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Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.

Lucie E. White

University of California at Los Angeles School of Law

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Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.

LUCIE E. WHITE*

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* Assistant Professor, University of California at Los Angeles School of Law.

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The profound political intervention of feminism has been . . . to redefine the very nature of what is deemed political. . . . The literary ramifications of this shift involve the discovery of the rhetorical survival skills of the formerly unvoiced. Lies, secrets, silences, and deflections of all sorts are routes taken by voices or messages not granted full legitimacy in order not to be altogether lost.¹

IN 1970 the Supreme Court decided *Goldberg v. Kelly*.² The case, which held that welfare recipients are entitled to an oral hearing prior to having their benefits reduced or terminated, opened up a far-reaching conversation among legal scholars over the meaning of procedural justice. All voices in this conversation endorse a normative floor that would guarantee all persons the same formal opportunities to be heard in adjudicatory proceedings, regardless of such factors as race, gender, or class identity. Beyond this minimal normative consensus, however, two groups of scholars have very different visions of what procedural justice would entail. One group, seeing procedure as an *instrument* of just government, seeks devices that will most efficiently generate legitimate outcomes in a complex society.³ Other scholars, however, by taking the perspective of society's marginalized groups, give voice to a very different—I will call it

1. B. Johnson, *Is Writerliness Conservative?*, in *A WORLD OF DIFFERENCE* 25, 31 (1987).

2. 397 U.S. 254 (1970). *Goldberg* was litigated as part of a broad initiative to increase the power and expand the benefits of welfare recipients. See R. COVER, O. FISS & J. RESNIK, *PROCEDURE* 133 (1988). For more extensive discussion of the National Welfare Rights Organization's political strategy, see F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED AND HOW THEY FAIL* 264-361 (1977); L. BAILIS, *BREAD OR JUSTICE: GRASSROOTS ORGANIZING IN THE WELFARE RIGHTS MOVEMENT* (1974) and sources cited therein.

3. This position was endorsed by the Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976) (directing courts to balance accuracy, administrative costs, and other factors to determine the minimal procedures constitutionally required before the state can infringe a liberty or property interest). Jerry Mashaw has criticized the logic of the *Matthews* decision in *The Supreme Court's Due Process Calculus for Administrative Adjudication* in *Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Yet it is Mashaw who has most fully articulated a vision of process as an instrument of just government in a bureaucratic state. See J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985). See also his pre-*Matthews* article, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

a "humanist"—vision. According to this vision, "procedural justice" is a normative *horizon* rather than a technical problem. This horizon challenges us to realize the promise of formal procedural equality in the real world. But this horizon may beckon us even farther than equality of access to current adjudicatory rituals. It may invite us to create new legal and political institutions that will frame "stronger," more meaningful opportunities for participation⁴ than we can imagine within a bureaucratic state.⁵ *Goldberg* can be read to pre-figure this humanist vision of procedural justice. The Court's decision to mandate prior oral hearings for welfare recipients suggests "the Nation's basic commitment" to both substantive equality and institutional innovation in participation opportunities, in order to "foster the dignity and well-being of *all* persons within its borders."⁶

I begin this essay by assuming that the meaningful participation by all citizens in the governmental decisions that affect their lives—that is, the humanist vision—reflects a normatively compelling and widely shared intuition about procedural justice in our political culture.⁷ The

4. See B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

5. Prominent among the legal scholars engaged in articulating this vision of process are Martha Minow and Frank Michelman. See, e.g., Minow, *Interpreting Rights: an Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Minow, *The Supreme Court 1987 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Michelman, *The Supreme Court 1986 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS, DUE PROCESS 126 (J. Pennock & J. Chapman eds. 1977); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153.

6. *Goldberg v. Kelly*, *supra* note 2, at 264-65 (emphasis added). It is ironic that the *Goldberg* opinion itself fits best within the instrumentalist conversation about procedural values. Justice Brennan endorses oral pre-termination hearings for welfare recipients primarily because he assumes that such hearings will ensure accurate and politically legitimate decisions. Scholars from all political perspectives have raised questions about whether welfare hearings have in fact fulfilled those instrumental objectives, or otherwise increased the power of the poor. See, e.g., Scott, *The Reality of Procedural Due Process — A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972) (empirical study of the implementation of fair hearings in Virginia welfare offices); Mashaw, *The Management Side of Due Process*, *supra* note 3 (questioning the efficiency of individualized welfare hearings in every context); Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) (statistics show that hearing opportunities are rarely used by unrepresented clients). See also 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); Rosenblatt, *Legal Entitlements and Welfare Benefits*, in THE POLITICS OF LAW (D. Kairys ed. 1982); J. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986); Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) (all raising questions about how effective procedural reforms have been in expanding the substantive entitlements or political power of the poor).

7. Studies by social scientist Tom Tyler suggest that one of the major factors that determine the degree of fairness that a litigant *perceives* in a procedure is her opportunity for participation. See

essay explores a disjuncture between this vision and the conditions in our society in which procedural rituals are actually played out. Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups. Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms. These conditions—the web of subterranean speech norms and coerced speech practices that accompany race, gender, and class domination⁸—undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them. Furthermore, bureaucratic institutions disable *all* citizens—especially those from subordinated social groups—from meaningful participation in their own political lives.

This disjuncture between the norm of at least *equal*—if not also *meaningful*—participation opportunities for all citizens and a deeply stratified social reality reveals itself when subordinated speakers attempt to use the procedures that the system affords them. The essay tells the story of such an attempt—a story of enforced silence, rhetorical survival, and chance, as a poor woman engages in an administrative hearing at a welfare office. I tell the story more as a meditation than an argument—a

Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988). See also, Tyler, *The Role of Perceived Injustice in Defendant's Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984); J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). See also O'Neil, *Of Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161, 187 n. 129 ("[t]he hearing . . . serves a psychological need in the administration of benefit programs that may be even more basic to a civilized system of administration than the function of ascertaining the truth.").

8. In this essay I use "gender, race, and class" not to denote physical traits of individuals, but rather to refer to schema of shared meaning that construct and support social hierarchy by reifying and ranking human differences. Thus, the very *concepts* of gender, race, and class are inextricably bound up with norms that construct and sustain subordination. Albert Memmi describes the process of race classification as follows:

Racism is the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression. . . . Broadly speaking, the process is one of *gradual dehumanization*. The racist ascribes to his victim a series of surprising traits, calling him incomprehensible, impenetrable, mysterious, strange, disturbing, etc. Slowly he makes of his victim a sort of animal, a thing or simply a symbol.

A. MEMMI, *DOMINATED MAN* 191-95 (1968). Catharine MacKinnon explains the concept of gender: "Gender is also a question of power, specifically of male supremacy and female subordination. . . . [D]ifferences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who was who." C. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 40 (1987).

meditation on the conditions that undermine the humanist project of procedural justice in our present society and the changes that might bring us closer to realizing that vision in the future.

The essay has two parts. In the introductory section, I briefly describe three ways that gender, race, and class subordination have been expressed in our culture through speech norms and language practices. I begin by pointing to stereotypical images of woman's speech, to give one example of how the voices of subordinated groups are often constructed by the dominant culture as deviant or dangerous. I then briefly trace how legal doctrine has reflected and validated such negative stereotypes by excluding the speech of subordinated groups from legal rituals altogether, or by systematically devaluing their speech. Finally, I survey recent research in linguistics and anthropology which suggests that when socially subordinated groups gain *formal* access to legal rituals, they are often perceived—and indeed may feel *compelled*—to speak in ways that invite dominant speakers to dismiss or devalue what they say.

These three themes of socially constructed deviance in the speech of subordinated groups provide a setting for the essay's central project—a story of how “Mrs. G.,” a woman subordinated by race, gender, and class, attempts to make herself heard in an administrative hearing. After telling the story, I interpret it. First, I survey the local landscape of her hearing, identifying three barriers that obstruct her participation, even though the formal *legal* obstacles have been removed. I suggest that these local barriers are erected on the deep foundation of overtly racist and gendered speech norms that I have pointed to in the introduction. At the same time, these barriers are concrete expressions of on-going race, gender, and class subordination. I then offer my own reading of the story, tracing how Mrs. G.—guided by distrust, impulsiveness, and luck—managed to maneuver around these barriers, more or less. I close by asking what legal and social reforms might give Mrs. G. a fairer, more meaningful opportunity to participate in the governmental decisions that shape her life. Although I do not offer a definitive answer to that question, I suggest that the commitments that might realize a humanist vision of *procedural* justice converge with commitments our society has repeatedly considered—and sometimes haltingly undertaken—to redress deeply rooted substantive inequalities.

I. THE SHAPING OF SUBORDINATE SPEECH

A. *Ancient Images: Dangerous, Seductive Voices*⁹

A recurring theme in our cultural imagery of gender is the privileged status of men to speak.¹⁰ The very term for the male sex organ, "testis," is linked etymologically to the root for "testimony" and "testify"—bearing witness, reliably, truthfully, authoritatively, in the public realm, about events in the world.¹¹ Thus, the concepts of maleness and witnessing are linked in the very language we use: in the deep logic of our lexical system,¹² to be a "real" witness one must, quite literally, have balls.

In contrast to this concept of the male as witness, the concept Wo-

9. In this section, I draw on familiar misogynist imagery to suggest that systemic subordination is often expressed through deep—and perhaps even subconscious—assumptions that the disfavored group has deviant capacities for human speech. Because of the close link between language capacity and our concepts of personhood, it may be that all subordinating ideologies presume that the stigmatized group has an inferior or deviant capacity for speech. This section points toward that conclusion, but does not attempt to document it comprehensively across different subordinating ideologies. In reading this section, the reader must be aware of the problems inherent in abstracting one dimension of subordination, such as gender, from the complex experience of subordination in real lives. For perceptive discussion of those problems, see, e.g., E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; B. Hooks, *Racism and Feminism: The Issue of Accountability*, in *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 119-158 (1981); A. Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114-123 (1984); A. Rich, *Notes Toward a Politics of Location*, in *BLOOD, BREAD, AND POETRY* 210-232 (1986).

10. Catharine MacKinnon summarizes the recurring insight of a wide range of feminists when she notes that "[a]nyone who is the least bit attentive to gender since reading Simone de Beauvoir knows that it is men socially who are subjects. . . . Thus the one who has the social access to being that self which takes the stance that is allowed to be objective . . . is socially male." See C. MACKINNON, *supra* note 8, at 55.

11. Black's Law Dictionary (5th ed. 1979) defines "testify" as "to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact." *Id.* at 1323. According to the Oxford English Dictionary, the Modern English term "testis" has been assumed to have an etymological identity with the Latin term "testis," which meant witness. 17 OXFORD ENGLISH DICTIONARY 834 (2d ed. 1989). Though there is some dispute about this connection, the identity has been assumed throughout Western history, as evidenced by the sixteenth century usage of the French term "tesmoign" to refer to both the male sex organ and a witness in a court proceeding.

12. Both historical linguists and feminist theorists claim that the full significance that any concept conveys in a living language reflects the historical process through which that cluster of current meanings evolved. Therefore, one of the most fruitful approaches to the understanding of a semantic system is through the reconstruction of the etymologies of the words in it. See, e.g., M. DALY, *WEBSTER'S FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE* (1987); A. MEILLET, *THE COMPARATIVE METHOD IN HISTORICAL LINGUISTICS* (G. Ford trans. 1967); M. BREAL, *SEMANTICS: STUDIES IN THE SCIENCE OF MEANING* (N. Cust trans. 1964).

man has traditionally connoted a very different kind of speaker and a very different quality of speech. Although they have documented many variances, anthropologists studying cultural imagery of women have noted a characteristic polarity.¹³ Some have called this pattern the "pedestal-gutter syndrome"¹⁴ or "idealization and disparagement."¹⁵ Woman is portrayed, often in a single embodiment, to be both a goddess and a slut. In sharp contrast to the authoritative speech of the male, Woman's speech cannot be trusted, in either of her contradictory personae. As goddess, Woman's voice cannot be trusted because it is "indecidable." Refusing to conform to the binary logic of male language, the voice of the goddess poses a threat to the entire "phallogocentric" regime.¹⁶ And as the whore, Woman's voice cannot be trusted because her words have been purchased and they therefore conceal her real passions and her real designs.¹⁷ Thus, Woman's speech is not reliable, like the male's. Rather, at best she is a mystery, "covered by a veil . . . of beautiful possibilities, sparkling with promise, resistance, bashfulness, mockery, pity, and seduction."¹⁸ More typically, however, the image of Woman's voice has aroused deep fear and hatred, as John Lyly, an Elizabethan playwright and rhetorician, expressed in a stylized misogynist tirade:

Take from them their periwiggs, their payntings, their Iewells, their rowles, their boulderings . . . then will they appeare so odious, so vgly, so monstrous, yet thou wilt rather thinke them Serpents than Saynts, & so lyke Hags, that thou wilt feare rather to be enchanted than enamoured.¹⁹

13. See, e.g., Ruble & Ruble, *Sex Stereotyping*, in *IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING* 188, 190 (A. Miller ed. 1982).

14. C. TRAVIS & C. OFFIR, *THE LONGEST WAR* (1977).

15. J. WILLIAMS, *PSYCHOLOGY OF WOMEN: BEHAVIOR IN A BIOSOCIAL CONTEXT* (1987).

16. Some feminist philosophers have made the sweeping argument that the form of logic through which knowledge has been articulated in male-dominated, or "phallogocentric" European civilization presumes gender domination, the denial of the bodily experience and language capacity of women, in order to conceal its own internal contradictions. Elaboration of this provocative but complex argument is beyond the scope of this essay. See, e.g., L. IRIGARAY, *SPECULUM OF THE OTHER WOMAN* (G. Gill trans. 1974); L. IRIGARAY, *THIS SEX WHICH IS NOT ONE* (C. Porter trans. 1985); J. DERRIDA, *SPURS: NIETZSCHE'S STYLES* (B. Harlow trans. 1979). For relatively accessible commentary and critique of this literature, see, e.g., T. MOI, *SEXUAL/TEXTUAL POLITICS — FEMINIST LITERARY THEORY* (1985); J. Culler, *Reading as a Woman*, in *ON DECONSTRUCTION* 43-64 (1982); E. Grosz, *Three French Feminists* (forthcoming); Fraser, *The Uses and Abuses of French Discourse Theories for Feminist Politics* (1989)(unpublished manuscript on file with the author).

17. A. DWORKIN, *WOMAN-HATING: A RADICAL LOOK AT SEXUALITY* 29-46 (1974).

18. F. NIETZSCHE, *THE GAY SCIENCE* 272 (W. Kaufman trans. 1974).

19. J. LYLY, *Euphues*, in *THE COMPLETE WORKS OF JOHN LYLY* 254-55 (R. Bond ed. 1902), cited by S. GRIFFIN, *WOMAN AND NATURE: THE ROARING INSIDE HER* (1978), at 12-13, quoting K. ROGERS, *THE TROUBLESOME HELPMATE* 111 (1966). Such misogynist tirades became one of the typical vehicles through which Renaissance rhetoricians throughout Western Europe practiced their

The unsettling imagery of Woman's voice is linked to the social subordination of real women in a complex, circular dynamic. Cultural images that construct Woman's voice as dangerous and fearful rationalize the social control of real women. Yet at the same time these misogynist stereotypes *describe* social reality; they point to qualities that real women—precisely *because* of their subordinate status—have been forced to learn.²⁰ Women cannot afford to speak with candor—or even to *perceive* what it is that they really feel—because the threat of male violence has taught them to shape what they say by the way in which they read male pleasure, if they want to survive.²¹

Some feminists insist that this “mirroring” is the only social role that women can play.²² Yet these theorists underestimate the capacity of human speech. Contrary to their analysis, women's social subordination can never reduce them to silence. For even in their most apparently docile moments, when their words seem most obedient to what men want, women—because they retain the *power* of speech—can find in the very ambiguity of the language they use the means to mock their masters, challenging the hegemony of the male regime.²³ Every word that they speak, every silence, carries the risk of subversion, of a double meaning

verbal craft. See P. Parker, LITERARY FAT LADIES: RHETORIC, GENDER, PROPERTY 8 (1987)(interpreting misogynist representations of Woman's voice in Renaissance literary and rhetorical texts).

20. Nietzsche states the logic in an aphorism: “Reflect on the whole history of women: do they not have to be first of all and above all else actresses?” See NIETZSCHE *supra* note 18, at 317.

21. For feminist analyses of how the pervasive threat of male violence has shaped the identity of Woman, see West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 87, 94 (1987)(“...[o]ne responds to pervasive fear and pervasive threat not by changing one's behavior, but by *re-defining oneself*. . . . A fully justified fear [of the violent nature of male sexuality] . . . permeates many women's — perhaps all women's — sexual and emotional self-definition. Women respond to the fear by *re-constituting* themselves in a way that controls the danger and suppresses the fear.”) (emphasis in original); and MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 528-30 (1982).

22. See V. WOOLF, A ROOM OF ONE'S OWN 35-36 (1969)quoted in MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 645 & n.18 (1983)(“Women have served all these centuries as looking-glasses possessing the magic and delicious power . . . of reflecting the figure of man at twice its natural size. . . . [W]hatever may be their use in civilized societies, mirrors are essential to all violent and heroic action. That is why Napoleon and Mussolini both insist so emphatically upon the inferiority of women, for if they were not inferior, they would cease to enlarge.”).

23. Patricia Yaeger is among the group of recent feminist critics and linguists who explore the emancipatory potential in human language *capacity* that no repressive cultural system can fully extinguish. “[L]anguage is both constraint and means of emancipation or action. . . . [Speech] enact[s] the repressions of the dominant culture, [but] . . . can also deflect and begin to reconstruct the dominant culture's direction.” P. YAEGER, HONEY-MAD WOMEN: EMANCIPATORY STRATEGIES IN WOMEN'S WRITING 111 (1988). See also D. CAMERON, FEMINISM AND LINGUIST THEORY (1985).

that those in power can never fully understand.²⁴ Thus the repression of women in the social world, rather than alleviating the misogynist fear of Woman's voice, actually fuels that fear, thereby rationalizing further measures of social control.

B. *Archaic Laws: Keeping Subordinates Silent*²⁵

The law governing the use of speech in legal rituals—the law of evidence—has devised an arsenal of doctrines for guarding against the voices of women and other subordinate groups. The most common device has been the outright exclusion of testimony from the members of stigmatized groups. Prior to the Civil War, most states had statutes which forbade peoples of color²⁶ from testifying against whites in courts of law. These statutes did not necessarily bar the targeted groups from testifying in matters involving other members of the same group. Rather, they often applied only when the hierarchy of caste might be threatened: when the speech of a Black, for instance, might prejudice the interests of a white.²⁷

When these statutes were challenged, the courts sometimes spelled

24. A recurring fear of the master is that the slaves will devise a private language through which they will plot their escape — or his murder — in his uncomprehending presence. See, e.g., E. GENOVESE, *FROM REBELLION TO REVOLUTION: AFRO-AMERICAN SLAVE REVOLTS IN THE MAKING OF THE MODERN WORLD* (1981).

