

“. . . The Law Is All Over”: Power, Resistance and the Legal Consciousness of the Welfare Poor

Austin Sarat*

I. INTRODUCTION

“For me the law is all over. I am caught, you know; there is always some rule that I’m supposed to follow, some rule I don’t even know about that they say. It’s just different and you can’t really understand.” These words were spoken by Spencer, a thirty-five-year-old man on public assistance (general relief), whom I first encountered in the waiting room of a legal services office. I introduced myself and told him that I was interested in talking to him about law and finding out why he was using legal services; I asked if he would be willing to talk with me and allow me to be present when he met with his lawyer. While he seemed, at first, both puzzled and amused that I had, as he put it, “nothing more important to do,” he agreed to both of my requests.

As my research unfolded, what Spencer said in our first conversation, “. . . the law is all over,” served as a reference point for understanding the meaning and significance of law in the lives of the welfare poor. His words helped me interpret how people on welfare think about law and use legal ideas as well as how they respond to problems with the welfare bureaucracy. In this paper I present that interpretation and describe what I call the legal consciousness of the welfare poor.¹ I suggest that the legal

* Support for this research was provided by an Amherst College Faculty Research Grant. I am grateful for the able assistance of Chris Saylor and Jarl Alhqvist. Amrita Basu, Nathaniel Berman, Kristin Bumiller, Lawrence Douglas, Tom Dumm, Patricia Ewick, Joel Handler, Christine Harrington, Sally Merry, Deborah Rhode, Stephanie Sandler, Stuart Scheingold, Carroll Seron, Susan Silbey, Stanton Wheeler and participants in the Law and Society Seminar at Northwestern University, the Amherst Seminar on Legal Ideology and Legal Process and the Legal Theory Workshop at Yale Law School provided helpful comments on earlier versions of this paper.

1. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *Stan. L. Rev.* 575, 592 (1984) defines legal consciousness as “. . . all the ideas about the nature, function and operation of law held by anyone in society at a given time.” I use the term consciousness, but I could have as easily substituted ideology. Indeed for my purposes legal consciousness and legal ideology could be used interchangeably.

Consciousness and ideology are used instead of attitudes because speaking about attitudes toward or about law suggests a radical individuation, a picture of persons influenced by a variety of factors, thinking, choosing, deciding autonomously how and what to think. The language of attitudes links popular views of law with feelings and, in so doing, “diminishes the authority of the attitude holder.” See Brigham, *The Public’s Property: Distinguishing Law From Attitude*, (1989) (unpublished

consciousness of the welfare poor is a consciousness of power and domination, in which the keynote is enclosure and dependency, and a consciousness of resistance, in which welfare recipients assert themselves and demand recognition of their personal identities and their human needs.

The legal consciousness of the welfare poor is, I will argue, substantially different from other groups in society for whom law is a less immediate and visible presence. Law is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives. Legal rules and practices are implicated in determining whether and how welfare recipients will be able to meet some of their most pressing needs. Law is immediate and powerful because being on welfare means having a significant part of one's life organized by a regime of legal rules invoked by officials to claim jurisdiction over choices and decisions which those not on welfare would regard as personal and private.² Thus, Spencer's sense

manuscript).

Consciousness and ideology suggest greater structure and constraint. These terms embed the study of ideas in social structure and social relations. They draw attention to the way similarly situated persons come to see the world in similar ways. They suggest that subjectivity is not free floating and autonomous but is, instead, constituted, in a historically contingent manner, by the very objects of consciousness. See Harrington and Merry, *Ideological Production: The Making of Community Mediation*, 22 *Law & Soc'y Rev.* 709, 711 n. 1 (1988).

2. When an individual takes public assistance he or she becomes a legal subject in a rather dramatic and visible way. As Hunt argues, "It is by transforming a human subject into a legal subject that law influences the way in which participants experience and perceive their relations with others." Hunt, *The Ideology of Law*, 19 *Law & Soc'y Rev.* 11, 15 (1985).

In the United States the transformation of the human subject into a legal subject which is accomplished when someone takes public assistance traditionally has been tainted and stigmatized. See W. Ryan, *Blaming the Victim* (1971). For the welfare poor, the choice is to internalize and accept, or to resist and reject, what Tocqueville once called, the ". . . notarized manifestation of misery, of weakness, of misconduct. . . ." which comes with the acceptance of public assistance. This quotation is taken from G. Himmelfarb, *The Idea of Poverty: England in the Early Industrial Age* 150 (1983).

Legal rules both establish the conditions for relief and historically have given meaning to being "on welfare" through a system of intrusions, invasions and indignities reserved specifically for welfare recipients. For example under the 'absent' or 'substitute parent' rule, which was invalidated in *King v. Smith*, 392 U.S. 309 (1968), states would deny AFDC payments if the mother 'cohabits' with any able-bodied man. See W. Trattner, *Social Welfare and Social Control* (1983); J. Handler, *The Coercive Social Worker* (1973) and M. Katz, *In The Shadow of the Poorhouse* (1986).

In the last twenty five years, however, efforts have been made to alter that system through the legal recognition of welfare rights and procedural limitations on the power of the welfare bureaucracy. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). Yet such rights and procedural limitations further inscribed the welfare poor in law even as they made the identity constituted by and the meaning of being "on welfare" more complex. Simon, *Rights and Redistribution in the Welfare System*, 38 *Stan. L. Rev.* 1431 (1986).

During the last decade welfare eligibility standards have been made more stringent, and a continuous process of reporting and review was put into place. Law's hard, bureaucratic face has supplemented, if not altogether replaced, its rights-protecting concerns. "Even before the days of QC [federally mandated quality control] welfare administration required procedures for application, for determining categorical and income eligibility, for establishing benefit levels and for making changes as circumstances require. In current practice this has come to involve visits to welfare offices, forms to fill out, forms to mail in, interviews with workers, investigations and waiting." See Bane & Dowling, *Trends in the Administration of Welfare Programs* 7 (1987) (unpublished manuscript). For recipients this has meant more problems in getting and keeping welfare benefits. It has increased the difficulty and fear associated with the welfare experience and further complicated efforts to make sense of law. *Id.* at 9.

that “. . . the law is all over” is an introduction to the pervasiveness and obtrusiveness of legal rules and practices in the lives of people on welfare.

For Spencer and other welfare recipients law is not a distant abstraction; it is a web-like enclosure in which they are “caught.” It is a space which is not their own and which allows them only a “tactical” presence.³ It is both a metaphorical trap and a material force. Like the man from the country in Franz Kafka’s parable “Before the Law,” law is, for Spencer and others on welfare, an irresistible and inescapable presence. For them, however, it is an already entered space, an enclosure seen from the inside, an enclosure whose imperative power, whose “supposed to’(s),” is clothed in the categories and abstractions of rules.⁴

The rules Spencer confronts are a series of “they say(s).” The rules speak, but what Spencer hears is the embodied voice of law’s bureaucratic guardians. For him, as for Kafka’s character, the power of legal rules and practices is derived, at least in part, from the incomplete, yet authoritative, representation of law’s categories and abstractions by officials authorized to say what the law is.⁵ Legal rules and practices are all around, immediately and visibly present; yet the law itself remains a shadowy presence.

The law that the welfare poor confront is neither a law of reason and justification nor of sacred texts and shared normative commitments. Spencer and others like him are not invited to participate in the interpretation of those texts,⁶ and they are included in neither the official explication of welfare law nor in the construction of meaningful accounts of the legal practices they regularly encounter. They are “caught” inside law’s rules,

3. Here I use the concept of tactics as it is used by de Certeau. For him a “tactic is a calculated action determined by the absence of a proper locus. No delineation of an exteriority, then, provides it with the condition necessary for autonomy. The space of a tactic is the space of the other.” See *The Practice of Everyday Life* 36-37 (1987).

4. White notes that a welfare recipient for whom she provided legal representation had the “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. . . . Yet those rules confined her.” See *Unearthing the Barriers to Women’s Speech: Notes Toward a Feminist Vision of Procedural Justice* 90 (1989) (unpublished paper).

5. Derrida, *Devant La Loi*, in *Kafka and the Contemporary Critical Performance* 136 (Avital Ronnell trans. 1987), asks what holds Kafka’s man from the country before the law; “is it not its possibility and impossibility, its readability and unreadability, its necessity and prohibition, and those possibilities, as of the relation, repetition and history?”

Other research has noted that welfare is, for welfare recipients, “. . . a mysterious process, one which they do not understand and one which . . . is not visible to them.” See Briar, *Welfare From Below: Welfare Recipients Views of the Public Welfare System*, 20 Cal. L. Rev. 370, 377 (1966). Indeed two welfare administrators suggest that recently welfare programs have “become more and more mysterious to workers and clients. (We are not sure we understand the AFDC program completely ourselves. . . .)” See Bane and Dowling, *supra* note 2, at 11-12. More generally, as Derrida claims, “. . . we know neither who nor what the law is.” See *Devant La Loi*, at 144.

6. Cover suggests that “. . . [A]s long as legal interpretation is constituted as violent behavior as well as meaning . . . there will always be a tragic limit to the common meaning achieved. . . . [F]or those who impose the violence . . . justification is important, real and carefully cultivated. Conversely, for the victim, the justification recedes in reality and significance. . . .” See *Violence and the Word*, 95 Yale L.J. 1601, 1629 (1986).

but are, at the same time, excluded from its interpretive community.⁷ In all of their dealings with welfare they act on "a terrain imposed . . . and organized by the law of a foreign power."⁸ Their law is a law of power and of compulsion, and their experience of being inside, but yet excluded, is one indication of the way that power is exercised over the welfare poor.

While the welfare poor are surrounded and entrapped by legal rules as well as by officials and institutions which claim authority to say what the law is and what the rules mean, they are not, like the man from the country, transfixed or paralyzed. In this paper I argue that the welfare poor subscribe to neither an allegedly hegemonic "myth of rights"⁹ nor to a picture of law as autonomous, apolitical, objective, neutral and disinterested.¹⁰ They are not the passive recipients of an ideology encoded in doctrine which is allegedly taken seriously among legal elites.¹¹ Power and domination are thus only part of the story of the legal consciousness of the welfare poor. Because welfare recipients are trapped or "caught," because they are involved in an ongoing series of transactions with officials visibly engaged in the interpretation and use of rules, the welfare poor have access to inside knowledge not generally available to those whose contacts with law are more episodic or for whom law is less visible. This inside knowledge means, as we will see, that they have few illusions about what law is or what it can do. They are, as a result, able, when the need arises, to respond strategically, to maneuver and to resist the "they say(s)" and "supposed to(s)" of the welfare bureaucracy.

Resistance exists side-by-side with power and domination. Thus, when people like Spencer seek legal assistance or go to legal services they fight the welfare bureaucracy and its "legal order" even as they submit themselves to another of law's domains. They use legal ideas to interpret and make sense of their relationship to the welfare bureaucracy even as they refine those ideas by making claims the meaning and moral content of which are often at variance with dominant understandings.¹² They resist

7. For an analysis of the nature and terms of the exclusion of welfare recipients and other members of the public from law's interpretive community see Brigham, *supra* note 1. Such exclusion might give rise to what Wolin calls a "democratic critique of the welfare state." Such a critique asks, "what are the political implications of humanitarianism, of classifying citizens as needy and of making them needful objects of state power. . . ." rather than allowing them to use "power to constitute a collaborative world." *The Presence of the Past: Essays on the State and the Constitution* 154 (1989).

8. de Certeau, *supra* note 3, at 37.

9. For an examination of the nature of the "myth of rights" see S. Scheingold, *The Politics of Rights* (1974).

10. For a description of this picture of law see Singer, "The Player and the Cards": *Critical Legal Studies and Nihilism*, 94 *Yale L.J.* 1 (1984) and Gordon, *New Developments in Legal Theory*, in *The Politics of Law* 286 (D. Kairys ed. 1982).

11. To assume that they are persuaded by those ideologies, or that they give meaning to law on the terms that law itself provides, would be to see them as ". . . passive, helpless and deluded recipients of the ideas produced by an active and creative ruling class." Merry, *Concepts of Law and Justice Among Working-Class Americans*, 9 *Legal Stud. F.* 59, 68 (1985).

