

SILENCE IN THE COURT: PARTICIPATION AND SUBORDINATION OF POOR TENANTS' VOICES IN LEGAL PROCESS

*Barbara Bezdek**

Powerlessness is not possessed by the individual; it is a collective phenomenon.¹

INTRODUCTION

Spend a morning on the hard benches of Baltimore's rent court and one readily concludes that the forum fails to provide redress for the claims of tenants with anything like the regard it accords the formal rights of landlords, which are delivered with smooth and speedy dispatch. Despite the enactment of tenant-protective legislation in the mid-1970s, the rent court² operates in virtually the same man-

* Assistant Professor of Law, University of Maryland School of Law.

I am grateful to Taunya Banks, Robin West, Richard Boldt, Karen Czapanskiy, and Theresa Glennon for comments on an earlier draft of this Article. Thanks are also due to members of the Mid-Atlantic Clinical Legal Theory Workshop for the attentive hearing they gave the ideas presented herein. Deborah Bell, Gary Bellow, Anthony Cook and Lucie White provided helpful commentary and encouragement through their participation in a panel at the Law and Society meeting in May 1992, at which I presented portions of the paper. I would also like to acknowledge the students in my Legal Theory and Practice: Property course at the University of Maryland Law School in the Spring 1990 term, who conducted much of the research which prompted this Article, and my co-teachers in the course, Richard Boldt and Everett Goldberg, who supported and assisted the project. Finally, I owe special thanks to Margaret Hogans-Ott for innumerable hours of record review and data entry, Robin Simonds for programming, and Deborah McCalpin, Sharonne Robinson, and Michael Yeager for research assistance.

1. RICHARD E. FLATHMAN, *THE PRACTICE OF POLITICAL AUTHORITY: AUTHORITY AND THE AUTHORITATIVE* 149 (1980).

2. This is an administratively-created specialty court of the Maryland District Court for Baltimore City, Civil Division [hereinafter rent court], which has exclusive jurisdiction for summary ejectment cases, and is fully absorbed by this function. In counties throughout the state, the function is performed by the district courts through docketing mechanisms, typically hearing summary ejectment proceedings one day a week. The dynamics described in this Article constituting the silencing of tenants' voices through the legal process available in these courts are only partially particular to the local institution. I believe readers will find parallels in the operation of their own jurisdictions' courts of first resort for poor and unrepresented people.

ner as it did nearly twenty years ago.³ Today few tenants raise the available defenses; even fewer find it worth the candle.

Beneath the veneer of due process and the ordered resolution of disputes, Baltimore's rent court systematically excludes from the law's prescriptions litigants who are members of socially subordinated groups.⁴ The exclusion is enacted over and over each day in rent

3. In the mid-1970s, many jurisdictions across the United States enacted new or enhanced protections of residential tenants' legal interests in possession, habitability, rent control or conversion of rented premises. One common reform, of which Maryland's reforms are one example, was the modification of the summary eviction proceedings to permit the interjection of defenses based on a newly enacted warranty of habitability. At least forty states and the District of Columbia have adopted an implied warranty of habitability, either by statute, judicial decision, or both. See Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 526 (1980).

4. My use of "subordination" is intended to capture both the conceptual and the material patterns of a systematic hierarchical domination that accompanies the economic, social, and political inequalities. In American society, this continues to be distributed largely along identifiable group identities constituted by common stigmatizing features such as race, ethnicity, and gender. See Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 13-14 (1989) (showing how the combination of two statuses, black and female, constitute a new and particularly low-ranking status which further limits the life opportunities of black women); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988) (distinguishing "material" and "symbolic" subordination). That these patterns persist despite the nation's adoption of formal "group" equality through a battery of civil rights statutes invites scholars to explore the social practices, and their underpinnings in people's belief systems, that perpetuate the material and ideological subordination of some groups by others.

This Article speaks from a particular set of material conditions which manifest but do not fully constitute the subordination shared by poor black women in Baltimore. "Black people are not merely disadvantaged when they are poor, they are also relatively poor because they are black." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY AND PUBLIC AFFAIRS, 175 (1976). Kenneth Karst describes the particular "culture of subordination" that was Jim Crow, in order to illustrate the lack of independence of legal doctrine and its institutional settings from the social experience in which it is embedded. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 64-69 (1989). "Ritual is prior to dogma," he reminds us, since culture provides the symbolic meanings underlying one's notions of inequality and of belonging. *Id.* at 40. Social practices and physical acts such as segregation of drinking fountains, parks, and lunch counters, as well as lynchings and cross-burnings, inflict their own harms. Additionally, they construct a shared cultural image of the subordinated group as inferior and hateful. For one discussion of stigma-pictures and the social construction of reality, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 383 (1991).

For analyses of the opportunities within law practice and theory to re-construct culture, in its public and private dimensions, see *infra* note 242; see also Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & SOC'Y 309 (1990); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988); 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

court, where a single judge deals with as many as 2500 cases on a daily docket. The great proportion of tenants who appear are poor black women.⁵ The great proportion of housing leased to tenants summoned to rent court is in such a condition as to provide meritorious legal defense to the landlord's claim for nonpayment. Virtually every tenant is unrepresented and unassisted before, during or after her court appearance.⁶ Few tenants inform the court of the landlord's lapses. The handful who do attempt to press their own substantive rights are effectively not heard.⁷

It is this aspect of the court's operation, the functional voicelessness of virtually all tenants in this forum, to which this Article gives center stage.⁸

Courts assigned to hear small claims were designed with the expectation that citizens would speak directly to courts without the aid or obstacle of formal rules of evidence, professionally trained rep-

(1982-83). See generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978) (reviewing efforts to utilize litigation to promote social change).

5. See *infra* notes 21-24 and accompanying text.

6. See *infra* note 15 and accompanying text.

7. The tenants' words are not quite right: assertions are made indirectly, which neither express nor convey entitlement. The tenant's testimony is evidently accorded less value relative to the landlord or rental agent, in the course of which the tenant herself is devalued. She may be treated by the other players as uncomprehending the legally pertinent parameters, or as self-serving in her testimony, with greater frequency than are landlords or their agents. With very rare exception, the tenant has not anticipated the court's expectation of a paper trail or a written motion, or the devastation this lack will wreak in her hearing. Some tenants are thoroughly mystified in light of the judge's open-court statements that one goes to that court to "tell the judge" about the case.

8. As used here, voice, and more particularly voicelessness, is an act in contemplation of community; an interlocution, not unilocal. Thus, I treat voice both as an individualized expression and as a societal function. In giving voice, persons signal and define their willingness to participate in the societal context of a given opportunity for lifting one's voice. By granting a forum for people's voices, society signals and defines its willingness to listen.

Similar uses may be found in Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1357-60 (1991) (describing the lively world of interactive and variously accented, albeit non-oral, communication in the deaf community); Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139, 152-60 (1989) (criticizing uses of authoritative universal voice to obscure and exclude the experiences of black women from legal theory and feminist mobilization); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (urging members of outgroups to voice their stories because of the power of narratives to construct community and destruct the misallocative status quo, as well as urging members of ingroups to listen to them so as to enrich the conversation through which communal reality is constructed).

representatives, or elaborate rules of entitlement or presentation.⁹ Yet, tenants are silenced by dynamics occurring in and around the court room. This is due both to differences in speech and to dissonant interpretations between speakers and listeners, since they do not share a culture of claiming. I explore these theses by using data gathered in one city's rent court. I expect the analysis to be applicable to the legal process found in the courts of the poor in many other cities.

This Article is an effort to analyze the rent court in context: to examine the social relations which influence the behaviors that occur in proximity to its formal structure and operation.¹⁰ Such an approach sheds the more familiar analysis—"what happens in court"—as constituted by individual actors' moves within the constraints of decisional rules governing the forum. The judges who have presided in this court during the last few years—generally well-meaning people—clearly imagine and expect tenants to be able to use the court as the law allows, that is, to state and prove their claims and defenses involving rent and property condition. Their account of the court's dysfunction features the personal inabilities of tenants as individuals to know, assert, or express legal entitlements.

Granted, the poverty shared by many tenants in this city often carries with it real limitations such as functional illiteracy, poor health, hourly-wage work and/or child care obligations which make it very difficult to wait in court all day. Such material characteristics of living also limit many tenants' ability to use and understand middle-class white English, not to mention law talk. But it is dangerous to ignore the overindividuation inherent in such discussion of "personal" attributes of poor people in court. The intellectual and social history

9. See, e.g., Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 295, 302. "In the lower courts where the smaller cases were heard the poor could plead their own causes." *Id.* at 313 (quoting REGINALD H. SMITH, JUSTICE AND THE POOR 6 (1967)); see also Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 268 (1979) (describing the small claims courts as designed for a "more effective system of justice for the 'average' American Citizen").

10. Beginning in the 1970s, this limiting frame was enlarged by the Civil Litigation Research Project ("CLRP") at the University of Wisconsin. CLRP responded to the limitations of prior research by extending the range of behavior to be investigated, and more significantly, the framework for explaining the behavior. Thus developed a focus on "dispute decisions." Work in this area has included inquiry into: aggrieved persons' decisions to use or not use courts and variables influencing those decisions; outcomes, in relation to formal claims and the underlying relationship between parties; reviews of court performance, evaluation of procedural reforms, and administrative impacts of delay and congestion. See David M. Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485, 494-96 (1980-81).

of the United States illustrates the tendency of the leadership classes to see "poverty" and "the poor" as an aggregation of separate personal cases arising through deficits in individuals' capacity, circumstance, or character.¹¹ A fundamental aim of this Article is to question this familiar perspective and to analyze the rent court's patterns of dysfunction as the product of structural, not solely personal, failure: a systematic exclusion from meaningful participation in the operation of the law.

One cannot meaningfully study institutions without attending to the human expressions and effects of their operations.¹² A study of an institution necessarily draws meat and meaning from the behaviors of people operating within it. However, we erroneously narrow the frame if we limit discussion to individual competence and capability.¹³ The court's operation produces a societal effect that goes be-

11. For an abbreviated history of this ideation and programs expressing it, see Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 906-27 (1990).

Today, such structuralist analysis is a recognizable school of thought among sociologists. This is a sharp rebuke of the "culture of poverty" debate which occupied social scientists and others during the 1960s and 1970s. See Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, SIGNS 856 (1989). That debate was succeeded by the related and more recent attention to an "underclass." See KEN AULETTA, *THE UNDERCLASS* (1982). A small army of empirical sociologists have conducted studies refuting the central tenet, that some cultural deficiency among the marginalized poor accounts for a failure to take advantage of opportunity. For research and analysis, see Zinn, *supra*, and works cited therein, as well as Loic J.D. Wacquant & William J. Wilson, *The Cost of Racial and Class Exclusion in the Inner Cities*, ANNALS AM. ACAD. POL. & SOC. SCI. 501 (January 1989).

12. Galanter featured such ever-present dynamics pertaining to every resort to "court" by constructing a matrix of the relative strategic advantages possessed by parties in relation to the class of legal specialists, passive legal institutions, rules, and alternatives to the official litigation system. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

13. We fall too easily into a discussion of personal attributes when we talk of people in courts. Such discussion tends to feature individual competence or capability as relevant to using courts. See Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 546 (1980-81). That language belies an expectation that people having different levels of skills, personal resources and relevant experiences will have different and higher incidences of perceiving grievances, making claims, and pursuing disputes. Although the empirical evidence on this point is mixed, the expectation persists, even among those who conduct such empirical surveys. See *id.* (citing mixed support for the proposition, yet pursuing the thesis that socially advantaged individuals would be better equipped to perceive and protect their interests and make claims for redress, due in part to greater knowledge, confidence, and resources).

Of the variables in Miller and Sarat's study, few accounted for much of the variation in grievance experiences. Demographic variables such as being female, black or hispanic did link up with reporting discrimination in employment, housing or schooling. Educational attainments and legal-system experiences and contacts did tend to enhance their grievance

yond the mere accumulation of individual impacts. It results in the institutionalization of nonremedy and the anti-enactment of tenants' statutory rights in the condition and retention of the housing they rent.¹⁴

The subject of this Article is poor people who go to court on their own, without lawyers. Baltimore's rent court is one in which lawyers do not practice. Thus, there is almost never an effective translator available in the process to assist the tenant in conveying her legally pertinent story, to aid the judge in hearing it, to translate statements made between the two, or to stop the judge when s/he mishears or fails to hear.¹⁵ Rather than address the customary, yet chimerical, prescription for legal counsel for all tenants,¹⁶ I explore the expressive and the instructive functions of the courtroom dynamic. By "expressive function," I mean the factors facilitating and inhibiting tenants' participation in the proceedings, as illumined by what tenants attempt to say, decline to say, and are heard to say. The "instructional function" of the courtroom is the set of features in this limping adjudication process which reinforce the powerlessness of tenants'

perceptions. Income, however, did not, which surprised the authors. *Id.* at 551 n.17.

Furthermore, in accounting for claims, the authors found race to be a much better predictor of claims in consumer, tort, and discrimination problems than in other categories such as debt, property, landlord, post-divorce, and government, where blacks in the study were found to be less assertive than whites. *Id.* at 552.

14. Judging by the law reviews, the topic of tenants' rights in the condition and repair of their dwellings appears passe. These interests have been overshadowed in the minds of scholars by economic analyses of the effects of rent control and warranties of habitability, public roles in the generation and preservation of housing, and in the conception of rights to shelter and housing. My purpose is less to resurrect the particular substantive rights addressed in this Article, than to expose the fallacies underlying the granting of "rights" to subordinated people.

15. It should be noted that while a lawyer's representation can be significant to the presentation of some version of the client's interests, it does not convey the client's voice. Advocacy is the practice of speaking for one's client, and thus, of prescribing the silence of the client. Even lawyers who seek to practice law in ways empowering poor clients find themselves reenacting the subordination of poor people in their own work. Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 861 (1990).

16. Here is where I take issue with my friend and colleague, Michael Millemann, who recently described the need and importance of legal assistance to tenants in Baltimore's rent court, and advocated that such assistance be rendered by lawyers, law students, paralegals and trained lay advocates. See Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18 (1990). Reliance on the volunteerism of lawyers and students, even supplemented by community-based lay advocates, perpetuates the premises undergirding the model of legal protection criticized here. It is parentalistic and it lets us off the hook for our parts in the charade of legal entitlement and rights vindication.

socially subordinated position, as well as the missteps in formal "instruction" by the court which fail to break through the larger coded messages of exclusion.

This Article offers an analysis of the speech and silence of tenants based on empirical data presented herein, and drawn as well from my own experiences as a tenant advocate, as court observer, and as an interviewer of non-client tenants. I write also as a teacher of law students who manifest the widespread phenomenon of resistance to a non-formalistic account of the dysfunctions of legal process.¹⁷

I endeavor here to render an account of one local institution of the law, to expose the seams at which the legal order (purportedly offering protection defined by substantive rules, procedures, and roles) and the social order in which poor citizens dwell, twist each other into unspoken meanings and disabling teachings. These are even more cruel because of the guise of citizen participation in which courts for "small" claims are cloaked.

One possible explanatory hypothesis, perhaps the standard one offered for the evident ineffectiveness of the formal provision of tenants' rights to change the landlord-tenant relationship,¹⁸ proceeds from a view of law as a kind of cranky but adequate machinery that is capably protective when set in motion with a bit of special skill to assure that it operates properly.¹⁹ Such a standard "access to justice" analysis of the defects of this particular legal institution is flawed and incomplete, because it proceeds from a view of law and society in which law is distinct from the social and political realms, and because of its correlative image of law as imparting "legal protection." This conception promotes the illusory notion that law is a source of power and authority disconnected from other power structures in society.

Without doubt, each of the enumerable constraints impeding poor

17. "Formalism" is used to capture the assumption that the analysis of legal rules entails discerning their internal coherence so that they can be used effectively to constrain the discretion of the judge. This approach treats legal analysis as separate and distinct from sociological, philosophical, political, or ideological realms of social life or forms of argumentation. See generally Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973) (setting forth a "model of formality" designed to make the best possible case that judges should view themselves as law appliers doing the will of law makers postulated to be legitimate).

18. See *infra* notes 24, 126, 240 and accompanying text.

19. The law students felt affinity for what are perhaps the predictable, first-round explanations for tenants' nonparticipation: lack of information about legal rights or of more specialized knowledge such as the kind they enrolled in law school to learn; the possible intimidation of the setting or of one's landlord; or, a final attribution, the tenant bargained for substandard housing in exchange for a preferred level of rent.

tenants' court access²⁰ is a substantial barrier to the assertion of claims by an appreciable numbers of tenants. Yet taken together, they are inadequate explanations for the magnitude of the silence of so many tenants. In this paper I suggest two more:

First, the operational premise of the rent court as an institution is to enforce the entitlement of the landlord to payment and possession, while it obscures the entitlements of tenants under the same governing law. In other words, in the absence of evidence produced by either party, the court uniformly awards judgment to the landlord. More than the formal statutory material is needed to explain this phenomenon. In important part, this is an expression of centuries of culture regarding landowning and its centrality to "worth," as well as an expression of judges' class-related assignments of parties' credibility and their conceptions of the social world. In order for tenants to articulate the claims available to them, they must challenge these powerful underlying premises held by the power-wielding figures in the room—the judge and the landlord.

Second, the great majority of defendants in these actions are members of groups that are, relatively speaking, socially powerless. They are mostly women,²¹ mostly black,²² almost all poor,²³ and tenants.²⁴ The standard view of access-dysfunction largely ignores

20. The point is discussed in KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 1-10 (1988) (citing Howard Zinn, *The Conspiracy of Law*, in *THE RULE OF LAW* 15-36 (Robert P. Wolff ed., 1971)).

21. Seventy-one percent of tenants appearing in court were women. A great many were accompanied by small children, although this observation in the courtroom was not recorded in our study. Census data for Baltimore indicates that 53.9% of all households include children, and that of all such households, 49.4% are headed by women. BALTIMORE CITY DEP'T OF PLANNING, 1990 CENSUS: POPULATION AND HOUSING CHARACTERISTICS (STF-1A), 4 (June 1991) (Profile 4—Household Characteristics) [hereinafter 1990 CENSUS].

22. In our observation, 87% of tenants appearing were black and 13% were white. For an examination of trends in the concentration of poverty for racial groups and the finding that concentrated urban poverty is confined principally to blacks outside the West, see Douglas S. Massey & Mitchell L. Eggers, *The Ecology of Inequality: Minorities and the Concentration of Poverty, 1970-1980*, 95 AM. J. SOC. 1153 (Mar. 1990). Literature grew rapidly in the 1980s documenting the disproportionate representation of black female-headed families in poverty. See Zinn, *supra* note 11.

23. See *infra* notes 30-34 and accompanying text.

24. The appellation "tenant" is an assignment to a culturally recognized economic class of persons excluded from property ownership and its literal and symbolic meanings for autonomous participation in the social order, in its economic, civic, political, and social dimensions. The name describes a basic social practice by describing the legal relationship of "lord and peasant," which not only "condition[s] how the people relate to each other, but to an important extent define[s] the constitutive terms of the relationship" Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984).

the dimensions of social power allocations in the ways our legal institutions, including the legal profession, fail poor people.²⁵ At its root is the acculturated belief that the individual is the proper unit to scrutinize when analyzing disputes about performance under a lease agreement. This is a belief afforded only to socially mobile people and not to the "poor" people who lack the experience of individual power to affect one's status and circumstance. In matters where rights are asserted, including but not limited to civil litigation, this is manifested as an ideology of participatory election, i.e., that individuals autonomously decide whether to take steps when they believe they have been wronged. This premise operates throughout the civil law paradigm and thus, through the formal structure of tenants' rights. But it operates in our lowest courts, on our poorest citizens, in ways that are contrary both to the expressed intent and the evident spirit that accompanied the enactment of significant tenants' rights statutes in the mid 1970s. It also demeans and disables them from claiming, believing, and participating in the civic community which the courts ostensibly serve. This is violence in the form of spirit-murder.²⁶

Section I of this Article familiarizes the reader with the institution of rent court and the data compiled in this three-part study. Section II evaluates the local data by critiquing an analysis based on a model of protection through legal process, and by offering an analysis which accounts for class-based boundaries of inclusion and exclusion from the potentially protective legal conversation. Section III identifies four principal strategies of tenants' silence and speech, reflecting the

25. My students balked at any analysis of rent court phenomena that might take account for the grouping of tenants. This reaction mirrors ideas embedded in the doctrine and practices of the rent court. In Section IV, I take up the theme of group membership, including dominance and subordination, as these ideas have been catalyzed for me by law students and tenants occupying and interpreting the same courtroom at the same time.

For an early warning that poor people, rather than lawyers or other professionals, should control efforts to work extensive change in the legal structures perpetuating poverty, see Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1322-32, 1338-40 (1964). For contemporary self-criticism by portions of the poverty bar, see Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOK. L. REV. 729 (1990); William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. at 777; Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. at 805; White, *supra* note 15, at 861; see also Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88).

26. See Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

insights that are available from the field research of sociolinguists and anthropologists. Section IV ponders the relationships among notions of culture, identity, and legal rights for enhanced participation by subordinated people in the courts of first resort.

I. LEGAL RIGHTS: FORMALISM AND NORMALISM

Each year in Baltimore, some 195,000 cases for summary ejectment are filed by landlords against tenants in district court.²⁷ Over 736,000 people live in the city of Baltimore; of these, 49.7%, or approximately 355,300 people, are renters.²⁸ The volume of ejectment cases is even more palpable after realizing that nearly 180,000 residents are under eighteen years of age, thus these numbers suggest that more than one-third of the city's householders, and nearly two-thirds of all adult tenants, are summoned to this court each year.²⁹

The city has one of the highest concentrations of poor families in the United States: 20% of its families have incomes below the federal poverty level.³⁰ The tenants who are sued for nonpayment are almost always poor, and the monthly rent claimed in these proceedings is typically under prevailing market rates.³¹ More than half

27. See ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT OF THE MARYLAND JUDICIARY, *ibid.* DC-4 (1990-91) and previous years.

28. 1990 CENSUS, *supra* note 21, at 6 (Profile 6—Housing Unit Characteristics - Persons, Rooms and Tenure). Thus, renters comprise 49.7% of all people in occupied units (the balance reside in owner-occupied units, excluding over 12,600 institutionalized persons and another 8,100 in other group quarters).

