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Number of Lines: 1396
Job Number: 1841:12516249
Client ID/Project Name:
Research Information:
US Law Reviews and Journals, Combined
AUTHOR (Melanie w/3 Abbott)
ARTICLE: SEEKING SHELTER UNDER A DECONSTRUCTED ROOF: HOMELESSNESS AND CRITICAL LAWYERING

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SUMMARY:
... While the tenets of Critical Legal Studies ("CLS") are appealing because they acknowledge many of the inherent biases of the legal system and deconstruct the myths of law, the refusal of many CLS advocates to settle for anything less than the complete restructuring of society can leave those trying to help the disenfranchised with a profound sense of dissatisfaction. ... Both through its use of symbols and rituals and through its reliance on legal reasoning, theorists contend, the legal system "reifies" the social structure. ... Feminist legal theory is like CLS in that it seeks to expose the value judgments in this case what it identifies as the male bias inherent in the legal system. ... In that way, critical lawyering theorists contend, the interaction will enhance the CLS-based principles of understanding, and presumably challenging, the inherent inequities in the legal system. ... In addition, Wexler posits that attempts by the legal system to promote therapeutic objectives may cause the opposite results in some situations. ... Some CLS theorists, mindful of such criticisms, have offered more or less concrete suggestions for applying their theories to change the legal system. ... A homeless person may require an advocate's assistance at the preliminary stage of identifying the nature of his or her difficulties and recognizing that the legal system may be of help in solving those problems. ... litigation as a means of achieving social change does not preclude using litigation to stimulate a critique of the legal system. ...

TEXT:

The setting is the day room of a homeless shelter. Threadbare furniture is scattered haphazardly, with inexpensive framed prints hung on the walls in an attempt to brighten the otherwise dismal surroundings. Smells of human origin blend with the chemical smells of disinfectant and cleaning solutions. Scratchy music emanates from an unattended radio, barely audible over the rumble of voices.

A young lawyer enters the room, dressed casually so as not to intimidate the residents. She is energetic and eager, but more than a little frightened by the aura of desperation that permeates the room. Perhaps she is a recent graduate of a public interest clinic in her law school. She has seen the problems of society's poorest members and wants to use her skills to assist those who are most in need. Perhaps she is there as a representative of a bar association's program to encourage...
lawyers to volunteer their services to the communities in which they work.

She approaches the harried shelter supervisor and introduces herself. With the supervisor's bemused blessing, she begins to make the rounds of the room's occupants. She tells the first man she meets that she is a lawyer and asks if she can assist him. He looks blankly in her direction but seems unable to interrupt the conversation he is having with the voices inside his mind. He waves her away, shouting an unintelligible response to a comment only he can hear.

In the next chair sits a young woman with an infant on her lap and two toddlers restively playing around her feet. The young woman asks the lawyer if she is from the State. When the lawyer says she is not from the State, the woman asks whether she has any apartments to give her. Again the lawyer says no, offering to help the woman with applications for state aid. The woman turns away, saying that unless the lawyer has apartments or money to give away, she's not interested in talking with her.

The young lawyer gamely continues her efforts, working her way around the room. Some of the shelter occupants appear to be under the influence of alcohol or drugs. Even when others express an interest in talking with her, they drift away when she begins to explain the state mechanisms available to help them get food, medical care, or more permanent shelter. They seem overwhelmed by the bureaucracy she describes, by their own burdens, by the confusion of the room. When the young lawyer finally gives up for the day, she leaves with a sense of frustration at her inability to reach these obviously needy people. She also experiences a private, albeit guilty, sense of relief that she can return to her usual practice, where the clients have problems she, and they, understand; problems she can help them solve.

I. Introduction

The desire to make a lasting contribution by promoting change in society provides profound motivation for activists in all fields. People offer their unique skills in the service of causes to which they are committed, and they turn to leaders in their fields for the inspiration to continue when times are darkest. So it has been with lawyers. Thurgood Marshall looked to his mentor, Charles Hamilton Houston, for encouragement. What Houston gave him was "a fire . . . a rage to go out into the legal profession immediately and reverse the myriad injustices of Maryland and America." What drove Houston, and then Marshall, was the desire to use their gifts to improve society. Houston and Marshall took to heart the themes of Legal Realism, which stressed the connection between law and society, and emphasized that the importance of the law lay in its impact on individuals. The result for Houston and Marshall was a long history of profoundly meaningful contributions to American society.

Just as Marshall drew inspiration from Houston for his efforts to eradicate racism from our culture, activist lawyers today must look to progressive leaders for encouragement in their struggles to eliminate homelessness and poverty. The hypothetical young lawyer of the Prologue will look to her professors, her senior colleagues, and to books written by others who have tried to use their skills to confront social problems. She will look to any and all sources in an effort to find a way to help those she met in the shelter's day room.

In seeking inspiration from today's mentors, however, young lawyers who identify with progressive causes and who want to work toward a more just society receive mixed signals. While the tenets of Critical Legal Studies ("CLS")
are appealing because they acknowledge many of the inherent biases of the legal system and deconstruct the myths of law, the refusal of many CLS advocates to settle for anything less than the complete restructuring of society n8 can leave those trying to help the disenfranchised with a profound sense of dissatisfaction. The ideas of the post-CLS

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theorists, including therapeutic jurisprudence, critical feminist theory, critical race theory and critical lawyering, while more precisely focused, also fail, in varying degrees, to provide the sort of motivation needed by lawyers who are working to end homelessness.

This article argues that there exists in current progressive scholarship a philosophical basis for the work of activist lawyers seeking to eradicate homelessness. To that end, this article first summarizes the current knowledge about the causes and the extent of homelessness. Next, it traces the origins of four pivotal schools of thought: Legal Realism, Critical Legal Studies, the post-CLS critical lawyering movement, and Therapeutic Jurisprudence, with particular attention to the relationship between jurisprudence and social action. After addressing the challenges presented by the current political climate to progressive action on behalf of society's disenfranchised, the article offers suggestions for ways in which to implement the theoretical bases of the current progressive scholarship in constructive efforts to address the critical problem of homelessness.

II. Homelessness: The Current Problem n9

A survey published in 1994 estimated that 8.5 million Americans were homeless at some time during the period from 1985 to 1990. n10 The same study estimated that 7.4% of all adult Americans (13.5 million people) had experienced what the study called "literal homelessness," which was defined as "street and shelter" homelessness. n11 Both of these figures are significantly higher than previous estimates, which ranged from 250,000 to 3 million, depending on the method used to determine the numbers. n12

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Unlike many previous studies, which generally focused on the large cities as the primary locus of homelessness, the 1994 study surveyed households throughout the United States. n13 As a result, the study determined that, contrary to previous estimates, homelessness is as much a problem for rural Americans as for urban dwellers, for women as for men, and for whites as for African-Americans. n14

The scope and intractability of the problem of homelessness reflect some significant inequities in American society. For example, the income of the lowest economic segment of the population declined 13% during the 1980s, while that of the highest economic segment increased by 8% during the same period. n15 Those who are homeless suffer from serious health problems resulting from hunger, n16 poverty n17 and lack of adequate medical care. n18

In its 1994 report, the Interagency Council on the Homeless n19 ("ICH") defined two classes of problems leading to homelessness: 1) "crisis poverty," traceable "to the stubborn demands of ongoing poverty," and 2) "chronic disability," which is "homelessness accompanied by one or more chronic, disabling conditions." n20 The ICH enumerates the causes
of homelessness as poverty, \(^\text{n}21\) changes in the labor market from a production-based market to a service-based market, \(^\text{n}22\) a decline in the real value of subsistence payments made by state and federal governments, \(^\text{n}23\) lack of affordable housing, \(^\text{n}24\) an increase in single-parent families, \(^\text{n}25\) and the presence of drug use, disabilities and chronic health problems. \(^\text{n}26\) Other sources stress that domestic violence, particularly spousal abuse, is another significant cause of homelessness. \(^\text{n}27\)

The depth and complexity of these causes suggests reasons for our continued failure to solve the problem. The federal government's efforts to address homelessness have been in force only since the passage of the Stewart B. McKinney Homeless Assistance Act \(^\text{n}28\) in 1987. Passage of the McKinney Act notwithstanding, the Clinton administration is the first to make a clear statement of commitment to addressing the problem in all its complexity. \(^\text{n}29\) Unfortunately, the ICH recommends that, to support that commitment, Congress double the homeless budget of the Department of Housing and Urban Development from $823 million to $1.7 billion, with "an increase in overall homeless assistance funding to $2.1 billion." \(^\text{n}30\) Because the new focus of the legislative branch is to decrease the size of government by eliminating or cutting entitlement programs, it seems unlikely that the ICH's recommendation will be carried out.

The 1994 report demonstrates that the federal government has now accepted the fact that only a multi-faceted approach can succeed. \(^\text{n}31\) Unfortunately, the trend in Washington is clearly toward reducing the size of federal programs, even where there is nothing to fill the gap. \(^\text{n}32\) In the absence of federal guidance, a broadening of the role that law, and lawyers, can play in confronting this complex problem becomes even more important.

III. The Role of Law in Society

As the legal system has developed in the United States, lawyers and scholars have generated a number of theories to explain the role that the law plays in society. The theories discussed below just four of many, but each among the most important of its era \(^\text{n}33\) are of great significance in understanding the dilemma currently facing the progressive lawyer/activist seeking to fight homelessness. The Realist school played a pivotal role in encouraging progressive lawyers and activists to develop the legal and governmental systems that significantly changed society. The primary platform for progressive scholars attempting in the 1970s and 1980s to remedy the failings of the legal system was the work incorporated under the heading of Critical Legal Studies ("CLS"). The developments in post-CLS critical theories critical feminism, critical race theory and critical lawyering continue to refine our understanding of the role of law in creating and perpetuating social institutions. And Therapeutic Jurisprudence focuses the attention of legal policymakers on the particular relationship between legal institutions and therapeutic goals.

A. Legal Realism
The philosophical school known as Legal Realism arose in the early part of the twentieth century as a reaction against the Legal Formalism school represented by Christopher Columbus Langdell, Dean of Harvard Law School and popularizer of the case law method of study still in use in most law schools. Legal Formalism was based on the concept that a series of concrete principles of law exist and, once discovered and understood, can be applied to any legal dispute to yield the correct solution. In deciding cases, courts would not, and should not, take into consideration external factors such as the nature of the society in which the event had occurred, the political and social judgments represented by lawmakers' decisions, or anything other than the essential elements of the legal question and its logical conclusion. Students studying law would read appellate opinions, learn the essential "rules" on which each opinion was based, and study additional cases in which each rule was applied. The goal was to achieve scientific precision in legal thought.

Legal Realists challenged the assumptions underlying Legal Formalism. The work of Legal Realists began, according to many commentators, with Oliver Wendell Holmes. Holmes questioned the wisdom of complete reliance on abstract rules of law, arguing instead that sound legal reasoning required awareness of history and society as well as of the "axioms" of legal thought. In 1881, Holmes wrote in The Common Law:

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

The initial spokesmen for the Legal Realism school were Karl Llewellyn and Jerome Frank, although the works of Roscoe Pound also were important in the development of the doctrine. Llewellyn wrote a number of articles in which he described his view of Legal Realism, at times challenging analyses previously published by Pound. In 1930, Llewellyn explained his disagreements with the work of earlier scholars, focusing initially on the ambiguity of the concept of "rules" or "precepts" of law. Llewellyn described the confusion inherent in a discussion of a "rule" of "law":

In the particular case of rules "of law" a further ambiguity affects the word "rule": whether descriptive or prescriptive, there is little effort to make out whose action and what action is prescribed or described. The statement "this is the rule" typically means: "I find this formula of words in authoritative books." Does this connote: "Courts are actually proceeding according to this formula"; or "Courts always rehearse this formula in this connection?" Does it connote: "People are conducting themselves in the light of this formula"; or even "People are conducting themselves as this formula suggests..."
they ought to.” n46

Llewellyn went on to state that his goal was to refocus legal analysis, emphasizing not "substantive rights and rules" but "the area of contact between judicial (or official) behavior and the behavior of laymen.” n47 In his view, law was important only in the context of its relationship to the behavioral interactions between individuals and governmental officials. n48 This view is in obvious contrast to the Formalist school, which characterized law as a series of abstract principles, with a life apart from the situations in which they were applied. Although Llewellyn was careful to stress that he was "not arguing that 'rules of substantive law' are without importance,” n49 he insisted that those rules should not be the point around which all discussion of law is centered. n50

Jerome Frank, a scholar and federal judge, focused his attention on the interaction between psychology and judicial decision-making. n51 Frank was convinced that a judge's personal biases and intuitive predilections were the most important factor in the judge's decision-making process. n52 According

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to Frank, judicial opinions were merely "rationalizations” for the decisions arrived at through intuition, so that judicial pronouncements served more to disguise the actual thought processes of judges than to explicate them. n53

The primary elements of Realism included three concepts. First, Realists attempted to separate ideals and ethics from their study of the legal process. n54 Second, Realists contended that lawmaking in America occurred in the interaction between officials and individuals, rather than in the divination of the abstract legal theories that Formalists considered the essence of law. n55 Llewellyn styled this element as a focus on the effects of laws and an effort to ascertain those effects. n56 Third, Realists rejected the use of "formalistic, deductive logic” in court opinions, believing that such structures allowed judges to conceal the subjective bases of their decisions behind an artificial veil of reasoning. n57 They contended that a set of purportedly abstract, neutral principles of law could, when applied to a given set of facts, produce a number of different, but equally likely, conclusions. n58

While some of the Realists, particularly Jerome Frank, sought to apply scientific techniques to legal analysis, they did not do so in search of a body of legal truisms that would represent the full scope of legal thought. n59 Instead, they believed that an empirically-based analytical process would result in a more realistic understanding of the ways in which decisions

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actually were made. n60 The Realists reacted to what they viewed as the impossibility of a predictable judicial result by supporting the growth of the administrative system, which they viewed as more capable than the judiciary of gathering and applying empirical data. n61

Critics of the Realists expressed concerns about several elements of their analysis. Some scholars criticized as unfounded Frank's belief in the "scientific” validity of the psychological concepts on which he based his thinking. n62 Other critics focused on the cynicism of the Realist view. n63 One team of scholars charged that the Realists’ approach was "essentially negative and iconoclastic: it lacked any unifying thread or positive political program.” n64 The "insider” status of many of the Realists in the New Deal led those critics to describe the Realist phase as "in fact nothing more than a palace revolution.” n65
Nevertheless, the Realists made significant contributions to the development of legal thought. The jurisprudential legacy left by the Realists included the idea that law has no abstract and absolute existence, but rather it exists in a constant state of development and change. \(n^{66}\) The Realists also emphasized the necessity of policy analysis as the essence of legal problem-solving. \(n^{67}\) Finally, the Realists’ focus on the connection between law and society required that those interpreting governmental and legal decisions be aware of the individuals both judges and governmental actors who made those decisions. \(n^{68}\) The absence of certainty in the law created the potential

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for bias in decision-making by those charged with dispensing such decisions. \(n^{69}\)

B. Critical Legal Studies

The Critical Legal Studies ("CLS") movement \(n^{70}\) originated, in part, in the Legal Realism school of thought. \(n^{71}\) CLS began as a reaction against what its originators viewed as the overly scientific direction of legal philosophy. \(n^{72}\) Focusing on the "indeterminacy" of legal reasoning, \(n^{73}\) CLS scholars have challenged both the Realists' emphases and their solutions. \(n^{74}\) However, many threads connect the Realists and the CLS theorists.

