclude formation of unified legal culture).

23. Martha Minow gives several examples of the way that this cost of litigation may emerge in connection with gay and lesbian clients, as well as others. See Martha Minow, supra note 3, at 730, 748.

24. Mari Matsuda describes the acquisition of a different kind of “double vision” when she notes that women of color, accustomed to viewing certain injuries as a member of a particular oppressed group (or groups), must learn to view these injuries in a second, different way when they become law students. See Mari Matsuda, When The First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN’S RTS. L. REP. 7, 7-8 (1989). For another interesting discussion of multiple vision and the way it might be used to inform civil rights law, see Patricia Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 MICH. L. REV. 2128 (1989).
For a lawyer who represents historically-oppressed or politically controversial populations, this additional perspective is likely to be particularly influential. Many of lawyers in this group choose such representation because of personal experiences or political goals that make them particularly receptive to the perspectives of their clients. Yet even where such a lawyer enters the field by chance, and has no personal experience or political commitment that colors her legal socialization, she is more likely to experience the pull of her clients’ perspectives because they diverge more strongly from the perspectives of legal decisionmakers than the views of more privileged clients.

What sort of attitudinal framework this imparts to a lawyer’s practice will depend on a variety of factors: the kinds of cases in which she represents her clients; the kinds of relief that the law is able to provide; the extent to which her clients evince, articulate or otherwise make present a consistent perspective on the law and/or the legal system. It may also depend on whether the lawyer herself is a member of the client group or has experienced in her own life the kind of systematic disadvantage in relation to the legal system that shapes her clients’ perspective. It may depend on whether she regards racial, gender, or ethnic identity as a critical influence which constitutes one’s perspective on political institutions or social arrangements. Yet it is unlikely to yield up the homogeneous professional perspective assumed by critics of legal involvement with social change lawbreaking.

This attitudinal heterogeneity was evident, for example, among lawyers who represented labor unions in the 1930’s. It emerged more recently among lawyers who represented racial minorities and (other) political radicals during the 1960’s and 1970’s. If one takes as a sample the interviews conducted by Marlise James in her 1973 study, *The People’s Lawyers*, one sees marked variation on two issues central to the debate over social change lawbreaking: the legitimacy and viability of

---

25. See generally Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758. Peller argues that in the 1960’s and 1970’s, black nationalists were distinguished from black integrationists by, inter alia, “the core assertion that race consciousness constitutes African Americans as a distinct social community, in much the same way that national self-identity operates to establish the terms of recognition and identity in ‘regular’ nations.” Id. at 792. He argues that this distinction had broad implications for the way that African Americans viewed school integration, id. at 795-802 (nationalists contended that integration threatened assimilation of black children and black culture to white cultural norms that mainstream ideology of neutrality and universalism makes invisible), and civil rights organizing strategies, id. at 828-30 (nationalists favored mass direct action strategies over legalistic, court-based strategies of reform).


legal institutions as mechanisms for generating social change; and the extent to which the role of lawyer requires a distinct, articulable perspective which remains separate from that of the client.

Few, if any, of the lawyers interviewed in this study describe the legal system as wholly “legitimate.” Yet they vary in their diagnoses of the nature and severity of the problem, and in the implications it presents for their legal practice. Some lawyers in this group regard the legal system as partisan and exclusive, but also capable of being changed by greater efforts at inclusion. As Bill Robinson, who practiced with the NAACP Legal Defense Fund, explains:

The court system, or the system itself, isn’t the enemy of the people. However, they are run by people who have their own interests, which are frequently contrary to the interests of the people in various specific ways. . . . It needs some specific, identifiable changes so it would take into account some of the interests of the people, and of the community.28

Some lawyers view the legal system as deeply flawed, yet believe that it constitutes the best available alternative for challenging if not fully rectifying group-based injustices. Robert Gnaizda, who worked for many years with the California Rural Legal Assistance Program, which assists the state’s rural poor, states:

I have no respect for the institutions or the system per se, but I can’t think of a viable alternative that isn’t going to cause enormous bloodshed and not be acceptable to the majority of the people. As far as courts, I don’t think the court system now is capable of remedying what’s wrong with society, but I don’t think there’s ever been a court system that has been. Ours is one of the few court systems that allows challenges to those in authority.29

Other lawyers are generally skeptical about the capacity of the legal system for generating change, but believe that it can be used in conjunction with other institutions to produce discrete decisions or moments with radicalizing potential. Mary Kaufman, who represented political radicals through the Lawyer’s Guild’s Mass Defense Office during the late 1960’s and early 1970’s explains:

In appraising what we can expect from the courts and, from there, whether it’s useful at all to be a lawyer, one must recognize that the courts do not act in isolation. They respond to the same political pressures which are put upon all of the institutions in our society. But there are fortuitous moments in history in which a talented expression and development of the law in a particular case can

28. See id. at 271.
29. Id. at 57.
Still other lawyers who have represented oppressed groups regard the legal system as a wholly illegitimate instrument for privileging some at the cost of impoverishing or excluding others. Ken Cockrel, one of the founders of the Black Workers Congress, notes:

\[ \ldots \text{[T]he court system is simply the functional appendage of a larger system of racism, capitalism, and imperialism... it exists to serve two functions: 1) ... to facilitate the economic transactions that underlie the maintenance of the system of capitalism and imperialism; and 2) it also tends to isolate, possibly incarcerate, those who haven't already been killed who represent a sufficiently serious threat to the continued existence of things as they are. For us it is a very simple thing... We know we're not going to litigate or elect ourselves to liberation in this country.}\]