29. Of course, this statement is not literally true. Nearly 180,000 children reside in Baltimore. BALTIMORE CITY DEP'T OF PLANNING, CENSUSNEWS 1990, No. 3 Distribution of Baltimore's Population (June 1991) [hereinafter CENSUSNEWS] (179,869 residents under the age of eighteen). Poorer tenants are much more likely to be summoned and some small number may be summoned multiple times in a year. See *infra* notes 80-81 and accompanying text. However, neither aspect undermines the staggering fact of the rent court's volume.

30. Most of the poor renters in the metropolitan area are concentrated within the city of Baltimore (71%). Nearly one of every three renter households in the city had income below the poverty line in 1987. SCOTT BARANCIK & MARK SHEFT, A PLACE TO CALL HOME: THE CRISIS IN HOUSING FOR THE POOR—BALTIMORE, MARYLAND 43-44 (Center on Budget and Policy Priorities, June 1991). The authors draw their data primarily from the American Housing Survey 1987, published in 1990 and sponsored by the U.S. Department of Housing and Urban Development and conducted by the Bureau of the Census of the U.S. Department of Commerce.

31. The Court Record Study, *infra* note 53, revealed that 24.9% of cases involved monthly rents of \$250 and under; 17.6% for \$251-300; 25% for \$301-361; and 22% for \$362-450. (On rare occasion, higher-rental properties were the subject of rent court actions: rents between \$451 and \$600 accounting for 6.5% of all cases; rents exceeding \$600, just .11%).

The 1990 CENSUS, *supra* note 21, at 7 (Profile 7—Financial Characteristics of Hous-

of the tenant families paid more than half of their income for rent.³² The condition of the rented residences is poor also. Most of the rental housing stock consists of rowhouses which are two or three stories in height, half of it built before the 1940s, and most of it privately owned. Baltimore's public housing is home to about 38,000 people, with approximately 28,000 more on the waiting list.³³ Families with children may wait for as long as ten years.³⁴ At the last count,

ing Units) reports a median contract rent of \$326. "Average" rents reported by the Baltimore City Department of Housing and Community Development are much higher for every housing type; the average advertised contract rent for 3-bedroom houses in the City during April 1990 was \$443. BALTIMORE CITY DEP'T OF HOUS. AND COMMUNITY DEV., COMMUNITY PLANNING AND RESOURCES, RENT SURVEYS 1990, BALTIMORE CITY AND SUBURBAN AREAS, tbl. 1 (1990).

32. Over 63% of poor households in the Baltimore area spent at least half of their income on housing costs in 1987. An even larger proportion (78%) spent more than 30%, thus exceeding the federal "affordability" standard. BARANCIK & SHEFT, *supra* note 30, at 6. The typical poor renter household spent 68% of income for housing; while half paid less, the other half paid more. *Id.* at 3.

The U.S. Department of Housing and Urban Development ("HUD") considers housing "affordable" if it consumes no more than 30% of a household's adjusted income. HUD regulations would identify a household as poor if the total income of all members of the household is below the poverty line for households of its size. (The Department of Health and Human Services annually updates the federal poverty income guidelines to account for the price increases of the prior calendar year as measured by the Consumer Price Index. For a family of three in 1991, the federal poverty income guideline for the forty-eight contiguous states was \$11,140. Annual Update of the HHS Poverty Income Guidelines, 56 Fed. Reg. 6859 (1991)).

The Center for Budget and Policy Priorities ("The Center") analyzes household and affordability somewhat differently, and less obliquely, than does HUD. The Center defines "low income households" as those having income of \$10,000 or less in 1987. This differs from HUD's definition of "low income households" used in determining eligibility for HUD housing programs, which prescribes a set of income limits that vary by household size. BARANCIK & SHEFT, *supra* note 30, at 8. The Center's method permits a correlative definition of "low rent units" as those housing units renting for less than 30% of a \$10,000 income, or less than \$250 per month. *Id.*

According to Barancik & Sheft, in 1987 the fair market rent for a two bedroom apartment in the Baltimore area was \$479 per month. To afford such a unit while spending less than 30% of the household income for housing would require a household income of \$19,160. Yet the poverty line for a family of three was \$9,056 in 1987. In other words, that family needed an income of twice the poverty level to rent an apartment without exceeding the federal affordability standard. *Id.* at 11.

33. DEPARTMENT OF HOUS. AND COMMUNITY DEV., SEMI-ANNUAL STATISTICAL BULLETIN, 1 (1991); HOUSING APPLICATION OFFICE, APPLICATIONS ON FILE FOR PUBLIC HOUSING AND SECTION 8 AS OF APRIL 30, 1991 (1991) (on file with author). The 18,395 units of public housing in Baltimore are owned by the Housing Authority of Baltimore City. *Id.* In addition, there are 5,657 units which are privately owned and subsidized by the HUD Section 8 program. DEPARTMENT OF HOUS. AND COMMUNITY DEV., SECTION 8 HOUSING PROGRAMS 1 (1990).

34. BARANCIK & SHEFT, *supra* note 30, at 19.

63,442 occupied housing units in the city were deemed substandard including 35% of all rental units.³⁵ Yet tenants' opportunities to find better housing are constrained by the scarcity of affordable housing³⁶ and exacerbated by the city's or private owners' insufficient rehabilitation of existing units. The City does concede that at least 5,000 housing units remain vacant,³⁷ however, the 1990 Census counted 27,222 vacant units.³⁸

35. BALTIMORE CITY DEP'T OF HOUS. AND COMMUNITY DEV., CITY OF BALTIMORE COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY 6, 7 (Oct. 31, 1991) (using data from the 1990 U.S. Census). The Bureau of the Census and HUD classify housing units according to whether they have "severe" or "moderate" physical or structural deficiencies. Illustrative severe deficiencies include: the absence of hot or cold water or a flush toilet, lack of electricity, the existence of at least five basic maintenance problems such as water leaks, holes in floors or ceilings, peeling paint or broken plaster, or evidence of rats or mice within the last ninety days. A classification of moderate deficiency is prompted by, e.g., the presence of at least three such maintenance problems, unvented fuel-powered heating equipment, the unit's lack of a sink, refrigerator, or either stove burners or an oven. U.S. DEP'T OF COMMERCE & U.S. DEP'T OF HOUS. AND URBAN DEV., AMERICAN HOUSING SURVEY FOR THE UNITED STATES IN 1989 app. at App-14-15 (1991).

36. The average rent landlords sought for vacant-for-rent housing units was \$349. *See* 1990 CENSUS, *supra* note 21, at 8 (Profile 8—Housing Units Structural Characteristics).

The Center for Budget and Policy Priorities reported this shortage in the Baltimore metropolitan area as a widening gap between the number of low income renter households and the number of rental units affordable to them. *See* BARANCIK & SHEFT, *supra* note 30, at 9. Between 1979 and 1987, the number of low-income renters (i.e., having incomes under \$10,000) increased by 7%, but the number of low-rent units (i.e., units renting at the federal affordability standard of 30% of income, or \$250 per month) had declined by 32%. *Id.* During the economic recovery of 1983-87, following the recession of the early 1980s, the number of low-income renters fell by 6,600, but the number of low-rent units fell by 16,900. *Id.* at 10. Furthermore, many low-rent units were occupied by tenants with incomes exceeding \$10,000, so that of the 41,400 occupied units renting for \$250 or less per month, only 29,500 were occupied by households with incomes below \$10,000. *Id.* at 11.

37. *See* CITIZENS PLANNING AND HOUSING ASSOCIATION, BALTIMORE'S VACANT HOUSING—AN URBAN WASTE 15 (April 1988) [hereinafter URBAN WASTE]. The City owns 15% of the vacant housing stock. *Id.* at 17.

38. 1990 CENSUS, *supra* note 21, at 5 (Profile 5—Housing Unit Characteristics of the Population). This figure represents 9% of all housing units in the city. Only 3.8% of all housing units were available for rent. *Id.* Of the total vacant units, the Census counted 4,500 that were boarded up, with 49% of those being vacant for six months or more. *Id.* (Profile 6—Housing Unit Characteristics: Persons, Rooms and Tenure). The Census Bureau counts as vacant any unit if no one is living in it at the time of the interview, thus it excepts occupants who are only temporarily away. It includes as vacant the 654 houses with persons who have a "usual residence elsewhere," *id.*, but not units that are unfit for human habitation, that is, those whose roof, walls, windows or doors no longer protect the interior from the elements. *See* URBAN WASTE, *supra* note 37, at 15.

The City of Baltimore, however, counts as vacant only those units which are unoccupied and "from which all or most of the appliances and portable equipment have been removed, or which is open to casual entry." BALTIMORE CITY, MARYLAND, BUILDING CODE, art. 32, § 120.2 (1987). Unoccupied units from which appliances are not removed are deemed

A. *The Legal Construction of Tenants' Rights in Possession, Rent and Habitability of Housing*

As a formal matter, prior to the reforms of the early 1970s, the laws of Baltimore City and Maryland which governed the obligations of landlords and tenants provided nothing more than a summary process for the eviction of nonpaying tenants.³⁹ During the early 1970s, the winds of change sweeping the nation reached into landlord-tenant law in numerous jurisdictions, including Maryland. In 1969, the laws governing Baltimore were amended to authorize court-directed escrow of rent for leased premises having hazardous conditions⁴⁰ and to proscribe retaliatory evictions for tenants' complaints about property condition.⁴¹ In 1971, Baltimore's law was amended to allow rescis-

"temporarily unoccupied," and are required to be secured. They are not required to be utilized, and to the dismay of neighbors, this status may continue for an indefinite number of years. See URBAN WASTE, *supra* note 37, at 15-19.

39. Maryland law provides a summary ejectment action when a tenant has failed to pay rent. The action is commenced by filing a written complaint, commonly on a form printed by the state, which requests a warrant for repossession of the premises and judgment in the amount of rent that is claimed due plus costs. The court summons is issued, notifying the tenant to appear at a trial to be held on the fifth day after the complaint is filed. MD. CODE ANN. [REAL PROP.] § 8-401(b) (Supp. 1990); see also CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY § 9-3 (Supp. 1990) [hereinafter PLL], whose provisions are essentially identical and which governs in Baltimore. A prevailing landlord is awarded a judgment for possession which recites the amount of rent found due and unpaid, but does not receive a money judgment unless personal service of the action was made. Tenants possess the right to redeem the tenancy by paying the amount of rent recited in the judgment, plus court costs, until the constable begins the eviction, although this right may be foreclosed under certain circumstances. See *infra* note 81; PLL, *supra*, § 9-5; see also MD. CODE ANN. [REAL PROP.] § 8-401(e) (Supp. 1990). The landlord is obligated to accept rent tendered on or after the due date.

40. PLL, *supra* note 39, § 9-9 authorizes the rent court to establish an escrow account which requires the tenant to pay either the full rent or an abated amount into it, if the premises are leased for habitation and have conditions that "constitute a fire hazard or serious threat to the life, health or safety of occupants thereof, including but not limited to a lack of heat or of hot or cold running water . . . [or lack of] light or of electricity or of adequate sewage disposal facilities, . . . an infestation of rodents (except if the property is a one-family dwelling), [or of the existence of lead-pigment paint] on surfaces within the dwelling, provided that the landlord has notice of the painted surfaces, and if such condition would be in violation of the Baltimore City Housing Code." *Id.* § 9-9(b).

There is a similar state escrow law, see MD. CODE ANN. [REAL PROP.] § 8-211 (1988), and a provision particular to lead paint, *id.* § 8-211.1. Both state and local law condition the escrow relief upon notice to the landlord and subsequent non-repair after a "reasonable opportunity" to repair. Both statutes prescribe a rebuttable presumption that more than 30 days is an unreasonable delay. See PLL, *supra* note 39, § 9-9(d)(2); MD. CODE ANN. [REAL PROP.] § 8-211(h) (1988).

41. PLL, *supra* note 39, § 9-10.

sion where the premises were discovered to be unfit for habitation within the first 30 days of occupancy,⁴² and in 1975, the warranty of fitness for human habitation was extended to the entire tenancy.⁴³ Each of these provisions permits tenants to raise the issue of defects in the property's condition and obtain specified remedies in either the landlord's summary proceeding for repossession or affirmatively by the tenant's own complaint.⁴⁴

These new tenant remedies appear significant. The court "shall make any order that the justice of the case may require," which may include but is not limited to an order of inspection, repair, and abatement of rent to reflect defective conditions, as well as limited receivership remedies under the escrow law.⁴⁵ It may also award damages and rescission for breach of the statutory warranty of habitability.⁴⁶ Although the state of the housing stock makes it probable that meritorious conditions defenses exist in the majority of nonpayment cases in Baltimore,⁴⁷ such defenses are in fact rarely raised by tenants.⁴⁸ Legal scholars have been consistent in attending to the rights and remedies of tenants in housing availability, cost, condition, and tenure.⁴⁹

42. *Id.* § 14.1.

43. *Id.* § 14.2.

44. *Id.* § 9-9(c); § 9-14.2(b).

45. *Id.* § 9.9(f).

46. PLL § 9-14.2(d) provides that "damages shall be computed retroactively to the date of the landlord's actual knowledge of the breach of warranty, and shall be the amount of rent paid or owed by the tenant during the time of the breach less the reasonable rental value of the dwelling in its deteriorated condition." The landlord's warranty of fitness is, in theory, virtually absolute; the only conditions for which the owner is "not responsible" is any defect or damage caused by a tenant, the tenant's family members, or visitors "which contributes to the uninhabitability." The costs of tenant damage are borne by the tenant and "shall be collected as rent." *Id.* § 9-14.2(e).

47. See *infra* notes 85-86 and accompanying text.

48. See *infra* notes 89-90 and accompanying text.

49. See generally WILLIAM TUCKER, *THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICIES* (1990); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Rabin, *supra* note 3. For articles concerning market analyses of rent levels and their relation to property condition and availability of affordable housing, see Samuel B. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1 (1976); Werner Z. Hirsch et al., *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098 (1975); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence*, 1 FLA. ST. U. L. REV. 481 (1972); Bruce Ackerman, *Regulating Slum Housing Markets, On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971). For a sampling of proposals of tenant remedies and refashioned landlord obligations, see Lawrence Berger, *The New Residential Tenancy Law - Are Landlords Public Utilities?*, 60 NEB. L. REV. 707 (1981); Richard Cotton, Note, *Tenant Unions: Collective*

However, virtually none have ventured to study the operation of landlord-tenant courts on which the poorest citizens depend for the legal regulation of low-income housing.⁵⁰ This study is meant to fill that gap.

B. Description of the Court in Operation⁵¹

Our study includes data gathered from in-court observation,⁵² from court files,⁵³ and from exit interviews with tenants.⁵⁴ In the

Bargaining and the Low Income Tenant, 77 YALE L.J. 1368 (1968); Robert S. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

50. For the single exception known to the author, see Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 J. L. REFORM 8 (1973).

51. To see how this particular legal institution actually functions, one views the court through two frames as a physical space in which social relationships are expressed, as well as the particular expressions, i.e., "cases." The actors within these frames include tenants, landlords and their agents, other witnesses such as housing inspectors and landlords' employees, and on very rare occasion, an attorney or paralegal, in addition to the presiding judge. The roles for all of these actors include both observing the proceedings in the multitude of cases likely to be called during one's own wait, and enacting one's part within the case one came for.

52. The study was begun by watching the rent court in session during the spring of 1990. Trained observers sat in court completing a data sheet on every other case called. The variables checked were the parties' presence in court, representatives' appearances, tenants' race and gender, claims and defenses raised by the parties, as well as the judge's explanations to parties, parties' production of evidence, and outcomes. Every second case was recorded because of the speed with which so many cases are dispatched. See *infra* Section II. Observation teams went to court four times per week and recorded for two-hour sequences, which (except in the middle of the month when the court's docket is most crowded) generally covered the entire morning or afternoon session. A total of 399 cases were observed, coded, data-entered, and analyzed [hereinafter Observation Data].

The court-watchers were law students enrolled in the Legal Theory and Practice: Property course, a course in the University of Maryland Law School's required Legal Theory and Practice ("LTP") program, which seeks to provide students an integrated learning experience that links legal theory, doctrine and practice. The course, and a brief description of the history and institutional context which permitted the development of the LTP program at Maryland, are discussed in Barbara Bezdek, "Legal Theory and Practice" Development at the University of Maryland: One Teacher's Experience in Programmatic Context, 42 WASH. U. J. URB. & CONTEMP. L. 127 (1992). Additional accounts and perspectives appear in Barbara Bezdek et al., *Students and Lawyers, Doctrine and Responsibility: A Pedagogical Colloquy*, 43 HAST. L.J. 1107 (1992). Instruction prior to the data projects included the study of Maryland and local law governing landlords' and tenants' rights, application thereof through problems and through participation in the representation of tenants in the rent court, court observation and analysis, and small group instruction in the use of the data sheets with a faculty member experienced in practice in the rent court. Observation was conducted by teams of two with a faculty member or teaching assistant present as a check on recording errors.

53. The court record study was a random-sample survey in which every 20th case file

straightforward way of empirical efforts, it may be said that the study was intended to elicit whether tenants knew about the formal legal protections available to them, whether they were using the law's provisions, and with what frequency and result. However, these are all predicates to an exploration of the question, "Why are the tenants so silent?"⁵⁵

was read for selected sample points. Data was gathered on: personal and corporate ownership; representation by attorney or agent; incidence of landlord and tenant initiation of actions; amount and number of months' rent sued for; incidence of default; other dispositions; issuance of writ of restitution; and execution of eviction. The sample points were selected in order to control for filing and default patterns which might be affected by weather and holiday seasons. Furthermore, because volume of cases is cyclical over the month, with the middle weeks' dockets especially heavy, records were sampled at four points in each month. Thus the case files read were filed on the 3rd, 10th, 15th and 22nd of the month, for the months of January, March, May, August, November 1989, and January 1990. A total of 659 court files were examined, 569 of which were for calendar year 1989. The base figure for discussion of the Record Survey data are the 569 case records from 1989, which stand for the 186,978 summary ejectment cases filed in Baltimore City's rent court for that year [hereinafter Court Record Survey]. All files were read and data recorded by Meg Hogans-Ott. Collation of data was assisted by Sharonne Robinson.

54. A total of 106 exit interviews were conducted using an interview survey form which provided the questions the interviewers were to ask tenants. Interviewers posed 26 questions, including questions concerning tenants' post-hearing reports of their pre-hearing expectations, their own conduct during the hearing, knowledge of remedies available to tenants, bases for the dispute, and outcomes, as well as household size, income, and rent. *See infra* app., Interview Protocol. The exit interviews were conducted during the same time period as the court observation and by the same law students. [hereinafter Interview Data].

Interviewers were directed to make a standard approach to tenants who had just left the court room. By no means did the interviewer question every departing tenant. Often there were just two interviewers present outside the court room on any given day, and tenants departing while interviewers were occupied frequently went on their way, without a request to be interviewed. Furthermore, tenants were of course free not to participate, and some tenants chose this option. In instances where several tenants exited at the same time, interviewers must be assumed to have exercised some choice about whom to approach. This fact mitigates to some degree the randomness of the arrangement. Finally, because of the local practice to make emergency housing assistance grants available after the entry of judgment, many tenants were willing to give an interview while waiting in line to see an agency clerk who was to determine their eligibility for aid. This might be thought to skew the interview pool in favor of lower-income tenant respondents. Moreover, some of these in-line interviews were cut short at the point where the tenant's turn was called, and most of these did not complete their interview. Thus, the base number of responses varies by question, and is so indicated in the use of the data.

55. The study included observation of the gender and race of the tenants who appeared in court in order to determine the effects of these factors on outcomes. Studies in several states have indicated that participants' gender affects the process or outcome of particular cases. The Maryland study found that lawyers and judges perceive that gender bias is determinative in certain cases, and that the testimony of women, whether parties or witnesses, is deemed less credible. *See, e.g.,* REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 208-09 (1990); MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN

1. Court Characteristics

The entity called "rent court" is in fact a courtroom of the District Court for Baltimore City. A single judge and courtroom are assigned to the hearing of landlord-tenant disputes. Until recently, it was housed in the district court building of Baltimore's downtown, the only locus reasonably well served by the public transit system. In January 1989, the operation moved to a converted Sears department store, in one of the city's bedraggled and poverty-scarred neighborhoods far to the northeast of downtown. It shares the building with the "housing court," a half-time courtroom assigned to hear the State Attorney's prosecutions of housing code violations.⁵⁶ This centralized processing is a great convenience for landlords, landlord's agents, and the judges of the district court.⁵⁷ However, it is mightily inconve-

THE COURTS 107-116 (1989); REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS 141-70 (1989); *see also* Karen Czapansky, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS, 1, 3 (1990) (surveying recent state studies of gender bias in courts). Similar studies have been undertaken by some states to assess the extent of racial bias in legal institutions. The New York State Commission on Minorities reported in June 1991 that

[T]his Commission is constrained to draw the basic conclusion that there are two justice systems at work in the courts of New York State, one for Whites and a very different one for minorities and the poor The system serving minorities does not conform to our society's notion of individualized justice, of hallowed halls, of impartial, reflective decision-making. Many minorities receive "basement justice" in every sense of the phrase—from where their courts are located . . . to the "assembly line" way in which their cases are decided.

REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Executive Summary, 1 (1991). In the only known study of the effects of race and gender in an urban landlord-tenant court, the authors found their data inconclusive in the outcomes of contested cases and slightly linked to gender in the raising of defenses. They also found the landlord's race and gender somewhat linked with the type of action likely to be brought. Mosier & Soble, *supra* note 50, at 65.

56. This authority is nevertheless limited in scope and effect. The municipal housing inspection service may refer to the state attorney those cases of landlords repeatedly failing to respond to serious housing code violations. It is a limp enforcement system, according to the local Citizens Planning and Housing Association ("CPHA"), which reported long delays of up to two years between the report of violations and the hearing in housing court. CITIZENS PLANNING AND HOUS. ASS'N, HOUSING COURT—NO BARK, NO BITE 3, 5 (Jan. 1986). The verdict in 69% of all cases was "probation before judgment," with a grant of still more time to remedy the defects; fines, which by law may be imposed per violation per day, averaged \$11.95 per case. *Id.* at 19. Thus, when tenants do not raise housing conditions in the rent court, they are rarely raised elsewhere.

