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Reimagining Access to Justice in the Poor People's Courts

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ARTICLE

Reimagining Access to Justice in the Poor People's Courts

Elizabeth L. MacDowell*

ABSTRACT

Access to justice efforts have been focused more on access than justice, due in part to the framing of access to justice issues around the presence or absence of lawyers. This article argues that access to justice scholars and activists should also think about social justice and provides a roadmap for running a legal services program geared toward making court systems more just. The article also further develops the concept of “poor people’s courts,” a term that has been used to describe courts serving large numbers of low-income people without representation. The article argues that access to justice efforts can and should prioritize responses that address the unique, subordinating impacts of these courts, including those relating to race, class and gender bias, state intervention, and the punitive effects of intersecting state systems. In this context, the article proposes a new theory of access to justice as a counter-hegemonic practice; one that is aimed at challenging dominant ideologies and transforming subordinating systems, as well as delivering legal services.

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*“In institutions cultural meaning, social inequality, and legal consciousness are forged.”*¹

*“Poverty creates an abrasive interface with society; poor people are always bumping into sharp legal things.”*²

INTRODUCTION

Access to justice interventions aimed at low-income, unrepresented litigants have been largely focused on providing access rather than justice; individualized, case-based legal services uninformed by social change goals.³ This article advocates for a social justice approach, arguing that a structural analysis that interrogates the role of the coercive state is required to effectively address access to justice in courts frequented by poor people.⁴ Specifically, this article uses the term “poor people’s courts” to refer to state civil courts serving large numbers of low-income, unrepresented litigants—namely, family, housing, and small claims and other consumer courts.⁵ A social justice approach requires connecting access

1. Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. SOC. SCI. 323, 360 (2005).

2. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970).

3. See Gary Smith, *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, 45 CLEARINGHOUSE REV. J. OF POVERTY L. & POL’Y 34, 36 (2011) [hereinafter Smith, *Poverty Warriors*] (“The term ‘equal access to justice’ is a modern formulation, unknown in the 1960s, that describes piecemeal assistance to handle the personal legal problems of disconnected individual clients who cannot afford lawyers, without necessary reference to the critical needs of the larger poor community”). Some scholars date the concept of access to justice further back in time, but also limit it to access concerns. See, e.g., Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L. J. 115, 116 (2010). Galanter describes access to justice initiatives as occurring in three waves, “beginning in 1965 with the Office of Economic Opportunity’s neighborhood law firms program, [which] involved the reform of institutions for delivering legal services to the poor.” *Id.* at 116 (quoting ACCESS TO JUSTICE AND THE WELFARE STATE 4 (Mauro Cappelletti, ed. 1981)). Galanter further states that the concept of access to justice as access to judicial institutions dates back to the 1850s, and the concept expanded to access to all sorts of dispute resolution processes in the late 1970s. *Id.* at 115–16. See also Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice For Individuals*, 42 LOY. L.A. L. REV. 913, 914 (2009) [hereinafter Blasi, *Framing Access to Justice*] (observing that access to justice is framed in narrow terms).

4. See *infra* Part II (detailing how access to justice interventions may reinforce subordination).

5. Recent studies show that most litigants in family court, tenants in housing court, and consumers in small claims and other consumer courts are unrepresented by counsel, and are unable to obtain representation for financial reasons. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 35, 41–43 (2009) [hereinafter Engler, *Connecting Self-Representation to Civil Gideon*] (summarizing reports on rates of self-representation in housing, small claims, and family law cases). Other scholars have referred to courts with these characteristics as “poor people’s courts.” See *id.* at 39 (referring to family, housing, and consumer courts as “poor people’s courts”); see also Benjamin Mueller, *Dispute Over Family Courts Leaves Family Courts in Limbo*, N.Y. TIMES (June 15, 2014), <http://www.nytimes.com/2014/06/16/nyregion/dispute-over-judges-leaves-new-york-family-courts-in-limbo.html> (quoting law professor Cynthia Godsoe as referring to the New York family court as “the poor people’s court”); Caroline Kearney, *Pedagogy in a Poor People’s Court: The First Year of a Child Support Clinic*, 19 N.M. L. REV. 175, 180 (1989) (identifying child support courts as a poor people’s court). Some scholars have included administrative and criminal courts in the concept of poor people’s courts. See Steven Keith Berensen, *Preparing Clinical Law Students for Advocacy in Poor People’s Courts*, 43 N.M. L. REV. 363, 363 (2013)

to justice in poor people's courts to relevant discourses about subordination, the operation of state power, and progressive law practice—discourses from which much access to justice work has been disengaged.

A. *Disconnects Between Discourses*

In particular, there is often a seeming disconnect between the large and varied literature detailing the deeply problematic character of the poor people's courts and discussions about access to justice. This literature includes work by poverty lawyers, often drawing on personal experience to detail the ways in which poor people's courts present structural obstacles to justice for low-income litigants;⁶ studies demonstrating how structural barriers to counsel result in different outcomes for unrepresented litigants in family,⁷ housing,⁸ and small claims;⁹

(adding bankruptcy and some criminal courts to Engler's use of the term). I focus on state civil courts for clarity.

6. See, e.g., Leah Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—the Case of the Court Ordered Investigation*, COLUM. J.L. & SOC. PROBS. 527 (2007) (describing structural barriers to justice in New York City's Family Court); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (describing barriers in housing court); Emily Jane Goodman, *Housing Court: The New York Tenant Experience*, 17 URB. L. ANN. 57, 61 (1979) (same). Cf. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, (1990) [hereinafter White, *Sunday Shoes*] (describing structural barriers to justice for poor women of color).

7. See, e.g., ELEANOR E. MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 108–09, 300 (1992) (reporting significant differences in rates of awards for joint legal and physical custody depending on whether one or both parties were represented); WOMEN'S LAW CTR. OF MD., INC., *FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND* 66 (2006), available at <http://www.wlcmd.org/wp-content/uploads/2013/06/Families-in-Transition.pdf>. See also *id.* at 48 tbl.16; Jane Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 132 (1990); Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511–12 (2003) (reporting that eighty-three percent of women seeking domestic violence protection orders who had an attorney were successful in getting the order, while only thirty-two percent of women without an attorney were successful).

8. See Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 477–78 (2003) (providing an overview of studies of the eviction process). As noted by Engler, “The titles [of reports on courts processing housing cases] capture the perilous fate awaiting unrepresented tenants.” Engler, *Connecting Self-Representation to Civil Gideon*, *supra* note 5, at 46. See, e.g., WILLIAM E. MORRIS INST. FOR JUSTICE, *INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS* (2005); LAWYERS' COMM. FOR BETTER HOUSING, *NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT* (2003); AM. CIVIL LIBERTIES UNION, *ACCESS TO JUSTICE PROJECT, JUSTICE EVICTED: AN INQUIRY INTO HOUSING COURT PROBLEMS* (1987); Anthony J. Fusco, Jr. et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93 (1979).

9. See, e.g., DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 8–9, 215–21 (1974) (finding a default rate of over ninety percent among unrepresented consumers in small claims cases in New York, Chicago, and Detroit); CTR. FOR AUTO SAFETY, *LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER* 98 (1972) (reporting similar findings in Boston Municipal Court). See also Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 341, 367 (1976) (finding that represented plaintiffs in New York small claims court facing

work by clinical teaching scholars on the ways in which poor people's courts present unique challenges for lawyering (and thus teaching about practice);¹⁰ and studies documenting pervasive bias in the courts.¹¹ This work establishes that poor people's courts are not merely neutral spaces within the state where the poor go to access resources, resolve disputes, and seek justice. Rather, they are sites of coercive state power, where individuals already vulnerable to punitive state interventions may encounter additional, unwanted interventions into their lives and families, lose rights, and suffer less immediately tangible harm, such as to their autonomy and legal consciousness.¹² However, access to justice initiatives are not typically designed to address the systemic and intersectional disadvantages faced by low-income people in poor people's courts, like judicial bias or unwanted state interventions.¹³ The result (embedded in the term access to justice itself) is to imply that there is justice on the other side of access; that, if the correct measure of access to a tribunal is provided, then justice—or, at least, greater justice—is provided as well. This problem is exacerbated by access to justice discourses focused on the presence or absence of attorneys, which have tended to limit the scope of issues considered.¹⁴

For example, access to justice rhetoric sometimes characterizes attorneys as the enemies of access. In this view, access is limited by the complexity of procedures designed with attorneys in mind and thought to benefit them alone.¹⁵ This characterization obscures the role of the state in problems experienced by poor people in the justice system and advocacy's potential role in challenging subordination. However, while some reformers fight for expanding the right to

unrepresented defendants recovered two-thirds or more of their claimed awards 71.4% of the time, while unrepresented plaintiffs facing represented defendants recovered that amount only 13.5% of the time).

10. See, e.g., Berensen, *supra* note 5; Kearney, *supra* note 5.

11. Findings of gender bias are published in reports of state court task forces from more than thirty states, Puerto Rico, the Ninth Circuit, and the District of Columbia Circuit. See generally Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 2 n.1 (1996). Some court systems have studied and found bias based on other factors as well, including race and ethnicity. See Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996) (providing a bibliography of task force reports). For links to racial and gender fairness task forces and reports, see *Gender and Racial Fairness State Links*, NAT'L CTR. FOR STATE CTS., <http://ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx?cat=Gender%20Fairness%20Task%20Forces%20and%20Reports> (last visited Mar. 8, 2015).

12. See *infra* Part II (discussing the impacts of the poor people's courts on vulnerable communities and likening it to ritual degradation).

13. See *infra* Part II (describing the limitations of current approaches to Civil Gideon and self-help).

14. See *infra* Part II.

15. For example, multiple speakers at a recent access to justice conference, *Until Civil Gideon: Expanding Access to Justice*, held at Fordham University School of Law on November 1, 2013, advocated focusing on simplification of the procedures, forms, and substantive law that participants characterized as necessitating (and impliedly benefiting) attorneys alone. See notes on file with author. See also Benjamin Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1229 (2010); Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1231 (2014) [hereinafter Rhode, *Roadmap*] (describing the legal system as "unduly lawyer-centric").

counsel in civil cases,¹⁶ or relaxing the rules against the unauthorized practice of law to permit non-attorney advocates,¹⁷ they do so without a theory of advocacy that addresses the ways in which advocates in poor people's courts are sometimes part of the problem.¹⁸ Similarly, other common access to justice initiatives—such as making courts more accessible by simplifying forms and procedures, providing legal information and assistance through self-help programs and services, and changing judicial practices about assisting unrepresented litigants in court proceedings—are too often implemented without regard to court cultures and practices that put litigants at risk of losing substantive rights and experiencing dignitary harms.¹⁹ If we instead examine the distinct ways in which the law operates for poor people through legal institutions, new and more expansive goals for access to justice emerge, along with more promising approaches to familiar practices. This article undertakes this effort by identifying the unique functions of poor people's courts in reinforcing subordination and expanding state power.²⁰

B. Examining Poor People's Courts

This article builds this analysis from an in-depth study of the quintessential poor people's court: family court. This examination, which traces the ways in which family courts have impacted low-income litigants throughout family court history, is essential. Prior scholarship has characterized features associated with family courts, such as informality and interventionism, as recent developments,²¹

16. See Barton, *supra* note 15 (observing that “bar associations, academics, and poverty lawyers are working harder on civil Gideon than ever,” and providing examples of recent efforts).

17. Deborah Rhode has been the most outspoken advocate for an expanded role for non-attorneys in access to justice efforts. See Rhode, *Roadmap*, *supra* note 15; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 79 (1981); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Non-lawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 710 (1996); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 230 (1990); DEBORAH L. RHODE, ACCESS TO JUSTICE 87 (2004). See also Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2241 (1999) (referring to non-attorney legal assistance as “a necessary ingredient of any plan for meaningful access to the courts”).

18. See *infra* Part II (discussing implications of the absence of a counter-hegemonic theory for access to justice efforts). An important exception to this tendency is the work of Gary Blasi, which has influenced the development of my thinking about these issues. See, e.g., Blasi, *Framing Access to Justice*, *supra* note 3 (arguing for a more expansive view of access to justice); see also *infra* Part II (discussing Blasi's critique of Civil Gideon).

19. See *infra* Part II (describing degradation ceremonies in the poor people's courts).

20. See *infra* Part I (describing regulation of the poor in family courts); Part II (describing the hegemonic functions of the poor people's courts).

21. See, e.g., Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CINN. L. REV. 891, 894–97 (2010) [hereinafter Murphy, *Revitalizing the Adversary System*] (positing a “paradigm shift” in the way that disputes are resolved in family courts); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 731–33 (1988) (describing mediators and social workers supplanting legal actors in family courts as a recent phenomenon).

or as “bad seeds,” disconnected from the essential, historical functions of the court.²² Such approaches illuminate important problems but omit the ways in which these characteristics are intrinsic to the institutional culture and history of family courts, and to the subordination of low-income people.²³ In addition, following a broad historical overview, this article focuses on cases between private litigants. Regulation of the family through state action in juvenile and child welfare actions in family courts is well documented.²⁴ Cases where low-income people are litigating against one another in family court are less well recognized as implicating social justice in the sense of redistributing resources and reallocating power between haves and have-nots, or the state and the poor.²⁵ This article shows, however, that the operation of the state reinforces hierarchies including those relating to race, gender, and class in private, as well as

22. See Robert J. Levy, *Custody Investigations in Divorce Cases*, 1985 AM. B. FOUND. RES. J. 713, 718–28 (1986) (blaming the practice of custody investigations on divorce reformers who have adopted the rhetoric of nineteenth century juvenile court “child savers”); Herma Hill Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968) (analogizing contemporary calls for a family court to juvenile court ideology); Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 236, 229, 266 (1975) (distinguishing the resolution of private disputes in family courts to the child protection function of juvenile courts).

23. See *infra* Part I (showing that informality and interventionism, along with the intersection of family courts with criminal justice and social welfare systems, constitute the court’s essential, “delegalized” nature). Family court history also suggests the intractability of these features, such that changing rules will likely not greatly change the ways in which these courts operate, especially for poor people. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (noting how legal institutions preserve social stratification through transformation of rules justifying rhetoric over time).

24. In particular, Dorothy Roberts has documented state regulation of the black family through the child welfare system. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Dorothy Roberts, *Prison, Foster Care, and the Systematic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012). For a classic treatment of state regulation of immigrants and the poor through the juvenile justice system, see ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969). For an example of recent scholarship highlighting the racial aspects of state regulation in juvenile justice, see Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335 (2013).

25. See, e.g., Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493, 493–94 (1996) (asserting that client service work is viewed by commentators as apolitical and advocating for a different view of family cases involving domestic violence). That said, although progressive lawyers have disagreed about priorities and methods for poverty law practice, sometimes strongly, the existence of some relationship between individual legal needs and social change goals is generally not disputed. See MARTHA DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* at 33 (1993) (discussing different approaches to casework among early poverty law practitioners). For a recent application of the principle that client service work is a conduit to legal reform and social change, see Leonore Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 108 (2014). But see Smith, *Poverty Warriors*, *supra* note 3 (asserting that resolution of “individual demands for personal service, either singly or in the aggregate, has no necessary correlation whatsoever to the causes or conditions of poverty”).

state-initiated, cases.²⁶ Moreover, the proactive and interventionist role of the court in family cases suggests that the concept of “private party cases” as distinct from those initiated by the state is misleading. Family courts have abandoned the latent role associated with civil courts to take a more active role in case management and fact-finding, with continued detrimental results.²⁷ Therefore, the function of access to justice interventions in these cases, as well those cases more traditionally recognized as involving imbalances of power (such as those involving the state against an individual, or a landlord against a tenant), should include not merely creating access, but challenging or otherwise mitigating against the subordinating aspects of state power. In this context, this article also raises the overarching question: how do access to justice activists, and court reformers more generally, protect against the coercive and subordinating potential of state intervention while facilitating protective and supportive state functions accessed through courts?²⁸ Although fully resolving this question is beyond this article’s scope, I provide a framework for access to justice interventions that can be adapted to different court contexts in order to mitigate, challenge, and potentially transform the subordinating aspects of state action in poor people’s courts. Put another way, I provide a framework for access to justice as a counter-hegemonic practice.

C. Hegemony

The concept of hegemony describes how the control of a social group is achieved not only by “domination,” or physical force, but also through the consent of those who are dominated.²⁹ As part of the function of hegemony, dissent is subdued or co-opted as the dominant group’s perspective is disseminated through social institutions and popular culture, and internalized as common sense or “just the way things are.”³⁰ In this view, the legal system helps to

26. Cf. Naomi R. Cahn & June Carbone, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 113 (2013) (arguing that there is a separate system of family law for families who are neither elites, and thus best able to privately order their families, nor on welfare, and therefore are most vulnerable to state-initiated action).

27. See L.B. Day, *The Development of the Family Court*, 136 ANNALS AM. ACAD. POL. & SOC. SCI. 105, 108 (1928) (describing the traditional civil court’s powers as “latent and only called into action by the efforts of the parties in the case”).

28. See *infra* Part I (discussing the paradoxes of problem-solving courts).

29. This understanding of hegemony was developed by Antonio Gramsci. See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 12, 161, 170, 416–17 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971); see also Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 B.Y.U. L. REV. 515, 115–16 (2000); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982).

30. Litowitz, *supra* note 29, at 519; see also Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 374, n.11 (1982–1983) (describing “Gramsci’s main contribution to Marxist thought [as showing] how dominant groups maintain their social position through the creation of ideologies that have sufficient appeal to win over important segments of the lower and middle classes”); see also CARL BOGGS, *GRAMSCI’S MARXISM* 39 (1976) (noting, “as all ruling elites seek to perpetuate their power, wealth, and status, they necessarily

maintain hegemony by legitimizing the social order in two ways: first, by channeling individual conflicts into public settings that are “laden with ritual and authoritarian symbolism,” such as courts, that isolate legal “cases” from social context; and second, through legal reasoning itself, which presupposes the legitimacy of existing hierarchical power relations.³¹ In this context, hegemony can absorb conflict (e.g., about housing rights, or the rights of employees or family members) but reinforce the underlying power structure (e.g., by legitimizing property ownership, capitalism, and white heteropatriarchy).³² Modern scholars note that hegemony does not require ideological consensus.³³ Moreover, hegemony can be challenged or disrupted through counter-hegemonic practices and the development of counter-hegemonic consciousness.³⁴ Therefore, progressive advocacy strategies typically incorporate methods for developing client consciousness, such as through client empowerment and organizing.³⁵ Progressive legal scholars have also recognized the counter-hegemonic potential of

attempt to popularize their own philosophy, culture, morality, etc. and render them unchallengeable, part of the natural order of things”). Hegemony also operates to instill a sense of inferiority or inefficacy in subordinated groups in order to squelch dissent. *See* James Gray Pope, *Labor’s Constitution of Freedom*, 106 *YALE L.J.* 941, 950 (1997) (describing the operation of hegemonic thought: “A might exercise power over B not only by excluding her grievances from the public agenda, but also by preventing her from recognizing them as remediable problems, or even by convincing her that she is not the kind of person who is capable of defining and acting on grievances”); Gabel & Harris, *supra*, at 371 (describing how “alienation and powerlessness become a self-generating source of social repression that leads to the reproduction of class, race and sex hierarchies from generation to generation”).

31. Gabel & Harris, *supra* note 30, at 373–74; *see also infra* Part II (detailing the hegemonic nature of poor people’s courts).

32. Gabel & Harris, *supra* note 30, at 373–74; *see also* Elizabeth L. MacDowell, *Law on the Street: Legal Narrative and the Street Law Classroom*, 9 *RUTGERS RACE & L. REV.* 285, 301 (2007–2008) [hereinafter MacDowell, *Law on the Street*] (describing how anti-discrimination law is divorced from lived realities of racism and thus, cannot address the problem); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978) (reprinted in *MARKISM AND LAW* 210–335 (Piers Beirne & Richard Quinney eds., 1982)) (arguing that antidiscrimination law offers a credible measure of progress without disrupting the class structure of American society); Alan Freeman, *Antidiscrimination Law: from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 285–311 (David Kairys ed., 3d ed. 1998) (same). *See also infra* Part II (discussing how poor people’s courts allow for contestation of superficial disputes but not underlying norms).

33. *See* Michael Grossberg, *How to Tell Law Stories*, 23 *LAW & SOC. INQUIRY* 459, 467 (1998) (discussing evolving concepts of hegemony in modern scholarship); BOGGS, *supra* note 30 (defining hegemony as an “organizing principle,” or world-view (or combination of . . . world-views),” rather than a monolithic ideological construct).

34. *See* Gabel & Harris, *supra* note 30, at 374; *see also* MacDowell, *Law on the Street*, *supra* note 32, at 325–32 (describing opportunities for the development of counter-hegemonic consciousness); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 234–44 (1998) [hereinafter EWICK & SILBEY, *COMMON PLACE OF LAW*] (describing the condition of counter-hegemonic consciousness); Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC’Y REV.* 197, 220–22 (1995) [hereinafter Ewick & Silbey, *Subversive Stories*] (same).

35. *See* Gabel & Harris, *supra* note 30, at 374; Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 *WIS. L. REV.* 699, 763 [hereinafter White, *To Learn and Teach*]; *see also infra* Part III (describing counter-hegemonic qualities of social justice advocacy).

access to justice interventions like self-help.³⁶ This article incorporates the insights of social justice advocacy into a framework for systematically implementing counter-hegemonic goals in access to justice work within poor people's courts.³⁷ In so doing, this article better connects social justice advocacy traditions to access to justice work.

This is an important time to be reimagining access to justice. It has been more than fifty years since the Johnson administration launched the War on Poverty³⁸ and the development of law practice models that sought to eradicate poverty and structural inequality.³⁹ Today, in the wake of the Great Recession and massive reductions in welfare, more people are living in poverty than at any time in the last fifty years.⁴⁰ Moreover, not only are more Americans facing the deprivations of poverty, they are also facing an ever-more punitive state. Rates of incarceration and criminalization are astronomical, and the devastating impacts of hyper-criminalization in communities of color are well documented.⁴¹ But criminalization is only the tip of the iceberg: the erosion of distinctions between civil and criminal legal regimes—including through myriad civil consequences of criminal convictions,⁴² and increasing use of criminal sanctions for violations of civil laws⁴³—has exacted an incalculable toll on the poor. Indeed, rather than a War on Poverty, scholars and activists have characterized current national policy

36. See, e.g., Gabel & Harris, *supra* note 30, at 397 (describing “group-forming strategies like the *pro se* divorce clinic in which women and/or men can discover their common experience of being imprisoned within traditional family roles while working together to change their status”).

37. See *infra* Part IV (setting forth a framework for a new access to justice model).

38. See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 270–72 (1979) (describing the “War on Poverty” declared by Lyndon Johnson and related legislative enactments).

39. See, e.g., E. Clinton Bamberger, Jr., *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME L. REV. 847, 852 (1966) (reporting a statement by Clinton Bamberger, the first director of the Office of Economic Opportunity Office of Legal Services, that legal services attorneys should work to “defeat the causes and effects of poverty”). See generally, DAVIS, *supra* note 25, at 16 (detailing the rise and fall of the welfare right movement).

40. See *US Poverty Rate Reaching 50-Year High*, COMMON DREAMS (Jul. 23, 2012), <https://commondreams.org/headline/2012/07/23-2>. The United States Census Bureau reports, “[t]he nation’s official poverty rate in 2012 was 15.0 percent, which represents 46.5 million people living at or below the poverty line. This marked the second consecutive year that neither the official poverty rate nor the number of people in poverty were statistically different from the previous year’s estimates. The 2012 poverty rate was 2.5 percentage points higher than in 2007, the year before the economic downturn.” U.S. CENSUS BUREAU, *INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012* (2013), available at http://census.gov/newsroom/releases/archives/income_wealth/cb13-165.html.

41. As compellingly detailed by Michelle Alexander, criminal justice policies in the United States have effectively instituted “the New Jim Crow.” See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

42. See generally *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Cesney-Lind, eds., 2002). See also ALEXANDER, *supra* note 41, at 137–70 (detailing the collateral consequences of criminal convictions and mass incarceration, including stigmatization of African American communities).