Charles Garry, who served as legal counsel to the Black Panther Party, offers a similar view:

\[ \ldots \text{Black men and women don't get justice in the courts and... they haven't in three hundred years in this country... I don't see any more relevancy to the courts than I do to the universities. They are all part and parcel of the same thing. They just give the facade of legality to the robbery, in the economic sense, that goes on.}\]

Beyond their variety, the feature that is most notable about these views is how frequently they diverge from the assumptions underlying the second argument outlined above. None of the lawyers reflects a principled commitment to the legal system as a means of generating change, although some admit the possibility that it has some instrumental value. Few see the system as providing—or themselves as enjoying—the access to the levers of change that Dean Cowan describes. On the contrary, many complain of disparate access, and suggest that it is the identity of their client, more than their professional training or position, that determines their access.

Not surprisingly, lawyers who manifest such a range of views as to the legitimacy of the legal system, or its utility in generating change, reflect a variety of perspectives on the role of the lawyer and her rela-
tion to her client. Among those who see merit or radicalizing potential in the court system, some express more tolerance toward the constraining aspects of the lawyer's role, such as the obligation to work within the boundaries of the positive law, or the need to maintain a perspective distinct from the perspective of one's clients. Robert Gnaizda of CRLA notes, "I just do whatever is necessary to make changes within the confines of what is lawful."³⁸ This understanding of the lawyer's role is affirmed by Sheila Okpaku, who practiced with the Community Law Office in Harlem: "I think that a lawyer should try to change the legal system where he can and should work within it when he has no other choice. That is if he wants to be a lawyer. Many, of course, just turn away from it altogether."³⁴

Those who are more skeptical of the legitimacy, equality of access or radicalizing potential of the legal system diverge more pointedly from traditional characterizations of the lawyer's role. Some, surprisingly, stress the acquisition of traditional skills, as a means of maintaining a radical voice in essentially oppressive institutions. Mary Kaufman notes: "The dominant trend now is that there is some point in being a lawyer because the need for radical lawyers is so great. I think the greatest service a lawyer can perform at the moment is to perfect his legal skills."³⁵ This skills emphasis might seem to be consistent with a vision of the lawyer as having goals or methods distinct from those of the client. Yet this is not always the case. Ken Cockrel observes, "... I justify my participation in the legal process ... the same way I would justify my participation if I were a plumber or anything else. We need every skill that the enemy has."³⁶ The combat metaphor—aimed not at the opposing party but at the system as a whole—and the analogy to a non-professional worker suggests a unity of perspective that is not affected by the lawyer's professional role. Far from seeing the lawyer as invested in the legitimacy of the legal system, Cockrel sees it as part of the lawyer's task is to expose the politicization and illegitimacy of legal institutions:

... [T]he responsibility of a lawyer is ... to do all that is possible to discredit that institution, to disabuse persons of the fact that they ought to repose confi-

---

³³ Id. at 57.
³⁴ Id. at 290.
³⁵ Id. at 95.
³⁶ Id. at 150.
dence in the operation of that mechanism for the resolution of their grievances in any meaningful, just, and deliberate way.  

Charles Garry views such exposure as an obligation that he owes to his clients:

The role of the lawyer is to see that the client gets out on the streets, but, while you're doing that, you have to expose the system that brought him there. If you can't do that you are not making your responsible contribution as an advocate for your client.

Oscar Acosta, of the Chicano Movement, offers a slightly different formulation. He describes his will to expose the system as arising not so much from his obligation to his clients as from his identification as a member of the client group:

I relate to the court system first as a Chicano and only seldom as a lawyer in the traditional sense. I have no respect for the courts and I make it clear from the minute I walk in . . . The one thing I've learned to do is how to use criminal defense work as an organizing tool . . . I take no case unless it is, or can become, a Chicano movement case. I turn it into a platform to espouse the Chicano point of view so that that affects the judge, the jury, the spectators.

Although Acosta's is perhaps the strongest and most explicit embrace of a client's perspective, several others convey the sense that their professional self-conception, and their image in the eyes of others, is shaped at least as much by their affiliation with their clients as by their membership in the legal profession.

B. "Double Vision" and Contemporary Developments

The published reflections of lawyers who have consistently represented oppressed groups suggest a range of attitudes regarding such questions as the legitimacy of the legal system, and the extent to which, as legal professionals, they are willing to distance themselves from the perspectives of their clients. This variety not only indicates the reasons that some lawyers, as well as some clients, have viewed breaking the law as a plausible strategy for achieving social change; but it also militates against the expectations of attitudinal homogeneity that underlie the arguments against this strategy.

In this section, I will argue that contemporary developments have

37. Id.
38. Id. at 311.
39. Id. at 349.
further eroded the putative homogeneity of professional attitudes. Three developments, which have influenced both the practice of law and its theoretical and popular interpretation, have made it easier for lawyers to understand and embrace what might be identified as critical client perspectives on the law, and have made it possible for lawyers to distance themselves from the norms that mandate the maintenance of a distinct "professional" perspective.

