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Critical Legal Ethics

REVIEW OF *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER*, EDITED BY SUSAN D. CARLE,[†] FOREWORD BY ROBERT W. GORDON.^{††}

REVIEWED BY PAUL R. TREMBLAY^{*}

I. INTRODUCTION

These days, it is not easy being a progressive lawyer—one of those noble folks who choose to work with disadvantaged clients and underserved communities. Not because of the low pay or the diminished status that such lawyers may hold within some professional circles—although both certainly could be considered drawbacks. And not because the job is too tough; being a progressive lawyer is no doubt hard work, but it is certainly far more gratifying than most of the alternatives.¹ No, being a progressive lawyer is tough because of the increasing uncertainty that progressive lawyers encounter as they try to make sense of the responsibilities inherent to their role. In the olden days, it seemed like lawyers for poor people had a pretty well-defined role in life. They went to court and fought hard to win important rights for their clients. Of course those lawyers faced some hard choices—for example, whether to focus on individual client work or on bigger, and often sexier, law reform work—but, for the most part, public interest and poverty lawyers were, first and foremost, good, creative litigators on behalf of their clients.

These days, things are not so simple, but they are a whole lot more interesting. Thanks to waves of critical scholarship produced over the past 25 years about progressive lawyering and the role that law and legal institutions generally play in our society, most of the simple role conceptions and understandings about public interest and poverty law work have been (if you'll excuse the phrase) deconstructed and obliterated. Over the past several years, thoughtful scholars have rigorously reexamined how lawyers and clients might best work together and how power in their working relationships ought to be identified and negotiated. Critical thinkers have conceived alternative visions of lawyering practice,

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1. See Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J.L. & POL'Y 17 (2001) (recounting the joys, and travails, of a lawyer working in a public interest setting).

visions that embrace a greater respect for the power of community;² deeper attention to the influences of race, gender, class, and culture on the practice of law as well as on the relationship between the professional and her client;³ and more honest acknowledgement of the special tensions inherent in lawyering for disadvantaged peoples.⁴ Today, virtually all of the previously accepted understandings about what it means to "practice law for poor people"⁵ are contested in some fashion. And, importantly, the traditional dogmas have not yet been replaced by new ones. The sophistication and diversity of the arguments surrounding the role of progressive lawyers have prevented new understandings from coalescing. The newer developing wisdoms are tentative, and the explorations continue apace. It is therefore a great time to be a progressive lawyer, even if the role may not be an entirely comfortable one.

2. For a sampling of this scholarship, see Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88) [hereinafter Alfieri, *Antinomies*]; Susan D. Bennett, *Lawyering for a New Democracy: Little Engines That Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469; Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Zenobia Lai, Andrew Leong & Chi Chi Wu, *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L.J. 1 (2000); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000).

3. See, e.g., John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space and Poverty*, 67 FORDHAM L. REV. 1927 (1999); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby--LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585 (1997); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996); David B. Wilkins, *Identities and Roles: Race, Recognition and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997)..

4. See, e.g., Anthony V. Alfieri, *Theoretics of Practice: The Integration of Progressive Thought and Action: Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 768 (1992); Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133 (1994); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369 (2004); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994) [hereinafter Simon, *Dark Secret*]; Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999); Louise G. Trubek, *Embedded Practices: Lawyers, Clients and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996); Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 813 (1998).

5. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049-59 (1970).

The scope of the literature about critical lawyering⁶ is vast. With so much written and so many ideas in play, interested readers would benefit a great deal from anthologies presenting representative samples of prominent works in the field. Unfortunately, few such focused collections exist.⁷ Professor Susan Carle, a legal historian and ethicist from American University Washington College of Law, has finally prepared one such compilation. Her textbook, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader*,⁸ is a welcome and illuminating contribution to the world of critical lawyering scholarship.

Carle's textbook assembles forty excerpted articles, essays, and book chapters, each critically appraising some specific aspect of lawyering or legal education.⁹ Several of the articles Carle includes are well-known classics, and while some others are less familiar, at least to me, they are no less valuable. Each selection makes an important contribution to the rich and sophisticated debate currently underway regarding the proper role of lawyers who confront the injustices of contemporary society.

Carle ostensibly focuses on *legal ethics* in this compendium, but her reach is in fact broader than that, and happily so. Her book has very little—indeed, almost nothing—to do with the “typical” subjects of legal ethics scholarship including the *Model Rules of Professional Conduct*,¹⁰ the *Restatement of the Law Governing Lawyers*,¹¹ and the substantive law of lawyering. Instead, Carle's book focuses on tough questions about lawyers practicing as noble, justice-seeking actors in a system grossly tilted in favor of entrenched and powerful interests. If this is part of what

6. In this review I use the terms “progressive” and “critical” interchangeably, recognizing that in some other contexts the terms might acquire differing meanings.

7. A few important collections offer some exposure to the progressive lawyering and cutting edge clinical scholarship. See, e.g., *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998); *CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS* (Alex J. Hurder, Frank S. Bloch, Susan L. Brooks & Susan L. Kay eds., 1997) [hereinafter *CLINICAL ANTHOLOGY*]; *LAW STORIES* (Gary Bellow & Martha Minow eds., 1996); *MARTHA R. MAHONEY, ET AL., SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW: CASES AND MATERIALS* (2003). Several important freestanding books develop discrete critical lawyering ideas in depth. See, e.g., *GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); *DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); *DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); *STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* (2004); *WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

8. *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* (Susan D. Carle ed., NYU Press 2005) [hereinafter *LAWYERS' ETHICS*].

9. All but one of the excerpts were previously published elsewhere. The exception is the splendid contribution of David Luban. See David Luban, *Making Sense of Moral Meltdowns*, in *LAWYERS' ETHICS*, *supra* note 8, at 355.

10. *MODEL RULES OF PROFESSIONAL CONDUCT* (2004) [hereinafter *MODEL RULES*].

11. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000).

we talk about when we talk about legal ethics,¹² then her book is indeed an ethics text. But instead of relying on the typical doctrines that most legal ethics textbooks do, Carle's work digs deeply into emerging lawyering praxis theories and jurisprudential questions about the nature of social justice in a way that few law school texts have attempted.

Part II of this Review describes the essays and the viewpoints Carle has chosen to include in this collection and distills some of the critical messages that she hopes students will take away from her text. Carle has chosen wisely, both in terms of the content of the selections and in how she presents them. Most of the important progressive lawyering critiques find some air time in her book, and their messages are subtly spread among otherwise unconnected readings. Part III revisits three of the book's more prominent themes, all intertwined cross-currents within the writings. The three chosen in this Review for closer scrutiny are (1) the contours of client-centeredness as an orientation for lawyer-client associations, (2) the challenges of what we might call community or "rebellious lawyering," and (3) the persistent problem of moral activism. Part III of this Review reveals how deftly Carle has highlighted these and other contested lawyering theories, but also points out the inevitably introductory nature of a compilation like this. Part IV wraps up with some thoughts about how teachers might make the best use of this rich and valuable resource.

II. THE READINGS

Carle organizes her essays¹³ in an unexpected but ultimately useful way. Her editing of the original works is superb.¹⁴ Each chapter begins

12. See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985) (borrowing his title from RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE* (1981)). One scholar recently has suggested a very narrow definition of "legal ethics": "Legal ethics, however, is much more circumscribed [than religious and theological ethics]. Its core is in codes and rules; it is a technical subject in which one learns, for example, the intricacies of conflicts and of reasonable fees; it is tested on multiple choice exams." Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1253 (1998). For a more expansive view, and a disagreement with Professor Griffin on her definition, see Thomas D. Morgan, *The Relevance of Religion to a Lawyer's Work: Legal Ethics—A Response to Professor Griffin*, 66 FORDHAM L. REV. 1313, 1317 (1998); see also Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994), reprinted in LAWYERS' ETHICS, *supra* note 8, at 271 [hereinafter Menkel-Meadow, *Portia Redux*] ("broadly defined 'legal ethics'" includes "leading our lives as lawyers, making decisions about our clients, our opponents, ourselves, and our families, searching to be 'good lawyers' as well as 'good people'").

13. For simplicity's sake, in this review I shall often refer to each of the excerpted selections as an "essay," even though few of them would have been labeled essays in their original versions. With Carle's distilling the lengthy pieces into 7-12 pages of insight and argument, the extracts as they appear in the book read as essays.

with a very helpful introduction by Carle about her goals in including the selections in that chapter and how they might relate, followed by a series of questions for the reader to consider. She organizes the readings into two broad parts: one labeled “Theory and History” and the other “Contemporary Critical Approaches”; the former reads somewhat as background to the spirited debates found in the latter. As is true with so much of this book, the segments intersect in intriguing ways. Important themes that emerge in the historical background section play a key role in the later discussion of the contemporary struggles about proper lawyering roles and responsibilities.¹⁵

Within “Theory and History,” Carle first offers four articles that critically appraise the legal profession’s regulatory schemes and the justifications for its monopoly status. She begins with a classic, and quite cynical, commentary by Richard Abel,¹⁶ who argues that the American Bar Association’s ethics codes and rules serve no purpose other than to reinforce and legitimate the profession’s monopoly power. Carle balances the Abel argument with a somewhat more hopeful, if still critical, sociological argument from Terence Halliday,¹⁷ who argues that lawyer regulation and monopoly reflects “an implicit concordat between states and established professions,” by which the professions agree to provide important public services in return for their notable advantages.¹⁸ With those divergent orientations in place, Carle then offers David Wilkins’s

14. Carle’s ability to cull small fragments of longer pieces and leave a coherent, readable product is indeed impressive. While any reader familiar with a piece’s full text can quibble about what ideas Carle has chosen to include and what parts she has omitted, for the most part (there are a couple of exceptions) the edited readings flow gracefully and articulately.

15. In preparation of this review, I have opted to read the essays as they appear in their abridged form in Carle’s book, and not to read each piece in its original text. I had read many of the original articles or books in the past, but certainly not all of them, and any previous reading tended to be some years ago. I chose to focus exclusively on Carle’s edited selections in order to situate myself as close to the role of a new reader as possible, and to discern from the excerpts what Carle has presented for us. Some of my comments below will reflect that orientation, as, for instance, when I evaluate a piece’s limited explication of a certain point without acknowledging whether the original text had offered more depth.

16. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981), reprinted in *LAWYERS’ ETHICS*, supra note 8, at 18. As I refer to each of the pieces in this anthology, I shall cite to its original source and thereafter refer to it in its form and location within Carle’s book.