12. See Yngvesson, *Making Law at the Doorway: The Clerk, The Court and The Construction of Community in a New England Town*, 22 *Law & Soc'y Rev.* 409, 410 (1988).

those understandings by "vigilantly making use of the cracks that particular conjunctions open in . . . proprietary powers. . . ." ¹³ Yet their use of legal services and legal ideas further inscribes them in the world of state law and helps to reproduce official understandings of law and justice. It is, however, always an incomplete inscription.

Spencer and others like him stand in a contradictory, paradoxical and ambivalent relationship to legal authority, mobilizing one set of legal officials against another, moving from one arena of rules to another, ¹⁴ seeking recognition and help while being very dubious about the treatment they receive and seeking to establish spaces for, or moments of, resistance. ¹⁵ While they seek *legal* redress for wrongs done in the name of law, they contest what are sometimes said to be key symbols of law and legal authority, in particular the association of law with neutrality, disinterestedness, rule determinacy and rights. ¹⁶

The dynamic of power and resistance that I observed is, of course, played out on the "foreign" terrain of the lawyer's office, and the welfare poor seem very conscious of the fact that neither here nor in their dealings with the welfare bureaucracy are they able to find a "*place* that can be delineated as . . . [their] own and serve as a base from which relations of *exteriority* . . . can be managed." ¹⁷ The recognition that ". . . the law is all over" expresses, in spatial terms, the experience of power and domination; resistance involves efforts to avoid further "spatialization" or establish unreachable spaces of personal identity and integrity.

Power and domination are, however, represented in the legal consciousness of the welfare poor in temporal as well as spatial terms; ¹⁸ thus, the people I studied often spoke of an interminable waiting that they said marks the welfare experience. In that waiting they are frozen in time as if time itself were frozen; power defines whose time is valued and whose

13. de Certeau, *supra* note 3, at 37.

14. As Yngvesson argues, "The power of legal ideologies and law itself derives not only from its constitutive effects, but from . . . contradictions, paradoxes, and impurities as well. . . . Whereas some might see such contradictions, paradoxes, and impurities as weakening the power of law . . . these apparent weaknesses make law available for innumerable uses and provide an extraordinarily wide arc for its compass." See Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Culture*, 98 Yale L.J. 1689, 1693 (1989); see also Amherst Seminar, *From the Special Issue Editors, Special Issue: Law and Ideology*, 22 Law & Soc'y Rev. 629, 634 (1988).

15. The concept of resistance is discussed by M. Foucault, *Power/Knowledge* (trans. C. Gordon et. al. 1980); see also Fitzpatrick, *Law, Politics and Resistance* (1986) (unpublished manuscript). Here I use it to signify behavior or actions seen to be at odds with the expectations of those exercising power in a particular situation.

16. See Singer, *supra* note 10; Gordon, *supra* note 10.

17. de Certeau, *supra* note 3, at 36.

18. Greenhouse argues that law has "a mythic dimension, in its self-totalization, its quality of being in time (in that it is a human product) but also out of time (where did it or does it begin or end?) and in its promise of systematic yet permutable meaning. This myth is essentially a temporal one. Specifically the law's implicit claim is to invoke the total system of its own distinctions simultaneously in a way that both individualizes subjects/citizens and orients them toward particular forms of action." *Just in Time: Temporality and Cultural Legitimation in Law*, 98 Yale L.J. 1631, 1640 (1989).

time is valueless. For the welfare poor resistance involves a use of time against space, an insistence on the *immediacy* of their material needs, an attempt to substitute human for bureaucratic time. Thus metaphors of space and time become important signs of the way the welfare poor understand power and resistance as well as a currency for tactical maneuvers within a "world bewitched by the . . . powers of the Other."¹⁹

To this point I have talked about the welfare poor as if they were a homogeneous group whose legal consciousness and relationship to power and resistance were uniform. There is, however, considerably more fragmentation and division among people on welfare than might be suggested by my repeated references to *the* welfare poor.²⁰ As Spencer put it, "all welfare recipients aren't the same." He reminded me that the welfare poor are not a natural social group. They neither share a distinctive background nor common ties of sentiment; they vary greatly in their life situations, their ability to survive without public assistance and their disposition to do so.

Spencer insisted that many welfare recipients have lives not unlike my own only without the material comfort which a regular job would provide, that many have stable ties to their community and its major social institutions. They are often regular church-goers, who maintain close relationships with their extended families. They invest heavily in the effort to attain symbols of respectability even as they confront conditions of material deprivation. Others lack such stable social ties and aspirations. They are cut off from their families or do not know the identities of parents and relatives; some are involved in serious drug use and have criminal records.

Spencer helped me see that there are, if you will, at least two ways of life concealed by the singular label—the welfare poor—and that serious antagonisms sometimes occur between people whose lives on welfare are very different. One group defines itself, in part, by differentiating itself from what Spencer referred to as the "welfare crowd." In contrast, as I later came to appreciate, many members of that so-called "crowd" take pleasure in mocking efforts by people like Spencer to maintain "respectability" in the midst of misery. These differences suggest that legal consciousness among people on welfare may be as internally divided and plural as it is different from the legal consciousness of other social groups.

The following analysis describes the way themes of power and resistance weave their way through the legal consciousness of both the respect-

19. de Certeau, *supra* note 3, at 36. In the pages that follow references to time and an awareness of time will play an important role as the welfare poor speak about their experiences with the welfare bureaucracy and the legal services office. See *infra* text accompanying notes 30, 42, 51 & 56. For a discussion of the meaning of time in shaping a community's relation to law see Engel, *Law, Time and Community*, 21 *Law & Soc'y Rev.* 605 (1987); see also Greenhouse, *supra* note 18 at 1632-1633.

20. See Popkin, *Welfare: A View From the Bottom*, 48-53 (1988) (unpublished Ph.D. dissertation). See also J. Macloed, *Ain't No Makin' It: Leveled Aspirations in a Low-Income Neighborhood* (1986).

able poor and the welfare crowd. In the next section I describe the research upon which this analysis is based, and I note that the people I studied seemed to experience their relationship with me as a social science investigator in a way which is not unlike the way they experience their relationship with welfare workers and lawyers. The third section describes the way those people talk about and understand law and the relationship between legal services lawyers and the welfare bureaucracy. Section Four analyzes the reasons why the welfare poor bring their problems to lawyers, while the subsequent section examines the discursive construction of those problems and the way law's meaning is created and deployed in the efforts of welfare recipients to obtain legal assistance. The conclusion highlights the dynamic of power and resistance which characterizes the legal consciousness of the welfare poor and suggests that mass legal consciousness is more fragmented and plural than is suggested in some recent accounts.

II. THE RESEARCH

This article is based upon ethnographic observation of legal services offices in two cities with substantial welfare populations. Both are middle-sized New England cities. In each I secured permission to conduct my research from the managing attorney of the legal services office. As a condition of access I assured lawyers and clients that the location and identity of those offices would not be disclosed.

In each city I studied nineteen welfare recipients. Initial contact with those recipients was made in the legal services offices. There I was able to begin to understand how the meaning of law is constructed by watching and listening as welfare recipients attempted to cope with problems involving, among other things, eligibility for welfare and/or the denial, reduction or termination of welfare benefits.²¹ For purposes of this paper I have limited my attention to problems involving welfare.

All of the clients were interviewed at least once and some as many as six times. In addition, I was able to interview lawyers in twenty two of these cases. In one office I was able to observe lawyer/client conferences, and I did so in fourteen of the cases I studied in that office. I observed a total of twenty one meetings between lawyers and clients. As part of this research I also spent some time with several of the clients outside of the legal services offices—generally in their homes, and I was able to see how

21. Cases were selected to represent the range of issues and problems for which persons on public assistance sought legal assistance. In the thirty-eight cases studied there were twenty-two female clients and sixteen males; fifteen black clients, fourteen whites and nine Hispanics.

Of the thirty eight people in this study twenty eight had been on some form of public assistance for more than one year. Twelve reported that they had, at one time or another, been involved in a fair hearing. Twenty three had never before used a lawyer.

they spoke about their cases and their problems with family members and friends.

Interviews and participant observation are, of course, standard tools of social science, even of an interpretive, critical social science.²² These techniques are, in one respect, intended to insure the accuracy and reliability of observations; at the same time they, as well as other social science methods, work to establish the authority of social scientists and their descriptions. This was an authority which Spencer, and others I studied, disrupted in both direct and indirect ways.

The first disruption occurred when Spencer ended his brief introduction to the complex legal world of the welfare poor with the admonition—"you can't really understand." Having agreed to play my game, to allow himself to be probed and watched and to submit to my questions and observations, he warned me that his would be an incomplete submission. At first that warning seemed to be no more than a routine conversational marker, but in subsequent conversations Spencer insistently chided me about my inability, the inability of anyone who has not "been on and off welfare forever" to comprehend the life or consciousness of the welfare poor.

The phrase "you can't really understand" was an idiom which recurred as I observed meetings between recipients and their lawyers and listened to what they would say to me about their lives or their problems. In those conversations, people on public assistance hinted that they were withholding something, that something of decisive importance was at best only partially present. They enacted a similar drama of power and resistance whether they were talking to lawyers, caseworkers or the social scientist seeking to understand them.

When the welfare poor insist that their experiences with caseworkers and welfare bureaucracies, lawyers and legal services offices, as well as their encounters with legal rules and their feeling of being "caught" inside the law, separate them from those who have never been on welfare, they claim a privileged knowledge based on a lived experience. They claim that their lived experience establishes a boundary which even the curious social science observer may be unable to cross. Spencer's talk about the difficulty of knowing law's rules was thus not just talk about his own problem; he was, in addition, describing a problem for those who try to understand his world and his way of seeing the law.

At a subsequent point in our conversations, conversations that took place over a two month period, Spencer claimed that being on welfare is "so different" that I could never come to terms with the way recipients thought about anything, and he almost dared me to acknowledge openly

22. See Trubek & Esser, *Critical Empiricism in American Legal Studies*, 14 *Law & Soc. Inquiry* 3 (1989); Harrington & Yngvesson, *Interpretive Sociological Research*, 15 *Law & Soc. Inquiry*, (forthcoming 1990).

this possibility.²³ He said, "You gotta think you know a lot, that you are pretty smart. You all pretend you do, but I know how much you know or don't know. Only you'll never tell that I think you can't ever understand us. You couldn't without blowing it bad."

Through this dare and the insistence that I could not understand, Spencer resisted my effort to describe his views about law, and he inverted or disrupted, at least temporarily, the conventional hierarchy in a world which respects social scientists somewhat more than welfare recipients. At the same time, such provocations served, as I think Spencer intended, to insure my continued attention; the more he resisted, the more I persisted. However, this insistence on difference and impenetrability also set my effort to understand and describe the legal consciousness of the welfare poor somewhat in opposition to his effort to control his own story. For him, I fear, no attempt to empathize or to participate in his culture can completely authorize my descriptions or fully differentiate the person who purports to describe his world from the person who would regulate it.²⁴

Thus it is not surprising that Spencer remained playfully skeptical about me and my research, engaged enough to talk several times and to let me observe his conversations with his lawyer, yet dubious about what I would do with what he said or what I heard. He was, in the end, most doubtful about what my research would mean to him or other welfare recipients, about what its payoff would be. There was, however, a strange parallel between my effort to understand why he would use legal services and his effort to figure out why I would want to produce such an understanding. As I came to see, this engagement linked with skepticism, this doubt about what good it would all do, was an instruction about how the welfare poor understand their relationship with their lawyers, about why they use legal services to deal with problems with the welfare bureaucracy, and about the complex ways they both submit to and resist power.

III. LAWYERS, CASEWORKERS AND THE AUTONOMY OF THE LEGAL ORDER

"You know it's all pretty much the same. I'm just a welfare recipient whether I'm here (the legal services office) or talking to someone over in the welfare office. It's all welfare, you know, and it seems alike to me. I wish it was different but I've got to live with it this way. They're all the same. Welfare, legal services, it's all the Man." This was Spencer's somewhat indirect answer to my inquiry about whether he expected to be

23. The form of the introduction to this paper is, in part, what Van Maanen refers to as a "confessional tale." See Van Maanen, *Tales of the Field: On Writing Ethnography* (1986).

