2008

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Law on the Street: Legal Narrative and the Street Law Classroom

Elizabeth L. MacDowell

Every new and important understanding or insight that I have reached and found a way to articulate in my writing has come from dialogue with my students. . . .

I. Introduction

This essay is about the disassociation of law from context—and therefore, from the people it is most directly designed to benefit—that can happen in the classroom, and why that matters. For the purposes of this essay I will discuss two types of classrooms: the law school classroom (including, but not limited to my own school, Boalt Hall), and the inner-city high school classroom, where I taught Street Law during the fall semester of my third year. As this suggests, this essay is also a reflection on my own law school experience, a making sense of the process and meaning of becoming a “person of the law.” Thus, it is appropriate to begin with how my law school experience brought me to Street Law.

I was one of those students who was miserable in the first year of law school—not because of all the reasons people who don’t go


2. I thank my professor, Linda Hamilton Krieger, for this phrase.

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to law school assume, but because it was for me a kind of spirit death. As if that was not bad enough, I could not understand what in the law school environment was causing my misery. By the end of that year, I was obsessed with figuring out what had happened to me, and to so many friends who had also suffered during their law school years. What was the seemingly invisible force that did such damage? How could it even be described? One friend, out of school and practicing for nearly twenty years, still riled at the discussion of her painful law school experience. "There just aren't words for it," she repeated over and over. Hearing this, I decided that I would remember everything people told me about their law school experience and write it down, and for a while I did. I saw this project as a kind of post-apocalypse record keeping.

Interestingly, many of the stories I collected not only described losing the ability to speak, but used metaphors of eating, swallowing, and indigestion to describe or explain the painful psychological effects of law school. One friend's use of the eating metaphor was particularly interesting to me. According to my friend, the trouble with law school could be traced to the legal text itself. "You can't eat it!" she exclaimed. "It cannot be integrated with your intellectual, spiritual, experiential self." The resulting alienation, to her, was akin to a profound indigestion. You just can't eat it.

Eventually, this urgency of articulating what the "invisible" problem of law school was about faded. Focused more on achieving some type of meaningful engagement (and mental health), I determined to seek out points of contact within the education process where I might renegotiate the relationship between myself, law school, and what it might mean to be a lawyer. It was in this context that I signed up for a clinical program called Street Law: a national program, administered through local law schools, that
places second and third year law students in inner-city junior high and high schools and within juvenile facilities to teach a course in “practical law.” The curriculum for my semester, for example, included a general introduction to the legal system, and criminal, family, housing, and consumer law.

The Street Law program appealed to me because I thought it would provide a powerful reality check in terms of connecting as a law student with a community far from the law school classroom. It also fit with my conception of one of the meaningful things I could do as a lawyer: obtain important, specialized knowledge, associated with power, and make it available to people who otherwise lacked access. My instinct was that such transmission of information was empowering, in and of itself. Ironically, I did not think about the fact that receiving legal information had, at least initially, been distinctly disempowering for me and many people I knew.

I was assigned to teach Street Law to a class of juniors and seniors at Castlemont High School in Oakland. Our classroom was located in a portable at the rear of the campus. It was one of a dozen or so classrooms, mostly unused, which lay beyond the main campus area, separated from the rest of campus by a high cyclone fence. After the late bell, that twenty foot fence was padlocked shut, and there was no direct route to the main building. Physically separated from the heart of campus, the isolation was intensified by the fact that no administrators or security ventured back to the area of my portable. Indeed, my supervising teacher told me that no one from administration had visited her portable—even to observe her teaching—in her four years at Castlemont.
The lack of supervision, and tension among the students (including interrelated gang and racial conflicts), corresponded with regular outbreaks of violence in the area where my classroom was located. Frequently the lights went out. There was no heat. Sometimes, standing in that portable, attempting to lecture to my students in the near-darkness, the air was so thick with depression and futility I could hardly speak. I could feel each word take form and drop, seemingly without justification for its very existence. My students had spent their entire tenure at Castlemont in similar conditions.

Talking to my students about the law in this context, I was faced with the contrast of my own unexamined idealism about the transformative—and normative—power of the law. I also had the disheartening sense that I was not offering the students information or skills with practical or otherwise meaningful value. More often I felt that I was contributing to a sense of alienation and a kind of dislocation that reminded me of my own law school experience. This problem felt particularly strong when dealing with issues of anti-discrimination law and policy, for example in the housing law section. Anti-discrimination law seemed particularly relevant to my students, yet at the same time absurd in relation to what I grasped about the reality of their lives. Moreover, the way I understood the task of teaching them the law left little room for us to bring that reality to the fore and engage it with the legal text. If the project was to bring these youth knowledge of the law, how could I do it in an empowering, meaningful, or at least non-damaging way? And how much of this challenge lay in the nature of the beast I brought with me: the inedible legal text?

In this essay, I argue that the failure of anti-discrimination law to address the problems of subordination reflects the hegemonic perspective in legal narratives. For the lawyer concerned with
social change, it is imperative to identify these narratives and the ways in which they not only inhibit deep social change, but may perpetuate the conditions of subordination. Yet, law school polices against the consciousness necessary for the lawyer to identify the hegemonic narrative in the law, and often instills attitudes which are antithetical to the project of social change. In this context, Street Law is an arena for the development of counter-hegemonic consciousness in the lawyer and in subordinated communities.

Literature on narrative from the legal and social science communities inform this analysis. Activist legal academics and practitioners have increasingly turned to narrative as a method for invigorating theory, practice, and the relationship between the two. From the insight that law and legal storytelling is neither fixed nor objective, these scholars have argued for the transformative potential of incorporating traditionally excluded voices and viewpoints into legal discourse; they have utilized out-group\textsuperscript{3} stories to reexamine strategies in community law practice,\textsuperscript{4} focus critiques of specific laws and policies,\textsuperscript{5} and have promulgated narrative itself as an alternative form of academic

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expression. Explicit or implicit in this work is an understanding that the transformative potential in storytelling exists for both speaker and listener (roles which, of course, may be dynamic). Thus, inseparable from any further instrumental goals, the speaker may find healing in articulating an experience which had formerly been excluded or denied; the listener may enrich their understanding of the world by sharing in that experience.

On a complimentary and often overlapping path, social scientists examining the relationship between law and society have also focused increasing attention on narrative. Generally speaking, these scholars conceptualize narrative as a social phenomenon whereby understandings of power and identity are both shared and constructed. In addition to studying how narratives are produced and function as social action, social scientists have used narrative as a source of data regarding, for example, perspectives on and utilization of existing legal resources and remedies. In either context, these scholars' focus on the social dynamics of legality in daily life (inside and outside specifically legal institutional settings) broadens understanding of the significance of adding new perspectives to the project of legal criticism.


7. Plea, supra note 3, at 2439.


As will be seen in Part II of this essay, I conceptualize the classroom as a narrative moment in which legal text, interpretation and experience come together, and then establish a framework for analyzing these elements. First, I describe the Castlemont community as illustrating conditions of social marginalization and subordination. Next, I define the concept of narrative in greater detail, and introduce Ewick and Silbey’s theory of hegemonic and counter-hegemonic narrative. Lastly, this Part analyzes the narrative of discrimination offered by anti-discrimination law as hegemonic.

Part III explores how legal education thwarts development of the consciousness and skills a lawyer needs to work for social change. First, I discuss the conditions associated with counter-hegemonic consciousness. Next, I argue that the objective viewpoint of the law is hegemonic in nature. The manifestation of this viewpoint in law school hinders the development of counter-hegemonic consciousness in persons of the law, instills attitudes which thwart the project of social change, and leads to widespread alienation—particularly among students with viewpoints that are marginalized within law school.