17. TERENCE C. HALLIDAY, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*, in *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT*, reprinted in *LAWYERS’ ETHICS*, supra note 8, at 25. I found the Halliday piece to be one of the two least accessible pieces in the collection—not because of a shortcoming in Carle’s editing skill, but because of Halliday’s cramped writing style, at least to my eye. (As we see below, the other similarly challenging essay is the selection by Anthony Alfieri. See *infra* note 159.)

18. *Id.* at 29.

account of four types of lawyer regulation and his assertions about the essential role of *context* in any consideration of controls over lawyer behaviors.¹⁹ This theme of contextual reasoning remains a central one for the remainder of the book.

Another pivotal focus of the book's remaining essays appears in Lucy White's article about structuralist and Foucaultian visions of power relationships.²⁰ Following three essays explicitly about professional regulation, White's meditation at first seems out of place, but it is hardly so. By introducing Foucault's theories about the shifting, unpredictable quality of power, challenging more simplistic traditional visions of the powerful on one side and the powerless on the other, White's article begins a process of unsettling accepted wisdoms and resisting categorical thinking that becomes quite important later in the book.

Carle next turns to historical accounts of the profession's development from the early 19th century to the present. Some of these essays present essentially descriptive history, including pieces by Clay Smith,²¹ Susan Carle,²² and Genna Rae MacNeil²³ about the lawyers and the tactics of the early NAACP. Carle also includes two articles that discuss important Black women lawyers in the early 20th century by Virginia Drachman²⁴ and Kenneth Mack²⁵ and two other articles by Jerold Auerbach²⁶ and

19. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992), reprinted in LAWYERS' ETHICS, *supra* note 8, at 31.

20. Lucie E. White, *Seeking the Faces of Otherness*, 77 CORNELL L. REV. 1499 (1992), reprinted in LAWYERS' ETHICS, *supra* note 8, at 41 [hereinafter White, *Seeking the Faces of Otherness*]. In this essay White describes and defends "a new field of critical reflection on advocacy and pedagogy—a 'theoretics of practice,'" *id.* at 43, which, emerging from theories developed by Clifford Geertz and Michel Foucault, establishes the fluidity of power and the possibility of collaboration resistance among those otherwise deemed powerless. White suggests that progressive lawyers may learn a great deal from the theoretics of practice movement about navigating the power relationships between the professional and her clients, and between those clients and the structural institutions affecting their lives.

21. J. Clay Smith Jr., *Emancipation*, in EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, (1993), reprinted in LAWYERS' ETHICS, *supra* note 8, at 109.

22. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW AND HIST. REV. 97 (2002), reprinted in LAWYERS' ETHICS, *supra* note 8, at 114.

23. Genna Rae MacNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, in GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1990), reprinted in LAWYERS' ETHICS, *supra* note 8, at 120.

24. Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Gender Equality in Early Twentieth-Century America*, 28 IND. L. REV. 227 (1995), reprinted in LAWYERS' ETHICS, *supra* note 8, at 85.

25. Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405 (2002), reprinted in LAWYERS' ETHICS, *supra* note 8, at 92.

26. JEROLD S. AUERBACH, *A Stratified Profession*, in UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 40 (1976), reprinted in LAWYERS' ETHICS, *supra* note 8, at 79.

Carrie Menkel-Meadow²⁷ which offer a sociological view of the stratification and power imbalances in the profession in the past centuries. Other offerings in this section of the textbook are best labeled as intellectual histories—or glimpses thereof. Four essays address historical understandings of the “republican”²⁸ vision of the role of a lawyer. Russell Pearce argues that early legal ethics writing was quite republican in its ethos,²⁹ while Norman Spaulding is less persuaded.³⁰ Robert Gordon connects the early republican visions of civic virtue to the lawyer elites, whose wealth and power permitted a more independent professional philosophy, one less tied to client self-interest.³¹ And Clyde Spillenger acknowledges a republican strain in the work of Louis Brandeis, but with

27. Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification, and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621 (1994), reprinted in LAWYERS' ETHICS, *supra* note 8, at 99 [hereinafter Menkel-Meadow, *Culture Clash*].

28. As used in the historical chapters of this book, the phrase "civic republican" tends to correspond to the more contemporary phrase "moral activism," in connoting a vision of lawyering committed to the virtuous ideals of a community and resistant to individual client claims when those claims portend harm to the larger community. Writers often employ the phrase in that general spirit, although at times with emphases different from those found here. See, e.g., Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2249 (1993) (describing a similar notion of civic republican thought, as "the potential for virtuous citizens to engage in a political dialogue that generates public values and identifies a common good"); Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 696-97 (1994) (stressing the importance of narrative in civic republican conceptions and noting "[c]ivic republicanism is a political theory based on popular participation in dialogue about the common good"). Feldman's description of civic republicanism correlates well with another prominent theme of the Carle book, that of the power of narrative as a source of ethical meaning. Compare Feldman, *supra*, at 2248 ("Dialogic politics ... generates or produces public values and legal norms: politics, in short, is jurisgenerative."), with Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991), reprinted in LAWYERS' ETHICS, *supra* note 8, at 295, 304 ("We must actively engage the full breadth and depth of [our clients'] narratives to honestly and effectively further our analysis. What we will come to know as a result of this inquiry will be altered by the contextualized process through which we have come to know it. . . . [S]uch a theory-building practice is a distinctly ethical project.").

29. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 242 (1992), reprinted in LAWYERS' ETHICS, *supra* note 8, at 53 [hereinafter Pearce, *Rediscovering the Republican Origins*].

30. Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003), reprinted in LAWYERS' ETHICS, *supra* note 8, at 61.

31. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988), reprinted in LAWYERS' ETHICS, *supra* note 8, at 66 [hereinafter Gordon, *Independence of Lawyers*].

a more critical eye than one usually encounters in writings about Brandeis.³²

The remaining two “historical” pieces in this section of Carle’s book are landmark writings about the tensions inherent in public interest work. The first, by Derrick Bell, criticizes the ethical choices made by desegregation lawyers in the 1960s and 1970s for their disconnection to client community viewpoints.³³ The second is a classic essay by Gary Bellow and Jeanne Kettleson (now Jeanne Charn) which canvasses ethical frictions that emerged within the poverty law movement of the 1970s.³⁴ These two selections presage later discussions in the textbook about client-centeredness, moral activism, and community lawyering.

The second section of Carle’s textbook is more inclusive than the first. Her label, “Contemporary Critical Approaches,” serves as an umbrella for everything else she wants to include after the historically-focused introduction. Carle explores a number of important critical perspectives under this second heading. She opens with a subchapter that she calls “Clinical Approaches,” by which she means perspectives arising from the experiences of clinical law professors and their developing scholarship.³⁵ The label is of course broadly flexible, as clinicians have been writing about nearly every aspect of lawyering theory and practice over the past 30 years. But the inclusion of these perspectives is a welcome acknowledgement to the always-underappreciated clinical world.

Carle presents two such clinical approaches in this subchapter. The first, which Carle calls “client-centered/collaborative lawyering,” includes excerpts from four well-known articles, each offering a general embrace

32. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445 (1996), reprinted in LAWYERS’ ETHICS, *supra* note 8, at 72. Commentators frequently cite Brandeis favorably for his early championing of a more socially responsible lawyering ethics. See, e.g., John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 744; LUBAN, *supra* note 7, at 237-38 (praising the “Brandeisian vision of moral activism”); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 720-35 (1988); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 980 (1987); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 565-66 (1985).

33. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976), reprinted in LAWYERS’ ETHICS, *supra* note 8, at 128.

34. Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978), reprinted in LAWYERS’ ETHICS, *supra* note 8, at 136. The Bellow and Kettleson article is an important contribution and easily warrants inclusion in Carle’s collection, but its placement within the “historical” chapter seems odd. While the article was written many years ago (close to thirty years as I write), it neither describes a historical development nor captures the profession at a particular moment in time. Indeed (and this may be a sobering realization), the issues raised so elegantly by Gary Bellow and Jeanne Charn in 1978 remain just as relevant today and have not been resolved to anyone’s satisfaction.

35. LAWYERS’ ETHICS, *supra* note 8, at 145.

and constructive critique of the client-centeredness model of lawyer-client interaction.³⁶ Robert Dinerstein examines the interpersonal and ethical underpinnings of the deep-rooted client-centered stance.³⁷ Lucy White³⁸ and Binny Miller³⁹ each use affecting client stories to test the practice of collaboration. In the final excerpt, Michelle Jacobs criticizes the neutral, autonomy-focused qualities of client-centered counseling for marginalizing clients of color.⁴⁰ Collaborating *with* clients, rather than lawyering *for* clients, is an important characteristic of progressive clinical scholarship, and these four pioneering pieces afford students a few important glimpses into the unsettling challenges of such a seemingly simple prescription.⁴¹

The second clinical approach explored in Carle's book represents a strand of scholarship that may be in tension with the "client-centered/collaborative" model. Carle calls this approach "community/rebellious lawyering,"⁴² and, as its name implies, its adherents resist much of the client-centeredness model of lawyering which, they argue, places too much emphasis on the individual client. The

36. While thoughtful critics have continued to refine its understandings, the central premise of client-centeredness—that lawyers ought to respect the ultimate choices of their clients, rather than seek to impose their own choices, on questions of legal objectives as well as tactics—has become established doctrine within the academy. See Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370-71 (2006) ("[T]he client-centered approach remains the predominant model for teaching lawyering skills. . . . [I]t is not an exaggeration to say that client-centered representation is one of the most influential doctrines in legal education today."). Client-centeredness as a model for lawyering work is widely attributed to the pathbreaking work of David Binder and Susan Price. See DAVID BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

37. Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990), reprinted in *LAWYERS' ETHICS*, supra note 8, at 151.

38. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990), reprinted in *LAWYERS' ETHICS*, supra note 8, at 157 [hereinafter White, *Sunday Shoes*].

39. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994), reprinted in *LAWYERS' ETHICS*, supra note 8, at 169.

40. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997), reprinted in *LAWYERS' ETHICS*, supra note 8, at 181.