The first development is the substantial failure of the legal system to fulfill the promise of more-than-formal equality extended to racial minorities during the civil rights years. After a period of struggle and innovation, in which federal courts ordered and supervised the transformation of many public institutions, legally-driven reform slowed and, in the eyes of many claimants, seemed to reverse direction. For those claimants who had been victims of racism, three doctrinal changes in particular seemed to make clear that the view of race discrimination espoused by the courts differed substantially from their own view of their situation. The first was the movement, in the law of constitutional equal protection, from an effects test to an intent test: a change which seemed to herald the replacement of a "victim's" perspective on discrimination with a "perpetrator's" perspective. The second was a restriction of the availability of race conscious remedies, a development which seemed to signal a legal satisfaction with formal equal opportunity at a time when many members of minority groups considered substantive equality still a distant aspiration. The third development, which overlapped the second, was an increasing judicial solicitude to claims that the fourteenth amendment protected white males. This development, which had its origins in Regents of Univ. of Cal. v. Bakke

40. For a superb jurisprudential discussion of the meaning of these developments for the perspectives of people of color, see Kimberlé Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988).


42. In her article The Obliging Shell: An Informal Essay on Formal Equal Opportunity, Patricia Williams offers an array of minority perspectives on the drawbacks of formal equality as a legal standard, an institutional program, and a political ideology. Patricia Williams, supra note 24.

and reached its culmination in City of Richmond v. J.A. Croson Co.\textsuperscript{44} relied upon an abstraction from the historical facts of discrimination that minority group members and others found difficult to comprehend.\textsuperscript{46} These doctrinal developments vindicated the suspicions of many people of color that the law, which had operated as an instrument of inclusion, could also operate as an instrument of continued exclusion from all but the most formal guarantees of equality. These developments also crystallized the perceptions of many lawyers representing them that the legal response to race discrimination was based on an articulable perspective that was distinct from, and antithetical to, the perspective derived from the life experiences of people of color.\textsuperscript{46} The responses of these lawyers varied: some continued to press judge-made law in the direction of its earlier enabling role; others invoked its dwindling protections with increasing doubt and alienation; still others began to consider more radical tactics than judicial or legislative legal reform. But to perceive the law as embodying a perspective distinct from and, in substantial part, antithetical to the perspectives of people of color became an increasingly plausible legal view.

This willingness on the part of lawyers to distance themselves from established legal rules and assume the critical perspectives of their clients was strengthened by two developments in legal theory, which worked their way into American law schools in the 1980's: the critique of objectivity in law, and the valuation of experiential knowledge. Neither of these developments represented something entirely new, in either the academic or the political sphere. The critique of objectivity had been a focal issue in continental philosophy, and related disciplines, during the post-World War II period;\textsuperscript{47} both the critique and the valuation of experiential knowledge had been introduced into political discourse by black nationalists\textsuperscript{48} and feminists\textsuperscript{49} during the 1960's and

\begin{itemize}
  \item[44.] 488 U.S. 469 (1989).
  \item[45.] See Patricia Williams, supra note 24.
  \item[46.] Feminist clients and attorneys highlight similar tendencies in the numerous bodies of law that implicate gender. The argument is not, however, the more dramatic claim that legal doctrine has diverged from or ceased to reflect the perspective of victimized groups. It is that the law in a range of areas has never reflected the perspectives of women. See Catharine MacKinnon, Difference and Dominance: On Sex Discrimination (1984) in Feminism Unmodified 32-45 (1987).
  \item[47.] For a general discussion of the critique and some possible implications for legal scholarship, see Edward Rubin, The Practice and Discourse of Legal Scholarship, 86 Mich. L. Rev. 1835 (1988).
  \item[48.] See Gary Peller, supra note 25, at 758.
  \item[49.] See Catharine MacKinnon, Toward a Feminist Theory of the State 83-105
\end{itemize}
1970's. However, the introduction of these ideas into law schools and legal discourse, through the efforts of feminists and other critical scholars, is significant for purposes of the present discussion, because it made it easier for prospective lawyers to imagine embracing a vantage point on the law which was not the vantage point of official lawmakers.

The valuation of experiential knowledge that had emerged in the activism of the 1960's and 1970's began to influence the methodology of legal academics more than a decade later. Feminist scholars, who eschewed the long-standing distinction between theory and practice, suggested that consciousness-raising was not simply a means of placing personal issues on the political agenda, but the model for a distinct epistemological approach. Their arguments suggested that experience could function as a source of knowledge: comparable to the quantitative empirical investigations or processes of logical deduction valued by partisans of scientific objectivity, yet based on contrasting assumptions. As the argument was developed by white feminists and scholars of color, it carried a concrete political implication. People could develop important perspectives on received wisdom—be it familial relation-
ships, political arrangements or legal doctrine—by consulting and reflecting on their own experience. In the legal arena, this understanding reinforced the message from the civil rights cases: that lawyers and law students could invoke their experience, or the experience of their clients, to question the assumptions underlying new or extant rules, and to develop alternatives. This valuation of experiential knowledge enhanced the importance of group identity or affiliation in developing perspectives on the law, as such identities proved to be politically and legally salient ways of capturing personal experience. It also contributed to the final development I want to discuss—the critique of objectivity in law.

