

Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions

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ENACTMENTS OF POWER: NEGOTIATING
REALITY AND RESPONSIBILITY IN
LAWYER-CLIENT INTERACTIONS

William L.F. Felstiner † & *Austin Sarat* ††*

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INTRODUCTION

The view that social relations are constructed and power is exercised through complex processes of negotiation is now widely

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shared.¹ While the dynamics of power and negotiation are always uncertain and difficult to chart, most contemporary theorists no longer assert either that "society is . . . an association of self-determining individuals"² or that social action is epiphenomenal and determined by underlying structural realities.³ They realize that power is always "involved institutionally in processes of interaction."⁴ In the past the effort to understand power oscillated between the antinomies of structure and action.⁵ Today, every variety of theory recognizes that "notions of action and structure *presuppose one another*."⁶

Social structure is no more than patterns of behavior generated and re-generated through negotiations in people's daily lives.⁷ However it may appear to people subject to it, social structure is produced and maintained through human action. Neither social structure nor the power associated with it can be external to human interaction or abstracted from the practices of everyday life. To the contrary, both are encoded in seemingly uneventful and routinized

¹ See, e.g., PETER L. BERGER & THOMAS J. LUKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 30-32, 119 (1966); STANFORD M. LYMAN & MARVIN B. SCOTT, *THE DRAMA OF SOCIAL REALITY* 106-11 (1975); Thomas J. Scheff, *Negotiating Reality: Notes on Power in the Assessment of Responsibility*, 16 *SOC. PROBS.* 4 (1968).

² Robert Paul Wolff, *Beyond Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 3, 5 (1965).

³ See CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (1968); INO ROSSI, *THE UNCONSCIOUS IN CULTURE* 16-21 (1974).

⁴ ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY* 88 (1979).

Giddens adds, "[e]ven a casual survey of the massive literature concerned with the concept of power and its implementation in social science indicates that the study of power reflects the same dualism of action and structure that I have diagnosed in approaches to social theory generally."

Id.; see also STEPHEN LUKES, *POWER, A RADICAL VIEW* 21-23 (1974) (arguing that other conceptions of power are inadequate because of their "association of power with actual, observable conflict").

⁵ Giddens describes these antithetical views: "Social systems are produced as transactions between agents, and can be analysed as such on the level of strategic conduct. . . . Institutional analysis, on the other hand, brackets action, concentrating upon the modalities as the media of the reproduction of social systems." GIDDENS, *supra* note 4, at 95.

⁶ *Id.* at 53. Giddens defines action "as involving a 'stream of actual or contemplated causal interventions of corporeal beings in the ongoing process of events-in-the world. . . ." *Id.* at 55. In contrast, "'structure' refers to 'structural property,' or more exactly, to 'structuring property,' structuring properties providing the 'binding' of time and space in social systems. Structures exist paradigmatically, as an absent set of differences, temporally 'present' only in their instantiation, in the constituting moments of social systems." *Id.* at 64.

⁷ For an interesting case study of this process, see LAWRENCE ROSEN, *BARGAINING FOR REALITY: THE CONSTRUCTION OF SOCIAL RELATIONS IN A MUSLIM COMMUNITY* 165-69 (1984).

experiences.⁸ It is because of this presence in every social situation that structure and power are vulnerable to major changes of practice.

Although structure and power are created through ordinary action in ordinary circumstances, past practice as it is embedded in history and habit limits the choices that can be made. While people work out the terms of their interactions daily, they do not begin with a clean slate each day or in each situation; within any setting there is a limited number of available moves. Consider the situation of teacher and student or employer and employee at the beginning of any ordinary day. Hierarchical relationships, routine divisions of labor, and parochial practices will generally dictate who exercises what kinds of authority over what kinds of matters, who will do what and how each of the participants will feel about the day's tasks. The student will not question the lesson plan or the teacher's prerogative to evaluate student performance; the employee will not openly resist the day's assignment or the employer's prerogative to say when a job is ready for delivery to a customer.

However, over long stretches of time these exercises of hierarchical control may be resented and resisted in minor and subtle ways. Or in an abrupt fashion they may be overtly and definitively challenged. When we next examine these relationships, if we find that lesson plans are negotiated and teacher performance is evaluated by students and that employees have control over work assignments as long as certain end goals are met, we see that structure has changed and power is reallocated although no revolution has been proclaimed and no general notice may have been taken.⁹

Whatever the form of these interactions, the social phenomena that occur are negotiated. If this negotiation is not explicit, it is carried on through the exercise of power and attempts at resistance and subversion.¹⁰ Surprisingly, a review of the empirical literature on the lawyer-client relationship hardly suggests that lawyers and clients negotiate relationships, or that they enact the structure and meaning of professionalism and professional power through negotiation. The literature portrays professional practice as dominated by the lawyer or the client, depending on who has superior status or resources, or as split into rigidly defined spheres of influence, with

⁸ "Analysis shows that a relation (always social) determines its terms, and not the reverse, and that each individual is a locus in which an incoherent (and often contradictory) plurality of such relational determinations interact." MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* xi (1984).

⁹ ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

¹⁰ See JEAN COMAROFF, *BODY OF POWER, SPIRIT OF RESISTANCE: THE CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE* (1985); JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE* (1990).

clients autonomously defining goals and lawyers determining the means to achieve them.¹¹

In this paper we challenge these views. After studying the enactments of power in lawyer-client interactions in divorce,¹² we find that these interactions run with the great tide of social life rather than counter to it. Power in these interactions is a complicated phenomenon that, over time, is constructed and reconstructed so that its possession is neither necessarily obvious nor rigidly determined. Indeed, it is probably more accurate to say that power is not possessed at all. Power is mobile and volatile, and it circulates such that both lawyer and client can be considered more or less powerful, even at the same time.¹³ Even to describe power as an "it" implies more of an independent existence than we intend. It is better, perhaps, to view it as a dimension of relationships rather than a resource under someone's control.

In the traditional ideology of professionalism, professionals maintain control over the production of services.¹⁴ But in the cases that we observed, the delivery of professional service instead involved complex processes of negotiation between lawyer and client; processes in which we saw resistance as well as acquiescence, contest as well as cooperation, suspicion as well as commitment. These cases indicate that the services provided by lawyers to clients are contested and negotiated in the stream of interactions that constitute the professional relationship, and that the content and contours of the interaction vary considerably from case to case, and from moment to moment within cases.¹⁵

In this article we first discuss conventional views of power in lawyer-client relations. We then summarize our contrasting view of

¹¹ See *infra* notes 16-21 and accompanying text.

¹² In the research on which we base our analysis, we observed divorces over a period of thirty-three months in two sites, one in Massachusetts and one in California. We followed one side in forty cases, ideally from the first lawyer-client interview until the divorce was final. We followed those cases by observing and tape-recording lawyer-client sessions, attending court and mediation hearings and trials, and interviewing both lawyers and clients about those events. We observed one hundred fifteen lawyer-client conferences and conducted an equivalent number of interviews. For a more complete description of the research strategy, see Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 94-99 (1986).

¹³ We think this is one lesson that can be drawn from Lucie White's analysis of the case of Mrs. G. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

¹⁴ See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 10-15 (1989).

¹⁵ Our view of power differs significantly from the view prevailing in most literature on the legal profession. Heinz, for example, believes that the crucial distinction in the lawyer-client relationship is whether lawyers have the power to modify their clients' goals and that the lawyer's control over tactics and techniques is both assumed and irrelevant. See John P. Heinz, *The Power of Lawyers*, 17 GEO. L. REV. 891, 897 (1983).

power, which we illustrate through divorce cases. We develop our view in two important arenas of lawyer-client negotiation: what we call the "negotiation of reality," or the search for goals; and the "negotiation of responsibility," or the search for control over case progress and division of labor. Next, we describe the enactment of power in both of these areas through analysis of an illustrative case history. Finally, we estimate the extent to which our view of the negotiation of power in divorce cases is relevant to more technical and rule-centered areas of legal practice.

I

CONVENTIONAL VIEWS OF POWER IN LAWYER-CLIENT RELATIONS

The predominant image of the lawyer-client relationship is one of professional dominance and lay passivity.¹⁶ The lawyer governs the relationship, defines the terms of the interaction, and is responsible for the service provided. The client, in contrast, is the consumer of a service whose quality is difficult to evaluate.¹⁷ Studies of a wide range of legal situations and types of legal practices bolster this image. For example, Hunting and Neuwirth, writing more than thirty years ago, found that the majority of litigants in automobile accident claims in New York City had no idea what their lawyers were doing in their cases and had no say in when to settle or how much to accept.¹⁸ Legal services lawyers studied by Hosticka rarely even asked their clients what they wanted them to do.¹⁹ Such lawyers habitually engage in maneuvers that "exploit and reinforce client dependency on the lawyer's specialized knowledge and technical skill."²⁰ Kritzer's review of a national survey of lawyers and clients

¹⁶ See ZENON BANKOWSKI & GEOFF MUNGHAM, *IMAGES OF LAW* 111 (1976); HOWARD S. BECKER, *The Nature of a Profession*, in *SOCIOLOGICAL WORK* 96-97 (Howard S. Becker ed., 1970); TERENCE J. JOHNSON, *PROFESSIONS AND POWER* 53 (1972); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2463, 2465 (1989); Heinz, *supra* note 15, at 892.

¹⁷ On the idea of client as consumer, see Rick S. Carlson, *Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come*, 11 *LAW & SOC'Y REV.* 287 (1976); Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 *LAW & SOC'Y REV.* 247 (1976); see also John Griffiths, *What Do Dutch Lawyers Actually Do In Divorce Cases?*, 20 *LAW & SOC'Y REV.* 135, 155 (1986) (finding that "clients make a fairly passive impression, asking few questions, showing little interest in the procedural and legal aspects of their divorce, and manifesting little inclination to use legal strategies in their conflict with their spouse.").

¹⁸ ROBERT HUNTING & GLORIA NEUWIRTH, *WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS* 107-09 (1962).

¹⁹ See Carl Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 *SOC. PROBS.* 599, 604 (1979).

²⁰ Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2132 (1991).

in litigated cases found low client involvement in case development and strategy.²¹ From these studies one might think that contemporary lawyers fulfill Bakunin's 19th century prediction about scientific intelligence, namely, that it would lead to an aristocratic, despotic, arrogant and elitist regime.²²

Indeed, even where clients are involved in the management of their own cases, their involvement often is limited. Thus, Rosenthal's notion of a high level of client participation in personal injury litigation is confined in its interactive dimensions to expressing special concerns and making follow-up demands for attention.²³ Lawyers resent and resist the few clients who take an active role in their cases, considering them hostile and problematic rather than helpful and persistent.²⁴ In the conventional wisdom, people have "problems" and experts have "solutions."²⁵

There is, however, a less polemical view, one that is more reliable as a general view of the profession because it is more sensitive to context.²⁶ Spangler, for example, reports that private practitioners and corporate counsel are less likely to dictate action to their clients than are legal services lawyers.²⁷ Heinz and Laumann recognize that there is considerable variation, by area of law, in the practice characteristic they term "freedom of action,"²⁸ a notion reflecting the lawyer's unilateral power to decide on strategy and operate free of close client supervision.²⁹

While these scholars see variation in enactments of power by area of practice, others have found it on a case-by-case basis.³⁰ Still

21 HERBERT KRITZER, *THE JUSTICE BROKER: LAWYERS & ORDINARY LITIGATION* 66 (1990).

22 See CHARLES DERBER ET AL., *POWER IN THE HIGHEST DEGREE: PROFESSIONALS AND THE RISE OF A NEW MANDARIN ORDER* 5 (1990).

23 See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 33 (1974).

24 See Hosticka, *supra* note 19, at 607.

25 IVAN ILLICH, *DISABLING PROFESSIONS* 11 (1978).

26 See HUBERT J. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 3 (1963).

27 See EVE SPANGLER, *LAWYERS FOR HIRE* 166-67, 170 (1986).

28 See JOHN HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 108-09 (1982).

29 See *id.* at 104. The comparative aspect of the Heinz and Laumann findings must be treated with some care, since the data are two steps removed from actual behavior. Heinz and Laumann did not observe lawyers exercising "freedom of action"; nor did they interview lawyers or their clients about what went on between them. Instead they used a panel of law professors and social researchers to rate this characteristic for thirty fields of service. See *id.* at 30.

30 See Maureen Cain, *The General Practice Lawyer and the Client*, 7 INT'L J. SOC. LAW 331 (1979). Cain notes that the array of power between lawyer and client varies from client to client: the solicitors she observed adopted their clients' goals as the given agenda unless they had a conflict of interest or the clients exhibited unreal expectations. *Id.* at 342-51. Macaulay's careful analysis of the range of transformative effects that lawyers have on clients' goals contrasts with the picture presented by Cain. See Stewart Macau-

other researchers find power distributed between lawyer and client according to task.³¹ Finally, other analysts suggest that power in the professional relationship directly reflects control over resources. Thus Flood, having observed the history of two lawsuits in his ethnographic study of a large Chicago law firm, suggests that the allocation of power between lawyer and client depends on whether clients are likely to produce repeat business or pay fees that command attention.³² Abel is perhaps the strongest proponent of this view. He argues that corporate clients are typically the "dominant"

lay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979). It is unclear whether the difference reflects differences in American and British practice or differences in the sensitivity of legally trained and lay observers. The low frequency of clients exhibiting "inappropriate" behavior in Cain's data suggests that the cases she observed were considerably more straightforward than those generally encountered by American lawyers. In the same vein, Bottoms and McClean find that the extent of participation of criminal defendants in their cases varies by culture, personality and ideology. See ANTHONY E. BOTTOMS & J.D. MCCLEAN, DEFENDANTS IN THE CRIMINAL PROCESS 69, 232 (1976).

O'Gorman's role division into counselors and advocates implies a correlative active or passive part in devising client goals and tactics. See O'GORMAN, *supra* note 26, at 132, 134. He sees a causal relationship, dependent on degree of specialization, between professional security and tolerance of client direction. The less secure the lawyer, the greater the control he (almost all of his subjects were men) is willing to cede to the client. *Id.* at 145.

