



Negotiating Justice

**Progressive Lawyering,
Low-Income Clients,
and the Quest for Social Change**

Corey S. Shdaimah

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Preface

The Master's Tools

The master's tools will never dismantle the master's house.

—Audre Lorde¹

Ellis is an elderly African American man who lives in a declining neighborhood in Northeast City.² We met in his house in the summer of 2002. The curtains were drawn and the house was dark. When we began our interview he opened the curtains to let in some light. Ellis recalled his neighborhood's finer days:

When we were coming up where we would go to school and enjoy ourselves and work and try to help the family and help others—I—I mean, the way it is now you can't do that. It's getting terrible now. Now when I got on this street—oh man, it was so nice. You could walk on this street, you wouldn't have to uh, you couldn't even find a piece of paper on this block. The way it is now, they don't do nothing; they don't even want to clean up the blood.

Now a widower, Ellis lives alone. The living room where we sat was full of pictures of his late wife and their children.

Ellis told me that he and his wife had trouble with their mortgage company. Despite their timely payments, it seemed to them that the bills were getting higher and higher. No matter when they sent the payments, the mortgage company told them that they were late. And it appeared that the payment due dates were getting earlier and earlier. At first, Ellis tried to deal with the mortgage company directly:

I kept calling them, they said you have to speak to the manager and then they put me on hold and next thing you know—"beep beep beep beep

beep.” And then I call them back again and they said he’s on the other line and I never did get a chance to speak to him. I would call about two or three days out of a week to call them and tell them about the bills and all.

Ellis learned about Northeast Legal Services (NELS) from a friend. “One of my best friends had told me about it and I was in trouble about mortgage and stuff like that. He told me to go down there and that’s when I went. And I found out that they were the best and that’s why I went.” Ellis and his wife, who has since died, came to NELS in 1999 one day during intake hours. There, “each one of us had to get a number and then tell them who we wanted to talk to or what we wanted to talk about and they said, ‘We’ll let you speak to Marjorie.’” Marjorie came down to the intake area where Ellis and his wife were waiting and called them in. In my interview with her, she explained that she usually meets with elderly clients downstairs so that they don’t have to climb the one flight to her office. Ellis said he found Marjorie kind and reassuring. His wife was relieved after their first meeting and was sure that everything would be fine. “Because the way she talks, she don’t talk like the other lawyers. The other lawyers say, ‘I see about this,’ or ‘I see about that’ and different things like that.” Of Marjorie, he said, “The way I felt, just like my wife said, God sent us an angel. And that was Marjorie MacDonald.”

Marjorie devoted time and effort to Ellis’s case. Eventually she was able to reduce their mortgage: “She said they done dropped it all the way from 44,000 all the way to 20.” She told Ellis, “If they ever start over again doing the same thing to let her know.” Ellis has had to call Marjorie repeatedly, as the mortgage company continues to plague him. She has made herself available over the course of their three-year relationship. Ellis met with Marjorie periodically, first with his wife and then, after she died, on his own. They supplied whatever documentation she required. In each case, Marjorie goes over the letters and payment schedules with Ellis, reviews his payment records and, if necessary, responds on his behalf. Based on his experience, he thinks that people who do not have lawyers “have a hard time. They will have a hard time. Because they’ll never make it without one.”

Ellis’s wife experienced a great deal of stress from the mortgage problems. He and Marjorie both feel as though her death may be attributable to this stress. “Even the hospital was saying she was under too much stress. That’s what they were saying ‘cause her pressure kept going up.” He is concerned for himself.

Every time I would go and look at that letter, when they send me the bill saying that I owe this and owe that, when I go to my doctor they said, “You still under a lot of stress.” My—they would take my pressure they says, “You still taking your pressure pills?” I says yes. They said, “It ain’t doing no good.”

Ellis is eager to discuss his legal problems and offer his opinions about lawyers, Northeast City, mortgage companies, and justice. He appears lonely—during our interview he shares pictures and stories, mostly of his recently deceased wife of nearly 49 years and his children. One picture that he carries in his pocket shows his wife and him when they were just married, with Ellis in a uniform from the armed forces. His youngest son has drug problems and is involved in illegal activities. He unsuccessfully tried to help him and he felt the need to sever contact with him to protect his home and property (and his wife).