57. *See generally* Michael A. Fletcher, *Evictions in City Among Tops in U.S.*, THE EVENING SUN, Nov. 14, 1988, at A1 (quoting district court Chief Judge Robert F. Sweeney and Judge Andre M. Davis as describing the court as a collection agency for landlords).

nient for the thousands of tenants who rent in the many poor parts of town miles away.⁵⁸

Inside, the six courtrooms on the main level are used primarily for criminal cases, which explains the number of police officers throughout the first floor. Rent court is in the basement past the offices of the Public Defender and the Constables who execute evictions. If one arrives before the morning session begins at 9 a.m., one sees the blankness of the wide, bright linoleum corridor, leading past closed doors that read, "Rent Court Clerk," "Eviction Prevention Office," and "Legal Aid."⁵⁹ Around the corner, two sets of double doors are marked simply, "Silence—Court in Session."

Come an hour or so later, particularly in the busy middle of the month, and one sees an ever-replenished line of people who are mostly women, mostly black, and mostly with little kids. These tenants are waiting in turn to be called into the Eviction Prevention Office, where they will be quizzed about whether they are facing a "housing emergency" sufficient to entitle them to emergency assistance from the Department of Social Services ("DSS"). The tenants in line have already waited in the courtroom for their cases to be called. Each has received a "DSS slip" in exchange for which a judgment was entered against her for possession on the ground of nonpayment.⁶⁰ Now they

58. Data from the 1990 Census shows that Baltimore's two poorest areas are on the east and west borders of downtown; the median household income was \$4,999 in 1990; nearly all residents of both areas were black. BALTIMORE CITY DEP'T OF PLANNING, 1990 COMMUNITY PROFILES BALTIMORE CITY: DEMOGRAPHIC, HOUSING, HEALTH, EDUCATIONAL, INCOME, PUBLIC ASSISTANCE AND CRIME DATA BY CENSUS TRACTS B-2, B-20 (1992).

It would be a valuable service to compare the rates of tenant appearance by locale or zip code, before and after the court was moved from the city's center to the more remote parts.

59. This permanent label represents the wish of the administrative judge who designated the space, but not the practice of the Legal Aid Bureau ("LAB"), which has not established a regular court-house presence. Although the LAB does provide representation to tenants through staff attorneys and paralegals, it is insignificant in relation to the volume of the rent court. In my experience, this office was always vacant, and court personnel made it available to the law school clinical programs for their (seasonal) consultation with tenants.

60. In April 1990, the Income Maintenance Administration ("IMA") agreed to accept the tenant's summons as verification of the threat of eviction. INCOME MAINTENANCE ADMINISTRATION, INFORMATION MEMO No. OPA 90-53 (Apr. 9, 1990) (on file with the author). The change has had no impact on the court's implementation of this income transfer. No legal reason precludes a tenant from both raising conditions defenses and receiving DSS assistance. But absent a tenant represented by counsel who presses the matter, this is rarely the case. Practically speaking, this depends on the judge to make this option known to tenants on the hearing date.

Moreover, during the deepening recession of 1991-92, Maryland's budget cutting axe eliminated emergency assistance funding for households with no children. See Laura

wait to be screened, and the lucky ones will be directed to their local DSS office to apply for an emergency assistance ("EA") grant. If the tenant has no other funds with which to satisfy the judgment and retain her housing, and if the tenant has not had two prior grants in the year, then she will likely receive an EA grant. But in no event will this grant ever exceed \$250, and if there are no children in the household, or a prior grant has been made, it will in fact be less. Yet in 75% of the cases, the monthly rent sued for in rent court exceeds \$250.⁶¹ Plainly, even the EA grant does not "prevent" the tenant's eviction.⁶²

As one heads for the double-doors to enter Courtroom 7, one may notice off to the right a tilted counter—the docket board. Stapled to it are the cases on the docket for the day, listed by address and case number alone—neither landlord's nor tenant's name appears. No explanation is posted. One might assume, as some tenants do, that the list indicates the order in which cases will be called. This is not so, since cases are called by the courtroom clerk so as to facilitate rapid disposition. Thus, periodically throughout the morning session, the clerk will call from the bench, "All those tenants paying rent to or renting from AB Management Company, come forward and bring your rent notice." Landlord agents (non-attorneys appearing on behalf of client landlords) prefer to have all of their cases heard in sequence, so that they can either come later in the docket or leave before its end. This wish is accommodated by court personnel as a

Lippmann, *Emergency Grants Program Doomed*, THE SUN, Mar. 6, 1992, at D1.

61. See *supra* note 31. Surprisingly, most suits—78%—seek but a single month's rent. Other jurisdictions, such as New York City, require the landlord to send a demand letter before permitting suit. Such an enactment has been proposed every year for many years by the Chief Judge for the Maryland District Court. It has been rejected repeatedly in the Maryland legislature.

62. Emergency Assistance also falls short because of additional charges collectible as rent in these proceedings. These include arrears from past partial payments and late fees which, although limited by state law to 5%, MD. CODE ANN. [REAL PROP] § 8-208(3) (1988), are periodically violated by several landlords. Both are manipulated by some landlords through accounting maneuvers, such as when a landlord unilaterally adds to the rent those charges for repairs or utilities which the law or contract originally settles on the property owner. In most cases in which the court's scrutiny is invoked, such illegal claims are excised from the judgment, but such court supervision is quite rare.

The process is fraught with belittling power signals. Since the amount of the grant often is not enough to cover the rent claimed due, it is a routine agency practice to give tenants a printed list of churches, each of which may give a tenant \$10 or \$25. This practice causes both the State and the churches to funnel money to the landlord and not to the poor household. The State issues emergency housing assistance in two-party checks, the churches write theirs to the landlord directly.

matter of course.

Tenants, on the other hand, are extended no similar control over their schedule or expectation. They are given no idea when their case will be called, and throughout the long session they are at their peril should they leave the room to find the lavatory or to quiet the baby. In a few instances where the landlord appears on his or her own behalf rather than through an agent (no more than about 15% of the cases⁶³) the landlord and tenant may in fact know or recognize each other and realize that the momentarily missing party is in the court house. In the rare instances when this happens and it is brought to the judge's attention, the court may recall the case a few minutes later. Our court observation however, documented this only when the missing party was the landlord, never the tenant. But if a tenant's case is called and she does not move *directly* to the bench, the court will observe, "Landlord claims \$330 rent due, tenant has failed to appear, judgment is entered for landlord for possession." It all takes less than a minute.

Courtroom 7 is the size of a small city park. Wider than it is deep, two banks of twelve wooden benches, each seating eight adults, are arrayed before the raised bench. Two tables, one marked Tenant and the other Landlord, occupy the fifteen feet between the public seats and the bench at which sit the judge, court room clerk, and bailiff. The clerk carrying stacks of the summons on the day's calendar takes her seat before 9:00 a.m. Landlords and agents approach her with questions and requests for consideration about the schedule. A few tenants will ask questions and they are directed to take a seat and wait for their case to be called.

Four single chairs are set apart from the public seating, adjacent to the door through which the judge enters and departs. These have been appropriated by the homegrown business known in Baltimore City as "landlord agents."⁶⁴ A government-issue sign reading "Authorized Personnel Only," which would be more suitable for the door

63. Court Record Survey, *supra* note 53.

64. A handful of agencies make a living by performing for landlords the chores of filing and appearing in court for actions in summary ejectment qua rent collection. No actual property management or rent record-keeping is delegated to landlord agents. Their services include filling out form complaints for summary ejectment (generally, taking by phone the essential information of defendant's name, address, and rent claimed due), filing rent court cases, and answering the docket to secure the judgment. The two largest companies file 76% of all private landlord cases in Baltimore (public housing actions represent about 9% of the total caseload). Court Record Survey, *supra* note 53.

leading to the labyrinth behind the court room, has mysteriously appeared affixed to the wall and centered over this privatized row of seats. Court personnel have disavowed knowledge of its coming to be affixed in precisely that spot.⁶⁵

The occupation of apparently official space by landlord agents bears the imprimatur of the court's physical structure. It is unclear whether or how strongly it "matters" to the landlord agents to sit separately from the bulk of Baltimoreans drawn into this forum infrequently. It is no more clear that tenants in fact notice, or interpret, this derogation of public position by the landlord agents. But it is unassailable fact that the landlord agents are not in any sense "authorized personnel" of the court. Thus, any acquiescence by the court in this misrepresentation is an insulting, excluding message affixed as permanently as the raised dais which signifies the special status of the judge. Other such messages ebb and flow in the operations within the public space of the court room. For a time, one landlord agent opted to do her business prior to the start of the afternoon docket, seated in the witness box on the dais, from which vantage point she called out the names of tenants to come speak with her. Only after objection by a tenant advocate did one judge halt the practice, after professing certainty that the agent meant nothing "improper." His successor has permitted the practice to resume.⁶⁶

2. Aggregate Data About the "Cases" Heard in Court

The three sources of data, in-court observation, court record study, and exit interviews, together provide a detailed picture of the court's effectiveness in serving the rent-collection ends of the landlords.⁶⁷ Tenants appeared almost always as defendants, and generally lost.⁶⁸ While the study's structure did not permit follow-up of partic-

65. Several authors have tellingly observed and described the power of repeatedly occupying a space, including a psychological advantage one may possess and parlay into a sense of disadvantage in the experience of one's opponents. See Galanter, *supra* note 12; Gabel & Harris, *supra* note 4.

66. The judge assigned to rent court is generally the newest addition to the district court bench and arrives largely ignorant of landlord-tenant law. This is in keeping with the longstanding observation that the courts assigned to address the concerns of the poor can be identified by features which render them the weakest parts of the judicial system: their judges have the least and weakest training; they are served by legal representatives with the lowest status or competence; procedures are lax; the incidence of adversariness is low. Harry P. Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694, 718 (1968). See generally Yngvesson & Hennessey, *supra* note 9.

67. The data base and focus of each are described *supra* notes 52-54.

68. According to the Court Record Survey, the landlord was the plaintiff in 99.5% of

ular cases, the aggregate figures for tenant relief are shocking. Not a single order to the landlord to repair was observed in the sample. Abatement of rent to reflect housing violations was ordered in just 1.75% of all cases in the Observation Study.

Landlords prevailed outright in 67% of the cases observed. Tenants obtained judgment and were excused of claims for rent and possession in just 3.5% of all cases. Rent was ordered into escrow for a later determination of the parties' claims in 4.3% of all cases. In 5.5% of the cases, an initial claim by the tenant of unlawful housing conditions was credited sufficiently that the judge ordered a housing inspection and continued the case for a week in order to await the inspector's evidence. The balance of the cases were either dismissed, voluntarily or because the plaintiff failed to appear, or were continued.⁶⁹

In short, landlords avoided the imposition of rent abatement or damages for impaired habitability in 98.25% of all cases.⁷⁰ The Court Record Survey also confirms that 84.7% of the judgments were entered on the defendant's default.⁷¹

Our survey of court records indicates that landlord-tenant actions in Baltimore mirror the patterns of use familiar in other collection courts. Corporations and proprietorships comprise 72.6% of the plaintiffs, but only 0.36% of defendants.⁷² In contrast, individuals ac-

the cases. *See generally* Suzanne E. Elwell & Christopher D. Carlson, Note, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 483-88, 505-06 (1990) and sources cited therein (discussing the relationship between one's position as defendant and the likelihood of adverse disposition in small claims adjudications).

69. Of all cases called, 13.3% were dismissed. About 11% were continued, including the 5.5% in which housing inspections were ordered. Observation Data, *supra* note 52.

70. *Id.* One might surmise that this negligible abatement rate follows from landlords repairing the defects that prompted tenants' counterclaims. The study, however, does not support this theory. Its design did not permit observers to follow particular cases from initial hearing through subsequent trial dates. Consequently, it does not show the impact of a second hearing (following a continuance for a contest on asserted defects in the rented premises) on the tenant's ability to pursue the claim. The requirement of a return to court may deter some tenants having precarious work, transportation or childcare situations, as may the prospect of a more contentious encounter with one's landlord, or concern about the landlord's ire (actual or anticipated) during the intervening week. Conversely, the court's order that the landlord return next week, and that the city agency conduct an immediate on-site investigation and report its findings to the court, may provide useful encouragement to some tenants. *See infra* note 160. Nor does the study document the informally observed practice that, if the tenant fails to appear for the continued hearing, even though a city inspector does come with violation evidence in hand, the rent court's practice is to dismiss the counterclaim and enter judgment for the landlord, without hearing from the inspector.

71. Court Record Survey, *supra* note 53.

72. Government housing authorities accounted for about 5% of all the cases filed. *Id.*

counted for 27% of plaintiffs, but 99.6% of the defendants. Tenants were plaintiffs in the grand total of 3 cases, or .05%.⁷³

Landlords participate in the process almost entirely through agents. Only 5.8% of all landlord-initiated actions are filed by individual landlords in their own name. At least 76% of all cases are filed by "landlord agents"⁷⁴ and not by the owners of the rented properties nor their employees. These agents present these cases in court as well, thus eliminating the need for an appearance by anyone with knowledge of or responsibility for the rent records or property condition.

In the great majority of cases, the monetary stakes are small.⁷⁵ Tenants are usually sued when there is but a single month's rent due.⁷⁶ Economic considerations prevent attorneys from waiting around for two-minute, "two-bit" cases, thus appearances through non-attorney agents solves this problem cheaply. Landlord agents' specialization, experience, and familiarity with procedure and personnel, more than the limited law ever invoked, render them effective representatives for property owners.

Another advantage accruing to these repeat players is perhaps evidenced in the differential treatment accorded landlords and tenants when one party fails, or is slow to appear. Tenants were only half as likely to be awarded judgment when the opposing party failed to appear, whereas landlords secured a default judgment nearly every

The party-entity count was dependent upon the name indicated as landlord on the form complaint. Although Maryland rules of practice require the action to be filed in the name of the real party in interest, MD. RULES CIV. P. § 3-202, compliance in rent court appears relaxed or inept. Entity names indicating corporate status were counted as corporations, but several realty and investment firms routinely gave no indication of their true status. Indeed, some persons known to be principals in sizeable property-holding concerns filed repeatedly in their own names. The study did not include a check with the land records office to verify owners of record. While there may be some misallocation among the categories, the larger principle is demonstrated.

73. Court Record Survey, *supra* note 53.

74. *See supra* note 64.

75. "Small" is used in the sense of "small claims," and in the same sense that Marc Galanter uses in his article. *See Galanter, supra* note 12, at 98.

76. The Record Survey revealed that only one month's rent is sought in 78% of all cases. This does not mean that judgments are for a single month's rent since continuances, either on the request of a party or by the court to redistribute the burdened docket, may push the hearing past the next rent due date. In such cases, unless there is a vigorous contest, the court routinely assumes that the next month's rent is also due and unpaid and will itself amend the complaint, even where the landlord or agent makes no allegation or motion in this regard. This is yet another example of the court representing the landlord and not the tenant. *See infra* section II.B.

time.⁷⁷ Not even in one case was any willingness to wait a few minutes for the tenant's arrival exhibited, although such a courtesy was extended in half the cases in which the tenant appeared and the landlord did not.

The cases won by tenants on the default of their landlords represented only 2.26% of all cases observed.⁷⁸

Virtually no tenants are represented,⁷⁹ nor do they acquire the personal experience, knowledge, and relational advantages similar to those held by landlord agents or landlords who make their own appearances. Despite popular misconception,⁸⁰ most tenants are not chased into rent court each month, or even three or more times in a single year.⁸¹

The study did document a few instances of "mom-and-pop" landlords bringing legitimate claims after informal efforts to collect rent had been unsuccessful. These actions were few and far between. The primary operators in the rent court are a class of business agents whose repeated participation in the forum is a kind of legal education in the scope and form of legal claiming which is adequate to pre-

77. Of the 123 observed cases in which the tenant did not appear, default judgment for the landlord was entered in 117 cases (95%). Tenants obtained judgment only 45% of the time. Observation Data, *supra* note 52.

78. In our observation study, we were surprised to learn that fully one-eighth (12.5%) of landlords make no appearance, either in person or by representative. *Id.*

79. Of the tenants interviewed, 2.8% reported that a lawyer or Legal Aid representative provided "help" in presenting the tenant's case. Interview Data, *supra* note 54, at app. (question 13). In the Court Record Study, only a single file indicated the appearance of an attorney on the tenant's behalf, rendering an occurrence rate of 0.18%. Court Record Survey, *supra* note 53.

80. The popular picture of rent courts assumes that tenants are bad actors. The local landlord lobby promotes this view. For example, in a public report supporting landlords' release from liability for lead-based paint poisoning of tenants, the regulatory framework was criticized in part because it "compound[s] problems for landlords who often must tolerate tenants who exhibit violent and careless behavior that leads to . . . property damages . . . and the growing population of single female [tenants] who are mothers with multiple dependent children and who lack parenting and household management skills." Don Walls, *Lead and Housing from the Investment Property Owner's Point of View*, in LEAD ASTRAY 4 (1991).

81. In the study, only 11% of tenants reported having been to rent court three or more times in the last year. Interview Data, *supra* note 54, at app. (question 5). Repeated summonses are potentially significant for tenants in two ways. First, under Baltimore City law, a tenant who has been sued repeatedly for summary ejectment may lose the substantive benefits of the Public Local Law. One cannot bring a claim, defense, or counterclaim based on the hazardous condition of the rented shelter if one received "more than 5 summons" in the preceding year (three summons if the tenant has resided there for six months or less). PLL, *supra* note 39, § 9.9(d)(3). Nor can the tenant exercise the statutory right to redeem the tenancy by tendering all rent and costs found due if the landlord has obtained more than three judgements against the tenant in the preceding twelve months. *Id.* § 9-5(b)(2) (1981 Ch. 685).

clude even a minimal contest by most tenants and sufficient to defeat the few tenants who muster more. The representatives' repetitious experience provides a confidence in conducting business before the court, borne of a certain amount of familiarity with the setting and its rhythms, as well as the presiding officials.⁸² Rent court, more than most other courts, is a theater of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are poor and poorly situated with respect to the attributes that garner respectful hearing in court rooms.

*C. Who are Tenants in Rent Court and
What are They Doing There?*

Defendants in rent court generally occupy subordinated social positions. They share this circumstance with each other, but not, by and large, with the plaintiffs suing them. Although it is common in legal circles to describe a court *qua* institution with reference to the particular class of legal disputes it hears, doing so is a matter of social conditioning to preferring one lens over others. It is at least as useful to describe any societal allocation of judicial resources by reference to whom it affects, protects, exonerates, and excludes. Thus, from the "legal formalist" perspective, it suffices to assert that tenants are in rent court because they have missed paying the rent this month. But an expanded view permits recognition of the individuals in rent court as socially-located, and the social phenomena linked to gender, race, and class can be acknowledged as important aspects of the operation of rent court.

In general, Baltimore tenants miss rental payments because they live so "close to the edge" that in some months, there simply is not enough money to satisfy all obligations.⁸³ Such marginal economic

82. This observation has been made for many years. See Galanter, *supra* note 12, at 98-103; Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1662 (1969).

83. See, e.g., Barancik & Sheft, *supra* note 30, at 4. The poverty of most tenant defendants, and of the housing they occupy, is nearly invisible to middle class professionals. In a city where the average rent for a one-bedroom apartment is \$361, RENT SURVEYS 1990, *supra* note 31, 67.5% of the repossession cases seek payment for dwellings with contract rents below this figure. Court Record Survey, *supra* note 53. Typical clients of our program have been families of three to eight persons, occupying dilapidated two or three bedroom rowhouses, with median rents of \$250 (1989-90). This experience offers support for the thesis that much of the city's substandard housing is rented at below-market rates.

The fact that two-thirds of the rent court's volume targets the lease financially able of

circumstances are occupied by far more women and minorities than by other social groups.⁸⁴

1. Claiming

Among the nearly 200,000 cases being pressed in this court in Baltimore City each year, how many entail valid defenses which might well be raised, if the defendant were able and willing to assert her rights? How much examination of the merits does the court afford?

The in-court data of the claims and defenses raised are the best indication of the use of the formal legal provisions by tenants. Their formal availability, however, appears to have little effect on case outcomes. The data suggest that this fact cannot be attributed to the absence of legitimate bases for raising defenses. Municipal data concerning the quality of housing stock reveal an admitted and citywide

the city's citizens presents a new and important policy question: Why should taxpayers and tenants who pay the landlords' costs as part of each judgment, fund and operate a public collection service? Especially when the arrangement imposes the additional, anti-civic cost of teaching tenant defendants that even formally enacted rights are not theirs to claim.

84. Members of racial or ethnic minorities and women account for the overwhelming majority of people who remain poor and whose poverty is likely to continue in their children. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 26-29, 63-92 (1987); see also Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States*, in *THE URBAN UNDERCLASS*, 235, 245-47 (Christopher Jencks & Paul E. Peterson, eds. 1991) (reporting that in the inner cities studied, the poorer the neighborhood, the higher the proportion of its residents who were members of a minority group; single-parent families accounted for 65% of all families with children in ghetto neighborhoods; and that on average, children of single parents are poorer in income and other resources); Jeffrey S. Lehman, *To Conceptualize, To Criticize, To Defend, To Improve: Understanding America's Welfare State*, 101 *YALE L.J.* 685, 710-11 (1991) (review essay) (discussing sources whose data suggest a generational link for African-American children in the lowest income quartile). Although most blacks in America are not poor, and a clear majority of public assistance recipients in the country are white, the perception is widely shared among middle-class white Americans that welfare means aid to the members of racial and ethnic minorities. This perception is one factor contributing to the low levels of public assistance and support for social welfare programs in the United States, as compared with nations in Western Europe. See KARST, *supra* note 4, at 125-27.