³¹ Reminiscent of Johnson's distinction between defining needs and the manner of fulfilling them, work on large law firms indicates that even though corporations set goals and policy independent of lawyer influence, lawyers have a major say in tactical matters. Moreover, Rueschemeyer believes that American lawyers are more closely in tune with their clients' orientations than are continental lawyers whose roles are explicitly defined and whose personal contact with clients is less frequent. See JOHNSON, *supra* note 16, at 46-47; ROBERT L. NELSON, PARTNERS WITH POWER 264 (1988); SPANGLER, *supra* note 27, at 60-61, 64. See also DIETRICH RUESCHEMEYER, LAWYERS AND THEIR SOCIETY 112 (1973).

³² See John A. Flood, *Anatomy of Lawyering: An Ethnography of a Corporate Law Firm* 386-90 (1987) (unpublished Ph.D. dissertation, Northwestern University (Evanston)). In a similar vein, Olson summarizes studies that find client participation in several countries to vary directly with their socio-economic status. SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS 131-35 (1984). See SUSAN R. THOMAS BUCKLE & LEONARD G. BUCKLE, BARGAINING FOR JUSTICE: CASE DISPOSITION AND REFORM IN THE CRIMINAL COURTS 25 (1977); JOEL E. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 25 (1978); O'GORMAN, *supra* note 26, at 58-59; ROMAN TOMASIC, LAWYERS AND THE COMMUNITY 99 (1978); John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 295-96 (1979); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 28-38 (1967); William L.F. Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOC'Y REV. 321 (1979). But see JEROME CARLIN, LAWYERS' ETHICS 166 (1966) (lawyers with low-status clients are subject to more client pressures to violate ethical norms); FRANK SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLICIES OF CHURCH AND STATE 155 (1976) (factors other than socio-economic status important in explaining client participation in church-state litigation); Jack Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes*, 13 LAW & SOC'Y REV. 447 (1979) (suggests significance of crime type in explaining client participation in plea bargaining).

actors in lawyer-client relationships, while solo and small-firm practitioners "dominate" their clients.³³

Two things should be noted about conventional views of power in lawyer-client relationships. First, these views are basically structural: they suggest that power varies by status, economic resources, field of law, or the vagaries of particular clients.³⁴ Second, they treat power as a "thing" possessed at one time or another by one of the parties to a lawyer-client relationship. As we see it, power in lawyer-client interactions is less stable, predictable, and clear-cut than the conventional view holds. Power is not a "thing" to be possessed; it is continuously enacted and re-enacted, constituted and re-constituted. The enactments and constitution are subtle and shifting; they can be observed only through close attention to the microdynamics of individual lawyer-client encounters.

II

ENACTMENTS OF POWER IN DIVORCE CASES

In the divorce lawyer's office two worlds come together:³⁵ the legal world for which the lawyer speaks and to which he provides access³⁶ and the social world of the client, beset with urgent emotional demands, complex and changing relationships, and unmet financial needs.³⁷ Just as the legal world appears arcane and ritualized to the uninitiated, the world of the client is one to which the lawyer has access in only a limited, very mediated way. When lawyer and client interact, each confronts, in the world the other inhabits, something new and opaque, yet something of indisputable relevance to their relationship.

To each, the hidden world of the other becomes known mostly through reciprocal accounts.³⁸ This means that lawyer-client interaction is a process of story-telling³⁹ and interrogation in which law-

³³ See RICHARD ABEL, *AMERICAN LAWYERS* 204 (1989).

³⁴ The picture of client participation is composed of conflicting as well as convergent strands for two very different reasons. The people whose behavior is analyzed are very different personally, demographically, and institutionally from each other. The other reason that the picture of lawyer-client interaction is so varied is that the data come from such different sources. The ability to identify and comprehend the content of dyadic relationships like those between lawyers and clients varies widely when the information is secured through national surveys, structured interviews, open-ended interviews, telephone interviews, mail questionnaires, case studies, file reviews, participant-observation, or longitudinal observation.

³⁵ See Griffiths, *supra* note 17, at 152-55.

³⁶ See Austin W. Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *YALE L.J.* 1663, 1671-84 (1990).

³⁷ See Sarat & Felstiner, *supra* note 12, at 117-24.

³⁸ Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 *AM. SOC. REV.* 46 (1968).

³⁹ For an interesting discussion of the value of attending to stories in the legal process, see Kim L. Scheppele, *Foreword, Symposium of Legal Storytelling*, 87 *MICH. L. REV.*

yer and client seek to produce for each other a satisfying rendition of her distinctive world. What each accepts as "real" in the these accounts is negotiated, implicitly as well as explicitly, and frequently transformed over the course of their interaction.⁴⁰ Negotiating a version that overlaps and is treated as a joint product is essential if lawyers and clients are to construct a mutually tolerable story that is likely to be persuasive to the other side or to a judge.

Making a landfall in the treacherous waters of each other's world can be a threatening experience for both lawyers and clients. In the world of law, unknown rules and people operating in forbidding surroundings and through alien processes can influence or decide matters of great moment to clients: child custody, the rights of a non-custodial parent, the disposition of the family home, the division of property and income. In the social world of the client, the lawyer's professional skills may be severely tested by the client's guilt about marriage failure, unresolved feelings for the spouse, continuing and often irritating disputes over children and money, or by a new relationship whose relevance to the divorce may not be acknowledged.⁴¹ Even when the lawyer tries to keep it at bay, the social world of the client is continually present.⁴²

For both lawyer and client the stakes are high in what the other knows and reveals. While the client must rely on the lawyer's legal experience, the lawyer is largely dependent on the client's interpretations of her social world. For both, motives, goals and data may be suppressed by plan or inadvertence.⁴³ Each may consciously adopt a narrative style and rules of relevance that limit what the other can assimilate.⁴⁴ They may each say both more and less than they intend as they explain what they want the other to know.

Although lawyers and clients are highly dependent on each other, the stories they tell about their interactions are tales of suspicion and doubt. Clients are suspicious about the depth of commitment lawyers bring to their cases and their own ability to control the content and timing of their lawyers' actions. They worry about lawyers who are too busy to attend fully to the idiosyncracies of their cases, and about divided loyalties, competence, judgment and per-

2073 (1989); see also LANCE BENNETT & MARTHA FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* 3 (1981).

⁴⁰ See Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737 (1988).

⁴¹ See JANET JOHNSTON & LINDA CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 102 (1988); CATHERINE RIESSMAN, *DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS* 121-22 (1990).

⁴² Sarat & Felstiner, *supra* note 40, at 744-52.

⁴³ Erving Goffman, *The Nature of Deference and Demeanor*, 50 *AM. ANTHROPOLOGIST* 473 (1956); SCOTT, *supra* note 10, at 4-5.

⁴⁴ See Cunningham, *supra* note 16, at 2491; White, *supra* note 13, at 21-32.

sonality. Lawyers, on the other hand, are concerned because they have to deal with and depend on people who are likely to be emotionally agitated, in the midst of a profound personal crisis, ambivalent about divorce, determined to hurt their spouse, and misguided about what they can expect from the divorce process.⁴⁵

These concerns lead to responses that themselves produce secondary problems. Lawyers worried about the emotional instability of their clients often appear hyper-rational, detached, disloyal, and callous.⁴⁶ Clients, put off and alienated by such appearances, appear even more unstable and unpredictable to their lawyers. Lawyers worry about distortions introduced into client accounts and attempt to test client stories without expressing overt skepticism.

Recognizing this combination of mutual dependency and suspicion has enormous, and previously unexamined, consequences for the way scholars understand the exercise of power in lawyer-client relations. In the standard analysis of the profession, lawyers are presented either as agents moving tactically toward their clients' clearly expressed goals, as principals paternalistically operating in accordance with their sense of the clients' best interests, or as opportunists using the clients' cases to work out their own agendas.⁴⁷ Given these very different images of lawyers, it is natural to pose Rosenthal's well-known question, "Who's In Charge?"⁴⁸ However, asking "who's in charge" implies both that a single, stable answer can be provided, and that the possessor of power can be clearly identified.

We think that neither is the case. Both lawyers and clients are sometimes frustrated by feelings of powerlessness in dealing with the other,⁴⁹ and such feelings must be taken seriously. Often no one may be in charge. Interactions between lawyers and clients involve as much drift and uncertainty as they do direction and clarity of purpose. It may be difficult, at any one moment, to determine who, if anyone, is defining the objectives, determining strategy, or devising tactics.

Power in lawyer-client relationships would not be so ambiguous if it were just an attribute of position, or if it could be captured by attending simply to offices, roles and forms. Whether in lawyer-client interactions or elsewhere, however, power does not exist outside of particular social interactions. It is always generated from

⁴⁵ See Sarat & Felstiner, *supra* note 12, at 105-07, 117-20.

⁴⁶ See Griffiths, *supra* note 17, at 148-49.

⁴⁷ For two different images, see JONATHAN CASPER, *LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957-66* at 194 (1972); DERBER ET AL., *supra* note 22, at 140.

⁴⁸ See ROSENTHAL, *supra* note 23.

⁴⁹ See White, *supra* note 13.

the inside in a continuing series of situated assertions and rejoinders, by claims and responses to those claims, and by particular gestures and the resistance those gestures provoke.⁵⁰ It is not like a tool sitting on a shelf, waiting to be picked up and applied to the task at hand. Power, rather, is enacted and constituted moment-by-moment. It is seen in indirect moves and sleights-of-hand, in ruptures and ellipses, and in what is left unsaid and unacknowledged as well as in forceful, continuous and overt assertion.⁵¹

Power is continuously produced in the regular and apparently uneventful routines and practices that comprise most social interactions. But it is also conditioned by the cultural resources that particular lawyers and clients bring to their relationships. Even when it seems robust and irresistible, power may be fragile and contested.⁵² Each of the social interactions through which power is constituted has its own distinctive history and its own particular future. In this sense power is always created anew and, like any newborn, its progress and outcome is uncertain.

The malleability of power, however, does not mean that the respective positions of lawyer and client are decided by a coin toss, or that they are open to limitless development at the start of every session. Lawyer-client interaction always occurs in the space of law.⁵³ For the lawyer, this means that interaction takes place in a familiar space, a space of privilege. The books on the lawyer's shelves are books the lawyer has read or knows how to read; the language spoken is a language in which lawyers are trained and with which they are comfortable; the rituals performed give special place to the lawyer even as they are forbidding and unwelcoming to the uninitiated. Thus, following de Certeau's formulation, lawyers are able to act "strategically" in relation to their clients; that is, they act "in a place that can be circumscribed as proper and thus serve as the basis for generating relations with an exterior distinct from it."⁵⁴ For the client, on the other hand, the space of law is unfamiliar and forbidding. In such a space the client's enactments of power are, in de Certeau's sense, "tactical."⁵⁵

⁵⁰ See DE CERTEAU, *supra* note 8, at xvii-xx.

⁵¹ See SCOTT, *supra* note 10, at ch. 2.

⁵² See RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 112 (1977). Williams argues that power "does not exist passively as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not all its own."

⁵³ For an interesting exploration of this spatial metaphor, see Thomas L. Dumm, *Fear of Law*, 10 *STUD. IN L., POL. & SOC.* 29, 34 (1990).

⁵⁴ DE CERTEAU, *supra* note 8, at xix.

⁵⁵ A tactic insinuates itself into the other's place, fragmentarily, without taking it over in its entirety, without being able to keep it at a distance. It has

Here, as in each moment and location in society, there is a limited reservoir of possibility defined by history and habit. The possible enactments of power are situationally and organizationally circumscribed in ways that advantage some people or groups and disadvantage others.⁵⁶ To understand these limits, and the patterns with which they are associated, we must attend to the nature of professional projects and privileges, as well as to their connections to legal institutions, the meaning of divorce in society and the prerogatives of class, race and gender. Yet the lawyer is never solely in control of the production of legal services, and the client is never simply a timid consumer. Consumption of legal services is itself another domain of production.⁵⁷ As a result, the particular evolution of any lawyer-client interaction in divorce must be situated in the history and culture from which both parties draw when they enact their specific plays of power.⁵⁸

Power has many dimensions and is enacted in many domains. It involves interpreting the past, defining the present, and setting an agenda for the future. It is enacted in the domain of knowledge and understanding, in crafting definitions of situations and assigning meanings to them, as well as in the domain of action and behavior.⁵⁹ In legal affairs, the conceptual domain may be as important as the behavioral. As a consequence, we chose to illustrate enactments of power in both domains. In the next section we report how lawyers and clients negotiate a working definition of "reality." We consider, in particular, the strategies and tactics employed as they identify and settle on the goals that will be their joint objectives in the legal process of divorce. In a later section, we describe strategic and tactical enactments of power as lawyers and clients negotiate responsibility, and we examine struggles about who is going to do what in the case, and who is responsible for keeping it moving.

at its disposal no base where it can capitalize on its advantages, prepare its expansions, and secure independence with respect to circumstances.

Id.

⁵⁶ For a useful example, see Barbara Yngvesson, *Making Law At the Doorway: The Clerk, the Court and the Construction of Community in a New England Town*, 22 *LAW & Soc'y REV.* 409 (1988).

⁵⁷ As de Certeau argues, "The latter is devious, it is dispersed, but it insinuates itself everywhere, silently and almost invisibly . . . through its ways of *using* products. . . ." DE CERTEAU, *supra* note 8, at xii-xiii.

⁵⁸ *Id.*

⁵⁹ See MICHEL FOUCAULT, *POWER/KNOWLEDGE* 109 (1972).

