# LAWYERS TALKING RIGHTS AND CLIENTS BREAKING RULES: BETWEEN LEGAL POSITIVISM AND DISTRIBUTIVE JUSTICE IN ISRAELI POVERTY LAWYERING

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*The article inquires into the meaning, and the potential of lawyering on behalf of poor clients who disobey or violate the law in order to secure basic needs. Through an analysis of a squatting case handled by the Yaffo Community Law Clinic at Tel Aviv Law School, the article discusses the challenges and the limitations of lawyering for a cause in these circumstances. Anitta, whose eviction suit serves as the basis for the analysis in the article, invaded an empty public housing apartment to secure shelter for herself and her children. This move was not only an act of survival but also an expression of the breakdown of her trust in the fairness of the systems at work in her life - the legal system being one of them - as legitimate regimes to address her essential needs. In order to act as effective representatives within the legal system, Anitta's lawyers needed to rely upon law's doctrine, categories and concepts as bases for their act of representation. However these same concepts and categories reflect and reinforce the existing social and economic order, which had caused the client to disobey law to begin with. The article discusses the professional dilemmas that emerge from this tension, and while it acknowledges law's constraints to serve as a primary vehicle for social transformation, suggests several ways in which lawyers can utilize the legal system for this purpose, while simultaneously assisting an individual client.*

## INTRODUCTION

*The locksmith stood by the locked door and I said: break the lock, I lost the key to my apartment. Do you live here? he asked. Yes, I answered. I need a witness to confirm, he said. One of the neighbors walked by and I asked him – I live in this building, don't I? He nodded, somewhat puzzled. The lock was broken and the door flung open. We both looked in and saw the empty, bare apartment. He looked at me: 'Good Luck', he said, and walked away.*[1]

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[1] Interview by Neta Ziv with Anitta M. (real name with author; because details about

What should a lawyer do when her client *asks* if she can invade a vacant apartment in order to provide shelter for herself and her children? What should the lawyer do when the client *tells* the lawyer that she intends to take hold of the place? How should the lawyer *defend* her client in an eviction suit, after she knowingly trespassed into the apartment? What are the professional-ethical implications of lawyering in such circumstances, and how can legal representation of needy lawbreakers be used as part of a social change struggle?

In this article I focus on some substantive and professional aspects of representing poor people who disobey the law due to existential needs. I address this topic from two perspectives: the first inquires into the possibilities of utilizing legal proceedings in order to uncover deep-seated social and economic inequalities in "ordinary", every-day legal cases, in particular when law is used to discipline and reprimand its violators. The second focuses on specific tensions embodied in the lawyer's task during representation in such cases. On the one hand the lawyer needs to remain within the boundaries of the legal system in order to sustain legitimacy and to be effective in her professional role. On the other hand the lawyer, representing a client who defies the legal system and does not accept its legitimacy, may well be in agreement with the reasons motivating her client.

To be sure, there is nothing new about lawyers representing lawbreakers. In fact, the most common claim of the right to legal representation arises in the context of criminal defense lawyering, when the client may have infringed the law and nonetheless expects, and for the most part deserves, the best possible representation.[2] Defending a squatter in an eviction suit as described in this paper shares this concern with the criminal defense case, but it has additional attributes. To begin with, the mere decision to provide representation in a case of this sort is 'political' in the sense that it has distributive implications. Legal representation by lawyers is a limited resource and cannot be provided to all. Therefore the decision regarding who will receive representation and who will not is a choice that expresses preference for a certain claim over another. As will be described ahead, the decision to provide representation in the squatting case was based on an

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Anitta's children are provided, her full name was left concealed), client of The Yaffo Community Law Clinic at Tel Aviv Faculty of Law in her home in Yaffo (April 2003). Anitta authorized the publication of her story in this academic article. The interview excerpt reveals Anitta's description of the day she took hold of her apartment in the summer of 2000. Anitta lived in the apartment with her children for four years, until she was recognized as eligible for public housing in May 2004.

[2] On dilemmas of criminal defense representation *see, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 58-66 (1988); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1-15 (1975).

understanding about the severe problems of poor people in the area of housing in Israel and the way in which law is used against them. Second, in contrast to criminal defense where the unlawful behavior has already been completed, in the squatting event the unlawful behavior is ongoing and, more so, representation from a "social change perspective" makes a certain substantive claim regarding the legitimacy (in contrast to the legality) of this act.[3] In the case described in this article, the dissonance between positive law and notions of justice weighed in favor of representation. Third, beyond providing the individual client with qualitative professional representation, in this case there was an additional goal at stake: to try and use the legal process as a means to bring about social change.

I deal with these issues by analyzing a particular case handled by one of the legal clinics at Tel Aviv Law Faculty. Many of the insights offered in the article resonated from discussions that took place in the clinic and among students during representation.

In Part I, I describe the inherent tension in representing poor squatters in eviction cases. The economic crisis in Israel, which peaked during 2002-2003, resulted in hundreds of people taking hold of public housing apartments as a means to secure basic shelter for themselves and their families. Part II situates these legal cases amidst the developing public interest practice of poverty lawyering in Israel, and contrasts them with a different type of legal advocacy – proactive impact poverty litigation. Part III describes the story of Anitta, whose legal case constitutes the basis for analysis in this article. I suggest looking at her unlawful squatting through political as well as personal dimensions, and Part IV compares this approach with lawyering in cases of civil disobedience. Part V describes the inherent difficulties in oppositional, alternative legal representation in disobedience cases, due to the need to rely upon law's doctrine, categories and concepts, which in and of themselves reinforce the existing social and economic order. Parts VI and VII offer two partial responses to these difficulties. I conclude with some thoughts about the relationship between legal representation, positive law and substantive justice. I suggest that circumstances of "poverty disobedience" open up a possibility for lawyers to indirectly question the duty to obey the law. From within the legal system and its institutions they can expose the gaps that often exist between formal law and substantive justice, and at the same time assist their individual clients.

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[3] From an ethical perspective, whether the unlawful act has been completed or is continuing is of crucial significance. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.6 (B) (1983) (circumstances in which revelation of confidential information is permitted, to prevent future harm to third parties).

## I. LAWYERING AMIDST GROWING POVERTY IN ISRAEL

During 2000, over 200 families took possession of vacant apartments in the Southern City of Beer Sheva alone; all apartments belonged to the largest state-owned public housing company in Israel – *Amidar*.[4] In other parts of the country too a growing number of families – many of them single mothers with children – resolved their acute housing needs through this method. Although invasions of this sort were not unheard of in the past,[5] since the summer of 2002 they had become a widespread phenomenon in Israel. They were one of the outcomes of the deep economic crisis in the country, manifested in rising rates of unemployment and sharp cutbacks in public support for welfare, housing, health and education and in general, growing poverty and economic inequality.[6]

Though most invasions can be traced to the ongoing demise of welfare and other forms of public assistance for the needy, the particular circumstances of each one varied. Some inhabitants lost their leases in their formerly rented apartments following the loss of their job and inability to pay rent. Some could no longer pay their rent due to cuts in rent subsidies that took place in July 2002.[7] Others were evicted from their privately owned apartments due to their failure to pay their mortgage installments, many due to unemployment and loss of their major source of income.[8] Others, who relied on government assistance as their major source of income, defaulted on their housing payments due to reduction in welfare assistance during 2002.[9] For

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[4] Vered Levy Barzilay, *The Panthers are Back*, HAARETZ (Weekend Edition), August 7, 2002.

[5] *See, e.g.,* State Comptroller (Report no. 46), 1996, at 149, stating that there were 4700 public apartments that were either abandoned or "invaded" by residents who were not eligible to stay in them.

[6] Between August 2001 and April 2003 a series of cutbacks in public assistance were imposed in income security, child allowances, unemployment benefits, old-age benefits, and disability benefits, altogether more than 6 Billion NIS (New Israeli Shekels) during this period. For a detailed description of the budgetary cuts *see* Dr. Shlomo Svirsky, Etti Konor-Atiias, *Black Years* (Adva Center, Nov. 2003), *available at*: www.adva.org.ivrit/homepage_heb.html [hereinafter *Black Years*], and National Insurance Institute, Research and Planning Administration, *Annual Survey* 2002-03 (Leah Ahdut, ed. Jerusalem, April 2004), at 4-7, *available at* the National Insurance Institute website: http://www.btl.gov.il/English/btl_indx.asp?name-pirsumim/publications.htm (describing the effect of the 2002-03 economic measures imposed by the Israeli government on the level of poverty).

[7] In July 2002 government subsidies for rent were reduced by 50% from a maximum of 1170 NIS (about $250) to 600 NIS (about $130) a month. *See Black Years*, *supra* note 6.

[8] According to information submitted by a leading NGO in the area of housing rights, in 2003 around 2500 families lost their homes due to mortgage payment defaults, see YEDIDON, no. 6 (newsletter of Yedid), *available at* http://www.yedid.org.il (Hebrew).