Finally, Part IV returns to the Street Law classroom, and the nature of the opportunity Street Law presents for a person of the law and her students. This Part suggests that Street Law is an opportunity to develop the consciousness and other qualities necessary for social justice lawyering. This part also suggests that subjectivity is an appropriate methodology to employ in developing a pedagogy that encourages counter-hegemonic consciousness in the Street Law classroom.
II. Context and Framework: Teaching as a Narrative Moment

A classroom provides a space and a structure for stories. The confluence of text and the experiences and perspectives of students and teacher influence what stories will be told and what will be heard. In this view, none of these classroom ingredients are passive, including the subject to be studied. Further, all have the potential to be transformed within the dynamics of the encounter. While this perspective suggests that students, text, or teachers are not wholly determinative of any particular outcome, it also suggests the importance of each to the other and to the project of teaching itself. This Part seeks to contextualize my discussion of teaching Street Law by describing the Castlemont neighborhood and student community in greater detail, introducing the framework of narrative, and then discussing a legal subject highly relevant to this community—anti-discrimination law.

a. The Castlemont School Community

Conditions at Castlemont and the neighborhood it is a part of are interlocking conditions of social marginalization and subordination: poverty, violence, and the social isolation of racial and ethnic minorities.10 As members of this community,

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10. This is not to say that these are the only conditions of subordination or social marginalization, but that they are such conditions. Moreover, although the intervening years have resulted in dramatic changes in Castlemont's structure (it now consists of three smaller schools on one campus), data in the Executive Summary School Accountability Report Card 2005-6 for each school indicates that conditions of poverty and social isolation of minorities persists. Leadership Preparatory School, http://webportal.ousd.k12.ca.us/sarc/docs/sarc05-06/html/leadershipSARC.htm (last visited March 30, 2008); Business and Information Technology School, http://webportal.ousd.k12.ca.us/sarc/docs/sarc05-06/html/CBITSS%20Sarc.htm (last visited March 30, 2008);
Castlemont students are among the socially disadvantaged, however defined.

Castlemont sprawls for most of a city block in the Elmhurst District, one of Oakland's poorest and most violence-plagued communities,\(^\text{11}\) sharing an eastern stretch of MacArthur Boulevard with neighborhood churches, liquor stores, mostly empty storefronts, and blocks of vacant, fenced lots.

The year I taught Street Law, approximately 1,576 students, grades nine through twelve, were enrolled at Castlemont.\(^\text{12}\) Reflecting the racial and ethnic composition of the neighborhood, African Americans comprised 67.1% of the student body (or 1,057 students), Latinos 26.1% (412), Asian Americans 4.6% (72), Pacific Islanders 1.6% (25), Caucasians 0.4% (6), and Native Americans 0.1% (1). Additionally, 24.6% of Castlemont's students were designated limited English proficiency; only 1% of

\(^{11}\) The Elmhurst district, where Castlemont is located, had one of the highest murder rates in the state in 1999. Jim Huron Zamora, \textit{Mayor to Restructure Oakland Police Force}, S.F. EXAMINER, March 26, 1999, at A16.

\(^{12}\) Statistics regarding the Castlemont student body are drawn from the 1998 \textit{Annual Report to the Community on Oakland Public Schools}, published by the Oakland Coalition of Congregations in collaboration with the Oakland Unified School District and the Oakland Education Association, and from the \textit{Comprehensive High School Profile} for Castlemont. Both reports were previously available from the Public Information Department of the Oakland Unified School District. However, when I recently sought to obtain copies in order to prepare this article for publication, I was informed by the Office of the State Trustee for the school district that all copies of the records have been destroyed. Nor was I able to obtain the records from the Oakland Education Association or Coalition of Congregations.
these students were re-designated English proficient in 1997-1998. Ninety-one percent of the students lived in households where AFDC is a source of financial support.\textsuperscript{13}

The average GPA for all course work at Castlemont was 1.49. Only 17\% of students were taking course work designated college preparatory; of those, the average GPA was 1.32. Among eleventh graders taking the Scholastic Aptitude Test (SAT), 90\% scored below the 50\textsuperscript{th} percentile in reading, 79\% scored below the 50\textsuperscript{th} percentile in language, and 87\% were below the 50\textsuperscript{th} percentile in math. Castlemont’s composite score for the SAT (713, including grades nine through eleven in all test subjects) was 147 points lower than the Oakland Unified School District’s composite score, and lower than any other school in the district; it was 300 points lower than the state composite score.\textsuperscript{14}

The Comprehensive High School Profile provided by the Oakland school board does not offer statistics on the number of classes which failed to provide text books and other necessary supplies to students, the number of days the library was closed, or the number of class days missed due to teacher absences and a lack of substitutes due to substandard qualifications or because of fear for personal safety, although I observed these problems were endemic at the school.

\textsuperscript{13} The students in my class more or less reflected this profile. Of my thirty-two students, eight were Latino, one was Pacific Islander, and twenty-three were African American. Ability to read and write in English was poor for most of my students. It was difficult to assess abilities with complete accuracy however. For example, I discovered that some students masked levels of illiteracy with strategies such as refusing to hand in written assignments, copying work, and plagiarism from other materials. I was not privileged to information about their status \textit{vis-a-vis} AFDC.

\textsuperscript{14} Available data for the 2005-2006 school year shows that a troubled academic environment continues at the campus. OUSD Executive Summary, \textit{supra} note 10.
However, the issue of violence at Castlemont is well-documented elsewhere. In 1998, from September 8 (the first day of school) to October 15, at least ten students were seriously injured in fights at the school. The violence climaxed with the stabbing of a Castlemont student by a former student who had made an unauthorized visit onto school grounds. The following day, approximately one quarter of the student body stayed away from school, many in fear for their safety. In the midst of the barrage of media attention, school administrators finally stepped up security at the campus. However, their belated attempts, including locking down the campus after 8:30 a.m. and keeping all students on the grounds at lunchtime, added to a pressure-cooker environment in which inter-student hostilities flared easily.

Some blamed the outbreak of violence on the area's changing demographics—increasing numbers of new immigrants were moving into a once more solidly African American neighborhood—combined with race-based gang membership. My students said it was neither, and blamed it on "stupidity." According to them, and their primary teacher, this bout of violence was part of a predictable cycle—escalating every fall, cooling off for the winter,

15. Lori Olszewski, *A Time for Healing*, S.F. Chronicle, Oct. 16, 1998, at A21. According to my students, and my observations while at the school, many more students were injured than officially reported—some of whom had been beaten up by other students during this period.
16. Id.
17. Id.
18. Id.
20. Two gangs claimed turf which includes Castlemont, an African American street gang called the Rolling 100s, and a Mexican American gang called the Border Brothers. Olszewski, *supra* note 15.
and starting back up again in the spring. In this perspective, once a few people acted "stupid," it was easy for anything to function as an excuse for more violence.

Whatever the trigger in any given instance, violence was indeed a part of the fabric of life for Castlemont students, and it spilled over into my classroom in various forms. When a fight erupted between two boys in my Street Law class, another teacher and I were helpless to stop them; one of the boys ended up with a dislocated shoulder, another incident absent from the official list. Violence also left its mark on the classroom in the form of the cloud of depression that settled on everyone after a particularly bad incident on campus, or the edgy sadness of individual students who had experienced, or expected, trouble. Violence at home, or between couples, entered the classroom as well. The students' primary teacher and I met several times about reporting suspected abuse whenever students showed up in class with unexplained injuries, such as black eyes.