Like Realists, CLS advocates believe that the Formalist view of law as static and unchanging is incorrect; rather, they believe that law is in a constant state of development and transition. \(n^{75}\) CLS proponents allow that the process characterized as legal reasoning can in any one case support a

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number of mutually exclusive conclusions. \(n^{76}\) They also agree with Legal Realists that legal analysis should be based on a clear-headed appraisal of the political and social dimensions of a problem rather than on a formalistic application of abstract legal principles. \(n^{77}\)

CLS advocates, however, differ from Realists in their critical attitude toward those political and social dimensions. \(n^{78}\) They contend that legal reasoning as a substantive tool does not exist apart from its political components: "Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society." \(n^{79}\) CLS theorists argue that the indeterminacy of the legal system makes it hopelessly flawed and that traditional efforts to incorporate the Realists' criticisms into the legal system are destined to fail. \(n^{80}\)

Among the most important precepts of the CLS view is the contention that inherent in what Realists present as the neutral components of the social order are biases which perpetuate the inequities of society. \(n^{81}\) One CLS scholar explains: "CLS insists that the social values, on which there may well be agreement, are not valuable in some abstract and timeless sense. They are values because our society is structured to produce in its members just that set of values.” \(n^{82}\) As a fundamental part of the social order, the law provides a context for these values. Professor Phyllis Goldfarb describes

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this line of thought as "a theory of law as legitimation." \(n^{83}\) Thus, CLS scholars argue, even the victories achieved
by public interest lawyers, gaining "rights" for the disadvantaged, are not really victories because all that they have won is the reinforcement of the system itself. n84 CLS theories are based on an understanding of law as necessary to the maintenance of the social order. n85 Both through its use of symbols and rituals and through its reliance on legal reasoning, theorists contend, the legal system "reifies" the social structure. n86

Critics of the CLS theorists assert that their focus on "deconstruct[ion]," "delegitim[ation]" and "trash[ing]

nature of CLS scholarship leads some critics to argue that a more useful approach would be to imagine "new ways of looking at the world." n89 acknowledging the flaws identified in the current legal and political structure but not abandoning the effort to create communities in which those flaws are less determinative. n90 The failure of CLS theorists to present constructive alternatives and to offer standards against which to judge their arguments prompts other criticisms. n91

C. Post-CLS Critical Theory: Critical Lawyering

Perhaps in response to those criticisms, or perhaps simply as a result of the application of CLS-style analysis to other areas, since the mid-1980s, progressive scholars have developed themes similar to, and extending beyond, those found in CLS scholarship. Some scholars trace feminist legal theory and critical race theory, for example, in part to the "on-going internal critique" within CLS. n92 In each case, critical feminist and critical race theorists have challenged the ability of the so-called "mainstream" CLS advocates to represent accurately the perspective of feminists or persons of color within the CLS ranks. n93

However, both of those movements, along with the critical lawyering movement, are broader than just the elements of each movement contained within the bounds of CLS. Feminist legal theory, for example, covers a wide spectrum of political thought from radical to conservative and also embraces the work of theoreticians who have no political agenda. n94 Most commentators, however, construe the feminist theory agenda to include some degree of focus on consciousness-raising, the effect of which is to validate and confirm the experiences that are unique to women. n95 Feminist legal theory is like CLS in that it seeks to expose the value judgments in this case what it identifies as the male bias inherent in the legal system. n96 However, feminist theory goes beyond CLS in that it also seeks to expose the internal inconsistencies inherent in the experience of women in society. n97 Feminist theory also describes a "feminist view of law . . . focus[ing] on the value of love, intimacy and relational commitment." n98 While CLS theorists stress the indeterminacy of legal doctrine and the importance of politics in law, feminist scholars go further, emphasizing that all politics includes a sexual component, and that women's perspective on legal issues is distinct from men's. n99

Critical race theory shares with critical feminist theory the CLS awareness of the biases inherent in the legal structure and recognition of the existence of viewpoints among its constituency that are not reflected in mainstream legal thought. n100 It exceeds the bounds of CLS in its emphasis on the particular voices of persons of color and its consideration of the effects of specific modifications of elements of the legal system as a means of enhancing the participation of members of
those racial groups who are marginalized in society. \textsuperscript{[287]} Further, critical race theory exposes coercion as the means by which persons of color are forced to "accept" the legal structure, rather than accepting the CLS view that participants in society are convinced of the fairness of the prevailing structure. \textsuperscript{[288]} Moreover, some critical race theorists challenge the CLS criticism of the rights-based doctrine, arguing that "'trashing' rights consciousness may have the unintended consequence of disempowering the racially oppressed while leaving white supremacy basically untouched." \textsuperscript{[289]}

Critical lawyering, \textsuperscript{[290]} while not generally considered a jurisprudential movement, represents an effort to apply the principles of CLS to the practice of public interest law. \textsuperscript{[291]} Critical lawyering advocates contend that the traditional practice of law for the disadvantaged rests on a number of bases which are no longer reliable. For example, traditional public interest law requires "faith in available policy solutions . . . , reliance on procedural strategies to attain benefits for those traditionally underrepresented, and [confidence in] the effectiveness of advocacy in traditional arenas." \textsuperscript{[292]} Further, some critical lawyering advocates are troubled by the concept of the lawyer as "professional," although they admit that no single conception of that role exists. \textsuperscript{[293]}

Critical lawyering advocates stress the implementation strategies intended to empower clients, both individually and collectively, to recognize the political conflicts inherent in legal problems and to consider non-litigative ways to address those conflicts. \textsuperscript{[294]} Rather than presenting themselves as "experts" who know how to solve problems, critical lawyers should engage clients in a collaborative process intended to achieve broader goals than a court victory. \textsuperscript{[295]}

D. Therapeutic Jurisprudence

Therapeutic Jurisprudence is the term coined by David Wexler to describe the study of the relationship between law and the therapeutic or antitherapeutic consequences resulting from the involvement of individuals with the legal system. \textsuperscript{[296]} Professor Wexler describes his effort as "the study of the use of the law to achieve therapeutic objectives." \textsuperscript{[297]}

Scholars adding to Wexler's work have considered the relationship between law and therapeutic needs in a variety of contexts. For example, Wexler and other commentators believe that in some instances the legal system "causes or contributes to psychological dysfunction" \textsuperscript{[298]} by discouraging persons in need of treatment for psychological ills from seeking that treatment, by encouraging unnecessary treatment, and by labeling people as dysfunctional and thereby, encouraging them to believe that their inappropriate behavior is excused by their mental problems. \textsuperscript{[299]}

In addition, Wexler posits that attempts by the legal system to promote therapeutic objectives may cause the opposite results in some situations. \textsuperscript{[300]} He urges scholars to study the effects of different types of legal approaches on the intended therapeutic objectives. \textsuperscript{[301]} Further, he suggests that the particular legal structures used to reach decisions concerning commitment to inpatient treatment programs, such as hearings and grievance procedures, may have both
therapeutic and antitherapeutic effects. n117 Although the "trauma" resulting from the airing of embarrassing information about the patient may be harmful to that patient, in some cases the hearing itself may serve as "reality therapy" to alert the patient to the bounds within which his

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behavior must fall in order to be acceptable to society. n118 Finally, Wexler considers the therapeutic effects of different styles of behavior by lawyers and judges. n119 He contends that lawyers who are not trained to be "clinically-sensitive" may act in such a way as to reinforce antitherapeutic behavior in patients by uncritically accepting patients' allegations of grievances and thereby subverting the therapeutic process. n120

While Wexler's books, n121 along with works by others about therapeutic jurisprudence, have become well-known in a short period of time, their ultimate impact remains to be seen. They continue the Realist-inspired efforts to emphasize the relationship between law and social problems, particularly through their attempts to seek empirical data to support their theses. n122 However, the fact that the impact has so far been limited to the academic realm suggests that the effect of therapeutic jurisprudence has yet to be felt by practitioners. n123

IV. Jurisprudential Theories Applied to Social Action

The social consciousness of twentieth century lawyers who used their skills to advocate progressive developments finds its origins in the Legal Realism school of jurisprudence. n124 By acknowledging the relationship

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between law and society, and by emphasizing that law affects behavior, the Realists offered support for lawyers who used law as a tool to change society. n125 The progressive political bent of leading Realists, such as Karl Llewellyn, n126 provided a model for lawyers with liberal leanings to consider law as a means of achieving social change.

Jerome Frank, a leading Realist theoretician, n127 held a number of different public service positions in agencies created during the New Deal. He drafted farm legislation as general counsel for the Agricultural Adjustment Administration ("AAA"). n128 Always committed to speak his mind, Frank was "purged" from the AAA when he wrote a legal opinion asserting that sharecroppers working in cotton production deserved legal protection. n129 He next became special counsel at the Reconstruction Finance Corporation and then moved to the Public Works Administration, which allowed him to return to the courtroom to litigate cases involving the public power program. n130 Roosevelt later appointed Frank as a Commissioner of the Securities and Exchange Commission ("SEC"), where he worked with SEC Chairman William O. Douglas to reorganize the Stock Exchange and public utility holding companies. n131 After Douglas' appointment to the United States Supreme Court, Frank took over as Chairman of the SEC, where he served until his appointment to the United States Court of Appeals for the Second Circuit in 1941. n132 In all of these positions, Frank was able to put into practice the tenets of Legal Realism. He wrote at length about the importance of administrative agencies, n133 a position that was entirely consistent with the views of the Realists, especially as it allowed for the appointment of "experts" to make decisions that
required some special knowledge. Because he was concerned about the inherent biases of judges, Frank viewed the role to be played by those with special training as pivotal. Frank was able to put his views on judicial decision-making into action during his 16-year tenure on the Second Circuit Court of Appeals, the culmination of his career. n134

Just as it did for Frank, Franklin D. Roosevelt's New Deal provided substantial opportunities for many other bright young lawyers to enter public service. n135 Felix Frankfurter, who saw public service as the worthiest of aspirations for young lawyers, used his close relationship with the President and his contacts with Harvard Law School graduates to direct many of the best to positions of responsibility in the Roosevelt administration. n136

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Because of both the dearth of employment possibilities in law firms during the Depression and the appeal of the energetic new President, public service became a respected destination for successful law students in the early 1930s. n137 According to Jerold Auerbach, twelve percent of law review editors from the classes of 1933-35 at the elite law schools entered government service, a three-fold increase over the same group in the classes of 1930-32. n138 Auerbach emphasizes the appeal of work in activist New Deal agencies to those trained as Realists. n139

In addition to the governmental activism of the Realist scholars and their protégés, the Realist emphasis on the connection between law and policy n140 provided support for lawyers' efforts to change American society. The work of Charles Hamilton Houston, Thurgood Marshall, Spottswood Robinson III, and other leaders of the National Association for the Advancement of Colored People ("NAACP") provides a vivid example of the concern that Realist-trained lawyers had for social issues. n141

In 1951, the NAACP challenged the "separate but equal" doctrine of Plessy v. Ferguson n142 as it applied to public education in South Carolina. n143 Among the factors stressed by Marshall, then special counsel to the NAACP, and his colleagues was the presentation of psychological evidence of the way in which African-American children felt stigmatized by the inequities of the educational system. n144 Although the NAACP lost that case, n145 both the scientific nature of the evidence offered and, more importantly, the use of the legal system to remedy social injustice, were logical outgrowths of the ideas endorsed by the Realist school.

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For Thurgood Marshall, concern for the educational opportunities available to African-Americans resulted from both a personal rejection and the fortuitous result of that rejection. n146 In 1930, Marshall attempted to enroll in law school at the University of Maryland at Baltimore, the only law school in Maryland. n147 His application prompted a letter from the president of the college telling Marshall "in effect, to drop dead." n148 Marshall then enrolled at Howard University Law School, n149 where he became a protégé of Charles Hamilton Houston, the dean of the school, who later became chief counsel of the NAACP. n150 Houston was one of the originators of the litigation strategy the NAACP used successfully to challenge unequal education in American schools. n151 Houston's example and his teaching proved invaluable to Marshall. n152 Marshall's career accomplishments are well-known; n153 his was a life exemplifying achievement of the principles of the Realist thinkers.

