

TABLE OF CONTENTS

ACKNOWLEDGMENTS	III
COPYRIGHT ACKNOWLEDGMENTS	V
TABLE OF CASES	XXXVII
TABLE OF AUTHORITIES.....	XXXIX
Editors' Introduction.....	1

PART I. INTRODUCING THE CRITICAL CHALLENGE OF USING LAW FOR EQUAL JUSTICE

Chapter 1. Looking to the Bottom Is Step One in Systemic Advocacy	5
1.1 Law Isn't Always What It Seems to Be—If You Look at It from the Bottom	10
Reflections on the Bicentennial of the United States Constitution	11
1.2 Collective Knowledge “From the Bottom” Anchors Advocacy in Group Struggles.....	14
Looking to the Bottom: Critical Legal Studies and Reparations.....	15
Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements	23
Notes and Questions.....	34
1.3 Depending on Circumstance and Context, Bottoms (and Tops) Can Shift—So Must Advocates and Advocacy.....	35
Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm.....	35
Notes and Questions.....	41
1.4 Critical “Schools” and Advocacy “Approaches” Provide Wells of Knowledge for “Different” Groups and Their Advocates.....	42
LatCrit and TWAIL.....	47
Steady Work: A Practitioner’s Reflections on Political Lawyering	52
Changing Systems, Changing Ourselves	56
Notes and Questions.....	65
1.5 Deconstruction and Dual Consciousness Empower Subordinated Groups	66
Dual Consciousness About Law and Justice: Puerto Ricans’ Battle for U.S. Citizenship in Hawai‘i	67
1.6 Systemic Injustice Is Epistemic Injustice	76
Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights	77

Chapter 2. Framing the Dimensions and Dynamics of the Critical Challenge	81
2.1 Reflections and Lessons on the Critical Challenge of Using Law for Equal Justice—Adjudication, Lawyering, and Formal Equality.....	87
<i>Brown v. Board of Education</i>	87
<i>Brown v. Board of Education (II)</i>	90
The Segregation and Resegregation of American Public Education: The Courts’ Role.....	92
Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation	99
Notes and Questions.....	106
2.2 Does Formal Legal Equality Deliver Actual Social Change and Progress?	107
Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law.....	108
Notes and Questions.....	112
2.3 Legal Indeterminacy Magnifies Complexity and Discretion—Make Them Windows of Opportunity.....	113
Legal Indeterminacy, Judicial Discretion and the Mexican- American Litigation Experience: 1930–1980.....	114
Notes and Questions.....	117
2.4 Beyond Formal Equality—Identities and Groups, Interests and Power (IGIP)	118
<i>Brown v. Board of Education</i> and the Interest-Convergence Dilemma	119
Foreword: McCarthyism, the Internment and the Contradictions of Power	121
Notes and Questions.....	130
2.5 Democracy’s Role in Making the Critical Challenge Stick—While Hiding Systemic Inequalities in Plain Sight	130
Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens	132
Notes and Questions.....	141
2.6 Legalized Violence Enforces the Critical Challenge—Militarized Policing, Mass Incarceration, and Crimmigration	142
From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare	145
Naturalizing Immigration Imprisonment.....	152
Bring It on: The Future of Penal Reform, the Carceral State, and American Politics	155
Notes and Questions.....	158
2.7 Fighting Back Smartly—Using Amelioration for Transformation.....	159
The Color of Water: Observations of a Brown Buffalo on Water Law and Policy in Ten Stanzas.....	163
The Indispensable Ones: A Story of Mining Resistance from La Puya	166

Notes and Questions..... 173
 2.8 Chronic Injustice Is Systemic Violence 175
 Notes and Questions..... 176