But this overview of the Castlemont community is perhaps partially misleading. It is important to note that my students were survivors. First of all, they were alive—which can be considered an achievement in the neighborhood. Moreover, primarily seniors (there was one junior in the class), they hoped to graduate and an

21. While the danger of not surviving to adulthood is elevated in a neighborhood like Elmhurst, it is important to note that teens are generally more likely to be targets of crime than adults. Indeed, they are more than twice as likely to become victims of violent crime as any other group. Joanne C. Lin et al., Youth Violence: Redefining the Problem, Rethinking the Solutions, 28 CLEARING-HOUSE REV. 357, 357-58 (1994). Further, African Americans and Hispanics are the most frequent victims of crime, with African Americans being violent crime victims more than any other racial group. Robert Blakey, Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes But the Exercise of Responsible Prosecutive Discretion, 46 HASTINGS L.J. 1175, 1189 n.30 (1995).
informal survey showed that many, despite their poor preparation, hoped to go to college. Further, many were struggling to come to class in spite of competing responsibilities. Most of my students worked part-time jobs, and several were responsible for helping to support their families. Many also had significant responsibilities for children at home, with several students needing to take lengthy absences in order to take care of siblings or the children of siblings. 22

As Gerald López points out, “when we call a person or a group ‘subordinated’ . . . we’re always describing a state of relative powerlessness. For all that they endure [the subordinated] still retain the capacity . . . to resist victimization and subordination and to reverse its tendencies.” 23 This is an important insight in terms of recognizing the myopic tendencies of any total classification. However, as an emphasis on these students’ tenacity shows, their resistance necessarily references the adversity which is the context of its emergence, and which might pull them under at any time. Put another way, conditions of subordination shape the challenges the students face and can only partially control. Watching my students struggle through the surreal chaos, which often characterized life at Castlemont, I sometimes visualized a person stepping out of bed each morning onto a loose floorboard that flew up and struck him or her in the face. It was difficult to see what was responsible for the injury: the broken board or the act of stepping, much less how to avoid being struck again when, if that board were avoided or repaired, others lay in wait.

22. Most students at Castlemont who had children of their own were in a separate program designed for teen parents, which provides on-site childcare.
If the story of Castlemont and its student community is then—definitively, if not solely—one of social marginalization and subordination, what is its significance for the Street Law classroom? The next section will lay groundwork for using the concept of narrative to consider that question in the context of anti-discrimination law.

b. Framework: Narrative

The terms "narrative" and "story" are often used interchangeably—including in this essay. It is useful however, in defining what is meant by narrative, to untangle them for a moment.

Patricia Ewick and Susan Silbey identify three features a communication must have in order to qualify as narrative: selective appropriation of past events and characters; presentation of events in a temporal order with beginning, middle and end; and a relating of the events and characters to one another and to a statement about why and how the events occurred. Hayden White calls this latter feature the "closure," or the "demand . . . for moral meaning." This definition might also describe stories or tales, and indeed narratives are vehicles for stories. However, because the overarching framework of moral meaning can vary, several narratives can exist to explain the same thing. As Richard Delgado observes,

[a] rectangular red object on my living room floor may be a nuisance if I stub my toe on it in the dark, a doorstop if I use it for that purpose, further evidence of my lackadaisical housekeeping to my visiting

24. Subversive, supra note 8, at 200.

25. Id. at 200-01 (citing Hayden White, The Content of the Form: Narrative Discourse and Historical Representation 21 (1987)).
mother, a toy to my young daughter, or simply a brick left over from my patio restoration project.26

These possible stories about the object would be communicated through narratives, each also revealing something about the teller’s perspective, experience, and identity.27

Delgado’s illustration highlights the fact that narrative is not a rarified event but something occurring all the time, in all facets of human life and interaction. Yet, the peculiar characteristics of narrative often render its operation in discourse invisible. Unlike assertions of empirical fact, narratives make claims about causality and truth that are often implicit, and thus “elude challenges, testing, or debate.”28 For example,

[w]hereas a general claim that a certain group is inferior or dangerous might be contested on empirical grounds, an individual story about being mugged, a story which includes an incidental reference to the nonwhite race of the assailant, communicates a similar message but under the protected guise of simply stating the “facts.”29

Similarly, as explanations for “the way things are,” narratives frequently obscure their relationship to the social structures within which they are produced (i.e., racism) and from which they derive their plausibility (i.e., the assumption that crime is perpetrated primarily by non-whites). Ewick and Silbey call this tendency within narrative hegemonic, insofar as it constitutes and re-creates

27. See Poverty Law Narratives, supra note 4, at 866 n.14.
28. Subversive, supra note 8, at 214.
29. Id.
a taken-for-granted perspective on the world or particular people and events within it.\textsuperscript{30}

Obviously, however, people do not always agree with assumptions they recognize embedded in the narratives of others. Also, some stories expose specific relations to social structures. Ewick and Silbey call narratives which achieve the latter counter-hegemonic or subversive. An example comes from an encounter I had while getting fingerprinted at the police station for the Determination of Moral Character portion of the California State Bar. The cadet fingerprinting me asked why I needed the prints, and my explanation segued into a gripe session about my disgust with the Moral Character application. I was angry about the intrusion into my personal life. In addition, I pointed out, requirements like listing every place you have lived since age eighteen, or worked more than six months, were clearly geared toward students right out of college, and burdensome for a woman in her late thirties. “As if this succeeds at keeping bad actors out of the profession!,” I complained. The cadet, a woman, nodded. “We had some of the same hoops to jump through here at the police station,” she commiserated, adding, “it’s all about old boys’ networks. They set it up and that’s who benefits. They make it hard for you.”

The cadet’s response explicitly rejected the official explanation for the “hoops” I had alluded to (safeguarding the profession) and offered a counter-explanation that expanded on my suggestion that the rules regarding admission were not made with women like me in mind. By connecting our experiences with the familiar narrative of male protection of privilege, she telegraphed a theory that changed my story of frustration into a larger story about exclusion. Moreover, because I had complained about issues

\textsuperscript{30.} \textit{Id.} at 212.
related to age, not specifically gender, and because she was African American and I am white, I understood her to be choosing a theme that reflected our commonality—and the origins of both our professions—without necessarily sacrificing the different ways the harms of exclusion might manifest. Her story was counter-hegemonic because it directly referenced social structures related to differential access to power or, in other words, located “the individual within social organization.”

c. Anti-Discrimination Law as Hegemonic Narrative

As a social institution, law is like the classroom in that it creates a space and a structure for narratives; it also constitutes narrative insofar as it tells a story about the way things are. Anti-discrimination law references a complex body of doctrine interpreting constitutional and statutory provisions. Nonetheless, some general principles can be ascertained. The analytical framework of narrative reveals anti-discrimination law as embodying hegemonic narratives regarding the problem of racial discrimination and, therefore, its solution. Informed by these narratives, the doctrine of anti-discrimination law cannot recognize, describe, or address the interrelated nature of subordination faced by inner city youth such as Castlemont’s students. Thus, not only may it lack utility for solving problems related to discrimination, it does not provide a useful framework for analyzing the circumstances of subordination. Indeed, it may serve to perpetuate the conditions of subordination by simultaneously obscuring and reinforcing the social structures of their creation.

Anti-discrimination law tells a story about racial discrimination that proceeds from what Alan Freeman describes as the
"perpetrator perspective," as contrasted to the "victim perspective."31 These perspectives create very different vantage points from which to analyze social inequality:

From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life (lack of jobs, lack of money, lack of housing) and the consciousness associated with those objective conditions (lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual). The perpetrator perspective sees racial discrimination not as conditions but as actions, or a series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done to some victims than on the overall life situation of the victim class.32

From the perpetrator perspective, discrimination is an aberrant act occurring between "atomistic individuals" whose actions are understandable without reference to social structures or history.33 Corresponding to the belief that discrimination is aberrant, the perpetrator perspective presupposes a society that is otherwise basically fair.34 The role of anti-discrimination law in

32. Id.
33. Id. at 30.
34. The perpetrator perspective corresponds with other dominant narratives regarding, for example, the history of racism. Delgado gives an accessible account of the dominant discrimination narrative as it relates to race discrimination against African Americans:
this view is to restore normalcy—in other words, to preserve the conditions within which the discriminatory act arose.