The CLS scholars, however, reject the legal and governmental structure developed by the Realists just as they reject many of its underlying
principles. n154 If the CLS theorists are correct, the premises on which Legal Realism is based are unacceptably flawed and action based on those premises will not solve the problems of the society in which we find ourselves. The premises of many CLS writings, if followed to their logical conclusion, would require complete rejection not only of the current social order, but of any substitutes created in an attempt to square the injustices in our society. n155

Some CLS theorists, n156 mindful of such criticisms, n157 have offered more or less concrete suggestions for applying their theories to change the legal system. n158 Their ideas focus on returning control to individuals. n159 Professors Allan C. Hutchinson and Patrick J. Monahan characterize the suggestions offered by Gerald Frug and Karl Klare as part of a movement toward "decentralizing, deformalizing and demassifying." n160 Roberto Unger proposes a complete "reconstruction of the state and the rest of the large-scale institutional structure of society." n161

However, the "delegitimation" activity of the CLS theorists is fundamentally flawed. Having created and applied the techniques for "deconstructing" the legal system, they must recognize that any alternative they propose will necessarily be subject to the same sort of critical analysis. n162 Hutchinson and Monahan describe this as "the replacement of one form of consciousness with another; 'liberal consciousness' would simply be exchanged for 'Critical consciousness.'" n163 The only type of action that will not collapse under such analysis, according to these authors, is action undertaken by individuals: "[t]he transformation of society must be effected by spontaneous individual action." n164 However, as they correctly note, this fact makes critical theory by definition "impotent" as a tool for creating political action. n165

Hutchinson and Monahan offer their solution to the inherent dilemma of CLS theorists in the form of an application of psychological personality theory to what CLS advocates describe as the contradictory values of individuality and community. n166 They adopt a theory of personality development which suggests that if one finds a successful, intimate "object-relationship" early in life, one is able to "remain autonomous in relation to others." n167 Those who have succeeded in achieving this state of true intimacy will not experience the conflict between autonomy and group identity that CLS scholars accept as a necessary state. n168 Thus, Hutchinson and Monahan argue that a person could maintain her own sense of autonomy despite being subject to some sort of acceptable social control. n169 They conclude: "[I]t is on the development of a convincing theory of human personality that the fate of the CLS movement and, on their own terms, the fate of humanity, hangs." n170

On a more practical level, Professor Peter Gabel and attorney Paul Harris, former president of the National Lawyers Guild, offer both an excellent early attempt to incorporate CLS theories into progressive law practice and an example of the strengths of the post-CLS critical lawyering proponents. n171 Their goal is to help progressive lawyers redefine their work, changing from "rights-based" efforts n172 to those aimed at "expanding political consciousness through using the
legal system to increase people's sense of personal and political power.” n173 To that end, they suggest that progressive practitioners use their cases to “build[] an authentic or unalienated political consciousness.” n174

Gabel and Harris posit three principal goals, applicable to all types of cases, for progressive lawyers:

First, the lawyer should seek to develop a relationship of genuine equality and mutual respect with her client. Second, the lawyer should conduct herself in a way that demystifies the symbolic authority of the State . . . . Third, the lawyer should always attempt to reshape the way legal conflicts are represented in the law, revealing the limiting character of legal ideology and bringing out the true socioeconomic and political foundations of legal disputes. n175

In high profile cases, they argue, lawyers should keep in mind the underlying political issue and prevent the legal system from diverting attention from that focus. n176 Even in low profile cases, they recommend that progressive

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lawyers avoid seeking the easy solution, such as a plea bargain, and urge them to ensure that the underlying political views of their clients are presented. n177 They also advise advocates to seek out the political connections among superficially nonpolitical cases, focusing on increasing awareness of the ways in which the legal system is used to break down and divide those who lack the power to manipulate it. n178

The strategies proposed by Gabel and Harris are intended to encourage progressive lawyers to resist the temptation to rely on the time-tested rights-based strategies in an effort to delegitimize the legal system. n179 For many clients of public interest lawyers, these strategies are appropriate. However, for the homeless, the assumptions on which Gabel and Harris base their arguments are less likely to survive. The key differences between the homeless and other public interest client populations n180 may require advocates to reconsider their suggestions. Their practical ideas seem to be aimed as much at forestalling practitioner burnout as they are at advancing a progressive agenda. n181 Moreover, recent political and social changes require a reexamination of their ideas and those of other progressive scholars.

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The current political attempts to demolish the rights-based system achieved by the work of many social activists over the past forty years pose a tremendous threat to the work still to be done by progressive lawyers. n182 For advocates for the homeless who have so far failed to achieve even the most basic level of participation in society the diatribes from the right spell disaster. For advocates for other disadvantaged populations, even those who have followed the important suggestions made by Gabel and Harris, the present broadside that is aimed at rights for the disadvantaged may move them to abandon their efforts. The desire to reweave the fabric of American society by implementing an egalitarian political consciousness n183 may prove less compelling than efforts to prevent the complete destruction of the system, flawed though it may be. If that destruction occurs, the result for aspiring progressives may be a sense of despair. In the current political climate, such progressive desperation could be ruinous.

V. Critical Lawyering for the Homeless in the Current Political Climate
A. Current Political Climate

The midterm elections of 1994 demonstrated clearly that the mood of the electorate is decidedly conservative. For the first time since 1954, Republicans now control both Houses of Congress. n184 No incumbent Republican senator, member of Congress or governor was defeated. n185 The agenda espoused by many winning candidates is the Republican "Contract with America," n186 which advocates a balanced budget amendment, welfare reform, taxcuts and term limits along with some purely procedural changes. n187 Significantly, however, the first pledge made by Newt Gingrich, incoming Speaker of the House, was to place before the Congress, for action by July 4, 1995, a bill seeking a constitutional amendment that would permit prayer in public schools. n188

Seemingly hidden under the conservatives' focus on character is a new level of venality and hostility to those who are not, as Gingrich would say, "normal Americans." n189 For example, one group cut off from federally-funded programs by the Republicans' Contract is legal aliens. n190 Unlike the illegal immigrants targeted by California's Proposition 187, legal aliens have official status in the United States, pay taxes and serve in the armed forces. n191 Despite these societal contributions, under the budget-cutting measures in the Republican program, legal aliens would be ineligible for such programs as Medicaid, food stamps and welfare. n192 This change in policy would introduce a litmus test for benefits based on citizenship rather than on residence and contribution to American society and would, according to one commentator, "flout traditions that run deep in America's political culture." n193

Also meaningful in this time of political upheaval is Gingrich's characterization of the Clinton administration as reminiscent of the "Great Society, counterculture, McGovernick" era. n194 Gingrich has described President and Mrs. Clinton as "left wing elitists" who "thought it was their job to give the country the Government that they thought the country needed, even if they didn't want it." n195 However, rather than challenging the activism of what he describes as the McGovern era, Gingrich challenges only its focus. When asked whether "the American character" could be changed through politics, Gingrich replied, "absolutely." n196

One could interpret the conservative agenda as an attack on the Realist-inspired administrative structure. The efforts to "downsize" the government include a rejection of the scope and breadth of the administrative system. n197 While the new conservative agenda is rarely expressed in jurisprudential terms, the focus of the new majority in Congress on dismantling much of the infrastructure of that body, and of the executive branch, represents a rejection of the connection between government, at least on the federal level, and the everyday lives of Americans. n198 Changing behavior of welfare recipients, n199 and other agenda items indicates that the new Speaker believes positive law remains important to describe the interaction between the people and their government. Rather than rejecting the role of law in Americans'
lives, the new majority seems instead to want to change the focus of that interaction.

B. Strategies for Progressive Action to Combat Homelessness

In view of these changes, is there anywhere to turn for a progressive lawyer, sympathetic to many of the CLS critiques but anxious to continue to move toward the ideal of a more just society? Practitioners looking for guidance in counteracting, or simply surviving, the conservative groundswell have been set adrift, because progressive scholars to whom they would logically turn for leadership have cast their lot with the near-nihilism of the CLS movement. It is as sad irony that what the CLS theorists observe as the hopelessness and paralysis of the legal system is in many cases replicated within the hearts and minds of would-be activist lawyers, in need of motivation and example from progressive leaders.

As noted above, some CLS theorists reject the principles of the Realists and believe that only a complete restructuring of our society and our legal system, according to their theoretical constructs, will produce the kinds of changes they believe are necessary. But daily life is not lived on the palette of a painter of theories. Lawyers who believe in the goal of a more humane society want to work to provide greater opportunities for those who have not achieved even the most basic benefits that our society has to offer. The complex problem of homelessness and its causes provides an excellent laboratory for an attempt to apply the awareness of the flaws of the system revealed by the CLS theorists to practical efforts by progressive lawyers to remedy the problem.

Much of the work of critical lawyering advocates deals with the problems of the poor, particularly as they present themselves in search of assistance at legal services offices and law school clinics. However, poor people, who are also beset by the problems of homelessness, are less likely to appear on a lawyer's doorstep as self-identified potential clients. A homeless person may require an advocate's assistance at the preliminary stage of identifying the nature of his or her difficulties and recognizing that the legal system may be of help in solving those problems.

In their article, The Emergence and Transformation of Disputes: Naming, Blaming and Claiming . . ., William L.F. Felstiner, Richard L. Abel and Austin Sarat offer a cogent analysis of the process by which injuries become legal disputes. They describe three steps in that process: naming, when a person admits to himself that some experience has been injurious; blaming, when the injured person attributes the injury to the fault of a person or a social entity; and claiming, when the person confronts the one responsible and seeks a remedy. It is only after the responsible party rejects the claim that an injury becomes a legal dispute. The authors contend that the social position of the person affected by the injury may play a significant role in determining whether that person will perceive an injury, assess blame and ask for a remedy.

Problems in the identification of the legal issues confronting the homeless may arise at all three stages. First, persons who are homeless often experience a sense of alienation from society as a whole. Although those not disoriented
by alcohol or drugs are likely to perceive that their lot is not that of all Americans, they must take the additional step of
ceasing to take their situation for granted and naming the conditions that cause their homelessness. \footnote{213} For those who
are resigned to their status, this may prove to be a substantial hurdle.

Second, the homeless may find it difficult to attribute specific blame for their homelessness. \footnote{214} Deep-rooted
poverty and social problems provide

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a complex combination of causative factors. \footnote{215} And third, even one who is able to attribute blame is likely to find
the process of confronting the allegedly responsible party and making a claim for redress an insurmountable burden. If
the party identified as responsible is an individual, such as a relative who cast the homeless person out of a difficult living
situation, \footnote{216} the homeless person is unlikely to consider the claiming of redress as even a plausible option. \footnote{217} If
the homeless person blames the bureaucracy of the mental health system or the welfare system, any attempt to make a
claim for redress is likely to founder in the bewildering complexity of that system. \footnote{218}

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Thus, the particular characteristics of homelessness present significant problems in applying critical lawyering theories
which encourage lawyers to go beyond rights-based theories and to assist the client in becoming a fully-empowered
partner in remedying the problem. Even for lawyers who seek to use traditional avenues for redress, homeless clients are
likely to pose difficulties. However, some strategies inspired by and consistent with the CLS and post-CLS theories do
offer possibilities for lawyers who work to assist the homeless.

1. Litigation

Social activist lawyers have long used litigation as a means of effecting social change, seeking court victories to
remedy particular problems. \footnote{219}

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Lawyers who seek housing for the homeless have used this technique with some success in various jurisdictions. \footnote{220}

However, as activists' understanding of the process of influencing public opinion became more sophisticated, the arena
for their work expanded to encompass venues not limited to the courtroom. As the court system grows more conservative,
\footnote{221} those other arenas may prove to be preferable. Particularly in the context of homelessness, approaches other than
the court system may be better, because few states have constitutional provisions that their courts interpret as providing a
2. Litigation Intended Both for Its Own Effects and to Create Public Discussion

Some commentators point out that lawyers may file cases in court to encourage debate on important social issues as much as they do to achieve results for their particular clients. Even where cases help to focus the public's analysis of important issues, litigation is often merely a part of a multi-pronged strategy, which might also include administrative and legislative advocacy. On occasion, the process of conducting litigation is of as much use as the result. Activist lawyers have filed a number of cases seeking housing for the homeless, which has resulted in an expanded public discussion of the problem even where they have not achieved the results they sought. The CLS theorists' rejection of rights-based litigation as a means of achieving social change does not preclude using litigation to stimulate a critique of the legal system. If the purpose of a lawsuit is to encourage discussion of the flaws of the system, as well as, to seek to achieve a legitimate result for a client, the lawsuit is not merely legitimating that system.

3. Efforts to Change Legislation

Most commentators agree that progressive activists have become accomplished at influencing legislation as a means of addressing the problems with which they are concerned. Some commentators go so far as to suggest that advocates should set their sights high, seeking wide-ranging legislative changes that will ultimately affect the conditions underlying the powerlessness of those helped by the legislation. Although CLS advocates might assail efforts to influence legislation as further reification of a corrupt system, one might also view increasingly adroit manipulation of the legislative power structure as evidence of unwillingness to be limited by that structure's assignment of roles.

The Stewart B. McKinney Homeless Assistance Act was the first federal legislation to address the problem of homelessness. While its coverage is less than comprehensive, it did focus federal attention on the problem in a way that had not occurred previously.
the legislation to play as active a role as possible in the seeking of the legislation.