Recent minority legal scholars have emphasized this threat that subordinated peoples always pose to their dominators. See, e.g., Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 LAW & INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 103 (1987).

25. In this section I do not seek to pronounce a last word on these issues. Rather, by surveying some materials and asking many questions, I seek to open up new paths of inquiry.

26. The excluded groups were generally African Americans, Native Americans, people of mixed race, and sometimes Asians.

27. The Reconstruction Civil Rights Acts attempted to remedy this problem by giving Blacks the explicit right to "sue, be parties, give evidence" on the same basis as whites. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, and Voting Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144, both presently codified at 42 U.S.C. § 1981. It was not until these provisions were enforced by court decisions, however, that the formerly slave-holding states changed their practice. See *The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883).

Thus, as late as 1865, after the Civil War, Kentucky enacted a law that provided that "Negroes and mulattoes shall [only] be competent witnesses in all criminal proceedings where a negro or mulatto is a defendant" or a civil proceeding in which the only parties in interest are negroes or mulattoes. See Act of Feb. 14, 1866, ch. 563, 1865 Ky. Acts 38, quoted in Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 483 & n.51 (analyzing *Blyew v. United States*, 80 U.S. 581 (1883)). See also 50 AM. DIGEST *Competency of Negroes in General* § 107, 1658-1896 (1904).

out the underlying assumptions about the speech of peoples of color which rationalized them. *People v. Hall*²⁸ is an example. It concerns the trial of three whites for the murder of a Chinese man in California in the 1850s. The testimony of three Chinese was admitted against the defendants. The trial court convicted Hall and sentenced him to be hanged. On appeal the issue was whether a statute which barred Blacks and Indians from giving testimony against whites²⁹ should be read to bar Chinese witnesses as well.

The court, extending the statute to bar the testimony of the Chinese witnesses, reversed Hall's conviction. In its opinion, it set out the basis for the exclusion:

[it would be an] anomalous spectacle . . . [if a] distinct people . . . whose mendacity is proverbial, a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical confirmation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our government.³⁰

In this racist vision, non-whites were imagined to be so radically deviant in their essential nature,³¹ that it was unthinkable to allow them to speak out on matters that might affect whites. No harm would follow if they were allowed to speak among their own kind in their strange primitive languages. But their talk must not command any power in the world of white people. Thus, competency doctrine both rationalized and

28. *The People v. Hall*, 4 Cal. 399 (1854). The case is discussed in McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 548-53 (1984).

29. The statute at issue provided that "No Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man." Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, amended by Act of Mar. 18, 1863, ch. 70, 1863 Cal. Stat. 69, repealed by omission from codification CAL. PENAL CODE § 1321 (1872)(officially repealed, Act of Mar. 30, 1955, ch. 48, § 1, 1955 Cal. Stat. 488, 489). A parallel provision, "No Indian or Negro shall be allowed to testify as a witness in any action in which a white person is a party", applied to civil cases. Civil Practice Act of 1851, ch. 5, § 394(3), 1851 Cal. Stat. 51, 114, amended by Act of Mar. 16, 1863, ch. 68, 1863 Cal. Stat. 60, repealed by omission from codification CAL. CIV. PROC. CODE §§ 8, 1880 (1872)(officially repealed, Act of Mar. 30, 1955, ch. 33, § 1, 1955 Cal. Stat. 475), cited in *People v. Hall*, *supra* note 28, at 399, McClain, *supra* note 28, at 549 & n. 113.

30. *People v. Hall*, *supra* note 28, at 405.

31. For a discussion of the history of the depiction of peoples of color as sub-human, bestial, and lacking in fully human capacities of speech, see Brantlinger, *Victorians and Africans: The Genealogy of the Myth of the Dark Continent*, in "RACE," WRITING, AND DIFFERENCE 185-222 (H. Gates ed. 1986).

helped to stabilize a caste system. The doctrine tried to justify the exploitation of Africans and Asians by spreading the myth—belied by widespread sexual and economic interconnection—that these groups inhabited a lower, self-enclosed social world. At the same time, the exclusion of their testimony against whites helped make it easier for the dominant group to use violence against their subordinates without risking legal sanctions.

The law has also categorically excluded the speech of women from legal rituals, but in the more remote past. In medieval civil and canon law jurisdictions on the European continent, wholesale exclusion of women's testimony was the rule until roughly the fourteenth century.³² This policy was justified by ancient maxims about woman's nature, such as Virgil's "Varium et mutabile semper femina"³³ and the admonition from Talmudic Law that the testimony of women should not be received "on account of the levity and audacity of their sex."³⁴ Even after categorical exclusions were removed, rules remained in effect in civil law jurisdictions well into the nineteenth century that explicitly weighted the testimony of women less heavily than that of men.³⁵

From its origins, the common law system forbade women from initiating lawsuits except in limited circumstances that were tied to the marriage relationship.³⁶ The status of women as witnesses was more complex. The doctrine of competency had its origin in religious beliefs

32. See W. BEST, I THE PRINCIPLES OF THE LAW OF EVIDENCE 84-85 (1875).

33. "Fickle and always changing is woman." VIRGIL, 4 AENEID 569-70.

34. Joseph. Antiq. Judaic. lib. 4, c. 8, No. 15, cited in BEST, *supra* note 32, at 85. Best's own evaluation is that this rendering is probably "apocryphal". For a modern discussion of the status of women in Talmudic law, see Hauptman, *Images of Women in the Talmud*, in RELIGION AND SEXISM: IMAGES OF WOMEN IN THE JEWISH AND CHRISTIAN TRADITIONS 184, 194 (R. Ruether ed. 1974) ("[A] woman was excluded from giving testimony in most cases and from serving as a judge. . . . [S]ome apologists explain this exclusion in terms of women being too emotional, and therefore unable to testify with objectivity."); B. GREENBERG, ON WOMEN & JUDAISM: A VIEW FROM TRADITION 57-73 (1981). These attitudes carried over into the Christian tradition. See, e.g., "Let your women keep silence in the churches: . . . for it is a shame for women to speak in the church" (I *Corinthians* 14:34-35); and "Let the woman learn in silence with all subjugation. But, I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence." (I *Timothy* 2:11-2:12). See also S. Bem & D. Bem, *Training the Woman to Know Her Place*, in BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 97 (D. Bem ed. 1970).

35. For example, in Berne as late as 1821, the deposition of three women was only equal to that of two men. In the Swiss Canton of Vaud as late as 1824, the testimony of two women was required to counterbalance that of one man. Best, *supra* note 32, at 86.

36. The Magna Carta prevented women from initiating capital prosecutions against men, with a limited exception linked to marriage. See The Magna Carta, Clause 54 ("No man shall be arrested or imprisoned upon appeal [i.e., information, private prosecution] of a woman for the death of anyone except her husband."). Steven Yeazell pointed out this provision to me.

about what persons could swear an oath to serve as jurors. Women were not among this group.³⁷ After the functions of witness and juror were differentiated in the fourteenth century, a common law of witness competency evolved.³⁸ Although women were not barred from testifying *per se*, they were forbidden from giving evidence in many circumstances.³⁹ It was not until the eighteenth century that women's testimony was consistently admitted in criminal cases.⁴⁰ And it was not until the mid-nineteenth century, when the common law doctrine of coverture was relaxed by the married women's property acts,⁴¹ that wives were permitted to testify in cases in which their husbands were parties.⁴²

37. See generally, Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482 (1939). In this early stage, the functions of witness and juror were combined; women were excluded in both capacities. After jurors and witnesses were differentiated in the fourteenth century, women were allowed to give testimony in some circumstances. See Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892). Women were not allowed on juries in the United States, however, until the early twentieth century. See Glaspell, *A Jury of Her Peers*, in R. COVER, O. FISS, & J. RESNIK, *PROCEDURE* 1167 (1988) (short story published in 1917 advocating the inclusion of women on juries); Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986).

38. At various times, categorically "incompetent" groups have included children, Jews, heretics and pagans, slaves, the blind, the deaf and dumb, imbeciles and the insane, and poor people. See Rowley, *supra* note 37, at 488; 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 187 (1938).

39. For instance, according to Sir Edward Coke, women were prevented from offering testimony that might affect certain status or property relations of men. See E. COKE, 1 *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; A COMMENTARY UPON LITTLETON*, L.1 C.1. § 1.6.b. (F. Hargrave & C. Butler eds. 1823) (women forbidden from offering testimony "to prove a man to be a villein" or to prove that a man had male issue born alive). Villeinage refers to that class in medieval society which did not hold land in their own right, but were tenants bound to the service of the king.

40. BEST, *supra* note 32, at 79 cites several Scottish sources on this point. See, e.g., J. BURNETT, *A TREATISE ON VARIOUS BRANCHES OF THE CRIMINAL LAW OF SCOTLAND* 388-90 (1811). Burnett explains that the total exclusion of women from giving testimony was "a rule borrowed from the laws of the church, and . . . seems to have been founded more on a regard to female delicacy, and the supposed *indecorum* of women appearing in Courts of Justice, than upon any notion of their being less qualified to give testimony than persons of the other sex." *Id.* at 388. Burnett explains that by the eighteenth century the rule had been greatly relaxed in certain areas, but not in cases of murder or theft unless no male witnesses were available. Burnett was quite critical of the exclusion of women's testimony. He based his position on an idealization of the feminine: "women are in general most distinct witnesses . . . from their habits and temper, more apt to be strongly impressed with occurrences which pass before them, and consequently more accurate in their recollection of them." *Id.* at 390.

41. Under the common law doctrine of coverture, married women could not own property or bring litigation in their own right. Coverture was reformed in most American jurisdictions by the mid-nineteenth century. See 50 AM. DIGEST *Statutory Removal of Disqualification* § 166 1658-1896 (1904); *Kingsbury v. Buckner*, 134 U.S. 650, 683 (1889) (applying Illinois Statute allowing married persons to testify for and against each other in cases involving the separate property of the wife).

42. See Rowley, *supra* note 37, at 489. See also 2 J. WIGMORE, *ON EVIDENCE* § 600 (J. Chadbourne rev. ed. 1979). The rationale for the exclusion of wives' testimony in such cases was that the legitimate legal interests of married women were identical to those of their husbands. Further-

These glimpses into the history of competency doctrine suggest that race, gender and property have shaped the doctrine, but in complex ways. In many cases the exclusion of women's testimony reflected an image of Woman as an unreliable speaker. But an idealized image of Woman was also at play, a picture of a creature too delicate to withstand the ugliness of the public sphere. Furthermore, the substance of the case seemed a crucial factor in the admission or exclusion of women as witnesses. On some issues, such as the political or economic status of males, her voice seemed especially out of place. The treatises do not give a clue to the social reality, however. It may be that in certain settings, women witnesses commanded considerable *de facto* authority.⁴³ Much more research is needed to ascertain and interpret the patterns of formal exclusion of subordinated groups in court, and the means by which they overcame or evaded those barriers.

By the late nineteenth century, categorical notions of competency began to give way to the current "rational" approach, which requires individualized scrutiny of the potential witness based on established criteria of "reliable" speech. The witness must be able to perceive and remember accurately; he must have an actual recollection of the events in question; he must be able to distinguish between truth and falsehood; and he must be able to express himself clearly.⁴⁴ Under these criteria, the paradigm of the competent witness is a speaker who can disregard the listener, presume his own objectivity, and make pronouncements about the state of the world. As the next section demonstrates, this paradigm correlates with the typical language habits of socially privileged speakers; its effect is to transform the speech style of the dominant group into the norm against which the value of all testimony is assessed,⁴⁵ and to shift the exclusion of subordinate voices from the domain of formal exclusionary doctrines to that of discretionary judgments about the value—the credibility—of the speech.⁴⁶

more, it was feared that either the woman's affection for her husband would bias her testimony, or that her testimony would disrupt family harmony.

43. For instance, research by Hendrik Hartog into civil court records of Middlesex County, Massachusetts in the eighteenth century revealed that in cases of "bastardy" the midwife who delivered the child was privileged to give conclusive testimony on the question of paternity. Conversation with Hendrik Hartog (May 1988).

44. See FED. R. OF EVID. 601-03.

45. See *infra* notes 69-71 and accompanying text.

46. One might note that the Federal Rules of Evidence, as well as prominent commentators, recommend that the *a priori* exclusion of witnesses based on mental or moral qualifications should be eliminated entirely, and the factfinder should be charged to consider the indicia of competency in assessing the weight and credibility of witness speech. See, e.g., ADVISORY COMMITTEE'S NOTE TO

C. *Verbal Strategies: Hedges and Mirrors*

Linguists have repeatedly noted significant differences between the speech of dominant and subordinated groups within the same broad language communities. Particularly in the context of gender, such differences, both in language practice and in *beliefs* about how men and women speak,⁴⁷ have been documented across many cultures.⁴⁸ In an influential essay published in 1975, linguist Robin Lakoff asked *why* men and women are often presumed—and observed—to speak differently.⁴⁹ In seeking an answer to this question, she suggested that the speech of men and women might be motivated by two contrasting goals, the “transmission of factual knowledge” and “politeness,” which correspond to two contrasting verbal styles.

Lakoff links the first of these styles to the typical speech habits of men. In this style, the speaker’s primary goal is to inform the listener of new information “by the least circuitous route.”⁵⁰ The speaker will use succinct, unambiguous, declarative sentences—unqualified factual propositions ordered according to a linear logic.⁵¹ These features convey the speaker’s authority. They announce his autonomous power to make truthful statements about the world.

Lakoff claims that a contrasting “polite” style, crafted to sustain

FED. R. EVID. 601 (“A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility”); 2 J. WIGMORE, ON EVIDENCE § 509 *Evidence in Trials at Common Law* (Chadbourn rev. ed. 1979).

47. Folk-linguistics explores how people believe that they and others in their language community speak. See Hoenigswald, *A Proposal for the Study of Folk-linguistics*, in *SOCIOLINGUISTICS* 16 (W. Bright ed. 1966).

48. Major works of feminist linguistic scholarship from the last two decades include D. CAMERON, *FEMINISM AND LINGUISTIC THEORY* (1985); *LANGUAGE, GENDER, AND SOCIETY* (B. Thorne, C. Kramarae & N. Henley eds. 1983); C. KRAMARAE, *WOMEN AND MEN SPEAKING* (1981); *WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY* (S. McConnell-Ginet, R. Borker & N. Furman eds. 1980); M. KEY, *MALE/FEMALE LANGUAGE* (1975); and *LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE* (B. Thorne & N. Henley eds. 1975). For an overview and critique of feminist linguistic investigation, see Elshtain, *Feminist Discourse and its Discontents*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 127-145 (N. Keohane, M. Rosaldo, & B. Gelpi eds. 1981), and McConnell-Ginet, *Difference and Language: A Linguist's Perspective*, in *THE FUTURE OF DIFFERENCE* 156-166 (H. Eisenstein & A. Jardine eds., 1987). For a survey of linguistic data about gendered features in non-Western languages, see Bodine, *Sex Differentiation in Language*, in *LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE* 130 (B. Thorne & N. Henley eds. 1975).

49. R. LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975). Lakoff based her conclusions on introspection and intuition about the speech of white, middle class professional women like herself, rather than on rigorous field studies. *Id.* at 4 (“I have examined my own speech and that of my acquaintances, and have used my own intuitions in analyzing it.”).

50. *Id.* at 71.

51. See *id.* In characterizing this style, Lakoff draws heavily from H. P. GRICE, *THE LOGIC OF CONVERSATION* (1968).

connection with the listener, typifies the speech of women. Polite speech does not announce the speaker's own authority; rather, it enacts her deference to her listener and garners "some intuition about his feelings toward [her]."⁵² The "polite" speaker gives her listener great linguistic latitude to determine what she, the *speaker*, means to say. She does so by adding features to declarative sentences that render them ambiguous. These "hedgies," as Lakoff calls them,⁵³ include a rising, questioning intonation, "tag questions,"⁵⁴ excessive modals or hyper-polite circumlocutions,⁵⁵ and semantically ambiguous adjectives or intensifiers.⁵⁶ All of these hedgies undercut the claim to authority that is implicit in declarative syntax. They cede to the listener the power to determine what the speaker has to say.

Lakoff's essay has stimulated a vast literature of responses.⁵⁷ Some of her critics dispute Lakoff's negative evaluation of women's language.⁵⁸ These critics seek in women's speech habits a powerful utopian alternative to male language and male logic.⁵⁹ Other critics have begun to docu-

52. LAKOFF, *supra* note 49, at 70.

53. *Id.* at 53.

54. For example, "It's time for dinner, isn't it?"

55. For example, "Wouldn't it be a good idea if you could leave me alone?"

56. For example, "That seemed kinda all right."

57. Virtually every linguistic and political claim of Lakoff's has stimulated further research. The technical studies include Brend, *Male-Female Intonation Patterns in American English*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 48, at 84-87, and B. PREISLER, LINGUISTIC SEX ROLES IN CONVERSATION: SOCIAL VARIATION IN THE EXPRESSION OF TENTATIVENESS IN ENGLISH (1986). For a broad critique of Lakoff's method and conclusions, see Kramerae, *Women's Speech: Separate but Unequal?* in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 48, at 43-56. For a comprehensive bibliography of the linguistics literature scrutinizing Lakoff's claims, see LANGUAGE, GENDER, AND SOCIETY, *supra* note 48, at 233-252 (annotated bibliography of linguistic works exploring "Sex Differences and Similarities in Language Use: Linguistic Components").

58. See, e.g., B. Thorne & N. Henley, *Difference and Dominance: An Overview of Language, Gender, and Society*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE, *supra* note 48, at 25-26 ("[A]lthough stressing the primacy of social rather than linguistic change, Lakoff seems to argue that equality *should* entail women using the 'stronger' forms now associated with men.") (emphasis in original)).

59. These critics argue that women's speech can show us how to use language to negotiate truly human meanings, which are inescapably ambivalent, by attending to the Other, rather than by imposing an imperial truth on a captive audience. Furthermore, they claim that it is only by revaluing women's language, culture, and life experience that we can talk concretely about *what* norms and visions should motivate the feminist political project in the long term. See, e.g., Kramerae, *Women's Speech: Separate but Unequal?*, *supra* note 48, at 43-56; Fishman, *Interaction: The Work Women Do*, in LANGUAGE, GENDER, AND SOCIETY, *supra* note 48, at 89.

Lakoff's critics are correct to remind us that feminists must debate ultimate visions. However, at the same time we must make hard decisions about the concrete steps that might lead forward. It is to this "transitional" question that Lakoff speaks when she suggests that women should learn to speak

ment the speech strategies of the economically and racially subordinated women who were excluded from Lakoff's sample.⁶⁰ Their work suggests that "women's language" is best understood as the array of speech *strategies* that women—as well as other subordinated speakers—have devised to manage verbal encounters with more powerful Others. The common variable in these encounters is not the speaker's gender identity. Rather, it is the imbalance *between* two speakers in social power.