Tenants who depend on the welfare bureaucracy for the household's income will lack sufficient money for rent whenever the administering agency's check schedule lags behind the rent due day (usually the first of the month). A common cause for not paying the rent when due in Baltimore is that for several months of any year the Aid to Families with Dependent Children ("AFDC") checks are not mailed until after the first of the month. Often times it is sent on the fifth day of the month and in one instance in 1990, it was not sent until the eighth. The Department of Social Services has published a schedule of issuance dates. Nevertheless, most landlords or their agents persist in filing on the first or second day of the month.

deterioration.⁸⁵ In addition, over 60% of the respondent tenants in the exit interviews reported what they believed to be unsafe conditions in their homes.⁸⁶

Most claiming by tenants occurs on the defensive during the landlord's action, since tenants were plaintiffs in just 0.5% of all cases.⁸⁷ Tenants made some sort of claim against the landlord in 21% of the cases in which tenants appeared, which represents only 12.5% of all the observed cases.⁸⁸ Sixty percent of tenant claims were based on the property's condition.⁸⁹ Yet the aggregate outcomes of tenants' claiming was dismal, since tenants received favorable judgments in under 4% of the cases.⁹⁰ By contrast, tenants

85. See DEPARTMENT OF HOUS. AND COMMUNITY DEV., *supra* note 33; 1990 CENSUS, *supra* note 21, at 8 (Profile 8—Housing Units Structural Characteristics); BARANCIK & SHEFT, *supra* note 30, at 29-32.

86. Conditions most frequently reported were: broken locks, doors, windows; falling plaster from ceilings or walls; missing or defective light or electricity; and defective sewage plumbing. Next most common were: infestation of rodents; leaks from roof, windows, walls; lack of heat; defective railings and steps; flooding; and leaking pipes. Tenants also reported lack of hot or cold running water, and the presence of lead paint. Interview Data, *supra* note 54.

Under the Rent Escrow Law, actionable conditions are those "which constitute, or if not promptly corrected, will constitute a fire hazard or serious threat to the life, health or safety of occupants . . . including but not limited to a lack of heat, of hot or cold running water, of proper sewage disposal, light or electricity; as well as infestations of rodents in multifamily dwellings and the presence on surfaces of lead paint in violation of the City Housing Code." PLL, *supra* note 39, § 9-9(b). The city warranty of habitability contains a similar but not identical enumeration of conditions which render a dwelling not "fit for human habitation." *Id.* § 9-14.2(4).

87. Court Record Survey, *supra* note 53.

88. The interview data permitted a breakdown of claiming rates by race and gender groups. Interview Data, *supra* note 54, at Question 17. For the whole pool, the percentage reporting some claim against the landlord was 33%. The rates by race-gender group for telling one's claim to the judge were as follows: black women, 32%; white women, 30%; black men, 47%; white men, 20%.

89. In the minority of cases in which tenants do make claims, they rarely seek all the remedies the statute proffers. While the greatest proportions of tenant claims sought repairs, another 10% sought rent escrow, which is available only after certain proscribed conditions are proved. Tenants sought termination of the lease in 10% of the cases. In only two cases observed, or 4%, did a tenant ask for an abatement of rent. Observation Data, *supra* note 52.

90. Of course, claims can be partial, and partially vindicated, and still the judgment will be "for the landlord." This fact suggests that we ought to take account of the symbolic as well as material consequences of the rent court's judgments, and that perhaps we ought not to count all judgments for the landlord as losses for the tenants. When, for example, rent is ordered into escrow and the court issues an order for a housing inspection, these occurrences may constitute signals to the property owner that further steps must be taken before it can prevail. While I accept the symbolic potential of the court's actions, my figures reflect the material world, in which these occurrences remain rare. Orders for rent escrow and housing inspection are issued in only 4.26% and 5.5% of all cases, respectively. *Id.*

sought to defend against the claimed rent in 63% of the cases in which tenants appeared (37.8% of all observed cases).⁹¹

With regard to tenant claims made defensively, only a few tenants' assertions prompted any sort of landlord defense. Landlords answered the tenants' legislative entitlements in only 10% of all cases. Nevertheless, of these, landlords conceded the prior existence of defects in more than half of the cases.⁹²

The exit interviews were the only source of data concerning tenants' subjective experience of their cases. Black women constituted 70% of the tenant group appearing in rent court who agreed to speak with us as well comprising 70% of the tenants appearing in the rent court observation data. Thus the patterns of this group's answers in most instances predict the pattern of answers for the interviewed group as a whole. But there are some curious exceptions.

The interviews included a series of questions aimed at discovering whether the tenant voiced her position when she disagreed with the landlord's claim for rent due.⁹³ Two-thirds of the respondents told interviewers there were unsafe conditions in their homes.⁹⁴

91. Of these, 25% defended against the claim for rent based on the conditions of the rented premises. In addition, nearly 18% argued that they had paid the rent claimed and another 20% disputed the amount claimed. *Id.* These dispositions turn on whether an adequate paper trail exists, proving payment and receipt by the landlord. Very few tenants pay by check. Some pay in cash and depend on the landlord for a written receipt or entry in a "rent book." Many pay by money order, which is a method notorious for illegible carbons. Tenants never prevail in payment defenses without the landlord's corroboration or production of legible receipts. All benefit of the doubt goes to the landlord's presumably superior records, although seldom is the landlord asked to produce them. This is so, despite the fact that landlords, as plaintiffs, bear the burden of proof.

92. This represents the sum of repairs made, abatements by the Department of Housing and Community Development ("DHCD"), and no access situations. *Id.* Landlords insisted that there were no defective conditions in only .5% of the total sample. Landlords asserted defenses to tenants' claims in forty of the fifty observed cases of tenants' claiming. By far, the most prevalent defense was that the defects asserted had been repaired, eighteen of fifty (36%). The next most common defenses were lack of notice (14%) and lack of access (10%). Less common were the defenses that the DHCD had abated the violation notice or the assertion that no defective conditions exist. *Id.*

93. The interview protocol asked:

16. "Did you agree that you owed the money the landlord claimed?"
IF NO, "Did you tell the judge?"
17. "Did you make a claim against your landlord?"
IF YES, what claim(s)?"
18. "Did you bring anything to court to show to the judge?"
If yes, what?"
20. "Are there any conditions in your house/apartment that are unsafe, or not as they should be?"

94. Interview Data, *supra* note 54.

Women, particularly black women,⁹⁵ were more likely to remain silent before the judge, even when they disagreed with the landlord's claim (or, at least, were most likely to report as much in the interviews). In all the race-gender groups, 50 to 67% agreed as to the rent claimed.⁹⁶ Twenty-six of the 106 interview respondents reported their disagreement. All but four of this group reported that they made their disagreement known to the judge. All of the four who did voice their disagreement were women.⁹⁷

2. Explaining the Few Successful Claims.

What light is shed on non-claiming by the set of cases in which tenants successfully made claims? Access-to-justice theories would lead us to expect lack of claiming to correlate with such factors as deficits in the personal abilities of poor tenants to know their rights, to express them suitably, and to support them with evidence, as well as to appreciate the significance of facts, procedures, and legal notions of jurisdiction and remedy. This is not, however, what the data indicates.

Legal knowledge. Our data does not support an explanation for lack of knowledge of the law's remedies for tenant claims. Over 60% of the tenants reported that they already knew the court could order a housing inspection, order the landlord to make repairs, or direct the rent into an escrow account.⁹⁸ However, only 47% of all tenants said they knew the court could adjust the rent to reflect defective conditions in the premises.⁹⁹

95. I write of black women, rather than women of color, because in this study of Baltimore's rent court, the people of color are quite uniformly, black Americans. The study's observation and interview sections both recorded tenants' race. The data sheet for each tenant required indicating whether s/he was black, white, hispanic, asian, or "other." Baltimore's population is only slightly more diverse than this study suggests. A growing Korean community contributes to the 1.1% Asian community, the Hispanic community is 1%, and the small but vigorous Native American community accounts for just 0.3% of the city's population. Over 59% of Baltimore residents are black, and 39% are white. CENSUSNEWS 1990, *supra* note 29. Despite the currently small numbers of other racial or ethnic groups, their nonappearance in the rent collection qua summary ejectment process would bear investigation regarding the intersections of poverty, race, and residence patterns.

96. By race-gender group, the rates were as follows: black women, 55%; white women, 50%; black men, 67%; white men, 60%. Interview Data, *supra* note 54.

97. *Id.*

98. Tenants reporting that they knew that the court could order repairs: 63% (slightly higher for whites than for blacks); that the court could establish rent escrow accounts: 64% (slightly higher among black women and white men); that the court could order a Housing Department inspection of the rented premises: 61% (70% of white women, 73% black men). *Id.* at app. (question 22(a)-(c)).

99. One can speculate that tenants' calculation for defending might be changed if this

The discrepancies between landlords and tenants in case outcomes do not follow from differences between landlords and tenants in bringing evidence to prove their claims. Tenants reported bringing evidence to show the judge in 31% of the 106 cases reported in interviews.¹⁰⁰ From our observations, landlords brought rent records even less often than did tenants, in 25 of 399 cases, or 6% of all the cases. In only 66 of the observed cases, or 16.5%, did landlords produce any evidence.¹⁰¹

Representation or Other Assistance in Court. Representation is a complicated and ultimately unsatisfying explanation for the differences in success rates between landlords and tenants. It is the rare exception when either landlords or tenants are assisted by counsel. In our observed cases, landlords were represented 2.5% of the time while tenants had representation in 3.7%.¹⁰² While most assistance is rendered by non-attorneys, it appears to significantly affect the outcomes. The interview data identified three tenants who were assisted by counsel and six others assisted by friends or relatives. In none of these cases did the landlord obtain a favorable judgment on that day.¹⁰³ Landlords get the lion's share of non-attorney assistance. Ordinarily, they are represented in rent court by an agent who, in the great majority of cases, is a "repeat player" possessing the specialized

remedial power were more widely known. Because it has the potential of decreasing one's rent, even for just one month, perhaps tenants living under severe economic pressure would press conditions claims or defenses in the prospect of relieving some of that pressure for the month. But such a calculus would still require some belief by the tenant that s/he can utilize this legal process for this formally available end. However, this is seldom the case. *See infra* notes 113-18 and accompanying text.

100. Here, racial differentials were striking, although the numbers of whites in the sample were very small. Black women brought evidence 28%, black men, 33%, compared to white women, 50%, and white men, 40%. The differences are suggestive on the questions whether tenants share the court's expectation that proof is to be presented and will be credited, or perhaps it goes to the habit of reliance on writings. The proportions, by type of evidence produced were: receipts, in 19% of cases where tenant brought evidence; letters, in 8.5%; and photos, in 6%. Interview Data, *supra* note 54.

101. The most common forms of evidence, in cases where the landlord did produce evidence, were: rent records, 37.8%; repair records, 16.6%; lease, 13.6%; witness, 10.6%; abatement card, 7.5%. Observation Data, *supra* note 52.

102. The court record survey revealed only a single instance in which the tenant was represented by counsel. Court Record Survey, *supra* note 53.

103. Among the tenants who did have some assistance, 6 of the 9 involved contested cases which went beyond the initial hearing to a trial on a second date. Interview Data, *supra* note 54. Perhaps this highlights the significance of "participating" in the first hearing, as a means of gaining experience regarding how to proceed to the next step or the next case. If so, it also raises the specter that what people "learn" by coming the first time is just as likely to discourage tenants from pursuing the matter in this or future disputes.

legal knowledge needed to operate effectively in the forum.¹⁰⁴

The fact that the tenants who were assisted by non-lawyer friends or relatives achieved more success than the average tenant invites the speculation that qualities other than legal representation may account for some tenants' persistence in court. Qualities such as encouragement to pursue the matter and assistance in presenting it oneself may account for a more successful hearing. The ubiquity of landlord agents in the vast majority of actions, together with the great preponderance of landlords as plaintiffs, so skews the daily operation of the institution that the pertinent idea of "representation" shifts. Landlords' interests occupy the bench at every moment, and each agent "re-presents" the carbon-copy claims of the innumerable cases. Perhaps the significance of assistance to tenants, by a lawyer or otherwise, is chiefly the breaking of this rhythm.

Tenants on the Offense. Perhaps an affirmative posture, which might be connected to a greater knowledge of tenant's rights or to a sense of one's self as a rights-bearing individual, has a positive relationship to successful outcome. The tenant survey revealed nine cases initiated by the tenant.¹⁰⁵ In seven of these cases, the tenants asserted that there were unsafe conditions in their homes, although only six said they told this to the judge.¹⁰⁶ As a group, the plaintiff-tenants were not notably more knowledgeable about the legal remedies provided in the governing laws than the tenant group as a whole.¹⁰⁷ Nor were the plaintiff-tenants wealthier or in a higher-rent group. Two-thirds had a monthly household income under \$800.¹⁰⁸ The mean rent was \$281, and the mean household size was 2.89.¹⁰⁹ In fact, the outcome profile is significantly stronger for the handful of initiating tenants than for the whole group of 106 tenants interviewed.

104. The Court Record Survey revealed that 85% of all cases are filed by agents of landlords. See *supra* notes 64, 82 and accompanying text.

105. Of this group, six had been to rent court before, while three never had. Only two tenants had the assistance of another person in presenting their case, one a lawyer, the other a relative. Five of them said that appearing before the judge made them nervous. Interview Data, *supra* note 54.

106. All reported concern that their landlords would retaliate for their legal action, either by raising the rent (4), evicting the tenant (3), or using some other form of harassment (2). *Id.*

107. Two of the nine did not know that the law provided for rent escrow, housing inspection, or even orders to repair, while four of the nine did not know the court could abate the rent to reflect the defective condition. *Id.*

108. Half of these had monthly household incomes below \$500. *Id.* at Question 26.

109. *Id.*

Two of the nine plaintiff-tenants interviewed won judgments outright, with four tenants prevailing in the total interviewed group.¹¹⁰ Three lost a judgment to the landlord without a reported rent abatement or repair order. Three plaintiff-tenants won rent escrow orders, whereas for the whole interview group, rent was ordered into escrow in 7.6% of the cases.¹¹¹ Rates for rent escrow orders varied considerably by race and gender. There was a much higher rate of ordering the tenant to pay into escrow where the tenant was a black man, 20%, as compared to 0% for white men; 0% for white women, and 6.8% for black women.¹¹² Escrow operates as a security for the landlord and the court because if the tenant does not bring cash or a certified check to the clerk's office by the date ordered, the escrow order is vacated and judgment is entered for the landlord. The subsequent hearing on the tenant's claim is avoided.

Perception of Grievance. We asked tenants about their claiming, but did not ask directly about their sense of grievance or identification of dispute. "Grievances" can be said to have an objective nature comprised of concrete events, but they are also the product of subjective perceptions and beliefs that the events or circumstances are inappropriate or injurious.¹¹³ Whereas one tenant may find his landlord's failure to fix the leaky roof intolerable and remediable, another may find it unsurprising and "lump it."¹¹⁴

110. Tenants in the total database of observed cases obtained judgments in just 4% of the cases. Among race-gender groups, success was markedly higher for white women (20%) than for any other group (3% for black women, and 0% for men, black and white). *Id.*

111. Sadly, of the whole group, 18% gave no response or did not know the outcome of their case. *Id.*

112. This results in gender totals: Women, 5.9% (five cases total); Men, 15% (three cases total). *Id.* at app. (question 19).

113. See Miller & Sarat, *supra* note 13, at 537-38; see also William F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 635-36 (1980-81) (identifying the perception of an injurious event, i.e., "naming," as a predicate which may or may not be transformed into a grievance through "blaming". A grievance may be made a "claim" should the grievance-bearing person voice it to the one believed to be responsible and ask for a remedy). Thus, disputes are a tertiary form of grievance, i.e., the belief by an individual that s/he is entitled to some resource which another may grant or deny.

114. Miller and Sarat would say that the first tenant has a grievance and the second one does not. One possible response to the sense of grievance is to communicate that sense of entitlement to the party responsible for it, or at least to the party able to redress it, thus making it a claim. If the other party accepts the claim and delivers in full, there is no dispute. But resistance to or rejection of the claim based on a grievance constitutes a dispute. It is transformed as a civil legal dispute when framed as one involving rights or resources which could be granted or denied by a court. Other non-claiming responses might be "lumping it" or reframing the problem and blaming it elsewhere. Miller & Sarat, *supra* note 13, at

For people who perceive some event or circumstance as wrong and remediable, the range of possible responses includes avoidance, self-help without direct confrontation, lodging a claim, or demanding correction and monetary compensation.¹¹⁵ The transformation of grievance into dispute is made by acting on the expectation that a remedy may be obtained by resorting to claiming.¹¹⁶ Although a grievance is a matter of inward belief in one's entitlement to some resource controlled by another party,¹¹⁷ claiming requires voicing that belief to the other. But a dispute is dyadic and discursive, and necessarily relational. It is therefore not surprising that researchers report "clear and significant race effects" in the success of claims (independent of income and education) of black disputants as compared to whites.¹¹⁸

3. Substantive Subordination: Judicial Preference for Landlord Claims

What is the dispute brought by parties to the court? Legal professionals define the dispute narrowly. But laypeople commonly experience their disputes with reference to social rules of "wrong" rather than with reference to legal rules.¹¹⁹ The formalist notion oversimplifies the social experience of dispute and confuses it with its expression within a court system as a "case."¹²⁰

Many disputes are more partial than that correlative legal claim. Take, for example, a contract for home improvements totalling \$900. The contractor's performance is delayed and the impatient homeowner does some of the work himself. Eventually the contractor bills for \$900 and the livid homeowner thinks \$600 is more than fair. When

527.

115. *Id.* at 539. Miller and Sarat report their data by kinds of grievances and show considerable variation in claiming rates by the stakes, situations, and party configurations involved in the disputes. As possible explanations, they suggest the necessary distinction between availability and accessibility of mechanisms for providing redress, as well as claimants' lack of confidence that something can be done. *Id.* at 540. As for claimants' lack of confidence, see BUMILLER, *supra* note 20, at 70-77.

116. Miller & Sarat, *supra* note 13, at 527, 536-40.

117. *Id.* at 527.

118. Miller and Sarat report that black claimants are disadvantaged with respect to almost every problem type. *Id.* at 560. Also noteworthy is the finding that "nonmonetary claims are less likely to be resolved in favor of the claimant than are monetary ones." *Id.*

119. *See id.* at 527; *see also* JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990).

120. *See* Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and An Empirical Investigation*, 18 *LAW AND SOC'Y REV.* 515, 517-18 (1984).

the contractor sues on the \$900 contract, we can say the dispute is over \$300, not \$900.¹²¹ Assuming the homeowner wins his argument, judgment will still be entered for the plaintiff contractor. However, to say that the contractor prevailed and the homeowner did not departs from our sense of the satisfactory resolution of the dispute.

In parallel fashion, in virtually every contested case the tenant agrees that some, or even all, of the rent is owed. But in those cases in which the tenant also wants something in return, most often they want the landlord to make needed repairs, her concern is not treated as a legal claim. It is made invisible. Thus, in effect, the court enforces one class of claims, those by landlords for collection of rent, and marginalizes tenants' claims regarding the condition of the property.

II. READING THE LOCAL SCENE: LEGAL CULTURE AND CLASS BOUNDARIES

Cases in which both landlord and tenant appear typically take no more than two minutes. The dulling standard script proceeds as follows:

Judge: "Landlord claims rent due of \$297. Is that amount due?"

Tenant: "Yes."

Judge: "Is there anything else? Judgment for landlord for possession showing \$297 due and unpaid."

In a frequent minor variation on this script, the judge may add to the tenant, "Would you like a slip for DSS? See the bailiff." Ordinarily the tenant's response is a nod, no other response seeming necessary. Whether this is the tenant's self-identified need or purpose, or just acquiescence to the judge's evident expectation is not possible to observe.¹²²

This typical transcript illustrates twin barriers to tenants' voicing of claims and the court granting a hearing to tenants. These are the dysfunctional premises embedded in legal culture, and the failure of the legal process to mediate the subtle, and not so subtle, intrusions of the larger culture's calculus of social and material status.

A tenant asserting her claim of rent-impairing defects must satisfy the judge on two levels of communication not likely to be familiar

121. *See id.*

122. However, tenants have asked me a number of times about what the other tenants are getting. I have also witnessed many tenants joining the line to receive their DSS slips, without asking or appearing to understand its purpose and effect.

to her. These are the formal requirements for claiming within the official legal culture and the information gleaned from the tenant's presentation of herself and her claim, which the judge uses to interpret the tenant before him. This interpretation encompasses attributions as to race and social class.¹²³ In the elusive moment in which the tenant must state her claim or not, the tenant faces hurdles both of official legal culture and of the larger culture for which a lower court is scarcely a successful filter. As we shall see, both of these hurdles silence most tenants.

A. *The Premises of Legal Protection in Ordinary Civil Litigation*

The formal paradigm for rent court is the conceptual model of the ordinary civil law suit, in which one believing himself aggrieved can bring a claim in the court having the power to adjudicate the matter. The offending party is given notice and an opportunity to be heard by an impartial court, which acts only on a parties' initiative, and which will render a decision based on formal decisional rules and evidence presented.¹²⁴ If they choose, parties may have the assistance of a lawyer, chiefly by paying for it. Most lawsuits settle, and—the paradigm presumes—settlements out of court reflect the parties' assessment of the relative strengths of their positions without the headaches and costs of litigation. In short, the civil-action paradigm provides that the parties participate in the process, either by appearing or negotiating.

But this paradigm is flawed to the extent that it masks the systematic exclusion by the operation of the law of litigants who are members of socially subordinated groups. As Kristin Bumiller has recently observed, the model of legal protection contains within its conception of claims an obligation of rights assertion, that is, the idea that the individual who fails to insist upon her rights in the legal pro-

123. The ways in which "prejudice and status assumptions are tied inextricably to speech evaluation" are explored in Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1332, 1357-67 (1991). For a lucid analysis of American class consciousness and an argument for the utility of "class" as a concept for conflict analysis preferable to the predominant sociological preoccupation with "status" on a many-runged ladder of economic success and social prestige, see REEVE VANNEMAN & LYNN WEBER CANNON, *THE AMERICAN PERCEPTION OF CLASS* 1-17, 39-52 (1987).