The critique of objectivity was no stranger to the law school environment when it began to generate controversy in the 1980's. It had surfaced in connection with legal realism in the 1930's, only to come under fire for the inability of its alleged relativism to respond to the Nazi threat. It had emerged again briefly in the 1960's in response to student- and civil rights-based on challenges to the legitimacy of governmental power. The valuation of experiential epistemology permitted it to re-emerge more recently under slightly more congenial circumstances. The use of experiential perspectives helped some students and scholars to see how law articulated by the courts represented no objective or necessary resolution of the issues. Like the perspectives of frustrated claimants, the view embodied in law was a partial view. However, it was a partial view whose adherents possessed the power to make it the standard, and which rested on a large enough body of socially- and legally-entrenched norms to make its logic appear inevitable. While the critique has not become a dominant view, and has con-
continued to generate controversy in those schools in which it has been introduced. It has become increasingly prevalent for professors to discuss the issues it raises, or expose students to some portion of the literature in which it is expressed.

The debate over experiential epistemology also reinforced and contributed to a second portion of the critique, which addressed legal methodology. According to this argument, the methodological features of legal argumentation, often mobilized to insulate existing law from critique, could also be described as embodying the partial perspectives of powerful decisionmakers. Characteristics such as the privileging of abstract, deductive argumentation, the insistence on a distant, impartial stance by decisionmakers, and the reliance on “objective” standards for evaluating injuries sustained could be traced to the influence of an objectivist epistemology—a dominant, but not a universal or necessary methodological view. As scholars have begun to trace these features to a particular methodological viewpoint, and understand the position of this viewpoint in a particular social and political context, it has become easier and less heretical to advance arguments which value subjectivity, or move from neutrality toward contextuality.

One effect of these developments in law schools has been to render the unorthodox and heterogeneous perspectives of the “people’s lawyers” of the 1960’s and 1970’s more accessible to, and more common among, a broader legal population. It is increasingly more plausible for those within the profession to question the accessibility or legitimacy of the legal system as a vehicle for change; to look skeptically at the

59. For an example of the hostile response to the critique of objectivity, as reflected in the works of critical legal scholars, see Paul Carrington, Of Law and the River, 34 J. of Legal Educ. 222 (1984).

60. See Thomas Morgan, A Defense of Legal Education in the 1990’s, 48 Wash. & Lee L. Rev. 1, 7-8 (1991) (describing as one of the dozen themes of contemporary legal education the effort to explore “the political assumptions and implications inherent in legislation and judicial decision,” including “the risk that apparently neutral legal concepts mask significant political preferences”).


62. For two thought-provoking attempts to generate alternatives to these long-standing characteristics of legal methodology in the context of judging, see Martha Minow & Elizabeth Spelman, Passion for Justice, 10 Cardozo L. Rev. 1945 (1988); Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877 (1988).

63. For examples of scholarly efforts that undertake such innovations, see Patricia Williams, supra note 24; Charles Lawrence, supra note 54; Marie Ashe, Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law, 13 Nova L. Rev. 355 (1989).
boundary created by positive law; and to distance themselves, at least provisionally, from the perspectives of legal decisionmakers to consider the often-critical perspectives embodied in the experience of victimized groups. The burgeoning populations of white women and people of color in law schools have provided a pool of students whose experiences may lead them to endorse this critical analysis.

Among lawyers engaged in the representation of these groups, this challenge to both the record of the legal system and the perspective of decisionmakers has encouraged new forms of discourse and practice. It has increasingly introduced among such practitioners a "competing account" of the legal system as implicated in the oppression of historically disadvantaged groups. It has also led some attorneys to a reformulation of the "legal" role, in which the perceptions and experiences of oppressed groups are used as building blocks for the creation of new doctrinal and methodological approaches. These new approaches have involved lawyers in reinterpreting, challenging and breaking both substantive and procedural law, in order to highlight or implement the perspectives of their clients.

C. Client Perspectives in the Reformulation of Law and Lawyering

Embracing a client's perspective as a standpoint from which to judge the extant law does not mean having a unitary or predictable view of legal practice. Those contemporary lawyers who have adopted this standpoint display a range of attitudes and practices regarding such issues as their confidence in the legal system and its ability to enact progressive, client-centered change, their commitment to traditional modes of legal argumentation, and their responsibility to obey positive laws.

For some lawyers, the embrace of the client's perspective creates an ambivalent or multi-valent view of the role of law in progressive change. Elizabeth Schneider describes law as systematically inimical to women's subjective perspectives, and capable of being reconstructed by them:

Law is the classic example of the triumph of the dichotomy between the personal

64. Some legal scholars associated with critical race theory have described this as the process of generating "opposition narratives" about race and the role of the law. See Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 MICH. L. REV. 2411 (1989); Milner Ball, Stories of Origin and Constitutional Possibilities, 87 MICH. L. REV. 2280 (1989).
and the political. We are taught from day one in law school never to talk about what we feel, never to talk about our own views. We're taught not to start off thinking about a legal problem from our own sense of ourselves as people... [and] to hide who we are and detach ourselves from our experience of who we are... [law] is a discipline which values abstraction, values objectivity and places the primary value on detachment of the rational from the emotion. For that reason, feminist theory and feminist litigation have an incredibly important intellectual and transformative potential in the field of law.64