[9] In August 2001 the extended level of income support was reduced after 25 months, and in December 2001 the level of the allowance was not updated, and in addition all supplementary benefits awarded to income security recipients were eliminated. In April

many single mothers who lived on welfare, the change resulted from a combination of reduced welfare and child allowance benefits, failure to collect child support from the father, stricter eligibility criteria for receiving public housing and inability to find suitable work and supplemental income.

For some, there seemed to be no alternative but to invade vacant public housing apartments. Other options – such as temporary unsuitable lodging (empty basements or public shelters), moving in with family members, or staying on the street – were not considered feasible. Since many publicly owned apartments remained temporarily uninhabited,[10] taking over one of these dwellings appeared as a last resort. These apartments all belonged to public housing companies, owned by the state or jointly by the state and the local municipality.[11] As such, they were designated for the use of poor and needy families, and the new inhabitants considered themselves as such. It can be argued that this kind of act is different than invasions of privately owned apartments, which in fact have not occurred in Israel. At the same time, our intuitive feeling is that at least *prima facia* the state does have a point in demanding law obedience in general, including in the public housing area. The need to set certain criteria for the distribution of public resources, the concern for growing lawlessness, the real need to repair apartments and the shortage of funding for this purpose – are all claims we tend to sympathize with, or at least find hard to renounce instantaneously. Lawyering in squatting cases thus requires public interest lawyers to wrestle with this initial inclination, but to also raise doubts about it being the sole paradigm through which one might approach, analyze and judge such behavior.

This article examines the implications of lawyering in cases of

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2002 the allowance again was not updated and further it was reduced by 4%. In the proposed economic plan for 2003 the following changes were made regarding income security recipients: another reduction in allowance for recipients of enlarged allowances (mainly single mothers), reduction of benefits to working recipients (until then a sum of up to 17% of the average national income was not counted as an income that would disqualify recipients from eligibility, but after 2003 this amount was reduced to 7%). *See Black Years*, *supra* note 6.

10 This reality stands of course in sharp contrast with the State's claim of public housing shortage. It is not clear why so many apartments are standing empty, and information regarding the number of vacant apartments has not been made available. There are a few possibilities for this occurrence. One is that the squatters take hold of the place immediately after the former tenant moved out. Another is the statutory requirement that the housing company repair the apartment prior to its re-occupancy. Since budgets for repairs are not always available, the apartments stand empty for a while. In some cases, squatters occupy degraded apartments that are in dire need of repairs.

11 Public housing belongs to the State and is administered by the public housing companies. These companies are often State-owned companies or municipally owned, or a combination of both.

squatting by poor people in Israel by analyzing a particular case, of a woman, who was represented by one of the law clinics at Tel Aviv Law Faculty which I direct. Anitta, a single mother of three children (ages 8, 6, and 2 and a half), is a woman in her late twenties. In the summer of 2000 she took hold of a 2-bedroom public housing apartment in the city of Yaffo.[12] A few months later, the public housing company (Amidar) filed an eviction suit against Anitta in the local magistrate court, and the The Yaffo Community Law Clinic decided to represent her.[13]

The decision to provide representation to Anitta was based on several considerations. The Yaffo Community Law Clinic sets its substantive agenda according to the cases brought to the four walk-in client centers that it operates. The clinic tries to assist individuals who encounter legal problems in the area of civil debts, relations with the municipality, housing, and other civil matters. Housing problems constitute a major area of need for this population and the clinic has developed expertise in this area of law. When Anitta came to ask for legal assistance, the students saw a woman who needed their help, without which she might be left without a place to live. The fact that Anitta had committed an unlawful act due to economic distress was not unfamiliar to the students. They had encountered several instances in which residents illegally reconnected water and electricity to their homes after it had been disconnected, did not report all their income to the social security authority, withheld other information, or lied. The dilemmas raised by providing legal assistance in such cases were frequently discussed in class, and the students had debated them. Some felt that the clinic should not assist these clients; others felt differently. Opinions sometimes changed over time as the students realized how hard it was to settle the conflicting interests at stake. They were split between their intuitive tendency to denounce any violation of the law on the one hand, and a realization that a formal approach to this problem evades dealing with the apparent gap between positive

[12] Though Yaffo is part of Tel Aviv municipality, it is for the most part separate in its ambiance, demographic composition, history and administrative governance. About 45,000 people live in Yaffo, out of which 18,000 are Arab. Many of Yaffo's inhabitants are poor and unemployment rates are high, as is the level of crime. Yaffo has a celebrated past in the Arab culture, known as the "the Jewel of Palestine," it was mostly inhabited by Arabs until the War of 1948 when Israel received its independence. The State of Israel settled thousands of immigrants (many from Arab countries) into Yaffo's neighborhoods, and together with the Arab residents they comprise one of Israel's "mixed cities."

[13] Under Israeli law, the owner of land is entitled to use reasonable force to evict a trespasser without a court order, within 30 days of the invasion or after he found out about its occurrence. After 30 days the property owner must approach the court and file an eviction claim. The eviction order must follow a trial. *See* § 18-19 of The Land Law, 1969, L.S.I. 259 (1968-1969).

law and their sense of justice. During class we also discussed the difficulties in using the legal process in such circumstances to expose such complexities, and how different a case like this was from direct impact litigation. Anitta's case constituted an opportunity to "test" these complexities in court, and at the same time to provide zealous representation to our client. The fact that the case had almost no legal merit from a positivistic perspective played a limited role in the considerations regarding representation. As will be explained ahead, we felt that the case raised sympathy, and that it was possible to use the process to the advantage of the client even though the chances for winning the case on its merits were slim.

Subsequently, the clinic filed an administrative petition to the Tel Aviv District Court on Anitta's behalf challenging the State's refusal to recognize her eligibility for public housing. In May 2004, Anita was recognized as eligible for public housing, and left the apartment she had entered four years before.

It is common in eviction cases of this sort for inhabitants to lack legal representation. Though most defendants are likely to be entitled to State legal aid as they meet the economic need criteria, they are often rejected due to legal aid's policy to provide representation in cases that have some "legal merit."[14] Since the invaders do not claim to have any recognized legal right in the apartments, they do not satisfy this criterion.[15] There can be no doubt that without the clinic's legal representation, Anitta and her children would have been evicted from their home swiftly, as has happened in most similar cases that have reached the courts.

Representing Anitta in a civil case against her eviction from an apartment in which she had no formal title or legal right, required some innovative moves by her lawyers. In contrast to criminal cases, in a civil eviction suit there exists no "necessity defense" under which lawyers can attempt to exonerate their clients if *in retrospect* the court finds that the defendant violated the law in order to prevent a greater harm than the one created by the law-violation itself.[16] What can a lawyer do if her client explicitly admits to have taken something that does not belong to her under existing (positive) law, but claims to keep it because it is a necessity – fundamentally essential for the basic survival of herself and her children?

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[14] The Legal Aid Law, 1972 L.S.I. 95 (1972-1973), § 1 & 2 The Legal Aid Regulations, 1973, K.T. 2141 (1973-1974), §1-5.

[15] In some cases the State does provide representation, however this representation usually ends in a consent to evacuate the apartment within an agreed upon period of time, without contesting the claim itself.

[16] Israeli law recognizes the defense of necessity in section 34(11) of The Penal Code, 1976 L.S.I. 226 (1976-1977).

First and foremost, lawyers need to help their clients. Anitta's lawyers employed all possible means to prevent Anitta and her children from being thrown out on the street. In this sense, as will be portrayed ahead, they acted just like any other lawyer by trying to postpone the hearing on the case, raise every arguable claim, and utilize "lawyering tactics" to her advantage.

However, I suggest that legal representation in poverty cases of this kind provides an opportunity to do more than assisting an individual client. Precisely because positive law carries only a limited potential to aid a lawbreaker, the lawyer has to resort to law's innate structural and distributive features. The lawyer knows, perhaps understands, what caused her client to violate the law, seize property that does not belong to her and disregard established societal rules. These reasons - shared by many poor people – are a fusion of personal sentiments and political insights. They include the lesser housing opportunities existing for poor people largely due to historical inequalities in the distribution of housing resources;[17] the neo-liberal policies that have led to the near collapse of the welfare system; and growing poverty, which feed into personal hopelessness and mistrust of the social and political systems. However, these are not legal arguments that can stand in court. They are "political", "personal", "policy" contentions, and the courts are not equipped with the analytical tools to reason through them.

Nevertheless, I suggest that lawyers make use of the legal system in ways that reveal the limits of law's control over those who disregard its moral authoritative power due to survival needs. During representation the lawyer can touch upon the "root causes" - the social, economic and political forces - that have led her client to disregard law. By doing so she reaches beyond the formal and positive boundaries of law, within which her client has little or no claim. Since the strength of law largely depends upon its legitimacy in the eyes of its subjects, the lawyer's task is to try and uncover its instability and vulnerability - exhibited by the client's readiness to break the law due to her mistrust of the system of which law is a part.