4. Administrative Procedures

Along with litigation and legislative advocacy, the administrative system also provides some recourse to lawyer/activists. n233 Resort to this arena is a problem for advocates sympathetic to CLS theories because exploitation of this avenue, the particular focus of much CLS criticism, merely provides further legitimation for the system's biases.

Through a combination of federal and state benefit programs, the administrative system represents the most comprehensive interaction that homeless people have with government. n234 The problems that confront the homeless as they attempt to navigate the administrative structure are an excellent example of the CLS scholars' concern with the role of law as legitimation of a fundamentally inequitable social order. The fact that the "beneficiaries" of the system are often unable to navigate its intricacies without legal help resolves any moral reluctance advocates may have to legitimate the administrative system: without the "benefits" provided by the government, many homeless people would die. Theoretical railing against legitimation must take a back seat to survival. With the recent and future cuts in federal programs, n235 both the range of services offered by the administrative system and the availability of legal help to secure those services will be decreased. Progressive scholars and practitioners must work to fill the breach.

5. Consciousness-Raising

Consciousness-raising or client empowerment is a crucial element of the application of CLS theories to law practice. n236 Gabel and Harris contend that every case can afford an opportunity for the client to confront and resolve his own "sense of political helplessness." n237 Through encouraging the client to take responsibility for participating in his own case, by, for example, assisting a tenant to organize a group to challenge the landlord's lease violations, a lawyer both helps the client to develop his political consciousness and "demystif[es]" the legal system. n238 There are many dimensions to this technique as it applies to homelessness. Advocates for the homeless may be able to assist their clients in developing a strategy to confront the various dimensions of their problem, and may even be able to help create mechanisms that enable homeless people to work together to address their common needs.

However, the interest of CLS and post-CLS theorists in delegitimating the power structures offers an important lesson. In her article examining the impact, both positive and negative, of the mobilization of efforts to fight homelessness in the 1980s, Professor Lucie White describes meetings between a group of seminar participants studying homelessness and various formerly homeless people. n239 The seminar participants, all of whom were either students or advocates, objected to placing a shelter in a community that was predominantly African-American, based on their assumptions about the problems of "life in the projects." n240 The homeless organizer, formerly homeless himself, who spoke to the group took pains to stress that his clients were the "economically displaced . . . rather than the bums, the drug addicts, or the mentally ill." n241 Each case represents the use of stereotyping in an attempt, by those who would ordinarily be most likely to be hurt by such stereotypes, to demonstrate their achievement of the desired "raised" consciousness. These examples indicate that consciousness-raising is a complex process, with significant inherent peril.
Moreover, and on a more practical level, use of this technique assumes a level of readiness that many homeless people may not be able to achieve. One who spends his or her time attempting merely to survive, in the most fundamental sense, is unlikely to be ready for relatively sophisticated group process. Only after the basic needs are met can a homeless person be ready for consciousness-raising. Hunger and the absence of opportunities to perform even the most basic daily functions of personal life render more intellectual pursuits unrealistic, at best, and impossible, at worst.

Nevertheless, substantial benefits may be achieved by encouraging those who are homeless to begin the process of becoming involved in society. Voter registration drives, protests of governmental actions and other ostensibly political activities may have the effect of demonstrating to the participants the fact that they may be able to play a role in society.

6. Media Campaigns

Increasingly, lawyer/activists have adopted the techniques of other activists. Among these techniques is the use of media to attract public attention and to shape public opinion. In the early days of the homelessness crisis, advocates used media effectively to alert the public to the existence and scope of the problem. n242

As Professor White notes, there are possible drawbacks to the use of media to increase public awareness of problems. n243 If the public hears and sees too much about a problem, and becomes tired of it and convinced that there is no solution, there may be a backlash against the victims of the problem. Professor White refers to this as the "normalization of homelessness." n244 Further, she argues, the success that advocates achieved may ironically have worsened the problem, because as government spent more money on temporary housing solutions, it decreased the attention it paid to permanent low-cost housing. n245

7. Create Institutions to Solve Problems

Professor Martha Minow recommends that law students study the work of those social activists "who often work outside the formal legal and political systems to create institutions to address what they think the law ignores." n246 She cites the battered women's movement as an example of the creation of institutions to address a social problem. n247 In addition to providing shelter for families seeking refuge from dangerous homes, the movement has helped to focus public attention on the problem, leading to changes in state laws concerning domestic violence. n248 She notes, "[f]rom the base of alternative institutions, and with the insight and motivation nurtured in those settings, change agents may contribute to legal change directly, sponsoring legislation, or indirectly, by modeling workable programs that the state later adopts or sponsors." n249

Activists working with the homeless to seek development of multi-faceted shelter facilities in residential communities might create community boards, made up of residents, homeless people, teachers, and other interested parties to discuss
informally the concerns each group has about the others. n250 Perhaps a process for establishing person-to-person connections between residents and shelter inhabitants might be of help in overcoming prejudices. n251 Creative advocates will have many more ideas about creating new structures to facilitate solutions to problems. Particularly in light of the downsizing of governmental assistance programs, advocates

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would be well advised to devote their attention to the development of new approaches.

8. Outreach Activities

Last, and most importantly, progressive lawyers seeking to assist the homeless must work to reach out to potential clients. The alienation that many poor people feel from mainstream society means that they are less likely to avail themselves of legal services than are those who feel even moderately involved in the system. A part of the empowering function discussed above must be an increase in efforts to make those alienated from the system aware of the ways in which it may assist them. For lawyers seeking to help the homeless, this might mean establishing a presence at shelters and soup kitchens. n252 Rather than appearing in that setting as a legal expert, clothed in the trappings of the court system, however, Gabel and Harris contend that the activist lawyer should attempt to present herself "not as a lawyer, but as an ordinary person with special experience." n253 For those lawyers who work in law firms that support pro bono activity, the definition of activity that qualifies for firm credit should be expanded to take this sort of outreach into consideration. n254

Presumably, however, lawyers will prefer to use their legal training to aid the homeless rather than merely offering to make beds in a shelter or transport donated food from restaurants to soup kitchens. Perhaps what Gabel and Harris intend is for a lawyer to work to communicate in ways non-lawyers can understand, rather than indulging in "legalese" when talking to potential clients. In traditional large-firm practice, lawyers assume a basic level of awareness of legal concepts and language. Attempting to divest oneself of these presumptions might be a simple first step in becoming Gabel's and Harris' "ordinary person with special experience." n255

Furthermore, allowing clients to tell their own stories, in their own ways, at their own pace, and in familiar settings will provide significant

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advantages. n256 As lawyers allow themselves to shed the protective garb they wear in their more traditional roles, they may find that they are free to hear and experience much that they had shut out as they donned their new lawyer-focused identities. This new information will assist them in creating new strategies for helping those who need it most.

All of these strategies, and more not mentioned here, are important. However, no one can accomplish everything. Again, advocates must focus on the most basic needs first. If litigation will force a city to adhere to statutes requiring that they provide shelter for those in need, that type of litigation must be a priority. n257 Perhaps efforts to provide information about benefit programs will aid those who are eligible but not enrolled in achieving better nutrition and health care. That, too, must be a priority. However, after the elemental needs have been addressed if they can be addressed advocates must consider which among the other needs is greatest.
No one answer will be true for every situation. Each advocate must consider a range of factors, including her own particular strengths, the resources available in the form of other volunteers, funds, or fund-raising capabilities, access to media, the history of conditions in each location, successes and failures of previous efforts, and many others. Perhaps most important in the end is the willingness to plunge in and begin. Even one who accepts the goal of some CLS scholars a complete restructuring of a fatally flawed legal and social structure must start somewhere. Those who seek less cosmic changes must also begin somewhere. If we can learn nothing else from the Realists and their efforts, we must accept that they put their beliefs into action. That legacy alone may be their most profound.

VI. Conclusion

Just as lawyers trained and inspired by Realist scholars found inspiration and guidance for their attempts to promote social change through law, modern activists seeking to confront critical social problems can find support for their work in the ideas of the CLS and post-CLS critical theorists. Although much of the modern critical scholarship would discourage attempts to work within the system to achieve better treatment for the disadvantaged, those progressive lawyers who want to use their skills to assist in the eradication of homelessness can find the means to work toward that end. The myriad problems of the homeless present a complex setting for the application of critical lawyering principles, but efforts toward assisting the homeless can have positive effects without unnecessarily enhancing a biased system.

FOOTNOTES:

n2 Id. at 47.
n3 See infra notes 141–53 and accompanying text.
n4 See infra notes 34–69 and accompanying text.
n5 See infra notes 151–53 and accompanying text.
n6 Rowan, supra note 1, at 47.
n7 I recognize the term "progressive" carries a great deal of baggage. I use it in this article to apply to those who seek to increase the participation of the historically disenfranchised in American society and who wish to repair rather than abolish the structure which has over the past forty years attempted to equalize the benefits of our society. Not everyone would consider that to be a "progressive" agenda.
n8 See infra note 161 and accompanying text.
n9 For an analysis of the causes and complexities of the problem of homelessness, with particular attention to the relationship between homelessness and substance abuse, see Melanie B. Abbott, Homelessness and Substance

n10 Bruce G. Link et al., Lifetime and Five-Year Prevalence of Homelessness in the United States, 84 Am. J. Pub. Health 1907, 1907, 1910 (1994); see also Interagency Council on the Homeless, Priority: Home! The Federal Plan to Break the Cycle of Homelessness 2, 17 (1994) [hereinafter Priority: Home!] (referring to variation in estimates of number of homeless, and reporting that previous study by Link estimated that "about seven million Americans have experienced homelessness some for brief periods and some for years at some point in the latter half of the 1980s").


n12 See Abbott, supra note 9, at 67–72 nn.327–54 and accompanying text (describing different figures reached by a wide range of different methods, and discussing debate over who should be included in or excluded from the count).

n13 Link, et al., supra note 10, at 1907–08.

n14 Rosenheck, supra note 11, at 1886. The studies reported in Abbott, supra note 9, at 62–67, differ to some extent from the Link results. See, e.g., Abbott, supra note 9, at 62–66 nn.308–12 and accompanying text (concerning gender of the homeless, some studies report that men make up anywhere from two-thirds to three-fourths of the homeless population, but also reflecting that large urban shelters are more likely to serve men than women); Abbott, supra note 9, at 66–67 nn.318–20 and accompanying text (concerning race of the homeless, reporting that one study showed that 90% of homeless men in New York City shelters were African–American or Hispanic, and noting that studies overall reflect an increase in minority representation among the homeless). Most of the surveys reported in that article were based on city populations; few considered rural areas. Id. at 66.

n15 Rosenheck, supra note 11, at 1886.

n16 See Monica A. Fennell, Hunger and Homelessness: Why the Homeless Need Food Stamp Advocacy and How to Pay for It, 21 Fordham Urb. L.J. 127, 131–33 (1993) (analyzing the possible solutions for the problem of hunger among the homeless, and proposing outreach and increased advocacy to assist the homeless with problems with food stamps).

n17 Rosenheck, supra note 11, at 1886.

n18 Fennell, supra note 16, at 131–33. (noting that homelessness itself presents serious public health concerns and that the homeless also "suffer from . . . mental illness, substance abuse, tuberculosis and a substantial excess of deaths").

n19 The Interagency Council on the Homeless was created by the McKinney Act to coordinate governmental policy and communication concerning programs affecting the homeless. See 42 U.S.C. 11312 (1994); see also Abbott, supra note 9, at 21–22 nn.118–26 and accompanying text.


n21 Id. at 26 (The report notes that in 1992 14.5% of Americans were officially classified as poor, an increase from 12.8% in 1989, and discusses the relationship of race and geography to poverty. It also states that 3 million people joined the ranks of the "very poor," with incomes less than 50% of the poverty level, and notes that that group is most likely to become homeless); see Lucie E. White, Representing "The Real Deal," 45 U. Miami L. Rev. 271, 277–78 (1990–91) [hereinafter White, The Real Deal] (noting decreases in real income that led to increases in homelessness).
n22 Priority: Home!, supra note 10, at 27 (noting negative effects on the job prospects of those with few marketable skills, reflecting racial makeup of the job categories hit hardest by the change in the economy, and noting effects of these factors on self-esteem of those affected).

n23 Id. (reporting that "[f]rom 1970 to 1992, the median inflation-adjusted monthly State AFDC [(Aid to Families with Dependent Children)] benefit . . . for a family of four with no income dropped from $799 to $435 in 1992 dollars").

n24 Id. at 28-29 (tracing decline in affordable housing for those at the lowest income levels in both urban and rural areas).

n25 Id. at 33 (reporting that in 1992 single-parent families represented 22% of all families, up from 14% in 1972, and noting that 39% of the officially poor population consisted of single-parent homes headed by mothers).

n26 Id. (The report illustrates a strong connection between substance abuse and homelessness: "[t]he evidence is strong, in short, that substance abuse is an important factor in the ‘selection’ of homeless people from among others who are also poor.").

n27 See Gretchen P. Mullins, The Battered Woman and Homelessness, 3 J.L. & Pol'y 237, 244 (1994) (Substantial percentages of homeless women are homeless because of battering: a 1990 study in Philadelphia revealed that 42% of homeless families "listed domestic violence as the cause of their homelessness," while another study showed that in 1987, 40% of women and children in New York shelters were there for the same reason.).


n30 Priority: Home!, supra note 10, at 4.

n31 See id. at 67-68. The ICH recommends that the government work toward two goals: "1) take emergency measures to bring those who are currently homeless back into our communities, workforce, and families; and 2) address the structural needs to provide the necessary housing and social infrastructure for the very poor in our society to prevent the occurrence of homelessness." Id. at 67.