As Freeman explains, the perpetrator perspective spawns twin doctrinal concepts in anti-discrimination law: fault and causation. The concepts of fault and causation operate, in interrelated ways, the assumption that blame-worthiness and its effects are limited and can be identified with some certainty, and serve to maintain the status quo of racial inequality. Below I discuss some of the problems that spin off from these dual concepts and the assumptions which inform them.

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Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent white victims of reverse discrimination. Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.

_Plea, supra_ note 3, at 2417.

Notice that this narrative supports the perpetrator perspective by isolating historical events—not just by placing slavery-cum-discrimination in the distant past, but by isolating the history of the subordination of blacks from the systemic subordination of other minority groups.

i. Fault and the Problem of Intent

First, the concept of fault dictates that discrimination must have been enacted by an identifiable, blameworthy person or small group of persons.\(^{36}\) Moreover, only intentional fault is characterized as illegal discrimination in most cases. In state action cases, this means that plaintiffs challenging a racially neutral law must satisfy the doctrine of discriminatory purpose. This doctrine requires direct or circumstantial proof that a racially discriminatory purpose motivated those responsible for the law’s enactment or administration.\(^{37}\) In most cases, when alleging discrimination by private (non-state) actors, intentional discrimination must also be proven.\(^{38}\)

Plaintiffs can attempt to prove discriminatory intent through direct evidence (i.e., statements regarding intent), circumstantial evidence (i.e., comparative treatment of members of other groups), and/or statistical evidence. The burden of proof on the plaintiff is high. While the defendant can introduce a “legitimate, non-discriminatory reason” for the challenged employment action,  

36. Id.
37. See Washington v. Davis, 426 U.S. 229 (1976) (finding no prima facie showing of discrimination where a screening test for District of Columbia police officers resulted in a failure rate that was four times higher for blacks than for whites absent proof of intent to discriminate; no showing of rational purpose for the test was required).
38. Disparate impact cases, limited to Title VII cases by the Supreme Court in Washington v. Davis, are an exception to this general rule. Disparate impact theory allows plaintiffs to challenge facially neutral employment selection criterion—such as educational requirements, tests, and measuring devises—which have a demonstrably unequal impact on a particular group, without proving the practice was intentionally discriminatory. However, the employer can defend against a showing of disparate impact by proving the challenged practice was a business necessity. The Court’s scrutiny of business necessity appears to be declining. Compare Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Washington v. Davis, 426 U.S. 229 (1976).
disproving this reason does not prove the employment action was motivated by racial animus. Thus, the plaintiff not only has to prove that the employer acted with discriminatory intent in a positive sense, he or she may have to disprove other asserted motives such as "personal animosity."

Intent requirements distort the project of remedying discrimination on several levels. First, plaintiffs are asked to prove something that probably does not exist, at least as conceptualized by the law. Modern psychological theories teach that people often do not discriminate intentionally, or at least consciously. Cognitive theories of psychological development, for example, suggest that discrimination can result from the learning of racial (and other) stereotypes that are culturally transmitted, and which inform interpretations of people and events in processes that are unrecognized by the conscious mind. In addition, Freudian theory suggests that the strength of social norms which are broadly accepted and contradictory to racism, such as the norm of equal opportunity, heightens the likelihood that conscious knowledge of racist ideas and feelings will be suppressed in order to relieve the mind of guilt.

40. Hicks v. St. Mary's Honor Ctr., 2 F.3d 264, 266-67 (8th Cir. 1993) (remanding to the district court with instructions to reconsider the case in light of the Supreme Court's decision on this issue). The plaintiff may be able to prove mixed-motives existed, but one of the motives must have been to intentionally discriminate on a forbidden basis. Id.; see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
42. Word, supra note 1, at 337-38.
These theories point to the cruel irony that anti-discrimination law requires plaintiffs to prove intentionality while simultaneously perpetuating ideology, which lessens the likelihood that intentional racism will be recognizable to minority or majority group members. The perpetrator's underlying assumption that society is not discriminatory absent the actions of blameworthy individuals encourages the perception that equality of opportunity actually exists. Moreover, it reinforces attitudes of non-accountability for racism and inequality among majority group members, while flipping the blame for conditions of subordination onto the subordinated. These effects interact to make it more difficult for victims of discrimination to recognize discrimination or to "name their experience." At the same time, the notion of individual, intentional blame for discrimination inhibits development of collective feelings of responsibility for the problem and its solution.43

Moreover, the intent requirement ignores the fact "that the injury of racial inequality exists irrespective of the decision-makers' motives."44 As Lawrence queries,

[does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind?45

43. Id. at 239.
44. Id. at 236.
45. Id.
ii. Causation and the Problem of Harm

In many situations however, intent is irrelevant because a victim, jurisprudentially speaking, does not exist. Put another way, certain actions, although based at least in part on racial bias, are not illegal discrimination. The concept of causation requires a plaintiff to isolate a particular condition and closely link it with behavior by the defendant. However, without a legal theory recognizing the linkage, there is no basis for a claim. For example, a company’s decision to relocate from an urban area to the suburbs may or may not be motivated by the desire for a white workforce. However, the reduced employment opportunities for a minority workforce left behind do not generate a cause of action against this employer. The only theory under Title VII that allows impact alone to prove discrimination applies to selection criteria. Other theories would require an adverse employment action taken in regard to specific employees. Reduced life chances are not interpreted as employment actions.

In state action cases, these issues play out in standing analysis. Standing doctrine is judge-made law extrapolated from Article III, Section 2 of the Constitution, which limits the jurisdiction of the federal courts to actual “cases” and “controversies.” This provision is considered to forbid courts to rule on executive or legislative action outside of a constitutional case, regardless of the constitutionality of the government action. To have standing to bring a claim, a plaintiff’s complaint must, among other things, “fall within the zone of interests protected by the law invoked.”46 In addition, the “plaintiff must allege a personal injury fairly traceable to the defendant’s allegedly unlawful conduct and

likely to be redressed by the requested relief.”47 The injury must be “‘distinct and palpable,’ and not ‘abstract’ or ‘conjectural’ or ‘hypothetical.’”48 If the “line of causation” between injury and conduct is too attenuated, the plaintiff does not have standing to bring her claim—or, put another way, the court lacks jurisdiction to hear it.49

Standing doctrine has been held to preclude cases alleging injuries based on racial stigma—collective harm experienced by members of a minority group as a result of government participation in the social structuring of racial discrimination—unless it is personally experienced, meaning “personally denied equal treatment” under the challenged action.50 Even where an injury is personally experienced, however, the connection between the challenged action and the hoped-for remedy might be insufficiently clear to provide standing. Ironically, the challenged action itself may create the problem of knowing what the situation would be absent the action.

In Allen v. Wright, the plaintiffs (respondents in the Supreme Court) were held to lack standing on both of these grounds.51 Allen was a nationwide class action brought by parents of African American school children against the Internal Revenue Service (IRS), alleging that the IRS failed to carry out its obligation to deny tax-exempt status to private schools on the basis of race.52

47.  Id.
48.  Id. at 751 (internal citations omitted).
49.  Id. at 752. Of course, this standing requirement, which serves to prevent a claim in a given instance, is a shell game: if the law invoked was interpreted as intending to reach a given injury, such injury would not be attenuated.
50.  Id. at 755.
51.  Id. I will refer to the respondents as “plaintiffs” for clarity.
52.  Allen, 468 U.S. at 739-40 (citing Bob Jones Univ. v. U.S., 461 U.S. 574 (1983)), where the Court held that the governing statute disqualified schools
The plaintiffs argued that this failure amounted to federal support of segregated schools and fostered the organization and expansion of such schools; thus, interfering in the efforts of federal agencies and courts in desegregating public school districts. They claimed two injuries: direct harm by the fact the government was supporting segregated schools, and harm because the government's actions impaired their ability to successfully desegregate their public schools. Writing for the majority, Justice O'Connor characterized the first injury as a claim of stigmatic injury unsuitable to provide standing. The second claim was rejected as based on a too attenuated connection between the IRS's conduct and the desegregation of the plaintiffs' schools.