While Ellis seems lonely and eager to talk, he is far from isolated or pathetic. He is outraged by changes in his neighborhood and works hard to protect it. He told me that he had provided information about suspected arson and calls the police when necessary. Himself a senior citizen, Ellis is active on his block, helping others and encouraging them to seek legal help.

Now I be sending a lot of different ones down [to NELS] when I, you know, see that they really need help and I’m trying to get my neighbor over there [points] two doors from me to go down—have me take her down there. See she’s 89. Each one on this block has a senior citizen to take care of. And I take care of her. And then another up the street. And I always take them different places, take them to get their checks cashed and all of that. So I’m going to get them down there. Because I told them this is the best.

Ellis is one of 31 clients whom I interviewed. While each story is unique, Ellis’s story illustrates a number of themes that I explore in this book, including trauma, oppression, and multiple impacts of poverty, from the mundane to the severe. So are the stories of resilience and persistence. Like the majority of NELS’s clients, Ellis lives in a poor section of Northeast City. His life contains a number of stressors: health problems, the recent death of his wife, and a son who has drug problems. When he first became entangled with legal problems, he tried to resolve them on his

own. The agency, in this case a private lender, proved evasive and unresponsive to his efforts. Ellis was treated so badly that he suspects that they were trying to defraud him.

Ellis learned about NELS by word of mouth and came seeking assistance, not quite sure what they could do but with no other options. He was surprised to find a lawyer who listened to him, who appeared to care about him and his wife, and who acted on their behalf. He is not really sure what Marjorie did, but he feels that his legal problems were resolved, at least temporarily. After his initial respite, however, he faced renewed problems with his mortgage company. Marjorie continues to assist him. Although she is pressed for time, she is sensitive to his recent loss and recognizes that his ongoing difficulties with the mortgage company would be difficult for him to resolve on his own. After his experience with Marjorie, Ellis advocated for others in similar situations by encouraging them to seek legal assistance from NELS. He is also clear that he thinks it is not fair that the mortgage company treats him the way they do.

In this book, I explore the meanings that legal services lawyers and clients like Ellis and Marjorie give to their work within systems that they perceive as fundamentally inequitable and hostile to the claims of poor people. Law has long been seen as a problematic but necessary tool for working for social justice (however defined). Much has been written about the potential for disempowerment in lawyer-client relationships, which is said to privilege expert knowledge and channel energy into practices that preserve the status quo. This particularly troubles lawyers who dedicate careers to representing poor clients. However, few studies have explored the perspective of lawyers and clients who choose to use what Lorde has called the “master’s tools.”

Audre Lorde contended that “the master’s tools will never dismantle the master’s house.” With them, “only the most narrow perimeters of change are possible and allowable.” While she cautioned that the master’s tools are imperfect and even dangerous in their potential to preserve the prevailing social order, she nevertheless advocated using them. This was because the master’s tools and discourses were available to her, and she believed that oppression should be fought wherever, whenever, and however possible. Lorde also used the master’s tools because they formed a bridge between power and lack of power and between those who are powerful and those who are deprived of power. Like Lorde, lawyers and clients in this study

have taken up the master's tools to chip away at the master's house from within. Lawyers and clients with pressing needs do not reject legal tools that, in their very use, acknowledge the authority of legal systems and of lawyers. For the lawyers and clients in this study, as for Audre Lorde, the challenge is to take up the legal tools at their disposal for radical purposes and with a critical perspective.

This book is an account of "situated" practice. By this, I refer to the way lawyers and clients practice within the context of their daily routines, personal and professional opportunities and constraints, and existing social and political arrangements. From the situated practice of lawyers and clients, it is clear that rigid theoretical prescriptions for practice are bound to fail. In the messy world of legal services, lawyers and clients alike learn to be flexible. If lawyers are truly open to their clients and clients truly open to their lawyers, even foundational ideals they bring to their work become open to revision and to competing values, like compassion or the importance of face-to-face practice with clients. Scholars who ignore the rich and problematic understanding that arises from situated practice risk providing incomplete and irrelevant critiques and interpretations. Failure to attend to those engaged "on the ground" is one reason for the mismatch between theory and practice. Lawyers and clients see their work together as a type of realistic radicalism rather than capitulation or system conservation. Their practices do not amount merely to a strategic or haphazard muddling through, but form an internally consistent and morally informed ethic of risk.³