n32 See Editorial, Mayors Grapple With Homelessness, St. Louis Post Dispatch, Jan. 8, 1995, at 2B (commenting on survey by United States Conference of Mayors concerning shelter demand in cities, and opining that cuts in federal spending would "destabilize cities," with little chance that private charities would be able to make up the difference); see also Mullins, supra note 27, at 249-50 (noting that federal funding for battered women's shelters has significantly decreased).

n33 For some thoughts concerning Sociological Jurisprudence, see infra note 43 (discussion of the role of that school in transition between Formalism and Realism). In Harold A. McDougall, Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process, 75 Cornell L. Rev. 83, 90-92 (1989) [hereinafter McDougall, Social Movements], Professor McDougall describes the Legal Process movement. Id. Professors H.L.A. Hart, Jr. and Albert Sacks created Legal Process at Harvard Law School in the 1950s as a means of synthesizing the policy orientation of the Realists with the rules structure of the Formalists. Id. at 90. The assumptions of Legal Process theorists were "that policy is indeed the province of the law, that policy is made by the clash of interested parties, and that the results of policymaking will be rational if the clash proceeds according to rules." Id. This theory validates the administrative structure of the New Deal by declaring rational the results achieved by competition between subjectively-motivated advocates. Id. However, as Professor McDougall notes, the failure of Legal Process to consider the dynamics of community interactions led to criticism of Legal Process by both Law and Economics and CLS advocates. Id. at 91-98. Professor Gary Minda has also reviewed the history of Legal Process. See Gary Minda, The Jurisprudential Movements of the 1980s, 50 Ohio St. L.J. 599 (1989). He describes the Legal Process movement as "reasoned elaboration," noting that the goal of this method was "to
provide an objective 'process' determined by legitimate procedures and proper institutions for resolving subjective questions of 'public policy.'” *Id. at 642; see also id. at 642 n.230* (associating the post-realist movement with the scholarship of Henry Hart, Jr. and Albert Sacks). Minda attributes the failure of Legal Process to the inability of its advocates to offer a basis for explaining why the objective process might not always reach “morally correct results” in cases where "social justice" was at stake. *Id. at 643.*

n34 American Legal Realism 270 (William W. Fisher III et al. eds., 1993) [hereinafter American Legal Realism]. The editors note that Langdell did not create the case-study method, but that his use of it at Harvard was the impetus for the adoption of the method in other American law schools. Id.; see also Allan C. Hutchinson & Patrick J. Monahan, Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 Stan. L. Rev. 199, 203 (1984) (using term Conceptualism rather than Formalism).

n35 See McDougall, Social Movements, supra note 33, at 87-88. McDougall notes that the structure of the American government was influenced by "Newtonian" thinking, which "depicted a clock-like universe in which randomness (such as that which characterizes human behavior) was not considered.” *Id. at 87* (citing Lawrence W. Fagg, Two Faces of Time 1-23 (1985)). He states that Langdell sought to create a method of legal study in a similar mode, teaching lawyers to view legal problems as accumulations of elements which, when dissected and studied individually, would yield consistent results. *Id.* (citing Clark Byse, Fifty Years of Legal Education, 71 Iowa L. Rev. 1063, 1072 (1986)). Professor McDougall also notes, however, that the application of this method of analysis to the law occurred during a time in which the applicability of Newtonian analysis to the scientific world was coming into question. McDougall, Social Movements, supra note 33, at 88.


n37 Id. at 147.

n38 G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 Va. L. Rev. 999, 1001 (1972) [hereinafter White, Jurisprudence and Social Change] (noting that jurisprudential scholars were attracted to the same search for "universal absolutes" as were economists, natural scientists and sociologists). Professor White attributes this drive for certainty to the conclusion that, rather than existing at state sufferance, property rights belonged inherently to individuals, free from interference by the government. *Id. at 1001-02.*

n39 *Id. at 1003.* This challenge occurred at the same time as the Progressive movement's confrontation with the laissez-faire governmental policies that had accompanied the industrial revolution. Id. Professor White points out that critics of nonregulation of industry became increasingly concerned with the social costs of unregulated industrial development. Id. Their concerns found a philosophical home in the Progressive movement, which "affirmed the worth of evaluating social theories on the basis of contemporary experience," with the result of such evaluation of the so-called "scientific" principles often demonstrating the "fallacy" of such principles. Id.; see Jerold S. Auerbach, Unequal Justice 151 (1976) (noting that the stock market crash of 1929 also contributed to the advent of the Realist school: "The skepticism of [Realist leaders] did not have its full impact on legal education or public policy until the 1930's; it was easy enough to disregard revealed truth once the social structure that sustained it tottered precariously.").

n40 See, e.g., American Legal Realism, supra note 34, at 3-6; Kuklin & Stempel, supra note 36, at 150; White, Jurisprudence and Social Change, supra note 38, at 1002-03 (referring particularly to Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905)).

n41 See White, Jurisprudence and Social Change, supra note 38, at 1003-04.

n42 Oliver Wendell Holmes, The Common Law 1 (1881), reprinted in American Legal Realism, supra note 34, at 9.

n43 See American Legal Realism, supra note 34, at 49-52; see also Jeffrie G. Murphy & Jules L. Coleman,
Philosophy of Law 33 (1990) (describing Realist movement as "loosely led and inspired" by Holmes, Llewellyn and Frank); White, Jurisprudence and Social Change, supra note 38, at 1013. In his comprehensive and thoughtful analysis of the relationship between the development of twentieth century jurisprudence and political and social schools of thought, Professor White notes that the school referred to as Sociological Jurisprudence helped to advance the progression from Formalism to Realism. White, Jurisprudence and Social Change, supra note 38, at 1004. Early in the twentieth-century, Roscoe Pound, Dean of Harvard Law School, called for a school of jurisprudence that acknowledged the importance of economics, sociology and philosophy. Id.; see also American Legal Realism, supra note 34, at 49-50 (explaining Pound's leadership in Realism). In articles published in 1911 and 1912, Pound announced that Sociological Jurisprudence was a "discrete and definable philosophy of law." White, Jurisprudence and Social Change, supra note 38, at 1004 (citing Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence (pts. 1 & 2), 24 Harv. L. Rev. 591 (1911), 25 Harv. L. Rev. 489 (1912) [hereinafter Pound, Scope and Purpose]). White distinguishes Pound's theory from that of Joseph Bingham, Pound's contemporary, in the context of their differing views on the role to be played by underlying moral principles in their concepts of sociological jurisprudence. Id. at 1003-04. In 1923, Pound elaborated on his theory in a three-part article in the Harvard Law Review. Id. at 1008-11 (citing Roscoe Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 802, 940 (1923) [hereinafter Pound, Judicial Decision]). Pound argued that the Formalists' mechanical theory was appropriately applied to cases dealing with property and commercial transactions, but that where cases concerned "the social interest in the individual human life," judges should consider "current moral ideas." Id. at 1008, 1011 (citing Pound, Judicial Decision, supra, at 825, 948). Bingham, on the other hand, had argued in 1912 that there existed no public consensus on an ultimate moral "right," so that judges should not rely on such an understanding in reaching judicial decisions. White, Jurisprudence and Social Change, supra note 38, at 1008-09, (citing Joseph Bingham, The Nature of Legal Rights and Duties, 12 Mich. L. Rev. 1, 3 (1912)). White contends that Pound's view was more consistent with those of the Progressives than was Bingham's because the Progressives had also believed that certain moral values were preeminent, and that the legal system was "a repository of moral values." Id. at 1011.

n44 For an analysis of the debate, see American Legal Realism, supra note 34, at 49-52. The editors introduce their discussion of the meaning of Realism with an account of the sometimes highly charged colloquy between Pound and Llewellyn, noting in particular that Pound's choice to respond to Llewellyn's criticisms of his own work was followed by "lasting regret." Id. at 50.

n45 Karl N. Llewellyn, A Realistic Jurisprudence The Next Step, 30 Colum. L. Rev. 431 (1930), reprinted in part in American Legal Realism, supra note 34, at 53-58.

n46 Id. at 439, reprinted in American Legal Realism, supra note 34, at 55 (footnote omitted) (emphasis in original).

n47 Id. at 442-43, reprinted in American Legal Realism, supra note 34, at 56.

n48 Id.; see White, Jurisprudence and Social Change, supra note 38, at 1018 (Llewellyn believed that governments interacted with citizens in very different ways than was reflected in the more "steril[e]" jurisprudence of earlier analysts. Llewellyn described his posited approach as "a sophisticated reversion to a sophisticated realism.").

n49 Llewellyn, supra note 45, reprinted in part in American Legal Realism, supra note 34, at 56.

n50 Id.

n51 See White, Jurisprudence and Social Change, supra note 38, at 1018-19.

n52 Id. at 1019 (citing Jerome Frank, Law and the Modern Mind 106 (1930) [hereinafter Frank, Modern Mind]).

n53 Id. (citing Frank, Modern Mind, supra note 52, at 130). Frank's goal was to encourage judges to be aware of the role played by their own biases, so that they could seek to improve the manner in which they gathered information. Id. at 1019-20 (citing Frank, Modern Mind, supra note 52, at 130).
n54 See G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. Rev. 279, 280 (1973) [hereinafter White, Reasoned Elaboration] (describing this view as "a relativistic approach to morals and ethics"). Llewellyn introduced this concept in his essay, Some Realism About Realism Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1236-37 (1931), reprinted in American Legal Realism, supra note 34, at 72 [hereinafter Llewellyn, Realism], where he called for "[t]he temporary divorce of Is and Ought for purposes of study. . . . [T]his involves during the study of what courts are doing the effort to disregard the question what they ought to do." Id. The editors note that Llewellyn drew this concept from Holmes, in particular from his "Bad Man" theory of the law, as described in his essay, The Path of the Law. American Legal Realism, supra note 34, at 52.

n55 White, Reasoned Elaboration, supra note 54 at 280; see also Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669, 1672 (1982) [hereinafter Note, Bramble Bush] (pointing out that, for Llewellyn, legal doctrine was based on "historical circumstance, rather than logical necessity").

n56 Llewellyn, Realism, supra note 54, at 1237, reprinted in American Legal Realism, supra note 34, at 73.

n57 White, Reasoned Elaboration, supra note 54, at 281.

n58 See Hutchinson & Monahan, supra note 34, at 204.

n59 White, Jurisprudence and Social Change, supra note 38, at 1019.

n60 See id. at 1020; Note, Bramble Bush, supra note 55, at 1675 (Realists advocated reliance on "behavioral sciences and statistical method to elucidate the public interest," with the intent to train lawyers for policy-making roles.).

n61 Hutchinson & Monahan, supra note 34, at 204 n.20 (describing this element of the Realist agenda, and attributing it particularly to Llewellyn, in A Realistic Jurisprudence, supra note 45).

n62 White, Jurisprudence and Social Change, supra note 38, at 1021-22 (quoting Mortimer Adler's characterization of the theories on which Frank relied as "merely theories and questionable empirical findings").

n63 See Murphy & Coleman, supra note 43, at 34. After noting the cynical tone of the Realist view, however, these authors suggest that they view the Realists' efforts not as an attempt to create a theoretical paradigm, but rather as a skeptical challenge to other theories. In other words, by adopting the Realists' method of poking holes in the full-blown theories of jurisprudence, analysts will gain a valuable perspective on those theories. Id. at 35.

n64 Hutchinson & Monahan, supra note 34, at 204.

n65 Id. at 204 n.21 (stating that Karl Llewellyn, Jerome Frank, and Felix Cohen participated in the New Deal programs); see infra notes 132-44 and accompanying text; see also Note, Bramble Bush, supra note 55, at 1674.

n66 See Note, Bramble Bush, supra note 55, at 1671.


n68 Id. at 508-09.

n69 Id.

n70 The CLS umbrella covers a wide range of scholarly work, with the expected doctrinal disagreements and disputes. However, most scholars seem comfortable with the appellation "movement" to describe the work of the
CLS theorists. For a comprehensive description of the tenets of CLS, see Roberto Mangabeira Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 563 (1983). An excellent article analyzing the breadth of the movement and emphasizing the various theoretical approaches that make up different branches of the movement is Hutchinson and Monahan, supra note 34. For another comprehensive analysis, see Note, Bramble Bush, supra note 55.

n71 Tushnet, supra note 67, at 505, 507. Tushnet contends that the other significant source of the CLS movement is the progressive tradition in American history that flowered in the 1920s and 1930s. Id. at 506. The Progressives’ concern with the role of special interest groups in American society was a logical forerunner to many tenets of the CLS school. See id.; see also Phyllis Goldfarb, Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory, 43 Hastings L.J. 717, 718 (1992); Note, Bramble Bush, supra note 55, at 1680 (CLS theorists use techniques of Realists, but “at a higher level of abstraction”).

n72 See Hutchinson & Monahan, supra note 34, at 200; Note, Bramble Bush, supra note 55, at 1669–70. The original members of the CLS school were the founders of the Conference on Critical Legal Studies. Hutchison & Monahan, supra note 34, at 200; Note, Bramble Bush, supra note 55, at 1669–70 n.3. Founded in 1977, the Conference was created as a means of advancing the “radical legal studies” views of such scholars as Duncan Kennedy, Mark Tushnet, Morton Horwitz, and others. See Note, Bramble Bush, supra note 55, at 1669 & n.3; see also Hutchinson & Monahan, supra note 34, at 200–01 & n.6 (discussing the Conference, and noting that another, much larger, radical lawyers’ group exists in the National Lawyers’ Guild, founded in 1937).

n73 Hutchinson & Monahan, supra note 34, at 201.

n74 See Note, Bramble Bush, supra note 55, at 1677 (describing CLS as “the maturation of . . . Realist methodologies” linking critical scholarship “not to reformist policy programs, but to a radical political agenda”).

n75 See id. at 1677.

n76 Hutchinson & Monahan, supra note 34, at 206.

n77 See Tushnet, supra note 67, at 507.