Exemplifying the perpetrator perspective, O'Connor wrote: "From the perspective of the IRS, the injury to respondents is highly indirect and 'results from the independent action of some third party not before the court.'" She stated that the plaintiffs' injury might be "fairly traceable" to the IRS if "enough racially discriminatory private schools receiving tax exemptions" were located in plaintiffs' neighborhoods to suggest that withdrawal of those exemptions would make "an appreciable difference in public school integration." However, even this vague basis for cognizable injury is illusory, because the result of ending government support for discrimination is uncertain:

[I]t is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would

that discriminated on the basis of race from tax-exempt status as charities.

53. *Id.* at 743-744.
54. *Id.* at 745.
55. *Id.* at 754-57.
56. *Id.* at 758.
57. *Id.*
lead the school to change its policies . . . . [i]t is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational . . . policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.58

The logic of the perpetrator perspective manifest in Allen severely limits the ability to challenge government actions that support subordination of minority groups, even when the government action violates other (non-constitutional) mandates (i.e., the statutory scheme applicable to IRS exemptions). Yet, it is the Court’s mystification of the linkages between IRS inaction and historical and social context that makes the remedy uncertain. The Court’s characterization of cause and effect as random and indeterminate obscures the fact that whites in general chose to separate themselves from blacks, a phenomenon documented in the residential housing context.59 From this perspective, any government support for segregation facilitates the tendency for what we have come to call white flight. Similarly, withdrawal of governmental support would likely be insufficient to stop self-segregation entirely, but might discourage it. Of course, even with a contextualized analysis, the perpetrator perspective suggests that liability should not be imposed because the blame is so shared and diffused.

58. Id. at 757.
The traditional causation requirement breaks down when responsibility for subordination in society is revealed as complex and social in addition to a personal problem. Indeed, many situations that illustrate subordination reveal no blameworthy perpetrator. Like the image of loose boards striking the unwary I used to describe the lives of my students at Castlemont, cause and effect seem impossible to discern from the perpetrator perspective. This is not only because the perpetrator perspective lacks context to interpret the metaphor; it is also because it *never questions the existence of the metaphorical boards themselves*. Like the administrators (and reporters) who struggled to make sense of and respond to the outbreak of violence at Castlemont, anti-discrimination law holds constant everything but the problem, narrowly defined, at hand. Thus, at Castlemont the question became: Is the cause of the violence gangs? Growing diversity in the ghetto? Youthful foolishness with a dangerous inner city twist? Missing are questions regarding the existence of these very features, along with how it came to pass that thousands of primarily minority students are warehoused in schools without basic educational resources, and what relationship this development might have with the perpetuation of violence and poverty in their communities.

Similarly, the law of discrimination, as constituted, cannot address the wheels of society and the way they turn and create the situations faced by Castlemont students or other subordinated peoples. Lacking an analysis of the epiphenomenons of subordination, which locates individuals in social structures, the perpetrator perspective disallows any meaningful discourse for moving beyond these problems, in imagination or in fact.
III. Counter-Hegemonic Consciousness, Legal Viewpoint, and Forming “Persons of the Law”

The conditions of subordination and the limits of antidiscrimination law in addressing those conditions illustrate a paradox for the lawyer concerned with social change: the lawyer’s tools constrain the very task for which they are employed and conditions hoped to be addressed through law may instead be perpetuated. Because of this paradox, it is essential for the lawyer to understand not only the law, but its limits; to develop the imagination the law lacks. In other words, the lawyer needs counter-hegemonic consciousness. This implies other, related qualities which are necessary as well. The lawyer needs humility regarding her role and the utility of law; creativity to imagine how both law and society might be different, and how the tools of lawyering might be strategically employed; and openness to the data which fuel critique—her own experience and that of her clients and others. These qualities, in turn, generate and sustain the counter-hegemonic understanding lawyering for social change requires. What, then, might contribute to the development and/or support of this consciousness?

a. Conditions of counter-hegemonic consciousness

Ewick and Silbey posit three conditions related to counter-hegemonic consciousness and the production of subversive

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60. See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in Critical Race Theory: The Key Writings That Formed the Movement 119 (Kimberlé Crenshaw et al. eds., 1995), on the paradox of using flawed tools in the struggle for African American rights. (“... the task at hand is to devise ways to wage ideological and political struggle while minimizing the costs of engaging in an inherently legitimating discourse.”).
narratives: social marginality, recognition of the world as socially constructed, and opportunity for storytelling.61

According to Ewick and Silbey, the condition of social marginality may contribute to counter-hegemonic consciousness because "[b]y definition, it is the marginal . . . whose lives and experiences are least likely to find expression in the culturally dominant schemas and who have [the] most restricted access to resources."62 Put another way, "those who are most subject to power are most likely to be acutely aware of its operation."63

However, as the authors recognize, social marginalization alone is not sufficient to challenge hegemony. The products of inequalities in social power may not be perceived as unfair, and those subject to power may not recognize opportunities for resistance and change.64 Thus, another condition for counter-hegemonic consciousness is "understanding how the hegemonic is constituted as an ongoing concern."65 One example of this understanding is the realization that law consists of socially constructed narratives related to a particular take on what constitutes reality. The import of the understanding is instrumental:

Perceiving a concealed agenda and knowing the rules enhance the possibilities of intervention and resistance . . . [R]esistance [is] opportunistic, taking advantage of openings within the face of power to escape, if only momentarily, its effects. For this to

61. COMMON PLACE, supra note 9, at 234-44; Subversive, supra note 8, at 220-22.
62. COMMON PLACE, supra note 9, at 234-35.
63. Id. at 235.
64. Id. at 238-39.
65. Id. at 239.
occur, one must recognize opportunity when it comes along. 66

Resistance may be comprised of any number of acts, including the reordering of experience within an interpretation which counters hegemonic meanings regarding experience. Lawyers do this when they push at the boundaries of the law, using the “nonfit” of their client’s experience 67— albeit partially, as they work within the constraints of legal frameworks. Catherine MacKinnon described this process as applied in the development of sexual discrimination law:

The strictures of the concept of sex discrimination will ultimately constrain those aspects of women’s oppression that will be legally recognized as discriminatory. At the same time, women’s experiences, expressed in their own way, can push to expand that concept. Such an approach not only enriches the law, it begins to shape it so that what really happens to women, not to some male vision of what happens to women, is at the core of the legal prohibition. 68

Clients also resist legal frameworks when, for example, they push at the boundaries of representation established by their lawyers. The imposition of lawyer pre-understandings on clients can result in misinterpretation of what clients want and need. 69 In some respects, revealing the law as a “game” with somewhat flex-

66. Id.
67. See Poverty Law Narratives, supra note 4, at 917.
69. Poverty Law Narratives, supra note 4, at 898-899.
ible participatory rules can result in client rebellion against lawyer control of strategy, and the assertion of their own values.70

As these examples suggest, however, information sharing is essential to counter-hegemonic consciousness. Thus, the third condition of counter-hegemonic consciousness is the presence of opportunities to recognize and develop an awareness of the relationship between the social construction of reality and self—or, as Ewick and Silbey describe, the “connection between history and biography.”71 One way to do this is through storytelling.

Opportunities for subversive storytelling often arise from the very conditions of subordination, as social structures “can create both a common opportunity to narrate and a common content to the narrative. The experience of sharing stories thus has the potential to reveal the collective organization of power . . . .”72 Ewick and Silbey give consciousness-raising groups of the 1960’s as one example of a social structure (in that case, postwar domesticity as a particular structure of female oppression) creating opportunities for subversive storytelling.73 However, because “storytelling is a conventional form of social interaction,” subversive storytelling most often arises in the routines and circumstances of every day life where people gather and talk, such as church, school, work, and the supermarket.74 As my conversation with the police cadet illustrates, even casual, serendipitous meetings can uncover common experience within a confluence of constraints

71. COMMON PLACE, supra note 9, at 241.
72. Id.
73. Id.; see also Catharine A. MacKinnon, Toward a Feminist Theory of the State 83-90 (1989) (hereinafter State).
74. COMMON PLACE, supra note 9, at 242.
and identities, bringing into question the status quo and creating alternative explanations for that experience.