The work of legal anthropologist William O'Barr lends support to this broad thesis.⁶¹ In observing courtroom testimony, he found that women are more likely than men to use the verbal features that Lakoff labels "women's language."⁶² Yet these features correlate more strongly with the speaker's social status than with gender *per se*.⁶³ Based on this

like males if they want to command power in the present-day public world. In her view, because dominant-group males control the public sphere, setting the standards for public discourse, women's verbal hedges are *heard* as confessions of their lack of power. This debate between Lakoff and her critics is but one example of a broader discussion among feminists about whether the historical practices of women should be regarded as symptoms of gender oppression or lauded as the signifiers of alternative feminist values. For an exposition of this debate, see *Feminist Discourse, Moral Values, and the Law — a Conversation*, 34 BUFFALO L. REV. 11 (1985). For discussion of the problem of "transition" in feminist politics, see Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Littleton, *Women's Experience and the Problems of Transition: New Perspectives on Battered Women*, 1989, 23 U. CHI. LEGAL F. (exploring the dilemma for feminists of choosing political tactics that will be effective in the present-day world without thereby reinforcing the dominant norms that one ultimately seeks to change).

60. See the essays in *LANGUAGE AND POWER* (C. Kramarae, M. Schulz & W. O'Barr eds. 1984). See also Nichols, *Women in their Speech Communities*, in *WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY*, *supra* note 48, at 140 (documenting contrasts between women speakers in different speech communities and conversational settings, which the author relates to such variables as social role and activities); Nichols, *Linguistic Options and Choices for Black Women in the Rural South*, in *LANGUAGE, GENDER, AND SOCIETY*, *supra* note 48, at 54; Scott, *The English Language and Black Womanhood: a Low Blow at Self-esteem*, 2 J. AFRO-AMERICAN ISSUES 218 (1974); Stanback, *Language and Black Woman's Place: Towards a Description of Black Women's Communication* (paper presented at meeting of Speech Communication Association, Louisville, Ky., 1982).

61. See Lind & O'Barr, *The Social Significance of Speech in the Courtroom*, in *LANGUAGE AND SOCIAL PSYCHOLOGY* (H. Giles & R. St.Clair eds. 1979); Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L. J. 1375; Erickson, Lind, Johnson & O'Barr, *Speech Style and Impression Formation in a Court Setting: The Effects of "Powerful" and "Powerless" Speech*, 14 J. EXPERIMENTAL SOC. PSYCH. 266 (1978).

62. O'Barr refers to the linguistic features that Lakoff associates with women — including hedges, hesitation forms, polite forms, question intonation and intensifiers — as "powerless" speech forms. See Conley, O'Barr & Lind, *supra* note 61, at 1379-80.

63. O'Barr & Atkins, *"Women's Language" or "Powerless Language?"*, in *WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY*, *supra* note 48, at 93, 102-03 ("[W]e were able to find *more* women toward the high end of the continuum [measuring the frequency of Lakoff's "powerless forms" that occurred in their speech]. Next, we noted that all the women who were aberrant . . . had something in common — an unusually high social status. . . . [T]hey were typically well-educated, professional women of middle-class background. A corresponding pattern was noted among the aberrant men. . . . [T]hey tended to be men who held either subordinate, lower-status jobs or were

data, O'Barr surmised that women—as well as minority and working class men—tend to use “women’s language” not because of any biological or cultural predisposition to speak differently, but rather because these speakers tend to occupy “relatively powerless social positions.”⁶⁴

O'Barr has also examined the narrative logic of *pro se* litigants' speech.⁶⁵ He has identified two typical storytelling strategies, which he calls “relational” and “rule-oriented.”⁶⁶ Litigants who use a relational framework do poorly in court because the logic of their stories clashes with the rule-breach-injury logic in which judges have learned to conceptualize legal claims. O'Barr found that socially powerless speakers, already disadvantaged by their verbal style, tend to use this relational logic to structure their testimony.⁶⁷ Thus, on the level of story as well as sentence, powerless speakers tend to use speech strategies that increase their disempowerment.

Another O'Barr study casts some empirical light on the feminist debate over the *value* of “women’s language.” Using simulated jury trials, O'Barr found that jurors are likely to assess speakers who use “powerless” language as less credible, competent, intelligent, or trustworthy than speakers who use typically “male” speech patterns.⁶⁸ W. Lance

unemployed.”). The data also suggested that those speakers who were more familiar with a courtroom setting were likely to use a lower proportion of powerless features.

64. *Id.* at 104.

65. See O'Barr & Conley, *Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661 (1985); Conley & O'Barr, *Rules versus Relationships in Small Claims Disputes*, in CONFLICT TALK (A. Grimshaw ed. 1989)(forthcoming). Because lawyers are rarely present in small claims proceedings to question witnesses and formal rules of evidence do not apply, litigants in these cases are free to give extended narrative accounts with little interruption. It was these narratives that Conley and O'Barr studied.

66. *Rules versus Relationships*, *supra* note 65, at 2-3 (“A *relational* account emphasizes status and relationships, and is organized around the litigant’s efforts to introduce these issues into the trial. A *rule-oriented* account emphasizes rules and laws, and is tightly structured around these issues. . . . Rule-oriented accounts mesh better with the logic of the law and the courts. They . . . concentrate on the issues that the court is likely to deem relevant to the case. . . . By contrast, relational accounts are filled with background details that are presumably relevant to the litigant, but not necessarily to the court, and emphasize the complex web of relationships between the litigants rather than legal rules or formal contracts”) (emphasis in original).

67. *Id.* at 29-30 (“[U]se of the rule-oriented approach correlates with exposure to the sources of social power. . . . Such exposure is in turn differentially distributed between men and women and among the members of various classes and ethnic groups. . . . Indeed, the rule-oriented relational continuum may be the discourse-level manifestation of the power-powerless stylistic continuum”).

68. The study was conducted with both male and female witnesses reading prepared scripts of “powerful” and “powerless” testimony. Among both gender groups, credibility was significantly enhanced when “powerful” speech was used. The baseline assessment of the male witnesses, as a group, was consistently, though only slightly, more favorable than that of the females. See O'Barr & Atkins, *supra* note 63.

Bennett and Martha Feldman have drawn similar conclusions from qualitative observations of actual trials. Their work also suggests that jurors from dominant groups will sometimes find subordinate speakers to lack credibility *not* because of the substance of their testimony, but rather because of the non-dominant linguistic and narrative conventions that they use.⁶⁹

Neither O'Barr nor Bennett and Feldman consider whether "powerless language" should be valued for the implicit critique that it offers of dominant norms of speech. Nor do they ask how juries can be taught greater tolerance for different cultural and linguistic styles, and judges made more aware of the distortions that social inequities bring into the fact-finding process.⁷⁰ Rather, their works speak only to the question of how the witness who wants to be taken seriously in the present-day courtroom should learn to speak. On this narrow question, the message of their research is clear. In today's courtrooms, language patterns that correlate with social subordination are not "neutral." Rather, those patterns cue the listener to devalue the speech.

In reflecting on his research, O'Barr has concluded that language practice and social power have a complex, recursive relationship.⁷¹ Socially powerless speakers do not have the luxury of confrontation—or even clarity—when they speak. Avoiding verbal commitment, training one's voice to anticipate the other's pleasure—such moves can defuse the risk of retaliation from a more powerful Other. Yet these strategies offer protection at the cost of confessing, and compounding, the speaker's lack of power.⁷²

69. See W. BENNETT & M. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 171 (1981) ("There are two ways in which systematic biases might result from differences in storytelling practices. First, some people may lack shared cognitive routines for presenting information in story-coded forms. The inability to produce a conventional story would leave individuals vulnerable to having truthful accounts of their actions rejected. Second, even the construction of a coherent story may not guarantee a just outcome if the teller and the audience do not share the norms, experiences, and assumptions necessary to draw connections among story elements. People who have different understandings about society and its norms may disagree about the plausibility of a story. . . . If legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience, then jurors who come from different social worlds may disagree about the meaning and the plausibility of the same stories.").

70. Both researchers do address these questions peripherally, however. See *infra*, notes 174-75 and accompanying text.

71. O'Barr, *Asking the Right Questions about Language and Power*, in *LANGUAGE AND POWER*, *supra* note 60, at 262, 266.

72. Robin Lakoff states the dilemma as some women might experience it: the acquisition of this special type of speech [women's speech, or "powerless" speech] will later be an excuse others use to keep her in a demeaning position, to refuse to take her seriously as a human being. . . . So a girl is damned if she does, damned if she

Sociolinguists and anthropologists have devised methods for mapping conversations across gender, class, and race gaps as complex negotiations of social power.⁷³ In addition to suggesting social policies to make the courtroom feel fairer, and less dangerous for socially subordinated groups, such mapping exercises can help advocates respond more intelligently to the pressures that clients feel—and the rhetorical strategies that they deploy—in encounters with their own lawyers as well as adversaries and the courts. The second part of this essay is such an exercise.

II. THE STORY OF MRS. G.

With one lingering exception,⁷⁴ our laws of evidence and procedure

doesn't. If she refuses to talk like a lady, she is ridiculed and subjected to criticism as unfeminine; if she does learn, she is ridiculed as unable to think clearly, unable to take part in a serious discussion: in some sense, as less than fully human. These two choices which a woman has — to be less than a woman or less than a person — are highly painful.

See Lakoff, *supra* note 49, at 5-6.

73. See, e.g., Jupp, Roberts & Cook-Gumperz, *Language and disadvantage: The hidden process*, in LANGUAGE AND SOCIAL IDENTITY 232 (J. Gumperz ed. 1982) (analyzing verbal interaction between Asian-born workers and welfare functionaries in Britain); Brown & Levinson, *Social Structure, Groups and Interaction*, in SOCIAL MARKERS IN SPEECH (K. Scherer & H. Giles eds. 1979). A recent example of such work in a legal context analyzes the witnesses' testimony at the Watergate hearings. See Molotch & Boden, *Talking Social Structure: Discourse, Domination and the Watergate Hearings*, 50 AM. SOC. REV. 273 (June 1985). Investigation has also extended to non-verbal communicative encounters. See, e.g., Henley & Freeman, *The Sexual Politics of Interpersonal Behavior*, in J. Freeman, WOMEN: A FEMINIST PERSPECTIVE 457, 465 (forthcoming) (concluding from such studies that "[i]n any situation in which one group is seen as inferior to another, . . . that group will be more *submissive*, more *readable* (non-verbally expressive), more *sensitive* (accurate in decoding another's non-verbal expressions), and more *accommodating* (adapting to another's non-verbal behaviors). . . . [V]erbal characteristics of persons in inferior status positions [include] the tendencies to hesitate and apologize, often offered as submissive gestures in the face of threats or possible threats. . . . [G]estures of submission [include] falling silent (or not beginning to speak at all) when interrupted or pointed at, and cuddling to the touch." (emphasis in original)).

74. This exception is in the area of rape law. Until feminists pressured for reform, the Model Penal Code and the law of many states provided that a person could not be convicted of rape on the uncorroborated testimony of the alleged rape victim, who is generally a woman. See MODEL PENAL CODE § 213.6(5)(1980); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1366 (1972). One rationale for this corroboration requirement was the widely held belief that rape victims are likely to lie. See, e.g., Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) ("stories of rape are frequently lies or fantasies"), quoted in S. ESTRICH, REAL RAPE 43 (1987). Although the corroboration requirement has now been eliminated in most jurisdictions, the existence of corroborating evidence is still widely used by prosecutors to determine the disposition of rape claims. See Myers & LaFree, *Sexual Assault and Its Prosecution: a Comparison with Other Crimes*, 73 J. CRIM. L. AND CRIMINOLOGY 1300 (1982); Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (Rutgers Univ., 1980).

A second special doctrine that courts have applied in rape cases is the cautionary instruction to the jury. Under this rule, the court must advise jurors to evaluate the woman's testimony with special care, "in view of the emotional involvement of the witness and the difficulty of determining

now treat the speech of all persons according to the same formal rules, regardless of the speaker's gender, ethnicity, or social class. Indeed, the notion that the law *should* value speech according to the speaker's gender or caste reads more like a footnote from history than a serious claim; it lies far outside the bounds of current debate over procedural and evidentiary norms. Yet a range of evidence suggests that women and other subordinated groups do not in fact participate in legal proceedings as frequently or as fluently as socially dominant groups. The work of Kristin Bumiller documents how women and minorities injured by discrimination often choose to forego legal remedies, rather than risk the trauma that they expect courtroom exposure to entail.⁷⁵ A few case studies look closely at what happens when women dare to bring gender-linked injuries into court.⁷⁶ And a growing body of empirical work broadly surveys the experiences of women in court—as judges, experts, attorneys, and jurors as well as claimants and witnesses—and concludes that, in all of these roles, many women continue to perceive themselves to be an unwelcomed presence in the courtroom.⁷⁷

the truth with respect to alleged sexual activities carried out in private." MODEL PENAL CODE § 213.6(5)(1980). Wigmore would have imposed a more radical means of protecting the tribunal from the rape victim's unreliable voice: he proposed that every rape victim be examined by a qualified physician before a charge could be sent to the jury. See J. WIGMORE, EVIDENCE § 924a, at 737 (Chadbourn rev. 1970); Note, *Rape and Women's Credibility: Problems of False Recantation and False Accusations Echoed in the Case of Cathleen Cromwell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59 (1987); Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235 (1983). It is ironic to note that in seeking redress for sexual violence, women themselves have deployed experts in an effort to have their own experience accepted as credible by the courts. See, e.g., Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985); Wilkes, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-defense*, 15 CONN. L. REV. 121 (1982).

75. See, e.g., Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987); K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988) (describing how victims may blame themselves for their victimization in order to enhance their own assaulted sense of autonomy, and may avoid legal process because they perceive it, and the confrontation with the perpetrator that it requires, as a further assault on their security and equilibrium).

76. See, e.g., *Rape and Women's Credibility* *supra* note 74, (recounting the rape recantation of Cathleen Crowell Webb); Bumiller, *Violence and Intimacy: The Social Construction of Rape* (paper prepared for the conference on Feminism and Legal Theory: Women and Intimacy, University of Wisconsin Law School (1987) (describing the courtroom experience of the prosecutrix in the 1984 New Bedford rape trial); Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75 (1987).

77. See, e.g., Schafran, *Documenting Gender Bias in the Courts: the Task Force Approach*, 70 JUDICATURE 280 (1987); *Report on the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L. J. 1 (1986-87); *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts — June 1984*, 9 WOMEN'S RTS. L. REP. 129 (1986); Eich, *Gender Bias in the*

Some women or minority speakers may not experience these feelings at all: through social advantage and force of personality, they have learned to speak with force and authority. As more women and minorities enter elite social positions, the ranks of such exceptional individuals will increase. They will be more readily accepted by legal audiences as "social males." But for many speakers who are stigmatized by gender, race, or caste—those unwilling or unable to assume the role of a social male—the lived experience of inequality undermines the formal guarantee of an equal opportunity to participate in the rituals of the law. Mrs. G. is one of this majority. Through her story we can trace how the complex realities of social inequality undermine the law's formal promise of procedural justice.

A. *The Story*⁷⁸

Mrs. G. is thirty-five years old, Black, and on her own. She has five girls, ranging in age from four to fourteen. She has never told me anything about their fathers; all I know is that she isn't getting formal child support payments from anyone. She lives on an AFDC⁷⁹ grant of just over three hundred dollars a month and a small monthly allotment of Food Stamps. She probably gets a little extra money from occasional jobs as a field hand or a maid, but she doesn't share this information with me and I don't ask. She has a very coveted unit of public housing, so she doesn't have to pay rent. She is taking an adult basic education class at the local community action center, which is in the same building as my own office. I often notice her in the classroom as I pass by.

The first thing that struck me about Mrs. G., when she finally came to my office for help one day, was the way she talked. She brought her two

Courtroom: Some Participants are More Equal than Others, 69 JUDICATURE 339 (1986). In addition to these studies, there is an empirical literature which examines how gender shapes the way that male listeners respond to women speakers, both in general and in the courtroom. On the general question, see, e.g., Rasmussen & Moely, *Impression Formation as a Function of Sex Role Appropriateness of Linguistic Behavior*, 14 SEX ROLES 149 (1986); D. Halpern, *The Influence of Sex Role Stereotyping on Prose Recall*, 12 SEX ROLES 363 (1985). On the specific context of the courtroom, see *supra* text and notes 68-70. See also D. BINDER & P. BERGMAN, *THE ASSESSMENT OF CREDIBILITY* 17 (1977) (suggesting that jurors' presuppositions about the speaker might affect their credibility assessments). It is not merely ordinary witnesses whose credibility suffers because of audience stereotypes. Expert witnesses, female lawyers, and even female jurors are also victims of the process. See Hodgson & Pryor, *Sex Discrimination in the Courtroom: Attorney Gender and Credibility*, 71 WOMEN'S LAW J. 7 (1985); Sherman, *Women as Expert Witnesses: Trial and Tribulations*, 19 TRIAL 46 (Aug. 1983); McHugh, *Sexism Hurts Lawyer Credibility*, 131 Chicago Daily L. Bulletin 1 (Dec. 6 1985); Cohen & Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts*, 9 SOC. BEHAVIOR & PERSONALITY 81 (1981); Weisbrod, *supra* note 37, at 59.

78. This story is based upon my work as a legal aid lawyer in North Carolina from 1982 to 1986. Certain details have been changed to avoid compromising client confidentiality.

79. Aid to Families with Dependent Children, 42 U.S.C. §§ 601, 615 (1982).

oldest daughters with her. She would get very excited when she spoke, breathing hard and waving her hands and straining, like she was searching for the right words to say what was on her mind. Her daughters would circle her, like two young mothers themselves, keeping the air calm as her hands swept through it. I haven't talked with them much, but they strike me as quite self-possessed for their years.

At the time I met Mrs. G., I was a legal aid lawyer working in a small community in south central North Carolina. I had grown up in the state, but had been away for ten years, and felt like an outsider when I started working there. I worked out of two small rooms in the back of the local community action center. The building was run-down, but it was a store front directly across from the Civil War Memorial on the courthouse lawn, so it was easy for poor people to find.

There were two of us in the office, myself and a local woman who had spent a few years in Los Angeles, working as a secretary and feeling free, before coming back to the town to care for her aging parents. Her family had lived in the town for generations. Not too long ago they, and most of the other Black families I worked with, had been the property of our adversaries — the local landowners, businessmen, bureaucrats, and lawyers. Everyone seemed to have a strong sense of family, and of history, in the town.

In the late 1960s, the town had erupted into violence when a local youth who had read some Karl Marx and Malcolm X led some five thousand people down the local highway in an effort to integrate the county swimming pool. He had been charged with kidnapping as a result of the incident and had fled to Cuba, China, and ultimately Detroit. My colleague would talk to me about him in secretive tones. Her father was one of those who sheltered him from justice on the evening of his escape. I think she expected that one day he would come back to take up the project that was abandoned when he fled.