n78 See id. at 507–09.

n79 Hutchinson & Monahan, supra note 34, at 206.

n80 Id. at 207–08. Professor Gary Minda points out that among the internal divisions within the CLS movement is a break between those who believe that no reconstructive efforts can succeed (the “irrationalists”) and those who believe that CLS theories can help to reconstruct legal theory (the “rationalists”). Minda, supra note 33, at 619–20.

n81 See Tushnet, supra note 67, at 508. Jeffrie Murphy and Jules Coleman point out that the philosophical underpinnings of CLS include the works of German philosopher Friedrich Nietzsche. Murphy & Coleman, supra note 43, at 52–53. Murphy and Coleman note that Nietzsche contended that definitions of morality arose in response to the relative possession or non-possession of power of dominant or submissive classes. Id. A dominant class would value the characteristics that allowed its members to remain dominant, while members of a dominated class would reject the dominant values and define morality in terms that allowed its members to retain their feeling of self-worth. Id. Thus, according to Murphy and Coleman, CLS scholars could find in Nietzsche support for their view that all morality is relative, and that societal definitions of good and bad are constructed by the powerful to validate their own power. Id.

n82 Tushnet, supra note 67, at 509. Tushnet goes on to note that the conclusion that values are induced by society means that attempts to change the legal system are doomed to failure: “[Y]ou cannot think about altering legal rules to conform to a society’s values when those values are constructed partly on the basis of the legal rules themselves.” Id.
n83 Goldfarb, supra note 71, at 721.

n84 See Robert W. Gordon, New Developments in Legal Theory, in The Politics of Law 413, 418-19 (David Kairys ed., rev. ed. 1990). Gordon notes: "Law, like religion and television images, is one of those clusters of belief . . . that convince people that all the many hierarchical relations in which they live and work are natural and necessary." Id. at 418. Other commentators note that: "In constructing elaborate schemes of legal rights and entitlements which are intended to permit individuals to interact with others without being obliterated by them, mainstream legal theorists simply justify the prevailing conditions of social life and erect formidable barriers to social change." See Hutchinson & Monahan, supra note 34, at 209. A discussion of what is wrong with rights is central to much CLS scholarship. See Minda, supra note 33, at 649 (inconsistencies in doctrine and indeterminacy plague mainstream attempts to apply rights-based doctrines). Professor Peter Gabel and attorney Paul Harris agree that, in order to build a "counter-hegemonic" legal practice, one must avoid relying on the "rights" concepts from mainstream legal thought: "an excessive preoccupation with 'rights-consciousness' tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves." 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, 375 (1982-83) [hereinafter Gabel & Harris]. The alternative is to focus on empowering clients and enlarging their political consciousness. Id.

n85 Gabel & Harris, supra note 84, at 372. The authors state: "The principal 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." Id.

n86 Id. at 372-73. The authors define "reification" as "the attribution of a thing-like or fixed character to socially constructed phenomena." Id. at 373 n.10. They connect it to the process of conditioning people to live in authoritarian societies. Id. Gabel and Harris emphasize that the role of legal reasoning in the legitimation of the system is particularly significant because the essence of the persuasive strength of that analytical process is its reliance on the "existence of and the legitimacy of existing hierarchical institutions." Id. at 373.

n87 McDougall, Social Movements, supra note 33, at 94-95 & n.68 ("The purpose of 'trashing' is to challenge hierarchy and order as well as rules, clearing the way for fundamental change in human relationships."); see Alan D. Freeman, Truth and Mystification in Legal Scholarship, 90 Yale L.J. 1229, 1229 (1981) (for CLS theorists, trashing is viewed as perhaps "the most valid form of legal scholarship").

n88 McDougall, Social Movements, supra note 33, at 95.

n89 Id. at 96.

n90 Professor McDougall focuses his analysis on the "interpretive community" proposed by Professor Owen Fiss. Id. at 98-101 (discussing Owen M. Fiss, Conventionalism, 58 S. Cal. L. Rev. 177 (1985) and Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982) [hereinafter Fiss, Objectivity]). Fiss' "interpretive community" idea, suggests that conversations among lawyers and judges could "give a legal text, whether statute or court opinion, a legitimacy stemming from consensus beyond that which is possible to achieve by the imposition of positive law." McDougall, Social Movements, supra note 33, at 100 (citing Fiss, Objectivity, supra, at 744-45). McDougall argues that the limitation in Fiss' communities to participants in the legal process fails to address the CLS scholars' concerns about the imposition of standards by virtue of political power. Id. at 100-01. McDougall proffers the social movements of the 1960s and 1970s, particularly the civil rights movement, as examples of superior structures because of their use of "dialogue, nonviolent confrontation and force of example." Id. He uses the term "implementive community" to describe his ideal and suggests that the Leadership Conference on Civil Rights is an example of such a community. Id. at 109-10.

n91 Minda, supra note 33, at 615. But see Tushnet, supra note 67, at 511 (noting that criticism in and of
itself is important, and that it has prompted internal debate within the CLS movement); see also Guyora Binder, Commentary: On Critical Legal Studies As Guerilla Warfare, 76 Geo. L.J. 1, 3 (1987) (summarizing criticism of CLS scholars as uninvolved in litigation, community organization, political campaigns, legislation, or other practical applications of their work); McDougall, Social Movements, supra note 33, at 96 (CLS has neither described the nature of a successful community nor provided suggestions as to how to achieve it.); Note, Bramble Bush, supra note 55, at 1681 (CLS theorists, in their attacks on liberalism, attempt "to characterize, not participate in, the ways in which law contributes to stabilization of a social world.").

n92 Minda, supra note 33, at 617 (Professor Minda characterizes this continuous reexamination as "[p]erhaps the strongest feature of CLS theory and practice.").

n93 Id.

n94 See id. at 624 (noting that because the experiences of women differ so greatly, it would be impossible to create one range of thought that included all women).

n95 Id. at 624–25.

n96 Id. at 630. Professor Minda also notes that some feminist theorists also share the CLS view that the traditional rights analysis is inadequate to meet the needs of women. Id. at 631.

n97 Id.

n98 Id.

n99 Id. at 638–39. Professor Minda also explains the difference in another way: "CLS scholars . . . look beyond law to examine politics. . . . [Feminist] scholars assert a new form of feminist criticism which looks into law and politics from the perspective of women in order to discover the influence of gender." Id. at 641 (emphasis in original).


n101 Id. at 387–88.


n103 Id. at 1357–58. Professor Crenshaw adds: "[I]f trashing is the only path that might lead to a liberated future, Black people are unlikely to make it to the Critics' promised land." Id. at 1357.


n105 Id. at 687. The authors define "public interest law" broadly to include "all of the ways in which legal services are provided to individuals, groups, and causes which for financial or organizational reasons would not otherwise be represented." Id. at 688–89. Thus, their focus is not merely on practice settings in which the principal clients are the poor. See generally Symposium, Theoretics of Practice: The Integration of Progressive Thought and Action, 43 Hastings L.J. 717 (1992) (addressing the application of critical legal scholarship to the interactions between lawyers and disempowered people).

n106 Buchanan & Trubek, supra note 104, at 689.

n107 Id. at 690.
n108 Id. at 690-91.
n109 Id.
n110 See id. at 691.
n112 Id. at 4.
n113 Id. at 5; see also id. Part I, at 21-126.
n114 See id. at 5-8.

n115 For example, Wexler cites studies comparing "paternalistic" commitment laws, authorizing commitment of a person based on a psychiatrist's opinion that the person is in need of treatment, with "civil libertarian commitment codes," which allow commitment only where a person is actually unable to manage life in the community. Id. at 10-11. In some instances, Wexler notes, the civil libertarian approach has the effect of promoting therapeutic objectives without resulting in commitment. Id. at 11; see generally id. Part II, at 127-242.

n116 Id. at 9-10.

n117 Id. at 14-16; see also id. Part III, at 243-306.

n118 Id. at 14-15.

n119 Id. at 16-19; see also id. Part IV, at 307-78.

n120 Id. at 17 (citing Robert D. Miller et al., Litigiousness as a Resistance to Therapy, J. Psychiatry & L. 109 (1986), reprinted in Wexler, supra note 111, at 329).


n123 See id. Section II, at 244-50 (noting that the movement is also criticized both for its perceived connection to the "therapeutic state" and for the ambiguity of its attempts to define therapeutic).

n124 See generally Note, Bramble Bush, supra note 55, at 1669-74. By contrast, lawyers who began practice during the Formalist era were reluctant to engage in activities critical of the social structure or of the legal profession, preferring to focus their efforts on business, which was the dominant institution in society. See Auerbach, supra note 39, at 130-31. Auerbach points out that the ending of World War I contributed to the "virulent patriotism" of lawyers' views: "corporation merged with country as the object of their allegiance." Id. at 130. He also notes that job preferences of law review graduates from Harvard, Yale and Columbia from 1918 to 1929 conformed to this idea, with some 81% choosing to enter law firms. Id. at 143-44. Auerbach examines at some length the career of John W. Davis, founding partner of Davis, Polk & Wardwell, who was nominated for President of the United States by the Democratic Party in 1924. Id. at 136-41. He quotes Davis on his legal education and philosophy, offering a concise characterization of the Formalist approach: They [Davis' law professors at Washington and Lee Law School] were more concerned that you should learn what the law was than that you should be invited to speculate on what the law ought to be.... I never conceived at the time [of a major case in my practice] that it was my duty to reform the law. It was my duty to find out what the law was, and tell my client what rule of life he had to follow. Id. at 137. One of Davis' most intense critics was Felix Frankfurter, then a professor at Harvard, who believed that Davis was owned by
his big corporate clients and that Davis should have spoken out from his platform as President of the American Bar Association against the conservatism and narrowness of lawyers' interests in the postwar period. Id. at 139-40. Even in 1927, Frankfurter's view of the role of a lawyer was more consistent with those of the Realists to come than of the Formalists whose views he had studied in law school. Id. at 144-50. For example, he took the unpopular position of speaking out in defense of Sacco and Vanzetti, alien anarchists who were convicted of murder and eventually executed in Massachusetts. Id. at 144-50. Auerbach notes that, with some exceptions, the only members of the legal profession willing to challenge the improper aspects of their trial and to defend the right of these unpopular defendants to full legal protection were academics. Id. at 146. Generally, members of the practicing bar refused to acknowledge publicly the "fallibility" of the judicial system. Id. Frankfurter, along with Llewellyn at Columbia and Charles C. Clark at Yale, openly criticized the trial and its outcome. Id. at 148. Auerbach notes that, far from being a "radical" position as their actions were characterized at the time their concern was with the integrity of the legal system and with their view of the lawyer's obligation to speak out on issues of great social importance. Id. This concern with social responsibility is consistent with the Realist view.

n125 Note, Bramble Bush, supra note 55, at 1673-74.

n126 See American Legal Realism, supra note 34, at 52 (noting that Llewellyn's progressive politics distinguished him from Holmes, and suggesting that the Realist movement was characterized by the "leftward political orientation" of its advocates).

n127 See supra notes 51-53 and accompanying text.

n128 Auerbach, supra note 39, at 177.

n129 See A Man's Reach xvii (Barbara F. Kristein ed., 1965) (In the Foreword, Justice William O. Douglas quotes from Lloyd Horace Fisher, The Harvest Labor Market in California 140 (1953), who described the "purge" and noted that the Democratic majorities in Congress refused to protect agricultural workers.); see also Auerbach, supra note 39, at 178 (Referring to the AAA purge, Auerbach notes that Frank's reputation was as the second most radical "lawyer-ogre" in the Roosevelt administration, after Frankfurter.).

n130 A Man's Reach, supra note 129, at xix.

n131 Id. at xx.

n132 Id.

n133 See, e.g., Jerome Frank, If Men Were Angels (1941).

n134 See A Man's Reach, supra note 129, at xx.

n135 Auerbach, supra note 39, at 166-79 (discussing attractions of public service for lawyers and law graduates during New Deal years and noting that for Jerome Frank, the tension created by the administration's emphasis on capitalism on one hand and social change on the other, was a source of stress).

n136 Id. at 167-73. Auerbach describes Frankfurter's joy over the extent to which able young lawyers assisted in the work of the New Deal, and notes that the true extent of Frankfurter's influence is difficult to pinpoint because of the heated claims his critics made at the time. Id. He notes that one critic described Frankfurter as "the most influential single individual in the United States." Id. at 170. However, Frankfurter, himself, played down the extent of his influence. Id. at 171. Auerbach lists among Frankfurter's "disciples" "Dean Acheson, Benjamin Cohen, Thomas Corcoran, Paul Freund, Alger and Donald Hiss, James Landis, David Lilienthal, Nathan Margold, and Charles E. Wyzanski, Jr." Id. at 171. Whatever the true extent of his influence, it is clear that Frankfurter's view of the importance of lawyers' role in public service, a position entirely consistent with the Realist school, served to encourage a number of very able lawyers to devote their efforts to working for the government.
n137 Id. at 169-70.

n138 Id. at 181. Auerbach notes that students from Harvard Law School led the exodus causing the wits of the time to say that "the most direct route to Washington was to go to Harvard Law School and turn left." Id.

n139 Id. at 189.

n140 See id.

n141 See generally Rowan, supra note 1.

n142 163 U.S. 537 (1896).


n144 Rowan, supra note 1, at 9-17. In litigating Briggs, Marshall enlisted the aid of Kenneth Clark, assistant professor of psychology at City College in New York City, to testify about experiments he had performed with black children using dolls that were identical in appearance except for the color of their skin one was black, one white. Id. at 14. He asked the children which doll was the best, which was the "nice" doll and which one was "bad." Id. Clark testified that the majority of the black children responded by identifying the white doll as the "nice" one and as the one they liked best. Id. A larger majority identified the black doll as the "bad" one. Id. at 14. Professor Clark's professional conclusion from these tests was that the African-American children were harmed by segregation, and that the injury was a lasting one. Id. 14-15. The NAACP team referred to this line of argument as the "stigmatic injury" argument. Id. at 11-12.