24. The people I studied seemed to be aware of the political dimensions of my activity, of the way we were implicated in relations of power. As Harrington and Yngvesson put it, "The politics of interpretative social research demand attention to power because interpretive work is embedded in social relations." Harrington & Yngvesson, *supra* note 22, at 32.

treated any differently by his legal services lawyer than by welfare workers. In this response he described the legal services office as virtually indistinguishable from the welfare apparatus. Just as Spencer portrayed himself as “caught” in the web of legal rules, he saw the legal services office caught within the welfare bureaucracy.

Being situated inside that bureaucracy, legal services seems somehow swallowed up, assimilated, presented as if it was not only inseparable from but was identical with welfare. In this identity, Spencer’s own identity is frozen. Unable to escape the welfare bureaucracy by going to legal services, he is unable to transcend or leave behind the self constituted by being on welfare. Whether talking to a caseworker or a lawyer he is caught yet again, only this time he is, and can be, no more than “just a welfare recipient.”

Other recipients displayed a similar understanding about the relationship of legal services and welfare if not a similar sense of the consequences of that relationship. Several responded to my query about their expectations concerning legal services by explaining that, as Gary, a young man on general relief, put it, legal services lawyers and welfare bureaucrats both “work for the same people. You see it says US Government on their checks so they can’t really pull in opposite directions.”²⁵ Another man explained that as far as he could tell, “they are both part of government.” For him, lawyers and caseworkers were both there to keep “things from getting out of hand.”²⁶ Still another man said

You get what you pay for and . . . [it’s] not any different here. . . . He’s not really my lawyer. You know they have to do this to get paid, just like my caseworker, but I can’t tell him do this or do that or . . . I’m not paying. [Laughs]. That’s what it’s all about. Being on welfare is just like being a child. Have to ask for everything, get permission before you can shit. No difference. Doesn’t matter whether they call it welfare or legal services. It’s the same shit.

Ellis, who went to legal services seeking help in dealing with a denial of general relief, talked about the relationship between law and welfare in similar terms.

Welfare didn’t just come from nowhere. Somebody had to make it up. That’s why they got lawyers, you see, to make up rules and stuff

25. White, *supra* note 4, at 104.

26. When asked what “things” he was talking about he said,

Look, it’s an old story. We [welfare recipients] are the problem for them. Without us, neither of them would have jobs, but they seem to think that we’re just problems, problems, problems. Nobody likes to be on welfare and nobody likes having to help people on welfare.

As a result, he, like other welfare recipients, worried about disloyalty, about the possibility that lawyer’s law might ultimately be turned against him, that his legal services lawyer might ultimately side with the welfare bureaucracy.

for them. . . . So without welfare those lawyers would have nothing, they'd have no jobs. But the way it works now with legal services, legal services is kind of like an Internal Revenue . . . no that's the wrong word. What is the word for the police force having their own inner group, you know, to make sure that cops aren't up to anything, like don't go too crazy with their guns. Law is like that. They put these legal services guys there to keep an eye on the welfare people because welfare would fall apart without them. Be a real big mess. See what I'm saying. They work together . . . not fighting, as if they're opposed. I can even tell from, you know, the way they are friendly.

For Ellis, welfare is a domain both legally constituted and constitutive of the legal domain. Legal services lawyers are thus an important part of an ongoing state activity. In such an activity lawyer's law operates through regulation and internal surveillance rather than prohibition and punishment, and legal services lawyers are part of the apparatus that disciplines both the welfare population and others (social workers) who are in the business of carrying out disciplinary activities.

Here Ellis seems to add some refinement to Spencer's view that it's "all welfare." Lawyers are inside welfare just as the welfare poor are inside the law; however, while the latter are denied an identity as anything other than a "welfare recipient," legal services lawyers are not just another in a faceless string of welfare bureaucrats. They are inside, in Ellis's view, in a special and important way.

Such a view helps explain why welfare recipients see the law of the legal services office as both weak and powerful in relation to the welfare bureaucracy. It is weak because, in Ellis's words, it "can't rock the boat without drowning itself;" as he saw it, the interests of legal services lawyers and caseworkers are so closely linked that there are real limits on what the former are willing or able to do in challenging and criticizing decisions of the latter. Yet, at the same time, the indispensability of legal services for the poor to welfare's bureaucratic operation gives lawyer's law considerable potential leverage.²⁷

While legal services lawyers sometimes claim that they are powerless to help their welfare clients and that there is nothing they can do, at other times they go to great lengths to help their clients. Sometimes help is withheld while at other times it is provided. Lawyers can help if they want to or deny help by proclaiming their own impotence. As a result they seem to have uncontrollable, if not irresistible, power.

27. The view that law is inscribed within the social activities that it is assumed to regulate was most often articulated when welfare recipients talked about their own problems with welfare. There were, however, several people who spoke in similar terms about the relationship of prosecutors and the police and housing court and landlords.

I'm nobody for her [the lawyer]. . . . She don't work for me and I just want her to do like a favor, you know, to make some calls for me, but she don't have to and no way I could make her. . . . I'm still waiting for her to tell me about what she's going to do. She could say like I can't help and that's that. Maybe she's going to figure out that I'm nobody and why make waves just for me.

Here, the all too frequent proclamation by legal services lawyers that there is "nothing I can do" is understood to be an act of power rather than a confession of authentic weakness, a refusal to help borne of desire not necessity.

Decisions about whether to help, according to welfare recipients, are made on the basis of an assessment of their character, whether they are a "nobody," rather than the merits of their claims or the extent of their needs. Thus people like Spencer, for whom maintaining an image of "respectability" was an important general concern, frequently criticized welfare and welfare recipients to their lawyers and to me. As one young woman put it, "being on welfare stinks and welfare makes you stink." A middle aged man receiving food stamps said, as if talking about a class to which he did not belong, "They [people on public assistance] better clean up, you see, get straight."²⁸

Such criticism puts distance between the individual welfare recipient seeking legal assistance and the class of recipients as a whole. It gives voice to the shame and stigma associated with receiving welfare and, in so doing, ratifies and reinforces the images that produce such shame and stigma.²⁹ Going to legal services the welfare poor feel no more in control of their own destiny than they felt in dealing with the welfare bureaucracy,³⁰ and their response, their effort to find some way of proving themselves worthy of the help that lawyers can either give or withhold, is a form of self-injury.

If they could enlist their lawyer's help, the welfare poor imagine that one phone call, one letter, even one word from their lawyer could make everything right. Yet, they worry that nothing *will* be done because they are "nobody" or, as Ellis suggested, the friendship between lawyers and welfare workers displaces opposition or that nothing *can* be done because,

28. Briar, *supra* note 5, at 377, notes that welfare recipients tend to refer to other welfare recipients as "they" not "we." He argues that this self-conscious "estrangement . . . reflects the desire of . . . recipients to disassociate themselves from the image they have of other recipients . . . [and to express] opinions about other welfare recipients which usually have been associated primarily with conservative, anti-welfare groups."

29. As Wolin argues, in the modern welfare state, "Welfare recipients signify a distinct category, the virtueless citizen. The virtueless citizen has no a priori claim not to be shaped in accordance with the rational requirements of state policy." Wolin, *supra* note 7, at 162.

30. For these welfare clients, law was just another infantilizing experience. Bane and Dowling speculate that such infantilization may frustrate the welfare system's alleged goal of encouraging recipients to "become self-supporting." Bane & Dowling, *supra* note 2, at 20. See also White, *supra* note 4.

as Nancy, a long-time recipient of AFDC, said, "the welfare holds all the cards." Even if lawyers take up the grievances that are brought to them, some recipients fear that they will, in the end, reach an impasse in dealing with the welfare bureaucracy. Thus images of power and powerlessness, awesome force and impotence exist side by side.

This is the case with Al, a fifty-eight-year-old recipient of general assistance who lost his benefits when he took a temporary job washing dishes in a local diner. Al went to legal services to find out if there was any way to keep that job and still retain his benefits. But as he told me,

Listen, there's not much they [legal services lawyers] can do, because why should any caseworker listen. They don't get paid to listen to nobody says.

QUESTION: Then why did you come to legal services?

What could I do, just lose everything? They can just tell them what to give me. . . . That is what lawyers do and why they are so good. They'll just tell them and there won't be no trouble.³¹

The linkage of power and powerlessness is also heard in the words of Damian:

They [lawyers] can do anything they want, just say the word and I'll be back on emergency assistance tomorrow. It's great. . . . Final is what they say, but it's no use because those welfare folks don't care about nobody, not me, not him [the lawyer]. I've seen people scream and cry, but they don't budge, so what can he [the lawyer] do. He ain't going to shoot them, you know, I mean, take a gun and go make them do it.

Al and Damien see their lawyers as both impotent in the face of an unmovable welfare bureaucracy and able, with but a single word, to end their troubles.³² It is almost as if they exaggerated the imagined power of lawyers to convey to me their own sense of the incredible impenetrability of the welfare system. Yet by conjuring up that image they may also be trying, if inconsistently, to gather the courage to enter a battle they seem unlikely to win. Theirs is an interesting combination of veneration and cynicism. What they venerate, what is "good" or "great," is a law whose power they hope to enlist, while the law about which they express grave

31. There is here an odd and interesting juxtaposition of speaking and listening. In one voice Al suggests that lawyers simply "tell" caseworkers what to do; Al speaks about the efficacy of the telling that lawyers do. In another voice he commands me to listen while he tells me that caseworkers don't "listen to nobody."

32. This simultaneous under- and over-estimation of law is a repeated theme among the welfare recipients I studied just as it was among the victims of discrimination studied by K. Bumiller, *The Civil Rights Society* (1988).

doubts is an apparently frustrated legality swimming upstream against bureaucratic resistance and inertia.

A common perception of virtually everyone I interviewed was that the relationship of legal services and the welfare bureaucracy typifies a legal system whose various elements are tightly interconnected rather than autonomous and separate and where political influence is pervasive. Few of the recipients think that the decisions made by lawyers, welfare bureaucrats or other legal officials are neutral, disinterested, impartial or rule governed.³³ Law is talked about as a thoroughly politicized patronage system which attends to who you are and whom you know; it is a system of contacts and credibility³⁴ which, at its best, makes "arrangements" to deal with problems.³⁵ In the welfare context, a good lawyer is able, as Spencer said, to "work something out;" a bad lawyer "can't get it done," "can't do no deal." In this "world of deals,"³⁶ "everything depends," as he told me, "on who you know in the system. You know, it really does seem to me, I really think it's who you know. How much you want to dish out to get back."

Whether talking specifically about welfare or about other aspects of law, many recipients see no difference between law and politics. "It's all political" was a recurring theme in conversations about the behavior of legal services lawyers, welfare officials, prosecutors and judges. Casey, a thirty-eight-year-old woman, put it this way,

All lawyers, even the lawyers here have to play politics. You can't get it, but they have to cozy up to my caseworker, you know, convince her that I'm not so bad. Same when my son went to court. It's a political game, that's all it is cause you have a judge and you get whatever you get, understand? The right lawyer, you see the right judge, you get the best sentence of all. Happens everyday. It's a whole political game. . . . I've seen trials that wait 'til certain

33. Elaine, a mother of seven receiving AFDC, is one of the few who think this way. As she put it, "Here [the legal services office] it don't matter who you are or what you done. Everybody's alike." While the welfare bureaucracy seems to her to make judgments about people on the basis of who they are and what they do, law as it appears in the legal services office seems evenhanded. In addition, as she saw it, "The law is the law. It should go by the books." While welfare officials ignore rules, the law that she desires would be a coherent, determinate rule system, a system in which rules produce results. Unlike Spencer who experiences rules as a confining trap, or those who see rules being used as weapons against them, Elaine seeks a formalist's paradise.