43. See, e.g., Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J.L. & FEMINISM 2 (2014); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 101 (2013) [hereinafter Gustafson, *Degradation Ceremo-*

as “the criminalization of poverty.”⁴⁴ Meanwhile, in the face of conservative opposition and restrictive legislation,⁴⁵ federally funded legal services to the poor long ago shifted away from attacking the structural roots of inequality to a more limited role in providing legal services to individuals.⁴⁶ Moreover, funding for individual legal services has been severely limited along with the scope of permissible services that can be provided—including at the critical nexus between punitive regulatory systems like family and criminal law.⁴⁷ Narratives about the “deserving” and “underserving” poor⁴⁸ also limit the services provided by privately funded programs.⁴⁹ Research indicates that only half of those

nies]; Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) [hereinafter Gustafson, *The Criminalization of Poverty*].

44. See, e.g., Kaaryn Gustafson, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011); Gustafson, *The Criminalization of Poverty*, *supra* note 43; Meghan Clark, *American Scandal & Disgrace: The Criminalization of Poverty*, CATH. MORAL THEOLOGY (Aug. 26, 2011), <http://catholicmoraltheology.com/american-scandal-disgrace-the-criminalization-of-poverty>; see also Bobbie Ibarra, *Criminalizing Poverty*, HUFFINGTON POST (Jan. 10, 2013, 9:03 AM), http://huffingtonpost.com/bobbie-ibarra/criminalizing-poverty_b_2442148.html; Nancy Ehrenreich, *Is it Now a Crime to be Poor?*, N.Y. TIMES (Aug. 9, 2009), http://nytimes.com/2009/08/09/opinion/09ehrenreich.html?pagewanted=all&_r=0; *How We Have Criminalized Poverty*, TEX. JAIL PROJECT, <http://texasjailproject.org/kerness-speech-how-we-have-criminalizedpoverty/> (last visited Mar. 8, 2015).

45. See REBEKAH DILLER & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR 3–4 (2009), available at <http://www.brennancenter.org/publication/call-end-federal-restrictions-legal-aid-poor> (describing the efforts of conservatives to dismantle the federally funded legal services program); Deborah Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11, 29–31 (2003) (describing cutbacks to federally funded legal aid beginning with the Reagan administration).

46. See Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1618 (2006) (reporting that most federally funded public interest law offices are focused on individual services rather than social change). Some argue, however, that federal restrictions do not fully account for a drop in federally funded programs aimed at eliminating poverty. See Smith, *Poverty Warriors*, *supra* note 3, at 39 (arguing that such programs moved away from anti-poverty work prior to federal restrictions for other reasons, and that a few manage to continue social justice-oriented work in full compliance with federal restrictions); see also Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 577 (1985) (reporting that legal aid lawyers performed relatively little legal reform work in the 1980s). Smith reports that under new federal legal services performance standards introduced in 2007, programs are encouraged “to engage in advocacy that will achieve systemic benefits and create broad legal remedies not only for individual clients but also for similarly situated low-income persons and indeed for the poor community as a whole.” Smith, *supra* note 3, at 39. In addition, non-federally funded programs have also moved away from poverty-elimination work. *Id.* But see Nielsen & Albiston, *supra* note 46, at 1620 (reporting that privately-funded public interest law offices are freer to pursue social change agendas and more likely to do so than their federally-funded counterparts).

47. See DILLER & SAVNER, *supra* note 45, at 5–15 (describing restrictions on practice by legal aid organizations receiving federal funds). Restrictions include providing *any legal services for inmates* related to litigation, even on family law matters. *Id.* at 12.

48. See, e.g., MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY 167 (2013) (discussing the role of metaphor in solidifying popular ideas of the undeserving poor).

49. See Elizabeth L. MacDowell & Ann Cammett, *Models of Invisibility: Rendering Domestic and Other Gendered Violence Visible to Students through Clinical Law Teaching* 9 (forthcoming, VIOLENCE AGAINST WOMEN), available at <http://ssrn.com/abstract=2591445> (observing that “most legal aid providers direct limited resources to those clients who appeal to their funders’ conceptions about the

seeking assistance from federally funded legal aid programs can be served, and fewer than one in five low-income individuals get the legal help they need.⁵⁰ In this context, a resurgence of imagination about the ways in which low-income people might use the law to challenge subordination and dismantle hierarchy is needed now more than ever.

Part I of the article establishes the institutional origins and philosophy of family court as a “delegalized,” problem-solving institution, creating unique challenges for access to justice efforts. While the phenomenon of a problem-solving court is often characterized as a new development, this Part shows the deep historical connection of family courts to informalism, intervention, and intersecting state systems of subordination. Part I also explores the intersectional impacts and paradoxical nature of the problem-solving court paradigm, which was established both to promote access to justice for the poor through comprehensive services and simplified procedures and maintain social hegemony. This Part shows how these contradictory agendas, facilitated through the exercise of procedural informality and broad judicial discretion, continue to fuel problematic state interventions into poor families.

Part II elaborates the ways in which poor people’s courts are implicated in maintaining hegemony. This Part shows that the problem with poor people’s courts is not merely that many individuals are unrepresented and need assistance accessing court services, but that their routine operation recreates existing social hierarchies. It also assesses the ability of current access to justice interventions such as Civil Gideon and self-help legal services to illuminate or challenge subordinating practices in poor people’s courts. Part II finds that both interventions fall short due to the absence of an animating theory of transformative advocacy. By showing the ways in which current approaches can work to reinforce hegemony and subordination, this Part begins to define the goals and objectives of a counter-hegemonic approach to access to justice.

Part III looks to counter-hegemonic conceptions of advocacy found in social justice lawyering and social justice-based advocacy by non-lawyers, such as social workers and lay advocates for abuse survivors. A closer look at the operation of social justice advocacy models reveals a plurality of advocacies that can inform access to justice theory and practice. This Part proposes an expanded conception of counter-hegemonic, social justice advocacy for access to justice work that focuses on transforming systems through empowerment, mobilization, and democratization.

Part IV proposes a new framework for access to justice that draws on the

deserving poor”). As the authors note, “[t]hese conceptions function . . . to exclude some individuals from receiving needed legal assistance, and shape what types of cases legal aid organizations choose to handle.” *Id.*

50. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW INCOME AMERICANS 2–3 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

principles, goals, and methodologies of social justice advocacy as developed in Part III. This Part delineates potential components of the new model, including collaboration between lawyers and other advocates to provide more comprehensive and holistic services; structural relationships between access to justice programs, courts, and communities designed to promote independence and accountability; and strategies concerning comprehensiveness of services and issue prioritization within a counter-hegemonic framework.

Finally, the article concludes by discussing additional work that may be necessary to fully implement the model, what can be done now in existing programs in order to make a positive difference, and the opportunities that this new approach affords for deeper social change.

I. FAMILY COURT REGULATION OF THE POOR IN HISTORICAL CONTEXT

A. *Delegalized Courts and Expansion of the State*

Legal scholars began taking notice of interventionist and informal procedures in family courts beginning in the 1960s, as the use of child custody evaluations and mandatory mediation increased in middle-class divorce cases.⁵¹ However, the use of non-legal professionals in family matters has a long history, particularly in cases involving low-income families. Family courts emerged at the turn of the twentieth century, built on the ideals and philosophy of their immediate predecessor, the juvenile courts.⁵² Like the juvenile courts, family courts were premised on the idea that intra-family problems are not primarily legal in nature, but are instead manifestations of psychological, medical, and social problems, and best addressed by a multidisciplinary, therapeutic approach.⁵³ Therefore, reformers believed families in distress required alternatives

51. See, e.g., Kay, *supra* note 22.

52. See Paul Alexander, *Legal Science and the Social Sciences: The Family Court*, 21 MO. L. REV. 105, 106 (1956) (“The family court also strives to wed the legal and social sciences. It lifts bodily the main features of the philosophy, methodology and procedure of the juvenile court and adapts them to the family court.”). See also Levy, *supra* note 22, at 120–28 (detailing the parallels between Progressive era divorce and family court reform advocates and the “child savers” associated with the juvenile court movement).

53. See, e.g., SAMUEL HOWARD PATTERSON, FAMILY DESERTION AND NON-SUPPORT, A STUDY OF COURT CASES IN PHILADELPHIA FROM 1916 TO 1920 at 249–50 (1922), available at <http://hdl.handle.net/2027/pst.000057640518> (“Sociologists are talking less about the so-called criminal types and more about the effects of the social environment. Except for those with a degenerate or psychopathic heredity the majority of criminals are made and not born.”); WALTER GELLHORN & JACOB D. HYMAN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY: A REPORT BY A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND A STUDY BY WALTER GELLHORN, ASSISTED BY JACOB D. HYMAN AND SIDNEY H. ASCH, ON THE ADMINISTRATION OF LAWS RELATING TO THE FAMILY IN NEW YORK CITY 6 (1954) (“Modern thinking demands that a proper disposition of many [family court] cases requires the discovery of the root cause and an effort to eradicate it rather than merely treating the symptom by punitive or purely legal remedies. Such an approach brings our jurisprudence in harmony with up-to-date sociological and therapeutic knowledge.”). See also Louise Stevens Bryant, *A Department of Diagnosis and Treatment for a Municipal Court*, 4 J. CRIM. L. & CRIMINOLOGY 198, 198 (1918) (concluding from

to traditional legal solutions—and the adversary system in particular;⁵⁴ solutions that could best be provided by a properly staffed and trained family court team,⁵⁵ led by a specialist judge.⁵⁶ This ideal family court was envisioned as “integrated” or “unified,” with jurisdiction over both civil and criminal matters related to distress in the family, including delinquency and child-welfare matters, paternity, child custody and family support (both within and outside the context of marital dissolution), and divorce and property division.⁵⁷

her “study of apparent causal factors of domestic difficulties in nearly six thousand cases . . . [in the] Domestic Relations Division of the Philadelphia Municipal Court . . . that the issues are overwhelmingly dependent upon medical and psychological interpretations). For a discussion of the juvenile court movement philosophy of “socialized” courts, see FREDERICK L. FAUST & PAUL J. BRANTINGHAM, *JUVENILE JUSTICE PHILOSOPHY* 145–49 (1974). For an accounting of the “child savers” movement for juvenile courts, see generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999); PLATT, *supra* note 24, at 6. See also Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694–95 (1991) (discussing the “child-savers” view of juvenile courts); Butler, *supra* note 24, at 1341–56 (discussing the role of black women’s clubs in the “child savers” movement); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 615–33 (2013) (regarding the child savers’ philosophy).

54. Reformers opined that problems relating to the breakdown of the family “are usually best treated with a preventative approach and should ordinarily not be dealt with as purely adversarial proceedings or in the light of purely legal considerations.” GELLHORN & HYMAN, *supra* note 53. See also Alexander, *supra* note 52, at 107 (“The traditional adversary procedures of the law when employed to resolve intra-familial conflicts then to fan the flames and intensify antagonism between and among members of the family; therefore such procedures should be displaced as far as possible by the non-adversary or conference type of procedure in both determining issues and prescribing remedies . . .”). Hostility to formalism was a part of a larger Progressive agenda that advocated for the “socialization” of the law. See Roscoe Pound, *Social Problems and the Courts*, 18 AM. J. OF SOC. 331, 340–41 (1912) (discussing the socialization of law and courts as part of a modern trend).

55. Court staffs should include “probation officers, investigators, case workers, psychiatrists.” Alexander, *supra* note 52, at 108–09 (quoting from, REPORT FROM THE A.B.A DELEGATION TO THE NAT’L CONFERENCE ON FAMILY LIFE; the conference was held in Washington, D.C. in September 1948). See also GELLHORN & HYMAN, *supra* note 53, at 6–7 (“[T]o perform their functions with any degree of adequacy, [family] courts . . . should be appropriately equipped with diagnostic and treatment facilities. Such facilities should include trained social case workers, medical, clinic psychiatric and psychological services, and marital and religious counseling services.”).

56. See Alexander, *supra* note 52, at 106–07.

57. GELLHORN & HYMAN, *supra* note 53, at 13 (calling for an “integrated” court); REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 74 (1919) (reporting consensus for “unification of jurisdiction and specialization by judges”). Gellhorn and Hyman note the existence of “almost unanimous agreement on the undesirability of the present fragmentation of jurisdiction over these different [family-related] problems between so many unrelated courts.” GELLHORN & HYMAN, *supra* note 53, at 7. Cincinnati has been credited with establishing the first consolidated family court in 1914. See WILLIAM J. BLACKBURN, *THE ADMINISTRATION OF JUSTICE IN FRANKLIN COUNTY, OHIO* (1935); Alexander, *supra* note 52, at 106. However, a domestic relations court was established in Buffalo in 1910, hearing nonsupport and other family matters such as offenses against minors and custody matters. See *MANUAL FOR PROBATION OFFICERS IN NEW YORK STATE* VOL. 2 at 249 (2d Ed. Rev. 1918) (on file with author); see also Christine B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, in *THE POLITICS OF INFORMAL JUSTICE*, VOL. I, *THE AMERICAN EXPERIENCE* (Richard L. Abel, ed., 1982) (“Domestic Relations courts adopted the juvenile court philosophy of social justice and applied it to cases of wife abandonment, illegitimacy, failure to support, offenses against minors, and custody disputes.”). This article refers to

While widespread implementation of these ideals was slow and uneven, and today there remain many variations among family courts in terms of organization and administration,⁵⁸ there nonetheless exists a shared institutional history and culture among family courts. This includes a common origin and philosophy that manifest in three interrelated features: interventionism (e.g., use of social workers and medical and mental health professionals to conduct evaluations of litigants), informality (e.g., simplification of procedures and forms, and efforts to resolve disputes outside of the litigation process), and intersecting systems, including the enduring interrelationship of criminal and civil procedures in family courts.⁵⁹ Together, these constitute what I refer to as delegalization. As it did in the juvenile courts, delegalization operated in family courts to expand the operation of the state in ways that are difficult to control or contain, and that have often had coercive and disparate impacts along intersecting racial, ethnic, gender, and class lines.⁶⁰ The impulse toward delegalization eroded distinctions between legal and non-legal professions and processes and between civil and criminal law, with the effect of both widening and obscuring the boundaries of state action.

In particular, the emphasis on psychosocial and environmental factors in family problems justified an expanded role for the state in addressing family dysfunction, or what has been termed “the ‘interventionist’ style.”⁶¹ Court reformers adopted the language of diagnosis and prevention, while court staffs with non-legal expertise were tasked with investigating family conditions, diagnosing family pathologies, and prescribing solutions.⁶² As in the juvenile courts before them, this provided family courts with new resources and linked courts to social agencies.⁶³ The family court also became a location for the intersection of civil and criminal systems, as authority for this expanded incursion into the family was initially accomplished in part through criminalization of some intra-family disputes—namely, family desertion and nonsupport cases.⁶⁴

these and other specialized courts hearing multiple types of family law matters as “family courts,” regardless of their official designation or extent of integration.

58. See Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230 (2008) (summarizing jurisdictions with a family court). Babb finds, in 2006, “thirty-eight states had either statewide family courts, family courts in selected areas of the state, or pilot or planned family courts, representing seventy-five percent of states. The number of states without a specialized or separate system to handle family law matters decreased from seventeen states in 1998 to thirteen states in 2006.” *Id.* at 231.

59. See *infra* Part I (describing key features of interventionism, informality and intersecting systems within the family court).

60. See *infra* Part I (describing the intersectional impacts of the family court).

61. Levy, *supra* note 22, at 718.

62. See Willard J. Hurst, *Changing Popular Views about Law and Lawyers*, 287 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1953).

63. Harrington, *supra* note 57, at 51.

64. See SMITH, *supra* note 57, at 75.

1. Intervention and Intersecting Systems

Originally civil issues, desertion and nonsupport were criminalized through a series of statutes, including the American Uniform Desertion Act of 1910.⁶⁵ Reformers justified use of the criminal law on the basis of the state's interest in regulating the family.⁶⁶ This interest was newly fueled by concerns about the relationship between crime and family dysfunction on the one hand,⁶⁷ and the longstanding desire to avoid state responsibility for family poverty on the other.⁶⁸ The coercive power of the criminal law could be used to enforce personal responsibility and compliance with support obligations for poor families; probation staff along with other court staff members could be used to investigate cases and assist the court in determining facts.⁶⁹ However, as some formerly civil family law matters were criminalized, criminal processes underwent delegatization, and these processes were in turn applied to civil family matters.

As leading Progressive-era legal reformer Reginald Herbert Walker Smith described:

65. *See id. See also* NAT'L CONFERENCE OF COMM'RS, AMERICAN UNIFORM DESERTION ACT: BEING THE DRAFT OF AN ACT RELATING TO DESERTION AND NON-SUPPORT OF WIFE BY HUSBAND, OR OF CHILDREN BY EITHER FATHER OR MOTHER, AND PROVING PUNISHMENT THEREFORE, AND TO PROMOTE UNIFORMITY BETWEEN THE STATES IN REFERENCE THERETO—NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1910), available at <http://hdl.handle.net/2027/hvd.32044053412987>. In New York City, actions to compel the support of a family remained under the jurisdiction of the criminal court until 1933. After that, support cases outside of the context of a matrimonial action were conducted in Family Court, which was part of the new Domestic Relations court. The new court could enforce financial support of a spouse, children born of a marriage, or a poor relative. GELLHORN & HYMAN, *supra* note 53, at 158. However, the Family Court retained a criminal jurisdiction under the Domestic Relations Court Act, which made non-support a crime punishable by up to twelve months in jail. *Id.* at n.1. Nonsupport of children is still a crime in all fifty states, and nonsupport of spouses is a crime in many states, with varying classifications and penalties. *See Criminal Nonsupport 50 State Table*, NAT'L CONF. STATE LEGISLATURES, <http://ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx> (last visited Mar. 8, 2015).

66. *See, e.g.,* SMITH, *supra* note 57, at 75 (describing criminalization of family matters as “entirely logical because the law has always claimed that the state has a direct interest in all marital and family questions, and that the best way to enforce that interest in fact is through criminal proceedings to which the state is a party and over which it can keep a much closer watch”).

67. *See* Charles Zuner, *The Domestic Relations Courts*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1926, at 114–15 (claiming children become delinquent due to abandonment by their fathers and citing studies).

68. *See, e.g., id.* at 115 (describing costs of desertion as including the financial burden of caring for children and women deserted by male breadwinners in public orphanages); PATTERSON, *supra* note 53, at 252 (observing that, loathe to extend widows pensions to deserted and unmarried mothers, “[t]he theory upon which society is going is to compel the deserting husband either to return or to contribute to the support of the family”). *See also* ROBERTS, SHATTERED BONDS, *supra* note 24, at 26–27 (pointing out that these justifications for differential intrusion on poor families date back to the “Elizabethan Poor Law”).

69. Gellhorn and Hyman describe a twofold theory of the law underlying the family court: first, the court is “aimed at enforcing individual responsibility”; second, it treats nonsupport as a symptom of a larger problem related to family breakdown. GELLHORN & HYMAN, *supra* note 53, at 163. The latter underlies provisions for home visits and investigation, in order to provide the court with “[a]n accurate and objective report in writing giving the facts thus obtained [to become] part of the case history.” *Id.*

[T]he domestic relations courts [like the juvenile courts] are rapidly eliminating the traditional forbidding aspects of a criminal trial by informality of procedure, by using the summons instead of the arrest, by having the attending officers in plain clothes, and by having the parties sit around a table with the judge instead of standing in cages or behind bars, nevertheless the machinery of the criminal law is more and more being used.⁷⁰

Smith points to the “steady drift” of incorporating civil matters like divorce, spousal support, and child custody into courts handling desertion, abandonment, and non-support, and other civil matters like illegitimacy, “and further the tendency of such courts, wherever they have acquired civil jurisdiction, to apply to the civil matters the same processes as those originally developed through the summary criminal remedies.”⁷¹ To the extent court jurisdiction over matrimonial matters remained separate, reformers pointed to the implementation of interventionist measures in domestic relations and juvenile courts as reason to expand their use in custody actions incident to divorce.⁷² Moreover, the impetus for these reforms was to facilitate judicial fact-finding, not solely or primarily for child protection, as some scholars have argued.⁷³

2. Informalism and Intervention

Progressive-era court reformers did not, for the most part, adopt the child savers’ child-protectionist rationales for intervention in family cases. This is not to say that reformers did not consider the intersection of judicial decision-making and children’s interests, but that the focus was on what sorts of facts were relevant to such an inquiry and what sorts of assistance was needed for resolving custody issues.⁷⁴ Reformers argued that adversarial processes were inadequate

70. SMITH, *supra* note 57, at 75. As Harrington observes, “[t]he summons, however, was backed up by the coercive power of a bench warrant if the defendant did not show up. It appears that ‘decriminalization’ represented little more than the use of less overtly coercive incentives to ensure compliance.” Harrington, *supra* note 57, at 52 n.14.

71. SMITH, *supra* note 57, at 81–82 (noting courts in Detroit, Philadelphia, and Cincinnati were investigating divorce cases using probation staff, or sought to do so).

72. See GELLHORN & HYMAN, *supra* note 53, at 310. See also *Ross v. Ross*, 143 N.Y.S.2d 234 (1955) (expressing frustration that the Supreme Court is denied adjunct clinical staff and the authority to appoint a skilled liaison to ensure its orders are followed); William M. Wherry, *But do the Children Get Justice?*, 9 B. BULLETIN 17–21 (Nov. 1951) (New York County Lawyers Assoc.) (comparing case processing methods in the New York Supreme Court and the Domestic Relations Court, and arguing that it would help eliminate juvenile delinquency to apply the non-adversarial methods of the Children’s Court to custody matters in the Supreme Court). Civil courts also sought to extend summary criminal procedures used in domestic relations matters to enforcement of orders in divorce and separation cases. See SMITH, *supra* note 57, at 82.

73. See Levy, *supra* note 22, at 719–21 (arguing that Progressive-era family-court reformers like Gellhorn emphasized children’s rights in divorce reform efforts).

74. See GELLHORN & HYMAN, *supra* note 53, at 315–16 (noting that judges may be asked to make determinations outside their expertise, such as how parental health impacts their child’s well-being). See also Wherry, *supra* note 72, at 17–21 (arguing that outcomes for children in courts using social workers

for the proper resolution of custody disputes, which they believed required “a determination of personality and emotional attitudes as they affect relationships between the parents and children.”⁷⁵ Rather than child protection, family court reformers were motivated by rejection of legalistic approaches to solving problems viewed as social in nature, a belief in social science, and a desire to rationalize court organization and administration.⁷⁶ As with the juvenile court reform movement, however, claims about the social nature of the issues involved and the non-legal expertise necessary for their resolution quickly led to an expanded, interventionist role for courts to handle other family matters.⁷⁷

The reliance on simplified procedures and non-legal processes and interventions was not only a reflection of the ideology of the new family courts; it was a method for managing burgeoning court dockets and expanded judicial authority under the new family court regime.⁷⁸ Reformers pointed to the burgeoning populations of immigrants and the working class, and the explosion of urban centers, as causing a breakdown in judicial administration.⁷⁹ Simplified forms and assistance from probation officers and social workers facilitated processing cases in delegalized family courts by gathering information needed by the judge in a court that prioritized “social” information. For example, Smith reports that in Cincinnati:

[E]very divorce case is thoroughly investigated and reported on to the Court before the parties put on their evidence. The report blanks require, in addition to the facts of the dispute, a complete personal history, including such matters as church membership, moral character, temperance, mentality, occupation, a statement as to the character of the home, its sanitation, cleanliness, and order, and detailed figures as to the earnings and joint holdings of the parties.⁸⁰

Additionally, conciliation was used in both civil and criminal cases in response to reformers’ anxiety about the social costs of marital breakups. Referring to desertion and nonsupport cases, Smith notes that:

and psychiatric services are superior to outcomes in courts using traditional legal methods). A greater focus on the children, however, was an inevitable result of prioritizing social over individual interests. See Pound, *supra* note 54, at 338 (“The individual interests of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interest of the child and the interest of society. In other words, here also social interests are now chiefly regarded.”).