124. For the classical exposition of this societal expectation of law as social ordering remains, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-71 (1978).

cess is herself at fault for the failure of the law to cloak her with its protection.¹²⁵

A similar cultural premise pervades the operation of rent court. The central normative function of the rent court is to ask of the tenant, "Did you pay the money claimed or not?" It implies a statement of the individual tenant's unmitigable fault¹²⁶ for the failure to make out her own case of legitimate complaint against the landlord.¹²⁷

The social subtext of implied warranties of habitability, if they function, is very different. The tenants' statutory entitlement that their landlords maintain the premises to minimum standards of habitability recasts the social relationship of landlord and tenant. The experience of claiming rent and possession in rent court potentially recasts the social relationship as well, by providing a channel in which the tenant can counter the landlord's declaration with her own experience. In a jurisdiction with a functioning warranty of habitability, the subtext in tenant-claiming cases would be: it is the landlord who has done wrong by failing to fulfill societally recognized obligations. In Baltimore, however, the formal allocation of responsibilities between landlord and tenant is effectively overwritten by the "tenant as deadbeat" subtext which is reiterated by the court on behalf of the class of landlord litigants.

Like all conversations between people of unequal power,¹²⁸ the

125. BUMILLER, *supra* note 20, at 10. Bumiller draws on the model of law developed in Donald Black's article. See Donald J. Black, *The Mobilization of the Law*, 2 J. LEGAL STUD. 125, 125-43 (1973) (referring to law in general and not to antidiscrimination law specifically); see also Williams, *supra* note 26, at 132-33 (arguing that the rhetoric of increased privatization of racist response functions as the agent of public unaccountability and irresponsibility).

126. The implied warranty of habitability offers an illustration of the ways in which the formal rules of legal obligation and liability express the rawer social experience. The rule prior to the enactment of a warranty of habitability was that a landlord had no obligation to maintain the rented premises. Thus, the tenant remained obligated to pay despite decline or defect in the premises. The social construction of this legal ordering of interests has been, to put it crudely, that the tenant is deemed the "deadbeat."

127. The immediate predicate failure, nonpayment of the rent, is a symbolic expression of the failure to be but a tenant in a society that preeminently values wealth. Williams observes: Blacks have been this society's perpetual tenants, sharecroppers, and lessees. Blacks went from being owned by others, to having everything around them owned by others. In a civilization that values private property above all else, this effectuates a devaluation of humanity, a removal of blacks not just from the market, but from the pseudospiritual circle of psychic and civic communion . . . [T]his limbo of disownedness keeps blacks . . . positioned analogically to the rest of society, exactly as they were during slavery or Jim Crow.

Williams, *supra* note 26, at 148-49; see also KARST, *supra* note 4, at 125 (noting that "[b]elieving in America as a land of opportunity, we are ready to view the poor as people who deserve their poverty because they have chosen not to try").

128. Expression entails the power to assign meanings to our experience. Wherever social

typical script has perhaps several subtexts. Commonly, the subtext to the foregoing script is:

Judge: "Landlord claims rent due of \$297. Is that amount due?"
[The issue here is whether you paid. Have you paid? If you haven't paid the man, then you lose].

Tenant: "Yes" [There are numerous subtexts for this one-word reply: Yes I haven't paid; Yes that is what he claims; and, Yes you are the powerful one here].¹²⁹

Judge: "Judgment for Landlord for possession." [Pay the landlord this amount or plan to move].

Sometimes, when the docket is light or when an appealing tenant¹³⁰ seems not to understand the judge's words or the subtext, the judge will carefully state the time frame in which an eviction may take place, as well as the tenant's legal right to redeem the tenancy. The judge may even ask the tenant if s/he would like a DSS slip. This careful articulation is an instructive moment to other tenants as well. Where this slightly longer text is spoken the case may take five minutes.

B. Silencing Tenants through Judicial Advocacy of Landlord's Case

In a surprising number of cases, the landlord says nothing. He hardly needs to since the merits of a nonpayment case are extraordinarily simple and the judge conducts the landlord's case anyway. Has the tenant paid the rent? If not, the tenant has ceased to pay for the right to possess, thus the landlord is entitled to have this tenant removed. Formally, the dispute is one of possession and the landlord's remedy is regaining possession. In reality, however, the scene is one of debt collection.

Formal legal rights do not modify this essential transaction because of the barriers to tenants' assertions of such rights. The way

power is unequal, so is expressive power. See Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 111 (1990) (observing that "[t]he means of subordination of black people in America have always included two techniques that lie in the realm of expression: labeling and silencing"); see also *infra* section III.B (discussing relative power and language-use).

129. See *infra* part III.A (discussing non-speech).

130. It is difficult to articulate concretely what "appealing" means. Conjure up the prototypical sweet grandmother striving to comprehend needless complexities, or the tenant so distressed by the arrival of the court notice that she disobeyed doctor's orders to come see the judge about it, as well as the occasional tenant who seems organically impaired yet deferential to the judge's explanations.

the rent court operates, the familiar formal allocation among the parties of the burdens of presentation and proof, are in fact turned on their heads. This is explained only in part by the summary nature of the proceeding for repossession. It is strongly reinforced by the phenomenon, all too ordinary in rent court, of the judge trying the landlord's case.

At least in the first instance, I read this as a tale of institutional exclusion rather than judicial bias.¹³¹ Directed by the complaint form as well as by the sitting judge, scarcely a question is required of or put to the landlord, whose *prima facie* case is stated by filling in the blanks.¹³² As practiced in Baltimore's rent court, a person appearing at the landlord's table is virtually never asked to prove any element of his case, including the amount of rent allegedly unpaid, a lease basis for other claimed charges, authority to collect rent, or title.

With perhaps 2,500 cases on the day's docket and the legislative injunction of a summary process, the institution can scarcely address the caseload and require every landlord to prove every element of the claim. But Maryland taxpayers can infer the institution's central function from the form of the court, which is a collection agency at public expense. To view the dysfunction of this court merely as a conundrum of administrative pressures, rather than as defects in the substance or process of the law, is dangerous and destructive of essential principles of adjudication.¹³³

131. I do not mean to exclude the possibility of judicial bias, particularly of a sort of inclination toward one's own class. It is plausible to expect judges to be drawn from upper or middle income strata. *See, e.g.,* MICHAEL D. SMITH, *RACE VERSUS ROBE: THE DILEMMA OF THE BLACK JUDGES* 33 (1983) (noting that this is generally true for white judges although not so uniform for black judges). This social position is likely to correspond with property ownership. Furthermore, judges by virtue of their legal training might be expected to share in the dominant professional culture of rights-believing. Such a set of affinities may in subtle ways have the effect of aligning judges with plaintiff-landlords rather than with defendant-tenants.

132. This process may not be sufficient under Maryland rules. *See* MD. CODE ANN. [REAL PROP.] § 8-401(b) (1988 & Supp. 1992) (a landlord's action to repossess premises shall be made by "written complaint under oath or affirmation"); MD. RULE 1-311(a) ("every pleading . . . of a party who is not represented by an attorney shall be signed by the party"). It is problematic either way, since entries on the complaint form are usually made by persons with no knowledge. Agents' secretaries will take the call from the landlord, fill in the appropriate blanks on the complaint form, and stamp the agent's signature. The form pleading requires a signature above an oath of personal knowledge, but this requirement is widely disregarded. In the majority of cases, agents at the hearing have neither knowledge nor records, since more than three-fourths of the agents filing cases for landlords are simply paper-pushers and not employees or property managers. *See supra* text accompanying note 74.

133. *See generally* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible*

C. Silencing Tenants through Judicial Instruction

1. Tenants' Subordinated Social Position made "Legal"

The interplay of legal culture and class may be illustrated by the procedural hurdle of notice requirements most often employed to bar tenants from successfully claiming redress for defective conditions in the rented residences. Typically the judge requires that the tenant give written notice to the landlord more than thirty days before the tenant makes her claim to the court. Clearly "notice" to the landlord of the tenant's claim of defect and nonrepair is an essential element of the tenant's case.¹³⁴ By law, the tenant is entitled to make her claim as an answer and defense to the landlord's suit for repossession which, as a summary proceeding, is scheduled for hearing within a week of the landlord's filing.¹³⁵ Baltimore local law recognizes "actual notice" and notices issued by government inspectors as valid forms of notice.¹³⁶ But it has been the practice of several rent court judges to prefer the statute's most stringent version of "notice" of defects—a tenant's certified letter to the landlord, of which the tenant has kept a copy and the returned receipt.

The cultural barrier is the judges' evident belief that it is "no big deal" for tenants to write letters or otherwise create paper trails for what they know.¹³⁷ This may be both an unconscious projection of

Courts for Minorities, 25 HARV. C.R.-C.L. L. REV. 341, 352-81 (1990) (arguing that procedural efficiency reforms tend to discourage minorities and others outside the political and cultural mainstream whose use of courts would challenge prevailing legal, political, and social norms).

134. MD. CODE ANN.[REAL PROP.] § 8-211(g) (1988); PLL, *supra* note 39, § 9.9(d), 9-14.2(c).

135. PLL, *supra* note 39, § 9-3.

136. *Id.* § 9.9(d)(1). Outside of Baltimore City, only government-issued violation notices or written notices sent by certified mail are recognized. *See* MD. CODE ANN. [REAL PROP.] § 8-211(g) (1988).

137. For a potent illustration of the cultural clash between poor clients and legal representatives concerning reliance on writings, see Austin Sarat, ". . . The Law is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMANITIES 343, 369-70 (1990); *see also* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). Our Observation Study revealed that tenants brought evidence, in any form, in only 23% of all observed cases (93 of 399). Of those cases, 13% included letters produced by tenants, or less than 3% of all observed cases. The most common form of evidence was rent receipts, but perhaps as an indicator of the divide between the tenants' expectations and the court's, only 27% of those bringing evidence brought receipts (i.e., in only 6% of all the cases observed). Photos and the lease were brought in 7.5% and 6.5% of the tenant-evidence cases, respectively. Observa-

official legal culture¹³⁸ or of a world view that one pilots one's own life, grounded in the social and economic status accompanying judges' professional station. Nevertheless, three points suggest that for many tenants, the letter requirement is clearly a significant hurdle to the hearing of real disputes by this court.

The first is Baltimore's legendary illiteracy rate—it has the least literate population of the nation's fifteen largest cities.¹³⁹ One-third of the city's people above the age of sixteen are functionally illiterate, that is, unable to read bus and street signs or medicine bottles,¹⁴⁰ much less the compound, complex "instructions" on the back of a tattered summons.

Second, the judges themselves have tended to raise the hurdle unreasonably high through their interpretation of simple letters which are submitted by some tenants. In one case the tenant's letter read:

To whom it may concern, I am written you this letter to as you to fix these thing in the house i rent from.

1. Bathroom, toilet
2. all window needs to be fix
3. seil [ceiling] going up to the third floor¹⁴¹

tion Data, *supra* note 52.

138. Meaning that dimension of the rule of law which is codified in formal statutes, dominated by a self-conscious professional elite, and enacted in a nationwide system of courts. See Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1693-94 (1989) (recounting the familiar portrayal of law as a pervasive cultural force in American society, but arguing that an explanation of legal culture requires attention both to locally contextualized meanings of law and to the ways that "the local" is continuous with official legal ideology, that is, with "a mainstream culture of liberal legalism shaped by an emphasis on individual rights, characterized by sensitivity to violations of rights, and associated with court use as a vehicle for claims by individuals on one another").

139. Comments of Richard Sullivan, United Way, reported by United Press International (September 7, 1988). Surveys by the U.S. Census Bureau in 1983 and 1985 identified the Baltimore region as ranking at the bottom of the nation's largest metropolitan areas in the proportion of adults who have completed high school. The national average was 73.9%. The average throughout the Northeast was 74%, and throughout the South, 69%. Central Maryland rated 62%, but in Baltimore City just 48.4% completed high school. UNITED WAY OF MARYLAND, CENTRAL MARYLAND MEGATRENDS 30 (1989).

140. Paul W. Valentine, *Baltimore Targets its High Rate of Illiteracy*, WASHINGTON POST, Aug. 27, 1990, at B1, B4.

Many of our clients perhaps disguise their functional illiteracy when they say such things as "I don't have my glasses . . . I don't see too good . . . I don't read so good . . . Would you read it," which are all familiar strategies for adult non-readers.

141. *A Management v. Purnell*, No. 611367-90 (Md. Dist. Ct. Baltimore City) (1990).

At trial, the judge rejected the letter as adequate notice, expressing concern that the letter did not sufficiently apprise the landlord that there was a defect in the toilet for which the landlord would be responsible.¹⁴² The landlord took the judge's cue that she did not "know" there was anything about the enumerated items to repair.¹⁴³

Third, although the court makes some scant effort to inform tenants of its formal expectations for notice, every instructional effort the court makes backfires. Intentional instructions are compromised by the concerns of docket management, and the unconscious instructions that are exuded in the court's operations teach tenants a bitter lesson. Instead of enabling poorer citizens to participate in the vindication of their rights, the obverse message is reiterated with a veneer of civility, dozens of times a day.

2. The Court's Counter-Instructions

Ordinarily, a tenant learns of the requirement for written notice (or any other matter of procedure, practice, or proof) on the day she answers her landlord's claim for rent in court. During the period 1989-91, the sitting judge read a statement at the start of the morning docket which was intended as instructions to all the tenants. Despite the statutory provisions, judges routinely instruct tenants that "you must send the landlord a certified letter listing the repairs that are needed, and keep a copy of the letter and the returned receipt of delivery" if they wish to make an issue of the condition of their rental.¹⁴⁴ Tenants who arrived late or could not hear the judge from

142. PLL, *supra* note 39, § 9-9(d)(1) requires that "the landlord or his agent was notified in writing by certified mail (return receipt) of the condition . . . or . . . by a violation or condemnation notice from an appropriate State or municipal agency, or received actual notice of the defects or conditions" (emphasis added). The same law makes the provision of "adequate sewage disposal facilities" the responsibility of the property owner, further defined by the municipal housing code to require the facilities to be "in good working condition." HOUSING CODE OF BALTIMORE CITY § 503 (1987 & Supp. 1991).

143. This was one of those rare instances where the tenant was represented at the hearing by legal counsel. This dangerous dynamic was deflected by tenant's counsel proffering a housing inspection report issued by the municipal housing department, whose official notation simply read, "Sec. 507 HC: Defective toilet. Repair."

144. Judge's Statement, Baltimore City rent court, (November 1990) (on file with the author). The quoted sentence is preceded by a stern admonition to be quiet and the assertion that the court's jurisdiction is very limited. The statement is introduced by the following:

If you are a tenant and you believe conditions exist in your home which represent a serious threat to life, health, or safety, the Maryland Rent Escrow Law may apply to your situation. You must prove that you gave your landlord notice of these conditions and an opportunity to make repairs. In order to do this you must send

their seats will hear the gist of this instruction in the other tenants' cases while they wait for their own case to be called.¹⁴⁵ The dialogue concerning notice often proceeds as follows:

Judge: "Did you tell your landlord?"

Tenant: "Yes sir, I told him every time he came to get the rent" [or, "I told his workmen"].

Judge: "When was that? . . . Mr landlord?"

Landlord: "I didn't get the message."

Judge: "Did you send your landlord a letter?"

Tenant: "No, but I . . ."

Judge: "I understand ma'am, but the landlord is entitled to 30 days notice. Now, he has to fix it if it is defective. If he hasn't fixed it in a reasonable time, then come back here next month¹⁴⁶ and tell me you were here today. Judgment for the landlord for the amount of rent claimed due, \$xyz. Thank you."

The judge's preference for the most onerous of the three forms of notice permitted by statute thus becomes an operational imperative.

Tenant education in the rent court consists of a set of direct and powerful instructions. Informed by the judge's formal instructions at the start of docket, tenants are told that they cannot raise conditions issues if they did not have the foresight to write a letter, mail it certified, and keep a copy. Tenants see the judge try the landlords' cases. Tenants observe that few tenants participate or have much to say. The few tenants who do attempt to gain the judge's ear are not

Id. The concepts featured in these "instructions" are the court's authority, the tenant's beliefs about the conditions, and the tenant's obligation to prove what they have to say. Presumably, the same would be central to a statement devised with the intention to discourage tenant participation.

145. Conceivably, tenants fare better if their case is called early. They avoid the cumulative impact of the disabling instructions and the observations made throughout a typical docket, since the court seldom explains the rules in ways helpful to the tenants asserting claims.

146. At this juncture, some judges have advised tenants to "hold back your rent so he'll sue you," if they still contend next month that there are conditions warranting the court's attention. Although the judge may credit today's in-court testimony as notice to the landlord, this is a slim procedural reed on which to stand. If a tenant follows this advice, the matter will come up as a new case with the tenant again in the defensive posture and subject to the high probability of an adverse judgment, regardless of the merits. The judge is not likely to recall the dispute's earlier phase, nor will the second action reference the first. Unless the tenant is exceedingly insistent, the landlord corroborative, and the judge willing to credit either of them (if it is the same judge), the tenant's legal position as to notice will have been static at best. Thus, the tenant's experience of following the judge's advice, only to waste her time getting nowhere, is no instruction in the vitality of her own entitlement.

assisted in making their claims in ways parallel to the assistance afforded landlords. Tenants are placed under a different burden of production, presentation, and persuasion. The court makes no reference to tenants' rights and no admonishment to landlords at the start of docket in order to honor tenants' entitlements.

The very setting of the court conveys the differential experience and regard among the players. Tenants are confronted by the familiarity between court personnel and the landlord agents. The landlord agents know things that the tenant does not, such as who the people are, who has certain authority, what to expect, the language used, and the procedure utilized. In its fundamentals, coming to rent court is not an experience of a leveled playing field in neutral territory. Instead, it is a hoax of a court, an extension of one's social situations and relations unmitigated by "rights." It is the "same ole, same ole."¹⁴⁷

III. SILENCE AND SPEECH

As interpretivist critics of liberal rights theory express it, the legal construction of reality is a form of social construction. To function at all, we assign meaning to events and conditions and interpret them. In so doing, we construct the world around us, ourselves, and others in the world. All social relations are made meaningful through such ideology or consciousness.¹⁴⁸ The consciousness of a society rests upon its set of world views, which are those basic presuppositions and assumptions of what is natural, just, necessary, and desirable. These are held deeply and out of reach of the ordinary impulses to question what we "know." The society's world views undergird the specific justifications of the society's characteristics: social hierarchies, unequal power, and differences in opportunity. The imprint of human and social relations so encompassed gives to the lives of a society's members that which is most fundamental: meaning.¹⁴⁹

Legal discourse is a significant piece of social construction be-

147. For an extended presentation of the views of many ordinary black Americans that whites retain the highest power no matter the setting, see JOHN LANGSTON GWALTNEY, *DRYLONGSO: A SELF PORTRAIT OF BLACK AMERICA* 93 *passim* (1980). For discussion and citation to contemporary literature and reportage of blacks' beliefs that American courts are racially biased, see Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

148. See David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the New Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111, 123-24 (1988); Handler, *supra* note 11, at 958-59; Gordon, *supra* note 24, at 103.

149. David M. Trubek, *Where the Action Is: CLS and Empiricism*, 36 STAN. L. REV. 575, 592 (1984).

cause the ubiquity of law translates into meaning and impact much broader than direct involvement with the legal apparatus.¹⁵⁰ One may speak of the legal consciousness of a society as the way in which the legal order is explained and understood. While this is shaped by the legal profession in large measure, the understandings of that sector do not delimit the legal consciousness of the society. Public assessment of and beliefs about the law's nature and operation are as much a part of our society's legal consciousness as the carefully composed views of courts and scholars.¹⁵¹

Human experience with courts and all that occurs in connection with them also requires interpretation to have meaning. But here it is useful to distinguish three levels of human experience at which interpretation occurs. First, interpretation occurs at the existing institutional setting, which includes the legal doctrine and the procedural rules in use. Second, it occurs at the interpersonal level (i.e., one's own conduct and others' conduct, which includes predictions and expectations of responses from the others). Third and deepest is cultural locus, at which persons' identities are forged, both self-ascribed and attributed, as well as social hierarchies and our deepest feelings about others.¹⁵² All three orders of interpretation are present and intertwined at any point at which we seek to understand the meaning drawn from a legal institution by and for people affected by its operation.¹⁵³

150. This tenet is central to several important currents within contemporary legal scholarship. These include, first, strands within critical legal studies whose core position is that legal rules are socially constructed and reflect the prevailing powers of domination. *See, e.g.,* Gordon, *supra* note 24, at 73-75. Thus, legal rights in fact disempower those they purport to protect. *See, e.g.,* Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 362-85 (1988); Peter Gable & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 26-35 (1984). Second, feminist jurisprudence views the oppression of women as deeply embedded in the legal system. *See, e.g.,* Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4-68 (1988); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). Third, critical race theory, the current effort to develop a jurisprudence that accounts for the reliance of American law on racism and seeks the elimination of this and related forms of subordination. *See, e.g.,* Crenshaw, *supra* note 4, at 1349-87; Matsuda, *supra* note 8, at 1331 n.7. For a useful account of convergences among such interpretivists, see Handler, *supra* note 11, at 957-65. For anthropological perspectives, see Yngvesson, *supra* note 138; Sally Engle Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 LEGAL STUD. F. 59 (1985).

151. Several authors would assert that the public's beliefs form the more important part of society's legal consciousness. *See* Gabel & Harris, *supra* note 4; Yngvesson, *supra* note 138; Merry, *supra* note 150.

152. *See* KARST, *supra* note 4, at 40-41.

153. *See* William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice*

We are accustomed to perceiving only the first two levels of interpretation when we consider courts, procedure, trial strategies, and historical-political treatments of significant cases. Interpretation is a central function of a court of law. Whatever other purposes it may have, surely it exists to interpret matters that bring people within its power. The court resolves contending versions of facts presented by witnesses and overrides all individual views in deciding who wins. The court creates the official interpretation and can direct certain powers of the state to compel its enforcement. But other interpretation occurs in courts besides these familiar features of court study. Witnesses report past events, and in doing so, they interpret them. Parties hear each others' accounts and interpret them. Advocates or other agents who make opening remarks, summations, and arguments for the application of legal rules to asserted facts, offer interpretations they hope will be adopted by the judge. Each ruling is a public announcement of which interpretation the judge accepts.¹⁵⁴ Although the judge's interpretations are cloaked with the power of official sanction, they scarcely exhaust the possibilities for the meaning of the courtroom events over which the judge presides.