III

ENACTMENTS OF POWER AND THE NEGOTIATION OF
REALITY

In the world of no-fault divorce, the legal process formally has limited functions—dividing assets and future income, fixing custody and visitation, and, occasionally, protecting physical safety and property.⁶⁰ Lawyers must understand their client's objectives concerning these issues. But determination of clients' interests is a known quagmire.⁶¹ Clients may not know what they want or may not want what they ought to want. They may change their minds in unpredictable ways, or they may not change their minds when they ought to do so. Clients may be insufficiently self-conscious, or plagued by false consciousness. Moreover, they may find it difficult to distinguish between lawyers who are trying to impose their vision of client needs on clients and lawyers who are trying to get clients to share a vision of those needs that is not controlled by the power of the lawyer's professional position.⁶²

When it comes to defining goals, lawyers generally are permissive. That is, they are intensely concerned that the client adopt "reasonable" goals, but within the rather broad parameters of that notion, lawyers are not directive.⁶³ For divorce lawyers and their clients, the realm of "reality" is the realm of the possible. Within that realm, the final choice is generally left to the client.⁶⁴ However, before that choice can be made, considerable energy is devoted to the construction of a mutually acceptable account of the reality of divorce. Defining and identifying "realistic" goals, and orienting and reconciling clients to the world of the legally possible, occurs

⁶⁰ See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 5, 7-8 (1988); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* c. 2 (1985).

⁶¹ See Kenneth Kressel et. al., *Professional Intervention in Divorce: A Summary of the Views of Lawyers, Psychotherapists and Clergy*, 2 J. DIVORCE 119 (1978).

⁶² See William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984). These difficulties, at first glance rather straightforward, have been built by Simon into an elegant set of distinctions between conservative, liberal and critical "visions of practice".

⁶³ Lawyers frequently exert considerable pressure on their own clients to be reasonable. When possible they cooperate with the lawyer for the other party in seeking to get their respective clients to agree to a reasonable settlement. They use all sorts of ad hoc tactics to try to bring about a 'reasonable divorce.' But the key to their role is a common strategy from which they seldom diverge: the maintenance of a stance of relative neutrality.

Griffiths, *supra* note 17, at 166.

⁶⁴ For a contrasting view, see William H. Simon, *Lawyer's Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

during complex negotiations in which struggle, if not overt conflict, is frequent.

The mutual construction of reality takes two forms in divorce cases. On the one hand, lawyer and client may develop, over time, a set of goals and tactics that capitalize on the lawyer's knowledge of the legal world and the client's knowledge of her own social world. The final version of what is real is not dictated by one or the other, but built by them together without the need for either to alter the other's view in many important respects. On the other hand, lawyer and client may not see reality in converging terms and each may seek to defend and/or advance his particular vision.⁶⁵ Developing a mutually satisfying sense of what reasonably can be expected or achieved is at the heart of the complex lawyer-client interactions we observed.⁶⁶ Yet that sense is not so concrete and tangible that, once achieved, it can be taken for granted and easily maintained. It is always in danger of slipping away as events from the client's social world intrude into the deliberations, and as lawyer and client together gather information about the goals, expectations and strategies of their adversaries.

In examining the ongoing and fragile negotiation of reality between lawyers and clients, we focus first on the factors that "distort" reality for lawyers and clients, and then on the strategies and tactics employed to promote particular versions of reality. Clients, of course, have greater difficulty than lawyers in becoming oriented to the world of the legally possible.⁶⁷ Some of the difficulty is obvious. Emotionally off-balance, angry, depressed, anxious or agitated, they may have trouble understanding what they are told, believing the information that they get and focusing on the alternatives that are presented to them.⁶⁸ They may be impelled to strike at or "pay back" their spouse in ways that are inconsistent with reality and even, by altering the posture of the other side, make their goals more difficult to attain.

Second, clients may expect more of the legal system than it can deliver under even the best of circumstances.⁶⁹ Unrealistic expecta-

⁶⁵ Often this clash of views is not made explicit. See White, *supra* note 13, at 46-48.

⁶⁶ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). While Mnookin and Kornhauser's notion of "bargaining in the shadow of law" refers to bargaining between the opposing sides in a divorce, it might equally well apply to relations between lawyers and their own clients.

⁶⁷ See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* ch.3 (1985); Blumberg, *supra* note 32, at 32; Macaulay, *supra* note 30, at 159-60.

⁶⁸ See JOHNSTON & CAMPBELL, *supra* note 41, at chs.4-5.

⁶⁹ On the nature of citizen expectations of the legal system, see SALLY MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 179 (1990).

tions may range from saving the marriage to transforming the spouse, but they are most likely to be centered on financial affairs. Clients tend to reason up from needs, rather than down from resources, and they have great difficulty in dealing with the gap between the two. Additionally, clients are slow to realize that many legal entitlements are not self-executing.⁷⁰ The judge at the hearing on temporary support may say that the client is entitled to \$100 a week, but that does not guarantee that the client will receive anything. Many clients are naive about their own financial needs, and may have to be patiently educated by their lawyers. Some clients have difficulty grasping the limits of what is possible because they cannot believe that the law actually is as it actually is. Finally, clients are slow to understand the costs of achieving their objectives. Vindication, the last dollar of support, meticulous estimates of property value, a neat and precise division of property, a visitation scheme that covers a very wide range of contingencies, and equitable arrangements that govern the future as well as the present may be theoretically possible, but even approximations require extensive services that middle-class clients generally cannot afford.

Lawyers, of course, are less encumbered on the legal side in developing a view of reality in particular cases. Nevertheless, it is not all clear sailing for them. There are, for instance, three kinds of information problems. In order to form a view of the possible they may need to know things that clients sometimes cannot tell them. These include client goals⁷¹ as well as things that clients sometimes will not tell them, such as their feelings. In addition, there are things that clients sometimes try to tell lawyers that lawyers do not recognize or understand.⁷² For example, in a case that we previously analyzed at some length, the client could not decide whether she wanted to settle or litigate, and could not make the lawyer understand that she had great difficulty in negotiating a settlement with her spouse because she could not trust him to fulfill any commitments that he made.⁷³

It would, however, be a mistake when thinking about divorce cases to assume that clients are emotional cripples and that the personalities, problems and politics of lawyers do not interfere with their ability to define reality and/or respond to their clients' defini-

⁷⁰ See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 23 (1974).

⁷¹ For a discussion of the rationales for imputing goals to clients who do not, or cannot, articulate them, see David Luban, *Paternalism and the Legal Professional*, 1981 *Wts. L. Rev.* 454.

⁷² See Simon, *supra* note 62, at 221; see also Alfieri, *supra* note 20, at 2123-24; Cunningham, *supra* note 16, at 2464-65.

⁷³ Sarat & Felstiner, *supra* note 12, at 111, 121.

tions.⁷⁴ Lawyers may not be astute, attentive or experienced enough to catch the client's message.⁷⁵ In addition, they may be so overworked or so worn down by practice that they do not have the patience or stamina to negotiate effectively with their clients.

However serious the distortions in the lawyer's grasp of the legally possible, the difficulties they face in determining social reality, in determining what is socially possible, are more serious. The lawyer's ability to interpret the social world of the client depends on the raw information they receive from clients, the interpretations that clients present, and the interpretations or re-interpretations that lawyers themselves make. All of these steps are complicated and pose difficulties for lawyers.⁷⁶ Occasionally, information is presented without an overt interpretation. For example, a client may simply state, "He did not give me money for tuition." More often, however, the information the client does provide is reconstituted through the client's experience and perception of self into highly interpreted material: "He had no interest at all in furthering my education." Often the client's presentations are influenced by emotional and financial stakes, or are incomplete or conflicted. The nature of client communications means that lawyers must continually sift through and evaluate the social world presented by the client in order to reconstruct a picture of the world that they can effectively use in promoting the client's interests.⁷⁷ In this effort they may, from time to time, be assisted by information that comes from other sources, such as opposing counsel or relevant documents. For the most part, however, lawyers must depend on their own experience and judgment.⁷⁸

Lawyers use an array of strategies to try to persuade their clients to adopt a particular definition of reality. Of course, their knowledge of legal rules and process, and the information that they have about specific players, such as other lawyers, judges and mediators, provide powerful arguments.⁷⁹ Unless they have been

⁷⁴ Some lawyers may be so committed to a particular political perspective on divorce that they do not easily recognize clients who are uneasy about or reluctant to endorse such a program. Alfieri calls this phenomena "pre-understanding." See Alfieri, *supra* note 20, 2123-24. "Pre-understanding is a method of social construction that operates by applying a standard narrative reading to a client's story." *Id.* at 2123.

⁷⁵ See Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7 (1990).

⁷⁶ See Alfieri, *supra* note 20, at 2131-45 (describing techniques that lawyers can use to get a fuller grasp of the client's social world).

⁷⁷ See *id.*; see also Cunningham, *supra* note 16, at 2482-83. For a discussion of the techniques of sifting, see DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 104-23 (1977).

⁷⁸ See Alfieri, *supra* note 20, at 2131.

⁷⁹ See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

through the process before, clients' only sources of information about the nature and limits of divorce law are their own lawyer and anecdotes related by their family and friends. In addition to their feel for the legal system and for the *dramatis personae*, lawyers, particularly specialists in family law, benefit from their experiences in prior cases. Having "heard it all before," they frequently interpret the behavior of the spouse and his or her lawyer with some accuracy, looking beyond words and positions articulated to more fundamental concerns.⁸⁰

Still, many divorce lawyers use their knowledge and experience in a manipulative way.⁸¹ The most common technique is to engage in what we call "law talk."⁸² Law talk consists of the conversations that lawyers and clients have about the legal system, legal process, rules, hearings, trials, judges, other lawyers and the other lawyer in the case. In general, we have found law talk to be a form of cynical realism through which the legal system and its actors are trashed on various accounts, frequently in an exaggerated fashion. The purpose of this rhetorical style is usually to convince the client that the legal process is risky business, that legal justice is different from social justice, and that clients can only achieve reasonable certainty at a reasonable cost, and maintain some control over a divorce, by negotiating a settlement with the other side.

Even when it takes the form of hyperbole, law talk is not commonly introduced into lawyer-client conversations in an aggressive way. Lawyers often join with their clients' positions and appear, at least initially, to be sympathetic. They introduce their clients to reality by invoking their own understanding of legal norms and their own expectations about what courts would do were they to go before a judge.⁸³ Clients are told that it does not make sense to "insist on something that is far out of line from what a court would do."

Lawyers use delay and circular conversation to convey messages about what is legally realistic. They engage in a form of passive resistance, maintaining the form of the agency relationship while subtly altering its substance. Rarely are expectations overtly branded as unrealistic in a judgmental sense; instead, most lawyers patiently, but insistently, remind their clients of the constraints that

⁸⁰ Luban, *supra* note 71, at 454.

⁸¹ For similar observations in a different context, see Alfieri, *supra* note 20, at 2123-30.

⁸² Sarat & Felstiner, *supra* note 36, at 1671.

⁸³ See Simon, *supra* note 64, at 214-16.

the law imposes on both of them, that is, of law's definition of reality.⁸⁴

The behavior of clients mirrors that of their lawyers. Expectations about lawyer performance are generally not made explicit. Clients rarely specify what they want their lawyers to do or how they want their lawyers to behave.⁸⁵ In fact, one of the chief difficulties with which lawyers and clients must contend is their mutual aversion to confrontation. In the face of continued client demands for the unreasonable, lawyers restate technical or strategic difficulties, try to recast reasonable goals into acceptable outcomes, or simply change the subject. They do not, however, directly tell their clients that they are being unreasonable.⁸⁶

In the face of lawyers' insistence that they accommodate themselves to the reality of what the law allows, clients generally persist, at least initially, in expounding their needs, explaining their notions of justice, or reiterating their objectives. But rarely do they insist that their lawyer make a particular demand, argue a particular position, or even endorse their view. Where dissatisfaction is great, the usual client response is exit rather than voice.⁸⁷

Although law talk is the divorce lawyer's basic device in efforts to reorient her clients' views of reality, others include rhetorical flourishes, technical language and role manipulation. Perhaps proceeding from experience in the law school classroom, some lawyers conjure up a "parade of horrors." In this scenario, clients are informed that if they continue to seek one goal or another, they will suffer a series of negative consequences of continuing and mounting severity. Alternatively, lawyers tell stories about other clients who have persisted in similar courses of action, pursued understandable but unrealistic objectives, and suffered disastrous results.

While technical language is rarely used as a strategy to confuse a client or make him feel dependent on professional expertise, clients report to us that it has this effect nonetheless. Some lawyers invest, or try to invest, their views with added persuasive authority by puffing up their status in the legal community. They cast themselves as the "dean" of the divorce bar, or as one of its most experienced and astute practitioners, or as an insider with special access

⁸⁴ See Griffiths, *supra* note 17, at 160:

Lawyers rarely present something as their own opinion. Their steering of the discussion and persuading of clients are largely presented in terms of the formal and practical margins set by the legal system, by the law and more particularly by the decisions that can be expected from the local court.

⁸⁵ See Simon, *supra* note 64, at 215; see also White, *supra* note 13, at 46-48.

⁸⁶ See Griffiths, *supra* note 17, at 160.

⁸⁷ See generally ALBERT HIRSCHMANN, *EXIT, VOICE AND LOYALTY* (1970).

to the judge and other functionaries. A rather striking example of the latter comes from a Massachusetts case:

Now I think I have a good reputation with the Registrar of Probate here. Judge Murdoch is married to, no, what am I saying, Judge Murdoch's sister is married to Bob's wife. My God, try again. His sister is Bob's wife. They talk all the time. Bob likes me very, very much. We get along very, very well. And I have a good reputation in this court and I think it is going to get through to the Judge.

In addition, most lawyers keep their clients at a social distance. Particularly in California, where we found that clients often consult a therapist as well as a lawyer during divorce, lawyers work hard to restrict their efforts to the legal side of divorce and leave the personal difficulties to someone else. The exceptions, however, are striking. One lawyer in Massachusetts routinely engages in behavior common among friends, but rare in lawyer-client interaction. She reveals extraordinary biographical detail to her clients, talking at length about her own divorce, health, finances, housing and the eating habits of her children. This lawyer violates the standard understandings of professional distance, becoming friend and therapist as well as legal adviser.⁸⁸ These multiple roles enable the lawyer who adopts them to use therapeutic moves and appeals to friendship to shape her clients' definitions of reality and blunt any critique of her performance.