75. GELLHORN & HYMAN, *supra* note 53, at 310.

76. See Harrington, *supra* note 57, at 63 (referring to the latter as an “administrative-technocratic rationale” for judicial interventionism).

77. See, e.g., Ross, 143 N.Y.S.2d at 234.

78. See Harrington, *supra* note 57, at 52 (describing the domestic relations courts as “represent[ing] the institutionalization of informal dispute processing”).

79. SMITH, *supra* note 57, at 6–7.

80. *Id.* at 82.

[C]ourts have . . . more and more employed the method of conciliation. The interest of the state in these cases is that homes should not be broken up except for grave causes and that families should be reunited whenever possible A conciliation proceeding gives the court its only chance to repair, reunite, and construct.⁸¹

Thus, conciliation simultaneously expanded the reach of the court into litigants' personal lives and facilitated processing cases in over-burdened courts.⁸²

Reformers acknowledged the tension between informal interventions and adversary processes, and generally affirmed that the latter should remain available for “any person demanding it for the finding of disputed fact.”⁸³ At the same time, they pushed for new rules to facilitate the expansion of informal interventions, including relaxing evidentiary standards,⁸⁴ and expanded judicial discretion.⁸⁵ Importantly, court reformers viewed informal processes and state interventions as providing access to justice for the poor as well as benefiting the state.⁸⁶

B. *The Paradox of the Problem Solving Court*

For reformers like Smith, administrative work done by courts in the state's interest—from investigation to enforcement—resulted in a corresponding decrease in the denial of justice to the individual.⁸⁷ This rationale for delegalization informed the development of not only family courts, but courts assigned to hear

81. *Id.* at 80.

82. See Harrington, *supra* note 57, at 53 (observing “[t]he flexibility of conciliation procedures facilitated social investigation into family problems”). See also Edgar J. Lauer, *Conciliation—A Cure for the Law's Delay*, 136 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (1928); Edgar J. Lauer, *Conciliation, A Cure for Congested Court Calendars*, 27 N. Y. LEGAL AID REV. 1 (1929). The interventionist nature of conciliation was exacerbated by how courts implemented it: all court staff members, from courtyards to bailiffs to judges, were encouraged to attempt conciliation at every opportunity. Harrington, *supra* note 57, at 54.

83. Alexander, *supra* note 52, at 107. See also GELLHORN & HYMAN, *supra* note 53, at 6 (opining that problems relating to the breakdown of the family “involve important sociological consequences affecting the community at large. Such matters . . . are usually best treated with a preventative approach and should ordinarily not be dealt with as purely adversarial proceedings or in the light of purely legal considerations. This does not mean that the traditional protections of the judicial process should be lessened in any degree in determining legal rights.”).

84. See GELLHORN & HYMAN, *supra* note 53, at 332–33.

85. See, e.g., Zunser, *supra* note 67, at 124 (calling for family courts to be granted equity powers, so judges could maintain jurisdiction over parties and ensure compliance with their orders). For a discussion of the rise of judicial discretion in family law cases beginning in the nineteenth century, see generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985) [hereinafter GROSSBERG, *GOVERNING THE HEARTH*].

86. See, e.g., SMITH, *supra* note 57, at 76 (“Desertion and refusal to support wives and children are made crimes in order to protect the state's interest in the family, but this change automatically worked a great improvement in the position of the poor before the law because it made available the processes of the criminal law.”).

87. *Id.* at 82.

other “low level” disputes, such as small claims and landlord–tenant matters, during the Progressive era.⁸⁸ Simplified procedures and court investigation made the court accessible to the poor because it reduced the need for lawyers;⁸⁹ use of the coercive tools of the criminal court put the onus of enforcement on the state, rather than the litigant.⁹⁰ Unifying courts so that related or similar matters could be heard by one judge or set of judges would both increase efficiency and make the courts more accessible.⁹¹ Reformers’ belief that fairness in administering justice was necessary in order to socialize and democratize new populations of urban poor and the working class lent urgency to their claims.⁹² While the new courts undoubtedly assisted some low-income individuals who sought help,⁹³ assistance from the new courts also came with hazards for the poor and working-class people—primarily minorities and women—whom the courts aimed to help; harmful effects that remain obscured by the rhetoric of access to justice.

1. Subordinating Impacts of the New Family Courts

The impacts of the new family court were shaped by the intersection of race

88. See Bezdek, *supra* note 6, at 535 (“Courts assigned to hear small claims were designed with the expectation that citizens would speak directly to courts without the aid or obstacle of formal rules of evidence, professionally trained representatives, or elaborate rules of entitlement or presentation.”). See also SMITH, *supra* note 59, at 41–59 (discussing small claims courts). These rationales continue to fuel calls for informalized, problem-solving courts. See Tal Finney & Joel Yanovich, *Expanding Social Justice Through the “People’s Court”*, 39 LOY. L.A. L. REV. 769 (2006); Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990); Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3 (1998).

89. See SMITH, *supra* note 57, at 78 (describing how simplified procedures and forms in family court have “eliminate[d] the attorney’s function insofar as it is dispensable”).

90. *Id.* at 79.

91. See GELLHORN & HYMAN, *supra* note 53, at 9 (arguing against the inefficiency of maintaining multiple courts with separate jurisdiction over overlapping family matters).

92. In the introduction to Smith’s report, *Justice and the Poor*, Henry S. Pritchett, then-President of the Carnegie Foundation (which funded the report), writes: “For no group in the citizenship of this country is [a fair administration of justice] more needed than in the case of the great mass of citizens of foreign birth, ignorant of the language, and helpless to secure their rights unless met by an administration of the machinery of justice that shall be simple, sympathetic, and patient. To such, *the apparent denial of justice forms the path to disloyalty and bitterness.*” SMITH, *supra* note 57, at xi–xii (emphasis added). See also *id.* at ix (then-Senator of New York Elihu Root opining in the foreword, “[Smith’s report] should be of great value to the multitude of Americans who are interested in the Americanization of the millions of foreigners who have immigrated to this country, and who fail to understand or who misunderstand American institutions”). Smith underscores the concern that the failure to prioritize Americanization will lead to political instability. See *id.* at 6 (warning that “[t]he inhabitants of the American colonies learned from the tyrannies and arbitrary conduct of George III and the Royal Governors what denial of justice meant, and it incited them to rebellion”). In keeping with this framing of the need for court reform, “Americanization rather than class injustice became the central focus when the American Bar Association considered Smith’s report.” DAVIS, *supra* note 25, at 16.

93. See, e.g., SMITH, *supra* note 57, at 80 (reporting amounts of support collected by domestic relations courts in Chicago, Philadelphia, Cincinnati, Detroit, and Boston, from 1911 to 1916).

and ethnicity, class and gender, and geography.⁹⁴ First, criminalization of family law matters like desertion and nonsupport meant that low-income women could rely on state resources to secure support from absent husbands and fathers.⁹⁵ However, it also meant that poor women and their families were forced into the criminal justice system for help with family economic troubles.⁹⁶ This was in contrast to wealthier families who had better recourse to divorce, which often required payment of a lawyer and court fees.⁹⁷ The impacts of expanding criminal penalties in the delegalized court were significant. For example, in 1923, 68.4% of all persons on probation in all magistrate courts in New York City were “non-supporters.”⁹⁸ The pervasiveness of the problem gave rise to use of the term, “poor man’s divorce” for desertion cases.⁹⁹ The impact of criminalization was hardest on urban lower-working class families, and black families in particular.¹⁰⁰ For example, a study of nonsupport cases in Philadelphia from 1916 to 1920 found that black husbands were represented at rates that were double their presence in the city’s general adult population.¹⁰¹

Second, the broad discretion afforded to the court staff responsible for investigating family court cases facilitated the imposition of white middle-class values and stereotypes on low-income families, especially low-income immigrant and black mothers.¹⁰² The institutionalization of discretionary decision-

94. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (setting forth the theory of intersectionality to describe the multidimensional experiences of black women); Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER, RACE & JUSTICE 531 (2013) [hereinafter MacDowell, *Theorizing from Particularity*] (advocating for a broad approach to intersectionality that analyzes the multidimensional experiences of men and white women and issues of relative subordination).

95. See SMITH, *supra* note 57, at 76–80 (describing criminal as opposed to civil processes for securing a support order).

96. See Zunser, *supra* note 67, at 118 (noting that the state required a complaint of nonsupport be brought by an individual in order to proceed with a nonsupport case).

97. See SMITH, *supra* note 57, at 20–30 (discussing court fees and court costs as barriers to access to justice for the poor). Access to the courts for divorce was not deemed a constitutional right until 1971. See *Boddie v. Connecticut*, 401 U.S. 371, 371 (1971) (holding state court’s failure to waive filing fees for indigents seeking divorce was a violation of the Due Process Clause of the Fourteenth Amendment).

98. That same year, the courts collected a total of \$2,322,588.91 from them for their families. Zunser, *supra* note 67, at 118.

99. See PATTERSON, *supra* note 53, at 252 (“Broken family life in the so-called upper social classes frequently results in divorce. In the so-called lower economic classes it takes the more simple form of desertion. Indeed, desertion has been called ‘the poor man’s divorce.’”).

100. See *id.* at 269–72 (discussing representation of black and foreign-born men in desertion and nonsupport cases); *id.* at 279–80 (providing data showing lower-working class black husbands were disproportionately represented in desertion and nonsupport cases).

101. *Id.* at 271. Immigrant husbands were prominently, but not disproportionately, represented in cases during the same period. *Id.* at 272.

102. See Butler, *supra* note 24, at 1358–61 (discussing operation of white middle class norms in the juvenile justice system during this era); ROBERTS, *SHATTERED BONDS*, *supra* note 24, at 59 (“Studies of child protection decision making show that caseworkers tend to use a model family as a frame of reference. They evaluate problem behavior by the extent it deviates from this parenting ideal. The model for many caseworkers is a white, middle-class family composed of married parents and their children”);

making by probation officers, social workers, and other family court staff complimented doctrinal trends in American family law that had resulted in broad legal standards for judicial decisions regarding the custody and control of children.¹⁰³ The latter trend allowed judges, beginning in the nineteenth century, to determine parental fitness for custody upon break up of the family and to enforce gender norms, particularly regarding maternal fitness.¹⁰⁴ Working in conjunction with one another in the new family courts, expansive judicial and extrajudicial discretion facilitated coercive state interventions in vulnerable families. Despite the rhetorical shift during the Progressive era toward diagnosis, treatment, and rehabilitation, eugenics-based theories about the inherent criminality and socially deviant character of certain groups remained influential.¹⁰⁵ Swelling populations of immigrants and black Americans in North American cities were associated with crime.¹⁰⁶ Stereotypes about black men and women as prone to criminality,¹⁰⁷ and black women as morally deficient “Jezebels” and prostitutes,¹⁰⁸ were prevalent. At the same time, the belief in the influence of environmental factors on behavior only served to reinforce justifications for court interventions in low-income urban immigrant and black families.¹⁰⁹ One result was an enduring legacy of racism and gender and class bias in juvenile and child-welfare cases that is reflected in historical accounts of the first family courts and continues to the present day.¹¹⁰ But these impacts are not only present in state-initiated cases. The subordinating impacts of expanded discretion and the imposition of bias, and intersecting punitive state systems, persists in cases where the state is not a party as well.

see also Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family and Criminal Law*, 83 CORNELL L. REV. 688, 707 (1998) [hereinafter Murphy, *Legal Images of Motherhood*] (“Conversations with [child protective services] workers reveal a deep bias about bad mothering based on race, class, and poverty”).

103. See GROSSBERG, GOVERNING THE HEARTH, *supra* note 85, at 234–85 (detailing the judicial transformation of custody law in the nineteenth century).

104. *Id.* at 252.

105. See Butler, *supra* note 24, at 1365–68 (discussing the persistence of eugenics-based theories of black inferiority in the juvenile court system). Platt refers to the child savers’ “rhetoric of legitimization” which drew from (sometimes conflicting) multiple sources: “From the medical profession, the child savers borrowed the imagery of pathology, infection and treatment; from the tenets of Social Darwinism, they derived their pessimistic views about the intractability of human nature and the innate moral defects of the working class; finally, their ideas about the biological and environmental origins of crime may be attributed to the positivist tradition in European criminology and to anti-urban sentiments associated with the rural, Protestant ethic.” Anthony Platt, *The Rise of the Child Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 22 (1969).

106. See Butler, *supra* note 24, at 1348.

107. See *id.* at 1364–65. Even upper-class blacks were unable to escape attribution of these stereotypes. See *id.* at 1383.

108. *Id.* at 1386.

109. *Id.* at 1362; Harrington, *supra* note 57, at 51 (noting that reformers viewed juvenile courts as helping poor and working-class immigrant children become “Americanized,” countering the perceived negative influence of crowded urban settings).

110. See Murphy, *Legal Images of Motherhood*, *supra* note 102, at 719 (describing the impacts of broad prosecutorial discretion in child-welfare cases).

2. Present-Day Dynamics

While civil courts do not typically track demographic information regarding persons using their services, one study of data from court-based services for unrepresented litigants indicates that, in some courts, the majority of litigants without counsel in private family cases that identify themselves as racial and ethnic minorities are women, and are poor.¹¹¹ Moreover, the use of informal and interventionist procedures, including use of child custody investigations and informal dispute resolution, has continued to expand throughout the twentieth century in private party cases.¹¹² There are new professional staff such as “parenting coordinators,” “early neutral evaluators,” and “family law facilitators”; the courts also continue to vest enormous power in nonprofessional staff such as clerks, custody investigators, case managers, and, in many cases, mediators.¹¹³

The continued institutionalization of informal fact finding and dispute resolution means that much decision-making affecting legal rights takes place largely without reference to legal rights and norms and, in many cases, without a written record or the possibility of appellate review.¹¹⁴ As in the early courts and in state-initiated cases, the discretion afforded to non-legal professionals and the indeterminacy of legal standards also leaves litigants vulnerable to the infiltration of bias in decision-making.¹¹⁵ While there may be some advantages to less

111. See, e.g., Emily Troshynski & Elizabeth L. MacDowell, *Gender, Self-Help, and Access to Justice* 6–7 (manuscript on file with author) (reporting demographic findings from meta-analysis of twenty self-help studies conducted between 2000 and 2010, from a total of ten California counties). Additionally, most self-represented litigants had not completed college and many were monolingual in a language other than English. *Id.* While demographics vary among courts, many jurisdictions report similar findings. See JOHN M. GREACEN, CTR. FOR FAMS., CHILD. & THE CTS., CA ADMIN. OFFICE OF THE COURTS, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 4–8, available at <http://courts.ca.gov/partners/documents/SRLwhatweknow.pdf> (last visited Mar. 8, 2015).

112. See Murphy, *Revitalizing the Adversary System*, *supra* note 21; see also Levy, *supra* note 22, at 716–17 (describing the increase in court ordered custody investigations in one Minnesota county from thirty-five investigations in 1956 to a predicted seven hundred investigations in 1985, despite the emergence of custody mediation, beginning in 1970).

113. See Murphy, *Revitalizing the Adversary System*, *supra* note 21, at 901–02.

114. *Id.* at 906.

115. It also creates process dangers based on power imbalances between litigants. Regarding mediation, see generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1576–77 (1991); Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN’S L.J. 57 (1984); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1395 (1985). As a result of problems associated with informality, some poverty law scholars contend that formal legal processes are the best way to protect low-income litigants. See, e.g., Mark H. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in THE POLITICS OF INFORMAL JUSTICE 119 (Richard L. Abel ed., 1982); Bezdek, *supra* note 6; Rebecca E. Zietlow, *Two Wrongs Don’t Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U.L. REV. 1111 (1996). Others, however, suggest that poor people may benefit from less formal procedures. See, e.g., William H. Simon, *Legality, Bureaucracy, and Class in the Welfare*

formal dispute resolution processes for litigants, the negative impacts of these practices fall hardest on vulnerable populations without the resources to negotiate legal remedies under more favorable circumstances.

Several decades of gender and race bias studies show pervasive bias against litigants in private family law cases, including cases relating to domestic violence, divorce, custody, and support.¹¹⁶ As summed up by Jeannette Swent in a comprehensive analysis of task force reports, these studies show that, “Women receive unfavorable substantive outcomes in cases because of their gender, and men do not. Women’s complaints are trivialized and their circumstances misconstrued more often than men’s, and women more often than men are victims of demeaning and openly hostile behavior in court proceedings.”¹¹⁷ Studies on gender and race bias have, for the most part, been conducted separately, and without regard to intersecting effects of gender, class, and race and ethnicity, or, for that matter, sexuality or other social positions.¹¹⁸ However, “many groups [studying bias] considered poverty and reported that poor women’s problems with access to justice are acute and are compounded by gender bias.”¹¹⁹ Further attention to intersectional subordination shows that the family court system impacts poor people differently and subordinates both poor men and women, often in gender-specific ways. For example, low-income men continue to be incarcerated in high rates for child support debt through the family court under doctrines of civil contempt.¹²⁰ Although incarceration is supposed to be limited to cases where the child-support obligor has the current ability to pay the support owed, judicial disregard of legal standards results in what amounts to debtors’ prison for some low-income obligors.¹²¹ Low-income women and men of color are still more likely than wealthier individuals to suffer the consequences

System, 92 YALE L.J. 1198 (1983); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990).

116. See Swent, *supra* note 11.

117. *Id.* at 55.

118. *Id.* at 78–80.

119. *Id.* at 80.

120. This occurs in child support cases initiated by the state in order to collect on welfare payments made to a custodial parent or guardian on behalf of a child and in support cases initiated by a custodial parent or guardian. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J.L. & PUB POL’Y 95 (2009). See also *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (involving the appeal of an indigent child support obligor incarcerated for nonpayment of child support debt to the custodial parent). “In South Carolina, where Michael Turner was incarcerated, child support obligors imprisoned for civil contempt comprise approximately thirteen to sixteen percent of the jail population.” Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy for Non-Custodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 618 (2012). Child support laws are gender neutral; therefore, while fathers are more likely to be noncustodial parents and liable for child support, noncustodial mothers may be subject to child support obligations and enforcement, as well. See *id.* at 618 n.8 (reporting that “a recent study of child support civil contempt hearings observed that twelve percent of parent–debtors were mothers”).

121. Patterson observes that, “[t]he majority of [child support] obligors with arrearages, and thus subject to repeated contempt proceedings, are below the poverty line. The Federal Office of Child Support Enforcement reports that 70 percent of child support arrearages are owed by noncustodial

of the ongoing intersection of the family court with the criminal justice system, including in private party cases.¹²²

In addition to child support enforcement, newer system intersections have caused increased exposure to punitive sanctions through family court proceedings. For example, civil protection orders, violations of which are a crime in all states, have become the primary remedy for domestic violence.¹²³ In some states, violations of these orders, which are typically obtained under relaxed civil evidentiary standards, have become a routine shortcut to convictions for additional crimes with greater penalties, such as burglary.¹²⁴ Protection orders also come with collateral consequences¹²⁵ that may impact parties subject to such orders in ways akin to criminal convictions.¹²⁶ Potential exposure to the child welfare system also increases with domestic violence claims, for example, through court programs utilizing child-welfare caseworkers to investigate

parents with no annual earnings or earnings less than \$10,000. Only 4 percent are owed by noncustodial parents with an annual income of \$40,000 or more.” Patterson, *supra* note 120, at 118.

122. This connection also manifests at the nexus of family law and mass incarceration. See Ann Cammett, *Deadbeats, Deadbroses, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL’Y 127 (2011) (detailing how mass incarceration increases poverty linked to child support debt). There is also a trend toward greater enforcement of child support through the criminal justice system. See Sheila Bapat, *Debtors Prisons are Alive and Well in America*, ALTERNET (Jul. 30, 2013), <http://alternet.org/economy/debtors-prisons-are-alive-and-well-america> (reporting raids to arrest child support debtors, and mass issuance of bench orders for nonpayment of support).

123. TK Logan & Robert Walker, *Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 685 (2009); see also Susan Keilitz, *Improving Judicial System Responses to Domestic Violence: The Promises and Risks of Integrated Case Management and Technology Solutions*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 147, 149 (Albert R. Roberts ed., 2002) (reporting that domestic violence survivors are more likely to seek protection through civil protection orders than the criminal justice system); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008) (characterizing civil protection orders as the “most commonly used legal remedy for domestic violence”); PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. JUSTICE, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000) (reporting that approximately twenty percent of the 1.5 million survivors of domestic violence obtain civil protection orders annually).

124. JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 19–34 (2009). Violation of some protection order provisions is also a deportable offense. See Immigration and Nationality Act § 237(a)(2)(E)(ii) (2009).

125. See generally, Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind, eds., 2002).

126. See, e.g., Putman v. Kennedy, 900 A.2d 1256, 1261–63 (Conn. 2006) (holding that because there is a possibility of “significant collateral consequences,” the expiration of the restraining order does not render the case moot). Collateral consequences include the social stigma associated with being identified as an abuser. *Id.* at 1263. Protection orders are accessible in future investigations about the same family and may be used to make negative inferences about the party subject to the order in future family law matters. *Id.* Additionally, employment may be affected by firearm restrictions that some states include on protective orders. Federal law also prohibits possession of firearms by individuals convicted of domestic violence or subject to some types of protective orders. See 18 U.S.C. § 922(g) (2010).

domestic violence claims.¹²⁷ Men and women of color may be particularly vulnerable to the operation of bias in the protection order process due to stereotypes about survivors and perceptible perpetrators of crime.¹²⁸

Finally, the number of family courts with concurrent jurisdiction over both civil and criminal cases is growing. As in earlier stages of the court reform movement, present-day reformers seek to increase access to justice by reducing what they view as unnecessary fragmentation in the court system. In particular, proponents of integrated courts seek to address problems of overlapping jurisdiction over family cases involving domestic violence, which often presents both civil and criminal issues. However, combining civil and criminal courts also facilitates more punitive state interventions into the family while reducing procedural protections for defendants and safety concerns for survivors. Notably, litigants seeking protection orders, and those responding to protection-order requests, have even higher rates of self-representation than other family cases, and are thus especially vulnerable to state interventions into their families as a result of these intersections.¹²⁹

The institutional roots and consequences of informality, intervention, and intersecting state systems illuminate the contours of access to justice work in family courts: to prepare or protect litigants. But the combined effects of delegalization also lead to a sum greater than its parts. The harms to low-income litigants in poor people's courts potentially include loss of rights,¹³⁰ limited autonomy and privacy,¹³¹ and deprivation of voice.¹³² The institutional culture

127. For example, while teaching a domestic violence clinical course in Orange County, California, I learned that the family court's Domestic Violence Prevention Services Project sends caseworkers from the Department of Children and Family Services unannounced to the homes of applicants for protection orders who are referred to the program. For a discussion of the often punitive impacts of child welfare systems on domestic violence survivors, see Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557 (2005). Child welfare caseworkers are sometimes used for custody investigations in non-domestic violence cases too. See Hill, *supra* note 6.

128. See MacDowell, *Theorizing from Particularity*, *supra* note 94.

129. Applicants for civil protection orders are also an especially vulnerable population, for other reasons. Survivors of domestic violence often seek protection orders at a critical juncture, such as the aftermath of an incident involving law enforcement, and this may be their first encounter with the court system. See Troshynski & MacDowell, *supra* note 111 (finding in a comparison study of legal self-help centers that sixty-five percent of litigants using the centers were going to court for the first time). Researchers like Sally Engle Merry argue that survivors' encounters with the legal system in this context are pivotal in the development of their legal consciousness and willingness to use the system again. See Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25:2 HUMAN RIGHTS Q. 343 (2003).

130. See Murphy, *Revitalizing the Adversary System*, *supra* note 21.

131. See *id.* See also Kim, *supra* note 127, at 592–95 (describing the potentially protective function of privacy for poor women).