34. A similar view seems to be held by some segments of the practicing bar. See Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 Yale L.J. 1663 (1989). Similar cynicism is noted in Bumiller's research, *supra* note 32. Tyler demonstrates the importance of such understandings of law for theories of procedural justice. See T. Tyler, *Why People Obey the Law* (1990); Tyler, *What Is Procedural Justice?* 22 *Law & Soc'y Rev.* 103 (1988).

35. This view is especially prevalent among those who had previous experience with lawyers. As one man put it, "Lawyers are pretty much the same. Here [the legal services office] they'll plea bargain just like my lawyer did when I was charged with burglary. Doesn't matter much whether you are innocent, it's the deal that counts."

36. Galanter, *Worlds of Deals*, 34 *J. Legal Educ.* 268 (1984).

judges are on the bench. Sure, lawyers are lawyers, judges are judges, that's all it is. They always just owe each other favors.

For Casey, the majesty of law is demystified; its power is located in human relations and transactions, in the pettiness of favor-doing and favor-getting. Moreover, it is not like one could get beyond the cozying up and playing politics by appealing over the head of the bureaucratic apparatus to a judicial system attentive to principles not personalities, to precedent not politics. For Casey and others with whom I spoke not only is there no escape from law, there is no escape for law. Lawyers and judges are themselves trapped within "the whole political game."

This favor-doing and favor-getting is just a polite and metaphorical description of corruption. Law is corrupted by politics, and politics itself is nothing but corruption. For Casey the corruption of politics is not simply a matter of bad people doing bad things; it is the essence of the political game. For her, acting politically, organizing and seeking to achieve significant political change is not a normatively viable alternative to law, a way of correcting its problems or seizing control of its instrumentalities. As Frankie, an elderly man with whom I had only one conversation, told me,

Law is too much political for me. For lack of a better word I'd call it all politics. It's always that way, always going to be that way. . . . Politics as I see it, it's all greed and power. . . . Those simple words greed and power corrupt you by money and by pure 'I'm God and you're nothing' attitude.

However, for Frankie and several of the others in my study, the greatest corruption of the welfare bureaucracy, legal services offices or the law in general is that they are not immune to discrimination. Many welfare recipients believe that race and ethnicity are noticed by legal officials and lawyers (including legal services lawyers) and that money counts, that the "rich" are treated differently than the poor. Frankie put this point quite vividly:

If you want to know the truth, I think that social workers, lawyers, judges hate Puerto Ricans. There's a lot of us now and that makes all them nervous because welfare's fine for white folks, but giving it to PRs is for them like giving it to animals. What I seen when I was arrested was different cause I'm from Puerto Rico. I was treated different. Same thing here [the legal services office]. I have to get here early and wait longer and I get the young guy who don't know shit. Who can't see it? You just can't.³⁷

37. Like Spencer, Frankie claims the authority of experience. The only people who cannot see the discrimination to which he is subject is someone like me who is neither Puerto Rican nor a welfare

Others made the same point in different ways:

If a poor person, okay, murders somebody, they're going to throw the book at them. But if some rich guy does something like that, they're going to get off. They might not get any time or they might get easier time than somebody like me that doesn't have anything. You can't really know what I'm saying. You know, it's basically money. They sure go harder on somebody's poor than somebody who has money. Like when you got nothing, what can you offer? I'm not calling it a bribe, but there's some fancy word for it, a person who doesn't have anything can't offer anything. They got nothing to defend themselves with so they've got to come, like me, to legal services.

* * *

Law is for people with money so if I had some cash to pay a lawyer it'd be better. If you don't have the money, forget it, you're not going to get service. That's how it is, you know, you might not get the help you need. But rich people they don't have to worry none about that. They walk into the room and everybody stands up.

* * *

The fact is if you're poor or a minority you don't get as good treatment from lawyers or anybody. These legal services people they hold their noses and just do what they have to do.

Merry notes that working class Americans see law as both inequitable and, at the same time, somewhat less inequitable than the rest of society.³⁸ In her view, law "benefits" from comparisons with other social institutions and practices. Working class court users accept the inequity they experience because they do not expect anything better. Among welfare recipients there is a similar tendency to think about law's discrimination in light of discrimination experienced elsewhere. At worst law is, as Frankie noted, "just like the rest, no better, no worse;" at best law's attentiveness to race, ethnicity, or wealth "doesn't get in the way."

Thus most of the welfare recipients I studied are more resigned than angry about law's inequities, inequities which in their view are built into the very fabric of law's rules and practices. Yet being resigned to the inequity of law does not mean being resigned in the face of particular deci-

recipient.

38. Merry, *supra* note 11, at 65.

sions, of decisions that hurt not because they impose disabilities in a biased or discriminatory way but because of the pain they inflict or the interests they threaten. The welfare poor worry about having enough to get by on more than about whether they are getting as much as anyone else. As a result, they are able to seek legal assistance and use law, both of which are tainted with and corrupted by political favoritism and discriminatory treatment, without particularly liking the law that they are using. They accept without condoning the unfairness of the system in which they find themselves, and seek ways of working within and around that unfairness.

In all of this—in their understanding of the relationship between legal services and welfare, their notions of the political character of the legal domain, their sense of pervasive inequity and unfairness, their complex understandings of law's blurred boundaries and of the way that blurring of boundaries constructs particular identities and precludes the construction of others—the welfare poor exemplify what Duncan Kennedy meant when he conceded, "We don't need Critical legal theory to be effective practitioners of the de-reification of institutions."³⁹ The welfare poor are not paralyzed by their understandings or their insight into the highly politicized nature of the legal system. The law as the welfare poor experience and understand it is grounded in the realities of a society in which race, wealth, and power matter, and law is neither more nor less useful because it does not transcend or transform the world as they know it.

IV. THE SEARCH FOR LEGAL ASSISTANCE

When I asked Spencer why, if he could see no real difference between legal services and the welfare office and if he thought that he would "just be a welfare recipient" in the eyes of his lawyer, he had come to talk to a lawyer, he smiled and shook his head as if amazed by the question and confirmed in his sense that I could never understand. However, after a brief pause the smile disappeared and he said, "I'm here cause I can't figure out what's going on . . . you know, how come they stopped my check. . . . I won't let them make me starve and cause all that stuff about, you know, some rule."

Spencer arrived at the legal services office uncertain but defiant. He had tried to find out what was going on by talking with people at the welfare office, but his efforts evaporated in a bureaucratic maze in which no one seemed to know what had happened or to be able to explain to him why his check had stopped. Without the money provided by general relief he could not imagine how he was going to live. Thus he came to legal services to fight what he saw being done to him by "them," and he inter-

39. Kennedy & Gabel, *Roll Over Beethoven*, 36 *Stan. L. Rev.* 1, 31 (1984).

preted the transaction which led to the termination of his welfare benefits as a personal attack. Interpreting his problem this way he denied the bureaucratic legitimacy which accompanies claims that decisions are impersonal and resisted efforts to clothe power in the rhetoric of rules. This tendency to see problems with welfare as personal attacks is quite consistent with views of law as driven by assessments of character or by who, not what, you know. "I won't let them . . ."; here personal power must be deployed against personal power. Given the prospect of starvation, real or imagined, there was no other choice.

Like Spencer, others who seek the help of a legal services lawyer do not see themselves as having a real choice.⁴⁰ Chris, an older woman who playfully refused to tell me her age, explained that she had come to legal services when her AFDC benefits were reduced to compensate for a previous overpayment. She said that because of the reduction she was behind in her rent and afraid of being evicted.

What else could I do when they [welfare workers] won't listen to me. All they do is make me wait so it's getting to be that I'm not going to have a place to live cause my landlord ain't going to let me be there as charity or free. Couldn't think of anything else. These are the only people to go to.

Or as a woman I call Barbara said,

I tried to get them [the welfare department] to let me know, but no way. You wouldn't think it mattered about getting less money and maybe it doesn't matter to them, but it does if you want to feed your kids. I don't like coming here [to legal services] no more than I like going there [to the welfare office]. No fun sitting, waiting, telling things to another stranger, but I'm at my end.⁴¹

For Chris and Barbara the search for legal assistance is part of a recurring drama in which they wait to speak only to be unheard, then find another place to wait and engage in yet another ritualistic telling. Waiting is, for them, the experience of being "spatialized," of having someone else's place triumph over their time.⁴² Waiting is the physical embodiment of their own weakness. Their experience with the welfare system is, more-

40. This is not to suggest that everyone who experiences problems with welfare seeks legal assistance. That surely is not the case. However, those who do seek help describe themselves as lacking any reasonable alternative. In another part of my research I am studying the legal ideology of welfare recipients who do not use legal services when they encounter problems with the welfare system.

41. "No fun . . . telling things to another stranger;" no more fun talking to me than to the lawyer or the caseworker. I wondered then and I wonder now why she talked to me when I could do nothing to help her "feed her kids." The best I could imagine was that I was a stranger who, if nothing else, seemed interested and willing to listen.

42. de Certeau suggests that the powerful "privilege spatial relationships . . . [and] reduce temporal relations to spatial ones. . . ." de Certeau, *supra* note 3, at 38.

over, often one of speaking into a void, of speech without response. What they have to say seems to be ignored or is, at best, impatiently tolerated by caseworkers and other officials.⁴³ As a result, they went to legal services without great confidence that their voices would register in that setting or that their speech would matter and doubtful about the efficacy of yet another telling to yet another official "stranger."⁴⁴ They went because they have exhausted other possibilities and were at the "end." They went even though they were uncertain that legal services lawyers could, or would even if they could, provide help, and even though they were afraid that their trip to the legal services office would ratify the inescapability or legitimize the unresponsiveness of the welfare bureaucracy.

As Marion, who sought legal assistance when welfare told her that there was nothing they could do to help her with a serious debt problem, explained,

I didn't want to come here, but they [the collection agency] said that I had to come cause unless my check started coming again and I made some payments they were going to take me to court. I got letters and they call me and call me. All this makes me sick, but I didn't know what to do. I was afraid of lawyers, still afraid, and I say maybe he'll agree with the welfare. He'll tell them that it's okay not to send me the check. He'll call the collection agency and tell them I'm no good for it. He could end up against me cause I don't count.

Because the welfare poor understand that they cannot fully escape law's enclosure and that they are all, like Spencer, "caught" in what Dumm calls "the space of law,"⁴⁵ and because they are quite conscious of their continuing dependence on welfare, many are also concerned about what will happen if they prevail in their present claims.⁴⁶ In such a situation they expect to be labelled "troublemakers" or "bad actors" by welfare officials who, in the future, might use some minor violation of an unknown rule as an excuse to get revenge. At some point those who move within the law from bureaucratic denial to adversarial response will return to the scene of that denial; there they again will be unprotected, and

43. In this limited sense, the welfare poor are by no means incited or encouraged to speak. *Contra* M. Foucault, *The History of Sexuality* (trans. R. Hurley 1980).

44. Many of the people I studied used legal services even though they did not have faith that their voices would matter and even though they did not believe that the legal services lawyer would be able to intervene successfully and straighten out the mess. Briar, *supra* note 5, at 380.

While most of those people were experienced in law's routine bureaucratic encounters and, as a result, familiar with the ambience of law, many had never been to a lawyer before. Inexperienced clients had no idea what a lawyer could do for them or whether a lawyer would do anything.

45. See Dumm, *Fear of Law*, 10 *Stud. in L. Pol. & Soc'y* (forthcoming 1990). See also de Certeau, *supra* note 3.

46. See White, *supra* note 4, at 76. This concern was widespread among both the "respectable" poor and the "welfare crowd."

will be even more vulnerable, less able to count on the assistance of lawyer's law.⁴⁷

The movement from the welfare office to the legal services office is then for many of the people with whom I spoke an experience of fear, fear that lawyers will not help or that help will provoke vindictiveness or that they will end up further entrapped by rules should their lawyer discover that they have violated some rule about which neither they nor their caseworker know. As a young woman named Marlene said to me before she saw a lawyer about a reduction in her AFDC benefits,

I don't know, the way the system is now, I think anybody can do practically anything now and be able to get away with it if they look hard enough in the law books. You can't understand this, but you never really know when you've broken some rule. It would be a real bitch if I found out here [the legal service office] that I've violated something on the books.