Clients are more limited in the resources that they can mobilize to persuade lawyers to accept their view of reality.⁸⁹ Their inherent advantage is their knowledge of their spouse and generally superior ability to estimate the spouse's reaction to offers or demands. Lawyers are sensitive to this comparative advantage and often try to exploit it. As one lawyer put it in speaking with one of his clients:

Let me ask you this, because you know him a lot better. Which do you think he'd be more likely to give a good response to? Something that's in writing, that he needs to respond to in writing, or something oral?

Or, as another stated,

That's what I'm inclined to do here, unless you're of the opinion you would rather start at sixty-forty. I mean, you know Joan and you know how she would react.

In the latter instance the lawyer is even prepared to alter her favored pattern of negotiation in the face of the client's superior

⁸⁸ For a discussion of various roles that lawyers play in divorce, see O'GORMAN, *supra* note 26, at ch.6.

⁸⁹ See Anthony V. Alfieri, *Speaking Out of Turn: the Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); see also White, *supra* note 13, at 46-48.

knowledge. For that instant, the social world of the client, rather than the world of law and legal experience, defines the parameters of the reasonable.

In addition to deploying their knowledge of their own social world, clients frequently assert their views, or resist their lawyers', through repetition and denial.⁹⁰ Lawyers may talk about the unreasonable or the unobtainable, they may predict this or that outcome, but clients need not, and frequently do not, acquiesce. Rather, clients may become quiet or change the subject, only to reintroduce the same topic later. What may seem to the observer to be wasted motion and circularity, may really be a tactic in an ongoing negotiation. Finally, clients on occasion fight back by withholding information, sometimes explicitly, sometimes not.⁹¹ They use this tactic when they want to exclude the lawyer from some field of inquiry, often because they consider an issue out of bounds or would be embarrassed by some disclosure.⁹²

The negotiation of reality between lawyer and client is time-consuming and repetitive, yet often incomplete or unclear in its results. Whose definition of reality prevails is often impossible to determine. Even as decisions are made and documents are filed, how those decisions and documents relate to lawyer-client conversations about goals and expectations can be mysterious. It is, however, precisely by attending to this mystery that one can understand enactments of power and tactics of resistance.

IV

ENACTMENTS OF POWER AND THE NEGOTIATION OF RESPONSIBILITY

Unlike the effort to define reasonable and attainable goals, the task of securing the client's objectives initially appears to be neither opaque nor ambiguous. The steps that must be taken to get on with the case are routine. Particular, well-defined procedural requirements must be satisfied to secure various kinds of court assistance. Knowing and executing the necessary steps are conventionally regarded as the lawyer's responsibility.⁹³ Many involve details of procedure beyond the experience of even the most sophisticated client.

⁹⁰ Other work emphasizes the way client stories are silenced in lawyer-client interaction. Our observations suggest that clients resist the definitions of reality their lawyers provide through persistent and recurring assertion.

⁹¹ See White, *supra* note 13, at 48-52.

⁹² See Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990).

⁹³ See ROSENTHAL, *supra* note 23, at 15. This is, of course, subject to the norms of informed consent. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

Most of the remaining steps involve various kinds of negotiations with the other side. Where the lawyer believes tasks are more easily or more cheaply carried out by the client himself, such an assignment ought to be straightforward. Some activities are clearly the exclusive preserve of the lawyer—preparing the pleadings, conducting hearings and trials, for example. However, other aspects of divorce that can be shared or assigned to the client often are not.

In general, lawyers try to maintain control over negotiations with the other side, except in discussions about personal property. They do this by insisting that these negotiations take place on a lawyer-to-lawyer basis. To lawyers, these professional exchanges are a core element of legal services in divorce, an arena in which their professional experience and competence are more nearly actualized than in helping clients comprehend the legal process or figure out their financial prospects. Nevertheless, some clients, perhaps fearful that their interests will not be adequately represented, want to negotiate directly with their spouse.

But whatever the explicit assignments of responsibility, divorce cases are not self-executing. It is not always clear what needs to be done, who is going to do it, and who is responsible for assuring that it gets done. Either lawyer or client might not take the steps that they ought to take, have agreed to take, or been urged to take. In this context, enactments of power, either in assuming or assigning responsibility, are, like those in the negotiation of reality, often unclear or confused.

One reason legal action in divorce does not proceed in a clear and orderly way is simply that individual and organizational agendas are beyond the control of any single party to the case.⁹⁴ However, the divorces that we observed suggest that the fundamental reason cases do not proceed steadily or smoothly is that lawyers and clients on the *same* side encounter, from each other, various levels of procrastination, vacillation, disapproval, withdrawal, repression, and information problems that delay, distort and jeopardize what they are trying to accomplish.⁹⁵ These moves involve indirect enactments of power and indirect tactics of resistance.⁹⁶ Rarely do lawyers or clients acknowledge that they are not going to do what they said they would do, or that they are repressing their inclination to say some-

⁹⁴ For an illustration in another area of law, see TOM DURKIN, ET AL., *PLAITED CUNNING: MANIPULATING TIME IN ASBESTOS LITIGATION* (American Bar Foundation Working Paper No. 9004, 1991).

⁹⁵ In the literature on client counselling and interviewing these phenomena are treated as symptoms of client misbehavior rather than recognized as tactics of resistance. See DAVID A. BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 237-56 (1991).

⁹⁶ See SCOTT, *supra* note 10, at 29-33.

thing they are not going to say. The effect of these covert enactments of power becomes manifest only after a price has been paid, and these enactments are more powerful on that account.⁹⁷

One of the surprising aspects of the lawyer-client relationship in divorce proceedings is the rarity of the imperative mode. Put quite starkly, clients almost never say to their lawyers something on the order of "I am the client, I am paying the bill, now do this."⁹⁸ This finding is not a comment about a form of speech. It is not that clients just find a more diplomatic way of issuing a command. Rather, in the face of disagreement, clients do not assert their prerogative to tell the lawyer what to do. Such a finding would not be so remarkable if the professional in question possessed scientific or technological expertise, such that a lay person would be out of order were he to issue commands against the professional's technical judgment. However, in the context of divorce, many of the judgments over which conflicts occur do not reflect technical considerations; rather, they are questions of timing, motive and interpretation for which the lawyer may have no comparative advantage. Indeed, insofar as the resolution of those questions depends upon a feel for the behavior of the spouse, the client's qualifications may well be superior.

Lawyers are no more inclined to command than are their clients.⁹⁹ They may urge, cajole, flatter, use rhetorical tricks, provide unqualified or contingent advice, predict harm, discomfort, frustration or catastrophe, but they almost never say, "I am the professional, I am the expert, now do this." Furthermore, although lawyers frequently fail to act, they rarely invoke their knowledge and experience as grounds for refusing to act.

The avoidance of imperative modes suggests that the expressive forms used are intuitively sound. Both lawyers and clients apparently recognize that, were they to behave as if they were hierarchically empowered, they would undermine the legitimacy of what is generally considered to be a cooperative enterprise.¹⁰⁰ But sound as the conventional forms may be for defining the limits of overt power, an unwillingness to issue commands opens a wide territory for subtle and latent maneuver.

⁹⁷ *Id.* at 202-03.

⁹⁸ This is, of course, the case where the client is not paying the bill, as in the legal services context. We were surprised that it was also true in the fee-for-service context.

⁹⁹ For a discussion of different understandings of the lawyer's right to command, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29 (1978).

¹⁰⁰ Some scholars argue that the prevailing cultural form is hierarchical. See, e.g., Simon, *supra* note 62, at 485.

As in many human endeavors in which progress is not externally imposed or organized, procrastination in divorce cases is frequently the weapon of choice.¹⁰¹ Almost all of the actions that need to be taken to move a case from initiation to conclusion can easily be avoided. Procrastination may occur when neither lawyer nor client does anything, although each thinks that the other is committed to action, and it may occur when the action not taken is concrete and bounded. Procrastination's effects may be increased by the haze that eventually settles over the question of who had responsibility in the first place.

Procrastination may be purposeful and self-conscious. It may also be structural, built into the way that lawyers organize their practice. Lawyers in small and medium-sized practices are extremely reluctant to turn prospective clients away. As a consequence, they frequently order their workloads in some form of queue. In the doctor's office one waits in line to see the doctor. In legal matters, the wait is not to see the lawyer, but once having seen him, to have him attend to your case. The outcome of such a regime is clients who press their lawyers to keep their cases moving, or clients who are frustrated and angry at the lack of progress.

Additionally, lawyers sometimes lose interest in cases, especially when the other side is intransigent over settlement and the client does not have the resources to pay for full-scale adjudication. Just such a stalemate led a California client to tell us:

I'm hung up over the matter that it's not wound up yet. And nobody is eager to wind it up . . . all the sympathy, but yet on the other hand they are not concerned about finishing the deal, closing the book. And I just find that really bizarre for lawyers to be like that and let it linger on and on. It's like it's stashed in another pile and I can't figure out why they are not doing anything.

On many occasions, rationalizations for inaction are offered that may simply excuse poor organization, inattention or bad work habits. Matters do not receive attention because the lawyer is concerned about provoking the other side, is trying to conserve the client's money, or is trying to get the client to take more responsibility for his own life.

Competing loyalties are another reason for procrastination. Blumberg's well-known paper, *The Practice of Law as a Confidence Game*,¹⁰² dramatically alerted us to the influence of the work context on lawyer allegiances. But his theory was developed in the organiza-

¹⁰¹ Power, as is now widely recognized, is exercised in the refusal to act just as surely as it is involved in assertion. See LUKES, *supra* note 4, at 23; see also PETER BACHRACH & MORTON S. BARATZ, *POWER AND POVERTY: THEORY AND PRACTICE* 43-46 (1970).

¹⁰² Blumberg, *supra* note 32.

tionally tight confines of a lower criminal court, where defense lawyers are highly dependent on their continuing relations with judges and prosecutors. These kinds of continuing relations are inherently less important in the divorce context. Divorce lawyers in the sites we studied are most often general practitioners; they practice in many courts and deal with a shifting cast of actors. Nonetheless, many of these lawyers went to great lengths to stay on good terms with the lawyer on the other side, even if this meant not prosecuting their client's case to the extent they had promised.¹⁰³

However, procrastination can originate in sound strategy. Lawyers frequently do not do what they have agreed to do, or implied they would do, because they disapprove of their client's agenda, disagree over questions of timing, or are deterred by cost. In these circumstances divorce lawyers are especially affected by their view of their client's emotional situation. Are the client's emotions under control? Is he able to function as a reasonable litigant? Has the psychic divorce kept pace with the legal proceedings, or ought the latter be delayed until the client achieves a more stable emotional perspective?¹⁰⁴

Clients also may have sound reasons to procrastinate. While they frequently do not agree with their lawyers, they may not want to contest the issue with them directly.¹⁰⁵ A client may be in this posture because of information she is unwilling to share with the lawyer, because she may be embarrassed by her own ambivalence, or because she may be inclined to trust her own, rather than her lawyer's, judgment or intuition.¹⁰⁶ Client procrastination may relate to major as well as minor matters. We observed a client decline to tell his spouse that he intended to seek a divorce after he assured his lawyer that he would; another client refused, without explanation, to authorize service of a divorce petition on the spouse from whom she repeatedly claimed she wished to be divorced; and a third client successfully evaded her lawyer's entreaties to agree to a medical examination to determine whether she was fit to hold a job.

Moving from procrastination to other strategies and tactics in the negotiation of responsibility leads, as it were, from the core to the periphery, from routine practice to more exceptional activities. For instance, repression, or the failure to state goals or views of which one is very much aware, is not at all unusual.¹⁰⁷ In addition,

¹⁰³ See Griffiths, *supra* note 17, at 165.

¹⁰⁴ *Id.* at 166 ("Lawyers' control over the legal procedure makes available various techniques for cooling off conflict. Simple delay is often used to this end.").

¹⁰⁵ See White, *supra* note 13, at 45.

¹⁰⁶ *Id.* at 47.

¹⁰⁷ For an argument about how lawyers should respond, see Luban, *supra* note 71, at 491.

we encountered vacillation and indecision in three different sets of circumstances: first, when both negotiations and adjudication appeared seriously flawed; second, when either the lawyer or the client viewed the other as unstable or unpredictable; and third, when one or the other apparently lacked the ability to order and rank alternatives. These occasions do not involve overt assertions of power; rather, they are power drifts, instances where context or personality disables lawyers and/or their clients from grasping the reins of power.

In the abstract, the lawyers we studied espoused an ideology of shared responsibility.¹⁰⁸ They said that they try to divide the labor with their clients such that, once they provide the client with the capacity to understand the technical requirements and with the relevant distillation of their professional experience, lawyer and client together can set overall strategy and plan tactical moves. Sometimes behavior conforms to this ideology; most of the time it does not. As one lawyer told us,

[The client] seems willing [to] . . . take my advice I would say, “. . . [W]e’ve got an agreement This is as good as you’re going to get in court, and I think it’s not worth the risk of going to court.” And I think she would say, “OK, fine.” On the other hand, if I said, “Look, I think you can do better in court, and I think it is worth the ordeal,” which it will be, to go in there, and I think “OK let’s go in there and let the judge decide.” She would agree to that, too.

This is not joint consultation. These are the words of an “expert” who assumes his advice will be heeded. This language can be interpreted as a reflection of power derived from professional structure, power that lawyers have because they are lawyers. It is, however, unclear what precise claim the lawyer is making—that the client will do as he says because he is a lawyer, or that she will do as he says because, being a lawyer, he has the knowledge and experience to warrant her reliance on him. In either case, the client is on foreign terrain, terrain where the deployment of knowledge and experience may be resisted in various ways. That resistance complicates and enriches the enactment of power in lawyer-client relations even as it makes difficult, for both lawyer and client, to determine who is responsible for what.

In the following section we examine enactments of power in the negotiation of reality and responsibility within a single case. By attending to a single case, we hope to demonstrate the forms that power and resistance take in lawyer-client interaction, to show how

¹⁰⁸ See Simon, *supra* note 62, at 486-89.

clients re-make the advice they receive as they consume professional services, and to illustrate changes over time in the enactments and dynamics of power.