132. Scholars, often writing from personal experience representing clients in the poor people's courts and in administrative tribunals, have documented the ways in which low-income women, especially those of color, are disadvantaged by the lack of receptivity of legal decision makers to their speech, such that their voices are silenced or simply not heard across differences of class, race, and the parameters of legal or other professional discourse. See Bezdek, *supra* note 6 (describing ways in which tenants are silenced in small claims court due to differences in speech and cultures of claiming); Catherine Therese Clarke,

and practices of these courts reinforce hegemonic relationships between the poor and not-poor, and the state and low-income people appearing before the court. Fully discerning the task of access to justice in family courts requires placing family court culture and practices within the context of poor people's courts and their role in maintaining social hierarchies. This context also demonstrates the importance of an access to justice framework that addresses subordination and power, which, as I explain in the following Part, current approaches fail to do.

II. MAINTAINING HEGEMONY IN THE POOR PEOPLE'S COURTS

A. *Poor People's Courts and Hegemony*

All courts reinforce hegemony. Peter Gabel and Paul Harris, in their classic article about counter-hegemonic law practice, state: "The principle role of the legal system . . . is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement."¹³³ Courts perform this role by creating a culturally salient and ritualized display of authority¹³⁴ where litigants may contest rights within narrowly framed legal discourses.¹³⁵ However, the poor people's courts do so in particular ways that are significant for access to justice efforts. Unlike the traditional image of an awe-inspiring and lofty court of law,¹³⁶ poor people's courts are more akin to other places where low-income people go to seek services or resolve disputes: administrative offices and agencies where, like the courts, one is likely to find crowded and shabby waiting rooms, long waits, opaque and frustrating procedures, and a predominance of black and brown-skinned people.¹³⁷

Missed Manners in Courtroom Decorum, 50 MD. L. REV. 945 (1991) (describing how informal rules regarding courtroom speech and decorum disadvantage outsiders); White, *Sunday Shoes*, *supra* note 6 (analyzing the ways in which welfare bureaucracies silence poor women of color).

133. Gabel & Harris, *supra* note 30, at 372.

134. *See id.* at 372–73 ("Taken as a whole, this display of legal symbolism lays the deep psychological foundation for a political culture that substitutes identification with authority for real democratic participation, and that substitutes fantasies of patriotic community for an actual community founded upon love and mutual respect.")

135. *See id.* at 373 ("Thus landlord–tenant law allows one to argue for increasing tenants' rights, but not to challenge the very existence of landlords and tenants because it has already been decided (by 'founding fathers') that freedom requires the protection of private property in its current form.")

136. *See id.* at 372–73 (depicting the quintessential court of law, where "the participants are brought before a judge in a black robe who sits elevated from the rest, near a flag to which everyone in the room has pledged allegiance each day as a child; the architecture of the courtroom is awesome in its severity and in its evocation of historical tradition; the language spoken is highly technical and intelligible only to the select few who have been 'admitted to the Bar.'")

137. *See Hill*, *supra* note 6, at 528–29 (describing the family court's "waiting rooms . . . filled—standing room only—with mostly black and brown people, the majority of them women, waiting for their cases to be called. Lawyers talked with clients in the hallways and on staircases, court officers yelled the names of litigants into the waiting room, and many people walked about, looking lost."); Bezdek, *supra* note 6, at 535 (describing Baltimore's rent court, "where a single judge deals with as many as 2500 cases on a daily docket [and the] great proportion of tenants who appear are poor black women"). *See also id.* at

These conditions are often exacerbated by jurisdictional divisions and funding allocations¹³⁸ that separate poor people's courts from those more likely to be utilized by litigants with greater financial resources and attorneys.¹³⁹ In addition to the black-robed judge, litigants in poor people's courts are subject to the authority of numerous other court staff and adjuncts that wield power over parties and cases.¹⁴⁰ Rather than decisions cloaked in formal rules, litigants in delegalized courts are likely to contend with hard-to-discern informal standards, or decisions that depart from rules altogether, so that the law appears opaque and arbitrary.¹⁴¹ Along with sexist or racist remarks and commentary,¹⁴² these disparities in the treatment of low-income litigants in the courts are degrading and disheartening and stigmatize poor people as unworthy of equal justice.¹⁴³

Moreover, normative biases about appropriate behavior for particular litigants and failure to follow formal rules are related phenomena in poor people's courts. For example, Gary Blasi notes that judges in housing courts frequently develop "a 'law of the courtroom' that is at odds with the controlling legal precedent" and which corresponds with ideas about acceptable behavior for low-income

540 n. 21, n.22 (reporting that seventy-one percent of tenants appearing in rent court were women, many of whom were accompanied by small children; eighty-seven percent appearing were black, and thirteen percent were white).

138. See, e.g., Goodman, *supra* note 6, at 61. Goodman writes: "The actual proceedings and atmosphere of the housing court closely resemble a three-ring circus. In addition to the calendar part, there are overflowing, mini-courtrooms for housing cases. At the same time, modern and spacious courtrooms are reserved for commercial, tort and criminal cases and often go unused." *Id.*

139. See, e.g., Hill, *supra* note 6, at 546. Describing the division of family law jurisdiction between New York's Family Court and Supreme Court, Hill notes that the "Supreme Court is a higher status court than Family Court, and supreme court litigants tend to be better-off financially and more likely to be represented by counsel." *Id.* In addition, Family Court judges use staff from the city's child protection agency to evaluate custody cases. *Id.* at 540–41. In contrast, New York Supreme Court justices use better-trained mental health professionals unassociated with the agency to conduct evaluations. *Id.* at 545–46. See also Goodman, *supra* note 6, at 61 (comparing conditions in New York City's housing court to other civil courts).

140. See Harrington, *supra* note 57, at 54 (noting "the view that court personnel should play a proactive role in the socialized courts").

141. The routine disregard of the law in the day-to-day operations of poor people's courts is well demonstrated by the conduct of the trial court described in *Turner*. In that case, the trial judge "spent less than five minutes [on the case], made no findings on the record, . . . and sent Turner to jail for twelve months." Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 160 (2012).

142. See, e.g., Swent, *supra* note 11, at 61 (reporting that "[w]omen in most states reported that they were subjected in court to inappropriate forms of address, . . . comments on their appearance, sexist jokes, hostile remarks based on gender and even unwelcome sexual advances. The task forces found generally that women in court are treated by judges and male lawyers as less credible than men, a finding that encompasses women lawyers, witnesses, litigants and experts"). Also notable is the cavalier behavior toward litigants that suggests they are not deserving of respect. See, e.g., Goodman, *supra* note 6, at 61 (describing a housing court hearing officer telling a litigant to leave the courtroom during his own proceeding because there was no where to sit).

143. See Goodman, *supra* note 6, at 61 (observing that the inadequacy of housing court as opposed to other civil courts "is a statement of contempt for the majority of people whose only contact with the judicial-legal system is in housing court").

tenants.¹⁴⁴ Thus, application of the law in poor people's courts may turn on judicial assessment of whether litigants perform their identity according to prevailing norms of acceptable behavior for poor people or other determinative categories.¹⁴⁵

Policies enforced by poor people's courts also reinforce normative assumptions that systematically disadvantage low-income people and perform the hegemonic function of structuring disputes so that underlying norms are unassailable. For example, child-support policies embody the normative position that financial support is the only valuable contribution noncustodial parents make to their children, a standard that low-income mothers and fathers are particularly challenged in meeting due to structural constraints, such as barriers to employment.¹⁴⁶ However, disputes over current ability to pay do not permit contestation of the underlying assumption. Similarly, conflict over the conclusions in a custody evaluation rarely permits litigants to contest normative assumptions about what makes a good home or parent that are embedded within such evaluations under the guise of professional expertise.¹⁴⁷ These and other routine practices in poor people's courts reinforce stereotypes about low-income people in ways that closely resemble the ritualized degradation of the poor that Kaaryn Gustafson describes as overtaking national welfare and criminal justice policies.¹⁴⁸

Gustafson draws on the work of sociologists Harold Garfinkle and Harry Murray to demonstrate how raced and gendered "degradation ceremonies" function to normalize treatment of the poor in the United States as criminals and cheats.¹⁴⁹ Just as courts lend the imprimatur of legitimacy to hegemony, "[w]hat makes the degradation of the poor in the United States ceremonious is the formal and public nature of the degradation, a formality lent to the degradation through the involvement of, or association with, the criminal justice system."¹⁵⁰ As Gustafson explains, the function of degradation ceremonies is to "help us learn what we know as social facts," including our understanding of what constitutes

144. See THE EMPIRICAL RESEARCH GRP., UCLA SCH. OF LAW, EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER FINAL REPORT 15 (2001), available at www.courts.ca.gov/partners/documents/Final_Evaluation_Van_Nuys_SHC2001.doc.

145. See *supra* Part I (discussing bias in family courts); see also MacDowell, *Theorizing from Particularity*, *supra* note 94 (discussing how intersecting race, class, and gender identities of survivors and perpetrators impacts judicial decisions in domestic violence cases).

146. See, e.g., Brito, *supra* note 120, at 646–47. Summarizing one study's findings on barriers to employment for low-income noncustodial fathers, Brito reports: "forty-three percent were high-school dropouts, thirty-nine percent had health problems, and thirty-two percent had not worked in three years. Overall, job prospects are not promising for men with already weak attachments to the labor force and other significant barriers to employment." *Id.* at 647. See also Cammett, *supra* note 122, at 146–47 (describing the poor employment prospects for noncustodial parents reentering society from prison).

147. See, e.g., Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence* (manuscript on file with author) (discussing the ways in which representations of scientific expertise masks ideology).

148. Gustafson, *Degradation Ceremonies*, *supra* note 43.

149. *Id.* at 105–06.

150. *Id.* at 106.

“acceptable conduct” and who are “acceptable persons.”¹⁵¹ These ceremonies “tend to differ for different groups, with the degradation ceremonies often specific for marginalized groups based on their gender, age, race, and ethnicity.”¹⁵² For example, “[f]or young African American and Latino men, police stops, frisks, and automobile searches are common degradation ceremonies.”¹⁵³ In contrast, degradation ceremonies for low-income women of color are different, and largely organized around devaluation of their motherhood.¹⁵⁴ As described by Gustafson, the commonality across ceremonies is their symbolic nature; like the operation of poor people’s courts, degradation ceremonies work to reinforce both concepts of state authority and stereotypes related to subordination.¹⁵⁵ The spectacle of degradation also performs expressive functions, including legitimizing poverty and the conditions of the poor through criminalization and punishment, and maintaining of myths that demonize black mothers.¹⁵⁶ In Gustafson’s view, the virulent nature of degradation ceremonies in present-day society indicates they also serve a sadomasochistic need among people to “dominate and express disgust for human beings who are considered inferior.”¹⁵⁷

Poor people’s courts perform the function of ceremonial degradation in the civil system—a role that is supported by their ties to the punitive child welfare system and an ever-increasing entanglement with the criminal justice system. In performing these functions, poor people’s courts arguably go beyond the hegemonic function of courts generally by simultaneously bolstering not only state power (with the indirect effect of reinforcing subordination) but also directly effectuating subordination. For example, subjecting low-income litigants in custody cases to caseworker investigations from the child-protection agency implies “they are likely to commit abuse or neglect.”¹⁵⁸ This reinforces stereotypes that associate low-income women of color with bad parenting and criminality; subjecting domestic violence survivors to such investigations reinforces stereotypes that women are somehow complicit in their own abuse.¹⁵⁹

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 110–39 (detailing degradation ceremonies faced by low-income mothers of color through criminalization of welfare fraud, criminal enforcement of public school enrollment restrictions against low-income mothers seeking better educational opportunities for their children, and prosecution of poor mothers for shoplifting baby formula and other necessities or utilizing “black market” sources for necessary goods).

155. *Id.* at 107.

156. *Id.* at 139–46.

157. *Id.* at 149. This desire is masochistic, not merely sadistic, because it is engaged in without regard to economic instability faced by most American and even by the poor themselves. *Id.* at 150.

158. Hill, *supra* note 6, at 541.

159. See, e.g., Jane Stoever, *Freedom from Violence Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 360 (2011) (describing the routine victim-blaming perpetrated by family court judges).

Lecturing and chiding litigants, typical of problem-solving court judges,¹⁶⁰ infantilizes litigants and reinforces notions that low-income people appearing before the court are childish and in need of state supervision.¹⁶¹ Family court practices that force incarcerated litigants to appear in shackles for custody or other hearings, without regard to risk posed,¹⁶² are forms of ritual humiliation and shaming¹⁶³ and also reinforce stereotypes associating the poor with criminal conduct deserving of public condemnation.¹⁶⁴ Despite the long history of problems faced by low-income people in family and other poor people's courts, however, common access to justice strategies like Civil Gideon and self-help tend to obscure the problem of state intervention and reinforce court practices associated with subordination.¹⁶⁵

160. Such conduct relates to the active judicial role of judges in problem-solving courts. See Eric Lane, *Due Process and Problem Solving Courts*, 30 *FORDHAM URB. L. J.* 944, 961 (2002). Lane quotes a judge from another type of problem solving court—drug court—making a statement that is typical of how family court judges perceive their role: “Well, one thing, I’m not sitting back and watching the parties . . . and ruling, I’m getting very involved with families. I’m making clinical decisions to some extent, with the advice of experts.” *Id.*

161. This is the logical flipside of the paternalism inherent in an active judicial “father.” Moreover, stereotypes of racial minorities, particularly blacks, as child-like are deeply rooted in white American culture. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *CORNELL L. REV.* 1258, 1262 (1992) (discussing dominant images of blacks in popular culture of the late eighteenth century as “that of the docile and contented slave—child-like, lazy, illiterate, and dependent on the protection and care of a white master”).

162. A Westlaw search turns up no law review articles on the shackling of adults in family court. However, as a family law attorney with over a decade of experience in the family courts of two states, I have found that some jurisdictions routinely shackle incarcerated litigants in child custody and other private-party disputes, as well as in child-welfare cases, without regard to whether or not the litigant is incarcerated for a violent crime or otherwise poses a threat. For the problem of shackling children in juvenile court, see Bernard P. Perlmutter & John C. Lore III, *Shackling Children in Juvenile Court: The Growing Debate, Recent Trends, and the Way to Protect Everyone’s Interest*, 12 *U.C. DAVIS J. JUV. L. & POL’Y* 453 (2008); Bernard P. Perlmutter, “Unchain the Children”: *Gault, Therapeutic Jurisprudence, and Shackling*, 9 *BARRY L. REV.* 1 (2007).

163. See Fatma E. Marouf, *Immigrants Unshackled: The Unconstitutional Use of Restraints in Removal Proceedings* 35–41 (manuscript on file with author) (discussing cognitive impacts on restrained individuals and citing studies).

164. See *id.* at 42–50. Also notable is the pillorying of child-support debtors for obligations often initiated by the family court. In a number of states, counties publish names, photographs, and amounts purportedly owed by child-support obligors. See, e.g., *Most Wanted*, RIVERSIDE COUNTY DEP’T CHILD SUPPORT SERVS., <http://dcss.co.riverside.ca.us/About/MostWanted/MostWanted.asp> (identifying alleged child-support debtors in Riverside County, CA) (last visited Mar. 8, 2015); *Deadbeat Parents*, MARICOPA COUNTY SHERIFF’S OFF., <http://mcso.org/DeadBeat/Default.aspx> (ranking the bond amounts of Maricopa County, AZ “deadbeat parents”) (last visited Mar. 8, 2015); *Deadbeats*, GARLAND COUNTY SHERIFF’S DEP’T, <http://garlandcountysheriff.com/deadbeats/index.html> (Garland County, Arkansas) (last visited Mar. 8, 2015); *Sheriff’s Deadbeat Moms and Dads*, WASHINGTON COUNTY, ARK., <http://co.washington.ar.us/index.aspx?page=447> (Washington County, Arkansas) (last visited Mar. 8, 2015); *Suwannee County Sheriff’s Deadbeat Parents*, SUWANNEE COUNTY SHERIFF’S OFF., <http://suwanneesheriff.com/DeadbeatParents.aspx> (Suwannee County, FL) (last visited Mar. 8, 2015).

165. See *infra* notes 173–209 and accompanying text.

B. Current Approaches to Access to Justice: Civil Gideon and Self-Help

Most controversies about current approaches to access to justice revolve around the issue of attorneys: whether the main focus of access to justice efforts should be on providing attorneys (e.g., through implementing statutory or constitutional Civil Gideon), or on alternatives to legal representation,¹⁶⁶ such as self-help.¹⁶⁷ Critiques that question or explore the goals of such initiatives are less common. Some access to justice scholars and activists argue that calls for Civil Gideon are unrealistic, distracting reformers from more realistic goals and failing to address the legal needs of non-indigent pro se litigants.¹⁶⁸ Critics also point to problems implementing Gideon in the criminal context, including underfunded and overstressed public defender offices and weak protection against ineffective assistance of counsel for defendants, as reasons to question the wisdom of extending Gideon to civil cases.¹⁶⁹ Existing provisions for civil representation in poor people's courts have faced problems similar to those experienced by criminal defenders or simply remain unimplemented due to lack of funding.¹⁷⁰

166. See Blasi, *Framing Access to Justice*, *supra* note 3, at 914 (“Access to justice has come to be framed rather narrowly into four components: (1) access of (2) an individual (3) to a lawyer, or some form of assistance purported to be at least a partial substitute, (4) to help deal with a problem or dispute already framed in legal terms.”).

167. The scope of self-help services overlaps with that of unbundled or “limited scope” legal services provided by attorneys, such as ghostwriting or limited advice sessions, and is often part of a triage or multi-pronged approach to service delivery that may include attorney representation (e.g., for the purpose of ghostwriting, or at a subsequent hearing). See Jessica K. Steinberg, *In Pursuit Of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 461–64 (2011) [hereinafter Steinberg, *In Pursuit*]. Here, I use the term self-help to refer to legal services that expressly do not involve the formation of an attorney–client relationship, regardless of whether or not the self-help services are provided or supervised by attorneys or non-attorneys.

168. See, e.g., Barton, *supra* note 15, at 1250–69 (detailing arguments against pursuing a Civil Gideon).

169. *Id.* at 1251–63; see also Rhode, *Roadmap*, *supra* note 15, at 1226–27 (noting the lack of procedural protections for defendants with ineffective assistance of counsel).

170. See generally Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. & POL’Y 245 (2006), available at <http://brennancenter.org/analysis/state-statutes-providing-right-counsel-civil-cases>. As detailed by Abel and Rettig, a patchwork of state laws have created the right to appointment of counsel in certain civil cases in various jurisdictions, sometimes referred to as “Civil Gideon.” *Id.* at 245. However, lack of funding for appointed counsel and inadequate (or frequently nonexistent) regulation and administration of civil Gideon programs limit their effectiveness. *Id.* at 248–51. In addition, few states impose caseload limits for appointed counsel, and only a few specify compensation rates; those states that do specify compensation rates typically allow for fees that are far below what private attorneys earn for the same type of work. *Id.* at 250 (observing that, in addition, “funding falls short of need almost everywhere”). As a result, appointed counsel are often encouraged to take higher caseloads than they can reasonably manage in order to make a living. *Id.* These problems are exacerbated by the absence in most states of a unified system of administration for the right to counsel, resulting in “vastly different access to counsel in different counties despite the presence of an applicable statewide law guaranteeing the right to counsel.” *Id.* at 250–51. The case-by-case approach to the right to counsel in family cases established by the Supreme Court further limits the value to poor families of state laws mandating or authorizing

While alternatives to traditional representation like self-help services have received less attention, critics of these services are concerned with the significant shift in legal-aid resources toward providing one-time, generic legal information, and with the untested assumption that this type of assistance is capable of replacing individualized and ongoing legal support.¹⁷¹ These observers view self-help as unlikely to empower litigants to deal with their legal issues unless it is accompanied by access to other types of services and are particularly concerned with the suitability of self-help services for socially marginalized litigants.¹⁷² Another type of critique questions when attorneys (versus alternatives) are really needed.¹⁷³ Embedded in this discussion is a nascent debate about what types of contributions attorneys make and how we should measure the value of legal advocacy.¹⁷⁴ This discussion gets closer, but only indirectly, to the issue of what the function of access to justice efforts should be in poor people's courts.¹⁷⁵

In a contrasting approach, some scholars have illuminated the normative underbelly of access to justice.¹⁷⁶ For example, Gary Blasi criticizes access to

appointment of counsel in civil cases. *See* *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (adopting a case-by-case standard that “leave[s] the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review”). Adopting this approach, the highest court of at least one state has ruled that there is no ineffective assistance of counsel claim available for a litigant who lacks a constitutional right to counsel in the first place. *See, e.g., In re Parental Rights as to N.D.O.*, 121 Nev. 379, 115 P.3d 223 (2005) (holding there is no action for ineffective assistance of counsel where facts showed there was no constitutional right to appointment of counsel in a “routine” termination of parental rights case).

171. *See* Jeff Giddings & Michael Robertson, *Informed Litigants with Nowhere to Go: Self-Help Legal Aid Services in Australia*, 26 *ALT. L.J.* 184, 184–85 (2001).

172. *See* Jeff Giddings & Michael Robertson, *Large Scale Map or the A–Z? The Place of Self-Help in Legal Aid*, in *AFTER UNIVERSALISM: RE-ENGINEERING ACCESS TO JUSTICE* 104–05 (Richard Moorhead & Pascoe Pleasence eds., 2003) [hereinafter Giddings & Robertson, *The Place of Self-Help in Legal Aid*].

173. *See, e.g.,* Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865 (2004) [hereinafter Blasi, *How Much*] (noting the need for a way of measuring and comparing the value of different interventions).

174. A recent colloquium at the University of Wisconsin about efforts to quantify the value of advocacy and related articles calling for a more nuanced account of what legal advocates do for low-income litigants are demonstrative. *See* Jane H. Aiken & Stephen Wizner, *Measuring Justice*, 2013 *WIS. L. REV.* 79 (2013) (arguing that much of what lawyers do for the poor is unquantifiable); Catherine R. Albiston & Rebecca Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 *WIS. L. REV.* 101 (2013) (arguing that more theory is needed in order to properly frame a research agenda about the value of legal services); Anthony V. Alferi, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 *WIS. L. REV.* 121 (2013) (exploring community education as advocacy).

175. *See, e.g.,* Aiken & Wizner, *supra* note 174, at 83–85 (detailing valuable but difficult to measure legal services such as respectful and sympathetic listening, and explaining the absence of remedy, practical advice, and informal advocacy).

176. *See* Blasi, *Framing Access to Justice*, *supra* note 3, at 939 (arguing for a broader conception of access to justice); *see also id.* at 879 (advocating for legal services that help litigants evaluate the potential legal significance of their interests; understand current and prospective rights, remedies, and risks; participate in political and legal processes; and obtain outcomes based on the law and facts, rather than differential access to resources, or their gender, race, or class); Smith, *Poverty Warriors*, *supra* note

justice initiatives for being too narrowly framed in terms of how they conceive of and address the legal needs of low-income people.¹⁷⁷ He points out that reformers are unlikely to get more than they ask for and encourages them to think more expansively.¹⁷⁸ In particular, Blasi argues that Civil Gideon initiatives short-change poor litigants on equal justice by not providing lawyers at early enough stages in the legal process or assisting them with collective action—both of which are generally available to wealthier litigants.¹⁷⁹ Instead, Civil Gideon is generally conceived of as responding to discrete cases that have been framed by individual litigants without the assistance of counsel.¹⁸⁰ Blasi's arguments for an expanded notion of Civil Gideon are focused on increasing equality (by providing litigants with the tools afforded wealthier litigants), effectiveness (by providing lawyers early enough to shape strategy), and efficiency (by solving the legal problems of multiple, similarly affected individuals at once).¹⁸¹ The context of his examples—housing cases where tenants are challenging slum conditions—is informative.¹⁸² He points out that collective action is often necessary for such cases to be effective, and the active assistance of an advocate is often necessary to make collective action possible, especially for litigants who are on the social margins.¹⁸³ Blasi ruminates that tenants might achieve more lasting change by pursuing remedies other than landlord litigation, such as suing the housing authority for lack of enforcement—strategies that would benefit from attorney involvement in the shaping of the case early on.¹⁸⁴ Blasi argues, in essence, that providing low-income litigants with legal resources comparable to those accessible to wealthier individuals is not only equalizing, and possibly more effective and efficient, but has counter-hegemonic potential: to show connections between the individual and the group, to challenge the normative

3, at 38 (observing that Civil Gideon isolates social problems as individualized cases). Smith is also concerned with the impact that Civil Gideon might have on remaining legal aid programs that prioritize strategies for attacking the roots of poverty and that consider the needs of communities, as well as individuals. *Id.*

177. See Blasi, *Framing Access to Justice*, *supra* note 3 (advocating for a more expansive view of access to justice); Blasi, *How Much*, *supra* note 173 (providing a multi-pronged rubric for evaluating access to justice initiatives).