**PART II. UNDERSTANDING THE SYSTEMIC POWER OF
 SOCIAL IDENTITIES AND ORGANIZED GROUPS**

**Chapter 3. Unlearning and Relearning Systems, Social Identities,
 and Castes..... 181**

3.1 Systems Are Judged on Actual Outputs and Recurrent Results..... 183
 The Systems Approach to Law 185

3.2 The “Rule of Law” System: Originating in Europe, Transplanted
 Through Colonialism, and Failing by Design 189
 The Rule of Law and Human Rights 191
 European Origins, the Doctrine of the Providential Function of
 Commerce, and International Law’s Embrace of Economic
 Growth 196
 Notes and Questions..... 200

3.3 Systemic or Not?—Public Health, Global Pandemics, and Social
 Problems..... 201
 Structural Inequality: The Real COVID-19 Threat to America’s
 Health and How Strengthening the Affordable Care Act Can
 Help..... 202
 Notes and Questions..... 206

3.4 Critical History and Other Disciplines Help Advocates Challenge
 Systemic Outputs..... 206
 Collisions at the Intersection of Gender, Race, and Class: Enforcing
 the Chinese Exclusion Laws 210
 Marital Supremacy and the Constitution of the Nonmarital
 Family..... 216
 Glorious Precedents: When Gay Marriage Was Radical..... 221
 Notes and Questions..... 228

3.5 Social Identities (Still) Matter in Legal Decision Making 229
 Johnson and Graham’s Lessee v. M’Intosh..... 230
 Dred Scott v. Sandford 233
 Bradwell v. State 237
 Downes v. Bidwell..... 239
 Buck v. Bell 241
 Korematsu v. United States..... 242
 Bowers v. Hardwick..... 244
 A Latina Judge’s Voice 246
 Trump v. Hawaii..... 249
 Our Lady Of Guadalupe School v. Morrissey-Berru 253
 Notes and Questions..... 254

3.6 Law Dispenses and Normalizes Private-Public Privilege and
 Subordination..... 255
 Straight out of the Closet 258

	Law as Microaggressions	266
	Space of Hate: Ethnicity, Architecture and Housing	
	Discrimination	271
	Notes and Questions.....	274
	Chapter 4. Unlearning and Relearning Winning, Losing, and	
	Progress over—and Using—Time	279
4.1	Elites Manipulate Law, Time, and Change to Preserve Identity	
	Castes	281
	“The Rule of Love”: Wife Beating as Prerogative and Privacy	281
	“Playing It Safe” with Empirical Evidence: Selective Use of Social	
	Science in Supreme Court Cases About Racial Justice and	
	Marriage Equality.....	291
	“Déjà Vu All over Again”: The Recourse to Biology by Opponents of	
	Transgender Equality.....	294
	Notes and Questions.....	300
4.2	Reproductive Liberty and Justice—Preservation Through	
	Transformation Today?	302
	Resuscitating the Black Body: Reproductive Justice as Resistance	
	to the State’s Property Interest in Black Women’s	
	Reproductive Capacity.....	303
	Chronic Harm	306
	Notes and Questions.....	310
4.3	Long-Term Struggles Need Contextual Metrics for Winning,	
	Losing, and Progress	314
	Varieties of Constitutional Experience: Democracy and the	
	Marriage Equality Campaign	316
	Winning Through Losing	329
	Disability: The Last Marriage Equality Frontier.....	337
	Notes and Questions.....	339
4.4	Managing Risk, Privilege, and Time in Organized Long-Term	
	Struggles	341
	The Role of Law in Progressive Politics	343
	Notes and Questions.....	349
	Chapter 5. Roadtest: Reclaiming Group Identities for	
	Antisubordination Insight, Consciousness, and Solidarity	351
5.1	Colorblindness Is a Racist Fiction and Top-Down Myth.....	353
	White Lawyering: Rethinking Race, Lawyer Identity, and Rule of	
	Law	357
	Notes and Questions.....	362
5.2	Critical Self-Reflection Unmasks and Redefines Social Realities;	
	“Asking Other Questions” Uncovers Systemic Patterns.....	363
	Mascaras, Trenzas, y Greñas: Un/Masking the Self While	
	Un/Braiding Latina Stories and Legal Discourse.....	365
	Beside My Sister, Facing the Enemy: Legal Theory out of	
	Coalition	371