Since World War II, the town had been a real backwater for Black people. People told me that it was a place that was there to be gotten out of, if you could figure out how. Only gradually, in the 1980s, were a few African American families moving back into the area, to take up skilled jobs in chemicals and electronics. But the lives of most Blacks in the county in the early 1980's could be summed up by its two claims to fame. It was the county where the state's arch-conservative senior Senator had grown up. Locals claimed that the Senator's father, the chief of police at one time, was known for the boots he wore and the success he had at keeping Black people in their place. It was also the county where Steven Spielberg filmed *The Color Purple*. By the time Spielberg discovered the county, the dust from the 1960s had long since settled, and the town where I worked had the look of a sleepy Jim Crow village that time had quite entirely passed by.

Mrs. G. and two daughters first appeared at our office one Friday morning at about ten, without an appointment. I was booked for the whole day; the chairs in the tiny waiting room were already filled. But I called her in between two scheduled clients. Mrs. G. looked frightened. She showed me a letter from the welfare office that said she had received an "overpay-

ment" of AFDC benefits. Though she couldn't read very well, she knew that the word "overpayment" meant fraud. Reagan's newly appointed United States attorney, with the enthusiastic backing of Senator Jesse Helms, had just announced plans to prosecute "welfare cheats" to the full extent of the law. Following this lead, a grand jury had indicted several local women on federal charges of welfare fraud. Therefore, Mrs. G. had some reason to believe that "fraud" carried the threat of jail.

The "letter" was actually a standardized notice that I had seen many times before. Whenever the welfare department's computer showed that a client had received an overpayment, it would kick out this form, which stated the amount at issue and advised the client to pay it back. The notice did not say why the agency had concluded that a payment error had been made. Nor did it inform the client that she might contest the county's determination. Rather, the notice assigned the client a time to meet with the county's fraud investigator to sign a repayment contract and warned that if the client chose not to show up at this meeting further action would be taken. Mrs. G.'s meeting with the fraud investigator was set for the following Monday.

At the time, I was negotiating with the county over the routine at these meetings and the wording on the overpayment form. Therefore, I knew what Mrs. G. could expect at the meeting. The fraud worker would scold her and then ask her to sign a statement conceding the overpayment, consenting to a 10 percent reduction of her AFDC benefits until the full amount was paid back, and advising that the government could still press criminal charges against her.

I explained to Mrs. G. that she did not have to go to the meeting on Monday, or to sign any forms. She seemed relieved and asked if I could help her get the overpayment straightened out. I signed her on as a client and, aware of the other people waiting to see me, sped through my canned explanation of how I could help her. Then I called the fraud investigator, canceled Monday's meeting, and told him I was representing her. Thinking that the emergency had been dealt with, I scheduled an appointment for Mrs. G. for the following Tuesday and told her not to sign anything or talk to anyone at the welfare office until I saw her again.

The following Tuesday Mrs. G. arrived at my office looking upset. She said she had gone to her fraud appointment because she had been "afraid not to." She had signed a paper admitting she owed the county about six hundred dollars, and agreeing to have her benefits reduced by thirty dollars a month for the year and a half it would take to repay the amount. She remembered I had told her not to sign anything; she looked like she was waiting for me to yell at her or tell her to leave. I suddenly saw a woman caught between two bullies, both of us ordering her what to do.

I hadn't spent enough time with Mrs. G. the previous Friday. For me, it had been one more emergency—a quick fix, an appointment, out the door. It suddenly seemed pointless to process so many clients, in such haste, without any time to listen, to challenge, to think together. But what to do, with so many people waiting at the door? I mused on these thoughts for a

moment, but what I finally said was simpler. I was furious. Why had she gone to the fraud appointment and signed the repayment contract? Why hadn't she done as *we* had agreed? Now it would be so much harder to contest the county's claim: we would have to attack *both* the repayment contract *and* the underlying overpayment claim. Why hadn't she listened to me?

Mrs. G. just looked at me in silence. She finally stammered that she knew she had been "wrong" to go to the meeting when I had told her not to and she was "sorry."

After we both calmed down I mumbled my own apology and turned to the business at hand. She told me that a few months before she had received a cash settlement for injuries she and her oldest daughter had suffered in a minor car accident. After medical bills had been paid and her lawyer had taken his fees, her award came to \$592. Before Mrs. G. cashed the insurance check, she took it to her AFDC worker to report it and ask if it was all right for her to spend it. The system had trained her to tell her worker about every change in her life. With a few exceptions, any "income" she reported would be subtracted, dollar for dollar, from her AFDC stipend.

The worker was not sure how to classify the insurance award. After talking to a supervisor, however, she told Mrs. G. that the check would not affect her AFDC budget and she could spend it however she wanted.

Mrs. G. cashed her check that same afternoon and took her five girls on what she described to me as a "shopping trip." They bought Kotex, which they were always running short on at the end of the month. They also bought shoes, dresses for school, and some frozen food. Then she made two payments on her furniture bill. After a couple of wonderful days, the money was gone.

Two months passed. Mrs. G. received and spent two AFDC checks. Then she got the overpayment notice, asking her to repay to the county an amount equal to her insurance award.

When she got to this point, I could see Mrs. G. getting upset again. She had told her worker everything, but nobody had explained to her what she was supposed to do. She hadn't meant to do anything wrong. I said I thought the welfare office had done something wrong in this case, not Mrs. G. I thought we could get the mess straightened out, but we'd need more information. I asked if she could put together a list of all the things she had bought with the insurance money. If she still had any of the receipts, she should bring them to me. I would look at her case file at the welfare office and see her again in a couple of days.

The file had a note from the caseworker confirming that Mrs. G. had reported the insurance payment when she received it. The note also showed that the worker did not include the amount in calculating her stipend. The "overpayment" got flagged two months later when a supervisor, doing a random "quality control" check on her file, discovered the worker's note. Under AFDC law, the insurance award was considered a "lump sum pay-

ment.”⁸⁰ Aware that the law regarding such payments had recently changed, the supervisor decided to check out the case with the state quality control office.

He learned that the insurance award did count as income for AFDC purposes under the state’s regulations;⁸¹ indeed, the county should have cut Mrs. G. off of welfare entirely for almost two months on the theory that her family could live for that time off of the insurance award. The lump sum rule was a Reagan Administration innovation designed to teach poor people the virtues of saving money and planning for the future.⁸² Nothing in the new provision required that clients be warned in advance about the rule change, however.⁸³ Only in limited circumstances was a state free to waive the rule.⁸⁴ Without a waiver, Mrs. G. would have to pay back \$592 to the welfare office. If the county didn’t try to collect the sum from Mrs. G., it would be sanctioned for an administrative error.⁸⁵

80. See 42 U.S.C. § 602(a)(17)(Supp. III 1982 ed.) and 45 C.F.R. 233.20(a)(3)(ii)(F)(1988). The implementing regulation states that “[w]hen the AFDC assistance unit’s income . . . exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including . . . personal injury . . . awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills resulting from accidents or injury . . .), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size.”

81. In contrast to other federal statutes, such as the Internal Revenue Code, which exclude insurance settlements for personal injury from income, see, e.g., I.R.C. § 104 (1982), the AFDC statute has been interpreted to authorize states to include personal injury awards in the income definition to which the lump sum rule applies. The federal regulations implementing the lump sum rule went farther than the statutory authorization, by affirmatively requiring the states to classify all non-recurring lump sum payments, including insurance awards, as income. See *supra* note 80. The statute’s inclusion of personal injury awards in its definition of “income” was unsuccessfully challenged by poverty advocates in *Lukhard v. Reed*, 481 U.S. 368 (1987) (AFDC statute permits states to define personal injury awards as “income” for AFDC purposes, even though common usage and other federal statutory schemes do not do so).

82. The provision was added to the AFDC statute by § 2304 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), 95 STAT. 845, as amended, 42 U.S.C. § 602(a)(17)(Supp. III 1982). See S. REP. NO. 35, 97th Cong., 1st Sess. 436, reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 702; *Bell v. Massinga*, 721 F.2d 131 (4th Cir. 1983).

83. See *Gardebring v. Jenkins*, 485 U.S. 415 (1988) (Federal AFDC regulations do not require that each recipient be given advance notification of the lump sum provision before the provision can be enforced).

84. See 45 C.F.R. § 233.20(a)(3)(ii)(F) (“A State may shorten the period of ineligibility when: . . . the lump sum income or a portion thereof becomes unavailable to the family for a reason beyond the control of the family . . .”). In its explanation of this regulation, the Department of Health and Human Services stated that “a State may shorten the period of ineligibility where it finds a life-threatening circumstance exists, and the non-recurring income causing the period of ineligibility has been or will be expended in connection with the life-threatening circumstance.” See 47 Fed. Reg. 5654 (Feb. 5, 1982).

85. The federal government monitors the state welfare agencies which administer the AFDC program for erroneous overpayments, but not erroneous underpayments. If a state’s “error rate” is deemed too great, the federal government sanctions the state by reducing its AFDC funding. See *Casey & Mannix, Quality Control in Public Assistance: Victimized the Poor through One-sided Accountability*, 22 CLEARINGHOUSE REV. 1381 (1989). This policy was reviewed and critiqued in a

I met again with Mrs. G. the following Friday. When I told her what I had pieced together from her file, she insisted that she had asked her worker's permission before spending the insurance money. Then she seemed to get flustered and repeated what had become a familiar refrain. She didn't want to make any trouble. She hadn't meant to do anything wrong. I told her that it looked to me like it was the welfare office—and not her—who had done something wrong. I said I would try to get the county to drop the matter, but I thought we might have to go to a hearing, finally, to win.

Mrs. G. had been in court a few times to get child support and to defend against evictions, but she had never been to a welfare hearing. She knew that it was not a good idea to get involved in hearings, however, and she understood why. Fair hearings were a hassle and an embarrassment to the county. A hearing meant pulling an eligibility worker and several managers out of work for a few hours, which—given the chronic under-staffing of the welfare office—was more than a minor inconvenience. It also meant exposing the county's administrative problems to state-level scrutiny.

Front-line eligibility workers were especially averse to hearings because the county's easiest way to defend against its own blunders was to point to the worker as the source of the problem. As a result, the workers did all they could to persuade clients that they would lose, in the end, if they insisted on hearings. The prophesy was self-fulfilling, given the subtle and diffuse retaliation that would often follow for the occasional client who disregarded this advice.

I could tell that Mrs. G. felt pressure from me to ask for a hearing, but she also seemed angry at the welfare office for asking her to pay for their mistake. I said that it was her decision, and not mine, whether to ask for the hearing, and reassured her that I would do my best to settle the matter, no matter what she decided. I also told her she could drop the hearing request at any time, for any reason, before or even after the event. When she nervously agreed to file the hearing request, I didn't second-guess her decision.

My negotiations failed. The county took the position that the worker should have suspended Mrs. G.'s AFDC as soon as the client had reported the insurance payment. This mistake was "regrettable," but it didn't shift the blame for the overpayment. Mrs. G.—and not the county—had received more welfare money than she was entitled to. End of discussion. I then appealed to state officials. They asked if the county would concede that the worker told Mrs. G. she was free to spend her insurance award as she pleased. When county officials refused, and the details of this conversation did not show up in the client's case file, the state declined to intervene. Mrs. G. then had to drop the matter or gear up for a hearing. After a lot of hesitation, she decided to go forward.

study commissioned by Congress and performed by the National Academy of Sciences in 1988. *See* Panel on Quality Control of Family Assistance Programs, Committee on National Statistics, Commission on Behavioral and Social Sciences and Education, *FROM QUALITY CONTROL TO QUALITY IMPROVEMENT IN AFDC AND MEDICAID* (F. Kramer ed. 1988).

Mrs. G. brought all five of her girls to my office to prepare for the hearing. Our first task was to decide on a strategy for the argument. I told her that I saw two stories we could tell. The first was the story she had told me. It was the "estoppel"⁸⁶ story, the story of the wrong advice she got from her worker about spending the insurance check. The second story was one that I had come up with from reading the law. The state had laid the groundwork for this story when it opted for the "life necessities" waiver permitted by federal regulations.⁸⁷ If a client could show that she⁸⁸ had spent the sum to avert a crisis situation, then it would be considered "unavailable" as income, and her AFDC benefits would not be suspended. I didn't like this second story very much, and I wasn't sure that Mrs. G. would want to go along with it. How could I ask her to distinguish "life necessities" from mere luxuries, when she was keeping five children alive on three hundred dollars a month, and when she had been given no voice in the calculus that had determined her "needs."

Yet I felt that the necessities story might work at the hearing, while "estoppel" would unite the county and state against us. According to legal aid's welfare specialist in the state capital, state officials didn't like the lump sum rule. It made more paper work for the counties. And, by knocking families off the federally financed AFDC program, the rule increased the pressure on state and county-funded relief programs. But the only way the state could get around the rule without being subject to federal sanctions was through the necessities exception. Behind the scenes, state officials were saying to our welfare specialist that they intended to interpret the exception broadly. In addition to this inside information that state officials would prefer the necessities tale, I knew from experience that they would feel comfortable with the role that story gave to Mrs. G. It would place her on her knees, asking for pity as she described how hard she was struggling to make

86. In public benefit cases, the courts have generally held that the doctrine of estoppel cannot be used against the government when a government agent's misinformation results in a claimant's loss of benefits. See *Schweiker v. Hansen*, 450 U. S. 785 (1981). The *Hansen* opinion states in dicta that estoppel may be justified in some circumstances, but the court did not specify what those circumstances might be. *Id.* at 788. Lower court cases have allowed estoppel against the government when an official gives a claimant erroneous factual information which the claimant was not in a position to identify and avoid, and when compensating the claimant will neither undermine important federal interests or deplete the public fisc. See, e.g., *Scime v. Secretary of H.H.S.*, 647 F. Supp. 89, 93 (W.D.N.Y. 1986), *rev'd*, 822 F.2d 7; *McDonald v. Schweiker*, 537 F. Supp. 47, 50 (N.D.Ind. 1981).

87. See *supra* note 84. The state implemented the exception for "life threatening circumstances" through D.S.S. Administrative Letter No. IPA-8-84 (DSS-3430)("Lump Sum Payments")(March, 82). The regulation illustrates "Life-threatening situations" by a list of six specific events, such as "serious health hazard to a member of the assistance unit, such as but not limited to a situation where the recipient's house is uninhabitable and the recipient must use the lump sum for essential repairs or necessary utilities." The seventh item on the list authorizes the "county director or his designee" to determine other life-threatening situations on a case by case basis. See *id.* § C-1-g.

88. I use "she" because virtually all of my clients who received AFDC benefits were single mothers. Although single fathers with custody of their children are technically eligible to receive AFDC, they account for an insubstantial percentage of the recipient pool: in my four years of welfare advocacy, I did not encounter any single fathers on AFDC.

ends meet.⁸⁹

The estoppel story would be entirely different. In it, Mrs. G. would be pointing a finger, turning the county itself into the object of scrutiny. She would accuse welfare officials of wrong, and claim that they had caused her injury. She would demand that the county bend its own rules, absorb the overpayment out of its own funds, and run the risk of sanction from the state for its error.

As I thought about the choices, I felt myself in a bind. The estoppel story would feel good in the telling, but at the likely cost of losing the hearing, and provoking the county's ire. The hearing officer—though charged to be neutral—would surely identify with the county in this challenge to the government's power to evade the costs of its own mistakes. The necessities story would force Mrs. G. to grovel, but it would give both county and state what they wanted to hear—another "yes sir" welfare recipient.

This bind was familiar to me as a poverty lawyer. I felt it most strongly in disability hearings, when I would counsel clients to describe themselves as totally helpless in order to convince the court that they met the statutory definition of disability.⁹⁰ But I had faced it in AFDC work as well, when I taught women to present themselves as abandoned, depleted of resources, and encumbered by children to qualify for relief.⁹¹ I taught them to say yes to the degrading terms of "income security," as it was called — invasions of sexual privacy, disruptions of kin-ties, the forced choice of one sibling's welfare over another's.⁹² Lawyers had tried to challenge these

89. The costs of this posture have been eloquently described by Patricia Williams in *Alchemical Notes*, *supra* note 24, at 419-20 (1987):

I got through law school, quietly driven by the false idol of the white-man-within-me, and I absorbed a whole lot of the knowledge and the values which had enslaved me and my foremothers. . . . I learned to undo images of power with images of powerlessness; to clothe the victims of excessive power in utter, bereft naivete; to cast them as defenseless supplicants raising — *pleading*— defenses of duress, undue influence and fraud. I learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice.

90. To be eligible for disability payments under the Social Security Act, one must be unable to engage in substantial gainful activity because of a medically determinable physical or mental impairment that is expected to result in death or to continue for at least 12 months. *See* 42 U.S.C. 423(d)(1982).

91. Under current law, in order to receive AFDC benefits, a family must meet the categorical requirement of "deprivation" — the absence of two able-bodied parents in the home — as well as a means test. *See* 42 U.S.C. 606(a)(1982). This requirement has been widely criticized for its exclusion of two-earner families living in poverty, and for the consequent pressure it places upon poor couples to live apart in order to receive benefits. *See, e.g.,* R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1986); Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1988).

92. To receive AFDC, women — with narrowly drawn exemptions for cause — must cooperate with the state in prosecuting paternity and child support actions, and in assigning child support payments to the state to repay AFDC benefits. *See* 42 U.S.C. 602(a)(26)(B)(1982). In *Roe v. Norton*, 422 U.S. 391 (1975), the Supreme Court found these conditions to be constitutional. *See* Sugarman, *Roe v. Norton: Coerced Maternal Cooperation*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 365 (R. Mnookin ed. 1985). In addition, a mother must apply

conditions, but for the most part the courts had confirmed that the system could take such license with its women. After all, poor women were free to say no to welfare if they weren't pleased with its terms.⁹³

As I contemplated my role as an advocate, I felt again the familiar sense that I had been taken. Here I was, asking Mrs. G. to trust me, talking with her about our conspiring together to beat the system and strategizing together to change it. Here I was, thinking that what I was doing was educative and empowering or at least supportive of those agendas, when all my efforts worked, in the end, only to teach her to submit to the system in all of the complex ways that it demanded.

In the moment it took for these old thoughts to flit through my mind, Mrs. G. and her children sat patiently in front of me, fidgeting, waiting for me to speak. My focus returned to them and the immediate crisis they faced if their AFDC benefits were cut. What story should we tell at the hearing, I wondered out loud. How should we decide? Mechanically at first, I began to describe to her our "options."

When I explained the necessities story, Mrs. G. said she might get confused trying to remember what all she had bought with the money. Why did they need to know those things anyway? I could tell she was getting angry. I wondered if two months of benefits—six hundred dollars—was worth it. Maybe paying it back made more sense. I reminded her that we didn't have to tell this story at the hearing, and in fact, we didn't have to go to the hearing at all. Although I was trying to choose my words carefully, I felt myself saying too much. Why had I even raised the question of which story to tell? It was a tactical decision—not the kind of issue that clients were supposed to decide.⁹⁴ Why hadn't I just told her to answer the questions that I chose to ask?

Mrs. G. asked me what to do. I said I wanted to see the welfare office admit their mistake, but I was concerned that if we tried to make them, we would lose. Mrs. G. said she still felt like she'd been treated unfairly but—in the next breath—"I didn't mean to do anything wrong." Why couldn't

for AFDC benefits for all of her children living in the household, even those who have an independent source of income such as child support or Social Security benefits. That income is then deemed available to the other children, and justifies a cut in the family's AFDC grant. See 42 U.S.C. 602(a)(38)(Supp. III 1982). This provision was found constitutional in *Bowen v. Gilliard*, 483 U.S. 587 (1987). See Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1987-88). For a history of oppressive conditions of AFDC participation on the state level, see W. Bell, *AID TO DEPENDENT CHILDREN* (1965).

93. See *Bowen v. Gilliard*, 483 U.S. at 608. The majority responded to the record of harms caused by the sibling-deeming requirement by stating that "[t]he law does not require any custodial parent to apply for AFDC benefits." The dissent responded that "[t]he court has thus assumed that participation in a benefit program reflects a decision by the recipient that he or she is better off by meeting whatever conditions are attached to participation than not receiving benefits." *Id.*

94. See MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2 Comment (1983) ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . ."). Whether this provision intends for lawyers unilaterally to select the basic legal theories they will advance in a case is, however, a subject of debate.

we tell both stories? With this simple question, I lost all pretense of strategic subtlety or control. I said sure.

I asked for the list she had promised to make of all the things she bought with the insurance money. Kotex, I thought, would speak for itself, but why, I asked, had she needed to get the girls new shoes? She explained that the girls' old shoes were pretty much torn up, so bad that the other kids would make fun of them at school. Could she bring in the old shoes? She said she could.

We rehearsed her testimony, first about her conversation with her worker regarding the insurance award and then about the Kotex and the shoes. Maybe the hearing wouldn't be too bad for Mrs. G., especially if I could help her see it all as strategy, rather than the kind of talking she could do with people she could trust. She had to distance herself at the hearing. She shouldn't expect them to go away from it understanding why she was angry, or what she needed, or what her life was like. The hearing was their territory. The most she could hope for was to take it over for a moment, leading them to act out her agenda. Conspiracy was the theme she must keep repeating as she dutifully played her role.

We spent the next half hour rehearsing the hearing. By the end, she seemed reasonably comfortable with her part. Then we practiced the cross-examination, the ugly questions that—even though everyone conceded to be irrelevant—still always seemed to get asked . . . questions about her children, their fathers, how long she had been on welfare, why she wasn't working instead. This was the part of these sessions that I disliked the most. We practiced me objecting and her staying quiet and trying to stay composed. By the end of our meeting, the whole thing was holding together, more or less.

The hearing itself was in a small conference room at the welfare office. Mrs. G. arrived with her two oldest daughters and five boxes of shoes. When we got there the state hearing officer and the county AFDC director were already seated at the hearing table in lively conversation. The AFDC director was a youngish man with sandy hair and a beard. He didn't seem like a bureaucrat until he started talking. I knew most of the hearing officers who came to the county, but this one, a pale, greying man who slouched in his chair, was new to me. I started feeling uneasy as I rehearsed how I would plead this troubling case to a stranger.

We took our seats across the table from the AFDC director. The hearing officer set up a portable tape recorder and got out his bible. Mrs. G.'s AFDC worker, an African American woman about her age, entered through a side door and took a seat next to her boss. The hearing officer turned on the recorder, read his obligatory opening remarks, and asked all the witnesses to rise and repeat before god that they intended to tell the truth. Mrs. G. and her worker complied.

The officer then turned the matter over to me. I gave a brief account of the background events and then began to question Mrs. G. First I asked her about the insurance proceeds. She explained how she had received an insurance check of about six hundred dollars following a car accident in which

she and her oldest daughter had been slightly injured. She said that the insurance company had already paid the medical bills and the lawyer; the last six hundred dollars was for her and her daughter to spend however they wanted. I asked her if she had shown the check to her AFDC worker before she cashed it. She stammered. I repeated the question. She said she may have taken the check to the welfare office before she cashed it, but she couldn't remember for sure. She didn't know if she had gotten a chance to talk to anyone about it. Her worker was always real busy.

Armed with the worker's own sketchy notation of the conversation in the case file, I began to cross-examine my client, coaxing her memory about the event we had discussed so many times before. I asked if she remembered her worker telling her anything about how she could spend the money. Mrs. G. seemed to be getting more uncomfortable. It was quite a predicament for her, after all. If she "remembered" what her worker had told her, would her story expose mismanagement in the welfare office, or merely scapegoat another Black woman, who was not too much better off than herself?

When she repeated that she couldn't remember, I decided to leave the estoppel story for the moment. Maybe I could think of a way to return to it later. I moved on to the life necessities issue. I asked Mrs. G. to recount, as best she could, exactly how she had spent the insurance money. She showed me the receipts she had kept for the furniture payments and I put them into evidence. She explained that she was buying a couple of big mattresses for the kids and a new kitchen table. She said she had also bought some food—some frozen meat and several boxes of Kotex for all the girls. The others in the room shifted uneasily in their chairs. Then she said she had also bought her daughters some clothes and some shoes. She had the cash register receipt for the purchase.

Choosing my words carefully, I asked why she had needed to buy the new shoes. She looked at me for a moment with an expression that I couldn't read. Then she stated, quite emphatically, that they were Sunday shoes that she had bought with the money. The girls already had everyday shoes to wear to school, but she had wanted them to have nice shoes for church too. She said no more than two or three sentences, but her voice sounded different—stronger, more composed—than I had known from her before. When she finished speaking the room was silent, except for the incessant hum of the tape machine on the table and the fluorescent lights overhead. In that moment, I felt the boundaries of our "conspiracy" shift. Suddenly I was on the outside, with the folks on the other side of the table, the welfare director and the hearing officer. The only person I could not locate in this new alignment was Mrs. G.'s welfare worker.

I didn't ask Mrs. G. to pull out the children's old shoes, as we'd rehearsed. Nor did I make my "life necessities" argument. My lawyer's language couldn't add anything to what she had said. They would have to figure out for themselves why buying Sunday shoes for her children—and saying it—was indeed a "life necessity" for this woman. After the hearing, Mrs. G. seemed elated. She asked me how she had done at the hearing and I

told her that I thought she was great. I warned her, though, that we could never be sure, in this game, who was winning, or even what side anyone was on.

We lost the hearing and immediately petitioned for review by the chief hearing officer. I wasn't sure of the theory we'd argue, but I wanted to keep the case open until I figured out what we could do.

Three days after the appeal was filed, the county welfare director called me unexpectedly, to tell me that the county had decided to withdraw its overpayment claim against Mrs. G. He explained that on a careful review of its own records, the county had decided that it wouldn't be "fair" to make Mrs. G. pay the money back. I said I was relieved to hear that they had decided, finally, to come to a sensible result in the case. I was sorry they hadn't done so earlier. I then said something about how confusing the lump sum rule was and how Mrs. G.'s worker had checked with her supervisor before telling Mrs. G. it was all right to spend the insurance money. I said I was sure that the screw up was not anyone's fault. He mumbled a bureaucratic pleasantry and we hung up.

When I told Mrs. G. that she had won, she said she had just wanted to "do the right thing," and that she hoped they understood that she'd never meant to do anything wrong. I repeated that they were the ones who had made the mistake. Though I wasn't sure exactly what was going on inside the welfare office, at least this crisis was over.

B. *The Terrain*

Mrs. G. had a hearing in which all of the rituals of due process were scrupulously observed. Yet she did not find her voice welcomed at that hearing. A complex pattern of social, economic, and cultural forces underwrote the procedural formalities, repressing and devaluing her voice. Out of that web of forces, I will identify three dominant themes, all of them linked, sometimes subtly, to Mrs. G.'s social identity as poor, Black, and female. The first theme is *intimidation*. Mrs. G. did not feel that she could risk speaking her mind freely to welfare officials. She lived in a community in which the social hierarchy had a caste-like rigidity. As a poor Black woman, her position at the bottom accorded her virtually no social or political power. She depended on welfare to survive and did not expect this situation to change in the future. She was simply not situated to take action that might displease her superiors. The second theme is *humiliation*. Even if Mrs. G. could find the courage to speak out at the hearing, her words were not likely to be heard as legitimate, because of the language she had learned to speak as a poor woman of color, and because of the kind of person that racist and gendered imagery portrayed her to be. The final theme is *objectification*. Because Mrs. G. had little voice in the political process that set the substantive terms of her welfare

eligibility,⁹⁵ the issues that she was constrained to talk about at the hearing bore little relation to her own feelings about the meaning and fairness of the state's action. I will explore each of these forces by positioning myself with Mrs. G., and imagining how each might have affected her.⁹⁶

1. *Intimidation: The Violence of Caste.* Perhaps Mrs. G.'s strongest feelings, as she approached the hearing, were fear and intimidation. The people she had to face at the hearing were the same ones who would decide if she would get welfare and Food Stamps in the future. From her standpoint, they were also the ones who could take her children away, if they wanted to,⁹⁷ or make it hard for her to stay in her apartment or find the occasional jobs she needed to make ends meet.

95. See, e.g., M. HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 6 (1963) ("Welfare recipients do not by and large belong to unions, fraternal organizations, political parties. They are without lobbies of their own; they put forward no legislative program. As a group, they are atomized. They have no face; they have no voice."). Though welfare recipients did obtain some political leverage in the late 1960s and 1970s, Harrington's description could characterize the early to mid-1980s. The exclusion of people of color from the political process has been demonstrated in voting rights cases. See 42 U.S.C. § 1971 (1965). For instance, in the case of *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986), a class action by Black voters in North Carolina, the court affirmed the District Court's findings that "the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted . . . to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process. . ."

96. Although I base this section on two years of intensive work with women in the social location of Mrs. G., this section should properly be a conversation with her, rather than an imaginative projection based on my own experience with her. Such a project, however, is beyond the scope of the Article, as it is beyond the bounds of much feminist scholarship. This limitation in my method deserves close attention, because it raises the broad question of how feminist scholars might write about subordination — about gender — without making other women into objects of study, and keeping for themselves the power to name problems and imagine solutions. In this essay, I mark this question by rejecting the universalizing rhetoric of "normal" scholarship and writing stories instead. But my story — about Mrs. G.'s claim to name her own needs — does not attend to her as a subject any more than the grandiose prescriptions of the policy engineers. My storytelling still guards the power to interpret firmly in my own hands.

A feminist alternative to this monologic approach to scholarship would entail conversation and translation, rather than observation and pronouncement. It would entail dialogue with the other subject and then the *mutual* creation of forms for expanding that discussion to a wider audience. The participants would themselves devise the appropriate method for that communication in each situation. In some cases, it might be a quantitative study, using mainstream social science methodology, or an essay in the discourse of academic philosophy. In other cases, however, the communication might take a quite different form. For two accounts in which groups, working with outsiders, chose drama as their "method" for communicating their analysis of their own political situation, see White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1989 WISC. L. REV. 699 and White, *Mobilizing on the Margins of Litigation*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88).

97. Though child protection and social services were administratively separated from income maintenance by federal law in the 1970's, in Mrs. G.'s experience the social workers who control the

The ground of her fear was very deep. It reflected the long history of violence toward her people in that county and the daily reminders that the history was not over.⁹⁸ But her fear also responded to her present-day relationship to the welfare office. First of all, a convergence of factors—a lack of child care, vocational training, and, most importantly safe, stable, decent-paying jobs—made her dependent on the county, the welfare office, and the housing authority, to survive.⁹⁹ And she knew that the rules of welfare would give the county plenty of ways to make her life hard if she became known as a troublemaker.

Thus, her fear reflected the racial caste system that still structured social relations in the community, and the more particular welfare doctrines that gave the dominant caste, the white power structure—she called it simply “the Man”—a potent modern-day weapon for keeping her quiet. The caste system in the post-Bellum American South has been treated at length in historical and anthropological literature.¹⁰⁰ Mrs. G.’s story suggests that, in spite of the sweeping changes that the Civil Rights era brought in social norms and legal structures, this system has not changed much for people like her in the half-century between the 1930s and the 1980s.

Her fear also reflected her sense that her welfare “entitlements” offered her no real security. The function of welfare to control the poor has

abuse and neglect process are closely linked to the eligibility workers who control the AFDC program.

98. In addition to the macroeconomic conditions — the poverty, unemployment, housing and job segregation — that were a direct legacy of slavery in that community, there were also small incidents to remind her of that history and her people's place — Klan marches, a local protest when the Department of the Interior insisted on renaming on official U.S. Government maps a local landmark called “Nigger-Head Creek” that celebrated a lynching.

99. There is a literature exploring the impact of “continuing relationships” on contract disputes. See I. MACNEIL, *THE NEW SOCIAL CONTRACT: INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 32-33 (1980); Handler, *Continuing Relationships and the Administrative Process: Social Welfare*, 1985 WIS. L. REV. 687; Macaulay, *Non-Contractual Relations in Business: a Preliminary Study*, 28 AM. SOC. REV. 55 (1963); MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; MacNeil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983); Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623. This literature can inform our understanding of constraints felt by welfare-dependent claimants like Mrs. G. in disputes with welfare agencies.

100. See, e.g., A. DAVIS, B. GARDNER & M. GARDNER, *DEEP SOUTH: A SOCIAL ANTHROPOLOGICAL STUDY OF CASTE AND CLASS* (1941); J. DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 245 (1937) (explaining how the sanctions of lynching and starvation were systematically used to control Blacks, and to punish them for transgression). For insight into the logic and social psychology of caste, see, e.g., F. FANON, *BLACK SKIN, WHITE MASKS* (C. Markmann trans. 1967); A. MEMMI, *supra* note 8; A. MEMMI, *THE COLONIZER AND THE COLONIZED* (1965). In spite of the violence and repression of the caste system in the south, African Americans developed a thriving culture of resistance and survival. See, e.g., E. GENOVESE, *supra* note 24.

been well studied.¹⁰¹ Recent changes in the structure of welfare law, changes made in the 1970s and 1980s have made it a stronger weapon of social control.¹⁰² These changes have made welfare eligibility more bureaucratized, more rule-bound than it had previously been.¹⁰³ Initially, welfare advocates supported the formalization of eligibility rules as a way to extend benefits to Blacks and other groups who were excluded in the earlier regime of unfettered local discretion.¹⁰⁴ But by the early 1980s, the formalization of eligibility rules was serving a very different political agenda. In the 1980s legalistic eligibility requirements were imposed to reduce welfare expenditures. In addition to providing new reasons for denying welfare to otherwise eligible clients, new procedural requirements made welfare programs too complex and burdensome for many poor people to negotiate.¹⁰⁵

In Mrs. G.'s experience, these highly formalized rules have a more important function than the wholesale exclusion of people from the rolls. They also keep people in fear. First of all, "churning," the occasional, arbitrary termination of large numbers of people for technical reasons, has the effect of keeping all recipients uncertain about whether their next check will come.¹⁰⁶ And the technical rules, although they appear very rigid, actually conceal countless enclaves of discretion, hidden places for harassing clients who get out of line, and obscuring the human agency¹⁰⁷

101. See, e.g., the classic work by F. PIVEN & R. CLOWARD, *REGULATING THE POOR* (1971). See also W. Bell, *supra* note 92; M. KATZ, *IN THE SHADOW OF THE POOR HOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986).

102. F. BLOCK, R. CLOWARD, B. EHRENREICH, & F. PIVEN, *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* (1987); J. Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987-88); R. PIVEN & R. CLOWARD, *THE NEW CLASS WAR: REAGAN'S ATTACK ON THE WELFARE STATE AND ITS CONSEQUENCES* (1985).

103. See Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983); Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

104. See W. BELL, *supra* note 92.

105. See Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. POL'Y REV. 3 (1984). See also *City of Los Angeles vs. County of Los Angeles*, No. C-655274 (Cal. Super. Ct. filed Oct. 19, 1987) (alleging that bureaucratic requirements, unrelated to substantive eligibility, are used by welfare officials in the County of Los Angeles to deprive eligible people of benefits and thereby reduce general relief expenditures).

106. See Dehavenon, *Administrative Closings of Public Assistance Cases: The Rise of Hunger and Homelessness in New York City*, 16 N.Y.U. REV. L. & SOC. CHANGE 741 (1987-88).

107. There is a literature on the function of bureaucratic structures to obscure human agency. See, e.g., Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); K. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984); N. FRASER, *Social Movements vs. Disciplinary Bureaucracies: The Discourses of Social Needs* (University of Minnesota Center for Humanistic Studies Occasional Papers, No. 8, 1987); Simon, *The Ideological Effects of Actuarial Practices*, 22 LAW & SOC'Y REV. 771 (1988).

behind that harassment.¹⁰⁸ Mrs. G. believed that "going to legal aid" or "asking for a hearing" were the best ways to make sure that this discretion would be used against her.¹⁰⁹

Thus, Mrs. G.'s fear of confronting the welfare office was engendered by concrete legal and social arrangements. These structures subverted the formal protections of the hearing process and posed a barrier to her speech. Had Mrs. G. not found her way to a lawyer, that barrier might have excluded her from the hearing process altogether: it would certainly have been safer for her simply to stay away.¹¹⁰ But even *with* a lawyer to protect her, Mrs. G.'s deep fear of retaliation was not completely put to rest. She did not need to be a legal scholar to understand that the law was largely impotent—or indifferent—to the subtle texture of retaliation in the welfare office. Her only real protection lay in the self-negating verbal strategies that she had learned so well—speaking female, crafting her words like a mirror¹¹¹ to reflect what she sensed that the

108. For instance, under the "new formalism", workers still have the discretion to decide how many pieces of paper they shall require a client to submit to verify her financial circumstances, or how often the client must come to the office to have her eligibility recertified. Furthermore, workers have the discretion to "misplace" documentation that the client has submitted, or to fail to notify her of a required appointment. These latter acts, admittedly not authorized by the letter of the rules, are nonetheless very hard for the client to challenge, even if she has legal assistance to do so. This shift in the function of formalism, from expanding to constricting welfare entitlement, shows that it cannot be evaluated in the abstract, apart from the concrete power relations of the setting. See Abel, *Informalism: A Tactical Equivalent to Law?*, 19 CLEARINGHOUSE REV. 375 (1985). Furthermore, as current circumstances indicate, no system can be characterized as formal or discretionary in the abstract. Rather, the judgment must be made in reference to the politics that motivate the actors within it. For further analysis of the conditions under which discretion can be benign, or might operate in the client's favor, see J. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY & BUREAUCRACY* (1986); Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988); Simon, *Legality, Bureaucracy, and Class*, *supra* note 6.