178. See Blasi, *Framing Access to Justice*, *supra* note 3, at 914 (“If we begin with [a] limited ambition . . . then that is as far as we are likely to get.”).

179. See *id.* at 939. See also, Wexler, *supra* note 2, at 1053 (describing traditional law practice as “hurt[ing] poor people by isolating them from each other, and fail[ing] to meet their need for a lawyer by completely misunderstanding that need”). As Wexler opines, “Poor people have few individual legal problems in the traditional sense; their problems are the product of poverty, and are common to all poor people.” *Id.*

180. See Blasi, *Framing Access to Justice*, *supra* note 3, at 931–37.

181. See *id.*

182. See *id.* at 934–97.

183. See *id.* at 937–38 (describing a client in a slum housing case as “a remarkable woman, but long hours in a garment industry sweatshop did not leave her much time to organize her fellow tenants. For that, she needed some help, along with resources: a place to meet, help with copying and distributing flyers, and so on . . .”).

184. See *id.* at 935 (discussing how framing of the legal problem constrains possible responses).

framing of legal problems, and to perhaps reveal the social, legal, and political construction of power relationships (e.g., property ownership).¹⁸⁵

Self-help services, which are expressly not intended to provide advocacy to litigants, and other efforts to make the courts more user-friendly, have even less transformative potential than conventionally conceived Civil Gideon. Like providing attorneys in the absence of sufficient resources and procedural protections, these services can work to legitimize an unjust legal system without rendering it more effective.¹⁸⁶ However, in the face of declining resources and the lack of doctrinal support for court appointed counsel, the use of self-help services and other alternatives to representation will likely continue to grow. Therefore, addressing inadequacies in these services is important. Legal services not informed by a counter-hegemonic goal potentially not only deprive litigants of counter-hegemonic possibilities but also have the potential to reinforce hegemony. This may happen in several ways.

First, traditional access to justice models work to isolate cases and clients and reinforce the hegemonic nature of the legal system more generally—by separating poor people from one another and isolating legal issues from one another in artificial ways that bear negative consequences for already vulnerable individuals. Legal issues and systems intersect in poor people’s courts and may bring unwary litigants in contact with punitive state systems and processes. The legal problems of low-income people arise in interconnected ways that can be exacerbated when these intersections are not addressed.¹⁸⁷ For example, the divorce of a lower income couple is especially likely to involve legal issues outside of family law, such as mortgage foreclosure or bankruptcy.¹⁸⁸ Similarly, a low-income applicant for a protective order may be especially vulnerable to potential economic impacts of this course of action, such as loss of support from the party subject to the order if he or she loses employment as a result.¹⁸⁹ The

185. Gabel & Harris, *supra* note 30, at 374 (asserting that it is “precisely because the hierarchies of the legal system are sustained only by people’s belief in them, legal conflicts of every type can become opportunities to crack the façade of legitimacy that these hierarchies project”).

186. In fact, there are next to no independent empirical studies evaluating self-help services. See Steinberg, *In Pursuit*, *supra* note 167, at 472–74 (citing only two studies of self-help services, both of which are single-service centers).

187. Wexler, *supra* note 2.

188. In this context, women are especially vulnerable to the economic consequences of divorce. See, e.g., LENORE WEITZMAN, *THE DIVORCE REVOLUTION* (1985) (reporting a seventy-three percent decrease in women’s standard of living post-divorce, and a forty-two percent increase for men). Single women with dependent children are even more likely to fall into poverty. The 2010 U.S. census found the poverty rate for women-headed families is 40.7%. See NATIONAL WOMEN’S LAW CENTER, *POVERTY AMONG WOMEN AND FAMILIES, 2000-2010: EXTREME POVERTY REACHES RECORD LEVELS AS CONGRESS FACES CRITICAL CHOICES 2* (2011) (announcing results of a study finding that that divorced women with children have a harder time recovering economically after divorce), available at <http://nwlw.org/sites/default/files/pdfs/povertyamongwomenandfamilies2010final.pdf>.

189. See Kim, *supra* note 127 (describing economic impacts of protective orders). Unable to afford childcare, my former client ultimately faced possible removal of her children by Child Protective Services after her estranged husband reported her for leaving them alone while she was at work.

applicant's "presenting problem"¹⁹⁰ (domestic violence) may also implicate matters such as housing, employment, debt, public benefits, and criminal and immigration law issues, and raise numerous substantive family law issues and non-legal needs such as safety planning.¹⁹¹ Legal services provided in a piecemeal fashion and self-help-type services that typically do not provide advice about the impacts of any particular course of action cannot address these intersections. Ignoring the often complex and interrelated nature of such legal problems leaves low-income people especially vulnerable to adverse consequences and greater social marginalization.

Second, traditional legal services tend to reify the legal professional, and to reinforce the inferiority of client knowledge and experience.¹⁹² As a result, they may create dependency rather than developing capacity.¹⁹³ According to Wexler, "[t]he lawyer for poor individuals is likely, whether he wins cases or not, to leave his clients precisely where he found them, except that they will have developed a dependency on his skills to smooth out the roughest spots in their lives."¹⁹⁴ Given the intractability of poverty and the fragility of legal services, providing legal services in ways that encourage dependency rather than capacity is obviously a problem for low-income communities.¹⁹⁵ While self-help services sometimes draw on the rhetoric of empowerment,¹⁹⁶ providing limited assistance with forms or legal information may not be sufficient to meet immediate legal needs¹⁹⁷ and

190. See MacDowell & Cammett, *supra* note 49, at 13, 18 (distinguishing how a legal case is identified and framed from the structural and systemic issues underlying it).

191. See Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyering and Law School Clinics*, 21 COL. J. GENDER & L. 220 (2011) (advocating for a holistic approach to representation of domestic violence survivors in order to address systemic problems and those relating to structural inequality).

192. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 23–26 (1992) (describing the "regnant" view of lawyering, in which lawyers are heroic experts and clients are helpless laypersons and how this view gains sway over lawyers and clients); Gabel & Harris, *supra* note 30, at 407 (arguing that, "[o]nce the lawyer *becomes* a professional and the client *becomes* a helpless layperson, the potential for oppositional energy that is produced by legal conflict will be dissipated, and the system will be the winner whatever the outcome of the case").

193. Wexler, *supra* note 2, at 1053.

194. *Id.*; cf. Edgar S. Cahn & Jean Camper Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1332 (1964) (arguing that service-oriented programs based on donor–donee relationships tend to reinforce, rather than challenge, dependence in poor communities).

195. See Wexler, *supra* note 2, at 1053 ("Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.")

196. See Greacen, *supra* note 111, at 24 ("many self-help programs have at their core a belief in empowering litigants to take responsibility for their own affairs"); see also Giddings & Robertson, *The Place of Self-Help in Legal Aid*, *supra* note 172, at 105 (explaining that notions of empowerment were central to the development of self-help in Australian legal aid).

197. See THE EMPIRICAL RESEARCH GRP., *supra* note 144, at 3 (reporting that self-help services in landlord-tenant disputes made no difference in outcomes, as tenants receiving self-help services faring no better in their cases than those who received no assistance); Steinberg, *In Pursuit*, *supra* note 167, at 482

does not assist individuals or communities in addressing systemic problems.¹⁹⁸

Third, legal services uninformed by counter-hegemonic goals will tend to screen out or further marginalize litigants, narratives, and claims that run counter to institutional norms, that staff members believe are inappropriate, or that are non-routine and therefore less convenient.¹⁹⁹ This is true for self-help services and legal services involving attorneys. For example, observation of self-help services in metropolitan areas in two western states found that self-help center staff members assisting unrepresented litigants applying for domestic violence protection orders treat some litigants differently, seemingly based on their view of the litigant's worthiness and whether or not they believe that the relief sought was appropriate.²⁰⁰ Their relative approval was evidenced by shifts in their demeanor, tone, or remarks to the litigant, as well as by the proffering or withholding of information to the litigants they assisted.²⁰¹ Negative responses were most often directed toward applicants who did not conform to the staff member's ideas of appropriate or authentic victims.²⁰² For example, applicants who asked if monetary restitution was available were perceived by staff as greedy.²⁰³ The clinics also fail to assist applicants with requesting all the relief available in their cases, such as child or spousal support, and restitution and attorney fees.²⁰⁴ Staff members instruct applicants on completing paperwork that has legal implications and might impact the outcome of their case; for example, some applicants are instructed to provide only information about recent incidents of violence, rather than a complete history.²⁰⁵ In this way, these ostensibly neutral legal service providers act as gatekeepers to the legal system.

Fourth, with limited resources and without a consciously counter-hegemonic approach, service providers may fail to prioritize meaningful, proactive assis-

(finding that tenants who received assistance with forms in housing court had improved procedural outcomes, such as avoiding default, but their substantive outcomes were not improved).

198. See White, *To Learn and Teach*, *supra* note 35, at 741 (describing a process of empowerment as giving a community the tools to create change and challenge subordination); see also *id.* at 744 (helping clients to reclaim cultural identity as a method of empowerment).

199. See Abel, *supra* note 46, at 567–70 (discussing the ways in which lawyers and others influence what legal aid is rendered). The ways in which dominant narratives constrain practice is particularly well established in the domestic violence context. See, e.g., MacDowell, *Theorizing from Particularity*, *supra* note 94, at 541–46 (summarizing the arguments and theoretical basis for the existence of a domestic violence discourse that limits recognition of survivors and claims). See also Abel, *supra* note 46, at 570 (observing that lawyers may prefer cases with clear rules and established law, thereby avoiding cases and clients outside established bounds of practice).

200. Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help* (manuscript on file with author).

201. *Id.*

202. *Id.*

203. *Id.* Staff members in one program attributed this policy to not having enough time to complete the additional paperwork and to the lack of applicant preparedness (e.g., not having the right documentation at the time of service). An administrator from another program thought staff members were reluctant to advise clients about relief the court was unlikely to grant. *Id.*

204. *Id.*

205. *Id.*

tance, such as community education, or to explore more expansive modes for action, such as system advocacy and social mobilization.²⁰⁶ Nor is there incentive to develop mechanisms for transparency, critique, and accountability to low-income communities.²⁰⁷ In the long run, these tendencies work in tandem to reinforce the hegemonic status quo for all.

These problems demonstrate the limitations of access to justice discourses that revolve around the presence or absence of attorneys. Imbalances of power extend beyond appointment of counsel and whether only one party is represented to the institutional culture and operation of poor people's courts.²⁰⁸ Even winning a case may inadvertently reinforce hegemonic constructs like social hierarchy.²⁰⁹ If attorneys took cases within a counter-hegemonic framework for advocacy (e.g., cases that were disfavored by courts and/or challenged legal or other norms), they might lose more often but serve poor people's interests better in the long run. What is needed is a multi-pronged approach to access to justice that accounts for hegemony. This approach would help relate the delivery of individual services to systemic change, illuminating and facilitating connections between individual people and cases, and social issues. The next section draws on theories of social justice advocacy that can inform a new access to justice model.

III. PRINCIPLES OF A COUNTER-HEGEMONIC APPROACH

A. *Social Justice Advocacy*

Social justice advocacy refers not only to method but also to a normative vision of legal and other professionals and lay people working with clients to resist subordination and transform systems. It is a counter-hegemonic practice. As shown below, this vision has been addressed and developed within scholarship on progressive lawyering, social work, and the field of lay advocacy for survivors—all of which have particular relevance to access to justice within poor people's courts. In addition to the obvious role of lawyers in providing advocacy in the courts, social workers trained on legal and other forms of client advocacy have successfully partnered with lawyers to more holistically address client

206. See Smith, *Poverty Warriors*, *supra* note 3, at 38–39 (arguing that legal aid organizations are already resistant to such pursuits in ways not explained by funding restrictions alone).

207. See Cahn & Cahn, *supra* note 194, at 1322–24 (describing incentives for leadership of legal services programs, however well-meaning, to insulate themselves from criticism and stifle dissent).

208. See Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REVIEW 196, 202 (2006) [hereinafter Engler, *Context-Based Civil Gideon*] (observing that which parties benefit from provision of counsel may depend on the type of case and differ from court to court).

209. See, e.g., MacDowell, *Theorizing From Particularity*, *supra* note 94, at 549–58 (describing how stereotypes about survivors and perpetrators and the performance of identity influence outcomes in domestic violence cases in family court).

needs.²¹⁰ Domestic violence and other lay advocates are also important providers of advocacy in the courts, especially for unrepresented litigants addressing gender violence.²¹¹ Scholarship on these forms of advocacy has created a collective wisdom and set of practices to inform a counter-hegemonic access to justice project: one that seeks to counter, address, and mitigate the subordinating effects of poor people's courts, and the ways in which they directly and indirectly reinforce hierarchies that oppress low-income people. Counter-hegemonic consciousness is an essential component of this project.

Sociologists Patricia Ewick and Susan Silbey identify three conditions associated with counter-hegemonic consciousness: social marginality, recognition of the world as socially constructed, and opportunities for storytelling.²¹² According to Ewick and Silbey, the condition of social marginality contributes to counter-hegemonic consciousness because "those who are most subject to power are most likely to be acutely aware of its operation."²¹³ However, the experience of social marginalization alone is not sufficient to recognize, much less challenge, hegemony.²¹⁴ Effective challenges also require an "understanding [of] how the hegemonic is constituted as an ongoing concern."²¹⁵ Achieving counter-hegemonic consciousness involves understanding the hidden nature of hegemonic power and having opportunities to unmask it.²¹⁶ These opportunities arise through storytelling.²¹⁷ Because storytelling is "a conventional form of social interaction," it most often arises in the routines and circumstances of everyday life where people gather and talk, sit in waiting rooms, or wait in line.²¹⁸ Examples of more purposefully constructed opportunities include meetings of community members organized for political, legal, or social change.²¹⁹ Within

210. See, e.g., Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999).

211. See, e.g., Arlene N. Weisz, *Legal Advocacy for Domestic Violence Survivors: The Power of an Informative Relationship*, 80 FAMS. SOC'Y: J. CONTEMP. HUMAN. SERVS. 138 (1999); Megan Allen et al., *Voices from the Field: Civil Legal Advocacy at Stand-Alone Sexual Assault Programs*, 16 CONNECTIONS 17 (2012), available at http://www.wcsap.org/sites/wcsap.huang.radicaldesigns.org/files/uploads/resources_and_pubs/connections_2012_10/Connections_2012_10.pdf.

212. See EWICK & SILBEY, COMMON PLACE OF LAW, *supra* note 34, at 234–44 (1998); Ewick & Silbey, *Subversive Stories*, *supra* note 34, at 220–22.

213. EWICK & SILBEY, COMMON PLACE OF LAW, *supra* note 34, at 234–35 ("By 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.').

214. See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1107–08 (1994) [hereinafter Simon, *Dark Secret*].

215. EWICK & SILBEY, COMMON PLACE OF LAW, *supra* note 34, at 239.

216. *Id.*

217. *Id.*

218. *Id.* at 242.

219. For example, feminist consciousness-raising groups of the 1960s were an important site for the development of counter-hegemonic consciousness challenging patriarchal construction of femininity and

these shared moments, storytellers may question the status quo, create alternative explanations for experience,²²⁰ and build community.²²¹ In particular, social justice advocates can organize their practice to disrupt the experience of legal problems as isolated and apolitical and help individuals discover “the inherent political content of common types of cases and [use] this political content to build community organization.”²²²

1. Social Justice Lawyering

Underlying social justice lawyering is the basic idea that lawyers and their allies can help clients resist and challenge subordination through the way they perform and deliver legal services.²²³ While social justice lawyers may employ a variety of methods, strategies, or tactics, there are at least four broad, interrelated components of social justice lawyering that can be identified as characteristic of the approach, including: education; collaborative work; a broad-based understanding of what lawyering entails; and commitment to client empowerment and transformation of people, relationships, and systems. These components distinguish social justice lawyering from traditional lawyering models (regardless of the purpose for which they are employed) that focus on the lawyer as a technical expert providing services to needful clients.²²⁴

The component of education is at the center of social justice lawyering: education of the lawyer, as well as the client or community.²²⁵ The vision of social justice education includes a mutually educative process in which both lawyer and client are teaching (one another) and learning (together) about problem solving.²²⁶ This process is enabled because, in contrast to the traditional view of lawyering, both the lawyer and client are viewed as having important knowledge that is relevant to resolve the problem at hand.²²⁷ Central to this educative process is a related emphasis on communication. Social justice lawyering has at its core a critical attention to the power of storytelling and

domesticity. *Id.* at 241; *see also* CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83–90 (1989) (describing feminist consciousness-raising as a method for perceiving the socially constructed nature of reality).

220. MacDowell, *Law on the Street*, *supra* note 32, at 315–16 (observing that, “even casual, serendipitous meetings can uncover common experience within a confluence of constraints and identities”).

221. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) (discussing the community-building functions of sharing stories).

222. Gabel & Harris, *supra* note 30, at 396.

223. As this implies, there exists on the flip side a possibility of disempowering clients through lack of attention to social justice principles. *See* Simon, *Dark Secret*, *supra* note 214, at 1099–1100.

224. Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*, 10 HASTINGS RACE & POV. L.J. 219, 220 n.2 (2013) (“Lawyering traditionally focuses on a system of technocracy where the lawyer is an expert who offers technical services to a client.”)

225. *See* LOPEZ, *supra* note 192, at 70–71; White, *To Learn and Teach*, *supra* note 35, at 763.

226. *See* LOPEZ, *supra* note 192, at 70, 74.

227. *See id.* at 50–51.

narrative,²²⁸ the value of reflective listening,²²⁹ and the role of lawyers in giving voice to subordinated communities—not only as spokespersons, but also as facilitators of speech.²³⁰ The concept of education within social justice lawyering is embedded in history, and especially in local adaptations of legal, social, and cultural struggle.²³¹ Learning this history may involve recovering forgotten or submerged knowledge, or reconstructing knowledge by both lawyer and client; uncovering it informs ongoing struggles by allowing participants to remain nimble and avoid uncritical attachment to particular strategies or methods.²³² Social justice lawyering also emphasizes the importance of learning through self-critique: a constant process of critical self-reflection, evaluation, and strategic adjustment that ties theory to practice as a matter of everyday problem solving within a broader anti-subordination agenda.²³³

Like the component of education, collaboration in social justice lawyering relies on a relationship of respect and equality between lawyers and clients, rather than a relationship in which the lawyer is the dominant participant.²³⁴ Collaboration takes place among lawyers, clients, and communities; it also takes place between lawyers and other professionals, as well as laypersons. The focus on collaboration leads to a related focus on opportunities for group work, which helps realize social justice goals in several respects. First, group work may be a more efficient and effective method of action in circumstances that include collective litigation or other legal action, community education, and problem solving.²³⁵ Second, opportunities for collaborative group work are essential to building counter-hegemonic consciousness through a creative dialectic that deconstructs hegemony and constructs new relationships and understandings within a social justice agenda.²³⁶

228. See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991). See also LOPEZ, *supra* note 192, at 39 (describing lawyering as problem-solving through story telling).

229. See William Quigley, *Letter to a Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 17 (2007) (providing a framework for reflective listening for social justice lawyers).

230. *Id.* (describing social justice lawyering as seeking to hear excluded voices and providing opportunities for those voices to be heard).

231. See LOPEZ, *supra* note 192, at 66–67. Therefore, helping communities to recover positive cultural practices that can inform community problem-solving or resistance is an important social justice advocacy practice. See White, *To Learn and Teach*, *supra* note 35, at 744.

232. See LOPEZ, *supra* note 192, at 67.

233. See *id.* at 65–66.

234. Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 158 (1994) (describing a vision of lawyering in which it is not a not a “unidirectional professional service” but a “collaborative, communicative practice”).

235. See, e.g., Blasi, *Framing Access to Justice*, *supra* note 3, at 937–38 (discussing need for collective action in housing cases).

236. See Delgado *supra* note 221, at 2415 (“[Such stories] 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.”).

Social justice lawyering also involves the understanding that lawyering includes everyday acts, rather than mere technical expertise.²³⁷ These everyday acts include storytelling and routine approaches to solving problems and manipulating power. Social justice lawyers must become conscious of claiming these everyday methodologies to further social justice goals.²³⁸ As Gerald Lopez describes, this process “entails the participation of lawyers in helping everyone (themselves included) to see that the skills they have already developed to cope with problems of everyday life can be used to solve less familiar problems” and contexts.²³⁹ In particular, “if people subordinated by political and social life can learn to recognize and value and extend their own problem-solving know-how, they . . . may gain confidence in their ability to handle situations that they would otherwise experience as utterly foreign and unmanageable, with or without a lawyer as representative.”²⁴⁰ Lopez distinguishes this view from perspectives that either romanticize the ability of poor people to solve social ills or comport with conservative “pull yourselves up by your own bootstrap” views that justify withdrawing supportive assistance and services.²⁴¹ He views teaching self-help and lay lawyering as part of a participatory and democratic approach to political life, “a vision where public institutions and professional service providers help people help themselves, in much the same way that people in subordinated communities, at least at their best, have long taken responsibility for themselves and one another.”²⁴²

This broad-based approach to lawyering also involves embracing nontraditional lawyering methods, including the educational component of social justice lawyering, and mobilizing and organizing clients and communities around social justice objectives.²⁴³ Each of these methods is interrelated and connected to counter-hegemonic objectives: develop capacity within subordinated communities and equalize relationships between lawyers and clients by identifying and valuing everyday problem-solving skills; and learn how to dismantle hierarchy and mobilize collective action through education.²⁴⁴ These methods are also central to an overarching commitment to empowerment and transformation—the final component of social justice lawyering.

237. See LOPEZ, *supra* note 192, at 62–65 (discussing how social change goals can be implemented throughout the workday through many “practical moments”).

238. *Id.*

239. LOPEZ, *supra* note 192, at 70.

240. *Id.*

241. *Id.* at 72.

242. *Id.* at 73.

243. See, e.g., Wexler, *supra* note 2, at 1053 (describing organizing as the most important work of a lawyer who wants to serve the poor).

244. See, e.g., LOPEZ, *supra* note 192, at 77 (describing what links lawyers and their allies to subordinated people as a double commitment: “They regard *every* form of group work as important to mobilization, and they consider educational aims as central to *every* form of mobilization.”).

A commitment to empowerment and transformation infuses and informs the pursuit of each of the other component parts of social justice lawyering.²⁴⁵ Through social justice-oriented education, clients develop “the agency and capacity to . . . change oppressive patterns and behaviors in themselves and in the institutions and communities of which they are a part.”²⁴⁶ Through collaborative works, this commitment extends to social justice lawyers as well as clients, “because communities and lawyers recognize the power within their hands to challenge subordination, exercise power, and create systemic change.”²⁴⁷ The goal is mutual empowerment and transformation as part of an anti-subordination project that also transforms systems and relationships to power. Together, lawyers and clients work to facilitate learning, reorganize social relationships, and initiate action to create systemic change. Social justice lawyering is a process-oriented practice wherein lawyers are engaged in “helping a group learn how to interpret moments of domination as opportunities for resistance.”²⁴⁸ Within this context:

The lawyer cannot simply dictate to the group what actions they must take. Neither the lawyer nor any single individual is positioned to know what actions the group should take at a particular moment. Sound decisions will come only as those who know the landscape and will suffer the risks deliberate together. The role of the lawyer is to help the group learn a method of deliberation that will lead to effective and responsible strategic action.²⁴⁹

While much of social justice lawyering scholarship is conceived around collective action, its insights are applicable to, and beneficially inform, services geared toward individuals as well.²⁵⁰ Social justice advocates flow back and forth from individual needs to group and structural concerns, and deliver services in ways that take the importance of both the individual and the collective into account.