	“And Then Comes Life”: The Intersection of Race, Poverty, and Disability in HBO’s <i>The Wire</i>	375
	Notes and Questions.....	377
5.3	Flipping Systemic Scripts—Social Identities as Group Assets for Long-Term Struggles.....	377
	The Devil We Know: Racial Subordination and National Security Law	378
	The End of Innocence or Politics After the Fall of the Essential Subject	383
	American Mestizo: Filipinos and Antimiscegenation Laws in California.....	386
	Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House.....	390
	Notes and Questions.....	395
5.4	Antisubordination Solidarity Builds Power Across Multiple Kinds of Difference	397
	Anti-Subordination Above All: Sex, Race, and Equal Protection	399
	Constructing Solidarity: Interest and White Workers.....	403
	Notes and Questions.....	410
5.5	Transforming Advocacy Helps to Transform Society—Bit by Bit, Year by Year.....	412
	Coolies, James Yen, and Rebellious Advocacy.....	412
Chapter 6. Organizing Bottom-Up Groups to Contest Top-Down Power and Rewrite “Ground Rules”.....		
423		
6.1	Elites Structured Society to Be Collectively on Top Always.....	427
	Where the Law Lies: Constitutional Fictions and Their Discontents.....	430
	Property and Suffrage in the Early American Republic	434
6.2	Public Enforcement of “Private” Property and Contracts Is Central to Identity Castes.....	438
	Race, Culture, and Contract Law: From the Cottonfield to the Courtroom.....	439
	The Private Law of Race and Sex: An Antebellum Perspective	444
	Whiteness as Property.....	447
	Contract Law Now—Reality Meets Legal Fictions	454
	Notes and Questions.....	455
6.3	Elites Orchestrate Power, Privilege, and Profit Continuously for Local-Global Rule.....	456
	The Lewis Powell Memo: Corporate Blueprint to Dominate Democracy	460
	International Institutions Today: An Imperial Global State in the Making.....	468
	Notes and Questions.....	473

6.4	Elites Use Neoliberal Ideology as Law to Magnify and Concentrate the Public Power of Private Wealth	476
	Framing the Elite Consensus, Ideology and Theory & a ClassCrit Response	478
	The Global Politics of Food: A Critical Overview	480
	Notes and Questions.....	489
6.5	Elites (Still) Suppress Voting to Manipulate Democracy and Control Outcomes	489
	The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions.....	493
	Notes and Questions.....	494
6.6	Advocates Support Organized Groups as “Repeat Players” to Contest Background Premises, Ground Rules, and Foundational Concepts	495
	Re-Valuing Lawyering for Middle-Income Clients	496
	Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change	502
6.7	Seeding, Sparking, and Supporting Long-Term Coalitions: A Tennessee Case Study	505
	Going South, Coming North: Migrant and Union Organizing in Morristown, Tennessee.....	508
	Two Months After the Raid: An Update from Morristown Tennessee Immigrant and Refugee Rights Coalition	515
	Tennessee OSHA Slams Meatpacking Plant Where Massive ICE Raid Took Place with 27 Violations and \$41,775 in Penalties....	516
	Doing Policy from Below: Worker Solidarity and the Prospects for Immigration Reform	518
	Notes and Questions.....	524

PART III. LEARNING TO WORK WITH DIVERSE TEAMS ON SYSTEMIC PROJECTS

Chapter 7. Road Test: Collaborating to Connect Experience and Knowledge for Teamwork and Coalitions	531
7.1 Recognizing Failure by Design to Overcome It.....	535
Structural Racism, Structural Pollution and the Need for a New Paradigm	536
7.2 Crafting Analytical Narratives for Advocacy Projects	543
Vampires Anonymous and Critical Race Practice	545
7.3 Teams and Teamwork Expand the Capacity of Systemic Advocates	554
Teaching Teamwork to Law Students.....	559
Notes and Questions.....	564