V

THE CASE OF THE "UNSUPPORTED WIFE"

The narrative that follows involves the divorce of Kathy, a client whose case we followed, and Nick. Kathy has retained Wendy, a solo practitioner, and Durr, Wendy's paralegal. When our observations began, Kathy had already conferred once each with Wendy and Durr. We observed four conferences between Kathy and Wendy and one between Kathy and Durr. In addition, we conducted five interviews with Kathy and three with Wendy.¹⁰⁹

Kathy is a housewife and part-time secretary living in California. She had been married for 28 years when Nick, a local government official, initiated divorce proceedings. They had four grown children, one of whom was living at home. Kathy tried for many months, without success, to bring about a reconciliation with Nick.¹¹⁰ Beside the family house, where Kathy lived throughout the divorce proceedings, the couple's assets consisted of their pensions, modest collections of sculpture and rugs, two small savings accounts, two vehicles, and assorted personal property.

Wendy began her legal career in 1963, a time when women lawyers in her community were rare.¹¹¹ Throughout her career she has been primarily involved in family law, first working for the government, then in a firm, and now alone. Although she says she has an unusual understanding of the emotional dimensions of divorce, particularly with respect to women, she is nonetheless ambivalent about this practice:

I kept getting these family law cases and I really kept fighting it and I really didn't think I wanted to be a family lawyer because it is really a miserable business. But one day I woke up and I thought, "Well, I've been through it myself and I really know what these people are going through and how they are hurting and somebody had to do it."

Wendy believes she has a distinctive way of practicing family law. Her theory is that, in addition to possessing all the expertise of

¹⁰⁹ All conferences and interviews were audio-recorded. Nick and Durr attended part of the first lawyer-client conference that we observed.

¹¹⁰ At the time we entered the case Kathy was clearly still trying to hold onto the marriage. She was psychologically unwilling or unable to accept the idea of being rejected. For an insightful picture of the psychological dynamics of separation, see DIANE VAUGHAN, *UNCOUPLING* (1972).

¹¹¹ This was typical of the situation of the profession as a whole. See CYNTHIA F. EPSTEIN, *WOMEN IN LAW 79-95* (1981).

a certified family law specialist, she provides superior service because she can recognize and validate the emotional trauma typically experienced by people in divorce. She is able to provide this service because she had been divorced herself, because she is a woman and thereby naturally empathizes with the situation of rejected women, and because in Durr she has a superior support structure, available at all hours, willing to listen to anything, and knowledgeable about the intricacies of law enforcement and social service resources.

To illustrate the dynamics and trajectories of power in the negotiation of reality and responsibility between lawyers and clients, we present this case chronologically, beginning with our first observation.

FIRST LAWYER-CLIENT CONFERENCE. The first conference we observed was unusual because of the presence of Nick, who had not yet retained a lawyer. The stated reason for the conference was to discuss the division of marital property. Wendy opens the meeting by asking Nick what his thoughts are concerning the property division: "Did you have a proposal for how you wanted to divide it or did you want . . . ?" Nick responds in a disarming way:

To me it's real simple. I mean, if she's going to ask for whatever, I'm not contesting anything. I don't care about what happens with that. I've given her the car, half the house, if it ever sells, whatever part of my retirement or whatever part I own, she can have it. I'm not trying to keep anything from her. To me it's simple. Just come up with whatever you feel is right and that's it.

This response is both passive—Nick says he is willing to do whatever Wendy feels is fair—and, at the same time, hostile. He talks about Kathy as if she were not present, and acts as if there really is nothing to discuss; everything is already settled. He appears both in control and ready to settle on whatever basis Wendy proposes.

Wendy all-too-readily accepts this posture and moves quickly to discuss how to determine the worth of the assets. In so doing she too largely ignores Kathy. She suggests that Nick obtain an evaluation of the pensions. Later, she delegates to Kathy the tasks of determining the value of their life insurance and of finding an appraiser for the sculptures. These tasks are, in her words, "little executory things." Kathy accepts her assignment without comment.

But signs of trouble quickly emerge as Wendy and Nick discuss various items of personal property. While Nick acknowledges that rugs exchanged in barter for his labor during the marriage are community property, he nevertheless feels that he has a privileged claim to them because he had to hold two jobs to obtain them. Before Nick leaves the conference, Wendy reminds him and Kathy of the nature of the process that they are embarking on. "Most divorces

nowadays," she says, "although there are a lot of emotions involved with it, and you know, 'he said' and 'she did,' and things like that, it really comes down to an accounting problem."

We see here the beginning of the negotiation of reality, of what the legal process of divorce can do for the participants. The reality that Wendy represents undervalues emotions, although she presents herself as a lawyer who cares, a lawyer who understands the emotional trauma of divorce. Even for a lawyer purportedly as emotionally sensitive as Wendy, everything must be assigned a value or else it is of no consequence.¹¹² There is little explicit resistance—neither Nick nor Kathy openly contest the version of legal reality that Wendy presents. Yet as soon as Nick leaves, Wendy predicts that Nick will "collapse" when he realizes the net difference between his and Kathy's pensions, and "scream bloody murder and hit the ceiling" when Kathy and Wendy make a comprehensive property proposal to him. Her warning that the legal process is really about accounting, not emotions, begins to have some bite.

Kathy responds by acknowledging that Nick has a temper problem. Yet the conference closes with Kathy defending Nick. She says that Nick is really "a nice man," and she expresses her hope that the divorce process will not "take that away from him." Wendy again tries to introduce a note of reality based on her experience with the legal process of divorce: "I hope we can do it with a minimum of animosity. But there's bound to be a little resentment." The reality of the divorce process is not just that it is an accounting problem, but that the best that one can hope for is a "*minimum* of animosity" and "*a little* resentment." While Kathy says she understands what Wendy is saying, she nonetheless insists that the reality of the legal divorce is not, and will not be, her reality. "I hate it," she says, "I hate the whole thing" (the divorce *and* the divorce process).

Thus, almost before this case begins, reality and responsibility are on the table. In the domain of responsibility, the lawyer tries to get the client and her husband to do the drudge work, ostensibly to save money. In the domain of reality, Nick's feelings about moonlighting, the reality of his hard work—*i.e.*, that the first job is to support his family and the second is for himself—are at war with his recognition that the law draws no such distinction. And Wendy warns the pair that they can indulge their emotions as they wish, but in the end emotions must give way to the "accounting problem."

Yet Wendy also recognizes that legal reality does not square easily with the social reality that both Kathy and Nick experience.

¹¹² For an extended discussion of this version of the reality of divorce, see Sarat & Felstiner, *supra* note 12, at 93, 116-25.

She knows that displacing emotions is not easy and predicts that Nick's volatility will take over when he comes face to face with the economic reality of divorce.¹¹³ In making this prediction, Wendy claims to know Kathy's social reality in a way that Kathy cannot claim to know Wendy's legal and experiential reality. Thus lawyer and client together paint the picture of a spouse whose first reactions to new developments are likely to be extreme. The client's contribution to this joint effort is based on first-hand experience with her husband's temperament, the lawyer's more cynical and pragmatic view is based on what she has seen in similar cases. Together, they lay part of the mosaic of reality.

In her final comments about Nick and the divorce process, Kathy resists and distances herself from the adversarial reality that Wendy represents. Power slips away; Wendy will not be able to dictate a single, uncomplicated reality. There is no easy acquiescence; for Kathy the negotiation of the reality of her divorce has just begun. Yet Kathy herself recognizes that she is now in an alien space where the procedures and traditions that will govern her divorce are not freely chosen. Whatever the possibilities for movement within this space, the legal divorce is legal precisely because it is law's to give. Entering the divorce process, she encounters rules that, while self-evident and taken for granted by others, are not of her own making. She must deal with professionals with well-established routines, no matter how foreign she finds these routines and no matter how hard she resists. Her freedom of action, though considerable, is constrained. Her resistance, however resourceful, will only become meaningful as a reaction to the hierarchically structured legal world.

FIRST INTERVIEW WITH CLIENT (4 days later). Kathy speaks easily to the interviewer about the breakdown of her marriage. She believes that counselling might have saved her marriage, but says that Nick would not take part. She only found out that Nick had filed for divorce when a friend noticed the announcement in the local newspaper. Nevertheless she admits that she still "has a glimmer of hope that maybe he will come to his senses."

Kathy consulted a lawyer (not Wendy) reluctantly:

Kathy: So I went to the lawyer and I waited and waited and waited and I thought, "Boy, it's sure taking him a long time to do something about this." So I called him one day.

¹¹³ At another point in this conference we observe the first hint of how the lawyer tries to keep the conversation focused on financial matters: when the client starts to talk about her struggle to help her "kid through his drug problem," the lawyer successfully changes the subject to the house and car payments. That part of the client's social world relating to her child's problems is not to be part of the "reality" of this case.

Interviewer: You mean this is waiting for your lawyer to do something?

Kathy: Yeah, to do something. Like three months had passed and I thought I surely should have heard something by now. Well, he says: "Oh, I just found this sitting on my desk and the papers were there."

Interviewer: You mean he had forgotten completely about the whole thing?

Kathy: Yes.

Kathy chooses "exit"¹¹⁴ and switches to Wendy, who has a reputation as "a go-getter" and someone who will "really fight for her clients." Moreover, Wendy makes available to her a person, Durr, who seems to guarantee she will not be just another lost file.

This interview provides both a graphic illustration of a failure in responsibility for case progress with the first lawyer, and intimations of difficulties with the current lawyer in defining reality and assigning responsibility. Kathy tells the interviewer that she wants to get her "fair share," which to her translates into the house, the opportunity to escape from her dead-end secretarial job, and something to even out their incomes. Yet she has not been asked to make her goals clear to her lawyer. Given Wendy's previously demonstrated tendency to extrapolate from her experiences with other cases to the reality of Kathy's case, Wendy may assume she does not need to ask in order to know what her client wants.

In any event, assuming rather than asking is an exercise of power by indirection. Power here consists in what is not being said, with the burden then shifted to the client, contrary to the picture of lawyer-client relations in which lawyers are portrayed as agents of their clients. But for the client, silence is its own kind of power and protection. Not stating one's goals means that they cannot be labelled unreasonable and dismissed.¹¹⁵

Another silence involves the division of labor between lawyer and paralegal. Wendy has told Kathy that much of her case will be processed by the paralegal, even though the paralegal's training and functions have not been defined. Had Wendy explained the role of the paralegal, Kathy might not have accepted that level of participation. The lawyer again exercises power by taking action without consultation, rather than through an explicit decision.

FIRST INTERVIEW WITH LAWYER (6 weeks after the first conference). To Wendy, gender is the touchstone to tactics and strategy, and explains her acute interest in power.

¹¹⁴ HIRSCHMANN, *supra* note 87, at 21.

¹¹⁵ On the power of silence as a strategy of power and resistance, see SCOTT, *supra* note 10, at 17-18.

Interviewer: Do you see a difference in your role with women clients?

Wendy: . . . The women have a problem. All of a sudden their career is threatened. They've been a housewife all these years When the other attorney starts pushing a woman who's been a housewife for 20 years . . . [to] go out and get a job, it really angers me because they have to realize that if they were suddenly told they could no longer practice law . . . it would really be just devastating I'm very protective of these women, especially because I feel they are going to make a career change which is going to affect them the rest of their lives, and as a result I want them to take their time I mean I don't want them making any rash decisions when they are under such an emotional strain. So I will cover for my clients. I will drag. I will delay.

Wendy either seeks to exercise maternal power over, and on behalf of, her clients, or likes to think of herself as doing so. She seeks to protect them from aggressive lawyers who underestimate what women go through during a divorce. In addition, by controlling the pace of the divorce, she serves interests that the client, in a rush to closure, does not know she has.

Interviewer: What if a woman is married for 20 years, so she's in her middle forties, [and her] kids are off in high school?

Wendy: The courts here feel she should become a useful, productive member of society. I don't agree with them. I think that a woman who has been a career mother and wife all these years has put in her time. If she had been in the army she'd be retired. But they don't look at it from that standpoint.

At this point the lawyer's view of what is desirable departs from the reality of law itself. Wendy presents herself as powerful because she knows both the reality of the everyday world of law and the reality of the everyday lives of women.

Interviewer: What kind of expectations do these women come to you with?

Wendy: Well, I think most of them see in the movies or read the books where the husband is going to pay for the divorce, and they are going to get alimony and they are going to get the house.

Wendy thinks of her clients as living in a world of fiction, as resisting the harsh realities of husbands who refuse to pay alimony and houses that get sold as just another piece of community property.¹¹⁶ She has struck at the core of the procrastination dilemma. Clients may not be emotionally ready to face legal and economic realities. The supportive lawyer ought then be prepared to "cover,

¹¹⁶ For a discussion of the impact of divorce on the economic status of women, see WEITZMAN, *supra* note 60, at 323-56.

drag and delay.” But for how long? And who is to decide how long is long enough?

At the same time as they expose the ambiguous nature of delay, Wendy’s actions show the indirect and elusive nature of some enactments of power. Interrogatories had been served on this lawyer and yet she has not looked at them. Have they been ignored as part of a conscious strategy of delay, or have they been shunted aside because of other, more pressing work? It is, moreover, unlikely that Wendy has told Kathy about the interrogatories. Is this a lawyer’s self-protective move, or a deliberate decision to let the client heal emotionally before she is dragged back into the minutiae of the case? Has the lawyer focused on the situation of *this* client, who has by this time been separated from her husband for nearly three years, or does she assume that all similarly situated middle-age women should be treated alike? Is this an instance of benevolent maternalism or simple neglect, of an enactment of power or the power of inattention?