This characterization of storytelling as a condition for the generation of counter-hegemonic consciousness invokes what Delgado calls the “community-building functions” of sharing stories. As he points out, however, counter-stories also serve a destructive function. “They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half—the destructive half—of the creative dialectic.” Thus, it is not just the sharing of stories of commonality that may facilitate such changes in consciousness, but the hearing of stories of difference. As discussed above, for a person in the law concerned with using the law for social reform, both functions are important. Ironically, law school—a formative experience for a person of the law—works against the generation or sustenance of counter-hegemonic consciousness. Indeed, the law school experience tends to cut students off from their pre-law school identities in ways that subvert counter-hegemonic consciousness and the conditions that sustain it, while new attitudes destructive to the project of social reform are learned. This problem is related in part to the hegemonic quality of legal narrative.

b. Law School: Destruction and Construction

As described earlier, anti-discrimination law embodies hegemonic narrative in that it analyses discrimination in a way that isolates incidents of discrimination from the social context

75. Plea, supra note 3, at 2414.
76. Id. at 2415.
in which they occur. This is not the only quality of hegemony in narrative however. As discussed in Part II (b) *infra*, hegemonic narrative also obscures its own socially constructed nature as it recreates a taken-for-granted perspective on the world. Thus, anti-discrimination law presents itself not as one story, but as the story of what constitutes discrimination, and moreover, not a story at all. Anti-discrimination law shares with law generally the pretense of objectivity, or point-of-view-lessness.

Catherine MacKinnon has referred to objectivity as the "epistemology" of law, which it adopts in emulation of science.77 This has great significance for the lawyer, who must acquiesce in some degree to the law's "way of knowing" in order to become a person of the law. As MacKinnon writes:

Objectivity as a stance toward the world erects two tests to which its method must conform: distance and aperspectivity. To perceive reality accurately, one must be distant from what one is looking at and view it from no place and at no time in particular, hence from all places and times at once. This stance defines the relevant world as that which can be objectively known, as that which can be known in this way. An epistemology decisively controls not only the form of knowing but also its content by defining how to proceed, the process of knowing, and by confining what is worth knowing to that which can be known in this way.78

In law school, law students are trained in the epistemology of the law through the case method. The latter requires the abstraction of "relevant" facts from the messy tableau of life, in order to compare those facts with other, like scenarios, in light of a specific legal rule. Yet, within the guise of objectivity, these

77. *MacKinnon*, supra note 73, at 163.
78. *Id.* at 97.
assumptions are both hidden in fact, and hidden as assumptions. The subjective—personal experience, for example—is unwelcome in the typical law school classroom. Moreover, objectivity-as-epistemology creates the illusion that critique itself is subjective; only contributions that reflect the law’s dominant assumptions are without viewpoint. In this way, law school polices against the formation of counter-hegemonic consciousness. “Inquires flowing from other visions are treated, by turns, as irrelevant, disruptive, unintelligible, agitative,” not just by professors, but by fellow students.79

Obviously, some students continue to resist the hegemonic force of the law school classroom. As suggested by Ewick and Silbey’s theory of counter-hegemonic consciousness, their experience of non-fit can create common ground on which to share and build new legal stories. Indeed, law students (and professors) create spaces where hegemony can be challenged on various levels, such as classes with “alternative” curriculum, and journals and organizations which provide forums of expression for the experience of ideological and/or cultural out-groups such as feminists, gays and lesbians, and racial and ethnic minorities. Products of this resistance include much of the literature cited in this essay, and this essay itself. However, while resistance is not futile, it may not be complete. The experience of law students suggests that counter-hegemonic consciousness within hostile institutions is at best ambivalent and partial.

At least one study suggests that, generally speaking, people are changed by the law school experience in ways which make them more uniformly conservative in outlook. In an in-depth, five year

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79. Lopez, supra note 23 at 25.
study of students at the University of Pennsylvania Law School, respondents across the board indicated "that law school taught them to be 'less emotional,' 'more objective,' and to 'put away... passions." Indeed, "[s]econd only to the skills of 'objectivity,' students report[ed] that over time they . . . learned to stop caring about others and [became] more conservative." Moreover, these changes were greatest in students whose perspectives and goals were initially in less conformity with the dominant law school outlook: women of all races and ethnicities and, to a lesser extent, men of color.

How this attitudinal transformation played out in women's changing attitudes toward "the social status quo," and their professional goals, provides a compelling illustration. First, the study found that men and women in their first year of law school had dramatically different assessments of sexism in their legal education. Female first-year students, more than all other groups, reported "that men are called on more often than women and receive more time and more follow-up in class, that the gender of students affects class experience, and that sexist comments are permitted under the informal 'house rules' of the law school." The study also revealed a large discrepancy in the career goals of male and female first-years: twenty-five to thirty-three percent of first-year women, compared to seven percent of first-year women.

80. Lani Guinier, Michelle Fine & Jane Bolin, Becoming Gentlemen: Women, Law School, and Institutional Change (1997) (hereinafter Gentlemen). This study did not have a statistically significant longitudinal sample however. Id. at 133 n.100 (discussing related issues, including typicality of respondents).
81. Id. at 53.
82. Id.
83. Id. at 45.
men, planned to find work in public interest law. However, by the third year of law school these attitudinal differences had diminished, with women's attitudes coming in line with their male counterparts. By third year, only eight to ten percent of women planned to practice in the public interest, compared to five percent of men. Moreover, females in their third year of law school no longer identified sexism as a serious problem.

In regard to the latter, the authors write, "either women ... tolerate displays of what they, as first year students, interpreted as offensive incidents of sexism or, in fact, the frequency of such incidents diminishes." The study's written narrative and interview data supports the former interpretation. As a third-year woman (worrying that law school had changed her because she was now more ambivalent about what constitutes sexism) explained, "I am more willing to tolerate sexist comments or to assume they are jokes rather than offenses." Narrative responses also identified a profound sense of alienation among a disproportionate number of all women (and men of color) from "their backgrounds, passions and communities."

84. Id. at 45.
85. Career plans were compared by sex only, not race and sex. Gentlemen, supra note 80, at 45. See table 4. However, narrative data from interviews and written answers showed that some female students of color actually decided to do public interest work as a result of their law school experience, because they felt no one else would represent their communities. Id. at 51.
86. Id. at 46.
87. Id.
88. Id. at 52. While those students who are less comfortable with the law school status quo may suffer disproportionately (and the Penn study suggests they do, see supra text accompanying note 117), law students in general experience a significant rise in psychological problems, and are nearly four times as likely to suffer from depression and anxiety than the general population. Benjamin Sells, The Soul of the Law: Understanding Lawyers and the Law 42 (Element Books 1994). One author connects this rise in mental anguish
While the authors focus on the alienating effect of classroom pedagogy such as the Socratic Method, which includes the hostility many female students perceive it generates in male classmates, to explain the results of their research, their data also points to the legal viewpoint of objectivity which informs classroom methodologies.

Laced throughout the interviews with both white women and, to a greater degree, women of color, we hear the desire to reinsert culture, race, politics, and 'emotions' back into legal interpretations. Many students explain that the law is structured in ways that value only individuals, not communities .... These students want to be able to move from the perspective of the elite to that of the victim, to pivot their vantage and interpretations in ways that might disrupt precedent, rather than merely accept the 'logic' of what has 'neutrally' been decided before.

among law students with the law's drive for objectivity, writing, "psychological problems arise when one idea or perspective tyrannizes all others, thereby restricting the soul's imaginative versatility." Id. at 43.