245. See White, *To Learn and Teach*, *supra* note 35, at 746 (describing client empowerment as the common theme of progressive, social justice lawyering).

246. Tyner, *supra* note 224, at 231. See also Simon, *Dark Secret*, *supra* note 214, at 1102 (“The prescribed goal of the new scholarship is ‘empowerment’ or enhancing the autonomy of the client. This means, first, minimizing the lawyer’s own power or the social power the lawyer would otherwise tend to implement. Second, it means enlarging the client’s capacities for self-assertion. The idea is to enable, or at least not disable, clients to assert their own goals, to draw on the insight they already have, and to act on their own behalf.”).

247. Tyner, *supra* note 224, at 231.

248. White, *To Learn and Teach*, *supra* note 35, at 763.

249. *Id.* at 763–64.

250. See, e.g., LOPEZ, *supra* note 192, at 83–329 (providing detailed examples of the application of social justice lawyering theories and methods in various lawyering contexts involving direct legal services).

2. Non-Legal Advocacy Models

a. Social Work Advocacy

Social work advocacy is informed by values that are similar in many respects to those at the core of social justice lawyering. These values include respecting the dignity and rights of individuals (e.g., every human being is unique and deserving); addressing imbalances of power and injustice (e.g., by giving voice to marginalized groups and individuals); facilitating self-determination (e.g., by helping clients to identify their own needs and actions they will take to fulfill them); compassion and the desire to relieve suffering; empowering through action-oriented advocacy (e.g., to help clients take action to solve problems); and honoring social justice.²⁵¹ Social workers also pursue social justice through multiple practice methods, many of which are similar to those used by social justice lawyers, including “direct practice, community organizing, supervision, consultation, administration, advocacy, social and political action, policy development and implementation, education, and research and evaluation.”²⁵² Like social justice lawyers, the goals of social work include “enhanc[ing] the capacity of people to address their own needs [and] promot[ing] the responsiveness of organizations, communities, and other social institutions to individuals’ needs and social problems.”²⁵³ However, social work (like law) is embedded in contradiction insofar as it is practiced within “the same structural base that creates the poverty and abuses of its clients.”²⁵⁴ This has led to a tendency to focus on explanatory paradigms for client problems that are focused on the individual rather than structural issues.²⁵⁵ In response, progressive social work scholars have developed alternative theories that explicitly take structural inequality and subordination into account.²⁵⁶

251. ROBERT L. SCHNEIDER & LORI LESTER, *SOCIAL WORK ADVOCACY: A NEW FRAMEWORK FOR ACTION* 78–79 (2001). See also NAT’L ASS’N OF SOC. WORKERS, *NASW CODE OF ETHICS* 2006, Preamble (rev. 2008), available at <http://www.socialworkers.org/pubs/code/code.asp> (identifying the core values of social work as service, social justice, dignity and worth of the person, importance of human relationships, integrity, and competence). The *NASW Code of Ethics* further states, “Social workers promote social justice and social change with and on behalf of clients Social workers are sensitive to cultural and ethnic diversity and strive to end discrimination, oppression, poverty, and other forms of social injustice.” *Id.*

252. *Id.*

253. *Id.*

254. Stephen M. Rose, *Advocacy/Empowerment: An Approach to Clinical Practice for Social Work*, 17 J. SOC. & SOC. WELFARE 41, 41 (1990).

255. *Id.*; see also Anne Marie McLaughlin, *Clinical Social Workers: Advocates for Social Justice*, 10 ADVANCES SOC. WORK 51, 51 (2009) (noting critiques of social workers for a lack of attention to social justice issues).

256. See McLaughlin, *supra* note 255, at 53. These approaches are also in keeping with the *NASW Code of Ethics*, which notes that, “Social workers are sensitive to cultural and ethnic diversity and strive to end discrimination, oppression, poverty, and other forms of social injustice.” NAT’L ASS’N OF SOC. WORKERS, *supra* note 251. See also *id.* at § 1.05 (c) (“Social workers should obtain education about and seek to understand the nature of social diversity and oppression with respect to race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief,

For example, Stephen Rose offers a model for clinical social work practice based on “advocacy/empowerment theory.”²⁵⁷ The basic premise is that awareness of the social and historical construction of one’s experience helps individuals create change.²⁵⁸ Advocacy/empowerment theory helps clients contextualize their experiences within personal and social history (“contextualization”); provides them with the support necessary to self-identify and produce a range of solutions that meet their needs (“empowerment”); and creates opportunities for them to locate their experience within social reality, including through the process of contextualization, and also through opportunities for group work (“collectivity”).²⁵⁹ Collectivity gives rise to the ultimate goal of the advocacy/empowerment model: social development, or transformation. As Rose describes, “transformation becomes the other dimension of collectivity, with the purpose being movement from a position of dependency and individual deficits, through contextualization, empowerment, externalization, critical reflection, and action to a position and experience of participation and conscious involvement in interdependent networks of social support.”²⁶⁰ As in social justice lawyering, this transformative process requires attention to the communicative process, or what Rose refers to as “a commitment to dialogue.”²⁶¹ The social worker must enter the client’s reality through listening, encourage elaboration of the client’s views, and articulate support for the client’s understanding of their situation.²⁶² However, uncovering social reality also requires helping clients to externalize their situation and examine it critically to reveal its social nature.²⁶³ In this way, “clinical dialogue is formed with two elements of expertise, one belonging to each participant, each assuming the necessity of producing communication that can develop and clarify the individual’s experience of her/his contextual participation.”²⁶⁴

Rose’s theory of advocacy is similar to the social justice lawyering approach in that it is process-oriented, and psycho-social in focus, with an ultimate goal of transformation and empowerment; it is also similar in its collaborative nature,

religion, immigration status, and mental or physical disability.”); § 4.02 (“Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical disability.”); § 6.04 (“Social workers should act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical disability.”).

257. See Rose, *supra* note 254.

258. *Id.* at 45.

259. *Id.* at 46–50.

260. *Id.* at 50.

261. *Id.* at 47.

262. *Id.* at 46.

263. *Id.*

264. *Id.*

and its emphasis on communication and mutuality. In a compatible, applied approach, Anne Marie McLaughlin locates social justice advocacy within social worker practice.²⁶⁵ Noting the lack of attention to social justice advocacy practice in social work literature and pedagogy,²⁶⁶ McLaughlin addresses this gap by studying the advocacy strategies of social workers working with mental-health clients.²⁶⁷ Her study identifies social justice aims embedded within three types of advocacy strategies engaged in by clinical social workers: instrumental advocacy, which involves holding systems accountable; educational advocacy, which includes educating individuals, families, and also colleagues and the larger society about client issues; and practical advocacy, which includes all varieties of hands-on assistance provided to clients—from assisting with forms, to advocating on behalf of clients before administrative bodies.²⁶⁸ She finds that each of these forms of advocacy are multidimensional, as they may be implemented on behalf of an individual or marginalized group or involve action directed toward achieving a more just society.²⁶⁹ This definition connects social justice to the very action of advocacy.²⁷⁰ Social workers employing these strategies were attentive to multiple forms of social justice, including distributive issues (such as equitable access to resources) and issues of power and subordination, including how individuals and groups experience social marginalization, stigmatization and powerlessness.²⁷¹ Because they are “adept at understanding the interplay between the person and their environment,” McLaughlin finds that social workers are motivated to maintain a social justice stance in relation to their work.²⁷²

b. Lay Advocacy for Survivors

Advocacy for survivors of domestic and sexual violence performed by lay advocates differs from the models discussed thus far, in that it is historically grounded in a feminist praxis focused on women’s empowerment and social change activism and is situated outside the bounds of professional, hierarchical, and bureaucratic institutions. As described by Andrea Nichols, “[e]arly radical feminist advocates worked toward collaborative survivor-defined practices

265. See McLaughlin, *supra* note 255.

266. *Id.* at 52.

267. *Id.* at 54–55 (describing methodology).

268. *Id.* at 56–60.

269. *Id.* at 57, tbl.1. See also RICHARD HOEFER, ADVOCACY PRACTICE FOR SOCIAL JUSTICE 8 (2006) (defining social justice advocacy as “[t]hat part of social work practice where the social worker takes action in a systematic and purposeful way to defend, represent, or otherwise advance the cause of one or more clients at the individual, group, organizational or community level, in order to promote social justice”).

270. See McLaughlin, *supra* note 255, at 56 (noting that social workers interviewed in her study used advocacy as a proxy for social justice).

271. *Id.* at 62.

272. *Id.* at 63.

because they saw hierarchical practices as patriarchal and oppressive to women.”²⁷³ An intersectional analysis of domestic violence and feminist praxis was a part of this early feminist response.²⁷⁴ In particular, “[b]lack and lesbian feminists noted that the ways that intersecting identities interacted with patriarchy impacted survivor’s experiences with domestic violence and the systems that addressed it.”²⁷⁵ Advocates used this insight to develop intersectional advocacy practices that aimed to increase the accessibility and effectiveness of services.²⁷⁶ To change structural conditions, advocates also worked to increase support services for abused women and expand public and political awareness of the problem of domestic violence.²⁷⁷

Professionalization of domestic violence services has been criticized due to the apparent cooptation of feminist advocacy strategies and their subsequent dilution.²⁷⁸ Research shows that advocates in professionalized advocacy organizations and those in partnership with social service institutions become distanced from the structural and gendered understandings of domestic violence and from social change activism.²⁷⁹ The result is that standardized services replace the feminist-informed activist model.²⁸⁰ Yet lay advocates for survivors of domestic and sexual abuse continue to play an important role in helping clients navigate legal and non-legal options for addressing gender violence.²⁸¹ Like social justice advocates in law and social work, lay advocates generally operate from client-centered perspectives to empower clients to reach their self-determined goals.²⁸²

Legal contexts for lay advocacy for survivors include helping clients pursue civil options such as protective orders and criminal interventions like arrest and prosecution.²⁸³ Advocates can play an important role in providing legal

273. Andrea J. Nichols, *Meaning-Making and Domestic Violence Victim Advocacy: An Examination of Feminist Identities, Ideologies, and Practices*, 8 FEMINIST CRIMINOLOGY 177, 178 (2013).

274. *Id.* at 180.

275. *Id.*

276. *Id.*; see also *id.* 191 (noting advocates used their awareness of multiple oppressions to advocate for survivors within the legal system, service organizations, and even their own organizations).

277. *Id.* at 181.

278. *Id.* at 182.

279. *Id.*

280. *Id.*; see also KRISTEN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 70 (2008) (“Currently, as part of the process of making battered women’s shelters more professional, a mandate exists for changing the primary methods by which shelters work—requiring them to move away from encouraging women’s transformation through consciousness raising to a more service-oriented model that involves administering clients’ needs.”).

281. Kenneth H. Kolb, *Victim Advocates’ Perceptions of Legal Work*, 17 VIOLENCE AGAINST WOMEN 1559, 1560 (2011).

282. See, e.g., M. Joan McDermott & James Garofalo, *When Advocacy for Domestic Violence Backfires: Types and Sources of Victim Disempowerment*, 10 VIOLENCE AGAINST WOMEN 1245, 1248 (2004).

283. Kolb, *supra* note 281, at 1559.

information and advice to survivors that are unrepresented by attorneys.²⁸⁴ Advocates may also accompany survivors to court and stand with them at counsel's table in civil proceedings to provide information and support.²⁸⁵ However, exercising legal options can heighten danger for survivors of abuse.²⁸⁶ Therefore, individualized, ongoing safety planning is an essential component of lay advocacy.²⁸⁷ Empowerment is also a component of safety-focused, client-centered advocacy.²⁸⁸ In this context, lay advocates for survivors perform what Kenneth Kolb calls "care work" and "legal work."²⁸⁹ Kolb defines care work as "listening patiently to clients, giving them control over the conversation, and empathizing with them when appropriate."²⁹⁰ Legal work involves "informing clients about how to exercise their legal options, both criminal . . . and civil . . ."²⁹¹ In practice, lay advocates shift back and forth between these forms of work.²⁹² Advocates' ability to provide valuable information (e.g., about legal rights and remedies) in conjunction with emotional support is essential to their success. As Arlene Weisz explains, "[a]dvocacy is successful when it includes empathetic relationships and empowerment through information."²⁹³ Survivors

284. See Weisz, *supra* note 211, at 142 (discussing the role of advocates in domestic violence cases); Allen et al., *supra* note 211 (describing advocacy services for survivors of sexual assault). A study of sexual assault protection order hearings found when lay advocates provided survivors seeking protection orders with legal advocacy in court, "there was an eighty percent success rate in getting the order granted, compared with a thirty-four percent success rate for petitioners without an advocate." *Id.* at 8. The difference in outcomes was attributed "to advocates keeping petitioners engaged in the process, conveying what to expect at court, and determining whether a [protection order] is the appropriate remedy." *Id.* See also Stoever, *supra* note 159, at 347 (discussing the need for advocates where "[a]lmost all petitioners [for domestic violence protection orders] enter the system pro se, and only a fortunate few are able to obtain counsel after filing their cases").

285. See Stoever *supra* note 159, at 352.

286. See *id.* at 335.

287. See JILL DAVIES & ELEANOR J. LYON, DOMESTIC VIOLENCE ADVOCACY: COMPLEX LIVES/DIFFICULT CHOICES 3-5 (2013) (defining woman-centered advocacy based on a partnership with the survivor in which a feasible safety plan is implemented).

288. See Stoever *supra* note 159, at 348 ("Women's sense of empowerment and ability to take greater control over their lives is considered critical to achieving freedom from violence, and an informative and empathic advocacy relationship can foster such empowerment."); see also WASH. ADMIN. CODE § 388-61A-0145 (2009) ("Advocacy-based counseling means the involvement of a client with an advocate counselor in an individual, family, or group session with the primary focus on safety planning and on empowerment of the client through reinforcing the client's autonomy and self determination."); Joanne Belknap & Hillary Potter, *The Trials of Measuring the "Success" of Domestic Violence Policies*, 4 CRIMINOLOGY & PUB. POL'Y 559, 561 (2005) ("Victim empowerment is probably the most important focal point of any implementation or continuation of DV policies.").

289. Kolb, *supra* note 281, at 1562.

290. *Id.*

291. *Id.*

292. *Id.*; see also Weisz, *supra* note 211, at 141 (noting that most interactions between advocates and survivors in a study involved advocates providing "information within the context of an emotionally supportive relationship").

293. Weisz, *supra* note 211, at 145. Weisz's interviews with survivors demonstrate that "advocates can have a powerful influence on survivors that contributes to the survivors' increased participation in the legal system." *Id.* Other researchers note, however, that institutional and other factors may lead advocates to *overemphasize* legal remedies, despite their potentially negative impacts on survivors. Kolb, *supra*

appreciate advocates for the comfort of their physical presence during stressful encounters with legal and other systems, their empathy, and their provision of vital information about rights and remedies.²⁹⁴

Lay advocates for survivors also engage in advocacy at what M. Joan McDermott refers to as “individual and institutional levels.”²⁹⁵ Advocacy at the individual level helps clients understand options, negotiate legal systems, and “obtain access to important resources such as housing, financial assistance, and education.”²⁹⁶ Advocacy at the institutional level includes “working to change institutional practices or policies that work against the needs of battered women and includes activities such as lobbying legislatures, working with criminal justice agencies at a local level, or even law enforcement training.”²⁹⁷ The goal of both individual and institutional-level advocacy work is to empower survivors. At the individual level, empowerment is conceptualized as helping survivors gain a sense of personal agency and take an active stance in fighting their oppression. At the institutional level, advocacy is viewed as helping to ensure that legal processes are responsive to survivors’ needs and, more broadly, that the state responds appropriately to violence against women, regardless of the views of individual survivors.²⁹⁸ Advocates who conceptualize themselves as engaged in social change activism also view advocacy with individual women as influencing change on a broader level. By sending a message to the larger community that violence toward women is not tolerated, advocates believe they help to create a safer community for the women who live there.²⁹⁹

B. Taking Expertise into Account

As demonstrated above, law, social work, and lay advocacy for survivors offer rich traditions and models of social justice advocacy for an access to justice

note 281, at 1567–70 (identifying reasons for advocates’ devaluation of care work in favor of legal work, including devaluation of care work performed by women, the stigma of survivor advocacy, and lack of professional credentials).

294. Weisz, *supra* note 211, at 145–46.

295. McDermott & Garofalo, *supra* note 282, at 1247.

296. *Id.* See also Stoeber, *supra* note 159, at 353 (“To sustain abuse survivors . . . and effectively eliminate domestic violence, advocates and attorneys should be encouraged to return to the roots of the feminist response to domestic violence. Namely, advocates and attorneys should listen to battered women and then provide comprehensive, individualized responses to their physical, environmental, and emotional needs beyond the entry of a court order.”). Notably, absent an individualized, client-centered approach, lay advocacy can also backfire, such as when it is unwanted or results in unintended consequences. See McDermott & Garofalo, *supra* note 282, at 1246 (arguing that an emphasis on offender accountability and survivor protection results in disempowerment when responses fail to meet the self-identified needs of survivors).

297. McDermott & Garofalo, *supra* note 282, at 1247.

298. *Id.* at 1248. See also Davies & Lyon, *supra* note 287, at 14–16 (describing how systemic advocacy informed by the needs and perspectives of victims complements individual victim-defined advocacy).

299. Nichols, *supra* note 273, at 192.

project that seeks to increase the experience of justice, as well as access. These models also suggest the different types of expertise that these fields might offer to such a project and how they might compliment one another. Lawyers, for example, have been identified as having three components of professional expertise: substantive, relational, and strategic.³⁰⁰ As described by Colleen Shanahan, “[s]ubstantive expertise is the abstract and principled knowledge held by professionals and gained through formal training.”³⁰¹ This form of expertise includes the principles and rules of law.³⁰² In contrast, relational expertise “involves understanding how to navigate the human relationships within which a professional’s work takes place including how to behave and how to communicate with others.”³⁰³ Specifically, relational expertise includes conduct with other legal professionals, including “judges, court staff, clients, and other attorneys.”³⁰⁴ Strategic expertise synthesizes both substantive and relational expertise, and makes capable lawyers distinctly valuable to their clients.³⁰⁵ As Shanahan explains, “[t]he concept of strategic expertise captures how lawyers make choices by synthesizing the rules that govern their work and the informal relationships they navigate in the course of that work.”³⁰⁶

Social workers and lay advocates for victims also offer valuable forms of expertise. Social workers may have more knowledge and experience about social welfare and other administrative systems than is typical of lawyers.³⁰⁷ Lay advocates understand survivor services and offer deep knowledge about gendered violence, the impact of other, intersecting, forms of oppression on survivors’ experiences, and the challenges faced by survivors in legal systems and other institutions.³⁰⁸ Both types of advocates also have greater expertise in care work, including empathy. As Robin Steinberg summarizes, writing about social workers working with lawyers is an interdisciplinary practice. “Their training makes them better listeners than lawyers. They are uniquely aware of the services available in the community, and they are adept at determining an effective defense strategy based on client needs and the client’s history.”³⁰⁹ This

300. See Colleen F. Shanahan et al., Representation in Context: Party Power and Lawyer Expertise 6 (Aug. 11, 2014) (unpublished manuscript), available at <http://scholarship.law.georgetown.edu/facpub/1368>.

301. *Id.* at 13. See also DAVIES & LYON, *supra* note 287, at 14–16 (describing how systemic advocacy informed by the needs and perspectives of victims complements individual victim-defined advocacy).

302. DAVIS & LYON, *supra* note 287, at 14–16.

303. *Id.* at 14.

304. *Id.*

305. *Id.* at 77 (describing strategic expertise as “the hallmark of quality legal representation and . . . inextricably linked with good judgment and zealous representation”).

306. *Id.* at 6.

307. See Galowitz, *supra* note 210, at 2126 (noting that social workers are also adept at “interviewing, evaluation, crisis intervention, short-term casework, negotiation, and referral”).

308. See Nichols, *supra* note 273, at 194 (describing advocacy practices among feminist-identified lay advocates).

309. Steinberg, *supra* note 210, at 988–89.

is not to say that working in multi or interdisciplinary teams is not without its challenges.³¹⁰ However, as a result of their differing types of expertise, social workers and lay advocates can contribute to a deeper knowledge of client context and afford more holistic services than can traditionally trained lawyers acting alone.³¹¹

Lay advocates contribute a focus on safety to access to justice efforts that is particularly relevant to low-income people facing legal problems in poor people's courts. Low-income people experience violence within state and social systems as well as interpersonal violence.³¹² Their experiences in court may increase their vulnerability to such violence and exacerbate other forms of oppression.³¹³ Although lay advocates for survivors generally concentrate on male-perpetrated violence against women, the concept of safety can potentially be broadened using a social justice lens to recognize how it applies to low-income litigants in poor people's courts more generally.³¹⁴

Lay advocates may also make a different sort of contribution: they act as a reminder of the role that (at least partial) outsider status and political commitment plays in successful advocacy. The nonprofessional, lay expertise of advocates for survivors renders them participant-outsiders in the legal realm, where they are neither lawyers nor have another, allied professional status. This outsider stance lends their advocacy its critical edge; their very status as non-professionals renders their advocacy political and is identified by scholars as key to their success in this role.³¹⁵ However, this critical edge is often lost in the bureaucratic

310. See, e.g., Galowitz, *supra* note 210, at 2135–44 (discussing potential conflicts between social workers and attorneys due to tensions deriving from differing ethical obligations, roles, and professional values).

311. See MacDowell, *supra* note 32, at 317–25 (describing how traditional legal education distances law students from the lived realities of low-income people and from social justice goals); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 619–20 (1994) (discussing lawyers' lack of "empathy training" in law school).

312. See MacDowell & Cammett, *supra* note 49, at 5–6 (noting the connection between "the interpersonal nature of domestic violence [and] other forms of social violence, including gang and other violence perpetrated in communities marginalized by poverty, racial subordination, and criminalization, violence within spaces of state custody and control such as prisons . . . and in other spaces and institutions occupied by low-income people, like the military").

313. See *id.* at 5 ("Victims who do not conform to normative stereotypes can be re-traumatized and disillusioned by the responses of courts and other systems to their claims.").

314. See *id.* at 5–6 (describing a clinical law program that helps students identify the gendered nature of structural violence using a social justice framework). Notably, the feminist theory of intersectionality is particularly useful in identifying, connecting, and addressing multiple forms of violence. See *id.* at 13–15 (describing the role of intersectionality theory in teaching law students to recognize and analyze multidimensional subordination and gendered violence).

315. See Elizabeth Ben-Ishai, *The Autonomy-Fostering State: "Coordinated Fragmentation" and Domestic Violence Services*, 17 J. POL. PHIL. 307, 323 (2009). It is through lay advocates' *partiality* to the needs and concerns of survivors that they operate to apply pressure, provide feedback, and initiate a type of "imminent critique" within state systems and institutions that claim neutrality. See *id.* Ben-Ishai argues that coordinated community responses to domestic violence "support the perpetual questioning of 'impartial' decisions and procedures undertaken by the criminal justice and legal system via a system of

and professionalized settings that typify contemporary service organizations. When advocates become too close to the state systems within which they operate, they may lose their partiality to survivors and the outsider viewpoints that make them effective.³¹⁶

These observations raise the larger question: what does it mean to move social justice advocacy into the setting of an institutionalized access to justice project? There are several broad, interrelated aspects to the issue: one aspect is the relationship between legal service projects and state institutions like courts; another is how such projects navigate the relationship between legal service needs and legal reform goals, and make decisions about cases and priorities; and a third is how individual advocates view the relationship between ideology and services in their work. The next section looks briefly at the last aspect and how it relates to organizational issues more generally. The first two aspects are considered in more detail in Part IV.