109. Examples of workers warning clients to stay away from legal aid or advising them not to ask for hearings are extremely common in my experience as an advocate. In a field course I taught in the spring semester of 1988 in Los Angeles, the students, who were placed as advocates in welfare offices, were shocked by how universal this phenomenon was, and rightly insisted that "the First Amendment" should bar such behavior. The problem lies in proving the retaliatory motive behind subtle, discretionary acts, in proving the systematic nature of the behavior, and in designing an enforceable class-wide remedy. It is surely a problem that should be taken on.

110. In John Gwaltney's ethnographic study of working class Blacks, *DRYLONGSO: A PORTRAIT OF BLACK AMERICA*, Ms. Ruth Shays gives expression to this choice, familiar to all subordinated peoples. After stating that things have not changed much since slavery, Ms. Shays explains that "our foreparents had sense enough not to spill their in-guts to whitefolkes . . . They just kept everything to themselves." J. GWALTNEY, *DRYLONGSO: A PORTRAIT OF BLACK AMERICA* 31 (1981).

111. See WOLF, *supra* note 22. A Black working class man states the same theme to anthropologist John Gwaltney when he explains that "[w]hite people want black people to do whatever white people want them to do at that time. They just don't want black people to have a mind of their own,

Other — "the Man" — wanted her to say.

2. *Humiliation: The Stigma of Welfare Fraud.* A second local force, the imagery of welfare fraud, posed a further barrier to Mrs. G.'s speaking frankly and with dignity at the hearing. While her social and economic marginality made her reluctant to speak at all, the mythology of welfare fraud worked to undermine her confidence and credibility when she did speak. This imagery predisposed the hearing officer to distrust Mrs. G. and led her to second-guess the integrity of her own actions. Furthermore, overbroad measures to control fraud deterred her from voicing any challenge to welfare officials.

"Welfare fraud" has long been one of the dominant themes expressing the ambivalence, indeed aversion, within modern political culture, to welfare.¹¹² "Fraud" connotes an idea—a negative image of the "typical welfare recipient."¹¹³ At the same time, it justifies an elaborate regime for monitoring eligibility determinations¹¹⁴ and restricting the welfare rolls.¹¹⁵ In periods of constriction of welfare benefits, as in the last decade, the media has been flooded with stories about the extent of the fraud problem. At the same time the government has enacted overextensive programs of fraud control.¹¹⁶

Given the inadequacy of AFDC benefit levels¹¹⁷ and the dollar for

or anyway, they want to be sure that we don't show it You simply cannot be honest with white people." J. GWALTNEY, *supra* note 110, at 44.

112. For background on the policy debate surrounding welfare fraud control, see J. GARDINER & T. LYMAN, *THE FRAUD CONTROL GAME: STATE RESPONSES TO FRAUD AND ABUSE IN AFDC AND MEDICAID PROGRAMS* (1984).

113. See Pear, *"Anecdotes and the Impact They Have Had on Policy"*, N.Y. Times, Dec. 27, 1983, at B6, col. 3 (reporting how President Reagan used an anecdote of a Chicago "welfare queen" which grossly exaggerated the facts of the case to justify his policy of "cracking down" on welfare fraud, and on welfare eligibility in general).

114. See E. BRODKIN, *THE FALSE PROMISE OF ADMINISTRATIVE REFORM: IMPLEMENTING QUALITY CONTROL IN WELFARE* (1986).

115. See Zwickel, *Providing Effective Representation in Welfare Fraud Cases*, 15 CLEARINGHOUSE REV. 53 (1981)(condensed by Daniel Taubman)("[P]oor people often suffer unduly when they are suspected of welfare fraud. . . . All too often, welfare recipients faced with such threats [of termination and/or criminal prosecution] agree to leave the public assistance rolls, even though they remain eligible for assistance. In other instances, recipients sign agreements to repay all benefits claimed to have been received improperly, without a prior determination that funds were in fact wrongfully received.").

116. For a discussion of the implementation of fraud sanctions against individuals, see Collin & Hemmons, *Equal Protection Problems with Welfare Fraud Prosecution*, 33 LOY. L. REV. 17 (1987).

117. In 1984 the annual combined level of AFDC and Food Stamp payments ranged, in different states, from \$10,224 (96.6 percent of the poverty level) to \$3,540 (41.8 percent of the poverty level). The average was 67 percent of the federal poverty level. For a complete breakdown, see Wickes, *1984 Comparison of AFDC Payments and Poverty Income Levels*, 18 CLEARINGHOUSE REV.

dollar reduction of benefits when a recipient reports work, many welfare recipients must add other income to their welfare stipends when they can.¹¹⁸ Furthermore, program rules are so complex and terminations so frequent and so arbitrary, that few recipients know how much they should be receiving, or why.¹¹⁹ In these circumstances, recipients typically feel themselves vulnerable to fraud charges. A finding of fraud means suspension from some benefit programs and a very real threat of jail.¹²⁰ Thus "fraud" is a concrete image that focuses Mrs. G.'s diffuse fear of the welfare office. This threatening image overwhelmed her at one point, when, distrusting her own lawyer's assurances, she contracted with the fraud investigator give back the overpayment. But even when her fear of fraud did not silence her entirely, it counselled her to keep a "low profile" before the welfare office, asking few questions and making few demands.

Furthermore, the obsession with fraud in the media and in the eligi-

962, 67 (1985). Furthermore, in 1970 dollars, the median AFDC payment level has decreased 33 percent from 1970 to 1986. See *State Cost of Living Measures and AFDC Payments*, 20 CLEARINGHOUSE REV. 1202 (National Social Science and Law Center, 1987). In 1988, North Carolina's official "need standard" — its official figure for a minimum subsistence income — for a three person household was \$532 per month. Yet the maximum monthly AFDC payment for such a family was only \$288. When the maximum monthly AFDC and Food Stamp payments available to such a family are combined, the total package is only 65 percent of the federal poverty level. See COMMITTEE ON FINANCE, U.S. SENATE, 100TH CONG., 2D SESS., DATA AND MATERIALS RELATED TO WELFARE PROGRAMS FOR FAMILIES WITH CHILDREN 10 (Comm. Print 1988).

118. In spite of this pressure on recipients to maximize their income, however, the extent of intentional client misrepresentation in welfare programs is actually quite small. See, e.g., Little, *An Examination of the Data on Welfare Fraud*, 16 CLEARINGHOUSE REV. 1005 (1983) (The government's own review of AFDC cases in 1981 shows that only about 4.7 percent of the cases contained errors attributed to willful client misrepresentation. Many of these mistakes were probably due to the client's inability to read program notices.); Collin and Hemmons, *supra* note 116 (fraud rate in AFDC program is substantially lower than fraud rate in non-poverty programs).

119. See, Dehavenon, *supra* note 106; Hirsch, *supra* note 92; Little, *supra* note 118.

120. See generally Zwickel, *supra* note 115. Food Stamp recipients who are determined in an administrative hearing to have committed an "intentional program violation" are suspended from the program for six months for the first violation, twelve months for the second violation, and permanently for the third violation. 7 C.F.R. § 273.16(b) (1989). In the AFDC program, federal law allows imprisonment for up to a year and a monetary fine for a criminal conviction of fraud. 42 U.S.C. § 1307 (1988). In addition, federal regulations require that the states seek to recoup all overpayments, either through direct client reimbursement or the withholding of future benefits. 45 C.F.R. § 233.20(a)(13) (1988). States may terminate recipients who refuse to cooperate with fraud investigations. See *Rush v. Smith*, 573 F.2d 110 (2d Cir. 1978) (approving suspension of AFDC recipients for refusal to cooperate with fraud investigation, so long as benefits are not also cut off from their dependent children); *15,844 Welfare Recipients v. King*, 474 F.Supp. 1374 (1979) (approving suspension of AFDC recipients who fail to cooperate with a fraud investigation, so long as the investigation itself is based on legitimate grounds for suspicion). Such sanctions can be disastrous to persons with no resources. Cf. J. Dollard, *supra* note 100 (describing how starvation is used in caste regimes as a method of social control).

bility process itself,¹²¹ places a stigma on all welfare recipients. It leads some to forego welfare altogether.¹²² And the popular mythology about welfare recipients—embodied in the Black, jewel-bedecked, Cadillac-driving welfare queen—conveys this negative stereotype to the broader public. This image—superficially moralistic, but fundamentally racist and sexist—encourages others to dissociate themselves from the political interests of welfare recipients.

For a woman like Mrs. G., who does not have the option to forego welfare, fraud control becomes a constant message that she is not a person worthy of trust. Rather, fraud imagery suggests that she will try at every moment to cheat the system, to lie. This image resonates with the ancient stereotype of Woman as liar,¹²³ as well other negative images of poor women of color. With these deeply negative images evoked, she begins to doubt her own decisions and her own words.¹²⁴ Thus, the fraud policy—so defensible on its face—is one of the structures that exacts silence, or self-defeating speech, from Mrs. G.—in the welfare office and at the hearing. When she is told so clearly, so incessantly, that she is expected to lie, her way of affirming her own dignity is to assume her own guilt, explaining that “I didn’t *mean* to do anything wrong.”¹²⁵

3. *Objectification: The Logic of the Client State.* A third local force that obstructed Mrs. G.’s full participation in the hearing is the bureaucratic structure of social welfare policy, and indeed, of the legal and political institutions that create it. This force entered the hearing through the questions that the advocate put to Mrs. G. The lawyer taught Mrs. G. to conform her words to the elements of the “lump sum” rule, the “life necessities” exception, and estoppel. Unlike the other two forces—which sought to silence Mrs. G. entirely or to undermine the value of her

121. Workers are trained to emphasize fraud at each stage in the application and grant review process. Claimants are subject to repeated lectures from their workers about fraud, and must sign forms acknowledging that they have understood these warnings. In addition they must submit third party verification of virtually all of the information they provide in the application process. These documentation requirements burden workers as well as clients. The only justification offered to clients for these requirements is to prevent them from committing fraud. These observations are based on my experience representing AFDC claimants. In addition to my informal contact with eligibility workers in this role, I also participated in training events for eligibility workers on welfare fraud.

122. See *Increasing Hunger and Declining Help: Study of Barriers to Participation in the Food Stamp Program* 82 (Physicians’ Task Force on Hunger in America, Harvard School of Public Health 1986); Zwickel, *supra* note 115.

123. See *supra* notes 9-19 and accompanying text.

124. See S. LUKES, *POWER: A RADICAL VIEW* (1974) (describing how the internalization of oppression is one of the methods by which power is exercised over subordinated persons.)

125. Cf. THE CIVIL RIGHTS SOCIETY, *supra* note 75.

speech—this third force dictated the shape that Mrs. G. had to give to her story—its basic plot and its motivating themes—if she was to be heard.

Mrs. G.'s persistent feeling about being on welfare was, in her words, that she was "boxed in." None of the formal rules of welfare set up boundaries to protect her against churning or retaliation.¹²⁶ Yet those rules confined her: they reduced her need to a mathematical formula for assistance. In all of her dealings with the welfare system—whether she was filling out forms at the welfare office, answering questions at a hearing, or casting her vote for those with the power to write the rules—Mrs. G. felt boxed in.

This bureaucratization of welfare was the third force that silenced Mrs. G. As public regulation of social life has expanded in complex societies, more and more activities have been made compatible with bureaucratic logic. That is, modes of acting—intuitions and customs—have been "legalized," or reformulated as systems of explicit rules, and values have been translated into a uniform currency, or "monetized." Bureaucracy has been a means for centralized resource allocation and uniform policy implementation across large, diverse populations. But these apparent "efficiencies" of bureaucracy carry a significant hidden cost: many social critics argue that the process of bureaucratization has gotten "out of control" in the regulatory state. Although they use different language, these critics share the sense that the expanding bureaucratization of modern life threatens to destroy the face to face networks and practices that we rely on, as human actors, to make sense of our social experience.¹²⁷

126. Cf. Williams, *Alchemical Notes*, *supra* note 24 (arguing that legal rights might become a source of protection for subordinate people from invasions of their autonomy and dignity as human beings). See also, *supra* note 8 and accompanying text.

127. Among the most powerful of these critics is Jurgen Habermas. See, e.g., 1 J. HABERMAS, *A THEORY OF COMMUNICATIVE ACTION* (T. McCarthy trans. 1983) (arguing that the "system world" had exceeded its appropriate boundaries in late welfare capitalism, and penetrates into spheres of life that must be shaped by intersubjective, communicative processes, in order to maintain their sense). See also Habermas, *Law as Medium and Law as Institution*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 210-11 (G. Teubner ed. 1985) (Bureaucratic implementation requires that concrete human life histories "be subjected to violent abstraction not merely because [they] have to be subsumed under the law but in order that [they] can be handled administratively." As a result, core areas of the "life-world" become "separated, through legalized social intervention, from the consensual mechanisms that coordinate action."). See also Fraser, *Talking About Needs: Interpretive Contexts as Political Conflicts in Welfare-State Societies*, 99 *ETHICS* 291 (1989); K. Ferguson, *supra* note 107; Radin, *supra* note 59 (critiquing the tendency in capitalism to reduce all aspects of life to fungible commodities). Other theorists raise the same set of issues from a different political perspective. See, e.g., Stewart, *Madison's Nightmare* 11-12 (1989) (unpublished manuscript on file with the author) (describing a growing perception that "the national government . . . including the federal administrative bureaucracies .. has overreached itself by attempting to command and control many

Some of these critics make the stronger argument that in capitalist or patriarchal societies bureaucracy becomes a specific vehicle of gender and class subordination.¹²⁸

Mrs. G. and her children are among the most vulnerable to this "pathology" of over-bureaucratization. Because they are stranded by the economy, they must depend directly on the state for their subsistence.¹²⁹ To manage the task of maintaining them, the welfare bureaucracy constitutes the terms of their lives in a form, a currency, that it can process. It equates Mrs. G.'s need with the sum of the stipends the state is willing to pay her.¹³⁰ It then contains her anger and her pain by locating those feelings as symptoms within a de-politicized "self" that psychiatric technologies are developed to manage.¹³¹

Mrs. G. has no role in negotiating the meaning of either her psychiatrically-defined pathologies or her bureaucratically-constructed "needs." She is excluded on principle from the therapeutic discourse: it is the experts who had the prerogative to say how her psyche and culture are defective.¹³² Her status in the conversation about welfare policy is

aspects of economic and social life"). See generally, G. Teubner, *After Legal Instrumentalism*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299, 305-308 (describing three different theoretical approaches to the "crisis" of over-bureaucratization in the regulatory state).

128. One "essentialist" version of this argument is that formalist-hierarchical ways of organizing social activities are uniquely repressive to women because of women's caring, interpersonally-focused gender-identity. See K. FERGUSON, *supra* note 107. Another version of the claim is that the ideology and practice of bureaucracy "mask" political decisions as technical problems, and therefore alienate subordinated persons from their own potential as political actors. See, e.g. Frug, *supra* note 107; Gabel & Harris, *supra* note 6. Gender is one of the determinants that shape how different groups experience these injuries.

129. Black men are equally stranded by the economy. See, e.g., W. WILSON, *THE TRULY DIS-ADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); YOUNG, *BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES* (J. Gibbs ed. 1988). However, to a large degree, the political system has simply written off their needs altogether. In contrast, for a variety of historical and ideological reasons, the system responded to pressures in the 1960s and 1970s to extend survival benefits to single Black women and their children. This expansion is now under attack, however. See Handler, *supra* note 102.

130. In the AFDC program, the states are given almost unchecked discretion to set "need standards" for AFDC families that are based on their own fiscal concerns rather than their best estimates of actual costs of subsistence expenses. See *State Cost of Living Measures and AFDC Payments*, *supra* note 117 (comparing the states' official AFDC "need standards" and payment levels with independent cost of living measures). The states are then free to set their AFDC payment levels substantially below their own need estimates. See *Jefferson v. Hackey*, 406 U.S. 535 (1972).

131. See FRASER, *supra* note 127. See also Habermas, *Law as Medium and Law as Institution*, *supra* note 127.

132. Cf. M. FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (R. Howard trans. 1965). For an historical perspective on the ideologies that have defined women's experiences of poverty as a psychiatric or cultural problem, see L. GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988).

more problematic, however. According to the theory of representative democracy, she *should* feel herself a participant in the process that creates welfare policy. When she confronts the "lump sum rule" at her hearing, she should know that her vote gave her at least a *virtual* hand in creating that rule. Yet that "knowledge" is not part of her experience.

First of all, racism has kept her community from voting for much of its history.¹³³ But Mrs. G.'s exclusion from the formulation of welfare policy has a deeper source as well. The public discussion of welfare—even among those who *have* access to the debate—has itself been framed by a bureaucratic logic. Its broad outlines reinforce deeply rooted moral judgments about the poor,¹³⁴ but its details are left to experts—economists and managers—to design. The discourse has become one of costs and incentives, of crisis containment and systems management, rather than a search among citizens for the social meanings of their interdependent needs. In this discourse, welfare is defined, at once, as a moral stigma and a technical problem, rather than an ethical and political challenge to the entire community. In this discussion, Mrs. G.—the primary *target* of welfare policy—is not regarded as a speaking being. The talk she might do—plain, angry, personal, . . . uncertain—is not accepted as sensible speech. Rather, she occupies the familiar female position. She is the Object who is shaped by those with the authority to speak, to reflect the internal logic of their own systems of power.¹³⁵

Feminist scholars are beginning to expose the concrete ways that a welfare policy that is generated in this bureaucratized discussion has reflected and sustained women's subordination. Mothers' pensions, and their federalization in the Social Security Act, gave some poor women—generally from elite social groups—a small measure of economic power to escape patriarchal households if they so chose.¹³⁶ Yet at the same time the Social Security Act systematically reinforced the male-headed nuclear family. All of the New Deal welfare programs were infused with incentives to encourage this family pattern at the expense of egalitarian

133. See *Thornburg v. Gingles*, *supra* note 102. For a discussion of the depth of this exclusion of the poor from majoritarian institutions in our society, see Karst, *Citizenship, Race, and Marginality*, 30 WM. AND MARY L. REV. 1 (1988); K. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

134. See Handler, *supra* note 102; Hasenfeld, *Welfare and Work: the Institutionalization of Moral Ambiguity* (1987)(unpublished paper on file with the author).

135. See *supra*, note 16. See also S. Bowles & H. Gintis, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND CONTRADICTIONS OF MODERN SOCIAL THOUGHT* (1986)(discussing generally how the electoral process has become bureaucratized in modern America).

136. See L. GORDON, *supra* note 132.

or woman-centered alternatives.¹³⁷ Furthermore, the AFDC program was unique among New Deal welfare programs in requiring claimants to open up their sexual lives to the scrutiny and control of welfare workers.¹³⁸ In order to participate in AFDC, Mrs. G. had no choice but to conform her life to the conditions the program imposed.