Kimberlé Crenshaw reflects a different kind of ambivalence in writing about the assertion of equality rights, the dominant mode of securing legal change for African-Americans. The tension is not so much between what law has been and what law might be as between the enabling and limiting consequences that follow from the invocation of rights:

Rights...[have been] the means by which oppressed groups have secured both entry as formal equals into the dominant order and the survival of their movement in the face of private and state repression... The very reforms brought about by appeal to legal ideology, however, seem to undermine the ability to move forward toward a broader vision of racial equality.65

For lawyers who express either form of ambivalence, one dominant strategy has been to invest extant legal categories, claims and definitions with new, more expansive meanings drawn from claimant's personal experience. Thus lawyers and legal scholars influenced by critical race theory have tried to reconceive such First Amendment exceptions as "fighting words" or "captive audiences," so as to accommodate the experiences of victims of racist speech.66 Feminist law reformers have sought to expand the concepts of "imminent danger" and "equal force" in the law of self-defense, so as to reflect the experiences of battered women.67 Yet not all the efforts that have sprung from ambivalent views reflect such deference to extant categories and practices. Some feminist lawyers have drawn on women’s experiences to introduce new forms of persuasion and argumentation, and argued for innovations in legal procedures that will make women’s accounts of their experience more accessible to legal decisionmakers. Some of these efforts, such as Martha

66. Kimberlé Crenshaw, supra note 40, at 1384-85.
67. See Charles Lawrence, supra note 54; Mari Matsuda, supra note 54.
Minow’s use of direct statements by multiple clients in her appellate briefs, 69 represent innovation well within existing legal forms; others, such as Martha Mahoney’s proposal to alter the rules of evidence so as to admit the non-linear testimony of battered women, 70 transform existing rule in a prospective fashion. Still others, such as Elizabeth Schneider’s decision to speak directly to a judge about his personal experience in an effort to help him understand her client’s perspective directly challenge the spirit if not the letter of courtroom procedures, 71 by challenging the customary detachment of the judge. 72

While these efforts transform the traditional role of “lawyer” by transforming the modes of argument and persuasion she employs, they do not alter the lawyer’s traditional deference to the boundaries of existing positive law. Others holding an ambivalent view of law’s potential, however, have taken this additional step. 73 Janet Benshoof, director of the ACLU’s Reproductive Freedom Project, employed direct action techniques more often the province of clients to protest abortion restrictions on Guam. In March 1990, Governor Ada of Guam signed into law the most restrictive abortion bill yet passed on American territory. The bill made abortion illegal, except when a woman’s life is in danger, with no exemptions for rape, incest or fetal disabilities. It made

70. Martha Mahoney, supra note 68.
71. See Translating Personal Experience, supra note 54, at 107, 137-38 (explaining appellate technique of invoking judge’s own experience).
72. For a useful critique of the judge’s traditional posture of detachment, see Judith Resnik, supra note 62, at 1877.
73. It is difficult to know whether lawyers such as Benshoof or el Amin regard the law with those types of ambivalence expressed by Schneider or Crenshaw, because their self-explanatory statements are comparatively brief. It is possible, for example, that Benshoof does not look upon the law with the kind of ambivalently critical perspective instilled by identification with a client group, but rather with the combination of confidence and deference which has been more characteristic of lawyers. The decision to place Benshoof and el Amin in this group of lawyers is a judgment call, based on my consideration of each lawyer’s words and acts.

Another group which might be described as having an ambivalently critical perspective on the law, instilled by identification with a client group, consists of lawyers representing, or engaged with, Operation Rescue. For a thoughtful discussion of why Operation Rescue has not been effective in using civil disobedience, and how it might reform its approach, see Charles DiSalvo, Abortion and Consensus: The Futility of Speech, The Power of Disobedience, 48 WASH. & LEE L. REV. 219 (1991).
anyone who obtained an abortion chargeable with a third-degree felony, and anyone who gave information about abortion liable for a $1,000 fine and subject to a year's imprisonment. Benshoof flew to Guam hoping to lobby the Governor before he signed the bill into law. When she was denied a chance to meet with the Governor, she resorted to a strategy of publicity and protest. She went before the Guam Press Club, stating that “[w]omen who are pregnant, seeking an abortion, should leave the island. I encourage them to go to Honolulu.”74 Benshoof was arrested and arraigned for violating the law.

Why Benshoof elected to violate the statute is a thought-provoking question. While her choice might be described as setting up a test case it was not strictly necessary to that goal: two days after Benshoof's arrest, the ACLU assembled a group of plaintiffs and obtained a temporary restraining order against the law.75 Although the law was as yet untested, distinguishing the case from some classical examples of civil disobedience, Benshoof took from civil rights activists the strategy of using violation and subsequent arrest as a means of publicizing an unjust law. Her published remarks on her choice were cryptic—“[n]ever have I seen a statute anywhere in the world where to talk about abortion to pregnant women is a crime.”76 Yet they suggest a view that some laws are so insidiously restrictive that the only way to demonstrate the magnitude of their intrusion is to perform the evidently innocuous act they undertake to punish. A lawyer, who may glimpse this intrusion more quickly than her lay colleagues, may be well-situated to make this demonstration.

Sa'ad el Amin, a criminal defense attorney practicing in Virginia, applied techniques of civil disobedience in the realm of procedural, rather than substantive, rules. When a jury impanelled to try his black client contained only two black jurors out of twenty, in a city that was close to 50% black, he moved for a new venire. When this effort failed, el Amin advised the judge that he would not go forward with the case because of racial discrimination in the jury panel. He persisted in this refusal, even after the judge cited him for contempt and ordered him jailed.77 Explaining his action, el Amin argued that lawyers have the

74. Charles Cohen, Testing Guam's Tough New Abortion Law, Janet Benshoof is Arraigned for Giving Advice, PEOPLE WEEKLY, April 9, 1990, at 64.
76. See Charles Cohen, supra note 74, at 7.
77. El Amin's unsuccessful appeal of the contempt citation is reported in Greene v. Tucker, 375 F. Supp. 892 (E.D. Va. 1974) (Sa'ad el Amin at that time practiced under the name of
same responsibility as other citizens for making the dramatic, self-sac-
ificing statement that can produce major legal change, a responsibility
that too few are willing to accept:

Sometimes . . . you got to stop believing that you are a rulebook, and som-
times you got to stand in front of the train . . . because nothing ever came from
just objecting. No changes ever came. Every change that's come into society has
come because somebody stood in front of the train. Unionism came because some
folks stood in front of the train . . . civil rights came because some folks stood in
front of the train. But it's always always strange because lawyers never stand in
front of the . . . train. I don't understand that. We know more about the law, we
know more about human endeavor than anybody in the world . . . but we're so
interested in our own . . . status that we refuse to stand in front of the train, and
then we say we're going to represent somebody if they do. But yet when it comes
down to you versus the train you will get out of the way.\textsuperscript{78}

For other lawyers, identifying with client perspectives means em-
bracing not an ambivalent, but a more unmitigatedly critical view of
the law. Catharine MacKinnon, feminist legal scholar and activist, re-
fects this view. For MacKinnon, taking seriously women's accounts
means seeing law as systematically implicated in women's oppression.
Because it is and has been controlled by the perpetrators of women's
subordination, the law—as doctrine and methodology—has been a crit-
ical instrument in their domination by men. While this relationship
does not render transformation impossible, it means that simply ex-
panding or reinterpreting legal categories by reference to women's ex-
periences will not suffice to produce the necessary change. Women's
perspectives—which, in MacKinnon's view, establish women's "use and
abuse by men"\textsuperscript{79}—must be used to create new doctrinal systems, to
supplant the rules and categories that have contributed to women's op-
pression. MacKinnon has pursued this goal by, inter alia, proposing
new causes of action for injuries framed from women's perspective.
Some of these represent new claims to be included within existing stat-
utes, such as MacKinnon's successful argument that sexual harassment
should be actionable as gender discrimination in violation of Title
VII.\textsuperscript{80} Others require the creation of new statutes or ordinances—for

\textsuperscript{78} Sa'ad el Amin, presentation at University of Virginia Law School (videotape on file
with Prof. Graham Strong at Cornell Law School). For a useful discussion of why symbolic acts
of self-sacrifice can be instrumental in achieving social change, see Charles DiSalvo, supra note 7.

\textsuperscript{79} See Catharine MacKinnon, supra note 46; Christine Littleton, Feminist Jurispru-
MacKinnon, Feminism Unmodified (1987)).

\textsuperscript{80} This view, once regarded as visionary, has been adopted by the federal courts up to and
example, the municipal ordinances through which MacKinnon attempted to define pornography as a violation of women's civil rights.81

MacKinnon seeks to transform substantial bodies of existing law, yet she proposes to do so through the enactment of new law, not through the mechanism of social change lawbreaking. Others who share her perspectives on the role of law in group oppression have chosen the latter strategy. Feminist legal scholar and activist Ann Scales has explored the connections between feminist jurisprudence and the non-violent civil disobedience of the Greenham Women's Peace Camp.82 Scales argues that the Greenham women's civil disobedience reflects a proper disrespect for those dichotomies—public/private, expert/layerson, leader/citizen—that disenable public action and an admirable sense of responsibility for a shared fate:

Our task as lawyers is to tear down the fences which in law school we were well-trained to revere. And we have to make connection with those who, in theory and in practice, are tearing fences down everyday—we have to overcome the insularity of the law... Women are bringing alternative perspectives to bear on all structures of social organization. Greenham Common is an inspiring example, but only one among many alternatives being tested by women world-wide. They are the women of Belfast, the women of Central America, the women of the Pacific. I cast my lot with these women, their methods and their goals.83

A more controversial effort to employ civil disobedience by systematic critics of legal legitimacy may be found in the advocacy of Alton Maddox and C. Vernon Mason. In their representation of Tawana


82. See Ann Scales, supra note 7.

The Greenham Common Women's Peace Camp was a small group of women [who] marched from Cardiff, Wales, to Newbury, England to protest NATO's decision to deploy United States cruise missiles nearby at R.A.F./U.S.A.F. Greenham Common. That protest, planned to last a few days, became a permanent encampment of women on the perimeter of the base. There they have been for over seven years, around the clock, living in the mud under plastic tarps, braving the vicissitudes of brutal British 1980's. Id. at 26-27. The Greenham Women's ongoing trespass on the government installation represented an indirect, non-violent, civilly disobedient protest of militarization.