Or as Eddie, a twenty-one-year-old, told me before he talked to a lawyer about his inability to obtain general relief,

It's always been, you know, one thing or another, you know, I mean it's got to be one set of rules and regulations. Lawyers are bad with that stuff so be careful. There is always some rule or if that one doesn't give you enough shit then they find another one. They've got rules for every possible thing, but I don't think them rules tell them what to do, I think they tell the rules what to do.⁴⁸

Here again the welfare poor do not distinguish lawyers from caseworkers. They seek legal assistance uncertain about whether the lawyers with whom they speak will take it upon themselves to enforce welfare's complex body of rules and regulations.⁴⁹ As welfare recipients seek legal assistance, as they move from the welfare office to the legal services office, they experience a "moment of vertigo that accompanies the movement from a place of protection (or at least of familiarity) to a place of exposure, (and they experience) the vertigo of uncertainty, not knowing

47. Some recipients believe a "law of diminishing returns" governs the use of lawyers to deal with the welfare bureaucracy. They believe that the first time a lawyer intervenes caseworkers are more likely to be responsive than they are in subsequent interventions.

48. This last comment is clearly not consistent with law's allegedly hegemonic, formalist mythology. Instead it seems characteristic of the impulses of a legal realism which sees rules as instruments used by officials to accomplish their own purposes, see Cohen, *Transcendental Nonsense and the Functional Approach*, 34 Colum. L. Rev. 809 (1935); see also Llewellyn, *Some Realism About Realism*, 44 Harv. L. Rev. 1222 (1931), or of an imperial law whose empire is manipulated by powerful mandarins. The way in which lawyers and administrators use the network of rules to maximize their discretion is discussed in Silbey & Bitner, *The Availability of Law*, 4 Law & Pol'y Q. 399 (1982).

49. See Blumberg, *The Practice of Law as a Confidence Game*, 1 Law & Soc'y Rev. 15 (1967).

and admitting that one does not know, what threats to well-being lay in wait."⁵⁰

This feeling and this way of thinking about the power and meaning of lawyer's law was, however, by no means uniform. Other recipients, especially those with longstanding, stable ties to the community (the "respectable" poor) saw their legal services lawyer as a tool in an ongoing struggle or, perhaps more accurately as a way of sending a message and asserting a self. Getting a lawyer is as important for the message it sends as for the results it produces. The message sent is a demand for respect, respect regularly denied in encounters with the welfare bureaucracy, a demand which cannot be fully captured by any claim to material benefits.⁵¹ Getting a lawyer makes it possible for some welfare recipients to live honorably with their continuing dependency. While the search for legal assistance may be a futile act insofar as it is understood in purely instrumental terms, it is a gesture that gives these welfare recipients a name, an identity, a way of being heard; it ends the frustrating experience of speaking into a void and of going unnoticed that Chris and Barbara described. It forces recognition through an act of defiance.

Another woman, Bernice, exemplified this view when she said,

Look, nobody pays attention. I could have spent the rest of my life sitting there waiting for them to pay attention and it wouldn't happen, no way. They got so much going down that I'm just one more person trying to get emergency relief. They don't pay no mind, but when they call, I mean when the lawyer calls, then I'm somebody, something. . . . I'm doing what I'm not supposed to, you see, being good means taking what they say you should get and not asking no questions. Well, I ask questions. I came here [to legal services] to get them to pay attention because they don't want to pay attention. Who knows? Maybe they'll get mad. Probably won't do no good, but why should I just put up with their stuff?

Unlike Kafka's man from the country, Bernice was not content to spend her life waiting to be admitted, to be allowed in. Here the search for legal assistance breaks the spell simply by ending the inertia induced by being on welfare. The search for legal assistance is, on this account, a way of individualizing and humanizing the welfare bureaucracy.

Bernice's explanation of why she went to legal services again portrays lawyers as wielding enormous power, as though a simple act could break through bureaucratic indifference and give someone an identity. Bernice's

50. Dumm, *supra* note 45, at 36.

51. Here one can see some limit to the use of the language of need in framing and interpreting problems with the welfare bureaucracy. See *infra* text accompanying note 58. Or perhaps what one sees is a contradiction between that language, with its immediacy and its attention to the material dimensions of welfare problems, and this more expressive, symbolic understanding of the meaning of legal assistance.

search for legal assistance was, however, not so much a search for an identity or an effort to become a "somebody" as it was an expression of her already constituted identity as someone who self-consciously defies the normative expectations of the welfare bureaucracy. Where "questions" are not supposed to be asked, she asks questions.⁵²

For her, being on welfare should not require becoming part of the faceless welfare clientele, and should not mean that one is treated, as she put it in another conversation, like "dirt." She was deeply troubled by dissonance between other aspects of her life, especially her role as a lay preacher in her church, and the way she was treated in the welfare office. Getting a lawyer was a way of responding to that treatment and was, at the same time, a strategy of self-assertion, a way of not being "just one more person trying to get emergency relief." For her, getting a lawyer was a way of getting attention and respect and making welfare officials, who seem otherwise unreachable, "mad."⁵³ It gave her a voice, broke a silence, insured that her complaint would not be ignored even if, in the end, it "won't do no good." For this woman, getting a lawyer was a step across an imagined boundary and a way of showing herself as someone to be reckoned with.⁵⁴

Yet, in the end, the thing that stood out most in Bernice's account of her experience with legal services was her lawyer's failure to remember Bernice's name and her need to look at the file to remember what the case was about in the second of their two brief meetings. As Bernice put it, "She [referring to her lawyer] would probably make a really good caseworker." It is, of course, ironic that the experience with legal services in some ways replicated the experience of impersonality and facelessness that she was trying to overcome by getting a lawyer.

As Bernice described her experience with legal services, it was, in the end, another "insult" to her dignity, another affront in her continuing search for respect. Since she had had previous dealings with legal services lawyers in a dispute with a landlord she was not surprised by this experience, nor did it diminish her sense that merely by seeking legal help she would be noticed in the welfare bureaucracy. Putting up with the indignities of the legal services office allowed her to juxtapose one bureaucracy against another and, in so doing, to get just a little space in which a self could claim recognition.

In contrast to Bernice's use of legal services as an act of defiance necessary to maintain self respect, for Karla, who had been on AFDC for seven

52. Merry notes how working class court users employ similar tactics. *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (forthcoming 1990).

53. Sennett warns that resistance itself may strengthen authority through what he calls the "bonds of rejection." See chapter 1 of *Authority* (1980).

54. Leff, *Ignorance, Injury and Spite*, 80 *Yale L.J.* 1 (1970), notes that many people use the law for just such purposes.

months when she received notice that her benefits were being reduced, seeing a lawyer was simply the "approved" thing to do.⁵⁵ In fact she went to legal services on the advice of her caseworker: "She told me I could get a fair hearing. I could have them review it, but that maybe it would do me some good to talk to a lawyer about whether that would be a good move. So here I am." Taking this advice was, in her view, exactly what the "good" welfare recipient does. As Karla put it, "I guess it is better to come here than just to bitch and complain about not knowing what is going on."

Echoing this theme, Bob, a forty-year-old man said,

Come sit in the waiting room [of the welfare office], and you hear all kinds of shit. Certain people get real angry and mad. Then before you know it they're doing some number on their worker, taking it out, being just dumb fuckers. Not me. That's not my way. It's better to come here [to legal services] rather than just getting all frustrated. No hassle for me and this way I don't hassle nobody.

For Karla and Bob, the movement from the caseworker to the lawyer is a journey from one part of the welfare bureaucracy to another, just "another office down the hall" as Bob put it, just another bureaucrat to talk to, just another set of forms to fill out. Resort to the legal services office is a logical next step within the welfare bureaucracy, a step which "respectable" people willingly take rather than being disruptive and making trouble.⁵⁶

V. THE LEGAL CONSTRUCTION OF SOCIAL PROBLEMS: NEEDS VERSUS RULES

When welfare recipients take that step what kind of a vocabulary do they use to make sense of, and talk about, the problems they bring to legal services offices? How are legal ideas and concepts used? Do recipients think about welfare as property or as a legally guaranteed entitlement?⁵⁷

55. *But see White, supra note 4* (noting that welfare recipients are sometimes explicitly discouraged by their caseworkers from seeking legal services).

56. For still others, the lawyer's office can be both a place of defiance and a place of safety. Why come here? Why? Cause there was nothing else. I'm just moving along in line like I'm supposed to. Anybody's ever been on welfare tell you that, you know, there's always more, someone to talk to. . . . These guys supposed to keep the other guys in line so they don't get away with nothing. They help me, but you know, I don't think they should let me just lose my electric and make me do a repayment so big that I can't get by. See coming here to these guys means I don't buy it and I'm telling them.

This view alleviates fear at the same time it gives the act of going to law its meaning. Because law is for some recipients inscribed in an ambivalent relation to welfare, they can both do what they are "supposed to" and refuse to acquiesce. This image of law makes the journey to the legal services office seem ordinary, expected, appropriate for someone on welfare and, at the same time, it provides a way of standing up to those upon whom one is ultimately dependent.

57. The legal status of welfare has been, during the last two decades, a subject of intense scrutiny. Since Reich's now classic description of the "new property," a variety of substantive and procedural

What kinds of arguments do they deploy in trying to make persuasive appeals to their lawyers?

Maria, a thirty-three-year-old mother of seven, lives with her children in a three bedroom apartment. She describes herself as a regular churchgoer and is, by her own account, a "responsible" person and "strict" parent whose children have never "been in trouble." For her, being on welfare is a "shame," but something she "had to do," and she insists that when her children grow up they will never have to take public assistance. They will do something better with their lives than she has done with hers. Maria, like Spencer and others aspiring to "respectability," is openly contemptuous of "the welfare crowd," people who think that they have a "God-given right to live off other people" and who have no other goals or ambitions than to keep getting public assistance. Such people are, in her view, "troublemakers and welfare cheats."

Yet Maria herself is frequently in trouble with her landlord and with the utility company. While she is careful with her money, she cannot figure out a way to "pay everything at once." It is difficult for her to stretch her welfare payment to cover all her expenses, and, as a result, she is often late with her rent or unable to pay her utility bills. Several times she has asked for an increase in her welfare payments, but each time she has been turned down. As she put it, "I never complain. I just tell them how hard it is and hope they give me more help."

However, the first and only time she came to legal services Maria was not seeking an increase in benefits. Early in the winter of 1988, again finding herself short of funds and unable to pay her utility bills, Maria sought help from a private heating assistance program run by the New England Farm Workers Union. Things proceeded smoothly until she was asked to get a letter from her caseworker certifying her continuing eligibility for public assistance and noting the amount of her welfare benefits. She sought legal help when her caseworker refused to write such a letter.

While she had had what she described to her lawyer as the "usual" difficulties with the welfare system, things had never before ". . . come apart, you know, not gotten straight quick." This time she had "lost [her] innocence." She told him that

I wanted to get some help from New England Farm Workers, you know, to pay heat, for my gas. So the lady there wanted some proof about how much I get from the state. See I get help for my kids . . .

rights have been extended to welfare recipients. See Reich, *The New Property*, 73 Yale L.J. 733 (1964); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U.L.Q. 659 (1979). The impact of that extension is discussed by Simon, *supra* note 2; Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 Yale L.J. 1198 (1983); Rosenblatt, *Legal Entitlements and Welfare Benefits*, in *The Politics of Law* (D. Kairys ed. 1982); Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare*, 58 Minn. L. Rev. 211 (1973); Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. Rev. 201 (1985).

and this lady wanted to know why welfare wasn't giving me the difference, you know to pay my heat. So I called to ask my caseworker if she'd give me some paper to explain, and she refused to give me information about my own self. She said that people from New England Farm Workers, some rule said they were supposed to ask her, not me. But she never sent the information. I think she'd made some mistake, you know, covering up, when I'd run out of protective payments last year. . . . I wanted to kill her. What's she doing? She's trying to kill me and my kids. I'm trying to keep it all together, and it's just what I need. That they know. . . . How can anyone live with small kids without heat? You don't do that to nobody, treat them like a dog, don't do nothing but let them freeze.

Here Maria initially described her problem as a simple request for "information about my own self," talked, at least in the beginning, as if the information being withheld were her property, and openly expressed resentment at being denied something she felt belonged to her. However, the more Maria talked about her problem, the more her initial sense of entitlement was overwhelmed by the immediacy of her "need," and the emphasis on the invasion of her ownership interest gave way to a concern for getting help to pay her utility bill.

Indeed, almost immediately after insisting that the information being withheld was "mine," Maria told her lawyer, "Look, I don't really care about that [whether the caseworker provides the information]. What I gotta have is something to pay my gas. I don't got nothing now so I don't care how, just tell the Farm Workers it's okay." For her, rights talk was less important than obtaining a particular result. She shifted the ground of her appeal to law, moved away from the problem of the caseworker and sought direct action by the lawyer who, in her mind, became a substitute social worker. The lawyer could provide the authority and authoritative help she needed to satisfy the Farm Workers. It made no difference to her who gave them the information they needed just so long as someone would tell them "it's okay."

Maria saw her problem as a bureaucratic foul-up, and, like Spencer, a personal attack clothed in the distant, impersonal, abstract language of rules;⁵⁸ she sought legal help as a tool of self-defense and a displacement of her own violent revenge fantasy. While she lived in a world of pressing material need and saw herself, in contrast to welfare cheaters, as asking for "just what I need," her caseworker seemed at best to care about rules and compliance with rules and at worst to be engaged in bureaucratic cover-up. In Maria's view, neither welfare officials nor lawyers should be interested primarily in figuring out whether some rule has or has not been violated; she is impatient with law's technicalities because those technicali-

58. Popkin, *supra* note 20, at 104, reports that, unlike Maria, most of the welfare recipients in her sample believe that their caseworkers treat them fairly.

ties are all too often used to frustrate her efforts to get help in dealing with pressing problems. Maria knew and understood how her alleged failure to comply with "some rule" was being used, how her caseworker was able to manipulate rule-based arguments to protect bureaucratic, or perhaps even narrowly personal, interests, and to do violence to herself and her children.

As Maria later said to her lawyer, "What's all this stuff about a rule? What rule? Why do they always care about what rule you haven't followed?" What Maria wanted was for her lawyer to break through and ignore her caseworker's invocation of rules and to do exactly what the caseworker refused to do, namely act in response to her immediate life situation. She wanted him to end the violence which was hidden in the abstract talk of rules. Hers was a consciousness of equity working out its continuing battle with a conception of law as rule and rule following; hers was an argument about need seeking to break through bureaucratic rigidity.

By emphasizing human need over rules, Maria identified a recurring tension in the welfare system, a tension between the supposedly humane, moral sensibilities of enlightened professionals and the constraining narrowness of a formally rational organization. Though she was, at least in her own eyes, no troublemaker, she refused to give in and go along when the welfare bureaucracy, supposedly established to help poor people,⁵⁹ prevented her from doing what she believed was necessary to protect and provide for her children.⁶⁰ She searched for ways, within the existing welfare system, to resist what seemed an unjustifiable decision, and found a language for expressing her resistance within the complex and contradictory character of welfare itself.⁶¹

Unlike many other welfare recipients, Maria spoke about welfare in very idealistic terms, as a system of "doing for those who can't do for themselves," a system "to make people's lives for the better." In using those terms, she tried to find a way of bridging the gap between her own understanding of law and that of her caseworker; she asserted the superiority of the humane and moral over the bureaucratic and rule-bound. Her idealism was, in this sense, strategic rather than naive; it allowed her to mobilize the rhetoric of welfare itself to deal with that system's apparent failure.

59. Lipsky suggests that "The importance of social programs that formally address but fail to meet need is that they give . . . the appearance of systemic responsiveness while implicitly signalling people who remain dependent that they are unlucky or somehow at fault for failing to take advantage of these programs." See Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 20 Soc. Serv. Rev. 3, 10 (1984).

60. I. Susser, *Norman Street*, chapter 5 (1982). See also S. Sheehan, *A Welfare Mother* (1976).

61. As de Certeau argues, "Through procedures that Freud makes explicit with reference to wit, a tactic boldly juxtaposes diverse elements in order suddenly to produce a flash shedding a different light on the language of a place." See de Certeau, *supra* note 3, at 37.

In the end, Maria received the assistance she wanted from the Farm Workers, but her understanding of law and of the welfare bureaucracy did not prevail. Her lawyer refused to deal directly with the Farm Workers and explained to her that it would be inappropriate for him to do so. He cited an office policy which prevented him from doing an end-run around the caseworker and insisted, over Maria's objection, on contacting the caseworker and working the problem out with her.⁶² What mattered yet again was not the immediacy of Maria's need, but an abstract commitment to a particular way of doing things. Trying to escape what for her was a bureaucratic 'Catch-22' Maria found herself caught up in another maze of bureaucratic policy and routine. While this time she got what she wanted, she was as baffled as ever. She never found out what the rule was that required direct contact between the Farm Workers and her caseworker; nor was she ever informed about what transpired between her lawyer and caseworker. Her lawyer just told her that "things had been taken care of."⁶³

The same sense of urgency which Maria brought to the legal services office, and the same language of need which she and Spencer deployed in dealing with their lawyers and with me, was also apparent as other welfare recipients articulated their grievances against the welfare bureaucracy.⁶⁴ Because welfare programs are set up to insure minimum levels of subsistence, recipients think that great sensitivity should be shown before benefits are reduced or terminated. Their claims are thus often framed as appeals beyond rules to a minimum standard of decency.⁶⁵

This is illustrated by Ellen, a twenty-eight-year-old mother of four, who came to the legal services office because, as she told her lawyer:

62. Unlike other welfare recipients, *see supra* text accompanying note 33, Maria did not think that a good lawyer was one who would make a good deal.

63. As I listened to Maria, I wondered whether I was guilty of the same tendency to abstract, and the same failure to comprehend or take seriously her immediate, material needs which she found so troubling in her dealings with both her caseworker and her lawyer. This worry reappears as I try to put in writing what I learned in the course of studying thirty-eight welfare recipients and as I try to fit their understandings into a framework of debates about legal consciousness. These are, of course, general concerns, concerns that go beyond my particular research. *See* J. Van Maanen, *supra* note 23; R. Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (1989); G. Marcus & J. Clifford, *Writing Culture: The Poetics and Politics of Ethnography* (1986).

In these acts I am rendering abstract and distant what is for the people I studied very real and very close at hand. Such abstraction, as Maria's claim vividly demonstrates, is, in many ways, their enemy. It is what they encounter in their dealings with caseworkers and lawyers; it is part of a conceptual apparatus which leaves people hungry and calls that justice or which responds to a call for help with a discussion of rules.

This is an example of what Bourdieu calls "symbolic violence." As he defines it, symbolic violence is "that form of domination which, transcending the opposition usually drawn between sense relations and power relations, communication and domination, is only exerted *through* the communication in which it is disguised." P. Bourdieu, *Outline of a Theory of Practice* 237 (1977).

64. *See* Briar, *supra* note 5, at 374.

65. These appeals are at variance with the belief that law is all politics and that it is only "who you know" that counts. These appeals beyond rules coexist with a deep cynicism about the welfare bureaucracy and the legal system.

I was receiving food stamps and still we wasn't eating right. So, I got a temporary job, nothing, not much, just a little more food. And then, I guess there are so many weeks you're supposed to let them know you're working. I was getting food stamps and I heard there was going to be a layoff and they stop my stamps and then the job goes. Why do that? Why? Don't they think we should eat? I'm not living high. I'm trying to get enough to eat. That's what this is about.⁶⁶

Lawyer: Yeah, there are so many weeks, but before they take anything they. . . . Did they tell you before your stamps were stopped?

I . . . I, who knows? Maybe, I can't remember. But who cares. I know I'm not getting them anymore.

Lawyer: It is very important. . . .

No, not for me. I can't remember.

Ellen seemed surprised by her lawyer's question and tried to redirect their conversation, to get it back to what she cared about and away from what seemed to her to be an insignificant detail. In this brief exchange Ellen suggested that she both could not remember whether she was told before her food stamps were terminated and that she did not think that she should have to think about or recall it. Her response was as much a refusal to shift the agenda as it was a failure of memory.⁶⁷

Two different conceptions of the meaning of Ellen's problem surfaced in this exchange. For her, the problem was about getting enough to eat; for her lawyer, the important question seemed to be one of notice. His focus on that question parallels the concern of the welfare people about Ellen's own failure to give them notice when she was working. Here Ellen could have gone along with her lawyer's conception and agreed to use the issue of notice the way it had been used against her. Instead she held her ground and, in so doing, kept alive the question of need, of hunger, of a minimum standard of decency.

Ellen tried to get her lawyer to understand the situation in those terms and to get him to communicate that understanding to the welfare people. Yet Ellen did not talk about her loss of food stamps as a matter of losing something which she had been promised or to which she was entitled as a matter of law. She said that the welfare people could not comprehend (they "just can't understand") and deal with her problem because they had never been hungry. All they are concerned with is making sure that they do not make overpayments, and

66. Federal rules require that documentation of earned income be provided on a monthly basis. Recipients must inform their caseworkers how many hours they work and how much money they earn and provide proof in the form of check stubs or letters from employers.

67. Welfare recipients frequently do not remember what are for their lawyers important details of their cases, nor are they able to provide the kind of paper record that their lawyers sometimes think is essential. As one somewhat sarcastically put it in responding to his lawyer's request for documents, "I ain't got enough room to keep a filing system and I ain't got a secretary."

they are too eager, in Ellen's words, to "flush" recipients for failing to comply with "some nit-picky" technical requirements.⁶⁸ Those requirements, she said, seemed to be more important to them than dealing with her hunger.

Here again we see how an appeal to human decency and a humane professionalism is used as a resource to oppose what appears to be a bureaucratic pathology and an excessively narrow preoccupation with rules. Ellen sought some way of dealing with her lawyer and the welfare bureaucracy without resorting to a formalistic incantation of rights and rules. She resisted her lawyer's repeated efforts to talk about her problem as an issue of failed procedures or violations of rules and to talk about the problem of not having enough to eat in impersonal, abstract terms. In so doing she avoided playing out her sense of grievance in terms with which the welfare bureaucracy would be most familiar and with which they would be most comfortable. As she said, "They know about all that rules and procedures. . . . Let them go hungry for a while and they won't be no talk about that shit."

Like Maria, Ellen deployed a language of persuasion that depended on ideas of right which are necessarily part of the life experience of persons at the margins of subsistence. She insisted that the normative commitments of the welfare community be heard and that the appropriateness of those normative commitments be recognized even as she used the instrumentalities of law to transmit that insistence. In the end, Ellen's food stamps were restored, but as she told me, "I don't know how or why, but I don't think it was because my lawyer ever really knew what I was going through. It was like some kind of game for him: You know some rule they didn't follow and he had caught them. It was no game to me."

Yet for Ellen more was at stake than the articulation of the normative commitments of the welfare community. In using the language of need she appealed to something she assumed was held in common by herself, her caseworker and her lawyer, namely, a shared humanity and a shared aversion to human suffering.⁶⁹ It is

68. The phrase "being flushed" was used to describe the experience of having one's benefits reduced or terminated. Bane and Dowling talk about the "churning" of clients" to refer to a process of "quick termination from and reinstatement to the assistance rolls—until clients complete procedural requirements." See *supra* note 2, at 5.

69. This language, some might argue, suggests that the welfare poor do not use legal ideas in constructing or framing their relations with the welfare bureaucracy. For example, Merry, *supra* note 11, at 65, seems to use law and rights interchangeably and, in so doing, to limit her understanding of the nature of law. Thus in discussing the pervasive use of the language of rights among working class persons experiencing interpersonal problems she says, "The legal definition is not the only one possible. . . . The language of rights recurs frequently . . . suggesting that . . . legal concepts are commonly used to interpret the behavior of neighbors, children, and family members" (emphasis added). See also Merry, *The Discourse of Mediation and the Power of Naming*, 2 Yale J.L. & Humanities 1, 6 (1990).

The vocabulary of law, however, provides ample room for formulating claims in various ways. See Silbey & Sarat, *Dispute Processing in Law and Legal Scholarship*, 66 Den. U. L. Rev. 437 (1989) and Fraser, *Talking About Needs: Interpretative Contests as Political Conflicts in Welfare-State Societies*, 99 Ethics 291 (1989). Because the content of legal rights is built on the basis of various kinds of calculations and considerations, many different conceptions of social relations are encoded in

because she assumed that that was the lowest common denominator among them that she was both so puzzled by the actions of the welfare bureaucracy ("Why? Don't they think we should eat?") and surprised by her lawyer's focus on the notice question.

Ellen, Maria and others like them (generally those who Spencer would call the "respectable" poor) understand law as being about more than rules and compliance. However, they do not think of welfare as a form of property the use and enjoyment of which should be recognized as presumptively theirs,⁷⁰ and see denials, reductions or terminations of benefits as invasions, in either the literal or metaphorical sense, of a domain within which they believe themselves to be sovereign.⁷¹ Few spoke about denials, reductions or terminations of benefits as if they had some *a priori* claim to those benefits. However, neither were their grievances phrased in such a manner as to suggest that problems were conceived of as the loss of a mere privilege or gratuity.⁷² Recipients interpret loss of food stamps, denials of emergency assistance, reductions in AFDC and similar events in a way that ignores the right/privilege distinction and act as if rational appeals could be made, as if the immediacy of their life situation would have a moral force that would compel attention and response. Keeping this belief alive was an important part of their aspiration to

doctrine and many different ways of constructing law are found in communities, welfare bureaucracies and legal services offices.

The legal constitution of social relations is thus multi-layered and complex. In a wide variety of areas, from negligence and nuisance to contracts and antitrust, claims are formulated in terms of the most efficient use of resources, and rights are derived from explicit economic calculations. The adequacy and limits of such calculations are discussed by B. Ackerman, *Reconstructing American Law* (1984). See also Calabresi & Melamed, *Property Rights, Liability Rules and Inalienability*, 85 Harv. L. Rev. 1089 (1972).

The law of welfare, on the other hand, relies on the language of needs, needs tests and needs assessments. Simon argues that a jurisprudence of need was developed by "New Deal social workers and . . . natural rights lawyers." They ". . . found a source of entitlement in the notion of minimum need . . . and sought to develop minimum need as a sufficiently determinate standard to appraise and reform the system." Simon, *supra* note 2, at 1459. So while welfare recipients like Maria and Ellen seldom use the language of rights in an explicit manner, their talk about needs is a way of articulating demands that is, or ought to be, recognizable. However, because this jurisprudence of need has developed its own bureaucratic self-understanding, welfare recipients are often unable to articulate their sense of need in ways that are recognizable to those in charge of the welfare system.

As Fraser puts it, in the welfare system ". . . people's needs are subject to a sort of rewriting operation. Experienced situations and life-problems are translated into administrable needs. And since the latter are not necessarily isomorphic to the former, the possibility of a gap between them arises." See Fraser, *Women, Welfare and the Politics of Need Interpretation*, 2 Hypatia 103, 114 (1987). For the welfare bureaucracy, need is a matter of rules and tables which measure it and arrange human situations in a static relationship to those impersonal measures. This way of thinking about need flattens its time dimension and obscures its embeddedness in ongoing human relationships. For welfare recipients, in contrast, need is thought about in terms of obligations to children and the changeable exigencies of life which leave Spencer afraid of starvation, Ellen worried about how she is going to eat and Maria uncertain of how she will keep her children warm during the winter.

70. See Reich, *supra* note 57; Michelman, *In Pursuit of Constitutional Welfare Rights*, 121 U. Pa. L. Rev. 962 (1973).

71. Maria's initial insistence that she was entitled to information about herself was an important exception.

72. The welfare recipients I studied would disagree with the argument made by Judge Holtzoff, in *Smith v. Board of Comm'rs*, 259 F. Supp. 423, 424 (D.D.C. 1966), that "[p]ayments of relief funds are grants and gratuities."

respectability. As Ellen said, "Good people know the difference between right and wrong. They don't have to be told what to do by no rule."

Occasionally one of the welfare recipients who Spencer would have labelled a member of the "welfare crowd" did press their lawyer to redress what they saw as a violation of the welfare system's own rules. Such an appeal was for them, however, a sign of despair if not resignation and hopelessness. The invocation of rules was generally a last-ditch effort to exercise leverage where recipients thought there were no shared values which might be deployed against bureaucratic indifference and insensitivity. It was just one more way in which some recipients tried to "work the angles" or "beat the system at its own game," and it represented an ironic mirroring of the mechanical, formalistic attitude toward rules they encounter in the welfare bureaucracy.

As Louise, middle-aged mother of four, told me, "If you deal with them [caseworkers] long enough, you know, like the rest of the world, they don't give a shit about you. The only thing that you've got on them is when they trip up, when they don't do like the rules say and then you can maybe make a deal."⁷³ Waiting for the moment "when" caseworkers "trip up" is yet another indication of the conjunction of the tactical and the temporal in the legal consciousness of the welfare poor. Here Louise stands ready to "accept the chance offerings of the moment . . . [to create] surprises" for those whose power defines the usual deployment of advantage and disadvantage.⁷⁴

She went to legal services when she was told that court-ordered support for the child of her third husband would be figured into the calculation of her total family income and that this might result in a reduction of AFDC benefits which had just resumed. As she told her lawyer, such a reduction should be "against the law and . . . illegal for them not to be giving me more. They aren't giving me my rights." She urged her "to find out how the decision was made and whether any rules were broken."⁷⁵ In so doing Louise, like other members of the "welfare crowd," talked about the welfare bureaucracy as if it only could be held accountable to its own system of specific and unbending rules.⁷⁶

73. Louise had had extensive experience with lawyers, judges and other legal officials before she showed up in the legal services office. Her oldest child, a twelve year old boy, was frequently in trouble with the police and juvenile authorities. In addition, Louise had been in and out of drug programs during the last several years as well as on some form of public assistance throughout most of her life.

74. See de Certeau, *supra* note 3, at 37.

75. Louise persisted even after her lawyer said that it was not against the law to include child support in the calculation of total family income. However, she shifted ground slightly and suggested that there should be "something to make sure this doesn't happen." In the end, she was told that there was nothing that could be done.

76. Louise displays a residual formalism which identifies the protection of rights with compliance to law, a formalism traces of which survive in all post-realist reconstructions of law, see Tushnet, *Post-Realist Legal Scholarship*, 1980 Wis. L. Rev. 1383 (1980); Sarat, *The "New Formalism" in Disputing and Dispute Processing*, 21 Law & Soc'y Rev. 695 (1988).

However, Louise was not hopeful that the appeal to rules would produce a beneficial result. As she told me (echoing sentiments described earlier in this paper), "it's all politics. Like even if they broke the rules, who says my lawyer is going to do anything about it." In her view, the rules of law are stacked against welfare recipients, and talk of rights is, in the end, just talk. For her, rule based arguments, though they are not particularly potent, are the last and perhaps only weapons available.

VI. CONCLUSION

The welfare poor understand that law and legal services are deeply implicated in the welfare system and are highly politicized. As a result, they are both uncertain and afraid when they seek legal assistance. Nevertheless, some use law and lawyers to get the welfare bureaucracy to live up to its own *raison d'être*. Uncertainty and fear do not defeat hope, and the discourse of need is used to appeal to a humane professionalism or a shared humanity. For others, all that is left by the time they go to legal services is the possibility of defeating the welfare bureaucracy on the basis of a "technicality." Their invocation of rules is an act of desperation as well as a parody of welfare's own bureaucratic pathology. Yet both the discourse of need and rules occur on law's terrain and depend on a vocabulary made available by law itself.⁷⁷ Both reaffirm law's dominance even as they are used to challenge the decisions of particular legal officials—or to provide the grounds for a redress of grievances.

The understandings and actions of the welfare poor do not fit easily with images of a population deeply attached to ideas of law's autonomy, neutrality and disinterestedness⁷⁸ or a so called "myth of rights."⁷⁹ By

77. See P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law* (1978).

78. See, e.g., Singer, *supra* note 10 at 12. See also Gordon, *supra* note 10, at 286.

In another work Gordon argues for a less constrained view of the nature of legal consciousness. He suggests that ". . . law figures as a factor in the power relationships of individuals and social classes but [it is] also . . . omnipresent in the very marrow of society. . . . [L]awmaking and law-interpret- ing institutions have been among the primary sources of the pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naivete and some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives. To put this another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live." See Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 109 (1984). Note how Gordon makes the empirical claim that law is "omnipresent" in the consciousness of "ordinary people."

Such an empirical claim is, however, left unexamined by many of those whose treatment of legal consciousness has been limited to judicial opinions. Some argue that such opinions work primarily at the ideological level. They state, "A principal vehicle for the transmission of . . . ideological imagery has been and continues to be 'the law'." Gabel & Feinman, *Contract Law as Ideology*, in *The Politics of Law* 173 (D. Kairys ed. 1982) Later in this same essay Gabel and Feinman argue that "'The law' does not enforce anything, however, because the law is nothing but ideas and the images they signify. Its purpose is to justify practical norms. . . . The key social function of the [judicial] opinion . . . is . . . to be found in the . . . rhetorical structure of the opinion itself, in the legitimation of the practical norm that occurs through the application of it in the form of a 'legal rule.'" (at 181). For an important criticism of this view of law see Cover, *supra* note 6.

adding this paper to the growing body of scholarship on legal ideology and legal consciousness,⁸⁰ I intend to highlight divergent strands among the welfare poor and differences between the legal consciousness of the welfare poor and other groups in society. In so doing, I want to suggest that legal consciousness is, like law itself, polyvocal, contingent and variable.⁸¹

Trubek, *supra* note 1, at 611 identifies two places, both in footnotes, where scholars interested in the doctrinal construction of legal consciousness, see Klare, *Labor Law as Ideology*, 4 *Indus. Rel. L.J.* 450 (1981); Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buffalo L. Rev.* 205 (1979), seem to acknowledge the need to study the recipients as well as the producers of law and the possibility that the cultural codes embodied in legal doctrine may not be translated into mass legal consciousness.

My effort to understand legal consciousness and ideology complements the concerns of Critical Legal Studies which Trubek contends rests on ". . . notions about relations among the ideas we hold about law and society, the structures of social life we are engaged in and the actions we take. . . ." *supra* note 1, at 575; see also Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law*, 62 *Minn. L. Rev.* 1049 (1978); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 *Minn. L. Rev.* 265 (1978); Klare, *Labor Law As Ideology*, 4 *Indus. Rel. L.J.* 450 (1981). Moreover, Hutchinson, *Introduction*, in *Critical Legal Studies* 227 (1989) contends that,

A crucial plank in the Critical platform is the need to appreciate the operation of law as ideology or as a particular mode of consciousness. CLS writers go beyond the marxist notion of ideology as 'false consciousness'. . . . Instead CLS insists that ideology is . . . a lived relation in the world . . . ; law does not so much falsely describe the world, as inscribes it with its own image. Law and legal consciousness are constitutive features of social life and change.

My efforts are, however, critical of those within that movement who embrace a top-down view of the relation of law and society. My own work attempts to illustrate the co-existence of various elements of formalist, realist and post-realist legal thought in contemporary legal consciousness by getting beyond the mandarin materials of elite legal culture and studying other "sites" in which law and legality are produced. For a useful discussion of the relationship of this kind of work to CLS see Trubek & Esser, *supra* note 22, at 31-34. My interest in this kind of research, the effort to describe law as it is seen from the bottom-up, is partially a response to an argument made by Cover, *supra* note 6, at 1629.

79. Scheingold argues that a "myth of rights . . . exercises a compelling influence . . . and provides shared ideals for the great majority. . . . Even otherwise alienated minorities are receptive to values associated with legal ordering. . . . [W]hile we may respond to the myth of rights as groups . . . most of us do respond." See Scheingold, *supra* note 9, at 78-79.