At the fair hearing, it was Mrs. G's *voice*, rather than her behavior, which was compelled to assent to the bureaucratized—and arguably also gendered—logic of welfare. The law of evidence—doctrines of relevancy and materiality—commanded her to keep her speech within the categories that the legislative/administrative process had generated. Even though the technicalities of evidence law did not apply to her case, the hearing officer would only attend to the narrow issues that the AFDC regulations charged him to decide.¹³⁹ Was Mrs. G.'s insurance award covered under the "lump sum" rule? Did Mrs. G.'s expenditures meet the administrative criteria of "life necessities"? Were the features of estoppel present in the case, and should the doctrine apply? Discrete responses to those questions—that was the measure of "participation" that this hearing gave to Mrs. G. She best not "fight the questions" if she wanted her voice to be heard at all.¹⁴⁰ Rather, she had to speak her need

137. For elaboration of this thesis, see, e.g., M. ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988); L. GORDON, *supra* note 132, at 108-15; Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, in *FOR CRYING OUT LOUD: WOMEN AND POVERTY IN THE UNITED STATES* 29-46 (R. Lefkowitz & A. Withorn eds. 1986). For a study claiming that the AFDC program has supported the nuclear family norm in its job placement and training policies, see Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983). See also *Working Women on AFDC*, 7 HARV. WOMEN'S L.J. 308 (1984). It should be noted, however, the AFDC program has been widely criticized for forcing two-parent families to split up in order for the children to qualify for benefits.

138. Program features that have been subject to criticism in this regard include the home-visits that are still often required to verify the absence of one parent, the regulations requiring women to cooperate in establishing their children's paternity and obtaining child support orders from absent fathers, and recent provisions requiring that women apply for benefits for all children in the home. All of these provisions entail scrutiny into the woman's sexual or intimate choices. See *supra* note 92. It should be noted, however, that Joel Handler has persuasively argued that the general relief programs, which have a predominantly male clientele, are typified by equally punitive provisions. *But see* Handler, *supra* note 102. These provisions do not typically entail scrutiny of the sexual lives and family choices of program participants, however.

139. N.C. Gen. Stat. § 150B-41(a)(1987) provides that in administrative hearings, rules of evidence shall generally be followed, "but when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available." Conley and O'Barr observe that even in small claims proceedings, where rules of evidence do not apply, judges make their decisions on the basis of technically relevant facts, screening out other aspects of litigants' stories. *RULES VERSUS RELATIONSHIPS*, *supra* note 65.

140. The "silencing" that Mrs. G. experienced from being required to "tell her story" within the categories imposed by the substantive law is an experience common to litigants from all social and

as an accounting of how she had spent a few hundred dollars. Within these constraints, her speech might be worth that sum if she won; it would have no other consequence.

C. *The Route Taken: Evasive Maneuvers or a Woman's Voice?*

If we measure Mrs. G.'s hearing against the norms of procedural formality, it appears to conform. The hearing appears to invite Mrs. G. to speak on equal terms with all other persons. Yet within the local landscape of her hearing, Mrs. G.'s voice is constrained by forces that procedural doctrine will neither acknowledge nor oppose. Each of these forces attaches a specific social cost to her gender and race identity. The caste system implements race and gender ideology in social arrangements. The "fraud issue" revives misogynist and racist stereotypes that had been forced, at least partly, underground by the social movements of the 1960s and 1970s. And the welfare system responds to gender and race-based injustice in the economy by constructing the poor as Woman—as an object of social control. Given the power amassed behind these forces, we might predict that they should win the contest with Mrs. G. for her voice.

Yet to detect these forces, we have read the story through a structuralist lens, which shows only the stark dichotomy of subordination and social control.¹⁴¹ It is ironic that this lens, which works so well to expose the contours of Mrs. G.'s silence, also leaves her—as a woman actively negotiating the terrain in which she found herself—entirely out of focus. If we re-center our reading on Mrs. G., as a woman shaping events, unpredictably, to realize her own meanings, we can no longer say with certainty what the outcome will be. We cannot tell who prevailed at the hearing, or where the power momentarily came to rest. Rather, what we see is a sequence of surprising moves, a series of questions. Why did Mrs. G. return to the lawyer after meeting with the fraud investigator to sign a settlement agreement? Why did she depart from the script she had rehearsed for the hearing, to remain silent before her own worker, and to

ethnic groups, especially those who are most alienated from the legislative process. It is an experience that the most ambitious of the humanist procedural scholars address when they seek institutions that will guarantee *meaningful* participation opportunities to all citizens. See *supra* text and notes 4-6, 127. Cf. Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN'S L. J. 39 (1986) (women law students sometimes "fight" the hypotheticals that they are presented, rather than respond in the categories dictated by the law). See also C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 66 (1982).

141. See L. Gordon, *supra* note 132; Gordon, *Family Violence, Feminism, and Social Control*, 12 FEMINIST STUDIES 453 (1986).

speaking about Sunday shoes? And why did the county finally abandon its claim to cut her stipend?¹⁴²

1. *Why Did Mrs. G. Return to the Lawyer?* The lawyer¹⁴³ thought she understood the answer to this question. In her view, Mrs. G.'s life had taught her that to be safe, she must submit to her superiors. Mrs. G. was faced with conflicting commands from the welfare agency and the legal aid office. So, like the archetypical woman, shaped to mold herself to male desire,¹⁴⁴ Mrs. G. said "yes" to everything the Man asked. She said yes when the lawyer asked her to go through with a hearing, yes again when the fraud investigator asked her to drop it, and yes once more when the lawyer demanded her apology. In the lawyer's view, this excess of acquiescence had a sad, but straightforward meaning. It marked Mrs. G.'s lack of social power: this woman could not risk having a point of view of her own.

Yet the lawyer was not situated to see the whole story. Though she aspired to stand beside Mrs. G. as an equal, she also sought to guard her own status—and the modicum of social power that it gave her. She *saw* Mrs. G. as a victim because that was the role she needed her client to occupy to support her own social status. For if Mrs. G. was indeed silenced by the violence around her, she would then be dependent on the lawyer's expertise and protection, and therefore compliant to the lawyer's will. With such clients, the lawyer could feel quite secure of her power, and complacent about the value of her work.

But Mrs. G.'s survival skills were more complex, more subtle, than the lawyer dared to recognize. There might be another meaning to Mrs. G.'s ambivalence about what she wanted to do. Perhaps she was *playing* with the compliance that all of her superiors demanded. By acquiescing to both of the system's opposed orders, she was surely protecting herself from the risks of defiance. But she was also undermining the value—to them—of her own submission. By refusing to claim any ground as her

142. Just like the inquiry in the previous section, those questions should be addressed, in conversation, to Mrs. G. See *supra* note 96.

143. As I begin this critique of the lawyer's perspective, I must note the ambiguity of my own position in this project. As Mrs. G.'s lawyer, I appeared in her story. Yet I also wrote that story, and I now prepare to read it. The reader should ask what feelings and events I might have left out of the narrative of Mrs. G. because I was not situated to perceive them. Although this reading purports to comment on how the lawyer's viewpoint was limited in the story, my interpretation of the lawyer's limitations is itself shaped by my own present social location and concerns. What questions does this reading pose to the story, and what issues does my reading conceal from view?

144. See *supra* note 16.

own, she made it impossible for others to subdue her will.¹⁴⁵

Self-negation may not have been the *only* meaning that Mrs. G. felt positioned to claim. She finally *came back* to the lawyer, repudiated the settlement, determined to pursue her case. Was this merely one more deft move between two bureaucrats,¹⁴⁶ searching them both for strategic advantage while secretly mocking the rhetoric of both spheres? Or did Mrs. G. finally get fed up at the unfairness of the welfare, and at her own endless submission? When she returned to the lawyer, she was offered a bargain. She might get money, and some limited protection from the welfare, if she went along with the hearing plan. But she might have also heard the lawyer to promise something different from this *quid pro quo*. In her talk of rights and justice, the lawyer offered Mrs. G. not just money, but also vindication. In going forward with the hearing, was Mrs. G. simply making a street-wise calculation to play the game the lawyer offered? Or was she also giving voice to a faint hope—a hope that one day she might really have the legal protections she needed to take part in the shaping of justice?¹⁴⁷

2. *Why Did Mrs. G. Depart from her Script?* The lawyer had scripted Mrs. G. as a victim. That was the only strategy for the hearing that the lawyer, within the constraints of her own social position, could imagine for Mrs. G. She had warned her client to play the victim if she wanted to win. Mrs. G. learned her lines. She came to the hearing well-rehearsed in the lawyer's strategy. But in the hearing, she did not play. When she was cued to perform, without any signal to her lawyer she abandoned their script.

The lawyer shared with Mrs. G. the oppression of gender, but was placed above Mrs. G. in the social hierarchies of race and class. The lawyer was paid by the same people who paid for welfare, the federal government. Both programs were part of a social agenda of assisting, but

145. See Dalton, *supra* note 24; Williams, *Alchemical Notes*, *supra* note 24, at 441-443.

146. Legal services lawyers are, after all, functionaries in a government-funded social program. Sociological studies which investigate this thesis include Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L. REV. 474 (1985); Menkel-Meadow & Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociological Ambivalence in the Delivery of Legal Aid for the Poor*, 9 LAW & HUMAN BEHAVIOR 397 (1985); J. KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* (1982).

147. Cf. Leff, *Law and*, 87 YALE L.J. 989, 1005 (1978)(in exploring the limits of the game metaphor for legal process, Leff notes "[i]f, however, [adjudication] is not a game, it is not not a game either. It is . . . an amphibian cultural artifact that embodies, simultaneously, at least two different social mechanisms. . . . [It] reflects simultaneously the causal and metaphoric universes, both integral parts of . . . life but neither dominant over the other").

also controlling, the poor.¹⁴⁸ Though the lawyer had worked hard to identify with Mrs. G., she was also sworn, and paid, to defend the basic constitution of the *status quo*. When Mrs. G. "misbehaved" at the hearing, when she failed to talk on cue and then refused to keep quiet, Mrs. G. pointed to the ambiguity of the legal aid lawyer's social role. Through her defiant actions, Mrs. G. told the lawyer that a conspiracy with a double agent is inevitably going to prove an unstable alliance.

The lawyer had tried to "collaborate" with Mrs. G. in devising an advocacy plan. Yet the terms of that "dialogue" excluded Mrs. G.'s voice. Mrs. G. was a better strategist than the lawyer—more daring, more subtle, more fluent—in her own home terrain. She knew the psychology, the culture, and the politics of the white people who controlled her community. She knew how to read, and sometimes control, her masters' motivations; she had to command this knowledge—this intuition—to survive.¹⁴⁹ The lawyer had learned intuition as a woman, but in a much more private sphere.¹⁵⁰ She was an outsider to the county, and to Mrs. G.'s social world. Mrs. G.'s superior sense of the landscape posed a subtle threat to the lawyer's expertise. Sensing this threat, the lawyer steered their strategic "discussion" into the sphere of her own expert knowledge. By limiting the very definition of "strategy" to the manipulation of legal doctrine, she invited Mrs. G. to respond to her questions with silence. And, indeed, Mrs. G. did not talk freely when the lawyer was devising their game-plan. Rather, Mrs. G. waited until the hearing to act out her own intuitions. Although she surely had not plotted those actions in advance, she came up with moves at the hearing which threw everyone else off their guard, and may have proved her the better *legal* strategist of the lawyer-client pair.¹⁵¹

The disarming "strategy" that Mrs. G. improvised at the hearing

148. Many works trace the history of this contradiction at the core of our society's conception of welfare. See, e.g., F. PIVEN & R. CLOWARD, *supra* note 101; Hasenfeld, *supra* note 134; J. Katz, *supra* note 146.

149. See *supra* text and notes 22-24. See also Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

150. The behaviors labelled "intuition" are among the strategies that subordinates use to manage an unequal power relationship. See, e.g., Snodgrass, *Women's Intuition: The Effect of Subordinate Role on Interpersonal Sensitivity*, 49 J. PERSONALITY & SOC. PSYCHOLOGY 146 (1985). See also *supra* text and notes 71-73.

151. Some readers have suggested that Mrs. G.'s testimony at the hearing simply shows how well the adversarial instrument works. They suggest that the ancient trappings of due process, the formality, the oath, confrontation, urged her, finally, to tell the truth. Her case file noted that the crucial conversation between herself and her caseworker *had* taken place, even if the file did not document this conversation in detail. In the hearing Mrs. G. equivocated about this uncontested fact. And her children's "everyday" shoes were there at the hearing for everyone to examine. The

was to appear to *abandon* strategy entirely. For a moment she stepped out of the role of the supplicant. She ignored the doctrinal pigeonholes that would fragment her voice. She put aside all that the lawyer told her the audience wanted to hear. Instead, when asked to point a finger at her caseworker, she was silent. When asked about "life necessities," she explained that she had used her money to meet *her own* needs. She had bought her children Sunday shoes.

a. *Her Silence Before her Caseworker.* When the lawyer asked Mrs. G. about the conversation with her caseworker regarding the insurance payments, Mrs. G. had nothing to say. The lawyer, smarting from her own rejection, felt that Mrs. G. was protecting a vulnerable Black sister with her silence—at her own, and her lawyer's expense. But perhaps something else was going on. Unlike Mrs. G., the caseworker had earned self-respect in the system. Mrs. G. and her like—desperately poor, with no formal schooling, burdened by too many children, "abandoned" by their men—cast a stigma on this woman because of the common color of their skin. Did this woman command a different kind of power over Mrs. G. than the white masters—a power that felt like shame, rather than fear? Perhaps Mrs. G. was not willing to flaunt her own degradation before this woman, as the lawyer demanded.¹⁵² Perhaps she was not willing to grovel—pointing fingers, showing off tattered shoes, listing each of her petty expenses—before this distant, disapproving sister. Perhaps Mrs. G.'s silence before this other Black woman, and her talk about Sunday shoes, expressed a demand—and an affirmation—of her own dignity.

b. *Her Talk about Sunday Shoes.* When Mrs. G. talked about Sunday shoes, she was talking about a life necessity. For subordinated communities, physical necessities do not meet the minimum requirements for a human life. Rather, subordinated groups must create cultural practices through which they can elaborate an autonomous, oppositional consciousness. Without shared rituals for sustaining their survival and motivating their resistance, subordinated groups run the risk of total domination—of losing the *will* to use their human powers to subvert their oppressor's control over them. Religion, spirituality, the social institution of the Black Church, has been one such self-affirming cultural

question of whether she *needed* to replace them was not a simple question of reconstructing the historical record.

152. This discussion does not imply that the social worker's imagined judgment of Mrs. G. is fair. Rather, it suggests that Mrs. G. made her statement at the hearing in the context of the complex relationship between these two women, a relationship that none of the other actors had access to.

practice for the communities of African American slaves, and remains central to the expression of Black identity and group consciousness today. By naming Sunday shoes as a life necessity, Mrs. G. was speaking to the importance of this cultural practice in her life, a truth that the system's categories did not comprehend.

At the same time that Mrs. G.'s statement affirmed the church, it condemned the welfare system. By rejecting the welfare's definition of life necessities,¹⁵³ she asserted her need to have a say about *the criteria* for identifying her needs. Her statement was a demand for meaningful participation in the political conversations in which her needs are contested and defined.¹⁵⁴ In the present welfare system, poor women—the objects of welfare—are structurally excluded from those conversations.¹⁵⁵ When Mrs. G. insisted on her need to say for herself what her “life necessities” might be, she expanded, for a moment, the accepted boundaries of those conversations.

Mrs. G.'s statement also spoke to a third dimension of her “life necessity.” When Mrs. G. talked about buying Sunday shoes, she defied the rules of legal rhetoric—the rule of relevancy, the rule against “rambling,”¹⁵⁶ the unwritten rule that told her to speak like a victim if she wanted to win.¹⁵⁷ Had Mrs. G. spoken the language that was proper for her in the setting, her relevant, logical, submissive, hyper-correct responses to their questions might have been comprehended. But, by dutifully speaking the language of an institution from which subordinated groups have historically been excluded and in which Mrs. G. felt herself to have no stake, her voice would have repeated, and legitimated, the very social and cultural patterns and priorities that had kept her down. Had she been a *respectful* participant in the legal ritual, Mrs. G. would have articulated someone else's need, or pleasure, rather than her own.

Mrs. G. did not boycott the hearing altogether. Rather, in her moment of misbehavior, she may have been standing her ground within it. Although she appeared, at first, to be deferring to the system's categories and rules, when she finally spoke, she animated those categories with her own experience.¹⁵⁸ She stretched the category of “life necessity” to express her own values, and turned it around to critique the welfare's sys-

153. See *supra* note 87.

154. See Fraser, *supra* note 127.

155. See *supra* notes 126-140 and accompanying text.

156. See O'Barr & Conley, *Rules versus Relationships*, *supra* note 65.

157. See Williams, *Alchemical Notes*, *supra* note 24.

158. See M. BAKHTIN, *THE DIALOGIC IMAGINATION* (C. Emerson & M. Holquist trans. 1981).

temic disregard of her own point of view. By talking about Sunday shoes, Mrs. G. claimed, for one fragile moment, what was perhaps her most basic "life necessity." She claimed a position of equality in the speech community—an equal power to take part in the *making* of language, the making of shared categories, norms, and institutions—as she spoke through that language about her needs.

When Mrs. G. claimed this power, she affirmed the feminist insight that the dominant languages do *not* construct a closed system, from which there can be no escape.¹⁵⁹ Although dominant groups may control the *social institutions* that regulate these languages, those groups cannot control the *capacity* of subordinated peoples to speak. Thus, women have evaded complete domination through their *practice* of speaking, like Mrs. G. spoke at her hearing, from their own intuitions and their own experience. Feminist writers have drawn three figures—play, archaeology, and poetry—to describe this emancipatory language practice.¹⁶⁰

159. This critique is developed in A. JARDINE, *GYNESIS: CONFIGURATIONS OF WOMEN AND MODERNITY* (1985). See also *supra* notes 16 & 23.

160. The figure of play connotes an exuberant, unruly approach toward conventions of discourse which can disarm an oppressive language-system, reanimating it with women's experiences. Patricia Yaeger elaborates in *HONEY-MAD WOMAN*, *supra* note 23, at 18:

[P]layfulness and word play are very much at issue in the woman writer's reinvention of her culture. . . . [P]lay itself is a form of aesthetic activity in which . . . what has been burdensome becomes — at least momentarily — weightless, transformable, transformative. As women play with old texts, the burden of the tradition is lightened and shifted; it has the potential for being remade.