Lawyers and clients find ways to navigate systems of which they are highly critical. By listening to them discuss how they accomplish this, we better understand their views on the nature of justice and the workings of the legal system. This book asks how the lawyer-client relationship hinders and facilitates the achievement of social justice goals. Relying on over 50 interviews with urban legal service lawyers and their clients during 2002 and 2003, I consider the themes of autonomy, collaboration, transformation, and social change. These are themes central to "progressive" lawyering literatures, those critiques of legal practice that value equality, social justice, and the dignity of all clients, which I review in greater detail in chapter 2. Based on the data, I offer a revised understanding of these themes that reflects how lawyers adapt their ideals to the exigencies of practice, and perhaps more important, to the circumstances and understandings of clients. I analyze the experiences

and aspirations of lawyers and clients and the trade-offs and negotiations they make together in working for short-term material assistance as well as more abstract notions of justice, fairness, and dignity in a system that both groups find oppressive. To begin, I introduce the lawyers and clients interviewed and the legal services organization that brought them together.

Clients and Lawyers

I mean, am I changing the world? No. But the revolution still isn't happening and at some basic level this office, legal aid programs and myself personally make a difference in people's lives . . . on basic bread and butter issues. . . . [T]here are people in this office . . . who have a lot of trouble . . . that we're playing at the margins, that we are not fermenting the revolution. And we're not. We're not. We really are not. And that's fine. I mean I can live with it. But no, I love this job, this is a great job. And we do make a difference, both individually and on issues that affect our client population. And *but for* the work we did, things would be considerably worse for our clients. —Steve, a Northeast Legal Services lawyer

I just think that when you got certain stuff that you're not clear about, you get a professional to handle it, so that is what I did. . . . It's a process that's not a familiar process for most people. And it's something that a professional should handle. There's no way in this world I would go and file legal proceedings and not know what I'm doing. —Dara, a NELS client

A one-page flyer, written in both English and Spanish, distributed by Northeast Legal Services (NELS), opens with a heading in large print: "Do you have a LEGAL problem or question? *We want to help you!*" NELS is a nonprofit legal services organization with a centrally located main office and one neighborhood branch office serving a large urban center. Its flyer offers assistance for questions as well as problems. It does, however, require that clients understand their problem to be a legal

one, and might deter those who are unsure if their case meets this criterion (see chapter 4). This flyer, as well as NELS's website that contains a similar message (but does not emphasize the legal aspects), both note that assistance is available in other languages but explain that this might not be immediately available:

Note to people who do not speak English: We are committed to serving you, but have few regular staff members who speak languages other than English or Spanish. If possible, please have a friend or family member come with you for your first visit, or call in advance so that we can make sure an interpreter is available.

NELS is committed to assisting non-English-speaking Northeast City residents through a language access project. NELS reports serving clients who speak Arabic, Cambodian, Cantonese, Creole, English, French, German, Italian, Korean, Laotian, Mandarin, Polish, Portuguese, Russian, Sign Language, Spanish, and Vietnamese.

Flyers are distributed when NELS does community outreach and, in some cases, NELS contact information is provided by local government agencies. For example, Northeast City's child protective services inform legal guardians that they can seek representation from NELS, as do appeal forms for Social Security Disability Insurance. In some cases, clients are referred through the court system, including many of the family advocacy clients. Most clients, however, must go through a screening process.

Each unit has its own intake process. Some units (such as the housing unit) have telephone intake, and others (such as the elderly law unit) go to centers where potential clients congregate. NELS's intake generally requires a potential client to come to their offices. At one time NELS had up to six neighborhood offices, but these were reduced due to funding cuts. The lack of neighborhood presence is a burden for clients who often have to travel far on public transportation, or who may have disabilities or may be caring for other family members. Martin, a NELS lawyer, remarks that when NELS reduced its number of neighborhood offices, it tried to minimize this concern by increasing telephone intake:

When I started working here we had five offices, so there were four neighborhood offices and then the midtown office. So it was easier for people to get in to see NELS, just physically easier. Now we only have two offices. And when we did, I think we tended to allow more phone intake

program-wide. The preferred method I still think, for most units, is for walk-in intake.