There is some evidence to support this view. For example, many of those who have studied public attitudes toward the Supreme Court note a widespread diffusion of such beliefs. See Casey, *The Supreme Court and Myth*, 8 *Law & Soc'y Rev.* 385, 393 (1974); Kressel, *Public Perceptions of the Supreme Court*, 10 *Midwest J. Pol. Sci.* 167 (1966); Dolbear, *The Public Views the Supreme Court*, in *Law, Politics and the Federal Courts* (H. Jacob ed. 1967).

80. See Hunt, *supra* note 2; Hay, *Property, Authority and the Criminal Law*, in *Albion's Fatal Tree* (D. Hay et. al. ed 1975); E. P. Thompson, *Whigs and Hunters* (1975); Macaulay, *Images of Law in Everyday Life*, 21 *Law & Soc'y Rev.* 185 (1987); Amherst Seminar, *supra* note 14.

81. These qualities of mass legal consciousness are highlighted in recent sociolegal research that describes the distinctiveness of insider views of law and the variability of legal consciousness within particular social groups. Among legal professionals, for example, there is evidence that lawyers actively debunk the idea of law's neutrality and disinterestedness and of the salience of rights in day-to-day interactions with clients. See Sarat & Felstiner, *supra* note 34. Lawyers tell their clients that the legal system is not governed by rules and that judges and other officials allow their own preferences and interests to shape legal decisions. They tell them that rights mean only what judges say they mean.

Other research (see, for example, M. Feeley, *The Process Is the Punishment* (1979) and Yngveson, *supra* note 12) suggests that when citizens use judicial institutions they are often introduced to a legal discourse in which formal rights play but one part. See also Kennedy, *Toward an Historical Understanding of Legal Consciousness*, 3 *Res. Law & Soc.* 3 (1980); Kennedy & Gabel, *supra* note 39; Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997 (1985). In that context, law speaks the language of individuation and is concerned with preserving relationships and

Such polyvocality, contingency and variability do not, however, dislodge the power of law or the dominance of legal rules and practices. That is surely the case with respect to the situation of poor people who find themselves embedded in the hierarchical relations which characterize the welfare system. Responses to that system are, in de Certeau's sense, tactical,⁸² and may, as we have seen, juxtapose differing elements of its official ideology (need as against rule formalism) or deploy particular elements to hold officials to account. In those responses some aspects of the official ideology are incorporated into new ideological configurations by persons seeking to

responding to human needs. (In another paper I have tried to track the way in which developments in legal practice and legal scholarship help to produce these various vocabularies of law. See Silbey & Sarat, *supra* note 69.

Outside such legal institutions, law's meaning seems to vary within, as well as among, different social groups. See Engel, *The Oven Bird's Song*, 18 *Law & Soc'y Rev.* 551 (1984); Greenhouse, *Courting Difference*, 22 *Law & Soc'y Rev.* 687 (1988); Bumiller, *supra* note 32; Merry, *supra* note 11. Engel, for example, shows how residents of "Sander County" think about particular problems (those involving contracts and repayment of debts) in terms of rights even as they resist or ignore rights in dealing with other kinds of issues (personal injuries). While these people see the assertion of rights in contract cases as supportive of a valued moral order in which broken promises create entitlements to legal redress, they think that asserting rights in personal injury cases is simply a cover for greed, self-interest and economic calculation. In addition to this problem-oriented segmentation in legal consciousness, a segmentation that allows residents of Sander County to both use and reject the language of rights, their relations with "outsiders" are thought about in different terms than relations with "neighbors" and long-time residents. Law is regarded as appropriate in dealing with the former and inappropriate in dealing with the latter.

Bumiller shows how the intended beneficiaries of particular legal protections—victims of discrimination—believe in the significance of law and yet refuse to take advantage of its protections. Those people ". . . view law as both protective and destructive. . . . [They fear] that if they seek a legal resolution [to their problem] they will not gain power but [will] lose control over a hostile situation. They resolve the ambiguity by rejecting the relevance of law to their lives," *supra* note 32, at 4. Their experiences, their grievances, are not understood in terms of rights, and law does not help interpret those experiences or make them meaningful. However, at the same time that law seems irrelevant to their experiences with discrimination, the people with whom Bumiller talked believe that ". . . the law in 'absolute' terms would rectify the injustices done to them." *Id.*, at 104. While rejecting legal protection in one context, they embrace it as an abstract possibility. They see themselves as having rights the content and particular utility of which are not specified.

Perhaps the most extensive empirical investigation of the complexities of contemporary legal consciousness has been carried out by Merry. See Merry, *supra* note 11; Merry, *Everyday Understandings of the Law in Working-Class America*, 13 *Am. Ethnologist* 253 (1986); *supra* note 52. Merry shows that among working class Americans a wide variety of personal and interpersonal problems, for example, problems involving barking dogs or loud noise, are understood in the language of law and are conceptualized as invasions of property. *Supra* note 11, at 65. For these people, property rights provide a set of symbols through which experience is interpreted and which highlight particular courses of action while making others seem inappropriate.

But, as Merry says, while members of the working class display a strong attachment to Scheingold's "myth of rights," "their ideology is complex . . . [It incorporates] competing interpretations of the nature of legal regulation and . . . [shifts] with experience with the legal system." Merry, *supra* note 11, at 60. The more experience those people have with law, the closer they come to the insider view in which rights seem less relevant and less absolute. Like Bumiller's victims of discrimination, Merry's working class court users remain attached to law, at least at a symbolic level. They do so, as Merry suggests, ". . . not because they are deluded or convinced that the possession of legal rights makes them the economic or political equals of the rich, but because the law, from time to time, delivers for them," and because the law is less unequal and less stratified than the society in which they live. Merry, *supra* note 11, at 68.

82. "Lacking its own place, lacking a view of the whole, limited by blindness . . . resulting from combat at close quarters, limited by the possibilities of the moment, a tactic is determined by the absence of power just as a strategy is organized by the postulation of power." de Certeau, *supra* note 3, at 38.

resist dominant power while other elements are rejected out-of-hand. Thus the official ideology is "both a resource and a constraint."⁸³

Continuing dependency of the kind that the welfare poor experience can and does coexist with conflict and challenge. For them, "the law is all over," but its complex structure provides opportunities for opposition even as it produces fear and uncertainty. As Yngvesson argues,

'[T]he spirit of the law', while embodying the concerns of a powerful and dominant professional elite, is not simply invented at the top but is transformed, challenged and reinvented in local practices that produce a plural legal culture in contemporary America. Recognition of plurality [or difference] does not eclipse the reality of pervasive cultural understandings and values. . . . Hegemony assumes plurality: '[It] does not just passively exist as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not at all its own.' . . . The interpretation of key symbols . . . is contested, while the dominance of a particular structure of differences in society is left unquestioned. Only by viewing legal culture in this dynamic way can we explain popular consciousness as a force contributing to the production of legal order rather than as simply an anomaly or a pocket of consciousness 'outside' of law, irrelevant to its maintenance and transformation.⁸⁴

My research indicates that the welfare poor frequently contest what are often thought of as the key legitimating symbols of law, in particular the association of law with neutrality, disinterestedness, rule determinacy and rights. They are not "taken in" by those symbols, and, like others with continuous, regular contact with law, they have a realistic, if not cynical, view. They have complex and sophisticated views of the bureaucratic and social relations that obtain between welfare workers and legal services lawyers.

Yet neither their realism nor their sophistication guarantees the production of counter-hegemonic views of law. Continuous, regular contact does not mean that the welfare poor are included, or can establish themselves, as full participants in the construction of legal meanings or in the practices through which power is exercised and domination maintained. Because the welfare poor are in positions of continuing dependency,⁸⁵ they must engage in an uphill struggle to make their voices heard and their understandings of right and justice part of the legal order.

They use lawyers in that struggle even though they have little hope of success in battling the welfare bureaucracy and even though neither law

83. Merry, *Everyday Understandings*, *supra* note 81, at 255.

84. Yngvesson, *supra* note 14, at 1693.

85. The meaning of such dependence is discussed by Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. Rev. 999 (1988).

nor legal services lives up to its self-proclaimed ideals. They do so because both provide strategic resources in an ongoing, if modest, struggle with the welfare bureaucracy.⁸⁶ Law, as well the complex relationship of legal services and welfare, is a social fact the broad parameters of which are not questioned; yet it is a social fact which provides room for maneuver and space for resistance.

It is, however, a social fact about which moral judgments are made. The welfare poor call their caseworkers, and sometimes their lawyers, to account for being inhumane or unfair or for violating the system's own rules. They describe law as corrupt, as institutionalizing privilege and treating the poor differently from others and as working through a system of arrangements and deals. Nevertheless, they are not disillusioned by law's failure to be disinterested, neutral or rule governed because they do not expect law to be that way.⁸⁷ They can be critical, and cynical about the possibility of change, without being paralyzed; neither their criticism nor their cynicism prevents them from using one set of rules and practices, lawyer's law, to respond to the rules and practices as well as the recalcitrance and inertia of the welfare bureaucracy.

Law, as they see it, is no better, and no worse, than the social world in which it is embedded. Thus the welfare poor construct a consciousness of law on the basis of their daily deprivation, their experience of unequal, often demeaning treatment, and their search for tools with which to cope with an often unresponsive welfare bureaucracy. Law is, for the welfare poor, embodied in a particular set of lived conditions; theirs is a law of practices, not promises, of material transactions, not abstract ideals.

In all this the welfare poor recognize that their experience is different from that of others in this society, whether they be social scientists seeking to understand the welfare poor or the incompletely identified class of "the rich." Differences arise, in one respect, because the poor operate in a space whose meaning they do not define, but whose dominance can be resisted through a "clever *utilization of time*, of the opportunities it presents and also of the play that it introduces into the foundations of power."⁸⁸ Differences arise, in another respect, because the identity of the welfare poor is, in substantial part, legally constructed, and because the legal constitution of their subjectivity is visible in a way the legal constitu-

86. For a similar argument in a different context see Merry, *Law as Fair, Law as Help: The Texture of Legitimacy in American Society* (unpublished manuscript) (1987). As Merry argues, less powerful groups in America "do not generally think that legal ordering has produced a fair and just society. More often, the law serves as a resource in struggles over control. . . . Legitimacy has many facets: it is not only a matter of beliefs and values but also social practices and strategies. Perhaps the power and resilience of the legitimacy of legal authority in American society, despite its failure to live up to its claims of equity and fairness, is the result of its utility. . . ." *Id.*, at 31. See also Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 *Wis. L. Rev.* 379 (1983).

87. If they are disillusioned at all it is by the failure of the welfare system to take human need seriously.

88. de Certeau, *supra* note 3, at 39.

tion of the subjectivity of others is not.⁸⁹ This is what Spencer and others were trying to communicate when they insisted that I would not understand them. The law that is “everywhere” in their lives is given meaning in the particular social relations which comprise the welfare experience. Perhaps Spencer’s challenges and his playful skepticism about my research were his way of trying to insure that the “law” of our relationship would be different, and perhaps better, than the law which governed his dealings with caseworkers and lawyers.

89. To talk about the legal constitution of identity is to talk about the way human subjectivity is “created by and through a range of different discourses” and to acknowledge that to some extent the law helps define what it means to be a person. “The creation of legal subjects involves the recognition of ‘the law’ as the active ‘subject’ that calls . . . [us] into being.” See Hunt, *supra* note 2, at 15. Yet the creation of legal subjects is never fully a product of state law. It occurs through complex interactions between state actors and individuals, through the articulation of a vision of the self in legal doctrine and in the appropriation of those visions in social relations. See, e.g., Hunt, *supra* note 2.

Thus many welfare recipients struggle to resist the official definition of their subjectivity. They struggle to maintain their dignity against the impersonality of the bureaucratic settings in which they are engaged. They struggle to escape legal rules which demean them or to create an idea of law through which they can express their normative views. Yet the struggle to escape law or to find a meaningful place within it is, for them, sometimes overwhelmingly difficult since their engagements with the welfare bureaucracy are ongoing and the power differentials within that bureaucracy are so enormous. See R. Elman, *The Poorhouse State: The American Way of Life on Public Assistance* (1966).