Brawley, a black teenager who alleged that she had been kidnapped, raped and marked with racial epithets, they employed a strategy of "non-compliance" with what they condemned as a deeply racist system of criminal justice. The inspiration for this strategy reportedly came from Rosa Parks, who refused to comply with the laws of segregation; and like the protesters who took up her effort, Maddox and Mason "combined their legal strategies with political pressure and public demonstration." Stating that there had been a "massive cover-up" of police involvement in the attack, Mason and Maddox counseled the Brawley family not to speak with investigators until a special prosecutor was appointed. When Governor Cuomo removed the investigation from the control of local authorities and appointed Attorney General Robert Abrams as special prosecutor, Mason and Maddox stated that the Brawleys would not cooperate unless Abrams, rather than his criminal trial chief, conducted the investigation. When this demand was met, they imposed additional conditions on cooperation. When Glenda Brawley, Tawana's mother, received a grand jury subpoena, her lawyers counseled her not to testify. At the hearing on contempt charges, they refused to present any defense, and she was sentenced to 30 days in jail. Although Tawana Brawley and her family never testified before the grand jury, and the grand jury ultimately found the evidence insufficient to bring an indictment, Mason and Maddox used the strategy of "non-compliance" to publicize their intricate accusation of racism in the New York system. "Every decision we made . . . in the Tawana Brawley case," they observed, "[was] based on how it will affect black people." Their implication was that when a criminal justice system contributes to the oppression of black people, the task of the lawyers representing these people is to expose it; whether by legal or illegal means is a secondary consideration.

III. Confronting a Plural Bar

Not all lawyers—not even a majority—have come to question the legitimacy of the legal system by adopting their client's vantage point on legal rules. And of those who have, not all have resorted to social change lawbreaking in order to change those rules. But, fueled by recent developments, the profession may be entering a period that reflects

both a new diversity of specialties and personnel, and a re-emergent diversity of professional opinion about the neutrality of, and potential for achieving change within, the legal system.

Emerging divisions can only be exacerbated if, as some early responses suggest, the pronouncements of the organized bar fail to reflect the attitudes of the full range of practitioners. In the worst case, this may portend a situation where the articulated norms may be used to enforce a homogeneous code of conduct against dissenting practitioners. One need only recall the state bar association harassment of those who represented socialist party members during the McCarthy period to recognized the danger of this possibility. Ethical regulations were also invoked in the 1960’s to raise roadblocks to the Office of Economic Opportunity’s nascent legal services program, and discipline those who represented “notorious” political activists. In the less ominous case, however, this disparity may create a situation where the emerging norms remain unacknowledged and ill-understood. Their proponents may be devalued or marginalized by the organized bar, which would neglect an opportunity to understand the variety of views it comprehends and promulgate more inclusive norms.

Instead of neglecting or disparaging the heterogeneity of opinion, lawyers and law professors should think more carefully about professional affiliation with critical perspectives on the law. To recognize that such perspectives may be inevitable at this historical juncture, or that they offer the profession fruitful insights regarding legal response to social problems is only a first step toward a better resolution. It remains to probe more thoroughly what it means to hold such a critical, client-inspired perspective, through what choices such perspectives might be expressed, and how the profession might support an ongoing difference of opinion around these issues.

We might begin by recognizing that we don’t yet fully understand what it means to be embrace or identify with a critical client perspec-

---

86. David Wilkins has argued that professional specialization, and the concomitant emergence of distinct sub-group cultures, have reached a point where it is inappropriate to address many ethical rules to the profession as a whole. See David Wilkins, supra note 9, at 515-19. Geoffrey Hazard has also commented on the emergent professional specialization. See Geoffrey Hazard, The Future of Legal Ethics, 100 YALE L.J. 1239, 1279 (1991).


88. JEROLD AUERBACH, supra note 2, at 270-75.

tive. It is easier to glimpse certain differences between a "feminist lawyer" and a commercial lawyer—this essay has been devoted to illuminating such differences—than to grasp the full range of things the former term may imply. Terms like "woman," "Chicano," "feminist consciousness," or "African-American race consciousness" are themselves the subject of intense controversy among the groups they describe. The definitions informally assigned to such terms may lack sufficient have enough clarity to promote group identification. They may be so narrow, or so inflexible as to exclude salient subgroups, or mask the intragroup struggles for power that infuse the effort at self-definition. These issues will only be exacerbated as such qualifiers begin to be applied to lawyers. Does a lawyer have to be a member of an oppressed group to assimilate its critical perspectives? How is the critical perspective of a lawyer who has experienced the same oppression as her clients different from the critical perspective of a lawyer who has simply represented such clients over an extended period of time? Legal educators should encourage students to confront these difficult questions as they examine their prospective profession.