n145 Briggs, 98 F. Supp. at 538.

n146 Rowan, supra note 1, at 45.

n147 See id.

n148 Id. Rowan notes further that Marshall's application caused the president to draft a form letter to be sent to future black applicants, stating that the state maintained "Princess Anne Academy as a separate institution of higher learning for the education of Negroes." Id. Marshall later filed suit on behalf of another applicant against the state of Maryland, and proved in court that Princess Anne Academy "was really an unaccredited junior college whose faculty contained only one person with . . . [a] college degree." Id. at 52. The result of that case was a writ of mandamus, ordering the admission of the student in question, and the inception of the strategy that would ultimately result in the Brown decision. Id. at 52-53.

n149 Id. at 46.

n150 Id.


n152 See supra text accompanying note 1. Carl Rowan notes that Houston's influence on Marshall was profound: "[H]e banged our heads with his belief in dedication. . . . Houston instilled in you the idea that the state, the school, the professors were giving you something for nothing, and that you had to give something back." Rowan, supra note 1, at 46-47. Houston, a graduate of Harvard Law School, went so far as to arrange for Roscoe Pound, Dean of Harvard, to offer Marshall a fellowship to enable him to earn an advanced degree. Id. at 47. Marshall was so anxious to practice, however, that he did not accept Pound's offer and went into practice when he graduated in 1933. Id. at 47. Thus, his law school career spanned the most productive years of the Realist movement, and it is likely that Houston's Harvard connections kept him, and therefore his students, in touch with the scholars' work in that area.

n154 See, e.g., Murphy & Coleman, supra note 43, at 55.

n155 Id.

n156 Of course, not all CLS theorists would agree that their work needs a practical component. See Note, Bramble Bush, supra note 55, at 1682-86 (responding to this concern by analyzing each of the "three predominant methodological approaches" of the CLS advocates: "textual explication, social theory, and pure critique," and concluding that none of those methods allows the CLS advocates to achieve their goal of advancing their political vision, so that a "realistic reconception" is necessary).

n157 Hutchinson & Monahan, supra note 34, at 227 ("To retain credibility, sustain allegiance, and mobilize support, they must offer their own tangible vision of the 'good society.'").

n158 The student author of Note, Bramble Bush, supra note 55, takes a thoughtful approach to the effort to provide CLS with a context from which to affect legal theory. The Note proposes that CLS scholars should consider "social experimentation and inquiry" to create a "radical scholarship of practice." Id. at 1686. Among this author's specific suggestions are the development of "conflict-resolution mechanisms in which community members serve as arbitrators of neighborhood disputes," and the involvement of "total environments prisons, hospitals, or workplaces . . . in activities that would explore the possibilities for sustained social and political engagement." Id. at 1687. The result of these non-traditional exercises of legal scholarship, according to this student author, could be "a first step toward realization of a transformed social order." Id. at 1688.

n159 See Hutchinson & Monahan, supra note 34, at 230.

n160 Id. The authors describe Frug's plan as requiring the decentralization of the political system, with opportunities for small groups to experiment with new democratic forms. Id. (citing Gerald Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059, 1149-54 (1980)). The authors report that Klare's focus is on the creation of "democratic governance in the workplace." Hutchinson & Monahan, supra note 34, at 230 (citing Karl Klare, Critical Theory and Labor Relations Law, in The Politics of Law, supra note 84, at 65, 84).

n161 Unger, supra note 70, at 586. Hutchinson and Monahan describe the "grand style and sweep" of Unger's theory, summarizing his "structure of no-structure" and his creation of a system of rights designed to better protect the freedom of the individuals in society. Hutchinson & Monahan, supra note 34, at 232-33.

n162 Id. at 228-29.

n163 Id. at 229.

n164 Id.

n165 Id.; see Note, Bramble Bush, supra note 55, at 1682 ("By seeking the realization of a social order not accessible via traditional avenues of legal reform, the critical legal scholars place novel and troublesome demands on their scholarship.").

n166 Hutchinson & Monahan, supra note 34, at 238-40 & n.180 (noting the works in the discipline of psychology addressing the issues of autonomy and relationships).

n167 Id. at 240.

n168 Id. at 240-42 (analyzing sources in literature of psychology and noting that Unger is the only CLS theorist who has addressed the need for a theory of personality as an element of a successful CLS theory).
n169 Id. at 242.

n170 Id. The utility of this argument to the problems articulated by the CLS theorists is not clear. The influence of law on each person's understanding of social values will exist regardless of the level of personal autonomy achieved by that person. The manner in which a personality theory, attempting to describe the process by which an individual's development occurs, can resolve the value biases within social institutions is not apparent from the discussion in which it is proposed.

n171 See Gabel & Harris, supra note 84, at 370-71. Gabel and Harris explain that their efforts were an attempt to combine the work of the Conference on Critical Legal Studies, see supra note 72, with the work of members of the National Lawyers Guild. Id. They note that many of their practical suggestions arose from the efforts of Guild members. Id.

n172 See supra note 84 and accompanying text for a discussion of the importance of "rights-based" analysis in CLS theory.

n173 Gabel & Harris, supra note 84, at 376.

n174 Id. at 375. The authors state that efforts to achieve rights for clients should be subordinated to this more important goal, although they also note that practitioners should of course try to win their rights-based cases. Id.; see infra note 223 (concerning ethical obligations of lawyers in raising claims).

n175 Gabel & Harris, supra note 84, at 376.

n176 They offer as examples the "Chicago Eight" conspiracy trial, in which anti-Vietnam protestors were prosecuted by the federal government, and the defendants and their lawyers "openly flaunt[ed] the hierarchical norms of the courtroom and ridicul[ed] the judge," and two murder trials of a woman who killed three men who had raped her, in which her lawyer on retrial refused to follow the original lawyer's strategy of pleading "impaired consciousness" and instead proved that the victim's state of mind was reasonable at the time because of the emotional effect of rape on the victim. See id. at 380-84. The work of Robert Hayes, founder of the National Coalition for the Homeless, offers an example of this approach in action. Hayes, described as "the quintessential public interest lawyer of the 1980s," Robert Safian, Robert Hayes, Am. Law., Mar. 1989, at 138, "understands how to use litigation as a component of a larger advocacy effort." Id. at 142 (quoting Mitchell Bernard, a lawyer at the Natural Resources Defense Council).

n177 The authors describe a case in which members of a Latin community organizing group were arrested for selling the group's community newspaper on the streets of San Francisco's Mission District. Gabel & Harris, supra note 84, at 389-93. Rather than advise their clients to plea bargain, which would have resulted in a suspended sentence, the lawyers challenged the seizure of the newspapers on First Amendment grounds, sought to ensure that many community members were present during trial to elicit jury anxiety about the community, and focused their presentation to elicit evidence of the lack of foundation for the arrest and the racism and hostility of the police department toward the community group. Id. The result, according to Gabel and Harris, was that "the defendants felt a sense of power and truth because the political meaning of their actions had been presented and vindicated." Id. at 392.

n178 Id. at 396-408. They emphasize that the lawyer, in his or her traditional role as a trained expert, is a manifestation of the system itself, so they advise lawyers to maintain an emotional distance between themselves and their roles in the court processes. Id. at 401-02. They refer to this approach as a "position of simultaneous detachment and involvement." Id. at 402.

n179 Id. at 387-88. The authors also note that even where a court recognizes a new right, it could limit application of that right by using the technique of distinguishing future cases. Id. The effect of that approach, according to the authors, is to "reassert the hegemony of the dominant ideological framework." Id. at 388.
n180 See infra notes 206–18 and accompanying text.

n181 Gabel & Harris, supra note 84, at 369–70, 396.

n182 See infra Part V. Maria Foscarinis, founder of the National Law Center on Homelessness and Poverty, personifies the best of the progressive tradition. Foscarinis worked with Robert Hayes on the National Coalition for the Homeless until a personality dispute led her to break off and form the Center. Susan Baer, She Gave Up Wall Street to Find Justice, L.A. Times, Apr. 22, 1990, A, at 37. She described her decision to leave Sullivan & Cromwell and join the Coalition: "It seemed like an opportunity to put into effect the abstract notions I had about the purpose of being a lawyer . . . . It seemed to me that the law involves basic issues of social justice and what the world should be like. At the same time, it provides tools for having an impact in the real world. Ideally, it could be a means to combining those two." Id. Foscarinis believes that the issue of homelessness must be considered in the context of poverty, rather than on its own, a difference of opinion that led to her split with Hayes. Id. Both Hayes and Foscarinis, however, are powerful examples of what can be achieved by those with the desire to use law to create social reform.

n183 See generally Unger, supra note 70.


n186 Id. at B5.


n189 See Maureen Dowd, G.O.P.'s Rising Star Pledges to Right Wrongs of the Left, N.Y. Times, Nov. 10, 1994, at A1. Gingrich used the term in a pre-election press conference, describing his strategy as casting Clinton Democrats as "the enemy of normal Americans." Id. When his use of the word "normal" was challenged, Gingrich suggested "middle class" as a substitute. Id.


n191 Id.

n192 Id.

n193 Id. Pear cites the Constitution's use of the term "We, the People," rather than the citizens, in the preamble, and notes that the United States Constitution did not define United States citizenship until the passage of the 14th Amendment. Id.

n194 Dowd, supra note 189, at A1.

n195 Id. at B3.

n196 Id. Gingrich steadfastly maintained that government formerly fostered positive values: "Until the mid-1960's, there was an explicit long-term commitment to creating character. It was the work ethic. It was honesty,
right and wrong. It was not harming others. It was being vigilant in the defense of liberty.” Id.


n198 See id. at A1; see also Dowd, supra note 189, at B3.


n200 See Hutchinson & Monahan, supra note 34, at 221 (describing many advocates of CLS theories as "part of the revisionist wing of Marxism," and noting that CLS theorists "hope to chart and sail a hazardous middle course between orthodox Marxism and modern liberalism"); see also Gabel & Harris, supra note 84, at 371 (stating that "[t]he work of the Critical Legal Studies Conference is closely allied with the neo-Marxist social theory that has gained increasing influence in the United States and Western Europe since the rise of the New Left in the 1960's"); Minda, supra note 33, at 603 & n.15.

n201 In the context of introducing her analysis of rights and politics, Professor Elizabeth Schneider urges activists to resist the "current disillusionment with the use of law for social change." Schneider, supra note 84, at 592 & n.14.

n202 See supra notes 80 & 155 and accompanying text.

n203 Gabel and Harris point out the phenomenon of the loss of idealism among progressive practitioners in their article. See Gabel & Harris, supra note 84 at 369. Rather than connect it to the inherent irony in the CLS theories, however, they attribute it to the limited range of success available to a lawyer concentrating on gaining more rights for disenfranchised clients in the current legal system. Nevertheless, they offer some still-viable suggestions for ways in which to incorporate CLS concepts into practice. Id.; see supra notes 171-79 and accompanying text.

n204 See supra note 9.

n205 Some critics of the CLS theorists dismiss those who choose to practice traditional advocacy scholarship. See, e.g., Hutchinson & Monahan, supra note 34, at 238 n.174 (criticizing Paul Brest, CLS scholar, for "[s]urprisingly . . . seem[ing] content to engage in 'advocacy scholarship'").

n206 See, e.g., Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107 (1991); Buchanan & Trubek, supra note 109; Gabel & Harris, supra note 84; Goldfarb, supra note 71.

n207 See generally William L.F. Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ., 15 L. & Soc. Rev. 631, 633-34 (1980-81) (While discussing their study of the process of the emergence and transformation of disputes, the authors emphasize that for a dispute to reach the stage where legal action is contemplated, an "unperceived injurious experience . . . must be transformed into a perceived injurious experience.").

n208 Id.

n209 Id. at 635-36.

n210 Id. at 636. The authors also note that delay in responding by the responsible party may constitute a rejection for transformative purposes, just as a direct refusal may. Id.

n211 Id.; see id. at 646 (noting that the likelihood of transformation of a claim into a legal dispute is affected by the lawyer's response to a dispute presented to her, and that studies have shown that lawyers respond differently to
claims made by members of different socio-economic and ethnic groups).

n212 See Priority: Home!, supra note 10, at 12 (noting that homeless people participated in development of Clinton administration's action plan on homelessness because "no constituency has been more isolated from government processes than homeless Americans").

n213 Felstiner et al., supra note 207, at 635 (noting that asbestosis in shipyard workers became a legal issue only after the workers "stopped taking for granted that they would have trouble breathing after ten years of installing insulation and came to view their condition as a problem").

n214 Id. at 635 (The attribution of specific blame is distinguishable from "a complaint against no one in particular" or from "a mere wish unaccompanied by a sense of injury for which another is held responsible."); see White, The Real Deal, supra note 21, at 277-78 (discussing causes and characteristics of homelessness); see also id. at 278-79 (discussing need for studies of "chicken and egg relationship between individual vulnerabilities and spates of homelessness").


n216 See White, The Real Deal, supra note 21, at 271; see also Stephen Wizner, Homelessness: Advocacy and Social Policy, 45 U. Miami L. Rev. 387, 393 & n.41 (1990-91).