Walk-in intake is conducted during limited hours; particular units do intake on particular days. Janet, a client, said that NELS did not help her over the phone: "No, they just said you have to go down there, they didn't really help me on the telephone. They said you just have to go down between such and such days, such and such hours." Clients who inquire over the phone are given the office's hours of operation. Clients who arrive at undesignated times are turned away and told to return during intake hours. There is also a general walk-in intake every day from 9 a.m. to 12 noon at the main office, and only on Monday, Wednesday, and Friday from 9 to 12 at the neighborhood office. Clients who arrive at the correct time and day wait to be called. As Janet explains:

Yeah. You just walk in, you fill out the forms. You go back and you talk to another lady doing intake and then she's the one referred me to Steve. . . . I was there most of the day. . . I waited quite a while before I got, before I was seen. In fact I remember I was falling asleep [laughs]! But then when I had an appointment, I didn't wait. But just the first initial time, I waited a long time.

Waiting time varies, although clients at the neighborhood office were more likely to complain of lengthy wait times. Elizabeth, who sought services at both offices, made the comparison: "No. I didn't have to wait a long time [at the main office]. That was good. Now [at the branch office]! I had to wait about a hour, 2 hours. I waited a long time. They don't see people after 12 o'clock. Lot of people in there." As Janet indicates, once a person goes through the intake process and becomes a client, she then schedules appointments with the individual paralegal or attorney handling the case and does not have to wait.

Lawyers and paralegals in most units participate in the intake process. They determine which cases are eligible based on a variety of criteria that include client's income and the area of law involved. Clients come to NELS in a variety of ways, and each unit has its own guidelines for interviewing clients and determining whether or not they will take on cases beyond NELS's universal income eligibility requirements. Some call lawyers directly. Other clients are referred by social service agencies, other public interest law organizations, or, in the case of the family division, by

the courts. My client sample includes people who enlisted the assistance of NELS via each of these routes.

NELS does not accept all clients who apply for assistance. According to e-mail correspondence with its director:

The truth about eligibility decisions is that they vary depending on the unit's situation . . . how many other cases came in recently and how swamped we are, along with an evaluation of the merits and likelihood of success, our expertise, time it will take, impact for the greater client community of handling this, etc. Some places are much better than we at putting those variables into writing . . . but they do change so often, that we do it on an ongoing basis, usually at unit meetings. But then there is the hard rule on certain cases . . . no one over the income limit, no Social Security insurance cases, because the private bar will do them, no divorces . . . because they're not seen as urgent and they can be done by private attorneys very cheaply, no employment discrimination (which we used to do) because they are so immense for one person's benefit, etc. Of course, tho I say those are "hard" rules, even they could be broken if there is an exceptional situation.

Selection criteria have been discussed in the literature and came up regularly in my conversations with clients and lawyers. I will discuss them further in chapter 6.

Legal services programs are not all of a piece.¹ With approximately 100 employees that include administrators, lawyers, paralegals, and social workers, NELS is one of the largest public interest organizations in a city with quite a few. It is well integrated in a collaborative and diverse public interest law community. From its inception, it kept close ties with local law schools and a wide variety of community organizations. NELS is a highly regarded, sought-after public interest law practice. Pete, a lawyer in the benefits unit, was attracted not only by the prestige and reputation, but by the caliber of the legal work that came out of NELS and the opportunity to work with highly qualified professionals:

When I made the move over to NELS, uh, we have, you know, without being like a braggart, you know, one of the top welfare practices in the country in terms of the collection of critical mass of people who have been doing this for a long time that have, you know, experience and perspective and who are really hard-working and thoughtful and, um, it's a

very unique organization. It serves both this kind of like a traditional, you know, neighborhood law center in the sense that we do individual cases but we also are for all intents and purposes a state and in some ways a national back-up center.²

While NELS engages in both individual and impact work, most lawyers have large caseloads and constant client interaction, in keeping with its legal services mission “[t]o help low-income residents obtain justice by providing them advice and representation in civil legal matters, advocating for their legal rights and conducting community education about legal services.” NELS has a number of operational divisions. These address either substantive legal issues such as Social Security benefits, employment or housing; or serve particular populations such as those in need of language assistance or the elderly. Participants in this study represented lawyers and clients from most of NELS’s units.