41. I explore this particular topic at greater length in Part III of this review.

42. *LAWYERS' ETHICS*, supra note 8, at 187. Carle notes that many scholars in this area understand the terms "collaborative" and "community" lawyering as referring to the same approaches. *Id.*, *Introduction*, at 5. See, e.g., Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 544-45 (2006) (choosing "collaborative" to capture the terms "community," "mobilization," and "rebellious"). Carle is correct to separate the labels, though, as the comparison between the White and Miller pieces and the López piece in this book tend to show. See *infra* text accompanying notes 89-148.

book includes three excerpts here, starting with a chapter from Gerald López's pioneering work, *The Rebellious Idea of Lawyering Against Subordination*, which established "rebellious lawyering" within the lexicon of the critical scholarship world.⁴³ López distinguishes those good faith, earnest, but ultimately ineffectual *regnant* lawyers, who use their considerable skill and dedication to try to achieve legal advances for their disadvantaged clients, from the more creative, community-based *rebellious* lawyers, who eschew traditional litigation and legislative advocacy in favor of organized resistance and lay advocacy.⁴⁴ López's piece is followed by two more focused examples of community lawyering, one describing lawyering stories from the Pueblo of Isleta in New Mexico⁴⁵ and the other telling a tale of organizing and advocacy within the Hmong communities of Northern California.⁴⁶ Whether either of these excerpts in fact presents a truly "rebellious" vision of lawyering is a question that students will want to consider carefully, and one which this Review addresses below.⁴⁷ In addition to offering students concrete examples of alternative visions of working with and for discrete communities, the Cruz and Hwang essays reprise a significant topic for progressive legal practice, one developed in the earlier essay by Michelle Jacobs,⁴⁸ namely the role of cross-cultural competence in effective lawyering.⁴⁹

Carle's next chapter, which she labels "Critical Theories" in recognition of the influences of Critical Legal Studies, Critical Race Studies, and the body of work popularly referred to as "LatCrit"⁵⁰ and

43. Gerald P. López, *The Rebellious Idea of Lawyering Against Subordination*, in REBELLIOUS LAWYERING, *supra* note 7, reprinted in LAWYERS' ETHICS, *supra* note 8, at 187.

44. *Id.*

45. Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999), reprinted in LAWYERS' ETHICS, *supra* note 8, at 201.

46. Victor M. Hwang, *The Hmong Campaign for Justice: A Practitioner's Perspective*, 9 ASIAN L.J. 83 (2002), reprinted in LAWYERS' ETHICS, *supra* note 8, at 210.

47. *See infra* text accompanying notes 128-48.

48. Jacobs, *supra* note 40.

49. The Jacobs, Cruz, and Hwang essays in their distinctive ways argue for cultural sensitivity when working with different clients, for the development of cultural competence, and for a healthy wariness of stereotyping and "essentializing" at the same time. (The book's essay by Angela Davis, discussed below (*see infra* text at note 56), addresses essentialism in feminist legal theory, as does Lucy White, *see White, Seeking the Faces of Otherness*, *supra* note 20, at 43.) Carle does not, though, include in her selections any in-depth discussion of how lawyers (or students) manage that balance in their daily client work. For two sources that attempt such practical advice, see Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 99 (2001); Paul R. Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver, ed., forthcoming 2006).

50. *See, e.g.*, Espinoza & Harris, *supra* note 3.

“FemCrit”⁵¹ studies upon the development of “subversive,”⁵² cutting edge visions of lawyering practice and ethics, consists of nine essays. Carle chooses two essays from the substantial body of scholarship belonging to the field known as Critical Legal Studies (CLS). While the first, a classic work by Peter Gabel and Paul Harris,⁵³ clearly fits within the CLS label, the other, William Simon’s groundbreaking article on ethical discretion in lawyering,⁵⁴ is a less obvious member of the CLS genre.⁵⁵ Carle follows

51. See, e.g., Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988). For an assessment of the emerging subgroups within Critical Legal Studies, see Jerry L. Anderson, *Law School Enters The Matrix: Teaching Critical Legal Studies,* 54 J. LEGAL EDUC. 201 (2004) (“[T]he [Critical Legal Studies] movement has now fragmented, to a large extent, into various interest groups of ‘outsiders’—RaceCrits, LatCrits, QueerCrits, FemCrits, and so on—that in many ways have differentiated or distanced themselves from the core principles of the original CLS theorists.”).

52. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581 (1990), reprinted in *LAWYERS’ ETHICS,* supra note 8, at 283.

53. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83), reprinted in *LAWYERS’ ETHICS,* supra note 8, at 230.

54. William H. Simon, *Ethical Discretion in Lawyering,* 101 HARV. L. REV. 1083 (1988), reprinted in *LAWYERS’ ETHICS,* supra note 8, at 238 [hereinafter Simon, *Ethical Discretion*].

55. While William Simon’s scholarship may comfortably entitle him to membership in the CLS club, see, e.g., Simon, *Dark Secret,* supra note 4; William H. Simon, *Visions of Practice in Legal Thought,* 36 STAN. L. REV. 469 (1984); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism,* 32 STAN. L. REV. 487, 551-59 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29 (1978); see also Duncan Kennedy, *The Limited Equity Coop As A Vehicle For Affordable Housing In A Race And Class Divided Society,* 46 HOW. L.J. 85, 115 (2002) (describing Simon as a “critical legal theorist”), his most famous article may seem to some too allied with mainstream legal values to qualify for CLS status. In *Ethical Discretion in Lawyering,* Simon advocates a “professional duty” and a “substantial responsibility for vindicating substantive merits” in legal disputes. Simon, *Ethical Discretion,* supra note 54, at 238, 243. The “justice” championed by Simon is reflected in the substantive legal merits of a dispute, and is not dependent, Simon insists, upon a lawyer’s “moral” assessment of the circumstances. *Id.* at 243-44. Simon’s arguments therefore imply an acquiescence in mainstream legal obligations, in ways different from the common CLS views describing substantive law’s inclination “to legitimize a social order that most people find alienating and humane” (Gabel & Harris, supra note 53, at 231), and arguing that “the legal system works ... to shape popular consciousness toward accepting the political legitimacy of the status quo” (*id.*). Scholars have critiqued that quality of Simon’s jurisprudence, which relies significantly on the philosophy of Ronald Dworkin. See David Luban, *Reason and Passion in Legal Ethics,* 51 STAN. L. REV. 873, 901 (1999) (believing Simon might have “too much faith in law”); Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World,* 51 STAN. L. REV. 973, 984 (1999) (“Do we really want lawyers, as professionals, to identify the demands of justice with even an idealized, deep-digging interpretation of extant law? Is our law really that good?”).

Simon does expressly credit his “ethical discretion” ideas not just to Dworkin’s influence, but also to the arguments developed by the CLS scholars. See Simon, supra note 54, at 247. Bradley Wendel acknowledges Simon’s crediting of CLS but finds it

her CLS offerings with three Critical Race Theory pieces by Angela Davis,⁵⁶ Bill Ong Hing,⁵⁷ and Anthony Alfieri.⁵⁸ Each of these articles addresses the connection between race-consciousness and actual lawyering practice.

Carle completes her review of critical theories with four essays labeled “Feminist Theory/Legal Praxis,” despite the fact that all of the critical theory essays, indeed most of the offerings in the book, touch on “legal praxis” themes. Her selection of feminist theory essays includes an excerpt from Carrie Menkel-Meadow⁵⁹ on feminism and the developing an “ethic of care” in lawyering (contrasted with a more traditional “ethic of justice”), Angela Harris’s deliberation on how gender essentialism risks silencing the voices of black women,⁶⁰ Lani Guinier’s review of her empirical study of women’s experiences with traditional law school training,⁶¹ and Phyllis Goldfarb’s elegant linking of feminist jurisprudence with the contextual ethical stance emerging from clinical education experiences.⁶²

The Critical Theories chapter teases the reader with an assortment of subversive ideas—or, ideas that at least seem subversive relative to conventional professional responsibility teachings. The authors included in this chapter illuminate the importance of contextual, rather than categorical, thinking. They rebel at the notion that there are simple right answers to the problems faced by lawyers and at the idea that there are universal rules for lawyers to learn and follow. Each demands frank attention to the effects of power, race, sex, and class in lawyering, but the authors refuse, for the most part, to suggest or define rigid protocols to which lawyers ought to adhere in their practice,⁶³ a not surprising

inconsistent with Simon's Dworkinian faith in law's determinate nature. W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 1028 (2006) [hereinafter Wendel, *Client Selection*].

56. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998), reprinted in *LAWYERS' ETHICS*, supra note 8, at 245.

57. Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901 (1995), reprinted in *LAWYERS' ETHICS*, supra note 8, at 258.

58. Anthony V. Alfieri, *(Er)race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999), reprinted in *LAWYERS' ETHICS*, supra note 8, at 265 [hereinafter Alfieri, *Ethic of Justice*].

59. Menkel-Meadow, *Portia Redux*, supra note 12, at 274.

60. Harris, supra note 52, at 283.

61. Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1 (1998), reprinted in *LAWYERS' ETHICS*, supra note 8, at 289.

62. Goldfarb, supra note 28, at 295.

63. The exception might be Angela Davis and Bill Ong Hing, two writers considered Critical Race Theorists, each of whom proposes new rules for lawyers requiring explicit attention to race in certain lawyering settings. See Davis, supra note 56, at 246 (proposing “the use of racial impact studies in prosecution offices to advance the responsible, nondiscriminatory exercise of prosecutorial discretion”); Hing, supra note 57, at 261-62 (proposing “a specific set of rules and guidelines that lawyers would be obligated to follow in cases involving, or potentially involving, racial and ethnic tension,”

conclusion given their resistance to categorical approaches to the fluid and often messy world of practice. These authors, like others featured in the book, intimate a deep skepticism about traditional zealous advocacy roles for lawyers out of a concern either for the lawyers' clients—who may prefer or prosper under an alternative, less adversarial stance—or for those third parties on the receiving end of adversarial tactics, notwithstanding the clients' preferences. They also imply an approach to moral truth which favors dialogue and care over a hierarchy of rules and principles.⁶⁴

Carle follows these critical theory selections, which make up the most substantial segment of the book, with three shorter chapters that veer away from the critical. Instead, these chapters offer insights about lawyering practice from important contemporary perspectives. The title of Chapter 6, "Legal Ethics Exploration through Literature, Myth, and Popular Culture," is a rather ambitious heading for two pieces. The first of these is Paul Bergman's entertaining frolic through classic films about redemptive legal practice;⁶⁵ the second is an important article by Rob Atkinson that connects Kazuo Ishiguro's *The Remains of the Day*⁶⁶ (the book, not the movie) to themes emanating from the moral activism debate percolating within various strains of legal ethics literature.⁶⁷ Neither of these essays specifically addresses the interplay between popular culture's visions of lawyers and the roles that lawyers adopt in their working lives—although Bergman's piece comes close.⁶⁸ Instead, these pieces serve to connect themes that appear elsewhere in Carle's book—including client-centeredness, moral activism, and justice—to the stories encountered in the films and literature explored by Bergman and Atkinson.