SECOND INTERVIEW WITH CLIENT (11 weeks after the first conference). Kathy begins by saying, “I don’t know what’s going on. Not a heck of a lot is going on. We’re just getting paperwork done.” Although the required attention to financial detail was “a pain in the neck . . . you sure know where you stand when you are finished.” When asked about her attitude toward the pace of the case, Kathy said:

I think I’m reaching a point now where I either want to get it over with or something else better happen I just can’t stand this any more I just feel like I’m floating around in space I don’t care if I clean my house I don’t care about anything. I’m not normally like this.

Despite her sense of urgency, Kathy had not said anything to either Wendy or Durr about “the pace at which things get done.”¹¹⁷ She believes that Nick is also anxious to get the case going, especially because his living conditions are “terrible.” Yet at the same time that Kathy wants the marriage to be over, she continues to be upset by its breakup.

I have a feeling that if we could have had counselling together that this is a marriage that could have been saved because it was a good marriage, it was a strong marriage, and I just feel like God, why are you doing this. But it is a need in Nick. I can really see that But I haven’t changed the way I feel. I really miss him very much It’s [the feelings about rejection] the worst thing I’ve ever dealt with in my life.

¹¹⁷ It is as if we were being given access to the kind of “hidden transcript” that Scott argues is constructed to resist dominant power. See SCOTT, *supra* note 10, at 4-5.

At this point, the social world of the client and the legal world of the lawyer appear to overlap, at least in terms of determining the client's financial needs. But in the more important matter of the client's emotional posture and whether or not to prosecute the case, there does not appear to be any connection between lawyer and client. It is not that the lawyer has prevailed in a contest over timing and progress and is now simply "in charge." Instead, the question of timing and progress is an unexplored, unaddressed irritant—a weakness, not a strength, for a lawyer who imagines herself as mother-protector.

Kathy wants to go in two directions at once. The status quo is intolerable. She wants her husband back and she desperately awaits the miracle that will return him to her life. But she fears this will not happen and is consequently resigned to getting on with the case. The problem in constructing a joint reality between lawyer and client is that, while the client tells this all to the interviewer, she fails to tell the lawyer. As a result, the case hardly moves at all.

THIRD INTERVIEW WITH CLIENT (23 weeks after the first conference). In a short interview, Kathy several times expresses her belief that substantial progress should have been made in her case, and disappointment that it had not:

I expected a lot to happen before I went on vacation, and I thought, "Nothing is happening," so I paid my bill and I went on my vacation and came back and still nothing has happened I expect it to be final pretty soon or something . . . but there's been nothing from a lawyer I really have not talked to those people for a good, I don't know, five months maybe.

Although she still seems bothered that progress in the case would carry her further away from marriage, she is increasingly reconciled to the fact that there is no alternative:

I don't really want [things to get going], I mean I have mixed feelings about the whole thing, but when I talk to my kids, they say, "Mom, just don't hold out any false hopes, so why don't you just get it over with." And I think, "Ok, they are right. It's time to stop this stuff."

This interview shows that the silence over case progress persists. The client's views are clear to us, if not to the lawyer. She wants to get on with the case unless her husband is coming back, which she understands is not really going to happen. But the lawyer is doing nothing to push the case along.

For Kathy the experience is mysterious; she does not confront the reality of a lawyer who is not paying attention to her case. Instead, in the face of her own inability, or unwillingness, to do more than pay her bill and hope that something will happen, of her inabil-

ity and unwillingness to enact the power of the principal to command her agent, there is the ambiguity of inaction.

Is Kathy's case again lost in her lawyer's office, out of sight and off the agenda? Or is Wendy acting on a theory that the best indicator of this type of client's readiness to proceed is when she affirmatively asks the lawyer to get on with it? Both alternatives would be passive enactments of power by the lawyer: the difference between them is that the first is about responsibility (the lawyer is not doing what the client wants because it does not suit her), the latter about reality (the lawyer knows the state a client must be in before progress is feasible and knows how to identify it).

FOURTH INTERVIEW WITH CLIENT (25 weeks after the first conference). This interview occurred in a brief interlude before the second lawyer-client conference. Kathy reports that she and Nick "were never going to be able to talk to each other again if something did not happen pretty fast," so she made an appointment with Wendy. She says that she hated the process of haggling over small amounts of money or items of property: "it's just so picky." At this point, the harmony of the earlier conversation between Wendy, Nick, and Kathy has disappeared. As Kathy feared, the divorce process is bringing out the worst in Nick. The legal reality is fast contaminating her social world. Despite the fact that she is paying the bill, she feels powerless to make things happen.

While the social world has finally signalled Kathy that she must take responsibility for getting the process going, in another domain the world of divorce has yet to make an imprint. While most people are generally quite concerned with style, since it is one of the common ways to draw social boundaries, Kathy has what might be called an unusually severe case of bourgeois manners. Arguing over small amounts of money is distasteful. But divorce, *in its entirety*, is in bad taste and the full range of its unattractiveness is not yet clear to Kathy. Although the lawyer appears to think that she comprehends the social world of the client, she has not fully initiated the client into the reality of the legal world.

SECOND LAWYER-CLIENT CONFERENCE (25 weeks after the first conference).

Wendy: Okay, from what I understand, Kathy, you want to get going on this again.

Kathy: I do. Nick is getting to the point where he would hardly talk to me and I don't want that to happen. I still would like to remain friends if we can.

Wendy's opening comment shifts the blame for the lack of progress in the case from lawyer to client. Yet Kathy chooses not to hear or feel the blame. Her "I do" resonates with what she hopes to

preserve from the marriage by moving forward to end it.¹¹⁸ Her wishes are finally made clear; what had been until now unspoken is finally put into words.

Yet the conference does not actually focus on how to get the case moving. Instead, attention shifts to financial detail. Discussion turns to the net value of the house, the value of other significant items, and the relationship of spousal support to property division. Kathy's fleeting assertion of power is quickly lost in "accounting."

Wendy: I can't see that we can come up with enough to offset your equity in the house unless he's willing to take a note or something to that effect. Have you discussed this with him at all?

Kathy: . . . At one time he said that he might be willing to go along, but this was about two months ago.

. . .

Wendy: I think you have to give him a note for \$24,000.

Kathy: That's a tremendous amount.

. . .

Wendy: Maybe we can get him to keep on making the house payments?

Kathy: I doubt it very much. I think he's really sick of it.

. . .

Wendy: You've had a long marriage and you should be entitled to some support because he does make a lot more money than you do So that's something we have to consider.

. . .

[You could sell the house and get a condominium or] buy a mobile home.

Kathy: I would prefer to keep my house if I could.

. . .

Wendy: The only way we can get this part resolved is by getting that little loose end tied [the value of some sculptures]. We have all the figures on everything else I can write her [Nick's lawyer] a comprehensive letter saying I think we should do it this way. I don't think your husband is going to agree to it, but I think at least . . . we will get things moving again.

There is one important diversion in this conversation:

Kathy: [The youngest child is] my cross to bear.

Wendy: The baby, huh? Doesn't want to leave. They must call that nesting now.

Kathy: Yes. I'm afraid that's what it is.

Wendy: And he's all settled in.

Kathy: Well, he's going to have to unsettle himself because I've told him

¹¹⁸ "I do" is also an eerie reminder of the marriage vow; "Do you take . . . ?" "I do."

Wendy: Now, what about the sculptures? We still haven't touched on those. We have the furniture divided, right?

The conference has begun on a by now familiar and ambiguous note. The plain meaning of Wendy's introductory remarks is that the client is responsible for the hiatus in case progress and has now decided to get things going again. Since we know that is not the case, Wendy is either smoothly shifting blame for the dead time to Kathy or trying to get a fix on her client's emotional readiness to get on with the case. But the language used is rather roundabout for a lawyer interested in the client's emotional condition.

Wendy quickly gets to what is for her the heart of the case. How can Kathy keep her house? Wendy is not optimistic about the house, and is rather cavalier in suggesting a move to a mobile home. Given Kathy's age, low income, and skill level, the question of spousal support would seem to be as important as the house, yet it is only raised as an item for future negotiation. Wendy is not ready to confront this aspect of reality and Kathy rather passively follows her lawyer's lead.

Wendy interrupts Kathy's attempt to explain how she is going to kick her youngest child out of the house with a question about the sculptures. This interchange repeats a sequence in the first conference and reflects Wendy's unwillingness to give her client's non-financial personal problems a place on the agenda. Although those problems have no legal standing, they are not explicitly ruled out of order; rather, they are shunted aside by a change in subject.

THIRD LAWYER-CLIENT CONFERENCE (31 weeks after the first conference). This conference is the defining moment in negotiations over both reality and responsibility. The agenda proves to be focused on three questions: who is going to conduct the negotiations; what are the lawyer's and client's goals concerning the house and support; and, if the goals are not clear, how they are to be determined. Kathy begins with a report of her discussions with Nick about the house. She had presented him with four scenarios:

- 1 - Sell the house.
- 2 - Sell the house in two years when they would be eligible for favorable tax treatment.
- 3 - Buy him out.
- 4 - Trade the house for two condos.

After a discussion of all the asset values, Wendy tells Kathy that it would take about \$20,000 to buy out Nick's share:

Wendy: So what we tell them, I don't know whether you want to tell him, because you seem to be negotiating fine, or I can call his attorney and say, "Well look, we have certain costs of sale and everything when you do sell the house. Because you will be sell-

ing it eventually. Therefore we figure the net equity is so much, and in adding the items that you should get versus what I should get and everything, I figure that \$20,000 is approximately"—I'll be glad to make a copy of this for you, in fact, so that you can take it along and show him if you wish.

Kathy: Yes.

. . .

Kathy: And this way you [imagining what she will say to Nick] don't have to pay any support.

Wendy: All right. Well, whatever, however you want to do that. But shouldn't you be getting support from him? Are you getting support from him?

Kathy: He's paying the house payment.

Wendy: Well, I think even after you get divorced you are going to need some continued help from him. If he's making the house payment now and you are going to have a \$20,000 second to pay on it, to him, how are you going to do that? . . . You know a little practicality around here won't hurt. You've had a long marriage and therefore you are entitled to support and obviously you can't make enough on your own to support yourself and become self-supporting. Now you can rent out rooms, take in laundry and things like that, but let's look at it from a practical standpoint.

Kathy: No, I threw my iron away.

. . .

Wendy: You know, as I have told you, whatever you take out of this marriage has got to last you the rest of your life. Prince Charming just has not been known to come along and sweep up my clients It is a practical matter that we have to figure out.

. . .

Wendy: This is really your best opportunity to keep this one [house] if you can. As you said, you are probably going to have to rent out a room or take a second job, if you want to do that, or turn to robbing banks Your husband is just going to have to get used to the fact that you are his forever insofar as responsibility for support is concerned. I mean, he may get rid of the body, but he ain't going to get rid of the responsibility. You are going to have to get support from him. You just don't make enough money.

Kathy: He's not going to want to hear that.

Wendy: Well, he's not going to want to hear it because people don't hear what they don't want to hear But it doesn't work that way. He is stuck with you.

The question of who will do the negotiating surfaces early in this conference. It is rather clear that this lawyer, unlike most, does not want to do it. She compliments Kathy on her performance to date, even though that performance has produced no concrete results. Then she says she could talk to the other lawyer, but in the

middle of the imaginary conversation that she would have with the lawyer she switches to the voice of her client—"in adding the items that you should get versus what *I* should get"—indicating, at least indirectly, that she is not really going to have any such discussion with the other lawyer.

The focus then shifts from the house to support. Kathy does not think that her husband will agree to pay support. Still, Wendy does not accept that picture of the future. Regardless of the disposition of the house, Kathy cannot support herself and should not delude herself that someone ("Prince Charming") is going to come to her rescue. Reality is again juxtaposed to fantasy, the world of the legally possible to the world of dreams and fairy-tales.

Wendy asserts that their job is to convince Nick that he cannot evade his responsibility simply through denial. Despite the force of both the argument and the language in which it is expressed, this enactment of power misses its mark, is evaded, and left unaddressed. Kathy does not contradict Wendy on the issue of need, but she never agrees that support is a fixed objective.

In a sense, two static versions of reality are at war with one another. Both Wendy and Kathy agree that Kathy needs support. Kathy does not think that Nick will agree to provide it, but she does not express this view forcefully enough to make her lawyer explain how to go about getting it. Again, no one seems in charge. This case, like most of the cases we observed, does not move in a linear fashion. Important questions are raised, discussed, but then left hanging; positions are advocated to an audience which seems all-too-able to tune them out.

This condition is most clearly reflected in the discussion concerning the disposition of the house. The conference began with Kathy talking about four different schemes that the client and her husband had discussed. In response, Wendy presents a series of alternatives, some of them intelligible, some of them not.

[1] The nice thing would be if you could buy him out and then, eventually, if you sell it you'll have the rollover by yourself.

[2] Another alternative would be taking spousal support of whatever your house payment is, \$400 something a month, and saying, okay I'll give you a note for \$20,000 and what you do is [just give it back to him].

[3] Now you might also work out some kind of agreement with him that you will owe him \$20,000 from the house that you will pay him when you sell the house or die, whichever comes first.

[4] Do we divide it up then [the time of sale] and figure out your [husband's] equity based on what is the actual price of the house or do you take your chances with me and hope it goes up in value, or if it goes down in value, you get less money?

[5] What we can do is put something to the effect that you'll keep the house, the house will be sold no later than or listed for sale no later than such-and-such a date, that upon the close of the house, that within 60 days thereafter, either one of you may put on a cap under the issue of support for the court to determine what your needs are at that time.

[6] [You could waive support in exchange for his interest in the house]. I really think that you would be giving up far more than you would be getting in a case like that because you are talking about \$400 a month is \$4800 a year and in four years he would have paid you \$20,000. If in that four year period of time you were to get injured and could not work, you may need to have the support continued. If you waive it for now and forever more, then if you get sick in two years, you may end up having to sell the house and live off that and go on welfare eventually because you have no recourse to have him help you. So it's one of those things you have to decide.

[7] Another possibility is the two of you refinance the house and he gets his \$20,000 out that way, and then you have a bigger house payment and guess who is going to help with that too?

[8] Of course, we talked about the possibility of using the renter to pay off the \$20,000.