Tenants choose among four principal strategies of participation in rent court: silence (including non-appearance, disappearance, and silent appearance in court); powerless speech; powered speech (outwardly consistent with, but constrained by the legal protection model of permitted speech); and empowered speech (in which the speaker's strategy and the forum's overt possibilities coincide). We ought to expect the speech strategies here described to offer corrective lenses for the interpretation of meaning in the proceedings of an urban rent court.

A. *Silence*

Silence means something, but what? How is it construed? How should it be interpreted? In Baltimore's rent court, "silence" takes three distinct forms: non-appearance, disappearance, and non-speech.

System, 22 *LAW & SOC'Y REV.* 137, 160 (1988) (explaining that "the observation of a discontinuity between lay culture and a powerful institution such as the law is significant in its own right"). The authors advance the importance of examining legal issues, not from the perspective of those who primarily make and practice law, but grounded in the reactions and attitudes of people who are "consumers" of justice. *Id.*

154. See WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* 97 (1982).

1. Non-Speech

Each day the court is faced with hundreds of tenants who appear in court, but not having paid the rent. The court observation and record survey documented the casually formed impression: fully 85% of tenants do not appear in answer to the summons. In civil legal parlance, they "default." Further attribution is made by the legal professionals and familiars (the judge, many law students, and landlord agents) that the bulk of the defaulters have no defense to make.¹⁵⁵ Our data do suggest that the choice not to appear is consistent with a fair assessment of the tenant's odds in court, whether or not one has a viable claim.

The puzzling question concerns the group of tenants who do appear in court, yet do not effectively "answer" in a manner attributed legal meaning. Of the tenants appearing, 87% do not speak so as to gain a hearing. One of two response types is common to the routine judicial inquiry, "Is there anything else you wish to tell me?" Many tenants say no, mumble something inaudible which is taken for no, or keep quiet. For others, the question prompts a human story which is not given legal credence, and thus with a short detour, the case concludes with judgment for the landlord.¹⁵⁶

The tenants who appear on the appointed day but who say nothing do not "default" in a technical sense, although they do fail to raise a cognizable claim. Why come to court then? Because they were summoned? Why take the time from work and risk losing the job, or ferry the kids across town, to get an adverse judgment, if one is not

155. Since no one has devised a study encompassing tenants who make no response to a summons within the ambit of the court, this is not a data-based conclusion, but an interpretation of human behavior.

156. For a discussion of narrative responses, see *infra* section III.B.2. These two sections likely overlap and impact each other. The "No" answer for some tenants may mean a simple no; or it may be a compound no, expressive of the belief that saying no is the fastest way out of this uncomfortable, or nonproductive, courtroom. These are both categorized as forms of silence. The human-story response is a kind of ineffective answer, one which does not purchase a hearing of the claim to right and recognition delineated by the formal law. As such it might be categorized as non-speech in effect. However, the human-story responses are treated here as instances of powerless speech. Initially, this was because they struck me as much more expressive of the speaker than the monosyllabic speaking that I am calling non-speech. More recently, however, I have come to see that the terse non-speech is also expressive of the speaker's sense of her immediate situation, being a poor tenant in a court operated by the State for property owners. Thus, they are distinguished based not on expressiveness, but on their natures as closed or open speech: whether the speaker intended to communicate, to make contact with the listener, or was resigned to the futility of doing so.

even going to contest the facts? The behavior might be explained by a judgment to submit to official power, or an intention to make a claim, or a sense of civic duty. What transpires in the time between arranging to come to court and the moment or two in front of the judge?

The very fact that tenants have not paid the rent claimed due is perhaps sufficient to predispose the sitting judge to a view of the case: the tenant has "failed" to pay and the landlord is "entitled" to be paid. This interpretation follows from the paradigm of civil disputes, where the judge expects each party to set forth pertinent claims, defenses, counterclaims, and evidence.

At least three objections are raised by this premise in the operation of small and summary proceedings. First, there is little reason to believe that litigants, whether they be landlord or tenant, share this expectation for claiming. Recall the very small proportion of landlords or tenants who bring any supporting evidence, or who speak in their own behalf.¹⁵⁷ Second, the expectation cannot be discerned from participation in the proceedings, or even from watching what passes as adjudication in others' cases while waiting for one's own case to be called. So little that is particular rather than *pro forma* is said in each case. For tenants, the models for disputing, or successfully disputing, claims are truly few. It is far more common to observe a tenant attempting to press perceived entitlements garners more disrespect than success, which leads to scant "hearing," and even less relief. Even real but partial success looks, sounds, and feels like losing. Third, landlords and tenants are under a different burden to discern the expectation, given the phenomenon described in section II that the landlord is seldom put under any burden of proof other than to send an agent with a form complaint.¹⁵⁸

The tenant's decision to say little or nothing may be the summative effect of the court's instructions, not the least of which are those explicit and implicit interpretations of priority and credibility as between the landlords and the tenants, which are broadcast consistently throughout the long procession of short cases. These are scarcely interrupted by the refrain of "Judgment for the landlord for possession," which is the marginal tenant's worst fear.

157. See *supra* notes 100-01, 137 and accompanying text.

158. See *supra* notes 132-33 and accompanying text.

2. The Dance of Default: Non-Appearance and "Dis-appearance"

The paradigm of the ordinary civil law suit is supported by the corollary that most cases settle. In small claims cases and in rent court, this framework readily leads to the assumption that people who do not come to court have assessed their claims' value, and generally, have no answer to make. Prior studies of small claims court processes have explored defendants' rates of non-appearance and default. In the major cities sampled, David Caplovitz's landmark study of courts' role in consumer debt collection reported that fewer than 10% of defendants made an effort to defend themselves.¹⁵⁹

From within the paradigm, it may be tempting to theorize that most who default know they lack valid defenses, or alternatively, that they prioritize values other than those represented by the dispute and choose not to spend their time in court. But even from within the paradigm, we must ask whether the decision to default reflects an accurate understanding of a lack of defenses and whether these defenses were waived knowingly or inadvertently. Moreover, for defenses which are technical or simply remote from the disputants' experience, there is no good reason to think the consumer or tenant would know what constituted a valid defense.¹⁶⁰

159. DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 191 (1974).

160. *Id.* For a contemporary systemic analysis of consumer judgments, see Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990).

Caplovitz advanced two related hypotheses which initially seem pertinent for contemporary rent courts as well: (1) some significant fraction of defaults were attributable to the fact that defendants were required to appear in court on two occasions; and (2) defendants' difficulty in answering a summons, given the legalistic framework and the language in which it is written. CAPLOVITZ, *supra* note 159, at 210.

Our data does not permit a distinction necessary to address the first question. In Baltimore City, at least two hearings are necessary when a tenant either sues affirmatively or seeks the protection of a rent escrow or court-appointed inspection of the rented premises. A tenant's decision to technically default is made either by not coming to court or by not waiting through the often lengthy docket for one's case to be called. Our in-court observations could not capture motivational data for either group and our exit interview survey did not happen to capture it.

Nevertheless, the hours logged in rent court did garner some unquantified observation on the two-hearing point: few tenants fail to follow through to a second hearing once the judge orders a housing inspection. One could hypothesize that only the deserving or aggressive tenants get the inspection orders. This is unsatisfying in light of the gap between the condition of the aggregate rental housing stock and the number of inspections ordered by the court. Thus, it appears likely that the tenants' commitment to pursuing a remedy is higher

Our exit interviews were, obviously, conversations with tenants who had opted to come to court and not those who stayed away. Their responses suggested that from 50-60% of appearing tenants had knowledge of the specific protections the court was empowered to provide tenants. The interview questions were not designed to elicit respondents' understanding of a legal notion of defense, nor their intuitive grasp of dependent promises as providing a basis for offsetting some rent. Thus, the study generated no clear basis for speculating that the no-shows had a greater or poorer awareness of the law's provisions than those tenants who did appear.

If we assume that the two groups possess comparable knowledge, then a legalist interpretation of no-showing appears to be in error. If we assume non-appearing tenants have less legal knowledge, then we must adjust the formalist account for tenants' scant success to explain why legal knowledge is of little help. But, what if we assume that non-appearing and "dis-appearing" tenants possessed greater knowledge than litigating tenants, knowledge not about formal protections in the law, but about that law in operation, i.e., the breach between its promise and practice? Then we can rationally support a theory of calculated no-showing. This might be analyzed as a form of empowered "speech," expressing a consciousness of resistance by overtly rejecting a mythology of rights.¹⁶¹

Note the important difference in the basis of the hypothetical calculus: formal law, or law enmeshed in the social structure unmodified by a statutory mutuality of landlord's and tenant's obligations. If the third supposition is true, it tells us that a tenant can calculate her chances for justice in the court by interpreting the "legal process" with absolutely no reference to the law. With reference only to social hierarchy, she may predict her chances correctly. In other words, the study and analysis of knowledge of legal rights is a long-winded legalist's scam for the typical tenant.

when they get as far as securing an inspection order. This could mean that tenant commitment to the proceedings is enhanced either by the court's favorable ruling in the initial hearing (commonly over the objection of the landlord, so that it might be interpreted as official recognition of the merit of one's claim), or because some assistance is perceived to result from the ruling. Assistance of two kinds might be perceived in the order for an agency inspection. The government inspector may function as either a corroborating witness or a superior voice as the court's preferred credible witness. Both functions may redress in part the power imbalance originally afforded to the landlord.

161. See Sarat, *supra* note 137, at 346 (discussing the "myth of rights" and citing STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974)).

Some tenants default after having gone to the trouble of getting to court.¹⁶² They go to court and talk with the landlord or the agent. However, they leave before their case is called, believing either that some accommodation had been reached or that there would be no redress for them in court that day. The landlord may proceed to get a judgment by default and avoid any judicial inquiry or finding that repairs are indeed due or that the tenant's rent ought to be abated.

Another transactional "default" may occur when the landlord's agent advises the tenant concerning the court's rules of operation.¹⁶³ Nevertheless, the tenant may believe the landlord, perhaps in recognition of their respective social situations and the likelihood that the landlord is better informed or connected to the ways of the court. Alternatively, the statement may be interpreted not for its truth, but for its transactional meaning, as the landlord's assertion of relative knowledge and control over the situation. Moreover, tenants who have dutifully arrived by 9 a.m., as the summons directs, will have absorbed the messages expressed and embedded in the court's operation, and will likely recognize that this is not a neutral court for the hearing of tenant grievances.¹⁶⁴ Thus, the landlord's advice and the court's operation speak together, a wall of sound seemingly impenetrable by the tenant's lone voice.

Tenants are silent and do not use the law for two reasons. One, because the law is weak compared to the bonds of tenants' subordinated position. And two, because the law prompts reactions by its more regular users which defeat its use by tenants.¹⁶⁵

162. Over the two years that students and faculty have represented tenants in Baltimore City, recurring types were reported to us. The tenant who has complained to the landlord about conditions requiring repair comes to court and talks with the landlord before the case is called, in the course of which the landlord promises to make the repairs if the tenant will pay the rent straight away. Certainly in a formal sense, this is a meaningless bargain because the tenant is still obligated to pay. And while the tenant gains no legal process to enforce the landlord's side of the bargain, the landlord has lost no legal entitlement to the rent or to a judgment. He may either proceed to get the judgment "by default" after the tenant departs, or he may leave today and yet sue on this sum of money in the future.

163. In Baltimore, this has run the gamut of misleading or malicious advice, from requirements for giving the landlord notice of conditions to claims that the landlord can have the tenant "evicted tomorrow" or "arrested today."

164. In Baltimore, tenants will have heard the judge give the long litany of instructions which feature landlords' rights to collect rent, as well as the high value the court places on speedy administrative efficiency. See *supra* note 144.

165. See BUMILLER, *supra* note 20, at 98-99.

B. Powerless Speech

1. Strategies of Subordinated Speakers

Among tenants who do give voice to claims, a subtler, recurring problem of access is evident: the presentational threshold required to have one's claim heard by the sitting judge.

The societal ritual we call a hearing is dialectic, as is conversation. It involves action and reaction, acts of "speech" and acts of "hearing." As human functions and as societal institutions, both hearing and speech may be clear or impeded, linking speakers and hearers in understanding or delineating boundaries between the heard and unheard. The capacity for hearing may be linked to speech in two significant ways, that is, both literally and as social construct. As a literal matter, speakers who are soft-spoken and not assertive are often accorded a limited hearing, or none at all, depending in important part on the capacities of the hearer. As socially constructed, hearers impose expectations for the speaker's speech, for example, as to usage, clarity, credibility, perceptual ability, and reporting reliability. Judges in courts of first resort are society's designated hearers.

An extensive literature by linguists documents the speech patterns and strategies used by subordinated speakers in verbal encounters.¹⁶⁶ The influential work inaugurating this area of study, published in 1975 by Robin Lakoff, identified two starkly contrasting verbal styles.¹⁶⁷ Each style is marked by its dominant communication goal as well as by its speech features. According to Lakoff, the primary goal of the first style which she named—"transmission of factual knowledge"—is to provide the listener with new information by the most direct route. It features such hallmarks of speech as succinct, declarative sentences and the ordering of unqualified propositions according to a linear logic. Lakoff asserted that together, these features convey the authority of the speaker to make truthful statements about the world.¹⁶⁸ The most controversial aspect of Lakoff's essay was her conclusion that this authoritative speech style is much more common among men than women.¹⁶⁹

166. For a particularly useful roadmap through the major works of linguistic scholarship pertinent to the distribution of social power, see White, *supra* note 137, at 14 n.48.

167. ROBIN LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975).

168. Lakoff used as data the speech of white, middle class, professional women like herself, rather than field studies. Her analysis and conclusions were informed by her intuition and introspection. *Id.* at 4.

169. *Id.*

According to Lakoff, the second style she named—"politeness"—is the more common speech style of women. Rather than to announce the speaker's own authority, its communication goal is to maintain connection with the listener. To this end, it conveys deference to the other. In lieu of unambiguous statements, it accords the listener much latitude to determine what the speaker means to 'say'.¹⁷⁰ Thus the speech of "polite" speakers is pockmarked with "hedges"¹⁷¹ that qualify declarative statements and render them ambiguous. Such hedges include statements disguised as questions, ending in questions' familiar rising intonation; questions tagged to the end of statements ("he has to give us hot water, doesn't he?"); circumlocutions underscoring politeness ("wouldn't it be good if your workmen came before night"); and ambiguous adjectives and intensifiers ("it seemed kinda fixed"). The effect is to use speech to enact the social power relation rather than to communicate information about the merits. This is done by permitting and inviting the listener to discount the substantive meaning and to highlight instead the social hierarchy.

Although Lakoff addressed speech styles and linked them to gender, subsequent work in the field has shifted the analysis to speech strategies devised for managing verbal situations with people having power,¹⁷² by economically and racially subordinated speakers.¹⁷³ This larger body of field-based research redefines and extends Lakoff's early identifications into "powerful" and "powerless" speech forms, which more fully correlate with the relative social status of the speaker than with gender.¹⁷⁴

Such research documents the disadvantages endured by socially powerless speakers because of their verbal style. Studies of actual trials¹⁷⁵ and research based on simulated jury trials¹⁷⁶ find that ju-

170. *Id.* at 70.

171. *Id.* at 53.

172. See John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375 (1978); CONLEY & O'BARR, *supra* note 119.

173. In addition to earlier sources cited by White, *supra* note 137, at 16 n.60, readers may wish to consult the introduction to the major works and currents in sociolinguistic research provided by the two-volume set of RALPH FASOLD, *THE SOCIOLINGUISTICS OF SOCIETY* (1984) [hereinafter FASOLD, *SOCIETY*] (treating large-scale sociopolitical issues influencing language forms and uses), and *THE SOCIOLINGUISTICS OF LANGUAGE* (1990) [hereinafter FASOLD, *LANGUAGE*] (concentrating on smaller scale social and structural influences on language use). Chapter 3 of the second volume is especially helpful to nonlinguists for its topical treatment of the burgeoning field of discourse analysis and its two principal subdivisions, text analysis and conversation analysis.

174. See O'BARR, *supra* note 154, at 62; Conley et al., *supra* note 172, at 1379-86.

175. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN*

rors will attribute less credibility to subordinate speakers because of the non-dominant speech conventions they employ.¹⁷⁷

A short stay in Baltimore's rent court shows that the "powerless" speech style predominates in tenants' usage when speaking with the judge. It coincides in aggregate with tenants' low success rate in Maryland's most-used court. The researchers' reports concerning hearers' assessments of the speech signals of those who feel powerlessness mirror phenomena observed repeatedly in this local setting. Virtually all tenants who attempt to claim the protection of the law find, in those moments before the judge, that tenants are neither credited with accurate or trustworthy reporting, nor are they helped in scaling the hurdles of filing claimings—which the State's apparatus makes so undemanding for property owners.

The lesson ringing out from this research, and its manifestations in Baltimore, is that the language patterns that correlate with social subordination infect our nation's courtrooms, making them not tolerably "neutral."¹⁷⁸ We are confronted with the socially and politically significant fact that important skills for meaningful participation are distributed by gender, race, and class. The burdens of stylistic powerlessness fall most heavily on women, minorities, the poor, and undereducated, with a disproportionate number of women and blacks in America being poor, undereducated, and relegated to the margins of economic and political power.¹⁷⁹

THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 171-74 (1981).

176. See, e.g., O'BARR, *supra* note 154, at 71-75.

177. *Id.* at 74. Jurors in O'Barr's studies were asked to assess witnesses' testimony after hearing tapes of the same witness using both powerful and powerless styles. Jurors assessed powerless speakers as less credible, competent, intelligent, and trustworthy than speakers using powerful style. The study used both male and female witnesses reading prepared scripts, and for both gender groups, the use of powerful speech markedly increased jurors' attribution of credibility. *Id.* at 95-96.

178. See White, *supra* note 137, at 18. On the utility of language to serve separatist as well as unifying functions for sociocultural groups, see FASOLD, SOCIETY, *supra* note 173, at 1-9 ("Societal Multilingualism"). For an examination of language used as a symbol of group membership, and thus nonmembership, see *id.* at 158-76 ("Language Attitudes").

179. See CONLEY & O'BARR, *supra* note 119, at 80-81. The authors report their findings of convergence between speech style and storytelling style, which compounds persons' tendencies toward powerless or powerful presentations in court. See *infra* section III.B.2.

2. Judicial Domination in Courtroom Discourse¹⁸⁰

Tenants' socially distributed tendencies toward "powerless" speech in court are compounded by the expectations and directions of the presiding judge for the structure of the speech sequences constituting the "hearing."

The cases in which both tenant and landlord appear consist entirely of two discordant conversations. The first is conducted by the judge on the landlord's behalf, within the framework of the ordinary civil legal dispute, and casts the landlord's interests in rent, prompt payment, and repossession in a legally pertinent telling:

Judge: "Landlord claims \$[265] due and unpaid. Is that correct?"
The second conversation is a (usually brief) colloquy in which the judge says to the tenant some version of:

Judge: "Is there anything you would like to tell me?"

In our observations, when invited in this way at this juncture, many tenants offer the court an explanation for their nonpayment.¹⁸¹ The judge either waits through the story or interrupts it, but at either point, tells the tenant that her remarks are irrelevant, and orders judgment for the landlord. This is the clash between the conventions for talking about troubles in noninstitutional settings and the law's conventions for speech within legal institutions, which the judge learned through formal education in law school and observation of other legal professionals' courtroom behavior.

In studies of self-represented litigants in small claims courts, Conley and O'Barr discovered two contrasting modes of organizing and presenting accounts of the dispute to the judge: rule-oriented and relation-oriented accounts.¹⁸² Rule-oriented accounts are typified by

180. "Discourse" has come to be used widely in social science disciplines as referring to the accumulating considerations of importance within a particular field of scholarly inquiry. A few disciplines feature the study of spoken as well as written language. For linguistics, anthropologists, and sociologists, discourse analysis also refers to "the study of connected sequences of speech such as conversations and narratives," involving the analysis of texts of segments of speech, whether recorded contemporaneously, mechanically, or from memory. CONLEY & O'BARR, *supra* note 119, at 2. For an excellent introduction to leading scholarly works in the field as well as some applications, see FASOLD, SOCIETY, *supra* note 173.

181. By far the most prevalent explanation is the tenant's own financial difficulty, often as a result of a job or health emergency involving a significant income-earner in the household. Less often it is a catastrophic expense such as an accumulated utilities bill. A very small number report that they could not get the landlord's attention to their complaints until they ceased payment of rent. For some number of tenants, regular expenses simply exceed regular income. Observation Data, *supra* note 52.

182. See JOHN M. CONLEY & WILLIAM M. O'BARR, *Rules Versus Relationships in Small*

emphasis on rules and laws, and are tightly structured around issues of the existence and interpretation of obligations. They tend to omit motivations, feelings, or pleas for understanding violations of obligations. By contrast, relational accounts emphasize status and relationships and the web of history between the litigants.¹⁸³ They also tend to be filled with background details which is important presumably to the teller, but not necessarily to the court.¹⁸⁴ The authors point out that both kinds of accounts are related to rules. A rule-oriented account is directed to legal rules. A relational account is oriented with respect to social rules.¹⁸⁵

The impact of the two story-presenting modes on small claims judges is significant. The courts typically treat relational accounts dismissively and regard their content as irrelevant and inappropriate. Litigants presenting their cases in a relational rather than rule-oriented way "are frequently evaluated as imprecise, rambling, and straying from the central issues."¹⁸⁶ Landlord and tenant act as though they conceive the dispute in sharply different ways. To the landlord, the matter is entirely a matter of commerce, while to the tenant it is a problem in social relations. The tenant's implied assumption seems to be that the court ought not take the side of a person who has made every effort to conduct himself responsibly. If this is a coherent and adequate argument to the tenant, he seems unaware that the legal

Claims Disputes, in CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS 178 (Allen D. Grimshaw ed., 1990); see also CONLEY & O'BARR, *supra* note 119.