n217 Some cities have found that, when they make better living accommodations available to those who identify themselves as homeless, more people emerge from crowded living situations in order to take advantage of those opportunities. See Celia Dugger, New Rules Tighten Access to Shelter in New York City, N.Y. Times, Aug. 11, 1993, at A1. However, where the only alternative is life in a shelter or on the street, there is clearly no such appeal, suggesting that those who find themselves in that condition after leaving an unsatisfactory living arrangement, voluntarily or otherwise, are unlikely to see any possibility for redress from the person whose home they left. Felstiner's "claiming" process assumes, of course, that there would be some legal basis for the claimed injury to become a legal dispute. Felstiner et al., supra note 207, at 635-36. Here, too, the facts of homelessness indicate that the result might well be different.

n218 See Abbott, supra note 9, at nn.54-158 and accompanying text (discussing complexity of governmental systems and noting difficulties confronting homeless people, particularly substance abusers, in taking advantage of even the limited benefits available to them). Felstiner and his co-authors identify a number of variables that may affect the likelihood of completion of the transformation process. Felstiner et al., supra note 207, at 640-43. As applied to the homeless, many of these factors demonstrate why advocates for the homeless must overcome some primary obstacles even before reaching the point in the process at which clinicians generally encounter their disadvantaged clients, who have in most cases accomplished at least the "naming" and "blaming" part of the transformation process before they seek help. See, e.g., Alfieri, supra note 206, at 2109-10. For example, the authors suggest that the nature of the parties to a dispute will influence the likelihood of occurrence of transformation. Felstiner et al., supra note 207, at 640 (Involvement of the disputant with other groups, personal characteristics such as feeling of "rule-mindedness," and the relative status of the parties all affect transformation). For the homeless, who are often unconnected to support systems and not likely to live in an orderly, "rule-based" fashion, the dispute process may be inaccessible. See White, The Real Deal, supra note 21, at 277-78 (describing the homeless as likely to score low on elements of "affiliation" and "social support" that might help them to avoid homelessness in times of trouble). Moreover, the contention of Felstiner that transformation of injuries into disputes occurs most effectively when individual injuries are combined into group claims demonstrates another hurdle for homeless advocates. See Felstiner et al., supra note 207, at 644. Little such organization is possible among the homeless, most of whom are alone or with nuclear families and rarely can stay in one location for any substantial period of time. Lucie White recognized the nature of these problems encountered by people who are homeless when she wrote: Stated simply, if you are very poor and also sick or troubled, you are at risk of losing the roof over your head when the housing market gets tight. And once you are out in the cold, it is hard to get a job, stay healthy or sober, and keep in touch with your friends. White, The Real Deal, supra note 21, at 278; see id. at 291-92 (discussing inability of the poor to organize in order to gain access to policymaking process). Similarly, Felstiner and his co-authors suggest that
persons who blame themselves for the injury are less likely to take action than those who do not. Felstiner et al., supra note 207, at 641. For the homeless, among whom feelings of low self-esteem are common, this factor also mitigates against transformation. See Priority: Home!, supra note 10, at 27 (noting effect of unemployment, one of the root causes of homelessness, on self-esteem of those affected). The authors also describe "ideology," a "sense of entitlement to enjoy certain experiences and be free from others," as a relevant variable. Felstiner et al., supra note 207, at 643. Here, too, people who are homeless may be less likely to have access to the communications which can, according to the authors, create a sense of entitlement to certain levels of service or performance.

n219 See generally Joel F. Handler, Social Movements and the Legal System (1978) (detailing and comparing thirty-five case studies in which lawyers used the legal system to achieve social change in the areas of the environment, consumer rights, civil rights and social welfare, and concluding that the likelihood of direct success depends on the bureaucratic barriers in place, but that indirect success from litigation may be harder to measure); see also Robert L. Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 Stan. L. Rev. 207 (1976) (examining the history of public interest law reform efforts, focusing on the early activities of the ACLU and the NAACP Legal Defense Fund and the more recent litigation efforts of the Sierra Club Legal Defense Fund and the Natural Resources Defense Council, arguing that litigation as a tool for social reform lacks effectiveness without ongoing follow-up and monitoring because of the diffuse authority and decision-making power of the governmental agencies against whom such suits are typically directed). Professor Rabin also notes, however, that litigation can be effective as a "pedagogical tool" even where the direct effects of the litigation are not immediate. Id. at 252-53.


n222 New York is one of seventeen states whose constitution has been so interpreted. See N.Y. Const. art. XVII, 1. For a comprehensive analysis of the state laws affecting the homeless, see Langdon & Kass, supra note 220, at 362-91 app. (providing a 50-state survey in the Appendix).

n223 See, e.g., Martha Minow, Law and Social Change, 62 U. Mo. K.C. L. Rev. 171, 173 (1993) [hereinafter Minow, Social Change] (noting that even cases like Brown v. Board of Education, 347 U.S. 483 (1954), and Roe v. Wade, 410 U.S. 113 (1973), as influential as they were, arose from wide-ranging efforts rather than from individual situations). But see Gerald N. Rosenberg, The Hollow Hope (1993). It is also important to keep in mind that a lawsuit which is identified by a court as frivolous could subject the lawyer to liability under Federal Rule 11. See Fed. R. Civ. P. 11. Rule 3.1 of the ABA Model Rules of Professional Conduct requires that lawyers make only "Meritorious Claims and Contentions." Model Rules of Professional Conduct Rule 3.1 (1994). However, Comment 2 to Rule 3.1 notes that a claim is not frivolous "even though the lawyer believes that the client's position ultimately will not prevail." Id. at Rule 3.1 cmt.2. The Rule states that "a good faith argument for an extension, modification or reversal of existing law" is not frivolous. Id. at Rule 3.1.


n225 See Gabel & Harris, supra note 84, at 394-95 n.40 (The authors describe the efforts of a lawyer seeking to improve living conditions in a farm labor camp. They note that the lawyer insisted on conducting depositions of the camp operators in front of the tenants so that they would see the operators as vulnerable to aggressive challenges; although the legal effort failed in court, the tenants organized to achieve the changes they had sought.).
n226 See, e.g., Palmieri v. Cuomo, 170 A.D.2d 283 (N.Y. App. Div. 1991); Callahan v. Carey, No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981). A Connecticut case represents a graphic example of the positive and negative aspects of this approach as a remedy for homelessness. Advocates for the homeless in New Haven, Connecticut filed suit against the City of New Haven when it attempted to close an emergency shelter providing space for men during the winter. Hilton v. City of New Haven, No. CV NH89-3165 (Conn. Super. Ct. Dec. 27, 1989). Citing statutory provisions concerning the state's obligation to provide for the indigent, the trial court ordered the City to keep the shelter open and to provide shelter for those in need. Id. Apparently in response to this ruling, the Connecticut legislature amended the state statute to substantially limit the class of persons for whom the state, through its municipalities, would provide shelter. The advocates filed a Motion for Reconsideration, asking the trial court to rule that the state had a constitutional obligation to provide shelter and asking for a ruling that the City was not in compliance with its obligations under the revised statutory scheme. Hilton, 1992 WL 389821, at *1. The court ordered the City to comply with the statutory scheme and ruled that the state constitution did impose an obligation to provide shelter. Id. The Connecticut Supreme Court affirmed the trial court's ruling with respect to the City's obligation to comply with the statutory provision, but held that the trial court was incorrect on the constitutional point. Hilton v. City of New Haven, 661 A.2d 973, 984, 986 (Conn. 1995). The Court cited Moore v. Ganim, 233 Conn. 557 (1995), a companion case to Hilton, in which the Court ruled that the state constitution did not provide a right to subsistence assistance for state residents. Id. at 984. Thus, the lawsuit filed by advocates in an attempt to improve the lot of the homeless of New Haven did succeed in forcing the City to provide shelter for a few, but also succeeded in focusing the public debate to the extent that the state legislature changed the laws to limit those eligible.

n227 See supra note 84 and accompanying text.

n228 See, e.g., Jane E. Larson, Introduction: Third Wave Can Feminists Use the Law to Effect Social Change in the 1990's?, 87 NW. U. L. Rev. 1252, 1254 (1993); McDougall, Lawyering, supra note 224, at 377 (arguing that litigation should be used in concert with administrative and legislative advocacy); Minow, Social Change, supra note 223, at 175 (noting that advocates for women's rights created "an alternative legal regime" as a result of their efforts to change the laws).

n229 See Minow, Social Change, supra note 223, at 175. Noting that advocates for women's rights encouraged the passage of a wide range of legislation, including "child labor laws, creation of juvenile courts, sanitation regulations and women's suffrage." Professor Minow argues that the production of this "alternative legal regime" should be the goal of activists in other areas. Id. As an example of a current activity in a similar vein, Minow notes that formerly battered women have created privately financed shelters and have used those shelters as a base from which to seek laws prohibiting domestic violence. Id. Professor Minow sees this as an alteration or expansion of the meaning of law. She notes, "[l]aw is also the practices of governance and resistance people develop behind and beyond the public institutions. These practices may alter formal, public law; they also alter the meaning and shape of law and provide a potentially rich context for social change." Id. at 176.

n230 See, e.g., Gabel & Harris, supra note 84, at 373.

n231 See supra notes 28–32 and accompanying text.

n232 See Abbott, supra note 9, at 5–6 nn.21–29.

n233 McDougall, Lawyering, supra note 224, at 376–77.

n234 See Abbott, supra note 9, at 9–29 (describing the wide range of federal benefit programs that advocates for the homeless have accessed, and noting the complexity of the system and the difficulties presented by the intricacies of the bureaucracies).

n235 Federal treatment of the Legal Services Corporation ("LCS") is perhaps the clearest example of the problems facing those attempting to use the legal system to aid those in need. The Legal Services Corporation was created in 1974 to provide legal services for the poor. Stephen Labaton, Back From the Brink, the Legal Services
Corporation Discovers It's in Danger Again, N.Y. Times, Mar. 31, 1995, at A28. The LSC was targeted by the Reagan Administration, which proposed to eliminate it entirely and to replace it with block grants to the States. Angel Castillo, Legal Services Lawyers Decry Plans to Halt Funds, N.Y. Times, Mar. 14, 1981, at A27. The LSC survived these attempts, and arrived in 1994 with high hopes for the future under a sympathetic President. However, Congress now proposes that the LSC be limited or even abolished, with the members of local bar associations making up the difference as pro bono volunteers. Labaton, supra, at A28. Under current funding, LSC provides one lawyer for every 6,000-7,000 people, as compared with one lawyer for 300 in the private sector. Id. Thus, LSC lawyers are unable to help the vast majority of those who seek their assistance.

n236 See Buchanan & Trubek, supra note 104, at 691 (listing "collaboration" as one of the "central tenets of the critical lawyering vision").

n237 Gabel & Harris, supra note 84, at 409 & n.61.

n238 Id. at 408-09.

n239 White, The Real Deal, supra note 21, at 309-11.

n240 Id. at 310.

n241 Id.

n242 Id. at 299-300; see also Safian, supra note 176, at 140 (describing Hayes' use of media both as a "tool for education and pressure," as he described it, and as a means to spur his litigation efforts).

n243 White, The Real Deal, supra note 21, at 299 (noting the numbing effects of constant media bombardment with images of the homeless).

n244 Id; see also id. at 295 (White describes the backlash and the advocates' response to the backlash which was to change the emphasis of their activism to families, "surely a group of indisputable moral worth."). Advocacy groups also began to notice the "backlash" of which Professor White speaks early in the 1990s, as the public began to tire of the seemingly unsolvable problem and cities and states acted to bar the homeless from public places and to cut homeless aid programs. Jason DeParle, Homeless Advocates Debate How to Advance the Battle, N.Y. Times, July 8, 1990, at A14.

n245 White, The Real Deal, supra note 21, at 297-98.


n247 Id. at 750. See generally Mullins, supra note 27 (analyzing the experiences of battered women and discussing obligation of government to prevent battered women from becoming homeless when they leave their abusive spouses).

n248 Minow, Breaking the Law, supra note 246, at 750.

n249 Id. at 751. Professor Minow also points out that participants gain strength from interacting in settings "where people can speak to one another without having to abide by conventions they did not themselves create." Id. at 750; see Mullins, supra note 27, at 251-53 (reviewing efforts of programs, in some cases made up of women who were victims of domestic violence, directed at providing long-term housing for homeless women with children). Of course, the battered women's movement may not be an appropriate model for those seeking to fight homelessness. Much of the movement's impetus came from the fact that many of the victims were middle class, rather than destitute, which gave the movement a resonance with the public that the cause of the homeless may not share.
n250 This idea is consistent with the "radical scholarship of practice" proposed in Note, Bramble Bush, supra note 55, at 1687 (advocating "situationally specific social involvement" by scholars as a means of enhancing opportunities to study CLS ideas in practice).


n252 The fact that many of the homeless are suspicious of government in general might lead activists to focus their efforts on privately-run shelters rather than those established by state or city governments.

n253 Gabel & Harris, supra note 84, at 408. The authors go on to recommend that the lawyer "perceiv[e] every social conflict that gives rise to a legal proceeding as an opportunity for both her client and herself to develop a sense of interpersonal power through overcoming the alienation and powerlessness that normally envelops them both in their daily routines as private citizens." Id.

n254 Most of the law firms participating in the work of the National Coalition for the Homeless, for example, have done so by providing lawyers to file suits. See Top-Tier Firms Helping the Homeless, Manhattan Lawyer, Aug. 23, 1988, at 9 (discussing relationship between Manhattan's top firms and the advocacy efforts of Robert Hayes and the Coalition).

n255 See, e.g., Gabel & Harris, supra note 84, at 408.

n256 See, e.g., Buchanan & Trubek, supra note 104, at 694–700, 703 (relating story of pro bono collaboration between lawyer and client, and emphasizing the lawyer's rejection of the traditional lawyer-client relationship in favor of a more peer-level style of interaction); see also Lucie E. White, Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice, 1 Clinical L. Rev. 157 (1994).

n257 See Hilton, 661 A.2d at 984, 986.