[9] Also you could arrange with your husband for interest only, payable at the end of five years or something and negotiable, re-negotiable at that time.

[10] Maybe he'd also work out something where he'll only have to pay half the support and he'll waive, he'll give you the house. I mean, that's another thing to look at. Say "Look, I'll agree to take only \$200 a month support in exchange and even make it nonmodifiable or something."

These alternatives were neither generated logically from some set of empirical and normative assumptions nor presented all at once; rather, they seemed to be the product of Wendy's stream of consciousness engagement with the problems of the house and support. That Kathy, even if she took notes, could keep much of it straight as she set off to deal with her husband, is doubtful. In mid-stream she confessed that the conference "gives me ideas, but I get totally confused when I thought I really knew what I was doing. I mean I really thought I had that thing [the house question] wired."

Despite the rather haphazard presentation of alternatives, we see in the following exchanges that Wendy does have a negotiation strategy in mind, however unusual it appears to be:

Wendy: You may need to talk to him some more before you come up with a conclusion or something and see if he's interested in any of these.

...

Kathy: That sounds like quite a few alternatives.

Wendy: Quite a shopping list right there that you can go over with him and kick around. Maybe one of these will be acceptable.

Kathy: Yeah, maybe.

Wendy: And if it is then we can work things out.

...

Wendy: Well, anyway, do some talking and see what you come up with and if you want me to step in and talk to the attorney I think

....

Kathy: I may have to.

Wendy: I'd be glad to.

Kathy: Because, as I say, I'm not that knowledgeable and I just hope that I can [interrupted].

While there is considerable confusion and circularity, there is also some forward movement. But it is still not a directed movement and neither Wendy nor Kathy seems to have the case in hand. Power drifts. Wendy extends a half-hearted offer of help, yet Kathy is re-assigned the responsibility to negotiate even as she admits that she is not sure what she is doing. Wendy and Kathy seem to agree that without spousal support Kathy has no income security. But Kathy still does not believe that her husband will agree to provide support. Despite Wendy's pressing concerns about the risks of life without at least the possibility of support, she gives Kathy *carte blanche* to relinquish such a claim, a remarkable position for a lawyer who, as we will see, believes her professional role is to stiffen the "backbone and spine" of her women clients. This negotiation about the reality of goals is, from Wendy's perspective, a negative enactment of power: the major theme seems to be that it is the client's life, hers to mess up if she pleases.

Wendy provides virtually no professional contribution, no explicit direction, despite her decades of family law practice. All she can do is list alternatives, as if to say, "Here is a set of outcomes that are technically feasible; see if your husband will buy any of them." Perhaps this is a subtle way to ascertain Nick's opening position, but it sounds more like an invitation to consider anything that he finds acceptable.

Wendy sends Kathy out to negotiate with Nick without any advice about psychology, structure, stakes, moves, tactics, or order of alternatives, and without any background about what a judge would be likely to do if a settlement is not achieved. Moreover, Wendy offers no justification for her abdication. Why, the client might wonder, does my lawyer exclude herself from negotiations with the other side?

This phase of the case is difficult to interpret. Have we encountered a lawyer who speaks the language of a politically correct professional woman, but whose behavior is in fact disorganized and

ineffective? Or is she, to the contrary, deftly sending Kathy out to negotiate with Nick, knowing that little will be accomplished, but believing that only these frustrating encounters with him will lead her to redefine their relationship in realistic terms, which then will form the basis for sound negotiations?

There is no point in searching for some positivist reality that drives out alternative meanings. This text is simply our reproduction of their production. But the truth of what is going on in Wendy's mind, if there is any one authentic version, does not make any difference to our larger point about the nature of power in professional relationships. Whether Wendy is a very poor, or a very crafty, lawyer does not affect the proposition that lawyers and clients are not fully conversant with each others' agendas, that their interactions are in the form of negotiations, and that direction and influence flow back and forth between them, and even away from them both.

FOURTH LAWYER-CLIENT CONFERENCE (37 weeks after the first conference). This conference may be viewed as something of a corrective to the preceding one. Wendy takes a strong position about goals, reinforces her view by describing a court's likely attitude, and establishes a practical plan for conducting the next stage of negotiations. However, because of Wendy's lack of preparation, the conference gets off to a bad start:

Wendy: Okay. Let's see. Where's your file, do I have it here?
What are we here for?

Kathy: I wish I knew what I was here for.

Wendy: . . . You were going to go back and talk to your husband, I believe.

Kathy: Yes, I did He just said anything I wanted to do, do it.

Wendy: . . . What can we do. There are several alternatives . . . I'm trying to remember because this was November 3rd, so it's been six weeks.

Kathy: You mean you can't remember that long?

Wendy: I don't understand.

Kathy: Gee, I can.

The image in this initial dialogue is not of a lawyer who has taken charge, but rather of one still unable to grasp the reality of the client's pressing needs. Those needs are indicated when Kathy says she wishes she knew what she was "here for." Wendy hears that comment as if Kathy had forgotten something, rather than understanding it as a general statement of Kathy's continuing doubts and disorientation. Moreover, Wendy quickly becomes the disoriented one, unable to grasp why the client would care that she remember the earlier meeting.

The conference moves on to review the conversations that Kathy has been having with Nick:

Wendy: And so you haven't told him the sad facts of life that you are going to have to continue to have money?

Kathy: I have not told him anything like that. I figured the less I said the better.

Wendy: [Whether you sell the house or not] you'll probably be entitled to some support What do you want to do?

Kathy: I don't know what the best thing to do is. I honestly don't, just listening to you. That's where I'm at a total loss. I do not know what the best thing to do is.

For the first time in their interaction, Wendy asks Kathy directly what she wants to do. Power is shifted; the client is invited to assume the directive role. But Kathy does not take up the invitation and substitutes the question of what is "best" for the question of what she wants. Any reality that she may want to construct seems to demand knowledge that she does not possess.

In Kathy, Wendy confronts a client unable to articulate goals despite the negotiations she has been conducting with her husband for months. Wendy responds by upping the ante:

Wendy: Well, it's really your decision because you have to live with it for the rest of your life.

Kathy: I know.

Wendy: If I make that decision and later on you are unhappy about it you are going to say, "Well, why did she choose this road to go." I think probably, unless you let him know he's going to have to pay support, you may be working on a false assumption. He's going to have to know that whether you keep the house or sell the house or whatever, he's going to have to pay you support.

Kathy: . . . I really wish that I didn't have to take anything.

Wendy: I understand that. But let's be practical. . . . You have all these basic expenses that there is nothing you can do about. You cannot meet them. You cannot make enough money to do so.

Kathy: You know I'm just a wimp.

Wendy: If you were a brain surgeon I'd tell you to tell him to go buzz off and waive it. But you can't do that. You don't make enough money, and I'm really concerned about how are we going to take care of you. You have to have income from him too. There is just no other way that you are going to get around it.

Once past the formulaic lines about whose decision counts, Wendy goes beyond the "we could do this or we could do that" stance that she took in the previous conference, insisting that the client demand the necessary spousal support. The world of the client's wishes is now vividly contrasted with that of practicality. Wendy insists that the client face a reality that, from her lawyer's

experience in divorce, she knows best. As the lawyer becomes more strident, the client's seems to lose all decisiveness—she has no idea what to do, and refers to herself as a “wimp.” This apparent indecision may reflect resignation rather than weakness, a paralysis induced by knowledge that she will not get that which she requires. In Wendy's insistence that there are no alternatives, what might look like a power grab seems more like the hard sell.¹¹⁹

The negotiation of goals and the allocation of responsibility between Wendy and Kathy take on new dimensions when recent financial experience is reviewed:

Wendy: So what he's paying you is certainly a fair amount . . . based on his income. But I still think you need more on top of that. Didn't I tell you you needed a couple of hundred dollars more than he's giving you already Is he paying the taxes and insurance or are you paying them?

Kathy: No, I'm paying it.

Wendy: So he's paying about \$400 a month.

Kathy: Uh-huh.

Wendy: Oh, he's not. That's ridiculous. Here we go again. He should be paying more now.

Kathy: . . . I know I've gone through the savings account almost.

Wendy: . . . Why have you let him get away with this all this time?

Conscious or not, Wendy is engaging in classic scapegoating: “why have you let him get away with this all this time?” Unappealing as this behavior may be, it is a forceful attempt to shake the client out of her reluctance to ask for support. Thus, in negotiating the reality of the client's post-divorce financial situation, Wendy now appears ready to employ whatever tools it takes to get her message across.

In the following exchange we see the reality that lawyer and client are trying to negotiate. That reality again involves a juxtaposition of Wendy's self-proclaimed practicality with Kathy's increasing willingness to play the role that Wendy is assigning to her.

Wendy: What do you do if the roof falls down? You have to have a new roof put on.

Kathy: I don't know.

Wendy: Well, you have to think about this. It's a very practical situation.

Kathy: I'm not, see, I've never really given much thought to me.

Wendy: Well, I understand that and we've already talked about being number five and now you are number one. You really have to start thinking about what's going to, what's best for Kathy. What are you going to do. And I'm really awfully concerned.

¹¹⁹ On the dilemmas of such a position, see Simon, *supra* note 64, at 217.

Kathy: Well, I will, I'll tell him. I can hear it now.

Matters of real significance are contained in this brief exchange. Kathy appeals to Wendy to take care of her by suggesting that she has never been able to take care of herself. Wendy seems to acknowledge that Kathy's difficulties spring from her view of herself and the world, as well as from simple naivete about the hard realities of living by herself. Kathy needs help to look out for herself, and if she cannot muster the courage to confront her husband about his responsibilities, her financial future will be bleak. The client initially resists: she cannot think about the confrontation without cringing. Yet, in the end, she imagines herself doing what Wendy has asked her to do, while fearing Nick's expected outrage.

A concrete proposal and a plan for negotiations is then worked out for the first time.

Wendy: What we will give him, no interest, \$22,000 payable in five years out of the sale of the house, and it would be secured by a second trust deed on the house. But at least if we make this kind of offer, now, if you like I can instead write a letter to his attorney making this offer. Generally, this is the way people do it, involving the attorney. But I know the two of you have been trying to keep the costs down and have been able to negotiate. So if the two of you can do it, that's just fine.

Kathy: Well, I will go back to him and tell him exactly as it's here.

Wendy: This way you've at least made an offer, so you've gotten things moving a bit; I mean this thing is really kind of mired down and it's silly for us every six weeks to get together and go over the same figures again and the same conversation.

Kathy: I know. And I'm such a dunce when it comes to anything like this, I just . . . I can remember that.

Wendy: Okay, give him a \$20,000 note payable in five years, secured, and that you need support of a minimum of \$500 a month. It should be more than that. Tell him that I said that's rock bottom . . . and I'm appalled that you haven't been getting more.

This climactic exchange is both clarifying and confusing. It is clarifying in that the lawyer and client have been able to negotiate a proposal and have agreed on a definite plan for its delivery. They have settled on reality and responsibility simultaneously. However, the exchange is confusing because they discuss two very different versions of the proposal. The first version includes a \$22,000 transfer, to be made from the proceeds of a sale; there is no mention of support. The second version involves a \$20,000 transfer, no sale, and includes support. Kathy says that she can remember "that," but which "that" is she to remember?

The exchange also suggests that Wendy's supposed interest in minimizing Kathy's legal fees, manifested in the assignment of ne-

gotiations to Kathy, is based on a lack of commitment to the case, a certain laziness about really getting involved. Wendy is well aware of both the inefficiency of Kathy's past efforts at negotiations and of the repetitive and circular nature of their exchanges. She acknowledges that it would be routine at this point to send the demand in writing to the other lawyer. But rather than make that effort, she makes only a half-hearted offer to take over the negotiations.

Is Kathy just a helpless victim of a lazy lawyer or, even now, are circularity and repetition her way of exercising power? At some level is she aware that, as long as she keeps the divorce process from reaching closure the possibility of reconciliation with Nick remains? Who is "using" whom and for what purpose? Is Kathy a passive consumer, or an agent whose apparent passivity produces an intended circularity and repetitiveness that Wendy now recognizes?

At the end of the conference, it is apparent that Kathy is still unconvinced that there will be any spousal support in her future.

Wendy: Once he finds out that you have to get spousal support, he may say "You'll rot in hell before I'll give you a nickel," which you can tell him, "Well heck, my attorney's heard that one before, umpteen hundred times." But that's not true. You will get money from him. There's just no question.

Kathy: I'm sure of that. I mean, I'm sure he's not sure of it.

Wendy: Right. But I'm just telling you if we go to court, you are getting money from him. You will probably get more. He's been getting away with murder and we've been letting him do it, but no more Ms. Nice Guy Too many people have lived to regret the fact that they wanted to get along with their ex-husband. If getting along with him means you live at the poverty level and he lives on Easy Street, how long are you going to get along with him before you start resenting it?

Kathy: Not very long, I'm afraid. I'm afraid that's very true.

In this exchange, Wendy mobilizes the conventional authorities, "what the court will do" and "what other clients have experienced," in an effort to persuade Kathy to accept the legal view of reality. She should receive support because a court would grant support;¹²⁰ she will regret the day she bargains for privation, as have other women. The client leaves and will talk to her husband—but what will she say? Neither lawyer nor client really know.

SECOND INTERVIEW WITH LAWYER (immediately following the previous conference). The interview focuses on Wendy's view of Kathy as a negotiator and the court's probable attitude toward support:

¹²⁰ This claim is a vivid example of the "bargaining in the shadow of the law" that takes place between lawyer and client. See Mnookin & Kornhauser, *supra* note 66.

Interviewer: Did you expect her, the last time that she talked [to the husband] to say the things that she's now going back to talk to him about?

Wendy: Yeah, I really thought that, well that was November 3rd, I really figured at that point she would take it to him and we would have it wrapped up It's not really a terribly satisfactory thing having her negotiate it like this . . . because she is not getting her fair share. And if she had said, "OK, you can handle it," she'd be getting quite a bit more than she's going to be settling for If I had it my way, we'd have been in court six months ago with an order to show cause to get a little more spousal support.