183. CONLEY & O'BARR, *supra* note 182, at 179.

184. *Id.*

185. *Id.* at 195 n.2.

186. *Id.* at 179. Interviews with both litigants and judges about these experiences suggested that such situations are unpleasant and frustrating for the legal decision makers, as well as for the litigants whose discourse is discounted. *Id.* at 195 n.3.

Compare the presentations of landlord and tenant speech in a contested hearing: The landlord agent's rule-oriented presentation appears much more responsive to the judge's specific questions. He speaks with apparent precision as he enumerates damages and suggests the landlord's readiness for trial by his apparent anticipation of the pertinent questions. The agent brought receipts, photos, and witnesses he asserts will support his claim. The features of the landlord's account convey an aura of authority as it makes use of quantitative references (e.g., "thirty days") and contains legal and technical-sounding words (e.g., "leased premises," "rebuttal"). By contrast, the tenant's relational presentation seldom provides precise or direct responses to the judge's questions. When asked when he and his family moved in, the tenant narrates a conversation about repairs he would make in lieu of a cash security deposit. When the judge follows up and asks for the contents of the parties' agreed list of needed repairs, the tenant instead enumerates the work he performed.

framing of the dispute may render his conception irrelevant.¹⁸⁷

Conley and O'Barr observe (as may we) the striking parallel that each party approaches the dispute in court in the same manner that he dealt with it as it occurred. The landlord ignored the frame of social expectations and delimited their relationship by legal codes. The tenant paid little heed to technicalities of lease provisions and did what he believed to be socially appropriate, relying on others to do the same.

Legally of course, the tenant's narrative of marginal economic circumstance is irrelevant to rebutting the elements of the landlord's claim for repossession based on nonpayment. That is not what is wrong with this picture. My point is that the judge is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicited. Doing so in this way is both misleading and destructive.¹⁸⁸

It is misleading, because the rule-oriented court talk expected and privileged by judges in low-level courts bears little or no relation to people's natural narratives. The rules of courtroom discourse are seldom explained to those witnesses expected to conform to them. They are generally not explained by court personnel and those unrepresented persons have no lawyer to tip them off.¹⁸⁹ Rules of evidence disallow the ordinary discourse rules used when people talk as they ordinarily do. For example, in describing a sequence of events, we frequently recount what we heard said by others in the story. In court, rules of evidence bar most such description as hearsay. A similarly familiar pattern of ordinary speech is to expect some inquiry by the listener, whose role after all is to participate in giving the incident meaning through hearing the account.¹⁹⁰ Judges, however, expect

187. *Id.* at 192-93.

188. An enterprising judge having an appreciation for this defect could respond by making a point to structure parallel discourse. This has yet to occur, however, apparently because of the tenet of legal culture which leads many judges to believe in their own culture-free neutrality.

189. See William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661 (1985).

190. See CONLEY & O'BARR, *supra* note 119, at 56. For the view that the listener is as implicated in the silence as is the silent one, see Deborah Tannen, *Silence: Anything But*, in PERSPECTIVES ON SILENCE 93-100 (Deborah Tannen & Muriel Saville-Troike eds., 1985); see also FASOLD, *LANGUAGE*, *supra* note 173, at 1, 65-75 (discussing research of social meanings structuring language behavior in interactive events); DEBORAH TANNEN, *CONVERSATIONAL STYLE: ANALYZING TALK AMONG FRIENDS* (1984) (treating "participatory listenership" as an attribute of "high-involvement" style of discourse).

parties to present their own case and abjure "acting as a party's advocate" by frankly eliciting storylines.

In small claims courts, where many such evidentiary constraints are relatively relaxed, we might expect there to be more tolerance for ordinary speech. Witnesses giving testimony in small claims courts often lack any understanding that the law imposes highly specific requirements on narratives, and not surprisingly, use the conventions of speech familiar to them.¹⁹¹ In a court like Baltimore's that hears only a single kind of case, each aurally indistinguishable from the next, the discourse structured by the court is all there is of legal process. Invariably, the judge starts the hearing with the landlord's claim for rent. So the tenant starts her comments with rent. Most often, only rent has been spoken of when the judge dismisses the tenant's speech and rules for the landlord.¹⁹² As structured, it excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade.

This is destructive of more than tenants' statutory rights. For most tenants, such a court offers a stern lesson that formal rights are for somebody else and not for them. Judicial manipulation of the hearing's discourse signals official priorities about the rights to be protected and the language to speak. Nothing in it encourages belief in a system of legal rights, nor an expectation that legal rights parallel one's intuitive sense of rightness, nor a perception of oneself as a rights-bearing person.

On occasion, a tenant will persist and ask timidly, "What about the hot water? He has to give us hot water, don't he?"¹⁹³ *That* this

191. In addition to data reported here, see Conley & O'Barr, *supra* note 189, at 698. O'Barr and Conley report that in the small claims courts they studied, more ordinary speech, retelling of conversations, expressions of opinions, and so forth, were heard. Every single litigant observed responded to the magistrate's invitation to speak, usually framed loosely as, "Why are you here?" by giving a narrative description of the situation. *Id.* at 676.

192. This must be analyzed as a failure to promote justice, both in the individual case where it occurs and in the instructive power possessed by the court, given that the roomful of tenants awaiting hearings chiefly rely on the conduct of the cases that precede their own for information about the law's possibilities.

193. When this happens, the hearing may take one of three directions, depending on the judge. The judge may start over, listening this time, and if she or he credits the tenant's testimony and the landlord lacks a rebuttal, the judge may order an inspection and continue the case for a week. Alternatively, the judge may be put off by a lack of clear notice, see *supra* notes 134-36 and accompanying text, and on that ground, grant judgment to the landlord, perhaps with instruction to the tenant to "come back in a month," and perhaps with advice to the landlord to take care of the problem. Finally, the judge on rare occasions may treat the in-court statement as notice and direct the landlord to act accordingly and then set a

happens tells us the customary conduct of this court is silencing tenants. It is not merely omitting to assist, but is disabling their assertion of legally recognized interests.

3. Powerlessness and Beliefs About Law

Do tenants who appear in rent court conceive of themselves as possessing legal rights? Do they conceive of the court as a forum governed by rights-conferring rules? These questions are important to my effort to enumerate the costs inflicted by the court's disfunction with respect to subordinated people, and to the fundamental premise that legal institutions are open to participation.

A small but growing literature by scholars in the fields of law and anthropology bears on the consciousness about law in the lives of poor people.¹⁹⁴ The concepts of consciousness and ideology convey the phenomenon that people who are similarly situated come to see the world in similar ways. Both suggest that views which are conventionally ascribed to individuals' separate and subjective experience are not ahistorically autonomous, but instead, are "constituted in a historically contingent manner, by the very objects of consciousness."¹⁹⁵

In an intriguing empirical study, Austin Sarat has reported on the legal consciousness of poor people receiving welfare, in his respondents' own voices.¹⁹⁶ Sarat reports that a central element of the ideology of law held by people on welfare is a consciousness of power and domination, of being enclosed by the power of the welfare apparatus and yet dependent on it.¹⁹⁷ To the welfare poor inter-

second hearing.

194. See, e.g., Sarat, *supra* note 137; Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988). For works by interpretive anthropologists accounting for legal culture more generally, see CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409 (1988); Carol J. Greenhouse, *Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies*, 22 LAW & SOC'Y REV. 687 (1988); Christine Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709 (1988). For a theoretical rather than empirical treatment, see Yngvesson, *supra* note 138.

195. Trubek, *supra* note 149, at 592 (defining legal consciousness as "... all the ideas about the nature, function and operation of law held by anyone in society at a given time").

196. Sarat, *supra* note 137.

197. Sarat chooses to study "ideology" or "consciousness" rather than "attitudes," since the latter suggests a radical and, to his mind, incorrect individuation, in which persons decide autonomously how and what to think. By contrast, ideology or consciousness convey the constraining structure of social relations, the social structure in which persons' experience is lived. *Id.* at 333-34 n.1.

viewed, rules are a series of "they say," the power of which is felt in the paucity of relief to be had from the law's abstractions and categories, made by people authorized to say what the law is. Thus, welfare recipients simultaneously report their experience as caught in law's rules,¹⁹⁸ while being aware that they remain excluded from its interpretive community.¹⁹⁹

This suggests that if tenants hold a similar consciousness to that described by Sarat, it would be largely devoid of "rights." In turn, this renders dubious proposals that information-delivery responses could remedy dysfunctional conditions of the rent court's operation. Thus, even when informed of rights created by statutes, tenants would not be likely to effect a shift in their legal consciousness on this point. In other words, knowledge of rights would not confer power.

Our experiences in the courthouse suggest as much. Dozens of conversations took place in the interstices of our pro se counselling work, in which law students labored with tenants to help them understand what rights were implicated and to advise tenants, as concretely as they were able, on a structure for the tenants' complaints that would enhance the court's recognition of their legal significance. Many tenants appeared to credit the students' advice as to cognizable claims and legally prescribed remedies,²⁰⁰ yet declined to follow the advice, intimating that the outcome was predetermined, i.e., that rent collection through rent court was another set of rules in which others have all the say-so.

The tenants who offer the court explanations for nonpayment, who tell of the lost job or other catastrophic event, may illustrate

198. *Id.* at 346.

199. *Id.* Sarat reports a second central element, a "consciousness of resistance," in which welfare poor assert themselves and demand recognition of their personal identities and human needs even while caught in the bonds of welfare's legalism. This observation prompts him to insist that welfare poor do not: (1) passively receive a "myth of rights," (2) subscribe to a picture of law as autonomous, apolitical, objective, neutral and disinterested, nor (3) passively receive ideology encoded in doctrine. Instead, his respondents see themselves as possessing inside knowledge, which leaves them with few illusions about the utility or meaning of claiming rights or gaining rights-asserting assistance from their legal services lawyers in order to help with welfare bureaucracy. *Id.*

200. Our observations of what transpired in our advisees' cases are not offered as an adequate test of the efficacy of even our simple advice service, much less a test of a systematic program of tenant education or courthouse-door information delivery. However false a notion in the short term, a thoughtfully designed tenant education program might over the long term promote a shifting local culture for some tenant users of rent court. For elaborations of the processes of such a shift, see Merry, *Legal Pluralism*, *supra* note 194; Yngvesson, *supra* note 194.

Sarat's report of people attempting to make an appeal to basic decency without accepting the concern of the welfare worker, lawyer, or judge for doing things in a particular procedural way.²⁰¹ Sarat's work suggests it is appropriate to see this as a tactic for denying the legitimacy of the court's operative rules.²⁰² If we do, then we ought to see the telling of human-decency explanations as a strategy, parallel to "powerless speech" in form and in apparent deference to the relatively powerful judge and landlord in the proceeding, but in fact a subset of "powered" or "empowered" speech.²⁰³

C. "Powered" and "Empowered" Speech

To speak of power in the context of Baltimore's rent court, we must attend to the social situations importantly described by race and class, as well as the disturbingly persistent fact that people of color are disproportionately poor. What part may race play in the silencing enacted by this court and courts like it?

One facet is suggested by sociolinguistic research identifying

201. Another explanatory hypothesis might be that some tellers of human stories seek to make or acknowledge a connection with the listening judge by cutting through rules of law and social distribution to that core at which we are all joined in our humanity. If so, it would seem remarkable and hope-engendering. Even if so, such attempts are enacted through the telling of the details of tenants' social and physical lives. My observation of Baltimore judges has been that most cannot fully credit the graphic reports since they do not square with their own experience of housing or habitability. Having the social and economic resources to avoid the world in which poor tenants live, they are unable to credit what they have not experienced, do not "know," and cannot imagine. For a similar instance of pretending away the real material circumstances of people in poverty, see Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499-1500 n.2 (1991).

202. See Sarat, *supra* note 137.

203. See White, *supra* note 137, where the author recounts a story from her legal service practice in the rural South. After much effort to devise a theory of the case and accompanying themes for the client's testimony that would express both the client's experience and a slim chance for prevailing in a recoupment hearing, the lawyer was surprised mid-hearing by the client's departure from the prepared strategy. Instead, she asserted her own needs to buy the children Sunday shoes, i.e., that the items purchased were necessities in her life although not so defined by the governing regulations. To the lawyer, the testimony would assure loss at the hearing. Years later, the client's shift in speech styles is still striking: the powerful, autonomous speech of the client during her "errant" testimony, in marked contrast to her hesitant and highly deferential speech at each of the half dozen sessions between lawyer and client. The author's analysis is that as lawyer, she had scripted her client as victim, as "the only strategy for the hearing that the lawyer, within the constraints of her own social position, could imagine for Mrs. G," despite her conscious efforts to collaborate with her client. *Id.* at 46. At the hearing, the client may have been willing to jettison strategy altogether, but surely she stepped out of the role of supplicant and ignored the doctrinal pigeonholes that would fragment her voice.

some kinds of black and white communication failures as rooted in cultural differences in expression and styles of language use.²⁰⁴ Given the subjects about which blacks and whites typically interact in public, cultural differences are not the only possible explanation for why interracial communication fails. If other explanations are more readily identifiable, one tends not to search for further explanation.²⁰⁵

It appears to be rare and difficult for people to account for cultural differences when we consider why communication fails. Often cultural differences are kept covert in communication—people pretend to understand each other, or believe that they do. Although it is unusual for people to discuss how they are interpreting each other, each participant assigns meaning to the interaction. The tendency of participants in conversation to assume that the meanings they assign to the situation are “the meaning,” encourages people to assume that the meaning and motives assigned to each other based on those meanings are justified.²⁰⁶

The public space of a courtroom, filled largely with black tenants and presided over by a succession of white judges, is a likely place for such mutual misinterpretations, particularly between people from “the neighborhood” and the typical judicial appointee.²⁰⁷ Where judge and litigant occupy quite different social situations,²⁰⁸ this process is likely to entail conceptual mistranslation that encompasses the assessments of credibility and remediability inherent in the court’s fact-finding function. Language, as well as justice, is a cultural arti-

204. THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* (1981). For a more general treatment of sociolinguistic research on the relationships of social and cultural values to the use of language, see FASOLD, *LANGUAGE*, *supra* note 173, at 40-64; *see also* RAPPIN’ AND STYLIN’ OUT: COMMUNICATION IN URBAN BLACK AMERICA (Thomas Kochman ed., 1972) (illuminating the communicative patterns within urban black American communities through a series of essays).

205. KOCHMAN, *BLACK AND WHITE STYLES*, *supra* note 204, at 8. In rent court settings, alternative explanations offered revolve around economic circumstances, including demonstrable differences between racial groups in education levels, employability and income, and home ownership, as well as the court’s reliance on statutory language and formal procedural rules not known to laypeople generally.

206. *Id.* at 7. For a review of the developing literature of conflict talk, especially useful for its attentiveness to the particularities of cross-cultural variations in conflict talk, see David L. Brenneis, *Language and Disputing*, 17 ANN. REV. ANTHROPOLOGY, 221, 221-37 (1988).

207. *See* KOCHMAN, *BLACK AND WHITE STYLES*, *supra* note 204, at 58-62 (addressing the cultural ethnocentrism in legal interpretation).

208. Both senses of “classification” are applicable here: class in the usual sociological sense, *see* VANNEMANN & CANNON, *supra* note 123, and membership or not in the official-legal culture, *see* Yngvesson, *supra* note 138.

fact that channels meaning, which the speakers of language may not fully realize even as they speak to, or past, each other.

Studies suggest that blacks and whites differ in their styles of public discussion, particularly in the calculus of what is appropriate as a matter of stance and level of spiritual intensity.²⁰⁹ Where the white mode is purposely "dispassionate and non-challenging," the black mode is "high-key, interpersonal, animated, [and] confrontational."²¹⁰ This follows from the recognition of two kinds of argument in black community culture: argument for persuasion, and argument for the ventilation of anger and hostility.²¹¹ The distinction is in the degree of effect and intensity and not, as in formal white discourse, in their presence or absence.²¹²

Serious misinterpretation may occur when this style and its cultural meanings are transplanted to a white culture that fails to make these distinctions. This white culture sees vociferous argument as appropriate only to ventilate anger and hostility, not as a process of persuasion.²¹³ Compare the profile of legal argument taught in law schools throughout the land, which is laced with the expectation that reason and emotion work against each other,²¹⁴ with argument in ordinary discourse, which is the subject of Kochman's works. The law school model contrasts sharply with an expectation of argument as a process for working out one's views, allowing that the dynamism will affect the views of either party to the argument. This is a cultural expectation that one argues from a viewpoint with passion and not dispassionately.²¹⁵

209. KOCHMAN, BLACK AND WHITE STYLES, *supra* note 204, at 18-20.

210. *Id.* at 18.

211. *Id.* at 18-20.

212. *Id.* at 18.

213. *Id.* at 16-42, 58-60.

214. See Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978) (describing the adoption of a "tough-minded and analytical attitude toward legal tasks and professional roles" as an "essential ingredient" of the paradigmatic law school class); Michael Meltsner, *Feeling Like a Lawyer*, 33 J. LEGAL EDUC. 624 (1983); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988). For a vision of humanistic legal education, see Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology To the Teaching of Law*, 53 N.Y.U. L. REV. 520 (1978); see also BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (Elizabeth Dvorkin et al. eds., 1981). For an introduction to the literature challenging the status quo, see Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

215. The cultural expectation of argument from a viewpoint, rather than dispassionately,

The expressiveness of black culture is not merely social; it is a demonstration of personal power, an expression of the self.²¹⁶ Thus, the act of the judge cutting off an inexperienced litigant who is attempting to participate may be received as a denial of that personal power.

This would provide one explanation for the failure of communication between judge and tenant when a black man adopts the "persuasion stance," familiar in his own life, in dealing with the judge who then treats it as open and inappropriate hostility and throws the man out of court. Here is the painful irony of a tenant speaking in his own voice and own way, personally "powerful," yet preemptively trumped and silenced by the legal process.²¹⁷ This is an assertion of self that, however expressive in terms of personal or black cultural norms, is rendered counterproductive in the legalistic perspective.

I have observed this phenomenon on three occasions during the course of three semesters' observation in Baltimore City's rent court.²¹⁸ On each occasion, the tenant certainly spoke loudly and with feeling. Yet in my view, the tenant was not, in fact, threatening the good order of the proceeding. He was not out-of-control, inebriated, spewing profanity, or violent, and was endeavoring to provide information pertinent to the dispute. Each exchange transfixed those waiting in the courtroom and prompted excited and knowing murmurs among the throng. The rarity of these events directs our attention to the lessons of expected acquiescence, delivered explicitly and implicitly by the judge's conduct *vis-a-vis* the parties. From the tenant's table, the judge appears to speak for both the State and the landlord. The constantly reiterated lesson for tenants in the court is the expect-

disinclines blacks to believe whites who claim not to have a point of view. KOCHMAN, BLACK AND WHITE STYLES, *supra* note 204, at 20.

216. *Id.* at 9; see also Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 429-33 (1987) (arguing that whites must confer upon blacks their recognition of black need and black identity).

217. Kochman observes that historically, the dominant society has moved prematurely against blacks "acting repressively while claiming to act defensively." KOCHMAN, BLACK AND WHITE STYLES, *supra* note 204, at 61; see also KARST, *supra* note 4, at 64-69.

218. That this figure is only a miniscule portion of the cases taking place in that court does not deny the point, given that few tenants attempt to make a case of any kind. Of those making a case (fifty, or 12.5% of all cases observed), only six (or 1.5% of all cases observed) were black men. Furthermore, the cultural patterns of men without power, including men of color dealing with powerful white men, often entail strategies for appearing to withdraw from the struggle. This may include the withholding of affect. "[W]hen blacks are working hard to keep cool, it signals that the chasm between them is getting wider, not smaller." KOCHMAN, BLACK AND WHITE STYLES, *supra* note 204, at 20.

ed deferential relation of the tenant to the judge.

The judge's rejection of black tenants' "powered" speech reiterates a familiar message of subordination by the dominant culture, experienced countless times a day in the frictions of living in the poverty and disdain which are features of the tenant's location in social structure. It also reinforces a differential experience of formal justice as dependent on the dominators' perceptions and attributions of the cultural meaning of the exchange. In other words, it reenacts the exclusion from the conversation that assigns legally operative meaning to the events and experiences constituting the dispute. The resubordination, at the moment of one's claiming membership in the political community through rights-assertion, may be a worse hardship to endure than the resignation to nonparticipation indicated by silence in the first instance.²¹⁹

These are instances of "powered" speech in which the tenant spoke from a full sense of self in a stacked situation. These are to be distinguished from "empowered" speech in which the litigant's personal resources, including his or her own voice, speech style, and community speech culture strategically align with the expectations of the court. This occurs on the relatively rare occasions involving tenants who, by all observable material and social indicia, appear to belong solidly to the middle class.

The freedom of expression is a mixed blessing for members of subordinated groups, since much of their subordination has been accomplished by the free expression of the dominant group.²²⁰ Any system of domination is communicated on a stream of messages that express a group's subordination—or dominance—and purport to justify it.²²¹ Expressing one's own claims, and thus one's identity, simultaneously claims one's rights to expression. The assertion by subordinated people that they too belong, presses at the boundary between dominant and subordinate.²²² The assertion often garners the response of more expression by the dominants and more explicit negation of the subordinate claimant. What strength of character or vision does it take, then, to comprehend the power situation, to publicly claim one's own place in it, all the while expecting that power

219. See BUMILLER, *supra* note 20, at 99.

220. Karst, *supra* note 128, at 109.

221. *Id.*

222. By declining to accept the legitimacy of the division, such assertion is a statement against that hierarchy of social power.

structure to slap you down with a class-based construct of reason?²²³

IV. EXCLUSION AND PARTICIPATION

A. Synergistic Meanings of the Group Membership of Individuals

I have assumed in this analysis that racism and sexism continue to operate in people's lives, and that these powerful prejudices do not loosen their hold when people enter courtrooms. Whatever one's view of the current rate of progress toward a more egalitarian society, clearly the effects of such prejudices persist in the form of segregated housing patterns,²²⁴ wide disparities in employment, income, and standards of living,²²⁵ as well as mounting violence ravaging communities in which race and poverty converge.²²⁶ Unequivocally, such particularized discrepancies in material well-being as employment, income, and ownership of goods are closely linked to those legal disputes, the basis of which may be described as the defendants' failure to have money. Contract defaults, foreclosures, repossessions, and evictions fit this bill. When these play out in the lives of isolated

223. See White, *supra* note 137, at 6-19; Karst, *supra* note 128, at 109-16.

224. See CENSUSNEWS, *supra* note 29 (reporting that the City is "still quite segregated—79% of the census tracts are 75% or more of one race" but that it is somewhat less segregated than in 1980); see also Massey & Eggers, *supra* note 22, at 1153-88 (reporting that current processes of racial segregation in housing play a significant role in generating the concentrations of urban poverty, in addition to the contributions made by class-based segregation patterns reported by Wilson and others, in WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987)).