Even more germane, perhaps, than the question of what such identification means is the question of how it should be expressed in practice. To defend, as a threshold matter, the legitimacy of critical perspectives among lawyers is not to endorse all conduct that may follow from them. There are risks that arise when a lawyer comes to identify with a critical client perspective that may not attend more conventional representations. She may assume a continuous perspective among clients of the same group when, in fact, their perspectives may vary; she may feel more free to substitute her judgment—ostensibly client-centered—for the actual judgment of her client. Mason and Maddox’s representation of Tawana Brawley, for example, suggests some of these dangers. By assuming that they could represent Tawana Brawley through a boisterous campaign aimed at what they perceived as the needs of “black people,” they risked substituting their judgment for hers, and submerging, in the problems of “black people,” the problems of a particular black woman90 or child.91

90. Several authors have looked at the Tawana Brawley case as an example of the difficulties black women have faced in alleging rape by white men, and the factors that have made silence their primary response. See, e.g., PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 168-78 (1991); Barbara Omolade, supra note 84.

91. Any assessment of Mason and Maddox’s representation in the Tawana Brawley case is complicated by the fact that Tawana Brawley was a minor. Not only did her relatively young age increase the risk that her lawyers could impose their views on her, but, as a minor, it is not clear
Complicating questions of the lawyer-client relationship are questions of the lawyer's means. Should we, as educators and promulgators of ethical norms, take a different position on some client-centered innovations than on others? Should we endorse critically-inspired practices, such as those of Catharine MacKinnon or Elizabeth Schneider, because they are purely prospective in form, or transform without breaking extant laws? Such an argument is not implausible, yet this choice might favor those whose reforms are incremental enough to be accommodated within existing practices, or popular enough to be approved as prospective legislation. Perhaps, if the neutrality or responsiveness of the legal system has become a contested question, we should not deny lawyers the opportunity to "stand in front of the train," to make the large, symbolic statement sometimes necessary to catalyze change. Perhaps, if the legal system is implicated in systematic forms of oppression, it is most appropriate for lawyers to make this statement. Yet this position may be extreme, given ambivalence among victimized groups about the role of law in their subordination, and given disagreements across the profession about the legitimacy of and the professional investment in the legal system as a whole. In the presence of such ambivalence and disagreement, granting lawyers carte blanche to engage in social change lawbreaking seems problematic. But how might we distinguish among different forms of such engagement? Is the rejection of substantive laws practiced by Janet Benshoof more effective or communicative than non-compliance with procedural rules? Does the respectful non-compliance and willingness to stand punishment expressed by Sa'ad el Amin\(^9\) reflect a more nuanced judgment on the legal system than the incendiary, evasive response of Maddox and Mason?

As we undertake these inquiries as individual lawyers and educators, we might also consider the role of the organized bar. Judith McMorrow has suggested that civil disobedience may not be a question that is best governed by direct professional regulation.\(^9\) She favors a system where the lawyer codes establish a "lowest common denominator," and lawyers draw their own conclusions based on inferences from professional self-conception such as those that she develops.\(^9\) I would

---

92. See Greene v. Tucker, 375 F. Supp. 892, 894-95 (E.D. Va. 1974). Particularly in contrast with el Amin's fiery rhetoric about "standing in front of the train" one is struck by the highly decorous and respectful terms in which he framed his refusal to proceed.


94. McMorrow believes the extant lawyer codes have this character, id., although other
endorse a similar position regarding the range of legal practices that arise from lawyers’ embrace of critical perspectives. These practices are not, at present, a proper subject for specific legislation by the organized bar. They are, rather, a crucial subject for reflection and discussion by individuals or groups of practitioners. This is not to say, however, that the bar should play no role in promoting such discussion. It is difficult to debate the intricacies of critical professional consciousness if the profession itself has affirmed that no such consciousness is possible. Perhaps the primary task for the bar should be to encourage a broad enough, heterogeneous enough conception of what it means to be a lawyer, that groups of lawyers—in our firms, offices and universities—can debate the thornier questions of what it means to embrace a critical client perspective and how it should be expressed in practice.

* * *

The primary issue raised by critical client perspectives is nothing less than what it means to be a lawyer, at a time when conventional definitions of the profession are increasingly becoming embattled. In preparing ourselves to address this issue, it may be useful to return to a metaphor with which Martha Minow began: the complicated, bumpy and ultimately capacious relationship between Eleanor Roosevelt and Pauli Murray.95 Telegrammed after Murray had been jailed for contesting a racial segregation policy on a bus line, Roosevelt responded that “Miss Murray was unwise not to comply with the law. As long as these laws exist, it does no one much good to violate them.”96 According to Murray, Roosevelt’s legalistic response revealed “little understanding of what it meant to be a Negro in the United States at that time.”97 It is interesting to remember that of the two friends, it was Pauli Murray who was the lawyer. Her perspective suggests that one’s position as a lawyer is not itself determinative of one’s approach to an unjust law, or one’s relationship with the groups one represents. Her sharp exchange with Roosevelt suggests the difficulties of accommodating that perspective when those at the helm of legal institutions have a scrupulous and self-constituting regard for legal boundaries. And their complicated friendship suggests the value of striving for an acceptably

commentators have suggested that they bear more directly on instances of civil disobedience. See CHARLES WOLFRAM, supra note 8.
95. Martha Minow, supra note 3, at 724.
96. Id. (citing P. MURRAY, THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST AND POET 147 (1987)).
97. Id.
mutual understanding. We must work toward a professional self-conception that is capacious enough to include Roosevelt’s punctilious respect for existing laws, Murray’s insistence on approaching an unjust law from the perspective of an oppressed group, and many attitudes in between.