C. Cause Commitments and Client Services

Lack of organizational support for social justice goals is an obvious barrier to social justice advocacy.³¹⁷ Promoting social justice goals within an organization requires implementing strategies to support social justice perspectives and practices.³¹⁸ Surfacing ideology and harmonizing goals is necessary for consistency and accountability within organizations pursuing social justice and social change agendas.³¹⁹ Research on the relationship between domestic violence lay-advocacy and feminist ideology helps further illustrate these issues.

For example, advocates within professionalized models of advocacy tend to view “domestic violence as an individual-level problem rather than [one] stemming from an unequal distribution of societal resources and power and thus [have] no inclination toward social change activism.”³²⁰ More pointedly, in a study of domestic violence advocates, Nichols found that “if advocates do not have feminist meanings of domestic violence, they are less likely to make the structural-level changes necessary to reduce inequalities that are associated with abuse and violence against women.”³²¹ In her study, Nichols found that only those advocates who self-identified as feminist had intersectional ideologies

institutionalized self-critique initiated by those arms of the state that are outside the impartiality-oriented ‘ethic of justice.’ In this sense, a critique of the impartiality-oriented aspects of the state is immanent within this mode of service delivery.” *Id.*

316. *See id.* at 328 (noting that “[p]rofessionalization may . . . be accompanied by a de-radicalization of domestic violence services and an ensuing depoliticization of the movement”).

317. McLaughlin, *supra* note 255, at 60 (discussing how social workers are marginalized or punished within organizations that do not support, or fail to understand, their social justice advocacy goals).

318. *See, e.g.,* Nichols, *supra* note 273, at 193–94 (discussing the relationship between social justice advocacy and organizational practices).

319. *Id.*

320. *Id.* at 182.

321. *Id.*

(e.g., explained to Nichols how intersecting identities related to victimization and advocacy).³²² Also, “social change activism was absent among all the self-identified non-feminist advocates.”³²³

Drawing on these findings, we can conclude, not too surprisingly, that ideology might play an important role in the social justice practices and commitments of advocates generally. Training and programming around social justice goals may be even more important. Nichols found that all the advocates in her study, including non-feminists, engaged in survivor-defined advocacy practices, and attributes this to lingering feminist influence at the organizational level, for example, in training and programming.³²⁴ She concludes that advocacy approaches were not entirely dependent on the self-identified ideologies of advocates. Moreover, including intersectional and social change ideologies in training and programming could ostensibly cultivate related advocacy practices in non-feminist advocates.³²⁵ Ideological consensus may not be required for a successful counter-hegemonic access to justice project; however, informing all training and programs with social justice goals and objectives would be. This reimagined, counter-hegemonic access to justice project will be shaped and defined by its commitment to social justice.

The next Part begins exploring what an access to justice program built on the principles of social justice advocacy might look like, both in terms of the nature of services provided and program decision-making and structure. The proposals that follow are not intended to be exhaustive but are offered as core parts of a framework for reimagining access to justice—an initial foray into a new approach, drawn from principles of social justice advocacy. This framework can apply to a variety of access to justice programs, including those that involve attorney representation, and may be implemented in whole or in part, as part of a plan for comprehensive reform, new program development, or incremental change. The goal in each case is to reorient program goals and objectives to a social justice advocacy perspective: specifically, one that promotes social justice in poor people’s courts. Staff members in such a program may or may not also act as advocates with, or on behalf of, particular litigants in the context of an advocate–client relationship. However, in all cases, they are within an advocacy role. To capture the presence of an advocacy stance, or partiality, that transcends but also incorporates individual advocacy relationships, the next Part uses the term “client–litigant” when referring to individuals using access to justice-program services under the new, proposed framework.

322. *Id.* at 187.

323. *Id.* at 192.

324. *Id.* at 193.

325. *Id.* at 193–94.

IV. BUILDING A NEW ACCESS TO JUSTICE MODEL

A. *Providing Services as Social Justice Advocates*

The foundational principles of a reimagined access to justice project emerge from the advocacy models and types of expertise outlined above. First, each of the models—social justice lawyering, social work, and lay advocacy for survivors—demonstrates the potential for providing valuable assistance from a social justice advocacy perspective, even when litigants are not represented by an attorney in court. Social justice advocacy takes many shapes and forms.³²⁶ Second, social workers and lay advocates demonstrate the ability of non-lawyers to offer meaningful, social justice-informed, legal and non-legal advocacy that complements lawyer advocates in ways that may increase the overall effectiveness of legal services.³²⁷ Third, the social justice practices and commitments shared by each of these models indicate that such assistance will be empowerment-based and will aim to better enable the poor to resist subordination.³²⁸

These models suggest that an access to justice program should work to empower litigants to resist practices and procedures that facilitate the operation of bias in poor people's courts and counteract the dignitary harms perpetrated in court settings by treating litigants with dignity and respect.³²⁹ In order to address the interrelated nature of poor people's legal problems and the impacts of intersecting systems, it will move away from a case-based and reactive focus, and

326. Indeed, the most important part of social justice advocacy may be providing an opportunity for deliberation, rather than the provision of legal services. See White, *To Learn and Teach*, *supra* note 35, at 732 (illustrating this principle with a description of a legal clinic in a South African village ran by the community).

327. See, e.g., Steinberg, *supra* note 210, at 988 (describing the benefits of interdisciplinary practice).

328. See *supra* Part III (describing the empowerment-based focus in social justice lawyering, social work, and lay advocacy); see also Gabel & Harris, *supra* note 30, at 375–76 (advocating for an approach that counters the profound alienation experienced within hegemonic social institutions by “expanding political consciousness through using the legal system to increase people’s sense of personal and political power”).

329. See *supra* note 256 and accompanying text (observing that an egalitarian and respectful relationship between lawyers and clients is a basic principle of social justice advocacy). The importance to a counter-hegemonic project of working to counteract dignitary harms is emphasized by Gabel and Harris, who observe, “the experience of minor lawsuits is one of the few times that most people actually encounter the public sphere directly, and the experience almost always intensifies the alienation they already feel. The degrading and manipulative way that these cases are routinely processed . . . only increases people’s sense of hopelessness about politics and about human nature in general.” Gabel & Harris, *supra* note 30, at 396. Therefore, attention to these goals should inform every point of contact between client–litigants and access to justice services and programs. See LOPEZ, *supra* note 192, at 98 (observing that even small details “can dictate the very nature of the relationship between the office worker and the client”). While the implications for service delivery and program organization is well beyond the scope of this article, it is worth noting that creating an environment that is courteous, respectful, and responsive to people’s needs can begin with looking at it from the people’s point of view and analyzing interactions from the perspective of program or office organization and design. See *id.* at 97–102.

seek to connect, rather than to compartmentalize, legal (and non-legal) issues.³³⁰ The process of identifying and uncovering these connections is also essential to the goals of engendering counter-hegemonic consciousness and resistance to subordination.³³¹ The first opportunity to address these issues is during the intake process, which should lay the foundation for services in a reimagined access to justice program.

1. Redesigning Intake to Account for Interrelated Problems

As noted above, most access to justice programs are designed to address legal problems and issues as they are identified and framed as a legal case by litigants.³³² The process typically begins when the litigant identifies the type of case for which assistance is needed, such as a divorce, protection order, or an eviction.³³³ Intake practices need to move beyond responses designed around a single issue or presenting problem. Intake is the first opportunity to collect the information necessary to identify issues in addition to what the client–litigant has presented, and to gain context necessary to help client–litigants evaluate their own pre-identified frames and responsive strategies.

This may also be the first opportunity for the client–litigant to consider the situation with the assistance of someone operating with his or her interests in mind. Legal frames may be driven by many influences, including coercive practices by state actors and others.³³⁴ It cannot be assumed that litigants have come to conclusions about legal issues and frames through a decision-making process superior to an advocate.³³⁵ An important part of an advocate’s value is to assist with sorting through the many factors that may impact a client–litigant’s decision.³³⁶ The intake process should be designed to identify issues that might

330. See *supra* Part II (describing how typical approaches to access to justice fail to address the way legal problems arise for low-income people); see also Gabel & Harris, *supra* note 30, at 396 (describing the importance of countering the ways that the legal process contributes to social fragmentation and political alienation by finding common threads among cases).

331. See Gabel & Harris, *supra* note 30, at 396 (describing the social isolation engendered by legal processes); see also Rose, *supra* note 254, at 46–50 (describing the importance of helping clients contextualize their experience as social and collective rather than individual and isolated).

332. See *supra* Part II (discussing limitations of access to justice programs).

333. This organization of services also tends to follow the organization of courts, such that a court-based self-help center will typically provide assistance only with the matters heard in that court.

334. See Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 400–13 (2006) (describing constraints on autonomous client decision-making). In my experience representing domestic violence survivors, for example, the client’s initial determination to seek an order of protection was sometimes the result of pressure from a landlord, employer, or case worker who was threatening the client with adverse action if he or she did not get the order, rather than the client’s independent determination that the order would make him or her safer.

335. See *id.*; see also Simon, *Dark Secret*, *supra* note 214, 1102–08 (arguing that progressive lawyers underestimate both their influence and their value).

336. See, e.g., Simon, *Dark Secret*, *supra* note 214, at 1105 (observing lawyers help clients reflect on their goals “by offering a detached perspective”); Kruse, *supra* note 334 (observing opportunities to support client autonomy by intervening in client decision making).

not be captured through a legal lens alone.

It is important to develop intake forms that assess common legal intersections and areas of vulnerability to state intervention or other adverse consequences from engagement with the justice system. For example, criminal defender organizations have developed intake tools that help them identify key issues related to civil collateral consequences of conviction (such as those related to immigration status, employment, housing, or family), or that might require other or additional interventions (such as untreated mental health issues), or implicate other legal actions or relief.³³⁷ The corollary intake form for access to justice programs working on civil cases would be designed to help staff members identify the presence of common co-occurring legal or other issues that might affect analysis of the presenting problem. If the presenting problem is a divorce, the intake form might inquire about the need for debt counseling or foreclosure assistance.³³⁸ A request for a protective order might inquire about employment and housing issues³³⁹ and whether the applicant seeks financial support from the adverse party.³⁴⁰ All intake forms would inquire about the existence of other cases, including criminal charges, in order to identify possible collateral effects.

In each type of case, the intake form would inquire about safety concerns. Broadening inquiries about safety to cases where the client–litigant has not identified domestic violence as a concern, and to non-family cases, embraces the broader concept of violence discussed above, which includes state and community violence, and also the violence of subordination. An advantage of this approach is that it includes issues that are typically triggers for safety planning, such as domestic violence. However, a discussion of safety is not dependent on narrower, legal notions of violence, or clients' understanding of legal terms.³⁴¹ It incorporates a wider array of issues that can impact safety, such as economic insecurity and homelessness, and mental and physical health. Various dimensions of health may be the subjects of more specific inquiries at intake; the point here is to focus on their implications for safety, broadly understood, as well as any

337. For example, the Bronx Defenders' intake checklist includes inquiries about the client's immigration and employment status; whether they are living in or applying for public housing; military service and mental health history; the existence of child welfare issues; and whether there was police misconduct. *See* The Bronx Defenders, Checklist (on file with author).

338. *See generally* MELANCA CLARK & MAGGIE BARRON, BRENNAN CTR. FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION (2009), available at <http://www.brennancenter.org/page/-/Justice/Foreclosure%20Report/ForeclosuresReport.pdf> (describing the widespread impacts of subprime lending and predatory practices on low-income and African American communities, and the urgent need for legal assistance with these issues).

339. *See* Carey, *supra* note 191.

340. *See supra* note 126 and accompanying text (discussing the economic impacts of protective orders).

341. *See* Stoever, *supra* note 159, at 348 (“Many women do not recognize the range of physical behaviors that are illegal and actionable, such as slapping, shoving, or pushing, with one client commenting to me, ‘I’ve told you about the times he used a gun,’ unmistakably indicating that she experienced multiple other less lethal forms of violence.”).

implications related to the client–litigant’s legal case. The goal is to obtain facts necessary to establish a comprehensive and sound basis for counseling client–litigants entering (or considering entering) poor people’s courts.

2. Counseling on Impacts, Intersections, and Options

Just as the intersecting nature of the law in poor people’s lives should inform the intake process, the ways in which systems intersect in poor people’s courts should inform approaches to counseling and educating client–litigants using those courts.³⁴² With this context in mind, those counseling client–litigants should aim to help them decouple or avoid the links between punitive and potentially supportive state functions. This means educating client–litigants about the potential connections between systems and the possible consequences of each course of action. Like every other aspect of this re-imagined access to justice program, the lens of social justice advocacy is essential for this process to be empowering rather than potentially debilitating.

For example, an applicant for a protective order with minor children should understand the potential economic ramifications of the order, any vulnerability to intervention by a child welfare agency or by the court, and how the order might impact any other related case. This counseling should be part of a deliberative process allowing for individualized analysis of both legal and non-legal issues, including safety.³⁴³ It is easy to imagine presenting this type of information in ways that—intentionally or not—discourage the client–litigant from seeking the order, or otherwise encourage him or her to take a particular course of action.³⁴⁴ Social justice advocacy supposes mindfulness about the advocate’s role in a process that facilitates, rather than overpowers, the client–litigant’s decision-making by providing needed information and support.³⁴⁵ In addition to providing opportunities for deliberation about individual circumstances with regard to legal options and possible outcomes, every care should be taken to provide information

342. See *supra* Part I (describing how poor families are impacted by the intersection of family courts with the child welfare and criminal justice systems).

343. See *supra* note 287 and accompanying text (discussing the importance of individualized counseling on safety issues).

344. See Simon, *Dark Secret*, *supra* note 214, at 1103 (arguing that the mainstream attorney bar has “mistakenly portrayed the practice of counseling as the neutral presentation of information for autonomous client decision”). Courts, too, feign objectivity when presenting information, which can more closely resemble indoctrination into court culture and ideology. For example, the Los Angeles Superior Court requires all parties to a custody dispute to complete a class called “Our Children First” prior to attending a mandatory mediation session. See *Our Children First*, SUPERIOR CT. CAL., COUNTY OF L.A., <http://ww2.lacourt.org/ourChildrenFirst/ui/index.aspx> (last visited Mar. 8, 2015). The class may be completed online or in person at the courthouse. *Id.* My clients who attended the class, under its former iteration called “Parents and Children Together,” reported that it placed a heavy focus on joint custody, encouraged informal resolution of cases, and discouraged litigation.

345. See *supra* Part III (describing the role of collaboration in social justice lawyering); see also Kruse, *supra* note 334 (describing a plurality of approaches to collaborative lawyer–client decision making).

in ways that are sensitive to the potential for influencing the decision-making process in unintended ways.

Notably, this sensitivity is distinct from services that are delivered by an ostensibly neutral party, such as legal services under models that presume lawyer neutrality³⁴⁶ or those that are not advocacy-based, like traditionally conceived self-help services for unrepresented litigants.³⁴⁷ The posture of neutrality can hide biases that do not serve the public. The advocacy goal is to support client–litigants in reaching well-thought-out, informed decisions about how to proceed with their cases—an advocacy goal. This goal requires the advocate to engage with the decision-making process as a facilitator with appropriate expertise.³⁴⁸ Sensitivity to the potential to disempower clients in this context gives rise to intentionality about position (e.g., that of the client and of the advocate) and process (e.g., does it reinforce hierarchy or promote equality and deliberation) rather than a purported withdrawal from the decision-making process.³⁴⁹

Counseling should also transcend the options available in poor people’s courts in favor of a broader, problem-solving approach. A social justice advocacy perspective demands that advocates advise client–litigants in a more comprehensive and holistic manner than the manner artificially imposed by the structure of the legal system or practice “silos” created through legal specialization.³⁵⁰ This approach includes discussion of alternative avenues for relief that might be available to client–litigants in other courts or administrative forums, as well as non-legal options. It may also include identifying opportunities for collective action, both through the deliberative process in particular cases and through observing recurring problems experienced by multiple client–litigants over time.³⁵¹ The implications of this broader approach for program structure and training are discussed below. The breadth of issues identified through intake and discussed in a deliberative, problem-solving approach to counseling may extend beyond the types of matters heard in poor people’s courts and the types of services that can be offered by the specific access to justice program. While addressing all litigants’ issues is unlikely to be within the ability of any single access to justice project due to the potential scope of issues raised, many issues may be part of a larger social change agenda with which the program is ideally affiliated.

346. See Kruse, *supra* note 334, at 373 (describing an “appearance of neutrality” as a “staple of client-centered interviewing and counseling techniques”).

347. See *supra* Part II (noting that self-help is premised on the absence of advocacy).

348. See Simon, *Dark Secret*, *supra* note 214, at 1103 (noting that lawyers do more than translate the law to poor clients; their professional judgment also has value); Kruse, *supra* note 334, at 415 (discussing the value of contextualized professional judgment).

349. See Kruse, *supra* note 334.

350. See, e.g., Steinberg, *supra* note 210, at 972 (observing how the field of poverty law has become siloed, due in part to the creation of separate funding streams for civil and criminal legal assistance and restrictions on practice).

351. See *infra* notes 382–83 and accompanying text (discussing the role of service delivery in obtaining data about community needs).

3. Educating about Narrative, Rights, and Resistance

Empowering low-income client–litigants also requires educating them about presenting themselves and their stories to the court. This type of education includes teaching client–litigants about the language of court, including legal terminology, and also less formal, but no less important, expectations about verbal presentation and etiquette.³⁵² Educating client–litigants about the language of court also requires exposing underlying ideologies and expectations, such as the expectation in family courts that good parents will refrain from making rights claims about children, or that domestic violence survivors are passive, or the expectation in housing court that tenants deserving of relief from eviction due to their rental units being uninhabitable have the money to pay rent.³⁵³ This educative process will also help client–litigants make decisions about presenting stories and claims that challenge normative assumptions and determine when and how best to reveal facts that run counter to prevailing norms.³⁵⁴ From the social justice advocacy frame, this educational process is vital not only for individual litigants, but also for creating new narratives and norms that more accurately represent the lives of client–litigants in poor people’s courts.³⁵⁵

Empowerment also requires educating client–litigants about strategically asserting rights in delegalized court settings. This includes working with client–litigants to determine when to ask for relief that is disfavored and engendering informed resistance to common practices. For example, in family courts, it is common for custody evaluators to ask parents to waive all doctor–patient privileges for the purpose of the custody investigation.³⁵⁶ For some client–litigants, this might present a problem, such as making sensitive medical or psychological information available to an abusive spouse. Considering the benefits and risks of refusing to waive privilege is important, but counseling on such issues is outside the scope of most programs offering

352. See Clarke, *supra* note 132 (observing the importance of unwritten, informal rules of conduct in legal settings).

353. See *supra* Part II (discussing the nature of hegemony in the poor people’s courts).

354. See, e.g., Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 120–23 (2008) (describing reasons that clients may choose to reveal experiences that do not conform to the court’s expectations, even when doing so may hurt their case).

355. See *id.* at 123 (arguing that advocates must find ways to create space for new narratives that challenge stereotypes). As Goodmark describes regarding stereotypes about battered women: “One crucial aspect of creating that space is helping judges understand that the paradigmatic victim speaks for very few battered women For years, advocates have relied on judicial education to broaden judicial perspectives on the experiences of battered women, with questionable success. The time has come to try something new. Telling counter-stories that show judges the diversity of battered women’s experiences may help us to make that space.” *Id.* at 123–24.

356. Like other privileges, the doctor–patient privilege can be waived by the holder of the privilege. See generally Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 24 J. AM. ACAD. MATRIMONIAL LS. 453 (2013).

assistance to unrepresented litigants.³⁵⁷ The educative process in an access to justice program informed by social justice advocacy should address different contexts that arise in particular cases, including appearances before judges, mediators, investigators, and other court personnel.³⁵⁸ In addition to providing better support for individual client–litigants, the process of engendering informed resistance to common court practices helps future client–litigants who challenge the status quo, as they will no longer be the exception to the rule. Resistance can help to change practice. If it is no longer easier to reflexively follow informal, interventionist practices, courts may be more open to change.³⁵⁹

These suggestions also demonstrate the need for ongoing access to justice services that extend beyond the opening of a case or the filing of specific motions. Client–litigants need assistance in other appearances and events, such as investigations and discovery processes, settlement, and trial. A social justice advocacy approach that empowers litigants in poor people’s courts requires ongoing education and support throughout the process. Ideally, it also anticipates potential future issues and addresses them proactively.

4. Developing Proactive Strategies

One of the roles an access to justice program plays (intentionally or not) is in educating client–litigants about what to do “next time.” For example, client–litigants may not meet the legal requirements for a desired avenue of relief or a defense in their first visit to the program, but they learn about what is required if the situation arises again.³⁶⁰ A more intentional approach to counseling and educating client–litigants would also address potential future issues that are implicated by present circumstances. For example, a parent ordered to pay child support should be advised about the need to seek modification of the order if his or her financial circumstances change and the problems that may arise (including the possibility of incarceration) from non-payment.³⁶¹ Being proactive also means helping client–litigants consider alternatives outside of what the law might

357. Indeed, I was informed by a family court custody investigator with several years of experience in the Los Angeles County Superior Court that no parent had *ever* refused to sign the waiver in his cases.

358. Absent attorney representation, tools to assist client–litigants would also be beneficial; for example, checklists, handouts, glossaries and trial preparation handbooks, and similar materials. *See THE EMPIRICAL RESEARCH GRP.*, *supra* note 144, at 3 (noting that litigants in unlawful detainer cases sometimes forgot to ask for relief that was available in their case and that they had been instructed about at the self-help center).

359. *See Engler, Context-Based Civil Gideon*, *supra* note 208 (arguing that the self-interests of stakeholders including courts must be taken into account in order to implement change).

360. For example, most of the tenants facing eviction at one self-help center had received an eviction notice for failure to pay rent and had no affirmative defenses available. *THE EMPIRICAL RESEARCH GRP.*, *supra* note 144, at 12. Nonetheless, these tenants now understand what is required to present an affirmative defense, such as uninhabitability.

361. *See supra* Part I (discussing incarceration for nonpayment under felony nonsupport laws). *See also Turner v. Rogers*, 131 S. Ct. 131 (2011).

provide. For example, this proactive approach could include helping parents in a private child-support case consider alternatives to a minimum child-support order if the noncustodial parent is unemployed, in order to avoid arrears accruing on an order that is, for all practical purposes, unenforceable.³⁶² Proactive strategies can seek to alleviate problems that arise in the disconnect between life and law and play a role in devising new solutions.

A proactive social justice approach also includes reaching out to community members who have not yet sought access to the court, for example, through community-based education programs.³⁶³ These should include programs designed to reach people, such as inmates, who have difficulty accessing poor people's courts and related services.³⁶⁴ Such programs would be designed to teach people about rights and responsibilities and better prepare them to make decisions about how to proceed with legal problems. They would also help people understand and interpret their experiences in the justice system and avoid some of its problems and pitfalls. Legal education can be a key part of the process of democratization, in which the public gains the knowledge necessary to understand the legal system and participate in its reform.³⁶⁵ However, there may be a fine line between education as part of an empowerment model and merely inculcating the public with the ideologies and norms of the existing legal system.³⁶⁶ If people are taught about legal rights and obligations without a critique of their utility or absent meaningful assistance with enforcement, then education is simply another aspect of hegemony: making subordination seem more fair because the subordinated were well-informed but failed to take correct action.³⁶⁷

A discussion at a recent conference of family court judges serves as an example of the easy shift from a progressive vision to a hegemonic one: during

362. Alternatives could include setting the order to begin after a set amount of time for job training or a job search; child support might also be waived in lieu of other considerations, like parenting time while the other parent works in order to save expenses for child care. See Brito, *supra* note 120, at 665–67 (discussing alternatives to current child support policy approaches).