225. See Wacquant & Wilson, *supra* note 11; U.S. SECRETARY OF HEALTH REPORT, Apr. 1991 (including infant mortality rates).

In March 1992, the Center for the Study of Social Policy Reported that a black child in Maryland was twice as likely to die in the first year of life as a white child. See James Bock, *Children in Maryland Trail Most in U.S. in Well-Being*, THE SUN, March 23, 1992, at 1A, 2A.

226. The incidence of death by homicide in black communities in Maryland is startlingly high. Between 1980 and 1986, 70% of all victims of homicide were black. The death rate from homicide for minority men was nearly eight times the rate for white men. The Federal Task Force on Black and Minority Health has noted that "no cause of death so differentiates black Americans from other Americans as homicide." Poverty, unemployment, and the prevalence of drugs and handguns are cited by the scant literature as causal factors. UNITED WAY OF MARYLAND, *supra* note 139, at 46-47.

Gunfire is the leading cause of death nationwide for black males aged 15 to 19. Lois A. Fingerhut et al., *Firearm Homicide Among Black Teenage Males in Metropolitan Counties*, 267 JAMA 3054 (June 1992). The National Center for Health Statistics reports that the rate of firearm homicides rose 71% from 1987 to 1989 to an average of 104 per 100,000. In a comparison study of 80 cities and counties, Baltimore ranked eleventh with a rate of over 132 homicides per 100,000 young black men. *Id.* at 3056.

individuals, they are merely the circumstances in which one is expected to arrange one's life (if you don't have the money, don't make the deal). But when patterns emerge in the distribution of such economic circumstances, as when members of an identifiable social group appear disproportionately in such circumstances of material disadvantage, then it must be said that a social and not merely private event is afoot. To treat these patterns merely as a string of individualized contract breaches for failure to have the money does not begin to address the truth of the matter.

These features of contemporary American life occur simultaneously in the intensely personal contexts of individual lives as well as in the impersonal public spaces of the social order. If one aggregates the experiences of Baltimore's poor tenants, and their counterparts in cities across the land, the commonalities in their situation become visible as a membership in a group. That group is marginalized from public processes that signal inclusion; it is associated with race; and it has the look of permanence.²²⁷

Recognition of the utter reality of persons' groupedness need not be seen as a denial of the individual persona. Quite the contrary: the "individual" is importantly constituted by his or her relation with identifiable groups.

As a society steeped in an ethic of liberal individualism, it is commonplace to attribute to persons circumstances often larger than their own making. Yet, when sets of circumstances befall classes of people, we must look more closely to assess whether the degree of individuation assumed in the operation of a given institution in fact promotes, or derails, its legitimate purposes. The importance of attempting to put flesh on the bones of this notion is underscored in the recurring resistance of most law students to any analysis of the rent court phenomena that might take account of tenants' group memberships. The resistance appears loosely based on an assumption that individuals become an endangered species by recognition of the aspects of each individual which are constituted by one's membership in social groups.²²⁸

227. See KARST, *supra* note 4, at 139. Karst elaborates on this idea in a reconceptualization of the constitutional standing of the marginalized poor, which he calls the principle of "equal citizenship." This principle would examine the material inequalities for their particular likelihood to stigmatize and to impair effective participation in society. *Id.* at 140-46.

228. As mentioned earlier, my students balked at any analysis of rent court phenomena that might take account of the "groupedness" of tenants. This is interesting in itself as the

The paradigms enacted and reenacted by societal institutions, and thus by the people who play roles in them, teach each of us our parts, and at times even hand us our scripts. Therefore, the meaning of one's encounters with these institutions will depend in part on one's role. It will depend on one's perspective of the larger scene derived from one's locus and assigned role in it. But meaning also will depend on attributions made by others.²²⁹ The cultural, gender, racial, and ethnic identities of a person are not simply intrinsic to that person. Everyone's identity is relational and not simply personal, and depends both on one's self-understanding and on communal understandings.²³⁰

This perspective offers an additional dimension of explanation for the mystery of why people bother to come to court and concede the rent is due, while making no claim, but stand there seeming to expect something else to occur. A fuller understanding of what transpires in the court acknowledges that virtually no tenant stands before the rent court judge as an autonomous individual. Instead, she is shadowed by the thousands who have preceded her, by the judge's culturally rooted premises and behaviors signalling she is out of place, and by her own experience. Her experience is not solely her own, but is constituted in significant part by the meaning she draws, and others have attributed about her identity, from her membership in culturally significant groups described by race, gender, and class.

If we turn the legalist lens on an institution like Baltimore's rent court, we should expect to see the adjudication of societally prescribed legal rights, carried out with presumably variable degrees of competence, efficacy, and equity. Yet the court I have described is riven by deep conflict. The rights of both parties are not being adju-

experience in the dominant culture—aligned with a white “non-gendered” perspective—and the preference to view individual rights as endangered by group rights. In teaching the course and supervising the research, I had not been asserting group rights, only group impacts. Where the former view sees individuals placed at risk of erasure by recognition of groupedness, the argument here is that it is necessary to turn the problem around. If there are group characteristics that have particular play in this court that metes out evictions, then it is wrong to pretend that it is individual fault that is the basis for these adjudications. This legal institution over-individuates and thereby threatens to extinguish the socially-constituted, but nevertheless essential, aspects of the persons who bear the brunt of the court's demonstrably patterned and prejudicial practices.

229. See Joel F. Handler, *Dependent People, The State, and the Modern/Post Modern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988).

230. Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 98 (1991) (citing Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990) (suggesting “we are not born with a ‘self’”)).

dicated. In its disfunction, the court fails one class of people and privileges another. While the pains and benefits it allocates are felt in the lives of individuals, it is at least as true to observe that they are distributed among socially identifiable groups of people. One's group memberships provide the best predictors of outcomes.

B. Legal Rights, Social Stakes

My discussion thus far drives us to this point: functionally, rights are not rights where they cannot be spoken or heard.²³¹

But do I honestly mean to say that rights—legal rights, civil rights, substantive and procedural rights, no matter how arcane—are not real, even though other dimensions of reality dim their glow as precious beacons in the sea of striving? No, that is not quite what I mean to say. Rights—the claiming of rights by those denied them and the coming to recognition of rights by the legal structure and the society—have been immeasurably important as means of entry to the social and political frames for “counting” in contemporary America. The civil rights movement is stirring evidence for this proposition. Rights have brought blacks into the American political imagination,²³² and in the black experience, “[t]he concept of rights, both positive and negative, is the marker of our citizenship, our participatoriness”²³³ We are appropriately reminded that rights can be significant as exhortation to stand and call for justice, and to respond to that call.²³⁴

Yet this transformative potential is inverted in eviction and collection courts like Baltimore's by the cumulative nonassertion of formally-granted rights. As we have seen, this constant accretion is amassed by the paucity of communication during the momentary proceeding so ironically called a “hearing.” In lieu of the transformative potential of membership-claiming through the call on publicly declared rights, the institution mass-produces badges of exclusion in the harm and the burden of its construct that “most tenants” are non-claim-possessing.

Several authors have suggested that rights claims can transcend

231. To put it another way, the power of rights depends on the probability that the state will enforce one's demands. See BUMILLER, *supra* note 20, at 94. As we have seen in a court like rent court, landlords can and do depend upon this probability, which is extraordinarily high in relation to their claims. The converse is true for the tenant participants.

232. Crenshaw, *supra* note 4, at 1378.

233. Williams, *supra* note 216, at 431.

234. See Handler, *supra* note 229, at 1038.

the parties' conflicts and enable communication through new means.²³⁵ This view offers the hope that claiming on behalf of tenants can operate as dialogue, now involving both parties in the act of expression and not only one. However, there is even a risk for tenants in this, namely, that conversations among unequals reinforce domination.²³⁶ It must be remembered that assertion of membership in the community by such an invocation of rights is not, by any stretch, the same thing as real change in the economic, social or political power constituting the parties' shared context.²³⁷ Acknowledging this, Minow pleads that the language of rights can offer some hope: "it is the language of protest made legitimate by the powerful, even for use by the powerless."²³⁸

If reconstituted legal rights can expand the dialogue within the confining structure of domination and by assertion alchemically alter that very structure as Williams and Minow explain, then how do we get from here—moribund formal legal rights mired in disparities of wealth and power, to there—legalized protest, in form the claiming of entitlement, and in essence the denial of bondage to those privileged by economic, social, and political power? More particularly, what can be made to happen on the human scale where the choices to claim rights and challenge one's landlord are made?

We are not able nor likely to effect this change. Embedded premises of rights theory disable would-be claimants. This is not because of the structural constraints on access to the system of legal redress, but because the decisional action must originate in the deep-

235. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1866, 1879, 1881 n.77, 1884 n.94 (1987); Williams, *supra* note 216, at 409-10.

236. Kenneth Karst argues that "expression is power," because in our social order the freedom of expression carries with it the freedom to contribute to the social definitions of other people. See Karst, *supra* note 128, at 95. In a society of differential allocation of social resources such as expression, people having more freedom also possess more of the correlative power to name, define, and label others. See Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). For people whose identities may be named in this way by more powerful others, it is the relationships between the powerful and powerless that shape identities. The relative power of some people versus others is manifested both through the ability to name oneself and others, and to influence the processes in which aspects of identity are negotiated. Minow, *supra* note 230, at 98-99.

237. When a member of a subordinated group voices a claim challenging a dominant community of meaning, expressions at that boundary arouse strong emotions because the very fact of that expression threatens the identities of people who are fully inside the dominant culture. That is to say, the dominant culture is constituted in important part by the subordinated behavior of the other. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 10 (1990); Karst, *supra* note 128, at 96.

238. Minow, *supra* note 235, at 1884 n.94.

est reaches of one's human self, on which slim reed rests the entire apparatus of authoritative societal remonstrance.²³⁹ The one who might act as claimant must take on the unpalatable and socially despised role of victim in order to invoke the legal process.²⁴⁰ This requires a reconstruction of self which even persons who perceive that they have been wronged resist in several ways. They resist chiefly through various personalized ethics of survival encompassing denial of an individuated intent by the perpetrator of the discrimination and a belief that "toughing it out" demonstrates one's own moral courage. Bumiller proposes that this constellation is altered for discrimination victims only where they see beyond their private dignity to the expression of a public cause. Where wronged people can integrate one's sense of personhood with the dimension of identity which is socially constructed and attributed, legal redress for the shared wrong can be sought. But, she observes that ordinarily, individuals are at a loss to see meaning and purpose in the incidents of discrimination in their lives.²⁴¹ Thus, those who argue for the power of rights to liberate subordinated people must first reckon with the power of culture to maintain their bondage. The appeal of recent expositions for the dialogic, inclusive, and expressive potential of legal rights, drawing from the experience of black Americans' civil rights struggles, are inducements to hope and persistence, even where Bumiller's work cautions us to pay close attention to the daily, lived meanings of celebrated successes. But, it is not at all clear that there is a parallel political-legal strategy to be pursued for impoverished minority tenants today.

The bar is in the premise of non-desert inculcated as part of the dominant notion of "poverty." The civil rights struggle in the mid-20th century picked up momentum and political force as black Amer-

239. See BUMILLER, *supra* note 20, at 95.

240. *Id.* at 58. Although Bumiller addresses particularly the structure of civil rights laws and discrimination claims in her exploration of the non-pursuit of grievances, there is a useful parallel here. For those tenants who are egregiously wronged to buck the tide of landlord entitlement that floods the court, requires crossing an ideological divide to assert that one has been wronged and deserves recompense, in the form of a societally sanctioned corrective of the landlord's conduct. The tenants' dignitary interest also deserves societal recognition, since it is commonplace for landlords to characterize their tenants as liars, slobs, bad elements, or disruptive, and yet fail to prove their allegations.

241. *Id.* at 95. This is an insight larger than the field Bumiller addresses. With respect to rent courts, legal process generally individuates into unrelated matters the social dislocations of inadequate housing, employment, and economic support plaguing poor residents of American cities.

icans expressed a sense of right of inclusion in the nation. This was a sense of right not dependent on law, but emanating from a deep human sense of deserving. The history suggests a threshold, a bed-rock of belief on which was anchored the necessary struggle in the streets, claiming in courts, and claiming on the conscience of the nation to change the national political and social culture.

Currently, no parallel appears on the horizon for persons whose materially constituted and socially attributed groupness is impoverished tenancy. Among poor tenants, there is virtually no evidence of a belief that they deserve as an adjunct to their humanity, to rent premises that are free of dangers posed by rats, falling plaster, and defunct plumbing. Nor do poor tenants possess the belief that they deserve to be freed of the threat of eviction and homelessness, much less a larger belief in entitlement to the social rights necessary to the exercise of political rights. There have been occasional and exceptional instances of "rights assertion" in the rent court where a tenant has expressed a human-sense of "right," an animating vision for her claiming to be heard in court. Although collective protests by poor people occur from time to time in American history, one is hard pressed to argue the existence of a culture-shifting political movement to include poor people in the rhetoric and reality of equality.²⁴²

V. CONCLUSION

This Article describes wrongs directed toward a group whose common circumstances are those of urban poverty, significantly associated with race. This is the conjunction of two statuses, being black and being poor, each "degraded" in our society.²⁴³ The group I de-

242. Joel Handler distinguishes the efficacy of legal rights for powerless people on the axis of separated individuals versus groups. Powerless individuals who are also isolated from a perceived community suffer in the course of making legal claims. Fearing risks and additional humiliation and stigma makes it a difficult decision to use the law. But when rights are appropriated by a group seeking movement in the social status quo, the exercise of legal rights may take on an expanded meaning to the group. Rights assertion may signify and promote solidarity, mutual identification, and the power inherent in appropriating the ideals of citizenship implicit in the rights which are the subject of the claim. Thus, the social act of rights talk has the capacity to change beliefs and expectations in the way that *Brown v. Board of Education*, 347 U.S. 483 (1954), provided a signal to believe that change was justified, and that massive resistance to race-based segregation was a significant mobilization of a reformulation of values and beliefs in the political arena. Handler, *supra* note 11, at 970-72.

243. See Scales-Trent, *supra* note 4, at 13 (describing the conjoined status of race and female gender).

scribe lacks a felt identity that approaches the power of race- or gender-group identification. Group formation begins when individuals become aware that they are being treated differently by society, in a manner that is based on the group definition.²⁴⁴ It may be a long time coming before this group develops a self-awareness and organized activity capable of sustaining and expressing such a consciousness of self-in-group. If the conjunction of poverty and race continues, meaning that if the trend for poverty to capture higher proportions of the nations' minority group members relative to their white counterparts persists, accelerates, or is perceived by this group to do so,²⁴⁵ one outcome may be further group identification along the axis of race rather than of joint status.²⁴⁶ Race is a culturally familiar means for understanding and speaking of the social world, while multiple statuses are less so. Alternatively, the group I describe might find a shared perception of commonality as poor minorities, or simply as poor. But it appears to be difficult to be poor in America, to identify oneself in this way, or to acquiesce in others' use of the description.²⁴⁷ It may be that the acquisitive culture of having and getting, which fills the billboards, airwaves, and even the public schools, is sufficiently powerful to mask even the grim grind of felt reality.

Such exhortation to a shared knowledge of entitlement is more readily found today in fiction, for the voices of poor people scarcely find their ways into wide printed circulation otherwise. In her novel

244. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 320-25 (1986).

245. DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 42-50 (1987).

246. Some have argued that the legal reforms generated by the civil rights movement tended to address the concerns of middle-class but not poor blacks. See WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987). Yet, much public discourse and scholarship submerges multiple statuses when addressing the included "participatoriness" of minorities in American life, thus leaving us a political and theoretical landscape smoking with the diminishing returns and remains of civil rights laws.

In posing this problem of "which group" might form or carry forward the cry for inclusion, I wish to underscore the dilemma that arises by asserting claims in the voice found through difference. The problem is one of strengthening the stigma that produces the describable difference. See Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 128-30 (1987). This problem is the product of denial that one may maintain a strong connection to a cultural group and still belong to America.

247. See MICHAEL HARRINGTON, *THE NEW AMERICAN POVERTY* 40-45 (1984); Sarat, *supra* note 137, at 348-49. But see SUSAN REES ET AL., *HOW THE POOR WOULD REMEDY POVERTY* (1989) (on file with author).

Beloved, Toni Morrison introduces us to old Baby Suggs who was sixty years a slave and who turned preacher to her people in the first years of her freedom, which were also the last years of her life. She taught her neighbors who knew suffering and injustice as fully as did she:

She did not tell them to clean up their lives or to go and sin no more. She did not tell them they were the blessed of the earth, its inheriting meek or its glorybound pure.

She told them that the only grace they could have was the grace they could imagine. If they could not imagine it, they would not have it.²⁴⁸

248. TONI MORRISON, *BELoved* 88 (1987).

APPENDIX A

Interview Protocol

UNIVERSITY OF MARYLAND LAW SCHOOL
 LEGAL THEORY & PRACTICE/REAL PROPERTY (Spring 1990)
 Professors Bezdek, Boldt & Goldberg

2/90

TENANT KNOWLEDGE OF "RENT COURT" IN BALTIMORE CITY

Student conducting interview _____ Date _____

1. Control Number _____
 2. Gender of Interviewee M ___ F ___
 3. Race of interviewee Black___ White___ Asian___ Hispanic___ Other___

[READ TO INTERVIEWEE:]

Hello, I'm from the University of Maryland. We are making a study of Rent Court and are trying to learn about the experiences of tenants who come to Rent Court. If you are willing, I would like to ask you some questions about what brought you to court today. It should take about 5 minutes. Can I ask you these questions?

Thank you for being willing to talk with me.

4. Who started this case: Did your landlord sue you? ___ OR
 Did you sue your landlord? ___
 5. Have you been to Rent Court before today? Y ___ N ___
 IF YES: About how many times in the last year? ___
 6. Before you came to Rent Court today, did you ask anyone about what happens in
 Rent Court? Y ___ N ___
 IF YES: Whom did you ask?
 Friend/relative ___ Landlord ___ Rent Court Clerk ___
 Lawyer ___ Law student ___ Other ___
 7. Was Rent Court like you expected? Y ___ N ___
 How? _____

[JUDGE'S OPENING STATEMENT]

8. When the Judge first came in this morning, the Judge read a statement. Did you
 hear it? Y ___ N ___
 9. Did you understand what the Judge said? Y ___ N ___
 10. Did you stay for your case to be called? Y ___ N ___
 Why/or why not? _____

[IF THE TENANT STAYED FOR THE CASE (A.M.)/ FOR ALL P.M. CASES:]**[IF A.M. TENANT DID NOT STAY, SKIP TO QUESTION 20]**

11. Was your landlord in court for your case? Y __ N __
 IF NO: Did someone else come for your landlord? Y __ N __
 Was that person an agent? ____ attorney? ____ other? ____
12. Did you make any claim against your landlord? Y __ N __
 IF YES: What did you claim? _____
13. Did someone help you present your case? Y __ N __
 IF YES: Was that person a: Friend/relative ____ Legal Aid (paralegal) ____
 Law student ____ Lawyer ____ Other ____
14. Were you nervous in front of the Judge? Y __ N __
15. What did the Judge say when you walked up? _____
16. Did you agree that you owed the money the landlord claimed? Y __ N __
 IF NO: Did you tell the Judge? Y __ N __
 IF YES: Did you ask for a DSS slip? Y __ N __
17. Did you make a claim against your landlord? Y __ N __
 IF YES: What claim(s) _____
18. Did you bring anything to court to show the Judge? Y __ N __
 IF YES: What?
 Rent book/receipts ____ Photos ____ Letters ____ Other _____
19. What was the Judge's decision in your case:
 a. judgment for landlord for possession ____
 b. rent due to landlord ____
 c. ordered a Housing inspection and set a new date ____
 d. ordered rent paid into escrow ____
 e. postponed the case ____

[ASK ALL TENANTS:]

20. Are there any conditions in your house/apartment that are unsafe, or not as they should be? Y __ N __
 IF YES:
 (a) What? _____
 (b) Did you tell the Judge? Y __ N __
21. Did you think that if you made a claim against the landlord, that your landlord would do something like:
 Raise your rent ____ Evict you ____ Harass you ____
 Do something else ____?
22. Did you know that you can ask the Rent Court:
 a. to make your landlord repair bad conditions in your apt/house?
 Y __ N __
 b. to let you pay your rent into Rent Court, rather than to your landlord; if there are bad conditions in your house? Y __ N __
 c. to decide that you owe less than all the rent because of the bad conditions?
 Y __ N __
 d. to order a Housing Department inspection of the conditions in your house?
 Y __ N __

[TENANCY & INCOME]

READ TO TENANT: Thank you, this is very helpful. We're almost through. I would like to ask just a few more questions about your tenancy and household income. Remember, no information that identifies you will be made available to anyone.

23. How long have you lived in this apartment or house?

1-3 months ____ 3-6 months ____ 6-12 months ____
1-2 years ____ 2-5 years ____ More than 5 years ____
N/A ____

24. What is your monthly rent? \$ ____

25. How many people live with you in the place you rent? ____

26. Which of the following categories includes the amount of income your household has each month:

- a. Less than \$500 a month ____
- b. \$500 - 800 a month ____
- c. \$800 - 1200 a month ____
- d. \$1200 - 1600 a month ____
- e. \$1600 - 2500 a month ____
- f. More than \$2500 ____

[AT END] Thank you so much for your time. What you have said to me today may help us help other people who come to Rent Court.