The figure of archaeology refers to the collective searching of private memories and the shared past to uncover the suppressed meanings that are latent in familiar words. Mary Daly invokes archaeology in *GYN/ECOLOGY* (1978) at 24 when she describes how, in her writing, she searches for the hidden powers of words:

Often I unmask deceptive words by dividing them and employing alternate meanings for prefixes. . . . I also unmask their hidden reversals, often by using less known or "obsolete" meanings. . . . Sometimes I simply invite the reader to listen to words in a different way. . . . When I play with words I do this attentively, deeply, paying attention to etymology, to varied dimensions of meaning, to deep Background meanings and subliminal associations.

The third figure that guides this emancipatory language practice is poetry — coaxing the language just beyond its systemic boundaries, toward images and understandings that both expand, and challenge, its rule. Used in this sense, poetry is closely connected to consciousness raising — the feminist method in which women, through their *practice* of talking together about their own experience, create the common language which makes that talking possible. See T. DE LAURETIS, *ALICE DOESN'T: FEMINISM, SEMIOTICS, CINEMA* (1984) (defining consciousness raising as "the collective articulation of one's experience of sexuality and gender . . . [which] has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality. Consciousness raising is the original critical instrument that women developed toward such understanding, the analysis of social reality and its critical revision"). Consciousness raising places new demands on the language because, through it, women grope to share feelings that have previously

When Mrs. G. construed "life necessities" to include Sunday shoes, she turned the hearing into a place where she could talk, on a par with the experts, about her "needs." For a moment she defied the rigid official meaning of necessity, and refused to leave nameless the values and passions that gave sense to her life. Adrienne Rich describes the process:

For many women, the commonest words are having to be sifted through, rejected, laid aside for a long time, or turned to the light for new colors and flashes of meaning: power, love, control, violence, political, personal, private, friendship, community, sexual, work, pain, pleasure, self, integrity When we become acutely, disturbingly aware of the language we are using and that is using us, we begin to grasp a material resource that women have never before collectively attempted to repossess. . . .¹⁶¹

Mrs. G. might want to add "participation" and "need" to the poet's list.

3. *How Was Mrs. G.'s Voice Heard?* The third question that the story raises is the ending. The story tells us that the hearing officer ruled against Mrs. G., and then the county welfare department decided to drop the case, restoring her full stipend. But the text does not say how the men across the table experienced the hearing, or why the county eventually gave in. Did Mrs. G.'s paradoxical "strategy" disarm her audience? Did she draw a response from her audience that was different—more compelling—than the pity that her lawyer had wanted to play upon? Did her presentation of herself as an independent, church-going woman, who would exercise her own judgment, and was willing to say what she needed—did these qualities make the men fear her, respect her, regard her for a moment as a person, rather than a case? Did they feel a moment of anger—about the ultimately powerless roles that they were assigned to play in the bureaucracy that regulated all of their lives? Were these men moved, by the hearing, to snatch her case from the computer and subject it to their own human judgment? If this is indeed what happened—and we do not know—would Mrs. G., in retrospect, have wished the story to end that way? Or was this moment of benign discretion a double-edged precedent—more dangerous to her people than the computer's reliable indifference?

gone unnamed. When those feelings find words, poetry is produced. As Audre Lorde expresses the matter in her essay, *Poetry is Not a Luxury*:

We can train ourselves to respect our feelings and to transpose them into a language so they can be shared. And where that language does not yet exist, it is our poetry which helps to fashion it.

See A. LORDE, *SISTER OUTSIDER* 37-38 (1984).

161. A. RICH, *Power and Danger: Works of a Common Woman*, in *ON LIES, SECRETS, SILENCE* 247 (1977).

We do not know why the county decided to drop Mrs. G.'s case. What we do know, however, is that after the hearing Mrs. G. remained a Black, single mother on welfare—poor, dependent, despised.¹⁶² Mrs. G.'s unruly participation at her hearing was itself political action.¹⁶³ Yet it was an act that did little to change the harsh landscape which constricts Mrs. G. from more sustained and more effective political participation. Substantial change in that landscape will come only as such fragile moments of dignity are supported and validated by the law. It is on that possibility that the essay concludes.

III. WHAT KIND OF PROCESS FOR MRS. G.?

Like all stories, the story of Mrs. G. is ambiguous. The only clear lesson that it teaches is negative: removing formal barriers to participation is not enough in our stratified society to achieve procedural justice, even in the modest sense of enabling all persons to participate in the rituals of their self-government on an *equal* basis.¹⁶⁴ Although Mrs. G. finally "won" her hearing, it was a fragile victory, more attributable to the mysteries of human character than to the rule of law. Even after that victory, she was still obstructed from meaningful participation¹⁶⁵ in her

162. Perhaps by collaborating more fully with Mrs. G. as we theorize about her, we could better comprehend the "doubleness" of her subordination — her power *and* her pain — without being caught between the inadequate paradigms of structural determinism on the one hand and unfettered human agency on the other. *Cf. supra* notes 59, 96 & 141.

163. For an elaboration of the idea that expressive activity should be understood, in our civic culture, as politically meaningful *action*, see Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups* (1989)(unpublished manuscript on file with the author).

164. Throughout this essay and most explicitly in this section, I speak toward an "horizon" of procedural justice that would entail the meaningful participation of all citizens in both legislative and adjudicative spheres. See *supra* text and notes 2-6. The legislative and adjudicative spheres are, of course, structurally and normatively separated in current constitutional discourse. We have been taught to assume without question that the constitution should mandate an impermeable wall between the legislature and the courts. And we accept that "due process" has been properly parsed into separate "substantive" and "procedural" doctrines that set different minima for legitimacy — legislative *rationality* and adjudicative *regularity* — in the two spheres. It is beyond the scope of this essay to elaborate a feminist critique of either the normative bifurcation of "due process" into substance and procedure, or the structural separation of powers to which those norms correspond. Jurgen Habermas addresses the normative question in his theory of communicative rationality. See J. HABERMAS, 2 *THE THEORY OF COMMUNICATIVE ACTION* (1988)(claiming that a deep form of procedural regularity — which assures direct, unencumbered, and equal participation of all speakers — will ensure the rational elaboration of social norms). And Martha Minow has begun a feminist critique and reformulation of the structural doctrine of separation of powers. See M. MINOW, *Separation of Powers, Powers in Relationships*, in *MAKING ALL THE DIFFERENCE* (forthcoming)(critiquing and reformulating the constitutional doctrine of separation of powers from a feminist perspective).

165. My use of this term throughout the essay presumes a moral and political theory through

own self-governance—not by overt legal barriers, but by deeply rooted conditions of social inequality. Is it asking too much of our Constitution¹⁶⁶ to enlist its normative authority to challenge those conditions? *Goldberg v. Kelly* speaks, in its margins, to this unsettling possibility. The majority opinion quotes an article which observes that “the prosecution of a [welfare] appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have.”¹⁶⁷ The opinion also states that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”¹⁶⁸ What would it mean to tailor procedures to take account of the “insecurity” that gets in the way when Mrs. G., and other “dependent” people seek to be heard? It is far beyond the scope of this essay—indeed, it may be beyond the scope of the possible—to provide a definitive answer to that question. Instead, in closing, I will return to the three local forces that obstructed Mrs. G.’s participation. I will point toward a few themes that Mrs. G. might herself suggest for countering those forces.

A. *Challenging the Grounds of Intimidation*

Perhaps the greatest barrier to Mrs. G.’s participation is her well-founded fear of retaliation. A substantial first step toward countering this barrier was taken when legal representation was made available to her.¹⁶⁹

which we can distinguish between “meaningful” or “authentic” and “distorted” or “inauthentic” participation. See Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (discussing possible normative grounds for the law’s interference with the expressed preferences of individual citizens). Habermas’ theory of communicative action provides a powerful possibility, particularly if the insights of his feminist critics are also taken into account. See J. HABERMAS, *supra* notes 127 & 164. But see Cornell, *Toward a Modern/Postmodern Theory of Ethics*, 133 U. PA. L. REV. 291 (1985); Fraser, *What’s Critical about Critical Theory? The Case of Habermas and Gender*, in FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER 31-55 (1987) (showing how Habermas presumes the basic social structures of patriarchy in his theory of “life worlds”); Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, in FEMINISM AS CRITIQUE 56, 67-73 (critiquing Habermas’ vision of communicative rationality for its failure to take account of the opacity of language and the irreducible heterogeneity of any speech community).

166. My use of the term “constitution” is informed by the work of Frank Michelman and Kenneth Karst. See Michelman, *Traces of Self-Government*, *supra* note 5 (identifying a repressed “republican” normative vision in our constitutional tradition); K. KARST, *BELONGING TO AMERICA*, *supra* note 133.

167. *Goldberg v. Kelly*, *supra* note 2, at 269 & n. 16, citing to Wedermeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 342 (1966).

168. *Goldberg v. Kelly*, *supra* note 2, at 253-54.

169. The *Goldberg* opinion itself acknowledged the importance of legal representation to any system of procedural protections for the poor. See *supra* note 2, at 270, quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”). Unfortunately, however, access to legal counsel by

Without skilled advocates, poor people cannot invoke the laws that already forbid intentional retaliation.¹⁷⁰ But even with access to lawyers, subordinated groups would need stronger and more sensitive laws to give them any real protection against the threat of retaliation. The penalties against retaliation must be increased, and the enforcement mechanisms simplified. The definition of retaliation and the methods of proof must be designed from the claimant's, rather than the perpetrator's point of view.¹⁷¹ And the claimant must be shielded from the risk of further retaliation for seeking relief.

In order to feel safe to speak out at a hearing, however, Mrs. G. needs more than *post hoc* remedies against overt acts of retaliation. She also needs to feel economically secure, economically independent. She needs to feel confident enough of her future that threats of economic punishment will have no bite. The social policies that might create such conditions are vigorously contested, and the political will that might enact them is not apparent. Without such economic security, however, *post hoc* measures to deter retaliation will never fully dismantle the barrier that intimidation imposes to her speech. For as long as Mrs. G. remains dependent on the pleasure of her masters for her next meal, she will continue to plot her words—and her silences—to speak *their* will, rather than hers.

the poor has been undermined by recent Supreme Court decisions. See *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981) (holding that the federal Constitution does not require states to guarantee counsel to indigent defendants in all proceeding to terminate parental rights); *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985) (upholding a statutory limit of ten dollars on attorneys' fees to lawyers representing veterans at benefit hearings). Access to counsel in civil contexts has also been undermined by federal funding cuts to the Legal Services Corporation, which had never been funded sufficiently to give all segments of the poverty population access to legal representation.

Although access to counsel is a crucial measure for equalizing participation opportunities across class differences, the story of Mrs. G. demonstrates that lawyers can reduplicate, rather than reduce, speech barriers linked to inequities of social power. Nevertheless, if the law offered more adequate protections against retaliation, and lawyers were self-reflective about the power relations between themselves and their clients, legal representation could substantially increase Mrs. G.'s security about raising her voice. This would be especially true if Mrs. G. had a more immediate involvement in the "legislative" decisions that shape her life.

170. The First Amendment, state statutes, and tort law all provide doctrinal remedies against retaliation. However, in all three areas, the protections have limited effect because of the plaintiff's burden of proving the defendant's retaliatory motivation, and the wide range of defenses that are available to negate the retaliation claim. See 40 A.L.R. 3d 753 (1971); *Edwards v. Habib*, 397 F. 2d 687, *cert. denied*, 393 U.S. 1016 (1968).

171. Theoretical work by feminist scholars on legal remedies for battered women can provide some guidance on doctrinal innovations that might surmount these problems. See, e.g., Littleton, *supra* note 59.

B. *Challenging the Imagery that Sustains Subordination*

The second force that impedes Mrs. G.'s participation is negative cultural imagery of gender, race, and class. This imagery dwells in the minds of her superiors. But it is also through these images that Mrs. G. understands herself, and learns to undermine her own voice. Mrs. G. was under the sway of these negative images when she repeatedly apologized to her lawyer for doing something wrong. These internalized images also led Mrs. G. to use "powerless" language at her hearing, language that might deflect overt violence, but at the expense of confirming her subordination. It is not easy to imagine mechanisms to protect Mrs. G. from the negative stereotypes that pervade the culture and distort her speech.

As a first step, lawyers and judges can be educated about the risk that race- and gender-linked speech habits will impact on credibility assessment. William O'Barr suggests that lawyers might coach witnesses to use socially dominant modes of speech. Judges might intervene during hearings to restate the testimony of "powerless" speakers. In cases where the social gap between witness and factfinder is extreme, the law might guarantee interpreters, or require corrective jury instructions, or even amend evidence rules to address the subtle distortions that dialect differences are likely to cause.¹⁷² Bennett and Feldman suggest the use of expert witnesses to educate juries about the risk that they might discredit testimony because of social barriers encoded into a witness's speech.¹⁷³ We could go beyond such educational measures, to require that the factfinder *share* the perspective¹⁷⁴—the social location¹⁷⁵—of the claimant, particularly in a context like welfare hearings where the claimant is likely to come from a marginalized social group.¹⁷⁶ All such proposals would

172. See Conley, O'Barr & Lind, *supra* note 61, at 1395-99, for speculation about how this proposal might work in the courtroom. There is a problem, of course, that such a remedy might itself exacerbate the perceived status difference between the witness and her audience.

173. See W. Bennet & M. Feldman, *supra* note 69, at 179. Experts might also work behind the scenes, helping lawyers take account of language and cultural barriers in preparing their cases, or providing the court with guidance on the venue issue or the jury selection process.

174. See Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988)(critiquing the norm of judicial neutrality in light of feminist theories).

175. This might mean sharing demographic characteristics such as class, race, ethnicity, gender, age, disability, or sexual orientation. It might mean sharing membership in a localized geographic community, such as a housing project or a neighborhood. Alternatively, it might mean sharing an identity as "clients" in a particular social program, such as AFDC or a public school.

176. Cf. Resnik, *supra* note 174. Such a requirement would expand the currently evolving constitutional doctrine of jury selection. In its present form, this doctrine is framed *negatively*: it prohibits prosecutors from using peremptory challenges to strike minority jurors because of race. See *Batson v. Kentucky*, 476 U.S. 79 (1986). See also Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Use of the Jury in a Criminal Trial*, 102 HARV. L.

run an obvious risk, however, of deepening the already profound chasms in perspective between dominant and subordinated social groups in this society.

A more ambitious reform agenda would expand the logic of proof¹⁷⁷ so that the conversational and narrative styles of subordinated groups are no longer deemed "irrelevant" to the decision process.¹⁷⁸ Uncertain, Other-oriented speech might be revalued in legal rituals that seek to build community rather than punish the transgression of legal rules. Informal processes carry serious risks in the welfare context, however, where the power difference between the individual claimant and the government is so great.

Even if any of these reforms could be implemented, however, none would address the hardest question that racist and gendered cultural imagery poses. Are the images themselves so central to Mrs. G.'s subordination that the law should challenge those images directly, even at the risk of silencing or chilling speech? This question has erupted into bitter political controversy within subordinated communities¹⁷⁹ and impassioned debates among constitutional scholars.¹⁸⁰ We may wish to avoid

REV. 808 (1989). An *affirmative* requirement that a significant part of each jury *share* the race, gender, and class background of the claimant would reach beyond current doctrine.

177. In his classic discussion of adjudication, Lon Fuller describes it as a ritual of participation in which troubles must be converted into bipolar claims of right or accusations of fault in order to be heard. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978) ("Adjudication . . . consists in the opportunity to present proofs and reasoned arguments. The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant. A naked demand. . . [or] a mere expression of displeasure or resentment [is not sufficient to warrant relief]").

178. For speculation on how such reform might reshape our adversarial lawyering process, see Menkel-Meadow, *supra* note 140.

179. Among feminists, this controversy has focused on a movement seeking passage of an ordinance that would make the proliferation of pornographic images actionable as gender discrimination. A version of this ordinance was enacted in Minneapolis and subsequently declared unconstitutional by the courts. See *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without hearing*, 106 S.Ct. 1172 (1986). A parallel controversy has recently erupted at colleges which have taken action to quell an epidemic of racist speech among students. See, e.g., Worthington, *University of Wisconsin Regents Move to Rein in Racism*, Chicago Tribune, April 12, 1989, at 1, Zone C; F. Barringer, *Free Speech and Insults on Campus*, New York Times, April 25, 1989, at A1, A11 (constitutional law professor Gerald Gunther compares an anti-race harassment proposal at Stanford University to feminist efforts to restrict pornography).

180. Some theorists claim that in a gendered society, the "speech" that we risk silencing in pornographic images is a method of domination, and unworthy of protection under our political norm of free expression. See, e.g., C. MACKINNON, *supra* note 8, at 206-214. Others rejoin that there is no principled basis for distinguishing pornography from the "abnormal" modes of expression that subordinated groups must employ to challenge dominant discourses. See, e.g., K. KARST, *supra* note 133, at 54-70.

getting caught up in this debate. But if we take Mrs. G.'s experience seriously, the law's appropriate response to racist imagery marks an empirical, strategic, and normative conundrum that we cannot avoid.

C. *Confining Bureaucracy*

Beyond the obvious injustice imposed by racism and gender looms the much more complex obstacle posed to the participation of all citizens by a structural momentum I have called bureaucracy. To dismantle the bureaucratic barrier—to imagine an alternative template for the organization of complex, “post-industrial” institutions—entails a much more daring reconstructive project than simply to realize the promise of formal equality. Can we reimagine the economy as a network of face to face deliberations, among citizens, about the production and allocation of social wealth? Can we reimagine our mature, liberated selves as interdependent beings, rather than lonely souls embattled by the selfish demands of others? And as women, weary from incessant connectedness, do we even want to?

Neither the answers to those questions, nor the project of creating post-bureaucratic institution, are easy. Such institutions will be neither feasible nor desirable in every domain of social life. Their creation cannot be driven by ideological presuppositions about what the future should be; indeed, misguided leaps forward have proved disastrous. Rather, the relocation of bureaucratized governance in participatory institutions must proceed cautiously, experimentally, guided by local knowledge rather than grand design. In diverse locales, gradual steps toward new institutional forms—democratic experiments in the workplace, in housing, in education, and in the community—are under way.

Perhaps a second “constitutional revolution” will eventually map these changes onto the charter of our government, superseding the bureaucratized normative vision of the New Deal regulatory state by a less holistic vision of power.¹⁸¹ Such a transformation must receive substantial support from the state, through reforms that protect against race and gender bias and reduce the risk of retaliation when poor people dare to speak out. Reforms that will dismantle the barriers to Mrs. G.'s political participation. But beyond that crucial economic and cultural sup-

181. See Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421 (1987) (describing the constitutional revolution of the New Deal era, which replaced a privatized liberal normative vision of our constitutional democracy with a norm of centralized, interventionist, bureaucratic governance). See also R. CRANSTON, *LEGAL FOUNDATIONS OF THE WELFARE STATE* 101-273 (1985); *DILEMMAS OF LAW IN THE WELFARE STATE*, *supra* note 127.

port, the shape of post-bureaucratic institutions will not come from the traditional architects of the law. It will come instead from the diverse, localized institution-building activities that poor Black single women with children—citizens—undertake for themselves, on their own ground.