363. See *supra* Part III (discussing the centrality of education to social justice lawyering); see also Alferi, *supra* note 174 (arguing that legal rights education—along with organization and mobilization—is central to “building and recovering community in neighborhoods segregated by concentrated poverty and race”); Rebecca L. Sandefue, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 77–79 (2010) (discussing how expanding access to justice might in some instances be best served by expanding legal education); Bridgette Dunlap, *Anyone Can “Think Like A Lawyer”*: How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States, 82 FORDHAM L. REV. 2817 (2014) (arguing that a broad-based approach to educating the public about the law will strengthen democracy and compliance with the rule of law).

364. See *supra* note 47 and accompanying text (concerning restrictions on the practice of law that prevent inmates from getting necessary civil legal services).

365. See Alferi, *supra* note 174; Dunlap, *supra* note 363; MacDowell, *Law on the Street*, *supra* note 32 (describing the role of community legal education in educating or reacquainting lawyers with the experiences of marginalized communities).

366. See MacDowell, *Law on the Street*, *supra* note 32, at 287 (noting that the process of legal education can be disempowering for many).

367. See *supra* Part III (describing the conditions conducive to developing counter-hegemonic consciousness).

the question-and-answer session following a presentation on problems with approaches to child support arrears that criminalized low-income parents, the judges' focus shifted from how to reform the system to how to reach poor people before they became parents in order to discourage them from having children they could not afford.³⁶⁸ One suggestion was to educate teens in high school or junior high about the high financial costs of raising children.³⁶⁹ In the judges' eyes, the purpose of education became a family court purpose—regulation of the poor—rather than a transformative, social justice goal, like revealing the cultural construction of law and engaging young people in trying to challenge systems of subordination.³⁷⁰ Nor did it include engaging processes to hold the system accountable. The process of developing and implementing programs will need to be carefully monitored to make sure that it is not coopted by other, more conservative institutional agendas.³⁷¹

Programs must be careful to not let efficiencies in delivering legal services suppress larger goals of systemic reform.³⁷² This will be especially challenging insofar as access to justice programs take all comers: it is simply easier to let the structure of the court and legal system dictate the process rather than to decide what is needed from a social justice point of view.³⁷³ These concerns point toward the importance of a program structure that supports social justice goals.

B. Structuring Programs to Promote Social Justice Commitments

1. Developing a Social Justice Criteria for Allocation of Resources

How should the reimagined access to justice program determine how to allocate resources? For example, how should decisions be made about where to target community education and outreach or which client–litigants require attorney representation? Should services be expanded to provide broader coverage or narrowed to allow for deeper focus on key issues? Should the program offer alternatives to existing services provided by the courts or focus on reform of existing court practices and programs? The principles of social justice advocacy suggest that answering these questions requires deep knowledge of context, including knowledge of poor people's courts, the present historical

368. See notes on file with author.

369. *Id.*

370. MacDowell, *Law on the Street*, *supra* note 32.

371. See, e.g., *infra* this Part, discussing the difficulty of maintaining a progressive agenda if dependent for approval on major community institutions like courts.

372. See Abel, *supra* note 46, at 575–76 (discussing the pressures on legal aid programs leading to routinization of services and neglect of law reform goals).

373. See *id.* at 574 (“It is hard for a legal aid office to turn clients down when it knows that it represents the last resort, particularly once the office has established an open door policy.”). Abel notes other pressures leading toward routinization, including the desperate nature of many individual cases, the desire to prove loyalty to the community, and pressure to neutralize political opposition to services by appearing neutral. *Id.* at 576.

moment, and community conditions.³⁷⁴ No set of criteria can or should provide absolute answers regarding priorities, especially in this shifting landscape.³⁷⁵ However, the context of poor people's courts suggests two guiding principles for a decision-making criteria in a reimagined access to justice program addressing subordination and seeking social justice.

First, the criteria will prioritize responses to individuals and groups who are most vulnerable to harm. The poor people's courts tend to reinforce subordination through intertwined processes of informality (creating opportunity for bias, lack of transparency, and undermining the effectiveness of counter-measures), interventionism (expanding state power and undermining autonomy), and intersecting systems (leading to punitive state action).³⁷⁶ The overall culture and practices of poor people's courts contribute to demoralization and social marginalization of low-income people through rituals of public humiliation that, while a collective experience (that is, one which all poor people may be subjected to), tend to further isolate individuals within the particularities of their legal case.³⁷⁷ Those who are most vulnerable are those who are already subject to multiple forms of institutional and structural subordination.³⁷⁸ This might include, for example, low-income client-litigants in family court who are incarcerated and have an especially hard time participating in their cases and overcoming bias; those whose immigration status renders them vulnerable to deportation if their civil case results in contact with the criminal justice system; and those whose eviction case may worsen a child welfare case.

Addressing the most vulnerable constituencies also includes targeting assistance to client-litigants whose identity, experiences, or claims are otherwise counter to institutional expectations or norms. This category might lead to focusing on assistance for LGBT family issues; programs to address potential bias in domestic violence cases involving client-litigants who do not fit the stereotype of the "perfect victim" (such as those who are gay or lesbian, are of color, or have a criminal record), or alleged abusers who fit stereotypes of perpetrators (such as men of color, and those with a criminal history); and housing cases for indigent renters with habitability claims or those with cases ripe for collective action. Within these broad categories, other factors may further refine decision-making about resource allocation.³⁷⁹ The most important consid-

374. See, e.g., LOPEZ, *supra* note 192, at 66–67; see also text accompanying note 231 (discussing the importance of community history for social justice lawyering goals).

375. See Cahn & Cahn, *supra* note 194, at 1346 (opining that a criterion "can do no more than suggest when a case might help a community or an individual to shake off a paralyzing sense of despair and helplessness").

376. See *supra* Part I (describing the family courts in historical context).

377. See *supra* Part II (describing degradation ceremonies in the poor people's courts).

378. See *supra* Part I (describing the intersectional impacts of the family courts); *supra* Part II (discussing the ways in which poor people's courts reinforce social hierarchies).

379. See, e.g., Cahn & Cahn, *supra* note 194, at 1347–48 (identifying factors for a legal services program to consider when choosing cases).

eration will be the program's purpose of promoting social justice and challenging hegemony. That goal suggests that vulnerability to harm should generally be related to a broader pattern of institutional bias or another structural issue, in order to draw significant program resources.

Second, applying the decision-making criteria will be informed by data from the community. This means data gained through observation and experience with client-litigants as well as data obtained by other means.³⁸⁰ Serving low-income communities provides an important opportunity to keep abreast of trends and patterns in the community that relate to hierarchy and social marginalization, and this data should be tracked and used for priority setting.³⁸¹ Gathering information for priority setting may also include active efforts to get the input of affected community members.³⁸² Data and other input regarding resource allocation must be assessed with the overarching program goals in mind, rather than giving preference to any particular criterion or privileging any one viewpoint.³⁸³ Engaging multiple viewpoints within multidisciplinary programs is also helpful.

2. Decentering Expertise and Maximizing Interaction

The reimagined access to justice program may include staff members from different advocacy backgrounds, including attorneys, social workers, and lay advocates, who each play a role in providing services in a variety of possible configurations. Addressing the harms of poor people's courts suggests the importance of structuring these relationships so as to appropriately utilize, yet decenter, any single professional or lay expertise, and to maximize interaction so that client-litigants and service providers can learn from one another across areas of expertise. These structural concerns arise from several interrelated issues. Addressing the courts' role in demoralizing and alienating requires providing

380. See Steinberg, *supra* note 210, at 989–90 (“When deciding what services to offer and what partnerships to create [providers] should be careful not to make assumptions about the needs of the client population. Instead, [they] must begin to gather hard, statistical data in order to understand what resources should be incorporated to strengthen services and connect better with the community.”).

381. For example, Steinberg reports that the Bronx Defenders “knew that clients were in desperate need of housing because the court intake form asks for a ‘permanent address’ and we saw how often our clients checked ‘homeless’ or ‘none.’ But we had no way of knowing how often our clients were investigated by child-welfare agencies, or how often removal petitions were brought in family court. After collecting the data from our clients in a systematic way, we learned how prevalent child-welfare interactions were and how often our clients’ children were being placed in foster care, often as a result of a criminal charge.” *Id.* at 989. As a result, the organization decided to integrate a family defense practice into their services. *Id.* at 989–90.

382. Cf. Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1009 (2000) (proposing that legal responses to domestic violence be shaped with reference to the needs and concerns of those communities most vulnerable to both interpersonal and state violence).

383. See Cahn & Cahn, *supra* note 194, at 1348–49 (noting that any criteria must be approached carefully so as not to improperly influence making or rejecting decisions about rendering legal assistance, and discussing dangers from misapplication of criteria).

opportunities to develop counter-hegemonic consciousness, which emerges from learning about shared experiences within social hierarchies.³⁸⁴ Social justice models emphasize nonhierarchical models of collaboration and learning, which require a structure that facilitates interaction among participants. This structure will also maximize the benefits offered by different forms of expertise (including the lay expertise offered by client–litigants) and provide a non-hierarchical, collaborative model appropriate for a counter-hegemonic project.

Structuring the program to include planned opportunities for interaction can involve anything from open community meetings to classes and clinics designed to promote discussion among participants. These should be implemented with strategies to support community organization by uncovering political issues underlying seemingly personal and isolated problems, such as divorce or eviction.³⁸⁵ These approaches would seek to break down, when possible, the isolating effects of traditional law practice, which focuses narrowly on communication between clients and attorneys.

Maximizing interaction and collaboration can also take the form of organizing program staff into interdisciplinary teams. As described by Steinberg, a team model facilitates effective interdisciplinary communication and collaboration by “encourag[ing] each advocate to seek advice and assistance from a variety of experts, depending on the needs of the client, and regular team meetings provide an opportunity to highlight examples of effective interdisciplinary communication and collaboration.”³⁸⁶ The program can develop and promote interdisciplinary skills and exchanges by cross-training advocates, including training in areas outside their expertise, and shadowing and collaborative practice with members from other advocacy areas.³⁸⁷ Structuring a program to maximize interaction also includes the design of physical spaces, from waiting rooms to work spaces, in order to allow for and encourage communication and collaboration.³⁸⁸

Finally, social justice advocacy principles point toward the importance of developing capacity for agency and leadership in low-income communities, rather than dependence. This requires that client–litigants not just passively receive services, but also learn leadership skills and participate in leadership activities.³⁸⁹ Opportunities for client–litigants to take leadership roles in program activities might include returning to the program to teach or co-teach a class after completing their case. It may also include enlisting client–litigants in structural-reform efforts beyond their case. These opportunities can be relatively large (such

384. See *supra* notes 265–76 and accompanying text (describing the prerequisites for developing counter-hegemonic consciousness).

385. See Gabel & Harris, *supra* note 30, at 396–98 (describing strategies for politicization of common cases).

386. See Steinberg, *supra* note 210, at 992.

387. See *id.* at 995.

388. See *id.* at 992.

389. See Cahn & Cahn, *supra* note 194, at 1332 (referring to the need to cultivate individuals “who are capable of articulating the demands and concerns of their ‘constituency’”).

as joining a community campaign for legislative reform) or small (such as writing a letter to court administrators about a problem with court staff that arose during the case). Structuring the program to provide such opportunities for education and mobilization is consistent with goals of empowerment and social change at the heart of a reimagined access to justice program. These transformative goals also point to the need for structural independence for an access to justice program with a social justice mission.

3. Maintaining Organizational Independence

In order to maintain its social justice orientation, the reimagined access to justice program will need to be organizationally independent of the courts. This is true for several reasons. First, social justice advocacy requires freedom to represent marginalized community members and implement social justice goals. The program cannot be beholden to the very institutions it seeks to reform. As Edgar S. Cahn and Jean Camper Cahn observe, “The law’s capacity to create issues, to bring controversies into focus, tends to make . . . legal services too controversial for an organization to absorb if it must retain the support, or at least the sufferance, of the major institutions in a city.”³⁹⁰ Here, a partnership with poor people’s courts to provide access to justice services is an impossible conflict of interest. Courts want access to justice programs to make dealing with unrepresented litigants easier on the institution and its constituent parts while maintaining the status quo. This may be palatable for an access to justice program that is focused on access alone. However, access to justice as a counter-hegemonic, social justice practice seeks to challenge and change the status quo in poor people’s courts. While the interests of the program and court may sometimes overlap, each have fundamentally different positions, and a partnership between them cannot help but dilute the goals of the social justice enterprise. Access to justice programs should be organizationally independent of the courts, operationally and fiscally.

Second, organizing access to justice programs around court organization and legal specialization does not fulfill the needs of client–litigants, which transcend these categories. This concern suggests that such programs should also be sited in a manner physically separate from the courts, if possible. Siting the program in a convenient location separate from the poor people’s court might better afford the opportunity to develop a program that reflects client–litigant needs rather than court structure. A separate location might also help instill confidence in the community that the program was truly independent and not an extension of the state.

In addition to maintaining organizational and physical independence from the courts, the reimagined access to justice project should avoid over-concentration

390. *Id.* at 1349.

and monopolization of services. There is a tendency in legal and social services toward consolidation of services that may endanger social justice commitments. Examples include efforts to provide comprehensive services to entire communities,³⁹¹ programs aimed at consolidating services for a particular problem or set of problems, like family violence,³⁹² and movements to unify courts.³⁹³ The danger here, as with program–court partnerships, is dilution of the program’s social justice mission through alliance with organizations and institutions with incompatible perspectives, goals and objectives.³⁹⁴

Consolidation of access to justice services within a larger plan for coordinated or comprehensive services may also have the effect of removing decision-making from those most in touch with program context and needs, fostering risk aversion rather than innovation and slowing program implementation.³⁹⁵ Over-consolidation of services may result in problems similar to those caused by other forms of monopoly, including “insulation from the democratic market place[,] . . . relative immunity from criticism and evaluation, and [lack of] genuine responsiveness to consumer demand.”³⁹⁶ While consolidation and coordination of services has obvious benefits, such as avoiding duplication of services and possibly expanding resources and increasing efficiency,³⁹⁷ experience suggests that organizational independence with informal or more limited partnerships will better protect social justice goals. These considerations also point to the importance of organizational structures to promote accountability.

4. Promoting Accountability

Social justice advocacy involves constant self-evaluation and assessment of strategy to determine if current practices are effective. The reimagined access to justice program must develop practices and procedures to evaluate its progress and ensure accountability to its goals. The evaluative criteria for such a project would look different than the criteria for a program that merely provides access to the courts. It would evaluate more than the delivery of services. Informed by the

391. *See id.* at 1318–20 (describing Community Progress Incorporated (CPI), a comprehensive program located in New Haven, CT).

392. For example, the Family Justice Center movement seeks to provide survivors of family violence (including elder abuse, domestic violence, and sexual assault) with “one stop shopping” by putting law enforcement officers, district attorneys, social service providers, and legal assistance in one location. *See History of the Family Justice Center Movement*, FAM. JUST. CTR. ALLIANCE, <http://www.familyjusticecenter.org/index.php/history.html> (last visited Mar. 6, 2015).

393. *See, e.g.*, Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 20 TEX. J. WOMEN & L. 95 (2011) (regarding integrated domestic violence courts). These often also include efforts to consolidate related services at the court site. *Id.* at 117.

394. *See* Cahn & Cahn, *supra* note 194, at 1321 (noting that other organizations may have a “professional service orientation” that runs counter to the empowerment objectives of social justice advocacy).

395. *See id.* at 1325–26

396. *Id.* at 1322.

397. *Id.*

goals of social justice advocacy and counter-hegemonic practice, it would also examine whether the program's efforts reduce punitive practices, unwanted interventions, and the influence of bias, while increasing judicial compliance with the law. It would also develop methods to examine whether client-litigants are empowered to address the problems that brought them to the program.³⁹⁸

Evaluation and accountability in this context requires not only periodic assessment of program performance but also constant critical engagement with the justice system and with client-litigants. Just as the reimagined program must engage in dynamic interaction with client-litigants in order to help shape and respond to legal issues, it must connect its services to structural reform efforts in order to achieve meaningful change and to assess its effectiveness. This engagement can take many forms and occur (sometimes simultaneously) at micro and macro levels.

Court-watch programs afford an important example. These are programs where staff or volunteers observe court proceedings and collect information about court practices.³⁹⁹ Information gathered in court-watch programs can be used internally to understand outcomes in cases, to create new practices for advocates, and to guide allocation of program resources, and externally, to promote change.⁴⁰⁰ For example, the King County Sexual Assault Resource Center in Washington used information from its court-watch program to identify judges who were not following the law or who favored parties who were represented by counsel.⁴⁰¹ Using a procedure authorized by statute, lay advocates utilized this information to determine when to request that counsel be appointed for clients who appeared in front of those judges.⁴⁰² The Center also distributed its findings to all King County Superior Court Judges, and subsequent observations found some improvement in judicial practices.⁴⁰³ System-monitoring programs like court watch operate simultaneously at the level of data collection, program assessment, and system reform.

The reimagined access to justice program must create or support ongoing mechanisms to evaluate and resolve system conflicts. These include structures and channels for ongoing communication, feedback, and critique among system

398. Examples of such methods come from innovative work with domestic violence survivors. *See, e.g.,* Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 *YALE L. & POL'Y REV.* 93, 117 n.155, 121 n.176 (2005) (citing studies).

399. *See* Laura Jones, *Court Monitoring as Advocacy*, 16 *CONNECTIONS* 7, 7–11 (2012), available at http://www.wcsap.org/sites/wcsap.huang.radicaldesigns.org/files/uploads/resources_and_pubs/connections_2012_10/Connections_2012_10.pdf.

400. *See id.* at 8–9 (describing internal and external use of data obtained by a court watching program); THE EMPIRICAL RESEARCH GRP., *supra* note 144, at 16 (noting that court watch programs can be used as a tool for interpreting judicial responses and devise more effective responses).

401. Jones, *supra* note 399, at 8.

402. *Id.* at 8–9.

403. *Id.*

participants and stakeholders.⁴⁰⁴ This can occur through formal structures, such as community boards, councils, and task forces, and less formal processes, such as day-to-day advocacy on behalf of individuals or groups within legal and social service institutions. Elizabeth Ben-Ishai argues that, with mechanisms for this type of communication in place, the system “is endowed with a mode of imminent self-critique” that helps build or maintain accountability among the system’s constituent parts and acts as a “check” on otherwise oppressive state functions.⁴⁰⁵ That may be an overly optimistic view, and other modes of ensuring accountability are undoubtedly necessary—especially with regard to recalcitrant system participants. Increased accountability of the program and the larger system are intertwined, and requires a multidimensional and interactive approach.

CONCLUSION

This article makes a case for a more radical and comprehensive approach to access to justice that focuses on promoting social justice and systemic change. This approach requires a significant shift in focus, a reimagining of what is needed to address the needs of low-income litigants in poor people’s courts. The recommendations above respond to growing concern about the impacts of poor people’s courts on vulnerable populations—including concern among many judges and other court personnel and system participants.⁴⁰⁶ These recommendations also respond to concerns among progressive lawyers, scholars, and activists about increasingly punitive policies toward the poor—policies that cannot be addressed by focusing on access to legal systems alone.⁴⁰⁷ The problems in poor people’s courts require an approach to access to justice that takes coercive state power squarely into account.

This counter-hegemonic project has far reaching implications. In some instances, implementing the new approach will require reform of policies related to the delivery of legal and other support services. A social justice advocacy approach includes, but does not necessarily require, direct legal representation of client–litigants. It does require that the project of providing access to justice be approached from the point of view of an advocate for low-income people in poor people’s courts. Social justice advocacy models show the value of providing individualized assistance and the value of assistance provided by non-attorney advocates. While access to justice programs would ideally provide for collabora-

404. See Ben-Ishai, *supra* note 315, at 312–13 (discussing how such mechanisms can help create a “check on potentially paternalistic and confining modes of service delivery” in state systems).

405. *Id.* at 313.

406. For example, the National Association of Juvenile and Family Court Judges’ project, Courts Catalyzing Change, is engaging local courts in a concerted effort to stem the tide of disproportionate removal of children from poor families of color in abuse and neglect cases in family court. See *Courts Catalyzing Change*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, <http://www.ncjfcj.org/our-work/courts-catalyzing-change> (last visited Mar. 6, 2015).

407. See *supra* notes 43–44 and accompanying text.

tion among an interdisciplinary team, including attorneys who provide essential strategic expertise, this will not always be possible. Rules prohibiting the unauthorized practice of law may need to be reassessed in order to allow non-attorney advocates to provide valuable advocacy services, including legal advice.⁴⁰⁸ Policies regarding privilege for communications between client–litigants and non-attorney advocates may need to be reexamined. The reimagined access to justice model also requires thinking deeply about conflicts of interest and other ethical issues raised by new advocacy relationships and ways of configuring services.⁴⁰⁹

In addition, a new approach has to create new narratives about the purpose of access to justice work in poor people’s courts—narratives that do not rely on false notions of self-reliance but that incorporate concepts of support and empowerment drawn from the rich traditions of social justice advocacy found in progressive lawyering, social work, and lay advocacy. Constructing these narratives may also indicate the value of renaming services for unrepresented litigants. For example, under the new model, self-help services might be more aptly named “pro se support” or “pro se advocacy.” New narratives will also be necessary for client–litigants that do not fit the models of the “worthy poor” or “perfect victim” on which policy initiatives and fundraising efforts so often rely. These narratives will replace historical notions freighted with the baggage of intersectional subordination and will articulate new notions of human value and vulnerability in historical and social context.

Ultimately, this also suggests the need to reimagine legal education: to produce lawyers who better understand poverty, and the interconnected nature of legal problems affecting low-income people; to remove silos between doctrinal and practice areas; and to foster empathy and cultural competency in the legal profession.⁴¹⁰ Beyond that, it requires imagining and creating deep social change. Working for justice means working to dismantle systems of subordination and developing alternative structures for social empowerment. Access to justice programs can embody these goals and serve to reveal the social construction of power and empower low-income people to resist subordination.

It is possible to implement this vision. Models for policy reforms are already in place in some jurisdictions, for example, in states allowing lay advocates to assist clients in court⁴¹¹ and protecting their communications as

408. See *supra* note 17 and accompanying text.

409. See, e.g., Galowitz, *supra* note 210, at 2135–44 (discussing ethical issues in multidisciplinary settings); Hurder, *supra* note 17 (discussing rationales for limiting provisions of legal services by non-lawyers); Steinberg, *supra* note 210 (describing arguments against permitting limited scope representation).

410. Progressive lawyers, teachers, and scholars have long called for such reforms. See generally Wexler, *supra* note 2 (arguing that law schools do not prepare lawyers to represent poor people).

411. See, e.g., Weisz, *supra* note 211 (describing provisions for lay legal advocacy for sexual assault survivors in Washington).

confidential.⁴¹² There are already legal services programs in place that have successfully implemented elements of the framework laid out above, such as more holistic and interdisciplinary representation,⁴¹³ demonstrating that a new approach is possible. Implementing even small changes consistent with the vision of social justice advocacy for low-income litigants presented here could make a significant improvement in services, while not requiring a change in the structure of existing programs. For example, intake forms might be revised to spot safety issues or other legal needs and better guide assistance and referrals. Staff could be trained about implicit bias and how stereotypes might affect their responses to litigants. Pamphlets or other materials could be created to inform litigants about risks posed by intersecting systems and the need for future steps to avoid adverse consequences. More extensive changes could also be implemented over time. The first step is to engage in a process of reimagining what access to justice might look like if undertaken from a social justice advocacy perspective, with the objective of revealing and transforming the construction of power in the poor people's courts.

412. See A.B.A. COMM'N ON DOMESTIC VIOLENCE, SUMMARY OF DV/SA ADVOCATE CONFIDENTIALITY LAWS (2007), available at <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/AdvocateConfidentialityChart.authcheckdam.pdf> (summarizing state laws regarding confidentiality of communications between domestic violence and sexual assault advocates and their clients).

413. See, e.g., Steinberg, *supra* note 210 (describing the holistic and interdisciplinary approach taken by the Bronx Defenders).