89. See id. at 111 n.2.

90. This is not to minimize the importance of the different ways hegemony is maintained in law school—or other components of hegemony—but to focus on one aspect of the phenomenon. The University of Pennsylvania study is remarkable in its documentation of the relationship between the maintenance of patriarchy and law school pedagogy, and the ways in which different aspects of pedagogy bolster one another and hegemony itself. The authors of the study emphasize that the University of Pennsylvania is an Ivy League law school, which may be an important factor in their results. Ivy League schools have a distinctive history and culture. However, there is great uniformity in law school teaching; utilization of the case method and Socratic Method is nearly universal, especially in the first year. It would be interesting to research the impact of alternative curriculum on law students, particularly when that curriculum is introduced in the first year of law school.

91. Gentlemen, supra note 80, at 52.
However, as the study also shows, law school may not only fail to give these students the opportunities and skills they seek, they may leave law school having lost the desire or the emotional strength to pursue these goals. Moreover, the new person of the law is to some degree reconstructed in conformity with the law's image. This can be crippling for the lawyer interested in social reform. The collapse of the lawyer's world view into the law, however partial, is the loss of her pre-law eyes and the loss of empathy. "With blinders in place, 'I don't see your point' comes to mean, 'I cannot look through your eyes.'"92

This relates to another aspect of the training of law students, the formation of professional identity. In this regard, the law's drive for objectivity and detachment from context manifests in three interrelated tendencies: characterization of the lawyer as expert and the law as solution; the de-valuation of non-lawyer/client experience, knowledge, and problem-solving capability; and the collapse of legal narratives into the lawyer's world view. These tendencies cut the lawyer off from information which might challenge the dominant assumptions of the law and the lawyer's role, "undermin[ing] the very possibility for re-imagined social arrangements that lies at the heart of any serious effort to take on the status quo."93

The first two tendencies are captured by what Lopez calls the dominant or "regnant" view of lawyering.94 In this view, lawyers are experts, characterized by their special ability for legal analysis; the differing abilities of client communities are devalued, including for the lawyer oriented toward the public interest.95 (Or, perhaps

92. Sells, supra note 88, at 43.
94. Id. at 23-25.
95. Id.
more so, since subordinated communities are situated farther from the professionalization process typified by law school. The regnant view tends to value litigation over other forms of problem-solving, a strategy which reinforces the characterization of lawyer-as-expert. Clients and client communities are not seen as sources of information about how to approach problems, formulate solutions, or develop resources for change. Rather, non-lawyer communications with the attorney may be seen as cluttering the attorney-client relationship with useless information and distractions. This reinforces the attitude that non-lawyers are unfit to contribute to the important work of lawyering. At least until they are tutored by the lawyer, "about how to fit into a productive lawyer-client relationship—about how to conform to the ruling image."

Clients also participate in the maintenance of the regnant perspective. As López points out, the regnant view of lawyering exists in popular culture as well as the law school, which facilitates its often seamless flow into the assumptions of the legal academy and its burgeoning professionals. Thus it is also, to varying degrees, understood by non-lawyers before they walk in the door of the lawyer's office, although the lawyer may assist in the educative process. For clients from subordinated groups, López describes that "[l]earning on the street, rather than through formal education, provides . . . reasons for acquiescing in the reign of this idea":

Street smart means, in part, handling yourself 'well' in a professional (especially legal) culture—knowing or at least quickly picking up what's going on,

96. *Id.*
97. *Id.*
98. *Id.* at 27.
99. *Id.*
what people do, how people act. Working generally within the regnant idea, rather than fighting clumsily against it, permits subordinated people to be perceived somehow 'with it' rather than 'out of it', knowledgeable rather than ignorant. Less enabled than lawyers by the regnant idea, subordinated people nevertheless tend to resign themselves to this brand of law practice, perhaps as much to signal what they do know and can learn as to hide from any felt inadequacy. They may well be skeptical about lawyers and law, but they like being seen as on top of 'how to play the game.'

In addition, in the quest for legal services there is a more obvious motivation: the understanding that if one does not play the lawyer's game, one might not get the needed legal service. In the format of a client interview or other situations where problems are framed and defined, acquiescing to the regnant view can take the form of clients self-editing their stories, choosing to tell only what they believe the lawyer will consider relevant. Or, clients may simply not challenge the lawyer's method of eliciting and interpreting their story. Whatever its form however, the result is the reinforcement of a hegemonic view of the law and the lawyer, for both lawyer and client.

The latter result stems from the fact that the lawyer not only represents the client to the law, but represents the law to the client. The educative role of the lawyer is another way in which a person of the law can be an agent of social change. Just as counter-hegemonic consciousness allows the lawyer to perceive the limits and opportunities for change through the law, it enables the client to resist hegemony. A lawyer can engender counter-

100. Id.

101. See Poverty Law Narratives, supra note 4, at 905.
hegemonic consciousness about the law by revealing the socially constructed nature of law when counseling clients, by perceiving and acknowledging the limits of the law in relation to the clients needs and concerns, or the ways in which using the law may be harmful to them. The regnant view of lawyering stifles this exchange.

IV. Street Law: Creating a Different Story

Teaching law is another educative role for the lawyer, and can be utilized as an opportunity for activist practice, which enriches both teacher and student. However, unlike the typical academic, the Street Law teacher is exposed to conditions of subordination in an environment that may foster the consciousness and qualities lost or undeveloped in law school.

Teaching Street Law is also different than other forms of community law practice. The Street Law teacher operates away from the constraints of legal service delivery; because the relationship between teacher and student is not necessarily structured around active legal dilemmas, there is potentially much more freedom to formulate the goals of the interaction, and to share, question, and shape narratives regarding the interrelationship of life and law. Development of a pedagogy designed to foster the development of counter-hegemonic consciousness would expand this opportunity for the lawyer, and certainly for her students. However, aspects of the Street Law experience hold potential for transformation of the person in the law apart from any pedagogical reform.

First, working in an inner city high school classroom, the Street Law teacher experiences the conditions of her students' lives to a greater degree than lawyers experience the lives of their clients in most practice settings. Her interactions with her students are not in a setting controlled by her and are removed from the students' daily life. This and the relatively time-intensive nature of the student-teacher relationship (typically three or four hours a week for three months) may be important in terms of developing rapport and empathy between teacher and student.

No matter what identities the person of the law shares with her students, the challenge is reconnecting with others alongside a newer identification with the law; Street Law can build a pathway for that connection. For teachers from a different background than the students, however, connection with the students involves establishing a relationship with a population she may lack exposure to or have even avoided. For these teachers, the Street Law experience can result in the overcoming of deeply held stereotypes—additional barriers to the receipt of information with which to critique hegemonic perspectives in the law. To some degree, the high school students in the Street Law program go through the same process with their teacher.

I reflected on this dynamic after inviting two students from another law school to help me prepare my Street Law class for a mock trial. The law students had been recommended to me by a Street Law coordinator because of their interest in learning about the program. When we met at Castlemont, I found two young white women huddled nervously together outside the high school entrance. I soon learned that they were both from suburban, Midwestern backgrounds and had no previous experience with the inner city and little experience with minority youth. I was a bit anxious too: about how my guests would interact with,
and be received by, my students. Indeed, once in class, it was interesting for me to see how warily my students received the newcomers—for example, being unresponsive when they asked questions, or directing their responses to me, and hesitating to go with them when we used an empty portable to split into smaller groups. Watching this, I realized how much trust must have been developed between the class and me over the last several months, a process I had not been consciously aware of at the time.

In spite of the rough start however, the class ended well. The visitors were spunky and enthusiastic despite their nervousness, and had prepared well for the cases we were reviewing. The students in their group eventually warmed up to the project and did well in our practice competition at the end of class. Afterwards, I walked the two women off campus. They gushed happily about the experience, their excitement palatable. “The students were great!” one of them exclaimed. “Really, they are just like regular high school students.”