Evidently, the difficulty in this course of representation is that exposing law's weakness undermines the legal system's own legitimizing mechanisms and thus threatens its power. Therefore, this maneu-

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[17] On the inequalities of housing opportunities to different sectors in Israeli Society see: Yuval Elimelech & Noach Levine-Epstein, *Immigration and Housing in Israel, Another Look on Ethnic Inequality,* 39(3) MEGAMOT (1998), 243 (in Hebrew); Neta Ziv, *Housing Law and Social Exclusion: The Case of Public Housing in Israel*, paper presented at the Law & Society Annual Meeting, (Chicago, Illinois, USA, May 2004) (on file with author).

ver is not an easy task for the lawyer: she needs to situate herself simultaneously as an insider and an outsider to the legal system. In other words, she has to abide by the basic rules of the legal system in order to enter this field, remain in it, and preserve the special status of a professional lawyer arguing "real (positive) law." At the same time she needs to demonstrate law's contingency and indeterminacy, without undermining her own standing and her client's standing along with her. The case of Anitta demonstrates one modest attempt to do so.

## II. Israeli Poverty Lawyering – An Emerging and Evolving Agenda

As poverty in Israel expands, unemployment rates rise, welfare and other government assistance programs are cut back, and a growing number of children and adults are denied access to basic needs: housing, food, water, education and health services.[18] These measures triggered community-based organizations and other public interest groups to object to the various "economic plans" via public protest, organized campaigns and other grassroots activities.[19] These measures carried limited success; they remained mostly within organizations' activists and did not encompass the masses, who did not take to the streets.[20]

Concurrently, beginning in 2001, public interest lawyers initiated a series of legal petitions against a variety of economic measures that adversely affected the poor. Most petitions took the form of a direct challenge to the statutes through which these measures were implemented, in particular The Economic Arrangements Act.[21] Most cases

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[18] See for example, "*Nine Year Old Children: We Stole food Because We Didn't have At Home*" YNET, May 8, 2003, *available at* www.ynet.co.il.

[19] Between 2000-02 a number of different organizations attempted to mobilize citizens from all over Israel to demonstrate, protest and speak out against these measures. The "Social Organizations Forum" (Forum Ha'irgunim Hachevratiyim), was formed in order to organize events during the discussions in the government and the Knesset voting on the plans. The forum is a coalition of tens of grassroots and advocacy organizations on the local and national level. It uses strategies such as advertisements in the media, public protests and sit-ins, publications of position papers, analysis of economic measures, and the like. It is doubtful if these moves were even remotely successful; they did not succeed in attracting a significant number of people, and the economic measures were passed without any serious public objection.

[20] On this point see, for example, Avirama Golan, *Netanyahu Does It Better*, HAARETZ, Part B, December 27, 2003.

[21] Most of the changes in the economic plan were introduced via a statute passed together with the yearly budget labeled The Economic Arrangements Law, 2002 L.S.I. 146 (2002-2003). The statute, originally used for minor statutory amendments accompanying the budgetary legislation, has become the central legislative vehicle to introduce policy change on a general and comprehensive level. It has attracted much criticism for being used as a tool for policy change, without allowing sufficient and adequate parliamentary and public debates around the pivotal changes it contains. It has been labeled "a democ-

were filed before the Israeli Supreme Court, and related to different aspects of the economic plan. These included the cutback in child allowances to families in which parents did not serve in the army,[22] decrease of old age benefits,[23] non-expansion of the statutory "health services basket",[24] water disconnection to poor people,[25] reduction in the sum of welfare benefits,[26] and tightening the eligibility criteria for welfare to single mothers of children over two years of age.[27]

These lawsuits, in fact, signal a noteworthy change in the substantive agenda of Israeli cause lawyers and public interest organizations. Public interest advocacy around "social rights" - i.e., rights of the poor in the area of welfare, housing, employment, pension rights, education and health - is a relatively new phenomenon in Israel, beginning from the late 1990s.[28] Until then Israeli cause lawyering, in and of itself a rather novel form of professional practice, dealt almost exclusively with civil and political rights.[29] The "first generation" of Israeli cause

racy bypassing statute." *See, e.g.,* Ruth Sinai, *Bypassing Democracy in a Long-winded Way*, HAARETZ, May 12, 2003; Ruth Sinai, *Discrimination? The 2003 Cuts Hit Everyone*, HAARETZ, Dec. 8, 2003.

22 H.C. 4822/02, The Committee of the Arab Municipalities v. The National Insurance Institute. This case related to the reduction of child benefits to families whose parents did not serve in the army. Since most Arabs, persons with disabilities and some new immigrants do not serve, the case was litigated as an equal protection case. Following several hearings in this case, the Israeli Knesset changed the law and reduced benefits to all families, and the case was dismissed on July 31, 2003.

23 H.C. 5578/02 Rachel Manor v. The Minister of Finance (petition rejected on September 9, 2004).

24 H.C. 1632/03 The Association for Civil Rights in Israel v. The Minister of Health (petition rejected on April 28, 2003, following an adjustment in the health basket).

25 H.C. 5671/01 Halev (The Movement Against Poverty) v. The City of Tel Aviv, (decision rendered on April 4, 2004). The case ended in a concession to issue regulations that protect from water disconnection the severely needy who failed to pay their water bills due to their economic need.

26 H.C. 888/03 Bilha Robinova (and others) v. National Insurance Institute (case pending).

27 H.C. 1433/03 Svetlana Bachtin v. The Minister of Finance, (case is pending). The petition challenges the stricter eligibility requirements from single mothers on welfare. Before the change single mothers to children over seven years had to accept any suitable job that was offered to them, otherwise they would not eligible for welfare. The child's age was lowered to two.

28 See Noya Rimalt, *Legal Education: Between Theory and Practice*, 24 TEL AVIV UNIV. L. REV. 81 (2000), describing the attempt of the Tel Aviv University Civil Rights Clinic to argue for the right to education as a basic right.

29 Public interest lawyering, as an organized and systematic form of professional practice, appeared on the Israeli legal scene only in the late 1980's. On this point *see, e.g.*, Ronen Shamir & Neta Ziv, *State-Oriented and Community-Oriented Lawyering For a Cause: A Tale of Two Strategies* in CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA 211 (A. Sarat & S. Scheingold, eds., 2001); Stephen Ellmann, *Cause Lawyering in the Third World*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 349 (A.Sarat & S. Scheingold, eds., 1998) (hereinafter Cause Lawyering II). Ronen Shamir & Sara Chinski, "Destruction of Houses and Construction of a Cause",

lawyers set the agenda of Israel's public interest law practice through cases that centered on free speech, freedom of religion and movement. Much of the work in this area took the form of opposing state violations of basic human rights due to security and other State interests. Subsequently lawyers took part in advocacy and litigation in the area of group equality - for women, gays and lesbians, Arabs and people with disabilities.[30] In this respect, the social rights petitions to the Israeli Supreme court, launched by lawyers from numerous public interest rights organizations, signalled a real change in the overall interest of these groups, which now includes poverty as a central cause in rights advocacy.[31]

In the new poverty cases the legal arguments articulated by the lawyers ask to infuse novel meanings to the (already recognized) basic right to human dignity, to include the right to human subsistence, to health, education, shelter and water – as fundamental rights deserving constitutional protection.[32] However the form of most petitions is rather conformist - a direct constitutional challenge to a statute, i.e., impact litigation on the macro-level. Throughout this process the lawyers stay at the forefront, and the individual client is somewhat incidental to the case. In most cases an NGO is set as a named petitioner in addition to individual named plaintiffs (as the main objective is to challenge overall policy) and the NGOs undertake most major decisions in the process.[33] Moreover, by articulating the constitutional ar-

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Cause Lawyering II, 227. Neta Ziv, *Lawyering for the Public Interest – Who is the Public? What is the Interest? Professional Dilemmas in Representing Minority Groups in Israel,* 6 MISHPAT UMIMSHAL (LAW AND GOVERNANCE) 149 (2001).

30 Ronen Shamir, *Legal Activism in a bi-National Society: Israeli Palestinians and Jews at a Crossroad,* 43 JUSTICES, 99-111 (2002) (in French). Lisa Hajjar, *Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in* ISRAEL/PALESTINE 31(3) LAW & SOCIETY REVIEW 473 (1997).

31 These organizations include: The Association for Civil Rights in Israel, *information available at* http://www.acri.org.il/english-acri/engine/index.asp, Community Advocacy – A Center for Social Rights, *information available at* http://www.advocacy.org.il/index_eng.html, Yedid – Community Rights Centers, *information available at* http://www.yedid.org.il/english/, Mehuyavut Leshalom Ultsedek Hevrati (Commitment for Peace and Social Justice, Kav Laoved (Workers' rights), *information available at* http://www.kavlaoved.org.il/index_en.asp), National Council for the Child, *information available at* http://www.children.org.il/, The Clinical Education Programs at Tel Aviv University Law Faculty, *information available at* http://www.tau.ac.il/law/clinics/english/, and Itach – Women lawyers for Social Justice.

32 This move is somewhat similar to the strategy used by lawyers from the Welfare Rights Movement in the United States during the 1960s-1970s. The difference in Israel, however, is that Israeli lawyers base their argument on the individual right to Human Dignity, recognized in Israel's Basic Law: Human Dignity and Liberty, 1992 1391 S.H. 150. The crux of the legal controversy is thus to what extent the right to human dignity guarantees basic entitlements from the State.