Chapter 7 confronts a topic that is increasingly debated within the legal ethics community: the role of religious commitment on the proper functioning of a good lawyer. In this chapter, entitled "Legal Ethics and

including requiring alternative dispute resolution in cases where the parties "are of different racial or ethnic groups").

64. Carol Gilligan's work, not surprisingly, is an important, but critically appraised, influence within this book. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982), referred to in Menkel-Meadow, *Portia Redux*, *supra* note 12, at 274; Goldfarb, *supra* note 28, at 297.

65. Paul Bergman, *The Movie Lawyers' Guide to Redemptive Legal Practice*, 48 *UCLA L. REV.* 1393 (2001), reprinted in *LAWYERS' ETHICS*, *supra* note 8, at 309.

66. KAZUO ISHIGURO, *THE REMAINS OF THE DAY* (1990).

67. Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of THE REMAINS OF THE DAY*, 105 *YALE L.J.* 177 (1995), reprinted in *LAWYERS' ETHICS*, *supra* note 8, at 317.

68. Carle cites to some articles offering that perspective in her Appendix, for students' further reading on this topic. See Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 *WIS. L. REV.* 527 (1986); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 *U. CIN. L. REV.* 805 (1998); Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Character and Acts*, 48 *UCLA L. REV.* 1305 (2001).

Religious Commitment,” Carle presents three essays by Stephen Carter,⁶⁹ Russell Pearce,⁷⁰ and Thomas Shaffer.⁷¹ The essays she has chosen are interesting, readable, and provocative. Each addresses an important question about good lawyering, but none grapples directly with what seems to be a most important question within this realm: whether *religious* values are in some way independent of, or add to, the *moral* values attendant to the lawyering questions explored in each essay.⁷² It is also noteworthy, although perhaps not unexpected given the book's commitment to social justice from a progressive perspective, that Carle has included three essays from the left of the political spectrum, and none from the right, whose views would have the potential and propensity to use religious commitment to develop some very different conceptions of good lawyering.⁷³

The book's final chapter joins the ongoing debate about legal ethics and the posture of lawyers working for powerful corporate interests. Entitled “Future Challenges: Corporate Power and Lawyers' Counseling Role,” Chapter 8 includes two essays about Enron authored by two of the leading lights in the academy, David Luban and Robert Gordon. Luban's essay⁷⁴ revisits some of the arguments about moral responsibility that he first developed more than twenty years ago, but within the framework of the sobering practical experience of the corporate scandals of the past decade, all of which involved lawyers in central ways. Luban persists in his defense of activism, of course, but he recognizes that powerful institutional and psychological forces operate to undercut its practical

69. Stephen Carter, *Panel Discussion: Does Religious Faith Interfere with a Lawyer's Work?*, 26 *FORDHAM URB. L.J.* 985 (1999), reprinted in *LAWYERS' ETHICS*, *supra* note 8, at 329.

70. Russell G. Pearce, *The Jewish Lawyer's Question*, 27 *TEX. TECH. L. REV.* 1259 (1996), reprinted in *LAWYERS' ETHICS*, *supra* note 8, at 339 [hereinafter Pearce, *Jewish Lawyer's Question*].

71. Thomas L. Shaffer, *Should a Christian Lawyer Serve the Guilty?*, 23 *GA. L. REV.* 1201 (1989), reprinted in *LAWYERS' ETHICS*, *supra* note 8, at 343.

72. For an insightful article touching on the relationship between Jesuit training and teaching good lawyering, see Gregory A. Kalscheur, *Law School as a Culture of Conversation: Re-Imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation*, 28 *LOY. U. CHI. L.J.* 333, 366-70 (1996).

73. See, e.g., John J. Fitzgerald, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 245, 245 (2001) (“the Catholic law schools that train future lawyers have a fundamental responsibility to take up Christ's call so that they may in turn inculcate a sense of Christian mission in their students”). Fitzgerald opposes Catholic law schools' teaching in support of “contraception, the morality of homosexual acts, and the ordination of women.” *Id.* at 253-54; see also David L. Gregory, *The Bishop's Role in the Catholic Law School*, 11 *REGENT U. L. REV.* 23, 27 (1998-1999) (suggesting “that resolute proponents of capital punishment or abortion—the secular champions of the culture of death—[should] no longer be allowed a platform for such gravely immoral activities directly within the Catholic law school”).

74. Luban, *supra* note 9.

usefulness.⁷⁵ In the other essay, Gordon⁷⁶ meditates on the special fiduciary role of corporate counsel and offers a bold suggestion, which he fears may be an “idle dream.”⁷⁷ Gordon envisions “a separate professional role for a distinct type of lawyer, the Independent Counselor, with a distinct ethical orientation, institutionalized in a distinct governance regime” of particularized duties, rules and court practices.⁷⁸ This Review will discuss both Luban’s and Gordon’s arguments below in more detail, when it considers the activist messages presented by Carle’s textbook.⁷⁹

With this varied and eclectic mix of 40 essays by 38 scholars, Carle offers her readers important but unsettling glimpses into most of the topics that a sustained focus on the progressive pursuit of justice requires. None of her topics are developed in great depth in the book, however, and Carle no doubt accepts that necessary limitation. In the end, her book is a manageable read, and the essays are edited down to accessible, though still challenging, excerpts. Because any one of the essays excerpted in the book could serve as the source of serious, sustained deliberation and examination, 40 such articles would result in an unwieldy, excessively dense book. The risks Carle assumed in offering abridged versions of the essays were therefore worthwhile. At the same time, as Part III of this Review describes, students using Carle’s textbook will no doubt benefit from having a teacher or discussion leader who can mine the numerous insights and cross-current themes that emerge through the excerpts and, by helping students make connections between these themes, support the students’ development of a deeper appreciation for the subtle and sophisticated arguments presented in each work. Focusing on three of the more prominent themes that emerge in Carle’s book, the next part of this Review will now try to make some of those connections.

No reader can finish a book like this without wishing that his favorite topic received more attention, and I am no exception. I would have liked greater attention to the challenges about the effective delivery of legal services to those who cannot afford to pay for them—a “pursuit of social justice” theme if there ever was one. The Bellow and Kettleleson essay⁸⁰ hints at the extent of the access to justice problems, but does little more than that, and while some of the rebellious lawyering essays suggest deprofessionalization as one way to reduce the need for lawyers’ services,

75. *Id.* at 365-68. For an understanding of Luban’s earlier defense of the activist conception, see LUBAN, *supra* note 7; David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990).

76. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003), reprinted in *LAWYERS’ ETHICS*, *supra* note 8, at 371 [hereinafter Gordon, *Corporate Counselor*].

77. *Id.* at 383.

78. *Id.* at 381.

79. See *infra* text accompanying notes 149-60.

80. Bellow & Kettleleson, *supra* note 34.

none explores this idea in depth. In that same vein, readers encounter nothing here about the professional ethical struggles that surround lay advocacy,⁸¹ or proposals for “unbundled” legal practices⁸² and other cutting edge devices to assist pro se litigants,⁸³ or the ethics of triage within public interest and legal services practice.⁸⁴ The book also offers very little inquiry into the recent transformation of the large law firm and the emergence of an “eat what you kill” ethos within large, high-status legal practice settings.⁸⁵ Carle has reported that space limitations required her to cut some of those very topics;⁸⁶ a future edition may allow her the opportunity to address them.

III. THREE RECURRENT THEMES

This Part of the Review assesses what significant themes students might ultimately appreciate from Carle’s textbook. Part II offered a flavor of the disparate points of view that are presented in the book. However, that Part simply introduced these points of view without elaborating further. These disparate points of view thus deserve more elaborate consideration. As noted above, there is simply too much material and too many complex and sophisticated arguments covered in

81. See, e.g., RHODE, *supra* note 7.

82. See, e.g., Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617 (1999); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295 (1997); Robert Bickel, Note, *Limited Legal Services: Is It Worth It?*, 39 COLUM. J.L. & SOC. PROBS. 331 (2006).

83. See, e.g., Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997).

84. The several discussions of the ethical stance involved in “impact lawyering” in the readings come close to the questions of triage, but they do not deal with the question, noted in passing by Bellow and Kettleson, of how lawyers who have too many clients might properly and ethically choose among them. See Bellow & Kettleson, *supra* note 34, at 137. For a discussion of the ethics of triage, see Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL’Y & L. 143, 148-61 (2002); Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) [hereinafter Tremblay, *Triage Among Poor Clients*]; Wendel, *Client Selection*, *supra* note 55, at 1030-32.

85. Some references to that phenomenon appear in Menkel-Meadow, *Culture Clash*, *supra* note 27, at 102, and implicitly in Luban, *supra* note 9, at 361-62. For some careful exploration of the emerging patterns within modern law firm culture, see MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

86. LAWYERS’ ETHICS, *supra* note 8, at 7-8 (sharing in the Introduction her publishers’ space restrictions and her need, regretfully, to eliminate readings on invidious discrimination, mandatory pro bono, and unauthorized practice restrictions).

the textbook for most readers to come away from it satisfied. A thorough reading of each essay will no doubt provide insight, but also raise important questions, and even cause the reader hesitations, doubts, and disagreements. Each piece is by necessity incomplete: each provokes, but does not resolve.⁸⁷

Three themes surface often enough in the book to warrant deeper examination. This examination will ideally enable me to tease out the strands of meaning that accumulate slowly over the course of the book. The three themes explored here are client-centeredness, rebellious/community lawyering, and moral activism.⁸⁸ This Part will consider how those themes are presented through Carle's selections, and examine whether readers who might otherwise be new to those themes are likely to leave the text with an adequate understanding of the themes' nuances.

A. CLIENT-CENTERED LAWYERING

In compiling a textbook on legal ethics and the pursuit of social justice, Carle cannot avoid confronting some delicate questions about what it means for lawyers to practice in a client-centered way. Her book apports considerable space to this issue, which was a sensible decision. Although Carle includes a sub-chapter labeled "Client-Centered/Collaborative Lawyering,"⁸⁹ client-centeredness ideas show up in many other parts of the book as well. The book's message is decidedly ambivalent about this model of lawyering, and for generally wise and good reasons.

Let us begin with a brief précis about this lawyering orientation, the acceptance of which is soundly established within clinical teaching and

87. This is a theme developed by Robert Gordon in his Foreword to the Carle book. See Robert W. Gordon, *Foreword* to LAWYERS' ETHICS, *supra* note 8, at xiii-xvi [hereinafter Gordon, *Foreword*].

88. The three areas I chose to discuss are not the only ones I could have identified, although they are perhaps the most prominent over the course of Carle's book. Another prevalent perspective in the book is one of the contingency and fluidity of power, a message developed here with homage to the teachings of, among others, Michel Foucault and Audre Lorde. See, e.g., LAWYERS' ETHICS, *supra* note 8, at 2; Goldfarb, *supra* note 28, at 304; Harris, *supra* note 52, at 285; López, *supra* note 43, at 198; Mack, *supra* note 25, at 97 (quoting Audre Lorde: "Can the master's tools dismantle the master's house?"); White, *Seeking the Faces of Otherness*, *supra* note 20, at 42; White, *Sunday Shoes*, *supra* note 38, at 166. Carle's book also evidences a less prominent but still frequent questioning of the propriety of lawyers violating some rules in the interests of some greater, justice-driven good. See LAWYERS' ETHICS, *supra* note 8, at 149; Bell, *supra* note 33, at 130; Gabel & Harris, *supra* note 53, at 234; Hwang, *supra* note 46, at 222; and Menkel-Meadow, *Portia Redux*, *supra* note 12, at 280.

89. LAWYERS' ETHICS, *supra* note 8, at 145 (including the essays by Dinerstein, *supra* note 37; Jacobs, *supra* note 40; Miller, *supra* note 39; and White, *Sunday Shoes*, *supra* note 38).

lawyering scholarship.⁹⁰ In its crude formulation, client-centeredness rests on simple truths about the agency, and moral, relationship between a lawyer and her client.⁹¹ As Mark Spiegel pointed out many years ago, it is incoherent to look for meaningful distinctions between substance and procedure in lawyering work.⁹² The traditional liberal notion that clients choose the ends in their legal relationships, and lawyers choose the means, is unsustainable.⁹³ As first crafted by David Binder and Susan Price, the client-centered model rejected that traditional formulation and allocated essentially *all* lawyering decisions to clients, except those which are purely functionary and logistical.⁹⁴ That conception makes good sense, at least until several problematic nuances arise. For example, lawyers are agents, and clients principals. Principals hire the agents, and direct their work. Therefore, according to the nature of their agency relationship, lawyers can never know clients' preferences and wishes as well as clients themselves do.⁹⁵

Carle's essays do not develop fully the primitive model of client-centeredness just described.⁹⁶ And although students using this text in a clinical program will almost assuredly have encountered that rudimentary formulation, those studying it in a professional responsibility course may not have done so. What readers of Carle's book will discover, instead, are several questions that critical scholars pose about the apparently sensible client-centeredness orientation.

As previously indicated, the essays in this book collectively underscore the significance of context, contingency, and skepticism in lawyering and in relationships.⁹⁷ That theme is quite apparent in the book's treatment of client-centeredness. Robert Dinerstein, in the excerpt Carle includes in her book, highlights at least two important doubts about

90. See Dinerstein, *supra* note 37, at 152; Jacobs, *supra* note 40, at 181; Kruse, *supra* note 36, at 370-71.

91. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 67 (1979). Client-centeredness emerges from traditional agency conceptions because, as an agent for her principal, a lawyer owes a fiduciary duty to follow the principal's wishes. See RESTATEMENT (SECOND) AGENCY § 385 (1958); James Cohen, *Lawyer Role, Agency Law and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 403 (2000). It also emerges from the moral commitment to the client's right to autonomy and to be free from unwanted paternalism. See Kruse, *supra* note 36, at 400.

92. Spiegel, *supra* note 91, at 71-72.

93. Dinerstein points out that this false distinction survives in the allocation of decisionmaking. Dinerstein, *supra* note 37, at 155-56; see MODEL RULES Rule 1.4.

94. BINDER & PRICE, *supra* note 36. David Binder and Susan Price have refined their ideas in two later editions of that classic text. See DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); DAVID BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004).

95. See Kruse, *supra* note 36, at 378 (summarizing that position).

96. See Dinerstein, *supra* note 37, at 152-53.

97. See *supra* text accompanying notes 63-64.

a straightforward, non-contextual vision of client-centeredness. The early commitment to client-centeredness emerged from progressive criticism of the traditional lawyer-dominated model of client counseling, an approach that withheld from clients a respectful equality and a share of power in the relationship.⁹⁸ But, as Dinerstein reminds us, the commitment to client-centeredness for lawyers working with powerful clients translates easily into a “hired gun” paradigm which amplifies power to those interests “so powerful as not to need further empowerment.”⁹⁹ He hints that lawyers ought to *withhold* client-centeredness from powerful clients, who have less need for autonomy and who—the argument implies—will use any autonomy to further injustice.¹⁰⁰ Dinerstein does not demonstrate in this brief excerpt how lawyers might accomplish that feat, and indeed the suggestion seems rather visionary. But his suggestion alludes to a second, related criticism of client-centeredness, a critique that will tie into a later theme of Carle’s book that this Review will next examine: that of moral activism.

Client-centeredness serves as a vehicle to enhance a client’s autonomy—the right of the client to control her life and her affairs. However, that reality can trigger important moral questions when clients opt to use their lawyers’ services for unjust ends. Any defense of client-centeredness must craft a distinction between respect for a client’s *preferences* (which are idiosyncratic to the client) and respect for the client’s *moral choices* (which are decidedly not, unless one accepts a purely relativist outlook). Dinerstein perceives this concern, but does not elaborate on it in the excerpt provided by Carle in the book. In the excerpt, Dinerstein does imply that lawyers ought to be humble in their moral assessment of client choices, lest lawyers “impos[e] their values” on their clients.¹⁰¹ This argument invites, but does not receive in the book, a spirited rejoinder.¹⁰²

98. See Kruse, *supra* note 36, at 375; Spiegel, *supra* note 91, at 49-72.

99. Dinerstein, *supra* note 37, at 154.

100. *Id.*

101. *Id.* at 156.

102. Dinerstein’s resistance to lawyers’ imposition of values on clients materializes in his criticism of William Simon’s *Ethical Discretion in Lawyering*. See *id.* at 156 (citing Simon, *Ethical Discretion*, *supra* note 54). His criticism as it appears here is not fully persuasive, however. Dinerstein worries about Simon’s lawyers’ “denying [clients] the opportunity at least to seek vindication of hypothetically legal interests.” Dinerstein, *supra* note 37, at 156. If by “hypothetically” Dinerstein means “unmeritorious,” then Simon indeed would suggest such a denial, but for good reason. If by “hypothetically” Dinerstein means “possibly justified,” then he mischaracterizes Simon’s position, which calls for the exercise of ethical discretion only when, in the lawyer’s judgment, the lack of legal merit is clear. See Simon, *Ethical Discretion*, *supra* note 54, at 239-40. Simon also does not argue that lawyers should “impose” any “values” on clients, although he does argue that lawyers must share the value of respect for the legal merits of a dispute. See *id.* at 244 (resisting what Simon calls “the specious law-versus-morality characterization” of moral activism).

In addition to highlighting worries about the client-centered approach's propensity to support powerful interests and to sustain immoral enterprises, Carle's book exposes its readers to the cultural imperialism that some client-centered literature invokes. Michele Jacobs warns about that danger:

The irony of the [client-centered] models is that they were constructed to return the client to the centrality of the lawyer's work. Yet, even with the best of intentions, lawyers most concerned with preserving the autonomy of client decision-making have, *by adopting the "client-centered" model* of counseling, continued to place the client, especially the client of color, out at the margin.¹⁰³

Jacobs's excerpt presents a critical, but seemingly misleading, message for its readers. Her essay demonstrates elegantly, even in its abridged version, how race-neutral models for interviewing and counseling are apt to disappoint and to marginalize clients of color. More puzzling, however, is her argument that *by adopting client-centered models* lawyers contribute to that wrongdoing.¹⁰⁴ Is Jacobs suggesting that lawyers ought to reject client-centered approaches, in favor of a more paternalistic stance, in order to lawyer more effectively across cultures? That cannot be, and in fact is not, her argument. However, the segment quoted above, which is central in the excerpt provided by Carle, tends to mischaracterize her message.

Jacobs's disagreement is not so much with the baseline idea of client-centeredness, or with its premise that lawyers ought to respect the preferences of their clients. Indeed, the thrust of her argument advocates more respect for, and greater efforts to understand, what the client holds dear, especially (but not exclusively) when the lawyer and the client are from different cultures.¹⁰⁵ Jacobs's objections surface not from the commitment to respecting client values, but from the "neutral skills"¹⁰⁶ training that early editions of the most prominent interviewing and counseling texts seemed to advocate.¹⁰⁷ Those books might have been

103. Jacobs, *supra* note 40, at 181 (emphasis added).

104. *Id.*

105. *Id.* at 184.

106. *Id.* at 182.

107. In her original article, Jacobs reviewed the messages, implicit and explicit, of two leading interviewing and counseling textbooks at that time. See Jacobs, *supra* note 40, at 353-61 (reviewing BINDER, BERGMAN & PRICE, *supra* note 94, and ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990)). No doubt in response to reviews like Jacobs's, later skills texts have attempted to address the question of cross-cultural lawyer-client interactions. See, e.g., BINDER, BERGMAN, PRICE & TREMBLAY, *supra* note 94, at 34-38, 287, 395; JOHN M.A. DIPPIA, ROBERT F. COCHRAN & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING (2d ed. 2006); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR.,

read to assume that clients are largely fungible. Jacobs persuades her readers they assuredly are not, and that dimensions of class, race, gender, and ethnicity influence the attorney-client conversation in important ways.

Jacobs's homage to cultural competence as a critical lawyering skill supports, rather than undercuts, the central client-centeredness commitments, as long as those commitments include a robust and contextual understanding of the client and her community. The theme of cross-cultural awareness appears frequently throughout Carle's book. The essay by Christine Zuni Cruz¹⁰⁸ emphasizes her special connections to her Pueblo community and its traditions and sources of meaning. The excerpts from Lani Guinier,¹⁰⁹ Angela Harris,¹¹⁰ Bill Ong Hing,¹¹¹ Victor Hwang,¹¹² Phyllis Goldfarb,¹¹³ and Rob Atkinson¹¹⁴ each reflect, albeit in different ways, the importance of attending to race, ethnicity, gender, culture, and class in the development of effective lawyering theory.

One last client-centeredness complication presented by Carle's book deserves some attention. The selections presented in the book when read together highlight the contrast between crude notions of client-centered lawyering and more thoughtful conceptions of lawyering strategy and argument, as developed in the essays by Lucie White and Binny Miller. As they relate to strategic decisionmaking, the crude formulations look something like this: lawyers best understand the risks and implications arising from lawyering alternatives, but responsibility for selecting among those alternatives must rest with the client who best understands his risk-aversion, preferences, "values," and the like. The lawyer's assigned undertaking is to describe, neutrally (lest she unnecessarily influence the client), the terrain, the alternatives, and the likely consequences of the representation, and to assist the client to make choices based on the client's personal predilections. The lawyer's job therefore includes "the identification and assessment of alternatives and consequences, and assist[ing] client[s] in making decisions based on [the clients'] unique priorities, values and objectives."¹¹⁵ Absent some morally unacceptable ambitions by the client, each actor in this relationship has a clearly defined, and separate, role to play.

Lucie White and Binny Miller, adherents of a "collaborative" model of lawyering, complicate this elegant if sterile role-assignment scheme. They

ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 49-57 (2d ed. 2003).

108. Cruz, *supra* note 45.

109. Guinier, *supra* note 61.

110. Harris, *supra* note 52.

111. Hing, *supra* note 57.

112. Hwang, *supra* note 46.

113. Goldfarb, *supra* note 28.

114. Atkinson, *supra* note 67, at 326.

115. Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, TEMP. L. REV. (forthcoming 2006).

complicate the role designations in a way characteristic of so many essays in Carle's book—by introducing the contexts and contingencies of class, race, culture, sexual orientation, and power dynamics, reflected in the client's (and his or her community's) narrative. Carle offers us Lucie White's evocative story of the welfare fraud hearing for Mrs. G., a black mother of five children,¹¹⁶ and Binny Miller's compelling account of her students' representation of Jay, a black (and gay?) man charged with the crime of resisting arrest after a shoplifting allegation.¹¹⁷ Both narratives engender conflicting notions of lawyering and client autonomy that may perplex student readers.

The White and Miller excerpts demolish the neat role distinctions just described. Lucy White's essay describes a true encounter in which she, as a legal services lawyer, and Mrs. G, as White's client, prepared for and attended a welfare hearing. The essay illustrates the limits of sensitive, client-focused advocacy. Despite her lawyer's creative and thoughtful legal strategies, Mrs. G. defied the dictates of her role as "client," and supplied her own theory of the case at the hearing. One of White's claims is that, as she writes, "Mrs. G. was a better strategist than the lawyer—more daring, more subtle, more fluent—in her home terrain."¹¹⁸ White's narrative extols collaborative lawyering, but also unsettles any simplified visions of that alliance. Particularly interesting is White's message that collaborative lawyering may serve both the end of client empowerment and the goal of effective legal advocacy.¹¹⁹

Miller's story is similarly ambiguous and disquieting for adherents of a simplified client-centeredness approach. Miller "urge[s] lawyers to set aside their own stories in favor of client stories,"¹²⁰ and to "incorporat[e] client narratives in litigation,"¹²¹ especially into what clinical teachers

116. White, *Sunday Shoes*, *supra* note 38, at 157.

117. Miller, *supra* note 39, at 169.

118. White, *Sunday Shoes*, *supra* note 38, at 167.

119. White's story and analysis are ambiguous about a seemingly important instrumental consideration. White recounts that Mrs. G. flaunted White's careful if conventional strategic planning in favor of her own tactics, and as noted in the text, White admires Mrs. G.'s nimble read of the terrain. White also reports that Mrs. G. ultimately won her hearing in the end (after losing before the official who presided at the hearing). An implication from the *Sunday Shoes* story is that a collaborative lawyer will respect her client's choices *and* win more cases as a result. It is not hard to imagine a dissenting argument—that the collaborative approach instead offers a poignant trade-off between those two goals. The lawyer may be instrumentally better trained to manipulate mainstream legal processes, but her technical training may lead her to misrepresent her client's life and diminish the client's power in the process. I developed that point in an earlier article. See Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. Rev. 123, 126-27, 129 (1992).

120. Miller, *supra* note 39, at 169.

121. *Id.* at 170.

describe as developing a persuasive theory of the case.¹²² In assessing her client's case, Miller offers insightful reflections about how her students' understanding of the role of race, and perhaps of sexual orientation, in the client's story can make the litigation arguments much more persuasive, while acknowledging that her client had chosen not to present that particular case theory. While urging lawyer reticence toward imposing narratives on clients and constructing litigation themes for them, Miller implies that her client might have benefited from the insights that she and her students had developed about his case.¹²³ Although White's essay suggests the prospect that clients' strategic choices might be more effective as litigation devices than their lawyers' ideas (a contention which law students paying \$40,000 per year for three years of training will surely resist), Miller's essay appears more conflicted on that score.

Like White's earlier piece in Carle's book,¹²⁴ and the essays by Mack,¹²⁵ Harris,¹²⁶ and Goldfarb,¹²⁷ the Mrs. G. and Jay stories evoke the interplay of race, class, gender, sexual orientation, and oppression on ordinary lawyering theories and teachings. While championing the role of client narrative in everyday legal case development, these excerpts provoke important questions about the instrumental implications of doing so. The simplified teachings of the crude client-centeredness models may

122. Traditional clinical training has emphasized the importance of developing a "theory of the case" around which to organize strategic planning. See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 273-429 (1978); John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 *CLINICAL L. REV.* 85, 105-06 (1999); Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 *UCLA L. REV.* 611 (1987). Miller makes clear her goal of developing effective lawyering theory, one that does not lose sight of the trier of fact:

My aim is to articulate a theory of case theory that is truer to the client's life experience and to what it is that lawyers actually do. By defining case theory as an explanatory statement linking the case to the client's experience of the world, we create a context for seeing what we might not otherwise see. . . . Case theory makes actions seem quite reasonable that at first seemed unreasonable, and it allows us to accept the client's story and at the same time have a plausible explanation for other stories.

Miller, *supra* note 39, at 176. Miller's assertions may depart from White's claims about the instrumental effectiveness of the collaboration. See *supra* note 20.

123. Miller, *supra* note 39, at 177 ("Why did [Jay] tell a story at the trial that avoided the question of race? If we had discussed these issues, Jay might have been more hopeful about his case or might have better understood the implications of a race theory.").

124. See White, *Seeking the Faces of Otherness*, *supra* note 20, at 44-45.

125. Mack, *supra* note 25, at 97.

126. Harris, *supra* note 52, at 283.

127. Goldfarb, *supra* note 28, at 304-05.

be easier for students to learn, but the lessons from the essays by White and Miller strike me as more genuine.

B. REBELLIOUS/COMMUNITY LAWYERING

A second cross-current running throughout Carle's book is that of "rebellious," or community, lawyering. Students of legal ethics in a conventional classroom setting are unlikely to encounter the conception of community lawyering because it is a developing (and contested) theory not closely connected to typical private law firm practice.¹²⁸ Even students learning legal ethics within clinical programs may not confront literature describing the phenomenon.¹²⁹ Carle's book therefore offers students an important introduction to this progressive notion of lawyering.

In conventional conceptions of the lawyer/client interaction, the lawyer serves as a helpful expert who aims to solve a client's problems using the lawyer's hard-earned proficiency in the specialized world of law, regulation, and procedure. Client-centered lawyers use that proficiency in ways directed largely by their clients. Progressive lawyers often operate in that same fashion, but with a goal of protecting civil rights or resisting oppressive state or corporate powers, even if the client is not paying for the legal services. Whether progressive or mainstream, client-centered or lawyer-directed, the interaction looks as one would expect, with a client hiring a lawyer to accomplish some defined goal that is important to the client.

In contrast, the community or rebellious lawyering conception disclaims this ordinary understanding. As introduced most prominently by Gerald López,¹³⁰ but explored by a host of other critical scholars,¹³¹ community lawyering refuses to privilege the individual client as the source of direction for the lawyer or as the one who can alone define the goals of the legal representation. This model also refuses to privilege legal strategy as the product of the working relationship between lawyers and their clients. Rather, community lawyering, as its name implies, urges lawyers to respect the energy and the commitments of community members working together and to collaborate with them for meaningful

128. Most professional responsibility casebooks do not address this aspect of critical lawyering. One exception is the casebook by Deborah Rhode and David Luban, which addresses these tensions within public interest law and excerpts articles by Shauna Marshall and Stephen Wexler. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 846-53,862-71 (4th ed. 2004) (excerpting Marshall, *supra* note 2, and Wexler, *supra* note 5).

129. Only one textbook developed for clinical courses includes any serious exposure to community or rebellious lawyering. See *CLINICAL ANTHOLOGY*, *supra* note 7.

130. López, *supra* note 43.

131. See, e.g., Anthony Alfieri, *Antinomies*, *supra* note 2; Cummings & Eagly, *supra* note 2; Gabel & Harris, *supra* note 53; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

change, emerging from political and grass-roots movements rather than from clever advocacy efforts by smart lawyers in suits. López calls the well-meaning, instrumental lawyer-driven work produced by progressive lawyers on behalf of disadvantaged clients “regnant lawyering.”¹³² In his view, regnant lawyering is certainly good, but rebellious lawyering is a far more effective way for lawyers to work with subordinated populations.¹³³

Carle’s book is certainly not a “rebellious” treatise; it does not aim to present community lawyering as the preferred way lawyers ought to practice with disadvantaged communities. The readings Carle presents in this section include many suggestions which could fairly be considered “regnant.” But Carle offers her student readers some beginning understandings about this orientation. Her book provides enough of a taste to inspire some healthy curiosity about this model while at the same time, and inevitably, leaving a number of questions unexplored.

Carle offers community lawyering lessons directly through three essays explicitly labeled as such, and indirectly through allusions in other readings. The López excerpt¹³⁴ provides a lively, entertaining overview of the kind of lawyer who works in a rebellious way but goes no further than that.¹³⁵ The essays by Cruz¹³⁶ and Hwang¹³⁷ present examples of lawyering within and for disadvantaged communities, but neither fits exactly what I believe López envisions in his piece as true community lawyering. Cruz acknowledges that “[c]ommunity lawyers grapple with the tension between ‘zealous representation’ of individual clients and community concerns,”¹³⁸ but the short excerpt in Carle’s book offers no rich example of lawyering (or organizing) work where a powerful community need trumps an individual client’s interests or wishes—which I understand to be what Cruz refers to as the “tension” of community lawyering.¹³⁹ At the same time, Cruz’s essay underscores the importance, as noted in the Jacobs essay,¹⁴⁰ of cultural competence and sensitivity.

132. López, *supra* note 43, at 193.

133. *Id.* at 196.

134. *Id.*

135. López’s book, of course, explores those lawyers’ practices in great depth. See LÓPEZ, *supra* note 7.

136. Cruz, *supra* note 45, at 205.

137. Hwang, *supra* note 46.

138. Cruz, *supra* note 45, at 205.

139. Cruz does offer an example that implies a sacrifice of personal interests in favor of community interests. She describes a jurisdictional tension between the state courts of New Mexico and the Pueblos’ tribal court system over family law matters. The tribal court system will not provide for divorce decrees, but only legal separation orders, for well-entrenched cultural and faith grounds. Cruz reports that her legal clinic has a policy (which seems to be firm and independent of any individual client desire) not to use the state courts for any family law result except to accomplish the divorce order which is unavailable in the tribal courts. Limiting access to the state court system affords the clinic’s clients some justice “with the greatest respect being accorded to exclusive tribal jurisdiction.” *Id.* at 208. Cruz observes: “The Pueblo stance on not providing for divorce

Hwang's essay describes wonderfully creative, energetic, but perhaps regnant lawyering, if we apply López's definition of that phenomenon. His essay vividly captures, even if it does not (in Carle's excerpt, at least) develop or try to resolve, some of the conflicts inherent in the rebellious stance. At times, Hwang writes skeptically of the rebellious scholars:

The problem is that while we can debate the intangible but real harms caused by the chasm between progressive theorists and practitioners, we cannot ignore the daily injuries done to our communities by orchestrated assaults on their rights and by barriers to the pursuit of legal recourse. Families that are being unlawfully evicted, working in hazardous sweatshops, facing deportation, or being denied basic life-sustaining benefits do not care whether the change is temporary or systemic. They are concerned with the realities of food shelter, health and employment.¹⁴¹

This passage represents the deepest triage-driven critique of the rebellious stance—that lawyers who work for the long-term mobilization of the community must ineluctably sacrifice the short-term needs of those community members.¹⁴² If Hwang sounds rather regnant in the passage just quoted, he seems not to want that label as evidenced by his later admiration for López's rebellious ideas and his effort to connect those ideas to the narrative he shares.¹⁴³

Hwang presents a rich story of lawyering, organizing, and legislative lobbying with and on behalf of the Hmong community to change certain federal Social Security and welfare laws which excluded many disabled Hmong immigrants from income and health care benefits. His narrative serves as a provocative exemplar from which to evaluate the competing lawyering theories running throughout Carle's textbook. On the one hand, the creative work Hwang describes seems quite lawyer-driven; on the other hand, because it engaged substantial community input, relying on protests and similar mobilization efforts within the Hmong neighborhoods,

is deeply embedded in religion, yet the need for individual relief cannot be ignored. It presents a classic conflict of community and individual interests" *Id.*

140. Jacobs, *supra* note 40.

141. Hwang, *supra* note 46, at 211.

142. See Gabel & Harris, *supra* note 53, at 234-35 (suggesting that long-run gains ought to be preferred over the short-term benefits of instrumental lawyering work). For a description of the triage-based worry, see Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 963 (1992). Hwang's ideas remind us, as Cruz noted above, that community lawyering is not necessarily consistent with the commitment to client-centeredness. See Cruz, *supra* note 45, at 205.

143. Hwang, *supra* note 46, at 211-12.

the action appears very community-driven. In the end, the grass-roots campaign effected some significant change in federal legislation and regulation, which *sounds* regnant given its focus on changing discrete substantive law.¹⁴⁴ At the same time, the Hmong struggle with Washington legislators and bureaucrats may serve as a satisfying example of the best of community lawyering, because of its reliance not on arguments made by honey-tongued lawyers to judges but instead on organized political pressures from the community members themselves.¹⁴⁵ In this way, Hwang's essay serves as a valuable resource through which student readers can begin to appreciate and critique the conception of rebellious lawyering and its contrasts to good, effective, instrumental regnant work.

The community lawyering themes found in Carle's book highlight one more tension, which I will describe briefly before moving on. I noted above that a rebellious, community lawyering stance is not always comfortably client-centered. Long-term community goals are not always congruent with short-term community residents' interests. Conflicts inevitably arise within the community, calling for accommodation and reconciliation on the part of lawyers and leaders. Lawyers must choose some members within the community with whom to work, as good faith representatives of the larger membership. Choosing some, of course, means excluding others. The simplified construct of a lawyer neutrally respecting the autonomy and values of her client therefore ill fits the more nuanced work life of a community lawyer.

Readers of Carle's collection of essays will appreciate those tensions. The uncomfortable interplay between respect for client wishes and protection of community interests is especially well evoked in the excerpt from Derrick Bell's memorable article, described earlier in this Review, which criticized desegregation lawyers in the 1960s and 1970s for pursuing litigation strategies with which at least some members of the black community disagreed.¹⁴⁶ Bell's essay is powerful and trenchant, but its central argument—that the NAACP lawyers should have exhibited greater respect for what Bell calls “the client's current interests” when they differed from “the long range good of [the lawyers'] clients”¹⁴⁷—is

144. See Gabel & Harris, *supra* note 53, at 230 (describing how regnant lawyers (but not using that term, as the authors wrote before López) “discover that the expansion of legal rights has only a limited impact on people's lives, and that even those limited gains can be wiped out by a change in the political climate”).

145. See Bellow & Kettleon, *supra* note 34, at 140 (“In the long run, public interest lawyers cannot win such games [of litigating for marginal victories] for their clients. Political organization and activity by disadvantaged groups will be necessary to maintain, expand, and assure full implementation of any benefits and rights that lawyers might establish.”).

146. Bell, *supra* note 33. Bell's essay is found not within the client-centeredness or the community lawyering subchapters of the book, but instead in the historical section.

147. *Id.* at 134.

not sufficiently developed or defended in the short selection in the book given the power of available responses to it.¹⁴⁸ Careful readers of Carle's book will note the richness of the tensions raised by Bell and relate them to the competing arguments and reflections presented by several other authors in the collection.

C. MORAL ACTIVISM

A third recurring theme in Carle's textbook is that of moral activism. The notion that a good lawyer has a professional responsibility to attend to justice and fairness concerns in her work, and not solely to the wishes and interests of her own client, appears as a topic of discussion, centrally or otherwise, in at least 19 of the 40 essays in Carle's book. Virtually all of the discussion of this conception appears in a favorable light. One therefore comes away from a reading of the anthology with the understanding that moral activism tends to be a progressive orientation—that the left, by and large, supports an activist stance and, by implication, that the right would likely defend a more individualist, client-focused stance, committed to zealous advocacy, moral nonaccountability, and neutral partisanship. Although that perception may not be a terribly controversial one,¹⁴⁹ it is probably an imperfect one.¹⁵⁰

148. To the extent that Bell argues that the NAACP lawyers chased their own glory with little regard to the interests—long term or short—of the client community generally (*see id.* at 129 (noting Dr. Andrew Watson's worry of the influence of "'narcissistic gratification'" on the work of public interest lawyers)), then his critique is of course a straightforward one. But from the excerpt presented here, the landscape is plainly more complicated than that. If the lawyers (and the NAACP) believed in good faith that the long term interests of the black communities were better served by their desegregation strategy even over the opposition of some present members of that same community, it is not at all self-evident that the latter interests ought to trump the former, or that the lawyers should not have respected the views of the NAACP leadership. For a discussion of this point, see Tremblay, *Triage Among Poor Clients*, *supra* note 84, at 2477-79. For a recent revisionist historical review of the lawyering and political stances of pre-Brown black lawyers, see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

Bell's essay, as presented here, also leaves readers with some unresolved questions as he critiques the role of the bar and professional regulators in discouraging the kind of overreaching about which he worries. Bell argues that an approach found in the former *Model Code of Professional Responsibility*, "urging the lawyer to 'constantly guard against the erosion of his professional freedom' and requiring that he 'decline to accept direction of his professional judgment from any layman,' is simply the wrong answer" to the problem of lawyer overreaching. Such admonitions, in Bell's words, are "difficult to enforce." Bell, *supra* note 33, at 133-34. A few paragraphs later, though, Bell offers his own suggestion, that "civil rights lawyers come to realize that the special status accorded them by the courts and the bar demands in return an extraordinary display of ethical sensitivity and self-restraint." *Id.* at 134-35. Readers of this excerpt may find it hard to reconcile Bell's *Model Code* criticism with his own, equally unenforceable, proposal.