I hesitated, contemplating how to respond to her unstated, perhaps unnoticed, reference point for “regular.” It struck me that the source of the women’s excitement was linked to stepping over a kind of boundary, a boundary mined with fear of the unknown and categories of difference. I recognized myself in their energy. I had overcome these boundaries too, and it was invigorating. I also saw the irony embedded in the law student’s remark. She was broaching distance, and replacing difference, with allusions to sameness; but by absorbing the Street Law students into the “regularness” of her own experience, the opportunity for learning from their experience was reduced. To the extent this may be a common response to difference, at least for majority group members, the potential for generating counter-hegemonic consciousness through exposure to the lives of inner city youth.
is minimized. Yet, reflecting on my Street Law experience, it seemed it would be difficult to maintain the cycle of reducing difference to sameness—in large part because teaching Street Law contextualized difference in the lived conditions of its production. Moreover, as discussed below, the students would resist the tendency of reduction to sameness. I decided to let the remark slide.

The Street Law classroom is different than the law school classroom, and probably many other practice settings, in that the level of conformity to the assumptions of the law is lower. This does not mean the students will always disagree with the law's perspective. Indeed, many Street Law teachers I spoke to were surprised at the conservative viewpoints among their students; like law students, Street Law students may experience marginality, but any counter-hegemonic analysis of that experience may be partial and tentative. Rather, the Street Law teacher's students are less invested in proving themselves to the law than the typical law school student or client. They have not left their community of interests to attend an elite institution governed by its own rules; the Street Law teacher is on their turf. Similarly, they differ from a client in that they did not come to the lawyer with a problem. This problem came to them. Thus, they have less pressure to conform.\footnote{This is not to say the students have no pressure to conform, but that such pressure may be less or different.}

As a result, the Street Law teacher is, conceptually speaking as well as factually, outnumbered. In my experience and the experience of other Street Law teachers I spoke with, the students pepper the teacher with questions based on their own experience, frequently challenging legal frameworks and assumptions head-on in a way I never observed in law school. These challenges are
often difficult to reconcile or assimilate into legal paradigms (and the teacher will have less experience doing so than her law school counterparts). These challenges stem in part from the students’ use of what Gilkerson calls “the everyday language of rights,” a language normally censored (perhaps largely self-censored) out of the law school classroom.

As Gilkerson describes:

This... meaning of rights is more tentative and colloquial, and is referred to spontaneously, often far from legal institutions. There, rights are assertions expressing self-definition and affirmation connecting individual claimants to the larger community and society... the experiential, everyday meaning of rights encompasses the belief that one should not be abused, mistreated, taken advantage of, harassed, insulted, or denied access to the means for securing life’s necessities without adequate justification.\(^\text{104}\)

This more expansive view of rights is at odds with the law’s more rigid definitions. An example comes from a conversation I had with several of my students about their perspectives on discrimination.\(^\text{105}\) Although I tried to focus our conversation on employment discrimination, the students resisted locating the issue in any concrete way. They described discrimination as a continuum of unfairness, which sometimes overlapped with legal concepts of basis, location, cause and effect, but was not in any way fixed by those concepts. The ephemeral nature of this understanding of discrimination makes it difficult to identify

\(^{104}\) Poverty Law Narratives, supra note 4, at 901.

\(^{105}\) I spoke with four Castlemont students on April 29, 1999 (two of whom had been in my Street Law class), in preparation for writing this paper [herein-after Castlemont Interview].
the experience with any specificity. This stems in part from the fact that, while the students’ understanding shares with anti-discrimination law a focus on the interpersonal nature of discrimination, it views discrimination as something almost everyone does, “because people think in stereotypes.” As one student summarized:

Discriminating on anything, you’re stopping [someone] from doing what they want to do because of their race, color, whatever. Maybe because they don’t wear the same shoes as you; maybe because they don’t live on the same block as you. Discrimination happens sometimes and you don’t even know it . . . It’s not always about race or color. It’s about anything.

The students’ understanding of the injury of discrimination differed from anti-discrimination law as well. For them, injury was not limited to denial of right in a transaction (such as employment or housing), but in denial of “your self.” Accordingly, their remedy was not focused on “correcting” a transaction, but on changing the perspectives which lead to discriminatory acts: “That’s the only way [to remedy discrimination]. You have to give [people who discriminate] the other perspective . . . let them get to know each other; know how the other person feels.” These students’ responses are remarkably similar to the results of research

106. This is true at least in the abstract. The students might well identify particular examples of conditions or treatment as discriminatory that are not necessarily suggested by their definition of discrimination.

107. Castlemont Interview, supra note 105.

108. Id.

109. Id.

110. Id.
on adult legal consciousness.\textsuperscript{111} This suggests that Street Law is an opportunity for a person in the law to become familiar again with the extra-legal language of rights which will be essential to hearing what clients want and need, and to do so in a contextualized setting where that language has more descriptive power. Moreover, while lawyers can sometimes incorporate the everyday meanings of rights into representation, oftentimes these meanings will simply not fit into the law. Thus, Street Law is also an opportunity for a person in the law to learn how to discuss the limits of the law in ways which uphold the validity of extra-legal perspectives. Moreover, insofar as the Street Law teacher not only educates students about what the law is, she helps build an organizational framework for ideas of right not recognized by law. The classroom is a laboratory for counter- hegemonic consciousness and practice.

Development of a pedagogy which facilitates the formation of counter-hegemonic consciousness would be informed by the features associated with such consciousness: experience of marginality, recognition of the social construction of legality (and experience), and opportunities for meaningful storytelling. This pedagogy would reveal legal narrative as narrative; train students —and the lawyer—to notice perspective as social location; and make room for alternative narratives based on lived experience. The methodology of an alternative pedagogy would be subjectivity, as understood in critical legal scholarship.

As Charles Lawrence describes, there are three interrelated meanings of the term "subjective" which are central to critical scholarship:

\begin{quote}
[s]ubjective, indicating the scholars' positioned perspective in viewing and recording social constructs;
\end{quote}

\textsuperscript{111} See, \textit{i.e.} Common place \textit{supra} note 9, at 237-38.
subjective, indicating nonneutrality of purpose, that the scholar embraces certain values and that her work is avowedly political . . . ; subjective, indicating that the scholar places herself in the linguistic position of subject rather than object, as being capable of acting upon the world rather than as one upon whom others act.\textsuperscript{112}

Subjectivity here is not the same as mere relativity; it is more than “an acknowledgment of the existence and validity of many different and competing perspectives.”\textsuperscript{113} Rather, it is the privileging of the perspectives of outsiders, based on the “understanding that the dominant legal discourse is premised upon the claim to knowledge of objective truths and the existence of neutral principles.”\textsuperscript{114}

By modeling the subjective viewpoint and encouraging it in her students, the Street Law teacher can ground the classroom’s narrative elements. By helping students identify the position of perspective, she makes this a political process. In this way, a person of the law can facilitate the deconstruction and analysis of experience, which is the cornerstone of true empowerment—within or outside the law.

\textbf{V. Conclusion}

So, is legal text inedible? Perhaps not. Perhaps the problem was that my fellow law students and I felt swallowed by the law. As illustrated by anti-discrimination law, the paradox of lawyering

\begin{itemize}
\item \textsuperscript{112} Word, supra note 1, at 338.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\end{itemize}
for social change requires positioning oneself both inside and outside the law. Being consumed by the legal perspective is a loss of self and sight which stifles the creative engagement with the world necessary for activist lawyering. Yet, this is a common result of legal education. Community education projects such as the Street Law are an opportunity for the lawyer to re-envision the possibilities of legal education and the law, and develop the tools necessary for the project of social change. By developing counter-hegemonic consciousness within an individual and in subordinated communities, a person of the law is both laying the groundwork for that project, and making it happen.