33 Though in most cases there are named petitioners with individual claims, they are joined by the organizations as "public petitioners." It is clear to all parties that the issue is

gument that the right to basic subsistence/shelter/health is a human right, the lawyers invite the court to step into a new, semi-political terrain.[34] Through the use of a human rights discourse they claim, however, that this move is not only necessary but also legitimate, and attempt to offer the court the reasoning and the conceptual tools to review this legislation. It is important to recognize that by using this approach the lawyers are expressing a belief in law, since they relate to law as a separate sphere from politics. It is as if they are saying: law *can* be just; it *can* protect basic rights; this why we are here. In other words, they are conferring legitimacy upon the legal system.[35]

It is still not clear whether the poverty impact litigation will be successful in significantly altering actual policy and practices. In the meantime and as these cases unfold, poor people need to survive. Against a reality of growing unemployment, a sharp decrease in public assistance and dire needs in essential areas of life, the inclination to "break the law" has become more prevalent. People whose water supply was disconnected due to inability to pay their bills often reconnect their households to the city pipeline, bypassing the municipal water system; electricity disconnections are dealt with similar "self help" devices. Welfare fraud exceeds its normal share, and civil monetary debts are more readily ignored.

It is not that poor people suddenly became malicious lawbreakers. By and large, exceeding the limits of law in these circumstances should not be understood as an act of social deviance, but a means to secure basic needs.[36] Typically, the "unlawfully seized" resources are public in their nature: vacant public housing apartments, water and electricity; these are all public commodities that are administered by public (or semi-public) entities. Nevertheless, positive law does not

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not the individuals, but the policy at large.

[34] The political nature of these cases results from the kind of relief requested in them, which lends to direct allocation of financial resources and the need to judicially quantify social rights, by identifying when the State fails to meet its basic duties to provide human subsistence, health, education, housing etc.

[35] The separation between Law and Politics is a central feature of law's legitimatising force. On this point see: David Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1 (David Kairys, Ed. 1990) stating that legal authorities often proclaim the law to be "separate from—and "above"—politics, economics, culture, and the values or preferences of judges. This separation is supposedly accomplished and ensured by a number of perceived attributes of the decision-making process, including judicial subservience to a Constitution, statutes, and precedent; the quasi scientific, objective nature of legal analysis; and the technical expertise of judges and lawyers."

[36] On the political nature of social deviance see: Stuart Hall, *Deviance, Politics and the Media*, in DEVIANCE AND SOCIAL MOVEMENTS (Paul Rock, Mary McIntosh, eds., 1974), 261; Irving Louis Horowitz and Martin Liebowitz, *Social Deviance and Political Marginality: Toward a Redefinition of the Relation Between Sociology and Politics*, 15(3) SOCIAL PROBLEMS 280 (1968).

differentiate between private resources and public utilities, and such acts are considered a breach of law. Accordingly, the State employs law's coercive force by posing poor peoples' behavior as unlawful (whether through civil or criminal definitions). Law is turned against the poor. It is used by the State to control its subjects, as a means to enforce desired social policies.[37]

In these circumstances poverty and law meet through different terms than the ones discussed previously. Contrary to direct impact litigation such as described above, law is not engaged to assist the poor, relied upon as a semi autonomous institution that can trump politics. In contrast, poor people who defy law considered it inseparable to politics – it is part of the system that led to their problem. When Anitta invaded an apartment not hers in order to secure shelter for herself and her children, she did not think of law as a legitimate and just institution. Law was just another reflection of her problems: it was being used against her, to take away something she needed badly.

What can lawyers do in cases of this sort? Can they ignore their clients' understanding of law? Can they support it? To what extent can representation in such cases – in contrast to direct impact litigation - enable lawyers to adopt a different view on law's political dimensions? Can legal representation be employed beyond assistance to an individual client but also as a means to forward broader social change? Through Anitta's case I will begin to address these questions.

## III. Survival, System Failures and Personal Resistance

Anitta is a vital woman in her late twenties. She grew up in a poor family in Yaffo, a seventh daughter to parents who for many years were ill and disabled. Anitta finished 11 years of school, and in 1995 married her husband, pregnant with her first child, when she was 20 years old. Anitta suffered physical abuse from her husband, who was a drug addict, and after two years of marriage, with two children, she separated from him and decided to file for a divorce.

Being a single mother to two small girls Anitta qualified for Income Security Benefits. As a welfare recipient she was also eligible for rent assistance, with which she rented an apartment in Yaffo for herself and her daughters. However, the public assistance for rent that she received could not cover her housing expenses, and in three years she had to move three times, due to her inability to pay the rent. One of her daughters suffers from severe respiratory and other health problems, and was hospitalized several times during the year. Anitta

[37] On the use of criminal law to govern and enforce social policy see Jonathan Simon, *Governing Through Crime,* in The Crime Conundrum: Essays on Criminal Justice, 171 (G. Fisher and L.Friedman (eds.) 1997).

had to pay for her medication since National Health Insurance does not cover all prescriptions.

Anitta never held a job outside her home, and living off welfare was all she had ever experienced. She needed to buy food, clothing for her children, some toys, a TV. For years she had struggled to make ends meet: pay the rent, the health bills, school supplies, books and other essentials. She tried to maintain a clean and stable home for her children. Her husband, whose assistance in the support of the children was either minimal or non-existent, did not cooperate in the divorce proceedings. He did not show up for hearings in the Rabbinical Court and therefore time and again the divorce file was closed, and then reopened by Anitta. Despite his non-cooperation Anitta managed to get a court order for child support, which her husband occasionally respected.[38]

During her moves from one place to another, her daughters were being shuttled between their relatives. Anitta tried to maintain their schedule and school attendance, and provide minimal conditions for learning. As the girls were being moved around from one relative to another Anitta found out to her horror that a relative of her husband was sexually abusing one of her daughters. She then had to deal with the psychological effects of this trauma on her child, with the police investigation and with the criminal charges filed against the abuser. In the summer of 2000, after she defaulted on her rent payments, Anitta lost her lease, and realized she had to move again, the fourth time since she had separated from her husband. She was desperate. From word of mouth she found out that there was a vacant *Amidar* apartment in the building she lived in. She decided to act, and to invade the place, in the hope that somehow she would be able to stay there and organize shelter for herself and two daughters. After she found somebody to break down the door lock, she moved in. She brought her furniture from the apartment below and settled. She hung up curtains in the living room. She filled the girls' room with colorful beddings. Her home was modest and humble, with minimal furniture and appliances. The big TV, she said, was a present from her parents. Her husband continued to visit the girls, bringing things every once in a while. Sometimes he stayed for a while, and Anitta let him. After all, she said, formally he was still her husband. Then she got pregnant with her third child. She was aware of the fact that as a single mother with

[38] Divorce and marriage in Israel are governed by personal law, i.e., religious law, and are handled in religious courts (for Jews, The Rabbinical Court). There is no civil marriage or divorce. According to Jewish Law (*Halacha*), in order for a Jewish couple to divorce the husband needs to give a Bill of Divorce (*Get*) to the wife. Therefore, men have the power to deny their wives divorce by non-cooperation.

three children she was eligible for public housing.[39]

A few months later Anitta received the lawsuit Amidar had filed, demanding her eviction from the apartment. She then came to seek legal assistance in one of the law clinic's stations in Yaffo. The clinic decided to represent her in the eviction case, and also to help her apply to the Ministry of Housing for public housing as a single mother with three children. Her applications were rejected and all appeals were dismissed, on two grounds. The first was that she was not "a single parent": her divorce had not been finalized and, further, she had had another child from her husband since she moved into the apartment. The second reason was that as a lawbreaker who illegally invaded an Amidar apartment, she couldn't claim to receive the (housing) benefits from the same State agency whose rights she had disregarded.

Anitta realized she had to deal with law; it had arrived at her door, in real and symbolic means. She realized of course that she had taken hold of a place that was not hers, and that by doing so she might be withholding the place from a "more eligible" family (as the State indeed asserted). She was not happy with that, but claimed she would not leave the apartment, "even with a court order."

Listening to Anitta it became evident that she had lost all faith in the fairness of the systems at work in her life, or in the evenhandedness of any official procedure: in the administrative process that denied her eligibility to public housing, in Amidar, which claimed there was a shortage in public housing and a long waiting list, in the social services that continuously scrutinized her parental abilities, or in the court that was asked to evict her and her children from their home. She felt, she knew, that the whole story was simply not fair and that these institutions were part of it. Anitta started her life with very little: she grew up in a poor neighborhood, her parents could not support her, she married early to leave home, and never received a proper education. She had obviously made some wrong moves, but nevertheless believed she had done everything in her capacity to secure shelter for her family and a safe place for her children. Despite her personal endeavors – things had turned out for the worst.

Though squatting in the vacant apartment was, first and foremost, an act of survival on behalf of Anitta, it can also be understood as a

[39] According to the regulations of The Housing Ministry, housing assistance can be provided either through rent assistance (the eligible person rents an apartment in the private market) or through subsidized public housing apartments, in which the tenants pay low rent. One of the eligibility criteria for public housing is a single mother with three children whose income does not exceed a certain amount. For eligibility conditions *see* The Ministry of Housing *available at* http://www.moch.gov.il/Moch/HousingSupport/Vatikim Info.htm (in Hebrew).

form of practical defiance: an individual, non-organized, physical act of resistance on behalf of a subordinate woman. As aforementioned, during the economic crisis of 2002, resistance to the harsh economic measures imposed by the government was not exhibited through collective or organized action of the poor.[40]

However, as James C. Scott explains, collective action is but one mode of resistance of the powerless against a dominant oppressive regime.[41] We should also consider individual, everyday forms of resistance, which include "pretence, false acquiescence, theft, fake ignorance, larceny, obstruction, etc."[42] These forms of dissent do not require complicated planning, organizing or coordination, and are often acts of self-help aimed at protecting one's immediate self-interest. Nonetheless they exhibit a conscientious behavioral pattern that carries political significance. Under this approach, taking hold of the apartment was, in fact, a politicized act, a subtle and evasive breach of authority.

Necessity and subversion are not exclusionary: as far as Anitta was concerned, her dire need to find shelter easily coincided with her conscientious defiance of Amidar's regime of property rights. In other words, Anitta's multiple motives did not make her act non-political. Pure altruism may be a luxury that other kinds of political activists can afford, not necessarily the poor and disempowered people themselves.[43] Scott in fact warns against the false dichotomy between self-motivated and "principled" action of disempowered groups' resis-

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[40] During 2002 a number of NGO's attempted to organize protests against the economic measures, but these were sporadic and did not form a comprehensive opposition. In July 2003, Vicky Knafo, a single mother from the Southern town of Mitspe Ramon in the Negev started a solo march to Jerusalem. After the 5 day march she was accompanied by tens of other single mothers (and a handful of men) that squatted in a tent in front of the Ministry of Finance. This bottom-up grassroots protest signified an abrupt change from the want of civic protest by welfare recipients and other poor people against the harsh government measures imposed in 2002-03. However, after a couple of months this protest came to an end, and the protesters went back to their hometowns. The Minister of Finance, Binyamin Netanyahu proposed a plan to move single mothers from welfare to work, thus on the one hand seemingly responded to their demands, but at the same time did not budge on the main demand of the single mothers – to abolish the cutbacks in welfare payments. The story of the collective struggle of the single mothers has received much attention in the Israeli press, and debate is still continuing whether it can be viewed as a total failure or a partial success. *See, e.g.* , *Social activist Vicki Knafo faces hard times*, MAARIV NRG June 14, 2004 ("Months after her well-publicized fight with the Finance Ministry not to cut benefits for single mothers, Knafo now struggles to put food on the table.")

[41] JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE 29 (1985); JEAN COMAROFF, BODY OF POWER, SPIRIT OF RESISTANCE: THE CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE 194-6 (1985), Steven Kaplan, *Everyday Resistance Among Ethiopian Jews: A Look on the Research, a Look from the Research,* 10 THEORY AND CRITICISM, 163 (1997).

[42] *See* Scott, *supra* note 41.

[43] *Compare* Kaplan, *supra* note 41, at 168.

tance, and claims that oftentimes self-interest constitutes the essential impetus for mobilization.[44]

Likely to be motivated by both, Anitta did not have faith in any of the systems that impinged upon her life. But she had to deal with the eviction lawsuit, and obtained a lawyer to represent her in the legal process. The lawyer claimed not to be part of this whole scheme, and said she was on her side. Was she? Could she be?

## IV. Lawyers and Law Breaking Clients in Political Contexts: A Comparison to "Civil Disobedience Lawyering"

Lawyers have extensively explored their role in the representation of clients who engage in "civil disobedience", i.e., knowingly disobey the law for an alleged just cause.[45] Most deliberations of this issue dealt with representation of civil disobedients whose illegal conduct was geared at constituting a form of social change. In these circumstances, the clients act out of ideological defiance and disobey law because they perceive it to be unjust.[46]

At first blush, civil disobedience differs from poverty law breaking. Civil disobedience is usually understood as a deliberate unlawful conduct, accompanied by a readiness to accept official sanctions.[47] Civil disobedients are ideologically driven, their actions are morally based, and they do not act out of self-interest.[48] Their conduct is premeditated. Civil disobedience is often part of a broader political struggle in which dissidents openly display their conscientious convictions and moral beliefs against an official legal authority which they believe

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[44] Scott, *supra* note 41, at 30.

[45] *See, e.g.*, J.L. Chestnut, Jr. & Julia Cass, Black in Selma: The Uncommon Life of J.L. Chestnut Jr. (1990); Archibald Cox, *Direct Action, Civil Disobedience and the Constitution*, in Civil Rights, the Constitution and the Courts (Archibald Cox, ed., 1967); Nancy D. Polikoff, *Am I My Client? The Role Confusion of a Lawyer-Activist*, 31 Harvard C.R.-C.L. L. Rev. 443 (1996).

[46] Carl Cohen, Civil Disobedience: Conscience, Tactics and the Law 140 (1971).

[47] *See, e.g.* , Hugo Adam Bedau, *Civil Disobedience and Personal Responsibility for Injustice*, in Civil Disobedience in Focus 50 (H.A. Bedau, ed. 1991), defining civil disobedience as "acts which are illegal. . .. Committed openly (not evasively or covertly), nonviolently. . . and conscientiously (not impulsively, unwillingly, thoughtlessly, etc.), within the framework of the rule of law. . .and with the intention of frustrating or protesting some law, policy, or decision of the government."

[48] Chaim Gans, Philosophical Anarchism and Political Disobedience (1992), 2. Gans though later develops the argument that civil disobedience ought to be justified, given the fulfillment of other conditions, regardless of the substantive values underlying disobedience. See also Peter Singer, Democracy and Disobedience 10 (1973) ( "I am also concerned with acts motivated by broad political and ultimately moral considerations, rather than purely selfish acts. . .").

is unjust.[49] Even though the more ancient forms of civil disobedience were not restricted to overt action, the modern perception of this term requires open defiance of the law.[50]

Poor people who break the law are by and large less aware of the broader political dimensions of their act. The measures they employ are usually covert; they do not want to get caught or bear the consequences of their illegal act. Despite these differences, I believe there are significant similarities between the two cases. To begin with, law-breaking of this sort is an active exercise of discretion and personal judgment. As aforementioned, from a socio-political perspective, it can be considered a mode of individual resistance and thus a form of political action.

Mostly, however, the similarities between the two acts are founded upon their relation to law. A deliberate and open defiance of law upsets the legal system, regardless of the underlying motivation, due to the challenge to its legitimacy. Whether motivated by political ideology or survival, disobedient clients challenge the boundaries of law and expose the tension between official authority and personal obligation. If we return to Anitta: the underlying reason she decided to defy law was the breakdown of the law's moral authority upon her. This did not necessarily entail rejecting the overall regime as illegitimate and not worthy of respect.[51] However in areas pertinent to her basic needs and essential life necessities she had lost the belief in law as a legitimate source of authority, and in this context did not have faith in legal institutions as just systems of governance. This limited disregard of law was committed for reasons that seem to be just: the basic human need to survive and protect the well being of oneself and dependents. In other words, this decision carried moral dimensions (it was at least partially settled by morality); it entailed the implication of values (what one thinks is important), and of questions about right and wrong.

To be sure, there are significant differences between lawyering for political disobedients and poverty disobedients. To begin with, lawyers and civil disobedient clients frequently share similar personal attributes: they often belong to the same social, racial or other minor-

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[49] Martin Luther King, *A Letter from the Birmingham Jail*, in 1 A.J. Must Memorial Institute Essay Series, chapter 2, 13-34 (New York, 1981).

[50] Hugo Adam Bedau, *Introduction*, in CIVIL DISOBEDIENCE IN FOCUS, *supra* note 47, at 6-7.

[51] The differentiation between an illegitimate regime, under which disobedience is accepted, and a legitimate regime in which an unjust law exists is recognized in the literature on civil disobedience, see BURTON ZWIEBACH, CIVILITY AND DISOBEDIENCE 148-152 (1975).

ity group, and are sometimes enlisted to struggle for the same cause.[52] These criteria are less evident in lawyering for poverty lawbreakers. More often than not, lawyer and client belong to very different class or social groups. In fact, this gap between lawyer and client has pervaded the writing on poverty lawyering. Critics were concerned with the problem of domination of clients by their lawyers,[53] lawyers taking control over clients' struggles and weakening their social movement or lawyers silencing their clients.[54]

In addition, legal representation of civil disobedients sharpens the dilemmas of identification and separation. In civil disobedience cases, lawyers often feel part of the group they represent and at times support the goals of their struggle. At the same time they need to distance themselves from their clients in order to sustain their status as "professional" lawyers.[55] This creates a dilemma: if they associate too closely with their clients they are in danger of losing their privileged status with the state/legal system, which they retain as long as they are considered professional lawyers. If, on the other hand, they affiliate with the legal system, dangers of cooptation and alienation from the clients become more direct and acute.[56] This tension is less pronounced in poverty law breaking. In these circumstances, breaking the law is not done as part of an explicit political protest, and although the identification-separation issue is not absent altogether, it does take a different form.

Still, on a more fundamental level, similarities between the two kinds of lawyering arise. In both cases lawyers cannot avoid exposing the justification for breaking the law. If lawyers choose to touch upon the political dimensions of poverty law breaking (which may be less

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[52] *See* Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change,* 52 U. PITT. L. REV. 723, 747 (1991); Michael Keren, *Legal Professionals and Civil Disobedience: an Israeli Case Study*, 6(1) INTL J. LEGAL PROFESSION 91 (1999); Pollikoff, *supra* note 45.

[53] Stephen Ellmann, *Lawyers and Clients* 34 U.C.L.A. L. REV. 717 (1987); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in a Post-Modern, Post-Reagan Era* 48 U. MIAMI L. REV. 1099 (1994).

[54] William P. Quigley, *Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455 (1994); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUMAN RIGHTS L. REV. 67 (2000); Gary L. Blasi *What's a Theory For? Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1994).

[55] Polikoff, *supra* note 45, at 450: "To distance myself is to betray both myself and my relationship with my clients. To allow myself to be distanced by the system also feels dishonest. Nonetheless, I am not prepared to throw my lot in with those who disregard the rules of courtroom behavior by which I must live if I am to have any credibility or respect within the judicial system."

[56] Norman C. Amaker, *De Facto Leadership and the Civil Rights Movement: Perspective on the Problems and Role of Activists and Lawyers in Legal and Social Change*, 16 S.U. L. REV. 1, at 29 (1989).

explicit than in civil disobedience but exist in an innate manner), they need to address the social and political context within which it occurs. They cannot avoid confronting the relationship between the formal, positive aspects of law, and the substantive merits of the cause leading to its violation. In both cases, if they decide to politicize the case, the lawyers must find a way to reveal the injustice underlying the legal system and address the wrongs upon which the violation of positive law took place, by uncovering the ways it reifies existing powers and hierarchies. They need to resort to concepts of human and fundamental rights as a justification for violating positive law.

While clients are the ones that engage in the act of lawbreaking, it is lawyers who represent them and speak on their behalf within the legal system. The paradoxical difficulty for lawyers thus is to simultaneously "work" law in a way that challenges its legitimizing basis, while standing before the very system that is constituted upon the law which is being challenged, and from which the lawyers themselves derive their professional legitimacy and favored privileged status.

## V. Client Representation while Challenging the Authority of Law

Law's capacity to maintain social order is grounded not only in its coercive power but also because people believe in its moral authority. When the legal system loses its legitimacy it becomes a much less effective tool to sustain societal structures and norms.[57] One of the ways in which belief in law is acquired, and continuously sustained, is through the definition and usage of particular legal categories which constitute law's primary building blocks. These categories embed and reflect the existing social order and thus conserve its hierarchies and norms. Peter Gabel & Paul Harris explain that "the conservative power of legal thought is not to be found in legal outcomes which resolve conflicts in favor of dominant groups, but in the reification of the very categories through which the nature of the conflict is defined."[58]

In the area pertinent to this article - housing law –the legal process can be used to secure and to advocate for the rights of tenants vis a vis their landlords, and in some cases to even win more rights for the tenants. But it is hardly possible to challenge the actual categories of

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[57] Tom R. Tyler, Why People Obey the Law chs. 3, 4 (1990); Paul H. Robinson & John M. Darley, Justice Liability and Blame: Community Views and the Criminal Law 7 (1995) (underscoring the importance of the community's perception of the law's moral soundness in relation to obedience).

[58] Peter Gabel and Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* IX Review of Law & Social Change 369, at 373 (1982).

landlord and tenant as the framework for the general discourse and doctrinal argument. Similarly, the legal process is hardly susceptible to cope with the underlying distributive mechanisms which have led some to become property owners and "landlords" with accompanying privileges of this legal status, while others retained a lesser status – of "lessees" - in these dwellings.[59] These basic terms – that take up and develop a meaning of their own throughout the legal process - epitomize the existing social institutions. They are a prerequisite to enter the legal field; their acceptance a precondition to handle a legal conflict.

According to this analysis, when lawyers appear in court and represent a client in a landlord-tenant conflict, there is little space to dispute these categories directly. The starting point of any judicial process in the area of housing law is the acceptance of the basic arrangement: there is an "owner" of a dwelling, be it a public or private entity; the owner has title and rights in the house; he therefore carries the legal power to determine how and by whom the property will be used. The tenant lives in the dwelling if she accepts the landlord's terms. Though it is her home, her status in the asset is not determined by the regime of property rights, and she does not have as strong a status and claim in the place. This is the accepted "bargain", even if for the tenant the dwelling fulfills the most basic need of shelter and the owner is a public housing company.

In a housing or landlord tenant case, the lawyer has to work within this framework and build her argument around it. This is the lawyer's relative advantage – but also her weakness. As a professional she can try to secure the rights of her client. She can also be creative and offer new meanings to existing legal terms. However she is inherently limited by the foundation and the boundaries of the legal regime within which she holds expertise. Given these limitations, the crucial question is to what extent can the lawyer work within the legal system and at the same time contest its underlying structure, language and foundational assumptions. I believe there is not one single angle through which to address this question, and I would like to offer a few different perspectives on it, using Anitta's case.

The underlying assumption of my analysis is that lawbreaking can constitute a check on law's legitimacy and justifications. If, as critical writers tell us, law is an institution that reinforces existing social arrangements through its terms and categories, a client like Anitta who consciously defies the law by invading property which she knows not to be hers is saying: *I do not accept this arrangement. The regime under*

[59] On the historical processes that contributed to the ethnic division between owners of their homes and renters of public housing apartments see, Ziv, *supra* note 17.

*which I cannot acquire safe shelter for my children and myself is wrong. It needs justification*. It is not rightful just because it is, formally, "the law of the land." By doing so Anitta is in fact doing something very similar to civil disobedience: she is questioning, challenging the system's otherwise uncontested legitimacy.[60]

If her act of disobedience goes unnoticed and she is swiftly evicted from her apartment in order to restore "social order," then the disruption to the legal and social system is minimal. Law, in its formal coercive force, continues to sustain its power over poor people, curbing Anitta's subversive act of survival-disobedience. Her conduct remains in the personal sphere, and is treated as an isolated act of deviance. Not that this is completely invaluable – Anitta did take personal responsibility by making this choice – but in order to become a stronger form of dissidence, her statement needs to be "decoded" and conceptualized in terms and categories recognized by law.

I think that precisely at this juncture lawyers' intervention can make a difference. To begin with, and on the most basic level, lawyers can provide immediate and real (although usually temporary) help to their clients. Through the use of lawyering tactics (more often utilized to the benefit of stronger parties), Anitta's lawyers had managed to put off her eviction for a considerable period of time. Though Anitta knew that her chances of staying in the apartment on a permanent basis were not high, she had lived in the place for almost four years, the longest period she had stayed in one place in the last five years. Shortly after she moved out of the apartment (in May 2004), Anitta was recognized as eligible for public housing.

Second, during the legal process lawyers can try to expose the underlying distributive flaws of the socio-political system which led their client to break the law. In order to do so, however, lawyers need to "package" these extra-legal features within acceptable legal process and argumentation, and this requires some innovation.

Third, the legal process can be used to present the client's point of view and life experiences before the court. The manner by which a judge comprehends the social significance of a factual occurrence has a bearing on the judicial process. Such conceptions are notably influenced by personal life experiences that significantly affect the way judges (as other people) make sense of the world, and give the facts presented before them meaning in the legal process. Scott claims that

> [o]fficials of the modern state are, of necessity, at least one step – and often several steps, removed from the society they are charged with governing. They assess the life of their society by a series of

[60] Minow, *supra* note 52 at 743-4. *Compare* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 383 ("On Not Prosecuting Civil Disobedience")(1978).

> typifications that are always some distance from the full realities these abstractions are meant to capture.[61]

By describing the life realities of a poor single mother – her familial, cultural and economic background that had led her to take over the apartment – lawyers can try to narrow the gap between the life experiences of poor clients and those who determine their fate, including judges. Infusing Anitta's life reality into the legal process therefore was aimed not only to procure sympathy to her cause but it was an attempt to affect the application of particular legal doctrines to the facts of her case.

Finally, and the most difficult part of the lawyer's role, is to continuously remind those in official legal positions of the limits of law's control over its subjects. Since the tangible authority of law derives not only from its coercive force but from the acquiescence of its subjects and their willingness to obey formal norms and accept their legitimacy, disobedient clients like Anitta remind law of its vulnerability and contingent nature. Representing lawbreakers in these cases thus becomes an important and necessary safeguard for the rule of law in its substantive meaning.

In the next section I will address these aspects of lawyering, and their potential to constitute a form of social change. Analysis of this sort evaluates the overall legal process through multiple dimensions. Winning or losing is judged not only by the end result of a particular case, but also by other parameters. These include the individual client's experience and how she carried herself through the legal process, the effort the system has to devote to justify itself and show accountability, the narrative and terms introduced into the legal system, as well as by minute changes on the micro or semi-micro level.[62]

## VI. Defensive Poverty Lawyering – Benefiting from the Legal System's Tediousness

Critics of rights litigation in general and legal aid programs in particular, point to the ineffectiveness of the legal process to generate actual change. Wearisome bureaucratic hurdles, procedural obstacles, the lapse of time between filing a claim and arriving at the requested outcome and other "built in" barriers, constrain claimants' proactive efforts to use the legal system as an constructive means to secure their rights.[63]

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[61] James C. Scott, Seeing Like the State: How Certain Schemes to Improve the Human Condition Have Failed, 77 (1998).

[62] Compare, Ann Southworth, *Lawyers and the Myth of Rights in Civil Rights and Poverty Cases*, 8 B.U. Pub. Int. L. J. 469, (1999).

[63] Richard L. Abel, *Law without Politics, Legal Aid under Advanced Capitalism*, 32

This critique is powerful and real. Nevertheless, there are circumstances in which the tedious and burdensome nature of the legal process can be helpful for the disempowered client. When the State wishes to use law in order to impose sanctions on the individual, procedure can at times stall this course of action.[64]

In Anitta's case, legal representation in the eviction case complicated the process a great deal and prevented a swift eviction. Anitta entered the apartment in the summer of 2000, after she defaulted on her rent payments and had to leave her previous apartment, the third in the preceding four years. The chronology of the case had been as follows: Amidar filed the eviction suit in the magistrate court in July 2001. Anitta came to the law clinic's station in Yaffo, asked for legal assistance, and the clinic decided to represent her in this suit.[65] The students and the lawyers wrote a long and detailed defense, in which they situated Anitta's act within the broader social and legal context of the basic right to housing and the State's duty to provide for adequate housing for needy groups. At this stage Anitta was pregnant with her third child, and she gave birth on October 2001. As a single mother with three children she was then eligible for public housing from the State.[66] The clinic therefore assisted her in filing a claim for public housing, and asked the magistrate court to allow her to stay in the apartment until a decision would be handed down on this claim.

Amidar filed a motion to dismiss the defense, claiming it was without merit, since Anitta was occupying and possessing a dwelling in which she herself claimed to have no legal right. The clinic then filed an extensive response, rebutting the procedural claims in Amidar's motion, and expanding the argument of a basic, constitutional right to housing. The case was set for a preliminary hearing on the motion to dismiss, but was postponed several times.

In the meantime Anitta's request for public housing was rejected by The Ministry of Housing. The rejection was based on two reasons: the first being that Anita did not qualify as a single mother.[67] The

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UCLA L. REV. 474 (1985).

[64] This of course is the essence of the right to due process in criminal and in other areas of law in which the State moves to deprive a person of her life, liberty and property or in other cases of administrative takings. In these instances, however, the guaranteed rights are "held" by the individual by right, or by permit by the State. The case I discuss here is one in which the client possesses something she claims no right to, at least in its formal positive meaning.

[65] The clinic specializes in housing law, and in particular public housing. However, it had not handled an eviction case of this sort before. Invasions to vacant apartments became a more common phenomenon during 2000-02, and the clinic was contemplating a legal strategy for cases of this sort.

[66] On the different housing programs of The Ministry of Housing *see supra* note 39.

[67] Anitta filed for divorce in the Rabbinical Court in 1997, but was not able to secure a

second reason was that as a matter of public policy, a person who illegally occupied a public apartment couldn't then be granted housing by the State. Throughout 2002 the clinic appealed this decision to a higher administrative level, and when the appeal was rejected, in January 2003 filed an administrative petition to the District Administrative Court. The eviction hearing was postponed time and again in order to allow the exhaustion of the administrative process. In May 2003 the Tel Aviv District court rejected the petition, based on Anitta's status as a married woman.[68] The clinic appealed to the Supreme Court. Throughout the summer of 2003 Anitta managed to get a bill of divorce from her husband. Concurrently, the eviction case was decided. The magistrate court judge accepted Amidar's claim and ordered Anitta to leave the apartment. Though quite sympathetic to Anitta's plight, the judge stated that he could not rule otherwise. He postponed, however, the eviction order for eight additional months, until February 2004.[69] In the meantime the clinic renewed Anitta's claim for public housing, as a divorced mother to three children; again the public housing company rejected the request based on her invasion, and again the clinic filed a petition to the Tel Aviv District Court challenging this administrative decision.[70] In March 2004 the parties came to an agreement: Anitta agreed to leave the apartment and the public housing company agreed to consider her request for public housing on its merits. Her request for public housing was accepted in May 2004.

Lawyers have repeatedly been accused of abusing the legal system by meticulous and superfluous use of needless, exhausting procedures.[71] To be sure, in many cases this is indeed the case.[72] However, it can be argued, that when a stronger party (in this case, the State) uses law to reinforce an uneven "playing field," depriving powerless people of basic needs, the use of procedure in the manner described above is a corrective measure that partially equalizes this imbalance of power. Therefore "over procedurizing" a case is not *inherently* wrong

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divorce until the summer of 2003, since her husband did not cooperate with the proceedings. Since under Israeli law, divorce is determined by Jewish Law (Halacha), the husband must agree to divorce his wife. In order to qualify as an eligible single mother the Ministry of Housing regulation stated that the married woman has to live apart from her husband for two years and to keep the divorce file "active" for two years. Anitta, according to the Ministry of Housing, had not been "active" enough on this count.

68 Admin. Pet. (Tel Aviv Dis. Ct.) 1027/03, decision rendered May 22, 2003.

69 Civ. 7943/01 Amidar v. A. (Rishon Lezion Mag. Ct.).

70 Admin. App. (T.A.) 1204/04. A.M. v. The Ministry of Housing. (I have left the Petitioner's name in initials for her privacy).

71 DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE, REFORMING THE LEGAL PROFESSION, 117-141 (2000).

72 *See, e.g.*, RALPH NADER & WESLEY J. SMITH, NO CONTEST, CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA, 3-59 (1996).

or right, but depends on the socio-political context in which it is employed. From an ethical-professional perspective, if excessive procedure is used to reinforce power disparities, it is arguable that lawyers ought not to use it. However if "law" in this sense can be put to use to assist groups or individuals that historically have not enjoyed the protection of law, and in circumstances of merited need, lawyers are not only zealously representing their clients, but doing it in a manner that promotes substantive justice.[73]

In the case of Anitta the delay in the eviction suit gave her a limited but important suspension in the flow of hectic events that led to the invasion. Her children lived in the same home for a considerable length of time. Though her daughters were aware of the pending lawsuits (they often accompanied her to the court hearings), by the end of the day they had a home to return to, a room, and a desk for preparing their homework. The State argued that Anitta was occupying the place of a more needy family by staying in the dwelling. This may have been so, and I will refer to this claim at a later part of this paper. Nevertheless, as a client Anitta had an acute need of assistance, despite being provisional, which her lawyers could temporarily provide.

## VII. Legal Doctrine, Distributive Justice and Social Change

During the eviction proceedings (as well as the administrative appeals), Anitta's lawyers attempted to situate the case in the broader context of the breakdown in social services and public housing assistance. Though it could not be disputed that formally Anitta had no legal right in the place she possessed, it was important to offer the court a different perspective on the meaning of her act.

The legal doctrine under which the eviction case was considered applied two bodies of law. The first was the regime of property rights: Anitta had no recognized title in the apartment. The second was the threat to "public order": if Anitta would be allowed to stay in her home this could lead to lawlessness: the state would lose its control over an orderly distribution of its limited (housing) resources. Under this view, these resources ought to be allocated according to existing eligibility and needs criteria, and not to people who used force to ob-

[73] In this analysis I rely heavily on William H. Simon's theory regarding lawyers' ethics. Simon claims that lawyers should assess both the merit of their case in the meaning of the underlying values they stand for, as well as the procedural situation in the case. Their ethical obligations, according to Simon, ought to be those which further justice in these meanings. See William H. Simon, The Practice of Justice, (1998); William H. Simon, *Visions of Practice in Legal Thought*, 36 Stan. L. Rev. 469 (1984).

tain them. The court was thus asked to restore order by enforcing the regime of property rights and by disciplining those who "took the law in their own hands."

Against this doctrinal soundness, the socio-economic backdrop of the case became of crucial significance, and legal argument was constructed to reflect this line of thought. As for the property doctrine, it underscored the scope of the state's obligations to its citizens and their well being: the upsurge of squatting and invasions was the result of dire housing needs, which were not adequately met by the various public agencies. Though the property argument appeared to be grounded, the property-owner in this case was the state. As a public entity, it was argued, it retained its assets not for its own benefit but for the enjoyment and use of its citizens. It was thus arguable that since the invaded dwelling belonged to a public housing company whose sole purpose was to allocate housing for needy families, like Anitta, *ownership and property rights are less compelling interests than shelter.* Anitta was thus asking the court to permit her to remain in the invaded apartment *on a temporary basis*, until her housing needs were fulfilled in some way.

Under Israel's new constitutional regime, the Israeli Supreme Court had already ruled that the right to minimal shelter and subsistence was part of the right to human dignity, recognized in The Basic Law: Human Dignity and Liberty.[74] Before the court thus were two "basic rights" which were to be considered against each other, at least in temporal terms. In other words, the argument goes, the balance between the property rights of *Amidar* and Anitta's right to shelter and housing should be struck in her favor, at least for the short term. Under this analysis, "property" – especially when it belongs to the state – is not exhausted through the Blackstonian meaning of "sole and deposit dominion."[75] Rather property ought to be understood as a social institution for determining interpersonal relations, and can be used to impose and constitute an obligation upon the public owner towards disempowered individuals in society.[76] Property under this

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[74] C.A.Req 4905/98 Yoseph Gamzo v. Naama Yeshaya, 55(3) P.D. 360. The basic law explicitly recognizes the right to property, but not social rights such as housing, education, health and minimal subsistence. Much of the litigation in the last years in the area of human rights asked the courts to recognize certain social rights as basic human rights and the courts have taken some steps in this direction. Criticizing the exclusion of social rights discourse form Israeli Constitutional regime *see* Aeyal M. Gross, *Property as a Constitutional Right and Basic Law: Human Dignity and Liberty* [Hebrew], 21 TEL-AVIV UNIVERSITY LAW REVIEW 405-447 (1998).

[75] *See, e.g.,* Carol M. Rose, *Canons of Property Talk or Blackstone's Anxiety*, 108 YALE L. J. 601, 631 (1998); Kevin Gray & Susan Gray, *Private Property and Public Property*, in PRIVATE PROPERTY AND THE CONSTITUTION, 11-19 (Janet McLean, ed., 1999).

[76] On distributive and positive meanings of the right to property *see, e.g.,* JEREMY WAL-

view is transformed into a distributive term, and the legal system is asked to apply it to the benefit of poor and property-less (in the original meaning) persons.

Anitta's lawyers also had to confront the acclaimed threat her act posed to "public order," that is, the fear of lawlessness and anarchy. The lawyers needed to alter the paradigm through which public order was comprehended and captured. Under conventional terms, a threat to public order emerges when a single mother and her children take over public housing in order to obtain shelter (they "jump the queue"), but not when hundreds of families are left without homes. In other words, the conventional approach defines the term "orderly conduct" as compliance with the bureaucratic process of formal housing applications, satisfaction of eligibility criteria, filing of appeals etc.

However, as the situation in Israel has proven, this definition of social order is meaningful only if these procedures manage a policy that reasonably meets basic housing needs. But if people with dire housing needs are not eligible for public assistance, or if the assistance they get cannot secure basic housing solutions – this total breakdown of services constitutes a threat to social and legal order no less than any squatter does. Here again the attempt was to turn things around, at least a little: the state, no less than the individual, was responsible for the situation which had led people to "break the law."

In general, poverty lawyers can try to expose the social and factual backdrop of housing invasions by using conventional procedural tools: questionnaires, discovery, cross-examination of state witnesses, etc.[77] In Anitta's case the idea was not only to win the argument but also to compel the state to defend its claims and provide answers: Why does my client not meet the eligibility criteria? What is the ground for this criterion? How many others were rejected on these grounds? To compel the state to show accountability: How many clients are on the waiting list and for how long have they been waiting for housing? To compel the state to produce data: How many apartments are allocated for public housing compared to the growing need? And, of course, to stall the eviction process.

To be sure, courts cannot easily accept such lines of argument; especially lower courts where most eviction suits are handled. These

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DRON, THE RIGHT TO PRIVATE PROPERTY, 22-24 (1988). In the context of housing, homelessness and the bearing of the regime of property rights on homeless people *see* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991). In the Israeli context *see* Hanoch Dagan, *Property, Social Responsibility and Distributive Justice*, in DISTRIBUTIVE JUSTICE IN ISRAEL 97, 105 (Menachem Mautner, ed., 2000).

[77] Often lawyers are unsuccessful at this stage because the judges are reluctant to approve these measures, which seem to be "off the point." The task then is to persuade the court why this line of action is relevant to the case.

judges are expected to process a large mass of cases, not develop novel constitutional legal doctrine and theory. The notion of property in its positive-distributive meaning is quite foreign to Israeli jurisprudence. The public order analysis proposed above stands in sharp contrast to the court's traditional role to restore the existing order and to discipline deviant behavior. Courts handle individual cases by disassociating them from their broader context and they are hardly equipped to dwell into the underlying policies which have produced them. Still, there is value in argumentation of this sort because it creates a disturbance in the otherwise smooth dispensation of countless lawsuits in which law is put to use by the state to reinforce its power over poor people. Poverty lawyering of this sort thus attempts to unsettle conventional truths about the relationship of law, justice and order.

An even more difficult task for lawyers is to try the case while exposing the client's plain disregard for law. As aforementioned, clients who break the law due to existential needs have often lost respect for law as a normative feature in their decision making process. Lawyers cannot convey this attitude directly: they cannot tell the court that their clients do not believe the system is fair and just, and therefore have decided to take action and find their own solution to their needs. This message needs to be communicated in a subtle and oblique way: by sketching the personal story of the client intertwined in the formalities of the legal process. The message must be a reminder to the legal system that it too carries a responsibility to further substantive justice and to protect the human rights of vulnerable persons.

Anitta's case cannot be considered a success in the sense that all these arguments were acknowledged and accepted by the court. The judge listened to them during many sessions and read them in a number of motions, but nonetheless accepted Amidar's eviction suit based on positive law. Yet the process did not take a regular course. As aforementioned the hearings were postponed time and again to allow for negotiation and to find a practical solution for Anitta and her children. The public housing company had to make an effort to assert its claims. The principled arguments were raised, voiced, heard and discussed. They had to be addressed by the state. Anitta had her day(s) in court and felt that somebody had heard her story. Four years after she took over the apartment she left her home, following her recognition as eligible for public housing.

## Conclusion

The representation of poor law breakers carries professional and ethical implications that have long been debated by lawyers. Lawyers have asked themselves how to handle the common problem of unre-

ported income of welfare recipients: Can they disregard what they know? Can they tell their clients the chances of being caught? Is the fact that the unreported income is essential for basic survival a relevant factor in their decision-making? To what extent and under what circumstances? Is there a difference between consulting a client and representing her in court in this matter?[78] These ethical dilemmas do not have a one-size-fits-all answer. Lawyers need to evaluate the particular circumstances in each situation in an attempt to resolve their conflicting professional obligations: to the client, to the legal system, to third parties and of course to themselves.

Throughout representation Anita's lawyers were often challenged and asked if they did not feel uncomfortable arguing for Anitta's right to stay in the public housing apartment, since it probably meant depriving other poor and needy families (which might be even "more eligible" than their client) of public housing. In other words, the lawyers were considered personally accountable to the harm their representation might cause to other people. It is interesting to note that for some reason assertions of this sort are often voiced at lawyers who represent disempowered clients who break the law, but not at lawyers for power-clients. In the latter case, lawyers are not considered accountable for the end result of their representation, and for the harm it might impose on third parties. On the contrary; they are expected to act in zeal for their clients – as long as they remain within the bounds of law. But when a poor client is involved, the lawyer is suddenly a part of the problem.

From an ethical perspective, I believe that in both situations the question is merited. In principle lawyers *should* be held accountable for the adverse effects their representation bears upon third parties. This diversion from the principle of non-accountability exists regardless of the identity of the client (poor or rich), or the third party (a particular person or an indeterminate number of people).[79] Such ethical dilemmas were addressed and debated in the clinic, in depth, throughout representation. They constituted an integral part of the representation process, and were cast against the substantive merits of the case, as it developed and moved forward.[80] The decision to continue representation despite possible harm that might be caused to other poor families who might be in need of the apartment was dis-

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[78] For a refreshing analysis of this dilemma see Paul R. Tremblay, *Teaching Values in Law School: Shared Norms, Bad Lawyers and the Virtues of Casuistry*, 36 U.S.F.L. REV. 659 (2002).

[79] See SIMON, THE PRACTICE OF JUSTICE, *supra* note 73.

[80] On the need to link between the substantive legal problem and the ethical stance *see, e.g.*, Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

cussed against the backdrop of the overall situation in the housing area. It was countered with other interests and situated in the particular context of Anitta's need for representation.

The professional implications of lawyering on behalf of poor law breakers extend beyond ethical quandaries of this sort. In this article I examined the potential and the shortcomings of lawyering in such circumstances as a means to bring about positive social change. When breaking the law is done as an act of survival due to poverty and dire need, and does not entail the use of violence or direct physical harm to others, lawyers are provided with an opportunity to doubt and question the basic duty to obey the law. As agents of law and from within the legal system, they are best suited to inquire into the relation between positive law and substantive justice, and at the same time help their clients obtain what might be justly, though perhaps not lawfully, theirs.