149. Among the most prominent moral activist scholars are David Luban, Deborah Rhode and William Simon, all comfortably progressive in their lawyering theory

Student readers of this book may not sufficiently appreciate how contested the notion of moral activism remains among thoughtful scholars of legal ethics and lawyering theory, although admittedly some objections to moral activism do surface in a few of the essays. Upon reading the book students may also under-appreciate some of the complications about what it means to adopt the activist stance in day-to-day practice, and to live this philosophy as a lawyer—although the delightful essay by David Luban covers some of that ground.¹⁵¹

Carle's collection canvasses historical debates about the prominence, or not, of "civic republican" visions of professional responsibility (which I read as a variety of moral activism¹⁵²) in the legal profession of the nineteenth and early twentieth centuries.¹⁵³ She includes two essays demonstrating how the writers' religious commitments and teachings support their discomfort with an individualist, zeal-driven lawyering ethos.¹⁵⁴ Two other essays attempt to apply an activist orientation in a practical way to the ethical challenges presented by the recent corporate scandals such as Enron.¹⁵⁵ Another captivating, but at the same time somewhat perplexing, essay connects the activist debate (with some

scholarship. *See, e.g.*, LUBAN, *supra* note 7; RHODE, *supra* note 7; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); SIMON, *supra* note 7; Simon, *Ethical Discretion*, *supra* note 54. By contrast, an early pioneer of the neutral partisanship formulation (which resists moral activism) was Charles Fried, a noted conservative scholar, former Republican administration official, and former Justice of the Massachusetts Supreme Judicial Court. *See generally* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

150. One thinks, for instance, of progressive critics of moral activism such as Stephen Ellmann, Abbe Smith, and Bradley Wendel. *See, e.g.*, Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) (reviewing LUBAN, *supra* note 7, and resisting many of its activist arguments); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (2d ed. 2002) (defending a zealous, partisan posture); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005) [hereinafter Wendel, *Separation of Law and Morals*]; W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 364, 399 (2004) [hereinafter Wendel, *Civil Obedience*] (developing what he terms the "authority conception," a form of "wide" positivism" which may support much of the "loophole lawyering" decried by role critics). The Anthony Alfieri essay included in this book contains some oblique criticism of William Simon's activism from this critical scholar as well. Alfieri, *Ethic of Justice*, *supra* note 58, at 266-68.

151. *See* Luban, *supra* note 9.

152. *See supra* note 28.

153. *See* Gordon, *Independence of Lawyers*, *supra* note 31; Pearce, *Rediscovering Republican Origins*, *supra* note 29; Spaulding, *supra* note 30; Spillenger, *supra* note 32.

154. *See* Carter, *supra* note 69, at 329; Pearce, *Jewish Lawyer's Question*, *supra* note 70, at 340.

155. *See* Gordon, *Corporate Counselor*, *supra* note 76; Luban, *supra* note 9.

development of the nonaccountability position) to the moral tensions developed in Kazuo Ishiguro's novel *The Remains of the Day*.¹⁵⁶

Carle's book includes one essay directly aimed at articulating and defending one version of the activist project—William Simon's defense of a lawyer's professional duty to exercise "ethical discretion" and to seek justice.¹⁵⁷ However, the book does not include any scholarship directly arguing the opposite proposition.¹⁵⁸ Two essays on topics other than activism pointedly disagree with Simon's thesis, but neither in a very elaborate or even very persuasive way.¹⁵⁹ The result of all this is that

156. Atkinson, *supra* note 67. Here is why I describe Atkinson's piece as "perplexing," at least as it gets excerpted here. Atkinson seems rightly critical of Stevens, the butler in the Ishiguro novel (think Anthony Hopkins here), whose commitment to his role responsibilities permits him to carry out the order from his employer, Lord Darlington, that he fire the two Jewish servants working on the employer's estate, because the servants are Jewish. He compares Steven's reasoning in the novel to that of the supporters of neutral partisanship in lawyering theory. *Id.* at 321. Atkinson is evidently more sympathetic to the posture of Steven's compatriot, the former head housekeeper Kenton (think Emma Thomson), who voices her outrage at Steven's bureaucratic response to what she recognizes as clear injustice. Atkinson likens her response to that of the moral activists. *Id.* at 324-25. The fictional account, then, sets the stage for some lessons about lawyers' duties. In assessing the "two competing approaches open to contemporary American lawyers in such a situation," Atkinson concludes that "[e]ither answer, standing alone, is inadequate, but the story itself presents a more satisfactory, but no means perfect, response. . . . [But] Stevens and Kenton failed to choose that alternative." *Id.* at 320. Intriguing, right? But the excerpt here does not depict the unchosen, "more satisfactory," alternative. The most apparent reading is that Atkinson refers to the telling of stories itself as the "more satisfactory" alternative he prefers. In that case, readers are left without a convincing explication of exactly how the telling of stories affects (or effects) the moral landscape—and, notably, the moral *decision-making*—inherent in the order from Lord Darlington.

157. Simon, *Ethical Discretion*, *supra* note 54.

158. The extensive literature on activism versus neutral partisanship reads something like an ongoing, sophisticated contest of ideas. For one early, noteworthy point-counterpoint presentation of that contest, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1987). In recent years, Bradley Wendel has added a deeply thoughtful, intricate, and quite philosophical perspective to this conversation. See Wendel, *Civil Obedience*, *supra* note 150; Wendel, *Separation of Law and Morals*, *supra* note 150.

159. See Dinerstein, *supra* note 37, at 156 (criticizing Simon's proposal for its encouragement of lawyers' "imposing values" on clients and for "fail[ing] to provide a satisfactory answer to the problem of lawyer power"). Simon's defenders would disagree with Dinerstein's critique. The only "values" Simon suggests lawyers ought to pursue are those of legitimate legal merits; anything resembling "imposition" occurs only when clients wish their lawyers to take advantage of system failures to achieve illegitimate gains; see also Alfieri, *Ethic of Justice*, *supra* note 58, at 268 (accusing Simon of "a crabbed notion of the 'public dimension' of client-group loyalty" of "offer[ing] little guidance in the effort to reintegrate [the values of family, group and community] into a richer conception of other-regarding loyalty relevant to the support of 'third party and public interests,'" of "reinvigorati[ng] ... the vitality of legal liberalism," and of idealizing

Carle's book is generally supportive of a justice-driven, activist stance for lawyers, highlighted frequently in many essays but not subjected to serious, reflective scrutiny. Given the inevitable compromises that any compilation such as this will reflect, as its editor aims for a comprehensive but also manageable reader,¹⁶⁰ Carle's selection and editing choices may have been the very best available. Intrigued but skeptical students will easily find a trove of insightful scholarship on the activist project and, if a book such as this spurs a serious investigation into the merits of that project, it is hard to be unhappy with Carle's approach.

IV. SITUATING CARLE'S BOOK IN THE CURRICULUM

I end this Review with a few thoughts about how Carle's valuable book might find its way into the hands of law students. First, it is worth emphasizing that this book does deserve a prominent place within the law school curriculum. Carle notes in her introduction that the book should serve as a versatile, relatively inexpensive supplement to, rather than replacement for, a traditional legal ethics or professional responsibility casebook for use in a conventional legal ethics course.¹⁶¹ I hope Carle is right but worry that her aspirations may be too ambitious. My concern, of course, is that her book is too rich and too intricate to fit that bill. In light of the many themes the book seeks to cover and to connect with one other, it will be rather challenging for students to appreciate its nuances if they read selected passages as a break from the doctrinal law of lawyering found in more traditional legal ethics casebooks. Given the increasing complexity of the doctrinal developments within the field of lawyer regulation and liability, it is hard to imagine that this book will earn the consideration it deserves as an add-on to the usual lessons covered in a traditional legal ethics course.¹⁶² It would, however, be wonderful to

the lawyer who "may simply reenact his own private moral preference at the expense of a client-community participatory resolution"). Alfieri's criticism is harder to assess, if only because Alfieri's writing is itself more difficult to follow and understand fully. Simon's purposivist proposals may reinvigorate liberal legalism, *see supra* note 55, but his notion of justice may incorporate more community norms than Alfieri is willing to concede. *See* William H. Simon, *A Brief Rejoinder to Comments on the Practice of Justice*, 51 STAN. L. REV. 991, 1003-04 (1999) [hereinafter Simon, *A Brief Rejoinder*] (responding to Alfieri's criticism); West, *supra* note 55, at 982-84 (crediting Simon with a broader view of "legal merits" than implied here).

160. Its editor tells us she agrees wholeheartedly. *See* LAWYERS' ETHICS, *supra* note 8, at 7 ("The hardest part of editing this book has been deciding what to leave out.").

161. *Id.* at 6. Robert Gordon echoes that sentiment in his Foreword. *See* Gordon, *Foreword*, *supra* note 87, at xv.

162. Here's one teacher's story: I have taught this semester a three credit classroom course (four if a student elects to write a separate paper) called simply Professional Responsibility. My students read the newest edition of Stephen Gillers's bountiful and witty casebook. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (7th ed. 2005). I have found it difficult to cover in a three-credit course enough of the developing doctrine governing the legal profession, including expanding

accomplish that feat, and, as the legal academy is full of talented teachers, I do not wish to discourage anyone willing to try.

My sense is that Carle's book fits more comfortably in two other settings in law school. The first, and more obvious one, is for use in a specialized seminar or classroom course, perhaps called something like "Legal Ethics and the Pursuit of Social Justice." A professor teaching such a course could easily use Carle's book to introduce students to virtually all of the significant intellectual and political visions developed by critical scholars of legal ethics over the past few decades. The professor could effectively use Carle's book in conjunction with the full text of some of the essays or other related readings—which Carle's Appendix helpfully references.¹⁶³ That's a seminar I would love to teach, and indeed would love to take. The other potentially well-suited use for this book is in the seminar component of a clinical course, especially in clinics that aim to teach students as much about the broad themes of a lawyer's role, ethics, and justice as they do about substantive law or skills training. When considering this book as a supplement in a clinical setting, some risks inevitably arise: namely, that the richness of the readings and their interrelatedness might call for more in-depth discussion than the clinic seminar might ordinarily permit. However, while a more traditional legal ethics course will tend to cover much doctrine and regulation that is absent from Carle's anthology, the curriculum of many clinic courses is likely to focus on precisely the issues presented so well in Carle's book.

V. CONCLUSION

Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader is impressive both in its scope and in its elegance. Carle presents a rich compilation of insightful and innovative scholarship in a way that is at once accessible and challenging. Her book is therefore a welcome addition to the prolific field of scholarship about progressive legal ethics and lawyering theories. The book is more directly relevant to students' inquiries about these theories and models than are some of the more sociologically or philosophically focused collections that address cause lawyering. And, thanks to Carle's careful editing this book is more approachable than many others covering similar themes. Its limitations are apparent and not unexpected. Carle has chosen breadth over depth, and it is hard to quibble with that judgment call. Readers new to the contested terrain concerning progressive lawyering will come away from this book with many unanswered questions, some vigorous skepticism, and, importantly, a hunger for a deeper understanding of the complexities

liability theories, multijurisdictional and multidisciplinary practice innovations, Sarbanes-Oxley implications, and so forth. Adding enough of Carle's book to do it justice in a course like mine would be challenging, it seems.

163. LAWYERS' ETHICS, *supra* note 8, at 385-98.

of good and noble lawyering. Those readers will perhaps be more disquieted after reading this book than before, but they will be more enlightened and more wise.