All clients must meet NELS’s means test of having an income of no more than 125 percent of the federal poverty line.³ With management approval, NELS also accepts clients “with exceptional expenses or circumstances” whose incomes go up to 187.5 percent of the federal poverty line. An example of such a case provided by a NELS intake supervisor was a client who recently found employment, making him ineligible for services, but who had previously been unemployed and still had a high level of debt. In short, all clients experience some level of financial and social distress. In 2006, NELS handled nearly 17,000 cases. The number of people assisted in some way exceeds this, however, as a NELS administrator explained: “This number excludes many brief encounters where legal advice was dispensed, such as brief phone calls from individuals, other practitioners, or social service providers seeking our assistance.”

The Research Site: Northeast Legal Services

The Founding of Northeast Legal Services

The city that I call Northeast City⁴ is a de-industrialized urban center. Like many similar cities, it suffered a loss of well-paid blue-collar jobs and outward migration to the suburbs of the more affluent citizens over the last few decades. Today, Northeast City contains a core of struggling older communities, where a significant portion of the residents endure high rates of unemployment, violent crime, inadequate housing, under-

resourced public schools, and areas with high concentrations of extreme poverty. These communities have disproportionate numbers of minority residents, female-headed households, and immigrants. The central business district of the city is vibrant, and a number of poor neighborhoods are undergoing a process of gentrification that is encouraged by Northeast City's government. Community groups and housing advocates claim that this has made housing even less affordable for Northeast City's poorest residents and has had a deleterious effect on communities.

NELS was formed in the mid-1960s, a time when legal services programs were started around the country and legal services careers enjoyed a surge of popularity. Lawyers influenced by social and intellectual changes sought to create a different kind of legal assistance to the poor. At that time, critiques of traditional legal aid bureaus and offices abounded, and a new kind of lawyering for the poor was championed. The critiques decried the conventional stance of legal aid as disempowering. They also criticized the narrow provision of particular (and very limited) types of legal services and the limited pool of clients that, according to the critics, was based on inaccurate and self-serving determinations of deservedness. These programs did not mount any kinds of systemic or policy-related claims, and did not challenge the state or its administrative apparatus in any way. The evolution of legal services programs as we currently think of them was the product of social and intellectual ferment within the profession and outside of it. This was pioneered by organizations such as the National Association for the Advancement of Colored People that developed a social change-focused litigation strategy. It was also the product of a new generation of lawyers such as Edgar and Jean Cahn and Charles Reich, who wrote for and advocated to an (albeit limited) audience impatient with the glacial pace of social change.⁵

There was much contention within this group about how legal work could optimize social change, and the extent to which clients could and should be involved in the process.⁶ There was consensus that many of the existing government systems were fundamentally inimical to the interests of poor people and minorities; that the law could and should be used for social change; and that in order to mount these challenges lawyers needed to create a new form of practice to use the legal system against itself, challenging legal institutions to live up to the promise of equal justice.⁷

To some extent, these new legal services programs gained the support of the organized bar and institutional interests on the federal and local levels. However, this support often came from different motivations and

was drawn from a more conservative conception of legal services. For example, while some wanted to use legal services for radical social change, others saw it as a way to channel societal grievances into relatively tame legal frameworks. It also meant that, in practice, legal services lawyers were often criticized by their national and local professional counterparts.⁸

NELS was one of the first of this new breed of legal services programs. It was founded at the initiation of members of the Northeast City Bar Association, although it was not supported by all private attorneys or members of the organized bar. Lawyers who had been with NELS from the early days reported that NELS encountered hostility from local attorneys and judges and that it took some years for NELS to be accepted and respected by the broader legal community.

Founders of NELS in Northeast City sought to create a legal services program on the new model. In some cities, existing legal aid programs sought new federal funding without changing their mission or model of practice. According to Joe, a former NELS director, in Northeast City “the decision was made to close down the [existing] legal services organization although we acquired some of those employees.”

NELS followed the new model of storefront offices that served communities in their own neighborhoods. Ben, a longtime consumer lawyer with NELS, described how NELS had provided a variety of services in locations throughout Northeast City:

We had offices all over the city so . . . we'd have like five different consumer units and you'd have to have meetings of all the consumer lawyers in all the different offices, same thing with welfare and employment and social security and all the other things we do.