Interviewer: Do you think it's possible that she thinks if she sort of lives with this situation and behaves in a nice fashion, that he'll give up the idea of the divorce?

Wendy: No. But I think a lot of women delude themselves into feeling that if they are nice and fair that if they run into financial trouble, their ex-husbands will help them financially. And I try to get across to them that that is not going to happen.

In this conversation, Wendy initially portrays herself as the powerless victim of a client who will not let her act: if Wendy were able to act, Kathy would receive more spousal support. But Wendy still refuses to recognize that what Kathy wants from Nick is emotional rather than financial support. Thus, Wendy quickly dismisses the suggestion that Kathy may actually know what she is doing, that she has a clear purpose in mind. The reality on which Wendy focuses is not the reality of the continuing emotional tie between Kathy and Nick. Instead, Wendy is now in full "accounting" mode.

Interviewer: What do you think a judge's attitude would be about spousal support?

Wendy: There's no question. She's been married to him for a long, long time. He's making much more money than she is She's established her ability to earn an income and established a need. So there's no question a judge would order her support. And she would easily get \$500 a month.

The reality against which Wendy evaluates the posture of the case is shaped by her view of what the court would do. This reality places her in the unpleasant position of having to admit that their negotiating strategy is not working. As Wendy puts it, "I just don't think I'm going to get her enough money. But is there ever enough?" Yet Wendy seems helpless to change the strategy.

FIFTH INTERVIEW WITH CLIENT (43 weeks after the first conference). Kathy had come to the office to see Durr, but also spoke to the interviewer about Nick's response to the support proposal and her reaction to that.

Kathy: Wendy wanted me to go back and tell him [Nick] that I wanted to stay there two years or something and that I needed x dollars a month.

Interviewer: Did he have a specific reaction to that?

Kathy: Do you really want to know what he said?

Interviewer: Yeah, what did he say?

Kathy: He said, "Christ, I'm not going to do that." And I said, "Well, I'm just telling you what the lawyer said."

Kathy's response is as telling as her husband's. She did not argue for support on the merits. She puts all responsibility for the demand on her lawyer. She is not asking for this arrangement that infuriates her husband; she is simply a messenger relaying information from a professional. The reality that her lawyer thought she had finally negotiated with Kathy was, in Kathy's presentation to Nick, only an expedient, a way to end an unpleasant conversation.

That Kathy's social world was highly conflicted was made clear by this interview and by the conversation with the paralegal.

Interviewer: Do you think he is trying to push you to the wall?

Kathy: Well, I don't. I told him one time, I said I'm really scared. I am scared because I've been a wife and mother for a heck of a long time and all of a sudden I'm thrust out there. And he's always made fun of my stupid little jobs, as he called it. Now, all of a sudden, my stupid little jobs have got to be my livelihood.

Interviewer: Right.

Kathy: And I'm scared. I'm really scared.

Interviewer: And is he sympathetic, do you think, to that?

Kathy: Oh, I think so. He says, why should you be. You are intelligent. But intelligence has nothing to do with it.

This picture is one side of her reality—a vulnerable, untrained worker in a tough job market, with no prospects for improvement and no second line of defense. But despite her worry about the future, Kathy's definitive position seems to be: "You know, I'm not going to ask for the money. I really am not."

Throughout the case Wendy has been inconsistent, inattentive, and too late in her efforts at the joint construction of the social and legal world that make up the reality of her client's future. In the defining enactment of power, Wendy gave Kathy more responsibility than Kathy could carry, and she did this despite her misgivings about Kathy's ability to realistically imagine the future and confront its difficulties.¹²¹

¹²¹ At this point in the case the client asked that we stop observing conferences and not interview her further. She did not give a reason for withdrawing from the study. Her withdrawal paralleled the way clients react to the accumulation of unstated dissatisfaction with lawyers. See *infra* text accompanying note 87. The exit without explanation marked the limits of her tolerance for the social science strategy in which everything

THE DENOUEMENT. The marriage was eventually dissolved and a settlement agreement incorporated into the judgment one year and seven months after the first conference. Kathy kept the house. Her share of community property was stated to be worth \$27,000 more than Nick's. In consideration of Nick's foregoing any claim based on this unequal distribution, Kathy irrevocably waived any claim to spousal support.

THIRD INTERVIEW WITH LAWYER (14 months after judgment was entered). This interview was, for the most part, devoted to securing background information about Wendy's education, career, and her goals in divorce practice. The latter have a distinctly therapeutic, if not political, cast, yet they were hardly apparent in Kathy's case:

Wendy: Nobody wins. It's not a question of winning in this. It's how much can you take out with your sanity and dignity intact. I try to encourage them that living well is the best revenge and that they can't look back over their shoulders and worry about what he's doing with whom. They have to go on. And I guess the major satisfaction we've gotten out of it is to see some of these women come in who are just, I mean you have to scoop them up in a basket, they are just so awful. I mean, the women who come in here say: "Give him everything. He's going to kill me if I don't." Or the husband tells them "You are not going to get anything after all because the kids are grown and you don't deserve any support." And who believe their husbands because they have been conditioned to. And how we can bring them in here and they are absolutely spineless creatures that are just spread all over the floor and build them back into something with a spine and a backbone and finally realize, I'm a human being and I have rights, and they learn to stand up for themselves. It really is a real sense of accomplishment.

This program has two dimensions, one empirical and one rehabilitative. Wendy often acts for women who have been intimidated or conditioned by their husbands to accept less in divorce than the law would secure for them. Transmitting this technical information to such clients is not enough. Rather, their self-identity must be reconstituted so that they understand that they deserve that to which they are entitled. In the end, Wendy imagines that she produces not only optimal outcomes, she also produces new women.

Did she believe that she had wrought this transformation in Kathy's case?

becomes a subject of inquiry. It was both a gesture of resistance and an assertion that no more questions would be answered, not even that of why she was withdrawing. In a domain where clients become subjects, it was a striking enactment of her power in relation to us.

Interviewer: Did you find her an easy client, a hard client, to work with? Sort of typical or not typical?

Wendy: I would say the biggest problem with that case was that it was one of those hurry up and wait. There would be a lot of activity and then there was nothing.

Interviewer: Why do you think that was? Do you think she was ambivalent about the divorce?

Wendy: Yes. I think that they still kind of cared for each other quite a bit and I think that there was a lot of trouble letting go. And a lot of hurt. And I used to hurt her feelings so much because I called her Kitty all the time because she struck me as a Kitty. . . . A very soft person and to me that's a Kitty. And I mean I would often call her Kitty and she would look so crushed—"My own lawyer doesn't even know my name." I do know your name, but you are just a Kitty to me. So I tried to be really careful and call her Kathy. Kathy is harsher and to me she was just such a very sweet person. I really felt very sad about that case because I liked her so much as a person. So it was kind of sad the way it worked out. But I think she was happy with the results in the long run I get some cases where I just wish they would go away and get somebody else because this is costing them too much for what they are getting.

The gap between programmatic objectives and actuality in this case is obvious. To remake clients requires powers no divorce lawyer possesses. And Kathy was by no means remade into a new woman. In fact, Wendy candidly admits to compounding the client's difficulty of self-assertion.

CONCLUSION

We began this paper by arguing that power in lawyer-client interaction is not the straightforward phenomenon generally depicted in the literature, but a more subtle and complicated construct enacted through often ambiguous and conflicted behavior.¹²² Some of the more important respects in which power in lawyer-client relations differs from the conventional picture are that it is enacted through implicit negotiation as well as overt action; that motives, goals and data are often deliberately concealed; that power can be elusive, even to the point of disappearing; that assertions of power may be resisted openly or covertly;¹²³ that the locus and nature of power changes over time; and that lawyer-client differences, even on matters of great moment in a client's affairs, rarely result in open confrontation.

¹²² See *supra* text accompanying notes 4-6, 10-92.

¹²³ SCOTT, *supra* note 10, at 136-38.

We illustrated each of these attributes of power in the Case of the Unsupported Wife. There was implicit negotiation in the continuing silence over case progress and in the ambiguity over who, and under what circumstances, would control the critical decision about spousal support. Concealed motives and goals were reflected in the client's hopes about her husband's return, the lawyers' abdication of an active role in negotiations, the lawyer's failure to raise the support issue at an early date, and her interest in personality transformation. The insubstantiality of power is found in salient issues with which no one connected, such as taking the support issue to court or controlling the pace of case progress.

In addition, both Wendy and Kathy overtly as well as covertly resisted efforts by the other to exercise power. Wendy resisted her client's implicit attribution of responsibility for delay. Kathy resisted her lawyer's insistence that she ask for support: even as Kathy made the demand, she disowned it. Kathy resisted the notion that the costs of maintaining good relations with her husband were too high.

Avoidance of confrontation where there were differences about important issues was also common. Though Kathy was upset with the pace of progress, she did not complain about it to Wendy. While she did not think that her husband would ever agree to pay support, she did not confront her lawyer with her belief. Wendy, in turn, believed that her client might well be headed for the welfare rolls, but let her go her way without a fight.

In all of this we saw changes over time in the play of power and resistance. But those changes were by no means linear. Subjects would appear and disappear quite unpredictably from the negotiating agendas of lawyer and client. Indeed, in some sense Kathy and Wendy traveled along different, and separate, trajectories throughout the case. Power was enacted and performed, yet it was often difficult to say who, if anyone, was "in charge," who, if anyone, was directing the case. Power was at once shaped and reshaped, taken and lost, present and absent.

When power is considered to be dynamic and fluid rather than solid, stable and centralized, the subtle negotiations over reality and responsibility that we see in the Case of the Unsupported Wife are to be expected. Roughly comparable negotiations occur in all cases we observed. This view of the nature of power in the professional relationship does not, however, predict two dimensions of lawyer-client interaction that we also observed—the avoidance of confrontation even in the fact of disagreement over important issues and the reliance by clients on *exit*, rather than confrontation, as a response to dissatisfaction.

Divorce clients are typically weaker parties in their relationship with their lawyers. The weaker party in a relationship that reflects a major disparity in power does not often directly confront the stronger. Slaves, prisoners, students, and wives subjected to patriarchal hegemony have realized that effective resistance, even effective symbolic resistance, must be indirect, subtle, elusive and ambiguous. In divorce, lawyer and client negotiate power, but they do so on uneven terms. We have pointed out the entrenched position of lawyers—their turf, their rules, their vernacular—and the enhanced vulnerability of clients—high stakes, high affect, and inadequate resources. Avoidance and exit become the ultimate recognition of legal hierarchy, the final expression of a structurally-inferior person who cannot fight, but will not surrender.

But what can we learn from the reluctance of lawyers to insist that clients accept their professional opinion, from their disinclination to insist on action that incorporates their professional judgment? We interpret this behavior as a signal that the relationship between lawyer and client is hierarchically complex; that although it is not symmetrical, it is two-sided. The lawyers' position reflects professional power, but clients have two sources of structural power of their own—they pay the bills and they make the ultimate decisions to settle or fight, to accept the deal or not. Lawyers almost always want to retain clients on whose cases they have worked, and they almost always want to be paid. Since clients who come into direct and explicit conflict with their lawyers may conclude that their only recourse is exit, lawyers who engage in explicit confrontation, who draw lines in the sand rather than maneuver around impasses, jeopardize both these objectives. Thus, our model, like any analysis of the negotiation of power in human interaction, must take structural realities as well as individual initiatives into consideration.

To what extent is our view of the enactment of power in the negotiation of reality and responsibility limited to the divorce cases from which it is derived? Divorce practice is different from most other legal practice.¹²⁴ Divorce, more than most litigation, originates in personal failure and rejection. The number of clients in divorce who are experiencing some form of personal crisis is high, probably higher than in parallel fields such as criminal law, personal injury, worker compensation, landlord and tenant, consumer, and bankruptcy. As a consequence, the negotiation of reality may be more difficult and salient in divorce. And because divorce law lies at the discretion end of the rules-discretion continuum, the opportunity for creativity in interpreting the legally possible is

¹²⁴ For a discussion of those differences, see O'GORMAN, *supra* note 26, at 61-64.

greater than where rules narrow the scope of interim maneuvers and acceptable outcomes. Perhaps most importantly, the relative social status and economic power of divorce lawyers and their clients, rather than conforming to a single pattern, (as may be the case in fields as diverse as criminal and corporate law), is more varied, since the status of clients reflects the population at large. Thus, divorce lawyers tend to encounter clients of diverse social and economic status and, as a result, are less likely to develop patterns of domination and control than lawyers whose social position, relative to that of their clients, is more consistent.¹²⁵

On the other hand, many of the enactments of power in negotiations of reality and responsibility between divorce lawyers and their clients do occur in other areas of practice. Lawyers and clients must always negotiate a consistent version of events, an account of the client's situation and interactions with the other side. They must negotiate a fit between the client's goals and expectations and the results achievable through legal process. They must negotiate the timing of action to be taken in pursuit of the client's goals, and the division of labor between them. In each of these areas, whether the area of law be commercial or criminal, power is neither stable nor static.

Only on rare occasions, then, does interaction between lawyers and clients resemble a straightforward provision of technical services to a generally complacent, dependent and weak laity. The interaction is more often complex, shifting, frequently conflicted, and negotiated. In the relationship between lawyer and client, the professional, like it or not, shares power and resources with the client. It is a relationship where the knowledge and experience of each may be challenged by the other; where the economic investment of the lawyer in any particular client may equal or out-strip the client's investment in the lawyer; where lawyers have conflicts of interest that clients seek to identify and protect against; and where the humanity of each may be constantly under the scrutiny of the other. Thus, the nature of lawyer-client relationships beyond the context of divorce cannot be captured by simple models of professional or lay dominance, or by simple estimates of lawyer and client resources. Power in those relationships is, like power everywhere, deeply embedded in complex and changing processes of negotiation.

¹²⁵ The importance of client status in determining the nature of lawyer-client interaction is highlighted in HEINZ & LAUMANN, *supra* note 28, at 59-64.