7.4 Collaborative Professionalism and Critical Coalitions Empower
 Advocacy 565
 Collaborative Lawyering in Transnational Human Rights
 Advocacy 566
 Critical Coalitions: Theory and Praxis 577
 Notes and Questions 578

Chapter 8. Road Test: Designing a Systemic Advocacy Project

Around Social Problems and Three-Layered Goals..... 583

8.1 Mapping the Process and Components of Project Development 584
 Notes and Questions 594

8.2 Rights Are Important for Resistance but Insufficient for
 Transformative Projects 595
 Resisting Guantánamo: Rights at the Brink of Dehumanization 597

8.3 Situating International Human Rights in Local Systemic
 Advocacy 605
 Redefining Human Rights Lawyering Through the Lens of Critical
 Theory: Lessons for Pedagogy and Practice 606
 Notes and Questions 610

8.4 Three-Layered Goals Must Be Integral to Project Design 612

8.5 The Politics of Funding Require Multiple Ways and Means 620
 Notes and Questions 632

8.6 Advocates Act Despite Risks of Retaliation, Cooptation, and
 Tokenism 634
 Synecdoche 638
 Notes and Questions 646

8.7 Restrategizing Solutions for Transformative Access to Justice
 Projects 646
 Access to Justice: Looking Back, Thinking Ahead 650
 Framing Access to Justice: Beyond Perceived Justice for
 Individuals 651
 With Access and Justice for All 653
 Notes and Questions 656

8.8 Environmental Justice, Private Profit, and Climate Change 659
 Adaptive Law in the Anthropocene 661
 Bridging the North-South Divide: International Environmental
 Law in the Anthropocene 666
 Notes and Questions 670

**PART IV. TRANSCENDING THE LEGAL INDUSTRY
 TO PURSUE THREE-LAYERED GOALS**

**Chapter 9. Exposing the Values, Handcuffs, Blindfolds, and
 Hierarchies of Law as an Industry 675**

9.1 Law as an Industry Pursues Profits over Justice 678
 The Transformation of the Professional Workforce 679

	The Legal Services NYC Strike: Neoliberalism, Austerity and Resistance.....	689
	Flexible Accumulation: Changes in the Legal Profession and Their Effects in Legal Education	695
	Notes and Questions.....	700
9.2	Elites Designed Law as an Industry for Group Power and Privilege and to “Take out” Dissent or Competition	701
	The Law of High-Wealth Exceptionalism	703
	Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers	712
	Deconstructing the Distinction Between Bias and Merit	722
	Notes and Questions.....	728
9.3	Legal Education Handcuffs the Industry to Instill Top-Down Conformity	730
	Legal Education and the Reproduction of Hierarchy.....	731
	Notes and Questions.....	740
9.4	Legal Formalism Blindfolds Analysis Selectively to Obscure Systemic Injustice at Work	740
	<i>Geduldig v. Aiello</i>	743
	<i>General Electric Company v. Gilbert</i>	745
	<i>Hernandez v. New York</i>	747
	<i>Rice v. Cayetano</i>	750
	<i>Hernandez v. New York</i> : Courts, Prosecutors, and the Fear of Spanish	754
	Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities	757
	Still Writing at the Master’s Table: Decolonizing Rhetoric in Legal Writing for a “Woke” Legal Academy	760
	Notes and Questions.....	762
9.5	Legal Individualism—a Key Formalism—Atomizes Law to Mismatch Problems and Solutions	764
	Disrupting Individualism and Distributive Remedies with Intersubjectivity and Empowerment: An Approach to Justice and Discourse	766
9.6	Elites Use Public Power to Hide Private Power in Law and Society	768
	Foreword: Looking for Power in Public Law.....	769
	Confronting Power in Public Law.....	773
	Notes and Questions.....	775
9.7	Legal Ethics Teach and Enforce Industry Handcuffs, Blindfolds, and Hierarchies	775
	Rebuilding the Ethical Compass of Law	779
	Notes and Questions.....	782

Chapter 10. Advancing and Defending Three-Layered Goals in Systemic Contexts	787
10.1 Systemic Advocacy Centers Persistent Social Problems in Complex Contexts.....	791
A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty	793
Notes and Questions.....	802
10.2 Three-Layered Goals Are Geared to Three Recurrent Advocacy Scenarios	804
To Learn and Teach: Lessons from Driefontein on Lawyering and Power	806
Notes and Questions.....	830
10.3 Second-Layer Goals Combine Persuasion and Pressure to Build and Exercise Power	833
Notes and Questions.....	839
10.4 Third-Layer Goals Connect Micro-Macro Facts to Shift Consciousness and Cultures	840
The Blame Frame: Justifying (Racial) Injustice in America	841
Notes and Questions.....	848
10.5 Systemic Advocates Combine Traditional and Critical Tools for Three-Layered Progress	851
Notes and Questions.....	853

PART V. OUTLINING THE STAGES OF SYSTEMIC ADVOCACY FOR CRITICAL JUSTICE

Chapter 11. Stage One—Diagnosing Problems in Context Through Critical Research & Analysis to Prepare for Complex Actions	857
11.1 Knowledge Always Has a Politics, Which Can Bias Analysis and Action.....	860
Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics	862
The Ethics of Narrative.....	866
Notes and Questions.....	872
11.2 Advocates Diagnose Problems and Strategize Solutions in Two Recurring Stages.....	874
Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia	879
11.3 Three Bottom-Up Methods of Critical Research for Three-Layered Progress.....	894
A. Participatory Action Research	895
It's Critical: Legal Participatory Action Research.....	897
B. Critical Empiricism	908
Fair Driving: Gender and Race Discrimination in Retail Car Negotiations	909

C.	Analytical Narrative	918
	Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of “Cultural Competency”	922
	Notes and Questions	929
11.4	Three Norms Help Expand and Deepen the Impact of Critical Research and Analysis	934
	A. Counterdisciplinarity	935
	B. Critical Comparativism	935
	C. Social Analytics and Social Media	937
	Notes and Questions	943
11.5	Four “Mapping” Techniques Help Tailor and Implement Contextual Action Plans	943
	A. Concept or Problem Mapping	944
	B. Asset Mapping	946
	C. Stakeholder Mapping	947
	D. Power Mapping	949
	Notes and Questions	952

**Chapter 12. Stage Two—Building Campaigns and Institutions as
Complex Actions for Three-Layered Progress 957**

12.1	Complex Actions Combine Pressure and Persuasion in Stage Two of Systemic Advocacy	960
	Law in the Labor Movement’s Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight	968
	Worker-Owned and Unionized Worker-Owned Cooperatives: Two Tools to Address Income Inequality	987
	We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change	999
	Notes and Questions	1017
12.2	Supporting Complex Actions by Organized Groups: Finding Your Role	1021
	Power with: Practice Models for Social Justice Lawyering	1024
	Notes and Questions	1032
12.3	Collaboration and Conflict Coexist in Complex Actions	1032
	Lawyers, Organizers, and Workers: Collaboration and Conflict in Worker Cooperative Development	1036
	How Lawyers Manage Intragroup Dissent	1048
	Notes and Questions	1051

**PART VI. MAPPING THE HISTORICAL ROOTS AND
IDEOLOGICAL DESIGN OF LAW AS A SYSTEM**

**Chapter 13. Situating the Critical Challenge in the “Rule of Law”
as Systemic Ideology 1055**

13.1	Colonial Settlers Came for Conquest, Not as Immigrants, and Created Identity Castes for Racial States	1056
------	--	------

Law and Colonialism	1057
Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory	1062
Colonialism and Modern Constructions of Race: A Preliminary Inquiry	1078
Notes and Questions.....	1085
13.2 Racial States in Historical and International Context—an Admiring Perspective	1086
13.3 Imperialism and Globalization Entrenched and Expanded White Supremacy (and Related Identity Ideologies) by Force and Law	1088
Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism	1095
Globalization or Global Subordination?: How LatCrit Links the Local to Global and the Global to the Local: Globalization and the Reproduction of Hierarchy	1104
Notes and Questions.....	1109
13.4 Law-as-Identity Still Creates, Expands, and Perpetuates Colonial Castes and Ideologies	1113
The Gendered Jurisprudence of the Fourteenth Amendment.....	1114
Selective Racialization: Middle-Eastern American Identity and the Faustian Pact with Whiteness.....	1117
Terrorism and Human Rights: Power, Culture, and Subordination.....	1121
Notes and Questions.....	1129
Chapter 14. Road Test: Dismantling “Ideological Illusions of Equality” to Resist Hegemony.....	1131
14.1 Social Ills—like Sexism, Racism, and Homophobia—Prop up “Ideological Illusions of Equality” to Justify Persistent Group Inequalities	1135
“Justice” or “Just Us”: Racism and the Role of Ideology	1135
Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?	1143
Notes and Questions.....	1147
14.2 Over Time, Internalized Ideologies Shape People, Choices, and Castes	1149
The Colonization of the Womb.....	1151
Race, Ethnicity, and Hispanismo in a Triangular Perspective: The “Essential Latina/o” and LatCrit Theory.....	1153
14.3 The Social Hegemony of Identity-as-Ideology Kills Bottoms.....	1159
Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation	1159
Notes and Questions.....	1166

**PART VII. CLOSING REFLECTIONS ON CRITICAL
JUSTICE AND SYSTEMIC ADVOCACY**

Chapter 15. Running the Critical Justice Marathon—<i>Brown</i>, Formal Equality, and Beyond in Public Education	1171
15.1 Unpacking Persistent Educational Inequality and Material Injustice.....	1174
Business as Usual? <i>Brown</i> and the Continuing Conundrum of Race in America	1175
Notes and Questions.....	1182
15.2 Upholding by Law the Systemic Linkage of Property to Identity for Unequal Education	1184
San Antonio Independent School District v. Rodriguez.....	1184
Notes and Questions.....	1190
15.3 Designing Student Debt in Higher Education as New Professional Handcuffs	1191
The Law and Political Economy of a Student Debt Jubilee.....	1191
Notes and Questions.....	1197
15.4 Countering Systemic Violence in the Structuring of Public Education Today	1200
Ending the School-to-Prison Pipeline: A Case Study of Community-Led Disciplinary Reform in Kern County	1201
Notes and Questions.....	1210
15.5 Cross-Cultural Comparisons—and Their Limits	1211
Ethnocentrism and Feminism: Using a Contextual Methodology in International Women’s Rights Advocacy and Education.....	1212
With No Deliberate Speed: The Segregation of Roma Children in Europe.....	1214
Notes and Questions.....	1217
Chapter 16. Road Test: Crafting Long-Term Pathways Toward Critical Justice	1219
16.1 Every Advocate Must Unlearn and Relearn Problem Solving to Craft Their Own Lifelong “Road” to Critical Justice.....	1221
[On The] Road Back in: Community Lawyering in Indigenous Communities	1222
Letter to a Young Public Interest Attorney	1229
Letter to a Law Student Interested in Social Justice.....	1233
For Those Considering Law School	1242
Notes and Questions.....	1246
16.2 Pathways Change Along the Way—So Must Groups, Advocates, and Advocacy.....	1247
Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today	1248
Notes and Questions.....	1267

TABLE OF CONTENTS

xxxv

16.3	Deep Critique and Systemic Advocacy for the Long Haul	1268
	Deep Critique and Democratic Lawyering in Clinical Practice.....	1269
	Notes and Questions.....	1274
	Editors' Closing Reflections.....	1277
	INDEX.....	1279