Like other longtime NELS lawyers, Joe describes with a tinge of nostalgia his first experience in a NELS neighborhood law office:

You had to travel through the community on a daily basis and I think that had a healthy effect. And literally, I mean I would, you know, drive to the office, park my car and as I walked from wherever I parked to the office literally you would talk to people on their porches . . . and they would interact with you about their legal problems before and after work . . . You were this outside professional coming in and although you thought of yourself differently as a professional than perhaps other lawyers downtown, reality was that you were a stranger in that community.

And a stranger in a lot of ways . . . and so I had a lot to learn. But I think people were eager to teach you and to interact with you and were appreciative. But I think that was helped by the fact there were informal opportunities to interact as well as formal opportunities.

Joe and other lawyers practicing in these years associate lawyering in the community setting with the generalist practice model. Lawyers did not “screen out” cases and often had very little experience practicing law, but they were open to serving the needs of the clients as they came:

When I started we were all generalists in the law. There was no specialization. And people would drop in with a problem; you wouldn’t know what that problem would be. And we’d be expected to respond to that problem and I think that was a great challenge for lawyers. We were all young lawyers at the time in the program. There really were no senior lawyers so the level of experience was much, much lower than it is today in legal services. And that generalist approach in some ways, I think, made the institution closer to the communities that they served.

Although Joe’s tone is somewhat nostalgic, he does not romanticize the early years. The generalist neighborhood practice often lacked professional experience; it was also hectic and confusing. As another attorney, Barry, observed: “We probably didn’t have all the tools we needed to practice law the way we would have liked, so there are trade-offs.”

Nor does Joe romanticize all aspects of being in a neighborhood. He noted that over time, drug problems in poor neighborhoods grew worse and with drug use came concerns for safety. Leslie, a client of the benefits unit, echoed worries about safety at the remaining neighborhood office: “I was a little skeptical because I really didn’t like being [in the neighborhood office], ’cause it can be a little ah [laughs]! It’s not like it used to be.” In addition to concerns for safety, Joe observed that as the lawyers matured along with legal services, their own lives and obligations grew more complicated as they started families of their own and desired more regular schedules.⁹ Most lawyers did not live in client neighborhoods, so when connections to poor communities became more attenuated through the closing of neighborhood offices, no one picked up the slack outside of the formal work context.

Over time, due to a combination of cuts in state funding and restrictions placed on federal funding, NELS closed most of its neighborhood offices. This was a painful decision, and most lawyers saw it as a survival

mechanism with unfortunate consequences. Today, only two offices remain. One is a storefront neighborhood operation and the other is NELS's main branch, located in the heart of Northeast City in proximity to the seat of city government, the city bar association, and private and other public interest law practices. Although there is some overlap in the services provided and the type of clients served in the neighborhood and branch offices, some units only provide legal services to clients in one location.

The "feel" of the neighborhood office and the main office are very different from one another, as noted by clients and lawyers alike. The main office is newer. Erica, a client, summed it up: "Nice and clean. Professional." The offices are quieter, and the flow of incoming clients is regulated at the entrance. Clients come in at the street level and approach an intake window, where there is someone to receive and direct them. Clients directed further are sent to NELS offices, which take up several floors of the building. The main reception area, on the fourth floor, has parquet floors. Elizabeth notes: "The office is different!" She finds the main office "much cleaner and much better, modernized (sic). It's nice." By contrast, the remaining neighborhood office is "really run down."

The NELS neighborhood office is in a converted shoe store, located at a busy intersection in a low-income neighborhood. The basement contains offices, conference tables, and law books. The first floor has a reception area that is separated by a sliding window from an office area for paralegals and office staff. The reception area also serves as an intake space. Marcia, a lawyer who represents children on issues of Social Security Disability Insurance, worked in the neighborhood office before moving to the main office for personal reasons. She described the neighborhood office as drastically different:

I mean, you know, I was in the basement of a shoe store for eight years! I mean, we revamped and kept my feet—pulled out the drawer, the bottom drawer of the desk to keep my feet up because the mice—you know? I mean, you know, it's just so different.

Although clients familiar with both offices noted the differences, they did not attribute other differences to the physical surroundings. Elizabeth explained that she felt comfortable in both offices. Lilly, another client, saw advantages to the neighborhood office in view of the clients who used it: